

Anatomy of a Will Contest

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Anatomy

Study of the structure or internal workings of something



Anatomy of a Will Contest

External Factors

The Will Itself

The Condition of the Testator/Testatrix

Pleading

Discovery

Trial

External Factors

Reasons to Avoid Probate

Can be Costly
Time Consuming
Inflexible
Public

External Factors

Think of and Identify Non-Probate Assets

Not passed by the Will

Can make a Will Challenge worthwhile for a small/non-liquid estate

External Factors

Common Non Probate Assets to Consider

Intervivos Transfers

Life Insurance/Annuities

Joint Tenancies/Accounts

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Analyze the Will Itself

Will must be

Written

Signed

Two Witnesses

That May Seem Obvious



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CAPTAIN OBVIOUS

BUT...

Legal Zoom

Self-Help

Non-PCBA attorney

Analyze the Will Itself

Who Did the Will?

- Respected Attorney with Experience?
- Different Attorney from Previous Attorney?
 - Attorney for Beneficiaries?
 - Legal Zoom?

Analyze the Will Itself

Substance of the Will
Previous Instruments?

Gradual, Consistent Departure?

Or

Sweeping Change?

Analyze the Will Itself

No Contest Clause?

If so...

is it worth a contest?

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The Condition of the Testator/Testatrix

Anecdotal Evidence

(preferably corroborated by non-party)

Proximity to Death

Cause of Death

AND WARREN HERE
IS IN CHARGE OF
OUR GUT FEELINGS



If your gut tells you something is
wrong with the will...
protect the assets.

“the court can be seen as having not only the discretion but the duty, when requested, to attempt preservation of the property or fund in controversy so that ultimate success by plaintiffs may not result in a meaningless victory. By issuing its injunctions for this purpose, the court need not have decided that plaintiffs will probably be granted the basic relief they seek...”

Keeshin v. Schultz, 128 Ill. App. 2d 460, 468–69 (1st Dist. 1970)

See also American Re-Insurance Co. v. MGIC Inv. Corp., 73 Ill. App. 3d 316, 324-5 (1st Dist. 1979).

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Pleading

Lack of Capacity

Undue Influence

Tortious Interference with Expectancy

But First...

Request Formal Proof of the Will

Formal Proof of Will

- 755 ILCS 5/6-21
- Requires proof of the will via live testimony
- Affidavits and/or Attestation Clauses Not Sufficient

BUT...

Formal Proof of Will

Very Limited in Nature

“proof necessary to entitle a will to probate is confined to the essential elements fixed by statute... and is for the purpose of establishing whether a Prima [sic] facie case of validity has been made... [N]o contradictory evidence is admissible...” *In re Marcucci’s Estate*, 54 Ill. 2d 266, 269 (Ill. 1973)

“[t]he proponent has no duty to show the will is valid in all respects, but only the duty to prove the essential elements included in the statute.” *In re Estate of Dicks*, 2014 IL App (1st) 132908-U, 15

Cannot inquire into capacity or undue influence

So Why a Formal Prove-Up?

Cheap and Little Work on Behalf of Petitioner

Opportunity to Gauge Strength of Witnesses

Proponent May Just Fail to Formally Prove the Will



Thank You LegalZoom

*legal*doom

If Proponent Does Formally Prove-Up the Will

Complaint for Will Contest

Lack of Capacity

Undue Influence

Tortious Interference with Expectancy

Presumptively Void Transfer

Presumptively Void Transfers

755 ILCS 5/4a

Effective January 1, 2015

“In any civil action in which a transfer instrument is being challenged, there is a rebuttable presumption... that the transfer instrument is void if the transferee is a caregiver and the fair market value of the transferred property exceeds \$20,000.”

755 ILCS 5/4a-10

Presumptively Void Transfers

Caregiver: “a person who voluntarily, or in exchange for compensation, has assumed responsibility for all or a portion of the care of another person who needs assistance with activities of daily living.”

The Act includes the caregiver’s spouse, cohabitant, child or employee in its definition.

A “spouse, child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin, or parent of the person receiving assistance” does not constitute a caregiver.

Pleading

When Crafting a Complaint, Do Not Forget the
Non-Probate Assets!



Remedy

Generally, a successful will contest results in vacation of the challenged will and reinstatement of the previous will.

Once the previous will is reinstated, another will contest can occur to challenge that will (cannot be done simultaneously with the most recent will).

However, in rare circumstances, a successful undue influence plaintiff can invalidate a portion of the will if “the undue influence affected only a limited portion of the will and ... the testator would have intended that the entire will fail because of the invalidation of one provision.” *Williams v. Crickman*, 81 Ill. 2d 105, 115-6 (1980).

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Discovery

Witnesses with Personal Knowledge
(Dead Man's Act)

Previous Instruments/Attorney's File
(*See DeHart v. DeHart*, 2013 IL 114137 &
Eizenga v. Unity Christian Sch. of Fulton,
2016 IL App (3d) 150519, ¶ 29,)

Medical Records

Other Indicia of Incapacity/Influence
(Photos, letters, phone records, etc)

Discovery

Medical Records are a great source to get a feel for capacity via prescriptions, patient history, and diagnoses... However

Generally, lack an explicit opinion on capacity, so generally must depose.

However, keep in mind that...

Discovery

“While physicians are better qualified to testify to a diseased condition than are laymen, their testimony upon the subject of the mental capacity of an individual whom they have been privileged to observe is not entitled to any greater weight than that of laymen.”

In re Vardalos' Estate, 24 Ill. App. 3d 520, 526, (1st Dist. 1974) (quotation omitted).

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Trial

Hard

Generally need to combat testimony of attorney
and attesting witnesses

Expensive

Generally require a lot of physician testimony

FOCUS ON THE BURDEN

Questions?

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