Price & Farrington's Estate and Tax Planning *Fast*Faxts

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Estate, Tax and Wealth Planning for Advisors and Clients

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Planning to Use Your WillPower:

How to Avoid Will Contests

We've all heard horror stories about unhappy heirs attacking the will of someone who didn't leave them what they thought they deserved. Will contests occur with alarming frequency. Wills are usually contested by family members who were "cut out" or received less than their anticipated fair share of the maker's property.

In general, a will contest is any dispute over the validity of a property bequest at death. Probate controversies often involve the validity of wills, trust agreements, durable powers of attorneys or the way power was exercised under those documents.

The primary consideration for the court in resolving a will contest is to determine the intent of the person who made the estate plan. The most important evidence of a person's intentions are his or her estate planning documents. If the terms of the documents are clear, the court generally will not go beyond "the four corners of the document" to consider other evidence of the testator's or trust settler's intentions.

Interpreting an ambiguous document. Sometimes a will contest involves an ambiguous provision in an estate planning document. In that case, the court will establish the actual intent of the person who made the will (the testator) by considering evidence of intent outside the documents. Example: a will may contain one provision directing that a bequest be distributed immediately upon the testator's death, but also contain another - seemingly contradictory - provision that the bequest be held in trust for the beneficiaries until a certain age. Another example of ambiguity is a bequest to a named charity where there are two charities in existence which operate under the same name. *See* Sidebar, next page.

Determining whether a document is valid. A will contest can arise from a claim that an estate planning document is invalid and should be set aside because of mental incapacity or undue influence.

Mental Incapacity. There are different standards of mental capacity for different types of estate planning documents. In order to make a *trust agreement* or a *lifetime gift* of property, a person must reasonably understand the nature and effect of the transaction. To make a *will*, a person must be able to: (1) understand that he or she is writing a will; (2) know the nature, condition and extent of his or her property; (3) know the identity of the persons who would be the "natural objects of his or her bounty"; and (4) understand the scope and meaning of the provisions of the will.

Undue Influence. Not all influence qualifies as undue influence. It is not improper for a person to seek to influence someone's estate plan by appealing to considerations such as family ties, affection, or gratitude. *Undue* influence is influence that is so great that it overpowers the intentions of the person making the estate plan and substitutes the intentions of another person. Because it is difficult to produce direct evidence of undue influence, the law will presume that there was undue influence if: (1) there was a confidential or *fiduciary relationship* between the person who made the estate plan and the alleged influencer; (2) the alleged influencer had the *opportunity* to influence the person who made the estate plan; and (3) the alleged influencer *received a benefit* under the estate plan.

Important: Once a presumption of undue influence is established, the "influencer" has the burden of presenting evidence that the benefit received was *not* the result of undue influence.

Practical considerations. When you make an estate plan, you should follow a few basic guidelines to reduce the likelihood or success of a will contest. First, make sure that your estate planning documents are *prepared by a knowledgeable attorney* with expertise in estate planning. Second, thoroughly *communicate* your estate planning intentions to your attorney. Third, carefully review the estate planning documents before you sign them to ensure they are *consistent with your intentions* and goals. Fourth, *review your estate plan* perodically with your attorney to determine whether it needs to be revised in light of changed circumstances, goals or laws.

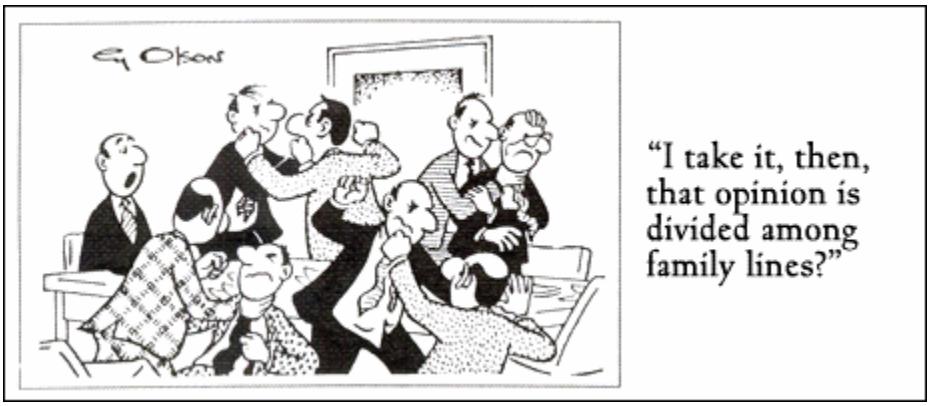
Finally, you can avoid unnecessary litigation if you refrain from making statements that create expectations of some kind of specific gifts or outcome. Although you may want to make a testamentary (i.e. death time) gift to someone in your current estate plan, you retain the legal right - with some exceptions - to change your estate plan at any later date. If, however, you have told the intended beneficiary about the gift, he or she may be disappointed - or worse - to find that the gift was deleted from the final version of the plan. Disappointed expectations can lead to a will contest, even if the estate planning documents are valid and enforceable. In fact, one of the purposes of the public, court-supervised probate administration of a decedant's estate is to provide a convenient forum for a disgruntled heir to step forward to contest the will.

Tips and Pointers.

☑ ***Marital share.*** It isn't possible in any state for a spouse to be completely disinherited from his or her legal share of the marital estate under a will, regardless of how it's drafted. In many states, a

Tidbits: Poor WillPower

- **Aging widow mom prepares her own codicil to her will. She takes it to her trusted bank and asks if it needs to be witnessed. She's told "No. We just need to notarize it." On mom's death, the codicil is invalid. Wrong advisor. Wrong advice.**
- **Consider how Archie Bunker might have felt if he knew his whole estate – primarily his favorite chair and his union card – had gone to the "Meathead" after Edith and Gloria were killed in a stampede at a Republican rally for Richard Nixon. Wrong beneficiary. Poor planning.**



spouse substantially left out of a will may *elect against the will*. Anyone can challenge a will, but only a spouse can elect against a will to claim a statutory share.

☑ ***Partners.*** Courts have long assumed that family - not "friends" - are natural beneficiaries. A valid will clearly describing your instructions protects your partner. If you think your will might be challenged by your family - or a previous partner - it's smart to include reasons for your instructions, as well as the reasons you've left out relatives or others whom the court might naturally consider your heirs. Moral: *Do everything you can to* clarify *your intentions for the probate court*.

An unmarried partner has no right to elect against a will, but can challenge it, though there is little if anything to be gained. Key: A successful challenge only defeats a will, placing the estate under the *laws of intestacy*. The partner is cut out either way. The best defense is a good offense. Unmarried partners with current wills are off to a good start.

☑ ***Back to intestacy***. If a will is invalid because it doesn't meet legal requirements, or fails as a result of a challenge, the court relies on either a previous will or the state laws of intestacy to distribute property, requiring full supervision. The result might not be what the testator intended.

☑ ***Disinheriting.*** If you intend to exclude or disinherit a person, spell it out in your will. A ne'er-do-well who doesn't deserve anything, or a well-to-do child who you believe might not need anything, could nevertheless expect to be included in your will. The prodigal son may feel entitled, or a wealthy doctor who worked her way through med school may not think it's fair to be penalized for her success. The best practice? Name the person excluded and state your reason for a decision that could later be questioned.

Take precautions to avoid a challenge by the person you disinherit. Explain your decision to appropriate family, friends and beneficiaries. Support your will with a personal letter explaining your rationale. If you think it could be necessary to prove you were competent to make the decision, make sure medical records will be available as evidence of your health status. Without sufficient proof of sound mind or with evidence of undue influence, certain provisions - or an entire will - could be voided. In some cases, it's advisiable to leave a tiny bequest rather than disinherit a person entirely. The intent of a bequest is more difficult to challenge than no bequest at all.

☑ ***Communicate***! Bottom line: Keeping everyone informed forestalls jealousy and power struggles. If family harmony is important to you, make an effort to clear the air and short-circuit a challenge by having the difficult conversations before making any decisions.

☑ ***Trust a trust.*** It is much more difficult for disgruntled heirs to attack *revocable living trusts* (RLTs) than their will counterparts. RLTs are private documents that, if implemented properly, aren't subject to the probate process. They are not placed in a public forum that requires notice and encourages debate and advocacy, as are their will brethren. On creation, an RLT isn't subject to the legal formalities of wills, which means there are fewer legal opportunities to contest or invalidate them. Tip: If you have a dysfunctional family with serious family issues or disagreements and/or other compelling reasons for greater privacy and stronger defenses in your estate planning, you should discuss a revocable living trust with your estate planning attorney.

Today's Moral: It is very costly, in more ways than one, to have your family suffer through the legal battles of a contested will. That's where good estate planning comes in. ■

As always, please contact us if we can be of assistance to you.

Sidebar : The Pitfalls of Preprinted Wills

A Tennessee court case highlights the perils of using preprinted wills rather than consulting with a qualified attorney to draw up an estate plan. *In Re Green* (Tenn. Ct. App., Aug. 29, 2003).

Lillie Green died on October 26, 2001, at age 91. Her will, a "do-it-yourselfer" executed without the help of an attorney, was a preprinted form with blanks to make handwritten entries. Mrs. Green's will stated, in part, "I leave all my estate to my children, if any, who survive me in equal shares, per stirpes."

The problem with this language is that the technical term *per stirpes* is inconsistent with the phrase that precedes it. "I leave all my estate to my children, if any, who survive me…" implies that any offspring of the deceased children who did not survive Mrs. Green will not be able to take under the will. On the other hand, the use of the phrase *per stirpes* in a will suggests the opposite: that offspring of deceased children may inherit.

This wouldn't have presented a problem if all of Mrs. Green's children had survived her, but unfortunately one did not, and that child left two sons. These grandsons of Mrs. Green believed that they had a claim on a portion of her estate because of her use of the term *per stirpes*. The case went through Tennessee's probate court system, no doubt at great expense, and ended up before the Tennessee Court of Appeals.

The Court of Appeals ruled that the grandsons cannot share in Mrs. Green's estate. The court held that Mrs. Green clearly intended to pass her estate to her surviving children and only to her grandchildren if no children survived her. The court found that the use of the term *per stirpes* on her preprinted will form was a mistake—one that a qualified attorney surely would not have made.

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