New Jersey Law Journal

VOL. 205 - NO 8 MONDAY, AUGUST 22, 2011 ESTABLISHED 1878

Estate Planning & Elder Law

Proactive Planning: How To (Maybe) Avoid a Will Contest

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With more money available for testamentary dispositions than in previous generations, it is not surprising that instances of estate litigation are increasingly a fixture in the estate administration process. Unlike statutes in some other states, New Jersey's rule relating to in terrorem or forfeiture clauses does little to discourage the filing of will contests. Rather, New Jersey's statute provides that a forfeiture clause is unenforceable where probable cause exists for the dispute. N.J.S.A. 3B:3-47. Thus, with the increased likelihood of litigation, practitioners should seek alternative ways to prevent estate litigation before it is a problem.

The first line of attack against a will is a contest over improper execution. To create a valid will, New Jersey requires substantial, not strict, compliance with the formalities described at N.J.S.A. 3B:3-2. See *In the Matter of Ranney*, 124 N.J. 1 (1991). Those formalities require that the instrument be in writing, signed by the testator, and witnessed by at least two individuals who were either present during the testator's signing, or before whom the testator acknowledged his signature. N.J.S.A. 3B:3-2.

Although New Jersey statute and case law do not require strict compliance for an instrument to be admitted to probate, such compliance is necessary to avoid formal probate in the state. N.J.S.A. 3B:3-19. Probate may be instituted by means of a formal complaint submitted to the Superior Court, or by informal application to the county Surrogate. R.4:80-1(a) and R.4:83-1. For many reasons, the simplicity of informal probate is preferable to formal probate, but perhaps the most important reason is that informal probate can be completed quickly (within 10 days of death under N.J.S.A. 3B:3-22). By strictly complying with the formalities listed above, and successfully appearing before the Surrogate to probate the will, the attorney has foreclosed against a contesting party's opportunity to file a caveat. Additionally, notice to interested beneficiaries need not be given in informal probate until 60 days *after* the will is admitted. While a contestant can still challenge the validity of a will after the instrument has been admitted to probate, challenging the execution of the instrument becomes more onerous, as the contestant must take the initiative to file a complaint and obtain an order to show cause as to why the judgment of probate should not be set aside. R.4:85-1.

Owing to the fact that proper execution of a will automatically quashes one of a contestant's primary grounds for invalidation, it is essential that every planning practitioner strive for strict compliance with the statute. This is best accomplished by the creation and adherence to a routine for use at every execution ceremony.

Another ground on which a will contest may be instituted, turns on whether the testator possessed the proper capacity to make a will. Under N.J.S.A. 3B:3-1, any individual who is of "sound mind" and over 18 years of age is capable of making a will. The level of capacity required to make a will is quite low, and so long as the testator comprehends the nature of his property, the objects of his bounty (i.e., family members or legal heirs), and the meaning of a will, such is enough to satisfy the statute. See *In re Heim's Will*, 136 N.J. Eq. 138 (E. & A. 1945); see also *In re Rasnick*, 77 N.J. Super. 380 (1962). It is important to note that the question of capacity is evaluated at the date and time of execution. Thus, even a testator who suffers from conditions that affect memory or cause delusions can be competent to make a will if he is of "sound mind" at the critical moment of execution. See *Ward v. Harrison*, 97 N.J. Eq. 309 (E. & A. 1925); see also *Gellert v. Livingston*, 5 N.J. 65 (1950).

To prevent against a will contest premised on the testator's lack of capacity, an

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attorney should establish practices which allow him to document a client's mental state during the planning phase and at execution. Information relating to a client's mental state observed during in-person meetings, phone calls and written correspondence should be well documented in attorney notes or through memoranda.

In New Jersey, a lawyer has an obligation to prohibit the execution of legal documents if he suspects a client to be incompetent. See *Lovett v. Estate of Lovett*, 250 N.J. Super. 79 (1991). If it appears that a client may be suffering from a condition which would impact his ability to make a will, it is not improper to suggest a medical or mental capacity examination, so that the results can be included in the attorney's file. Furthermore, situations may arise where even though a testator is mentally impaired by reason of a mental disease or health condition, he does not lack the capacity to make a will at the time of execution. In such cases, it may be appropriate to include special language in the will which acknowledges the illness or the fact that the testator receives treatment for such condition.

There are varying opinions on what safeguards should be utilized during an execution ceremony to establish the presence of capacity. Some practitioners believe in videotaping the execution ceremony; yet others think that videotaping can actually provide ammunition for contestants, particularly if the ceremony was interrupted or flawed in some minor way (e.g., a witness leaves the room). Additionally, because not all testators are actors, if ever presented as evidence at trial, a jury might mistake hesitation in the testator's voice or lack of eye contact for confusion. For those instances in which the testator has a diagnosed condition which affects his mental state but not his capacity, it may be beneficial to have the client's doctor attest to the testator's mental condition immediately before the execution ceremony, or even have the doctor act as a witness at the ceremony. In situations where an attorney suspects a will contest to arise, it may be wise to memorialize the ceremony through memorandums to the file drafted by the attorney and the attesting witnesses. Such memorandums should document the testator's capacity, where the will was signed, the testator's general appearance, and other details which can be easily forgotten so that such information is easily accessible if ever needed.

The most common ground asserted against the validity of a will is the presence of undue influence. Undue influence is mental, moral or physical persuasion that is so powerful that it destroys the free agency of the testator. See *In re Niles Trust*, 176 N.J. 282 (2003); see also *Haynes v. First National State Bank*, 87 N.J. 163 (1981). In New Jersey, a presumption of undue influence exists where there is a "confidential relationship" between a testator and a beneficiary and the presence of facts, that when evaluated in conjunction with the confidential relationship, indicate "suspicious circumstances." See *Haynes*, 87 N.J. at 176. A "confidential relationship" is defined as one where trust is reposed on the beneficiary by reason of the testator's weakness or dependence, or where the parties, by virtue of their relationship naturally place reliance in one another. See *In re Hopper*, 9 N.J. 282 (1952). Although the burden is on the contestant to prove undue influence, where both elements are established by the contestant, the burden of proof is shifted so that the will's proponent must prove the absence of undue influence.

"Suspicious circumstances" may be found to arise in situations involving a close relationship between the proponent of a will and the draftsman attorney. In cases where a will is prepared by an attorney who represents both the testator and the person with whom the testator has a confidential relationship, the problem of "dual representation" satisfies the suspicious circumstances component. See *Buscavage Living Trust*, 2010 WL 5510140 (N.J. Super A.D.). In such cases, the burden of proof to be met by the will's proponent is elevated to a showing of clear and convincing evidence (instead of preponderance of the evidence). See *Haynes*, 87 N.J. 163. Furthermore, there need not be "dual representation" present for a court to find divided loyalty, rather other relationships can give rise to suspicious circumstances. See *In the Matter of Landsman*, 319 N.J. Super. 252 (App. Div. 1999) (where attorney had a referral relationship with the proponent).

In order to minimize the possibility of a contest premised on divided loyalties, a drafting attorney should consult the conflict rules provided in RPC 1.6 and 1.7. As a general rule, an attorney should be mindful of the conflicts inherently involved in representing members of the same family who may have different plans for their wealth. Particularly in situations involving the joint representation of a husband and wife, an attorney should inform the parties of the conflict, explain the confidentiality issues that arise in joint representation, and have clients consent to the representation in writing. See RPC 1.6 and 1.7; see also *A v. B v. Hill Wallack*, 158 N.J 51 (1999). And, keep in mind that some conflicts may be too significant to be waived, or even if technically waivable, should not be.

Beyond the rules of professional responsibility, an attorney should be mindful of specific fact patterns which present "confidential relationships." The most basic example is where the testator's main care giver is an interested beneficiary upon whom the testator is dependent. In such situations, the planning attorney should take precautions to ensure that it is the intentions of the testator and not the care giver that are represented in the will. The attorney should speak with the testator alone, outside the presence of interested beneficiaries; this is the case even if it is the interested beneficiary who is the person who first contacted the attorney. The attorney should only share drafts of documents with the testator himself, and, moreover, although permitted by RPC 1.8, the attorney should only accept payment from the testator client.

Where it is clear that a confidential relationship exists, but the testator acts of his own free will in favor of the interested beneficiary, it may be wise to encourage the testator to include language in his will explaining the reasoning behind certain dispositions. However, care should be taken to make such statements as general as possible, so the explanation cannot later be used as invalidating evidence. Lastly, where undue influence is clearly present, it is appropriate for an attorney to terminate his representation.

In certain cases, if the attorney and client believe that a will contest cannot be avoided, or is more than likely, it may be appropriate to consider intervivos transfers to trust. In *Haynes*, 87 N.J. 163, the New Jersey Supreme Court declined to enforce an in terrorem clause contained in a trust agreement where there was probable cause

to challenge the trust. Although *Haynes* was decided under the principals of New Jersey common law, and not N.J.SA. 3B:3-47 or its predecessor (N.J.S.A. 3A:2A-32), the Court took the position that the inclusion of an in terrorem clause in a trust created under the laws of New Jersey would be equally as disfavored as one contained in a will. Therefore, in certain situations, a practitioner may wish to recommend a trust formed and funded under the laws of a jurisdiction that allows for the unfettered operation of an in terrorem clause, which may prove to be a meaningful deterrent to a prospective contest. Conflict of laws principles may or may not favor the proponent in such circumstances, but that is something to be weighed by the contestant before proceeding with his objection.

While the suggestions contained in this article are by no means exhaustive, it discusses many of the popular safeguards that can be used to help prevent a will contest. Although it may be impossible to avoid litigation in certain circumstances, an attorney who is well versed in the objections to a will's validity and opportunities to protect against them, is already in a better position to defend and protect the wishes of his client. ■