Steps Taken While Testator Is Alive Can Play a Key Role in Upholding Client's Estate Plan After Death

BY JOHN J. BARNOSKY AND JOHN R. MORKEN

A few careful steps taken during a testator's lie can minimize the chances of a will contest and protect the objectives set out in estate planning documents. Plans that involve the disinheritance of children or a second marriage call for special scrutiny.

The success of the planning effort may also depend on who is named as the executor of the will, the choice of witnesses, the content of prenuptial agreements and a decision on whether the will should include an ***in terrorem*** clause. Some consideration should also be given to the possibility of establishing a lifetime trust.

Recognizing the Signs

The first step in good defensive estate planning is identifying situations that are likely to prompt a will contest. The precipitating causes of one-third of will contests are divorce and remarriage. "Most of these contests are brought by children and stepchildren."[1] A recent study indicates that of 267 will contestants, 192 (or 71.9%) were either stepchildren or children, while only 36 (or 13.5%) were spouses.2

Statistics like these lead to the obvious conclusion that a contest is very possible when a child is receiving less favorable treatment than siblings, or children are receiving less favorable treatment than a stepparent.

Other telltale signals of a possible contest involve a testator who is suffering from diminished capacity or a chronic illness. The first question that must be addressed, and answered, is whether that person, perhaps a new client, has capacity to execute a will. That is not the end of the analysis, however. The testator with diminished capacity is also the one most susceptible to the undue influence of others, particularly those on whom the testator depends for care.

The attorney/draftsman who has taken the proper steps should be able to testify unequivocally that the testator possessed testamentary capacity and was not under any restraint. In the marginal case, where the client may have at least some diminished capacity, how does the attorney do this short of the rather radical solution that Troy Phelan used to put his heirs on record that he had capacity in John Grisham's best-selling novel ***The Testament?***

Although the subject can cover volumes, a few suggestions drawn from a seminar on the subject provide a checklist of some essential steps:

1. Explain to the client that in the circumstances a contest may be possible and that, therefore, there must be more discussion than might otherwise occur.
2. Obtain permission to speak to physicians and nurses.
3. Ask about recent illnesses and medications.
4. Ask the client as to her or his personal affairs, how they are being handled and how much he or she is involved.

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5. Ask about matters that interest the testator, i.e., current affairs, books, magazines, hobbies, newspapers, etc.
6. Speak to others, such as business associates or the accountant, about the testator's abilities.
7. Inquire about relationships, particularly between the testator and those who are being favored and disfavored.

Developing the Testamentary Plan

Besides the normal questions concerning family income and assets, the testamentary plan should be discussed thoroughly so that it is clear that the client understands the nature and consequences of what he or she is doing and has made a rational judgment concerning it. In other words, determine that the client can articulate the reasoning for any disposition that could be questioned.

This approach is not technically necessary under the standard test for testamentary capacity, and more properly fits within contractual capacity. Nevertheless, the ability to testify later about such conversations and produce notes regarding them will go a long way toward assuaging any concerns that might trouble a jury. Consider asking the client to provide, in her or his own handwriting, a statement regarding her or his testamentary intent, i.e., identifying the reasons for particular dispositions and/or providing some general explanation for the choices being made. Also, consider at least the possibility of audiotaping or videotaping the will execution.

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We do not mean that all of these steps should be taken. A final decision depends on the circumstances, and risks must be factored in. For example, a videotape of a person with diminished capacity may backfire if the client appears weaker and/or more confused than he or she really is, and retakes are not advisable.

As much as possible, contacts with the client should be direct and not through an intermediary. It is vital that beneficiaries be absent at meetings with the testator, and it is also helpful if travel and appointments are made personally by the client.

The form of the instruments to be executed must also be considered carefully. When possible, keep it sitnple-long, complicated wills are an easy target when the counsel for an objectant delivers the summation to a jury!

A draft of the will or other instrument should be sent to the client before execution to ensure that the testator has sufficient time for a careful review. A cover letter that describes the contents may also be helpful. Any draft should be carefully reviewed with the client, not only the final instrument that is to be executed.

Conversations With Family Members

Most people are reluctant to discuss their estate planning with their family. This is especially true with older clients who have a reluctance to discuss financial matters generally. We have all experienced clients who at the initial estate planning interview find it shocking that questions are being asked concerning the nature and value of assets.

The reluctance tb share financial and estate planning matters with close family is even greater. The sharing of the thought processes going into a particular estate plan might be the difference between a contest or not.

For example, in this day of second marriages, relationships between the children of the first marriage and the second spouse of the parent are often not smooth. Dad's new wife may be viewed as a "golddigger," especially a younger wife not much different in age than the children of the first marriage. The depth of the love and affection that Dad has for his new spouse may never be appreciated by the children. Accordingly, substantial financial provisions for her in his will may come as a shock. Lifetime communication by a parent to the children of the feelings of love and appreciation for the new spouse may lessen the shock. A frank discussion of the estate plan with the children may be warranted and cause the children to understand the parent's thinking.

The existence of a prenuptial agreement delineating the spouse's rights may further lessen the children's concerns. A qualified terminable interest property (QTIP) trust, which effectively causes only a deferral, not a denial, of the children's inheritance, may be a good tool in a second marriage situation. Obtaining the necessary spousal waiver supporting such a plan, and the fact that such has been obtained, may, again, calm the waters and put the children in a more understanding frame of mind. Compare this with a situation where there have been no pre-mortem discussions at all and the children first learn of the provisions for the new spouse when the will is read after their father's death.

If a child is being disinherited completely because the child is out of favor or has done something to alienate the parent, family dialogue will rarely help. However, if

the share of one child is being diminished vis-a-vis siblings for a legitimate reason such as medical, serious financial problems of other siblings. or simply that one, child is tremendously well-off financially while others are not, a family dialogue may be beneficial. In such situations, often the hurt and anger felt by the less benefitted child stems more from the emotion attached to not being treated equally with siblings than any particular concern over the money.

An explanation during life that the love and affection for all children is strong and equal but the parent simply feels there is more financial need in one family line versus another can go a long way. Parents will sometimes put the share of a particular child in trust versus outright provisions for other siblings because of concerns about the child's ability to manage money, fear that the money will find its way to a disliked son-in-law or daughter-in-law, or for other reasons. This is touchy ground but in some situations a dialogue with the child whose share is being placed in trust may help.

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Choice of Fiduciaries

The noted philanthropist Dr. Arthur Sadder was married three times. He had children of each of his first two marriages and his third wife was some 30 years his junior. During his lifetime, by dint of his strong personality and perhaps the extent of the financial aid he gave to everyone, superficially cordial relationships prevailed among the extended family. Dr. Saclcler wound up naming seven executors: his third and current wife, his first wife, two children of his first marriage, two children of his second marriage, and his lawyer. To say that matters did not run smoothly would be an understatement. Years of litigation ensued with a myriad of issues and, at one point, virtually every executor had separate counsel, leading to astronomical levels of attorneys' fees. Although even the right executor in this estate might not have avoided all of the litigation among the parties, it seems clear that a better choice of executors might have calmed the waters somewhat.[3]

Take a typical example: Mrs. Jones is 80 years old and has two children, a son and a daughter. She has been severely crippled with multiple sclerosis for a number of years and moved in with her daughter who takes care of her. She comes to you and advises that she loves both of her children dearly but wishes to give 60% of her estate to her daughter and 40% to her son, in recognition of the care the daughter has given during the period of her illness. She wishes to name her daughter executor. She is concerned that her son will be upset and might contest the will but she is adamant in her desire to establish a 60/40 split. On the narrow issue of who the executor should be, perhaps she should consider naming both children or, alternatively, another family member who has a good relationship with the son. If a claim of undue influence is made, the fact that the daughter did not push to be sole executor would weaken the undue influence claim. In addition, if a third party executor were named, the enhanced daughter could not be examined under N.Y. Surrogate.'s Court Procedure Act section 1404 (SCPA) even if there were an ***in terrorem*** clause.[4]

Choice of Witnesses

The execution of every will, and for that matter any important legal instrument, should be supervised by a lawyer, thus allowing for a presumption of regularity.5 If at all possible, that lawyer should be the attorney/draftsman.

There are different schools of thought regarding who the witnesses should be. Some lawyers prefer to use secretaries who, while familiar with execution procedures generally, have little knowledge of the testator. The opposite extreme is illustrated by the Doris Duke estate, where the propounded instrument was witnessed by the doctors who ayended Miss Duke. That unfortunate choice led to extraordinarily intensive SCPA 1404 examinations, wherein respondent's counsel was able to review virtually the entire medical history of Doris Duke, something that nonnally would not have taken place until after objections were filed.

We suggest that generally the most appropriate choice for attesting witnesses in problem cases would be attorneys, preferably estate attorneys. The attorney/draftsman should always be a witness. Under our rules of evidence, an attesting witness can give an opinion about the competency of the testator, despite being a layman.6 Allowing for the attorney/draftsman to so opine can only strengthen her or his testimony.

Prenuptial Agreements

An agreement between spouses, particularly in the second marriage situation, can go a long way toward forestalling any litigation. Of course it is imperative that both spouses be represented by separate counsel, and that there be full disclosure, particularly in light of the recent Court of Appeals decision in ***In re Estate of***

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Greiff.[7] There the court emphasized that while prenuptial agreements are favored,

> where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed (or to the proponent of the party's interest, as in this case) to disprove fraud or overreaching.a

The careful attorney will assume the existence of suc;h a_confidential r lationship, and talce steps· accordingly.

Standing to Contest Wills

A prenuptial agreement is also useful because, if properly drafted, it will include a waiver of rights in intestacy, resulting in the spouse not being a "person interested" in the decedent's estate and therefore not entitied to file objections to probate.[9] To obtain standing, the would-be contestant would have to bring a proceeding to declare the pre-nuptial agreement invalid. Thus, there are two hurdles to cross.

Another very simple device that may preclude standing is revocation of a prior will by physical destruction. For example, a stepchild, not being a distributee, is not a person interested who can file objections. However, if that stepchild is named in a prior will on file with the court, and her or his interest is adversely affected by the propounded instrument, standing is obtained.[10] If that will cannot be found, however, and is therefore presumed to have been revoked, or if there is positive evidence that it indeed was revoked by physical destruction, the stepchild must first demonstrate to the court's satisfaction that he or she could either prove the lost will was valid, or that the act of revocation was itself invalid because the individual lacked capacity or was affected by fraud or undue influence.

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In Terrorem **Clauses**

Opponents of ***in terrorem*** clauses argue that enforcing them inhibits possible contestants from challenging invalid wills, thus effectively depriving the Surrogate's Court of the ability to properly detennine whether a will is valid. Accordingly, such clauses "are not favored by courts and are strictly construed."[11] Moreover, the attorney/draftsman should be mindful that a skillful objectant's counsel will argue to the jury that the very existence of the ***in terrorem*** clause is but further evidence of undue influence.

On the other hand, an ***in terrorem*** clause may indeed deter a will contest as well as other tactics which might be employed to undennine the testamentary scheme, delay probate and harass the fiduciary.[12]

An ***in terrorem*** clause is not limited to wills. It has been recently held that such can be placed in a trust instrument as well.[13] An ***in terrorem*** can also be associated with a lifetime gift. An agreement.by a dooee not to contest a will in consideration of money given before death is valid· and not against public policy.[14]

Use of Lifetime Trusts

Drafting the client's dispositive plan via a revocable living trust rather than a will may provide some marginal advantage if there is an attack on the instrument.

In the contest of a will, a proceeding for probate must be commenced on notice to those who would take in intestacy and to those adversely affected by the instrument-offered for probate. No such notice requirement exists in the living trust scenario and. no citation, which many characterize as an invitation to file objections, is required.

In addition, the successor trustee of a revocable living trust can act immediately; there is no need for any court imprimatur of the instrument or for letters of trusteeship. The assets can be accessed and administered virtually immediately. This gives the advantage of being able to pay attorney's fees contemporaneously and not having to wait for issuance of letters. Also, in some counties, courts will restrict preliminary letters testamentary to require that attorney's fees can only be paid upon application to the court. This removes the strategic advantage that a proponent generally has when fees can be paid currently while the objectant must advance the funds from her or his own pocket.

Another consideration is that the burden of proof on a challenge to a living trust is more difficult for an objectant. In a will contest, the proponent has the burden of proof on the jssues of due execution and capacity and must meet this burden as part of her or his ***prima facie*** case. In the living trust challenge, however, the burden is entirely on the objectant as to capacity.[15] Every person is presumed under the law to be competent, and the proponent of the living trust may rely simply on its proper execution and acknowledgment.

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Ostensibly, therefore, it would-appear that it is more difficult to set aside a living trust than a will. As a practical matter, however, there may not be any substantial difference. In a will contest, the proponent easily meets the burden on capacity by the testimony of the attesting witnesses who opine that the will was properly executed and that the testator, in their opinion, had the capacity to make a will. The proponent then rests and the objectant must rebut the proponent's proof. On the other hand, the degree of competency necessary to create a living trust may be slightly higher than the capacity necessary to execute a will. This issue was addressed by Surrogate Lambert of New York County in ***In re Estate of A. C.N.*** [16] Io that case, the court was dealing with a challenge to the creation of an inter vivos charitable remainder unitrust. The court cited the familiar axiom that the making of a will requires less capacity than the execution of any other legal instrument, but found that a living trust does not have the same standard. The court found that a living trust is a contract and thus the standard of capacity for making a contract should be the governing principle_ [11]

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Lastly, and although legislation has been introduced to provide otherwise, and indeed to provide a statutory road map for challenges to a lifetime trust, the current law is somewhat unsettled as to the right to ajury trial in a lifetime trust contest. [18] To the extent that a jury trial could be denied, this is favorable to the proponent because the conventional wisdom is that surrogates favor the validity of wills and are not as likely as a jury to be influenced by emotional factors.

While the advantages may be marginal, disposition via a lifetime trust may provide some advantage, and in a tight case might mean the difference between winning and losing. In any event, there is little downside.

Conclusion

Effective estate planning requires that the attorney/draftsman be able to recognize the storm clouds of possible litigation looming on the horizon. While it would be foolish to guarantee a client freedom from litigation, the risk may be minimized with appropriate care. Such care might not only avoid litigation but, in the event litigation does occur, will help provide a successful defense, ensuring that the client's testamentary intent is implemented.

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1. Ronald Chester, ***Should American Children be Protected Against Disinheritance?,*** **A.B.A.** Real Prop. Prob. &Tr. J., Vol. 32, No. 3, at 411 (Fall 1997).
2. Jeffrey P. Rosenfeld, ***Will Contests: Legacies of Agi11g and Social Change,*** in Inheritance and Wealth in America, at tbl. 8.4 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).
3. ***See In re Sackler,*** 149 Misc. 2d 734,564 N.Y.S.2d 977 (Sur. Ct., Nassau Co. 1990), ***rev'd on other grounds,*** 192 A.D.2d 536,596 N.Y.S.2d 836 (2d Dep't 1993).
4. SCPA 1404(4).
5. ***In re Hedges,*** 100 A.D.2d 586,587,473 N.Y.S.2d 529 (2d Dep't 1984).
6. Richard T. Farrell, Prince, Richardson on Evidence § 7-202(m) (11th ed. 1995 & Supp. 1998).
7. 92 N.Y.2d 341, 680 N.Y.S.2d 894 (1998).
8. ***Id.*** at 345 (citations omitted).
9. ***In re Widma11,*** N.Y.L.J., July 17, 1990 (Sur. Ct., Westchester Co.).
10. ***In re Moore,*** N.Y.L.J., Apr. I, 1996, p. 33 (Sur. Ct., Suffolk Co.).
11. ***In re Estate of Robbi11s,*** 144 Misc. 2d 510, 514, 544 N.Y.S.2d 427 (Sur. Ct., N.Y. Co. 1989).
12. ***See In re Estate of Ellis,*** 252 A.D.2d 118,683 N.Y.S.2d 113 (2d Dep't 1999).
13. ***Ill re Stralem,*** N.Y.L.J., Aug. 5, 1999, p. 30 (Sur. Ct., Nassau Co.).
14. ***In re Piscionere,*** N.Y.L.J., Mar. 4, 1987, p. 15, col. 5 (Sur. Ct., Westchester Co.).
15. ***In re Estate of Obenneier,*** 150 A.D.2d 863, 540 N.Y.S.2d 613 (3d Dep't 1989).
16. 133 Misc. 2d 1043, 509 N.Y.S.2d 966 (Sur. Ct., N.Y. Co. 1986).
17. ***See id.; see also In re Estate of Goldberg,*** 153 Misc. 2d 560, 582 N.Y.S.2d 617 (Sur. Ct., N.Y. Co. 1992).
18. ***Compare In re Estate of Aronoff,*** 171 Misc. 2d 172, 653 N.Y.S.2d 844 (Sur. Ct., N.Y. Co. 1996) ***with In re Estate of Tisdale,*** *111* Misc. 2d 716,655 N.Y.S.2d 809 (Sur. Ct., N.Y. Co. 1997).

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