

🔗 Challenges to wills fraught with emotion



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When it comes to dealing with an inheritance, make no mistake: It's fertile ground for a family war. Often, one child feels cheated out of his share and ends up challenging the will.

"You would be amazed at the number of calls we get on the topic and the frequency it arises in client discussions," said Norm Lofgren, estate planning and tax lawyer at

Looper Reed & McGraw PC in Dallas. “Death, money and payback do strange things to folks.”

Those seeking to challenge a will need to know upfront: It won't be easy.

To begin with, “there's really not much you can do until the person passes away,” said Jay Hartnett, partner at the Hartnett Law Firm in Dallas, which specializes in estate and trust litigation. “You can't contest someone's will until they've died, until it's been offered for probate.” Hartnett also said much depends on the circumstances involved in the challenge. “If someone is 40 years [old] and is doing a will, it's very difficult to contest the will,” he said. “But if you've had someone who's had an estate plan their whole life and then in the last three months of their life, they suddenly change their estate plan completely and leave it all to one child and cut all the others out, that generally screams that there is some issue out there.”

Will challenges often occur in “second-family” situations, Lofgren said. “Dad divorces, remarries younger woman, Dad dies and children from Dad's first marriage are unhappy that the second wife receives more under Dad's will than the children think appropriate,” he said. “I can't tell you how many times I have cautioned a couple in second-family scenarios that the second wife is not the mother of the children from the first marriage, and, when Dad dies, there is a potential for a will contest.”

Hartnett advises parents not to cut a child out of their will. “Anytime a parent decides to cut one of their children out, they can pretty much guarantee themselves that there's going to be a will contest,” he said. In Texas, there are several ways to contest a will: Show that the person drawing up the will lacks “testamentary capacity.”

“Testamentary capacity simply means that the person executing the will knows that they are making a will, the effect of making the will, the general nature of their assets and their next of kin, and is able to make a reasonable judgment about these factors,” Hartnett said.

Estate planning attorney John Bauer of Shackelford Melton & McKinley in Dallas explains it this way: “Mom’s got to know that she’s got a house and basically \$100,000 in the savings account and she’s got a car and she’s got three kids. She has to understand those all at the same time. If she’s not mentally competent, then the will’s invalid.”

Show that the person drew up the will under “undue influence.” That is, the individual signed a will “that they would not have signed but for the improper influence of another person,” Hartnett said.

Bauer’s example: “If the daughter is putting a lot of pressure on the parent and, because of that, Mom relents and she names the child [as sole beneficiary], that’s undue influence.” But Bauer said the person making the challenge has to prove the undue influence. “She’s got to prove it by the preponderance of the evidence that that indeed happened. That’s a tough proof to make,” he said. Show that technical details weren’t followed or that the will was forged. “Was it done under the proper law?” Bauer said. “In other words, when you do a will, you have to do certain formalities. Was the will signed before two witnesses? You have to be 18 or older when you sign the will, and the witnesses have to be at least 14 years of age.”

The timing of a challenge also is critical. A will can be contested before or after it has gone through probate, Hartnett said, but you usually have only two years to file a challenge once one is probated. “A person who thinks they may need to contest a will should contact an attorney as soon as possible after the loved one passes away,” Hartnett said.

Here’s another critical fact regarding timing of a challenge: “Before the will is filed for probate, it’s up to the executor of the will to prove that the person was of sound mind, above the age of 18 and the two witnesses were above 14,” Bauer said. “Once the will has been admitted to probate, then it’s up to the challenger to prove that the person was incompetent or someone wasn’t of the right age. “If you think that Mom was

incompetent, the time to do it is beforehand because they have to prove by the preponderance of the evidence that Mom was competent.”

A recent change in Texas law benefits heirs. “In 2007, the Texas Probate Code was amended to provide that an executor of an estate had to notify the beneficiaries of a will that it had been admitted to probate and provide the beneficiaries with a copy of the will,” Lofgren said. “This was a good change to make sure that all of the beneficiaries were apprised of the probate and had a timely chance to oppose the probate.”

Challenges to wills sometimes come not from children, but from a distant relative of the parent, said Ellen Dorn, estate planning attorney at Fanning Harper Martinson Brandt & Kutchin PC in Dallas. “What I’ve seen is that when a controversy about a charitable bequest arises, it is far more common for that concern or challenge to be raised by a distant relative and not by a child,” she said. “What you see instead are great-nieces and -nephews — people who knew Aunt Suzie and Uncle Bob were well off, they were very loving, they were very hospitable, they had no kids, and of course they would name their nieces and their great-nieces and nephews in the will,” Dorn said. “They’re disappointed when they see that no, maybe a little token gift is given to the kids, but the bulk of the estate is going to charity.”

Will contests are emotionally charged, and you should think carefully before going ahead with one. “The advice I would give someone contemplating a challenge is to ask themselves why do you want to challenge the will,” Lofgren said. “Does the will reflect what Dad or Mom wanted to do with their own stuff? Is the money sought really worth destroying your family?”