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# Changing Family Demographics Bring Increased Will Disputes

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When an individual passes away, the administration of that individual's assets (estate) is dealt with in the Surrogate's Courts of the various counties of the state of New York. The county in which an individual lived at the time of his death is the county in which that Surrogate's Court will administer his assets and liabilities.

Estate administration consists of the probate of the decedent's last will and testament, filing of the will and proving in the court that it is the last valid will of that deceased individual. If no valid will exists, administration of the assets and liabilities of the deceased individual is handled by a court appointed administrator, generally a family member who is permitted to qualify, according to the laws of the state of New York.

In either case, administration by an executor under a will or an administrator under the law, the transactions that take place to have a deceased's assets collected, debts paid, and the remaining assets distributed pursuant to the terms of the deceased's will or in accordance with New York state law, is the same.

Notwithstanding the simple legal statements above, increasingly disputes among family members take place regarding the disposition of assets of a deceased person. These disputes over the past 20 or more years have increased due to changes in demographics of families. It is not unusual

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to find families with multiple marriages of a deceased and/or children from these multiple marriages. As a result, in-fighting amongst the various family members takes place in both wills and administration proceedings. These "contests" generally involve arguments between the surviving spouse of the deceased and the children of the deceased from multiple marriages. Under New York state law, a surviving spouse is entitled, regardless of what a will may say, to a certain percentage of the deceased spouse's assets. The surviving children of that deceased spouse will be entitled to the remaining percentage. The surviving spouse's percentage is generally called an "elective share." That percentage is one-third or $50,000, whichever is the greater share of the deceased spouse's estate assets. Certain lifetime transfers to a surviving spouse and certain ownership of joint assets, insurance proceeds, and the like may also affect the amount of that percentage.

Needless to say, parents, at times, have disputes with children, and as punishment for those disputes, make little, if any, provision for the currently out-of-favor child or children. There are times when a spouse is out-of-favor with the other spouse and one or both of those spouses write wills that leave little, if any, assets to the out-of-favor spouse. That is when the "elective share" comes into play.

Of course, when there is going to be a new marriage, second, third or possibly even more, prenuptial agreements setting forth rights and obligations of spouses to each other as to lifetime situations, divorce and death should be of prime concern to both of the marrying individuals. Even when these documents exist, disputes in the Surrogate's Court do take place.

Several examples of disputes that are taking place in the various Surrogate's Courts include a situation where a deceased married three times (the last time for approximately 18 days, leaving no will), has children from several marriages, life insurance beneficiary issues, pre-nuptial issues and disputes between the surviving spouse, the surviving parent of the minor children from a second marriage and the

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adult child from the first marriage. The numerous disputes taking place among all these different people with different interests not only are creating hours of work by many lawyers, but also dissipating estate assets while everybody fights over what the decedent left. In this particular circumstance, having the appropriate prenuptial agreement, will, and possible discussions with various family members may have eliminated or diminished some, if not all, of the disputes in court.

Another typical contest occurs when a recently executed will by an elderly infirm individual is either disinheriting or leaving disproportionate interests of his or her estate to some or all of his or her children. In this type of situation, questions arise as to the mental capacity of the deceased at the time the will was drafted and executed. Questions are also raised as to what medical treatment the deceased was undergoing, what medicines he/she was taking at the time the will was drafted and executed, what facility the deceased was residing in at the time the will was executed, and myriad other issues. For example, how many times did the deceased's attorney meet with the deceased to discuss the will provisions prior to the execution of the will? Who accompanied or was present when the deceased's will provisions were discussed with the attorney? Generally, the attorney should be dealing with the deceased without any potentially interested party being present, so that there is no possible claim of undue influence at the time that the attorney was meeting with the deceased. More than one session should take place for the discussion about will provisions and will execution.

In situations like the two discussed above, defensive planning should take place between the deceased and the attorney to minimize the risks and success of a will contest. For example, the attorney may wish to have his legal assistant, associate or other individual who is employed by the attorney be with the attorney when all interviewing of the deceased takes place and at the time of will execution. In fact, in some occasions using a legal videographer and a court stenographer at the time of will execution may be important for evidence that there was no undue influence or other factors such as mental incapacity at the time of will execution.

An **"anti-contest clause"** provides that if an individual contests the terms of a will and loses that contest, he/she is **completely disinherited** and receives nothing under the terms of the will, providing that the will did have some provision of benefits to that contesting party.

Another effective way to avoid a will contest is to include in the will an "anti-contest clause." This basically provides that if an individual contests the terms of a will and loses that contest, he/she is completely disinherited and receives nothing under the terms of the will, providing that the will did have some provision of benefits to that contesting party. Therefore, it is advisable if someone is going to put an "anti-contest clause" in a will, that some benefit exist for the potential contesting party in that will as the carrot to keep that person from contesting the entire or other provisions of the will. If no benefit is left for a potentially contesting party, that party has nothing to lose in making a contest.

If anyone reading this article has any question as to the amount of will contests that exist, they only need go and visit the Surrogate's Court in any county in New York on the calendar date (the day that the court hears cases scheduled for determination, conference, or trial) and watch and listen to what comes before the court. In many cases, you will be shocked to find out that people argue over significant issues, as well as insignificant issues. These proceedings are expensive to all members of families, and very often cannot be avoided due to personality, jealousy, anger, and most importantly, emotionally charged situations.

The best advice that I can give someone is (1) make sure you have a professionally drawn will taking into consideration tax planning and equitable distribution of your assets. Consider the family dynamics and how those dynamics will affect the orderly distribution of an individual's assets at time of death, without fighting amongst family members, (2) consider having a family meeting to discuss the planning for the orderly distribution of your assets, making sure that all family members understand exactly what and why you are taking the action you plan to take, dealing with any disputed matters during your lifetime, with the hope that they will be resolved to everyone's satisfaction so as to avoid the future fighting that would most likely occur on your death.

Based on the growing complexity of multiple marriages and family dynamics, it is fair to say that the business of the Surrogate's Courts of the various counties will not diminish in the near future, and is likely to stay the same or even increase.



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