New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
An ALM Publication
Trusts&Estates
WWW.NYLJ.COM
MONDAY, JANUARY 5, 2015

Can Wills and Trusts Be **Contest-Proofed?**

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Over the past several years, there has been a substantial increase in the amount of will contests and trust contests in the various Surrogate's Courts of the State of New York.

This increase relates to the fact that demographics of families have changed considerably. There are multiple spouses with first, second, even third marriages and children from this multiplicity of marriages, not to mention children who are born out of wedlock. As a result, the ex-spouses and stepchildren very often have disagreements over family matters, financial matters and other issues which give rise to contests of a decedent's estate.

While this article is meant to discuss contest proofing testamentary documents, the results of a contest can never be guaranteed. In New York, there are generally three grounds in which an interested party may contest a will: (1) that the testamentary instrument was improperly executed, (2) that the testator was not mentally competent, and (3) that the will was a product of fraud or duress. Here, we will discuss some of the procedures that practitioners should follow to defensively assist clients with their estate planning, so as to minimize a potential will contest. In addition, the same procedures should take place relative to living trusts, and other documentation that may be required such as family limited partnerships, personal residence trusts, Grantor retained annuity trusts, grantor retained income trusts and possibly the establishment of a family foundation.

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The primary responsibilities of an estate planning practitioner is to assist the client in minimizing estate taxes and probate expenses and, most importantly, to assist as much as possible in making sure that the testamentary documents executed by the client, which directs his or her last wishes, be executed in such a manner that the will shall withstand any objections to probate.

It is very important that the practitioner, when dealing with estate planning for a client, follow certain procedures in every single estate planning matter, regardless of how well the practitioner knows the client, the business relationship between the practitioner and the client and the familiarity that the practitioner has with the client's family members. Everything the practitioner does in the estate planning field should be based upon defensive actions for the benefit not only of the client, but also for the attorney and staff, when and if a contest does in fact arise. The more complete the practitioner's notes, files, and their showing of revisions of the testamentary instruments prior to the actual execution of a finalized document, the more it helps to deter actual court contests. The practitioner should never shortcut the estate planning process, which includes the careful procedures in having the testamentary documents prepared and executed, because failing to follow certain procedures may be a key factor in exposing the decedent's estate to attack by one or more of the decedent's heirs.

Specifically, the practitioner should meet with the client alone and with no other person except possibly an assistant, paralegal or other attorney from the practitioner's firm. Copious notes should be taken at that initial meeting, wherein the practitioner should ask and record questions and answers about the client's health, mental capacity, and reasons why the client desires certain provisions to be placed in the testamentary documentation, which may have an adverse interest on one or more of the heirs, including a surviving spouse.

After the initial meeting with the client, the practitioner should create a confidential memorandum, which should be shared with the client outlining all of the conditions and terms that the client discussed regarding the estate planning documentation and the contents thereof. Included in this memorandum should be a recitation about the client's assets, medical and mental conditions, and the planned disposition of his or her assets. The client should be given a copy of this memorandum and should discuss that memorandum with the practitioner at a second meeting. It is suggested that at the second meeting not only should the practitioner be present but again an assistant, paralegal or other attorney from the firm, who will take additional notes for the file regarding the client's discussion relative to the terms and conditions of the memorandum.

Once the second meeting has taken place, the documents should be drafted for the client based upon the information gleaned from the meetings. That draft document should then be provided in advance to the client for review. Once examined, the third, and most times final meeting should take place with the client with final copies of the testamentary documents available, so that the client may execute the same. The various

testamentary documents are comprised of a will and/or a living trust, health care proxy, living will, power of attorney and a disposition of remains, which directs the named representative as to where and how to dispose of the client's body upon death.

In the event that the client wishes to make any additional changes in the testamentary documents, it is generally advisable that the practitioner keep all prior drafts in the computer or in the files, for purposes of defending a contest relative to the testamentary documents. Each draft should be saved with the new date it was revised, to track all changes the client has requested.

Furthermore, if there is any reason to believe the client's mental capacity will be challenged in a will contest, it is highly recommended that the practitioner utilize extra preventative methods and/or services, such as arranging for a legal videographer to be present during the meetings and execution of documents. A professional legal videographer includes a stenographer as well, so your client will have the safeguards of a video and transcript. During the execution ceremony, the practitioner should explain in the video who each person is in the room, he should have the client read the will aloud, acknowledging his comprehension of each paragraph therein verbally and he should make sure he thoroughly questions the client to ensure that this is his or her final wish upon demise.

If the practitioner is drafting testamentary documents for both a husband and wife, or domestic partners, there should be a joint representation document signed by the clients stating that they understand that the practitioner is representing both of them, is meeting with both of them and will be drafting testamentary documents for both of them. The joint representation document should include statements that both clients understand that there is no attorney-client privilege as to and between anything discussed privately by either client with the practitioner. This is very important so that in the event there is ever a will contest by one of the married individuals, or the partners, there cannot be any claims that the practitioner violated attorney-client privilege or did not advise both parties as to the status of the representation. That letter should be signed not only by the practitioner but also by both clients.

Another valuable means of attempting to contest proof testamentary documentation is to suggest to the client that family meetings should be held with open discussions regarding the estate planning that the client wishes to undertake. Sometimes families ask that the practitioner be present at these meetings. It is important that the practitioner take notes as to the discussions at the meeting, and the planned outcome from those discussions. It is generally our advice that an assistant, paralegal or another attorney attend the family meeting with the practitioner. Basically, we are preparing for a potential will contest, having notes as to who said what, when and where for use in defending a potential contest.

> Everything the practitioner does in the estate planning field should be based upon **defensive actions** for the benefit not only of the client, but also for the attorney and staff, when and if a contest does in fact arise.

Also note that some practitioners are under the impression that inserting an in terrorem clause in the client's will in and of itself shall detract contests. Basically, an in terrorem clause, also known as a "no-contest clause," generally provides that if the beneficiary of a testamentary instrument unsuccessfully challenges the instrument's validity, then that beneficiary forfeits his or her bequest. The major oversight with this clause is that if your client wishes to disinherit a beneficiary completely, then that beneficiary has nothing to lose by challenging the validity of the testamentary instrument with an in terrorem clause, since he or she was not entitled to anything in the first place. A good recommendation to make for potential hostile beneficiaries is not to disinherit. Rather, leave a bequest that is sufficient enough for the beneficiary so that they are in fear of losing the same if they decide to challenge the testamentary instrument.

Typically, the larger the size of the estate, the more protection is needed to safeguard your client against potential contests. An infamous case in New York involved the late Brooke Astor, whose net worth was over $198 Million. Astor was a New York City philanthropist and socialite, who passed away at the age of 105 in 2007.

Unfortunately, the feuding over Astor's Estate commenced well before she even passed away, during several "hotly-contested Article 81 proceedings concerning the health, care and finances of society icon Brooke Astor."[1] Herein, Astor's only son, Anthony D. Marshall had various powers of attorneys and health proxies; however, Astor's grandson, ironically the son of Anthony D. Marshall, petitioned the court to remove his father and void these documents. The issue boiled down to Astor's mental capacity. Needless to say, the fighting between the father and son carried forward once Astor passed away, tying up the distribution of her estate. Ultimately, the New York County Supreme Court found Anthony D. Marshall guilty of fraud and conspiracy charges against Astor's estate, as well as first-degree grand larceny. He was sentenced to one to three years in prison in 2009, which was affirmed on appeal. According to a New York Time's Article dated Dec. 1, 2014, Anthony D. Marshall served two months in Fishkill Correctional Facility in 2013, before he was approved and released for medical parole. He recently passed away on Nov. 30, 2014, at the age of 90.

Astor's case is one of many that encompasses elder abuse, duress, fraud, and stealing of assets. This is why it is extremely important for the practitioner to safeguard his client's final wishes by following the tips herein. Again, following these procedures does not guarantee that there will not be a contest; however, contests are unlikely to survive if the attorney draftsman has extensive notes documenting the client's mental condition, demeanor and most importantly directions upon his or her demise, with the reasoning therein.

1. *In re Phillip Marshall*, 14 Misc.3d 1201(A), 831 N.Y.S.2d 360 (Table), 2006 WL 3615041 (N.Y.Sup.), 2006 N.Y. Slip Op. 52365(U).

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