A TEDRA Litigator's Advice on How Best to Defend Against a Challenge to Documents You Draft

by Karolyn Hicks – Stokes Lawrence. P.S.

There is no guaranteed way to avoid a contest challenging the validity of estate planning documents if a "disinherited" heir or beneficiary is determined enough. There are, however, steps that can be taken at the time the documents are prepared and executed that will minimize how effective a challenge will be. This article is intended to guide estate planners and drafters, who are likely to be the star witnesses in any will or trust contest, on how to anticipate a challenge and prepare documents that will withstand that challenge.

Generally a will or trust may be challenged on one of four grounds: lack of testamentary capacity, undue influence, fraud and insane delusion.

Lack of Testamentary Capacity

As most estate planners know "by heart," testamentary capacity has three elements. The testator must: (1) have sufficient mind and memory to intelligently understand the nature of the business in which the testator is engaged (i.e., creating/signing a will or trust); (2) be able to comprehend generally the nature and extent of the property that constitutes his estate and of which he intends to dispose (i.e., what does the testator own?); and (3) have the ability to recollect the natural objects of his bounty.[1] It is a lower standard than required for signing a contract.[2] This standard applies to both wills and trusts.[3]

For the purposes of preparation and certainly execution of the will or trust, a planner should meet the client in person so he or she can later testify that these three elements were satisfied by the client. Contemporaneous notes to the planner's file will certainly help the litigator who is later defending against the challenge to the will or trust. A planner may also want to consider having a form to use during the meeting which includes these three elements and space to write the client's verbal responses. This form can later be used to demonstrate that the planner discussed each of the three elements with the client, and the client's contemporaneous responses satisfied each of the elements of testamentary capacity. Also, at the time of execution the planner should use credible subscribing witnesses, and provide the witnesses with an opportunity to meaningfully interact with the client. The witnesses may also keep notes and/or prepare memos to the file about their interaction with the client.[4] These notes or memos can help bolster evidence of the client's capacity when defending against a challenge.

At times it is difficult to determine whether testamentary capacity exists. There are various cases in Washington that have reviewed some typical "end-of-life" scenarios and provide additional guidance on whether a client may have capacity issues:

Remaining Life Span/Advanced Age. Testamentary capacity is not affected by physical conditions nor one's approaching death if, in spite of that weakness, the testator had sufficient mental capacity to be able to know and understand the three elements described above.[5]

Poor Memory. The fact that a testator may have had poor memory is not enough to render a testator incompetent to execute a Will.[6] The mere fact that one is aged or occasionally forgetful does not render such person incapacitated.[7]

Dementia Onset. Even the onset of "senile dementia" is not enough to invalidate a will or trust.[8] Only when the dementia is sufficiently severe that the client can no longer satisfy the three elements described above can a will or trust be invalidated.[9]

Medications. Evidence that the testator was taking prescribed medications at the time the will was signed does not indicate lack of testamentary capacity.[10] Of course, if the client takes medications that severely affect memory or cognitive thinking, questions could be raised as to his capacity at the time of execution.

Significant Physical Limitations or Ailments. The fact that one was suffering from a terminal condition does not conclusively establish that a testator lacks testamentary capacity in the legal sense.[11]

The client does not need to be in perfect health to execute a will. A planner may want to gather more facts from the testator or testator's family, such as the state of the testator's health, what medical conditions could affect capacity, and what medications could affect capacity. The planner may also need to have more frequent meetings with the testator and/or take extra time in the execution of the will to make sure the testator is lucid and satisfies all three elements of testamentary capacity at the time of execution.

Undue Influence

Sometimes a client with testamentary capacity nevertheless may be susceptible to the undue influence of another. The planner must ensure that the client is exercising his or her own free will.

Undue influence occurs when someone has interfered with the testator's free will and has prevented the exercise of the testator's own judgment and choice.[12] Not every influence exerted over a person is undue influence: "[g]enerally, influence exerted by giving advice, arguments, persuasions, solicitations, suggestions or entreaties is not considered undue unless it be so importunate, persistent or coercive and operates to subdue and subordinate the will of the testator and take away his or her freedom of action."[13] It must be "influence tantamount to force or fear which destroys the testator's free agency and constrains him to do what is against his will."[14]

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Detecting the presence of undue influence may be harder for an estate planner than determining capacity or insane delusions. Often the influence takes place outside the view of the lawyer. Some circumstances to watch for include:

- A sudden, drastic or significant change in bequests from previous planning;
- The client's sudden change from his prior, long-term estate planner without explanation;
- Disinheritance of a family member in favor of a more distant relative, friend, charity or caregiver;
- Unequal treatment of children for no clear or articulable reason;
- The extent to which a gift or bequest has been made to someone an elderly or disabled testator depends on for care;
- Unusual or atypical behavior by the client during the meeting(s);
- Client's inability to answer questions without conferring with another person;
- Planner's inability to meet with the client alone; and
- Comments of the staff of the assisted living or other residence facility occupied by the client that the client is being harassed.

Other factors the planner might consider including in an office memorandum:

- Where did the meeting occur – planner's office, client's home, hospital, care facility?
- Who called the office to make the appointment?
- Who, if anyone, accompanied the client to the meeting?
- Did the person ask to come into the room with the client?
- Did anyone appear to be coaching the client, e.g., "Remember what we spoke about…?"
- Were there any statements that demonstrate a conflict in the family, e.g., "Nice to meet you, I'm the good daughter" or "His other children don't know we're here."
- Who did most of the talking?
- Does the new plan depart from prior plans and can the client (*not* anyone else) articulate why?
- How long did the planner meet with the client alone and what was discussed?[15]

The answers to these questions do not necessarily mean someone is exerting undue influence. In fact, it is not uncommon for a family member or close friend to accompany an elderly client to a meeting with his lawyer and try to be helpful. But further investigation is warranted when these circumstances are present. A planner should ask the client to articulate why, for example, he is making the change and/or favoring a more distant friend or relative over those who took under the previous plan or would take under the intestacy statutes. A planner should be sure he is satisfied with the response because he will likely be the star witness defending the will if it is challenged. Even if the case never gets to trial, the planner may be deposed and may be asked why the client did what he did. A planner may feel foolish if he has no idea and/or never asked why the client made some of the seemingly unusual decisions he or she made.

If the planner is satisfied with the client's response and there is an unusual or unexpected deviation from what one would normally expect, the planner should consider adding a precatory statement in the will about the intent behind the particular dispositions, and including a "No-Contest Clause."[16] Notes to the file addressing all of these issues will also be helpful if later a challenge is brought.

Fraud

An estate planning document can also be invalidated, either in whole or in part, on the ground of fraud, whether it be fraud in the execution or fraud in the inducement.[17] Courts will invalidate a will, trust or gift when the court finds that a beneficiary made willfully false statements of fact, intended to deceive a testator/donor and induce a particular result, which do deceive the testator/donor and induce the testator/donor to make a will, trust or gift, which the testator/donor would not otherwise have made.[18] This analysis is different than the analysis for undue influence, because in a fraud situation, the testator is not coerced, rather he is actually deceived. Though fraud and undue influence are distinct concepts, they are closely related. Facts that support a finding that one of these bases to invalidate a document or gift exists may provide additional support for a conclusion that the other basis is also present.[19] Fraud may be presumed in equity where the donor and donee share a confidential relationship.[20] In such a case there can be a "presumption of fraud."[21]

Fraud in the execution of wills is not common.[22] It is defined as "fraud that goes to the nature of the instrument

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itself…. 'If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.'"[23]

As with undue influence claims, it can be difficult for an estate planner to recognize fraud in the inducement because, more likely than not, the fraud has already occurred by the time the client comes to the office. However, the same advice described above regarding the timing and duration of meetings and discussion, investigation of facts with the client and / or family members, and detailed notes to the file are all applicable in this situation as well.

Insane Delusions

Although these situations do not occur frequently, a will, trust or gift can also be overturned when it is the product of an insane delusion. Even when a testator meets the three-part test for testamentary capacity, "he may, nevertheless, be laboring under one or more insane delusions which may have the effect of making his will a nullity."[24] An insane delusion is a false conception of reality that a testator of a will adheres to against all reason and evidence to the contrary.[25]

A planner should be on alert if a client has said anything that does not sound entirely credible. For example, if a client claims his or her daughter has stolen the family house, but county records show the house is still in the client's name, further investigation may be warranted. Is the daughter squatting in the family home while the parent is in an assisted living facility or is this completely delusional thinking?

Conclusion

The good news for estate planners is that anyone seeking to invalidate a will has the burden of proving by clear, cogent, and convincing evidence that the testator lacked testamentary capacity, was unduly influenced, was the subject of fraud at the time that he or she executed the will, or was suffering from an insane delusion.[26] This is a difficult, although not impossible, burden to meet. The law presumes the will is valid if it is executed in legal form and is rational on its face.[27] The planner's testimony alone will make it very difficult for the contestant to prevail, especially if the planner is deliberate in his or her work with the client and follows the advice provided in this article. *Good luck!*

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1 *In re Estate of Larsen*, 191 Wash. 257, 260, 71 P.2d 47 (1937).

2 *See Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 108-09, 120 P.2d 527 (1942) (quoting 17 C.J.S. *Contracts* § 133). To make a contract, one must "be of sufficient mental capacity to appreciate the effect of what he is doing and must also be able to exercise his will with reference thereto." *Id.* In contrast, testamentary capacity does not require such appreciation of the effects of the action, only that the testator can satisfy the three elements. *Estate of Larsen*, 191 Wash. at 260.

3 RCW 11.103.020, which became effective January 1, 2012, states that the standard of capacity for a Trustor to create, amend, revoke or add property to a revocable trust, or to direct the actions of a trustee of a revocable trust is the same standard as that required to make a will. This statute applies to trusts created before or after the effective date of the Act, confirming that, although revocable trusts can be viewed as contracts between trustor and trustee, the "contract standard" for capacity does not apply to them because revocable trusts generally contain a testamentary plan.

4 At the time of execution if the planner expects the will or trust may be challenged, it is incumbent upon the planner to have the witnesses to prepare contemporaneous memos of their interaction with the client.

5 *Estate of Larsen*, 191 Wash. at 261. Likewise, "'[g]reat age alone does not constitute testamentary disqualification,' and 'there is no presumption against a will because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body.'" *Estate of Denison*, 23 Wn.2d at 714 (quoting *Horn v. Pullman*, 72 N.Y. 269 (1878)).

6 *In re Estate of Malloy*, 57 Wn.2d 565, 568, 359 P.2d 801 (1961). Failure of memory is not alone enough to create testamentary incapacity, unless it extends so far as to be inconsistent with the "sound and disposing mind and memory" requisite for all wills. *In re Estate of Kessler*, 95 Wn. App. 358, 371, 977 P.2d 591, 599 (1999) (quoting *In re Estate of Denison*, 23 Wn.2d 699, 714, 162 P.2d 245 (1945)).

7 *In re Estate of Hansen*, 66 Wn.2d 166, 171, 401 P.2d 866 (1965). Offers of proof showing that the testatrix was subject to occasional lapses of memory, which are common to persons of her age, "would not support a finding that she lacked testamentary capacity when she executed her will, either standing alone or when taken in conjunction with all of the other testimony." *In re Estate of Malloy*, 57 Wn.2d 565, 358 P.2d 801 (1961).

8 *In re Estate of Denison*, 23 Wn.2d 699, 713, 162 P.2d 245 (1945). Although mental power of the elderly may, generally speaking, be below the ordinary standard of the populous, "if the testamentary act is understood and appreciated in its different bearings [and] if the mental faculties retain enough strength to comprehend the transaction entered upon, the power to make a will remains. In other words, to constitute senile dementia, there must be such a failure of the mind as to deprive the testator of intelligent action. Such is the rule of our own cases, and the rule established by the great weight of authority." *Id.* at 714.

9 For a litmus test regarding dementia, planners are encouraged to ask the attending physician for the client's score on the Mini Mental Status Exam (MMSE), if any. The MMSE is frequently used by litigators as well as by investigators of Adult Protective Services of the Washington Department of Social and Health Services to determine the severity of a client's dementia.

10 *In re Estate of Bussler*, 160 Wn. App. 449, 463, 247 P.3d 821, 829 (2011). "'[W]hile sick, a person desires to make a will,' and evidence that the person has been prescribed 'a sedative or some medicine to ease pain or reduce nervousness ... is not, of itself, proof or even weighty evidence of testamentary incapacity.'" *Id.* at 463 (quoting *In re Estate of Kinssies*, 35 Wn.2d 723, 734, 214 P.2d 693 (1950)). The Washington Supreme Court has also affirmed the trial court's finding that "the narcotic ministered to the testator – a quarter grain of morphine sulphate, given approximately three and one-half to four hours before the execution of his will … did not impair his mind, memory or faculties." *In re Estate of Mikelson*, 41 Wn.2d 97, 99, 247 P.2d 540 (1952).

11 *In re Peters' Estate*, 43 Wn.2d 846, 862, 264 P.2d 1109 (1953).

12 *In re Estate of Marks*, 91 Wn. App. 325, 333-34, 957 P.2d 235 (1998).

13 *Id.*; *see also In re Estate of Bottger*, 14 Wn.2d 676, 701, 129 P.2d 518 (1942); *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998))

14 *Estate of Lint*, 135 Wn.2d at 535 (quoting *Estate of Bottger*, 14 Wn.2d at 700); *see also In re Estate of Kessler*, 95 Wn. App. 358, 377, 977 P.2d 591 (1999).

15 It is recommended as a matter of standard practice that the planner enter a separate time slip for each office or home conference held with a client to further document how long each meeting lasted.

16 These clauses provide that if any beneficiary contest the will, then he or she inherits nothing (or $1.00) from the Estate. In Washington, no contest clauses are valid and enforceable. *Boettcher v. Busse*, 45 Wn.2d 579, 585,

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Notes from the Chair

by Mike Barrett – Perkins Coie LLP

These are the first two objectives in the mission statement of the Real Property, Probate & Trust Section:

- to assist our members in achieving the highest standards of competence, professionalism and ethics in their practices
- to assist the Legislature in the enactment and improvement of the laws affecting real property, probate, trusts and estates and to assist the Judiciary in the just administration of those laws.

I'd like to use this Notes from the Chair to describe some of the ways the Section works on these goals and to let you know how, if you're interested, you can become involved.

The Newsletter

Because you're reading this piece, you are already aware of one of the principal ways the Section pursues the first of the objectives in its mission statement – we publish the Newsletter. It comes out four times each year and provides articles on subjects of interest to members and updates on case law and new legislation. Behind the scenes, an editorial board that is led by an Editor and Assistant Editor identifies potential topics for articles, finds authors and provides editorial assistance to bring the content of each Newsletter into its published form. There are sixteen regular Editorial Board members (not counting the Editor and Assistant Editor) -- eight on the probate and trust side and eight on the real property side. All serve two-year terms, staggered so that no more than half rotate off the board each year. In addition, the Editorial Board may include up to four volunteers who work on the TEDRA articles that appear in the Newsletter.

Regular Editorial Board members are nominated by the Editor and Assistant Editor and appointed by the Chair of the Section. TEDRA members are nominated by the chair of the Section's TEDRA subcommittee and appointed by the Chair. There is no limitation on the number of successive terms that an Editorial Board member may serve, but we try to maintain diversity and provide leadership opportunities to as many Section members as possible.

If you know of a topic that should be addressed in the Newsletter, if you're interested in writing an article or if you're interested in serving on the Editorial Board, let the Editor or Assistant Editor know – you'll find their contact information in the Newsletter and on the Section website (http://www.wsbarppt.com).

Continuing Legal Education

In a typical year, the Section sponsors five CLEs – the annual Fall Real Estate Conference and a probate and trust CLE in December, a Trust & Estate Litigation CLE and a real estate CLE in the spring, and the annual Midyear Conference in early June. Many of these presentations can now be attended both in person and online. Attendance has been steadily growing, which we hope means our members find

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277 P.2d 368 (1954) (citing *In re Estate of Chappell*, 127 Wash. 638, 221 P. 336 (1923)); *In re Estate of Mumby*, 97 Wn. App. 385, 393-394, 982 P.2d 1219, 1224-1225 (1999). But the no contest or forfeiture clause does not operate where the contest is brought in good faith and with probable cause. *See Chappell*, 127 Wash. at 646, 221 P. 336; see also In re Estate of Kubick, 9 Wn. App. 413, 419-20, 513 P.2d 76 (1973); *Estate of Mumby*, 97 Wn. App. at 393-394. If a contestant initiates an action on the advice of counsel, after fully and fairly disclosing all material facts, she will be deemed to have acted in good faith and for probable cause as a matter of law. *Estate of Mumby*, 97 Wn. App. at 393-394 (citing *Kubick*, 9 Wn. App. at 420, 513 P.2d 76).

17 *In re Estate of Bottger*, 14 Wn. 2d 676, 701, 129 P.2d 518, 528 (1942).

18 *Estate of Bottger*, 14 Wn.2d at 701-702.

19 *Estate of Lint*, 135 Wn.2d at 537. There seems to be a fine line between fraud and undue influence in some cases. *See e.g.*, *In re Kleinlein's Estate*, 59 Wn.2d 111, 366 P.2d 186 (1962); *In re Estate of Kessler*, 95 Wn. App. 358, 977 P.2d 591 (1999); *In re Jennings' Estate*, 6 Wn. App. 537, 494 P.2d 227 (1972).

20 *See e.g.*, *Dean v. Jordan*, 194 Wash. 661, 671-72, 79 P.2d 331 (1938).

21 *Pedersen*, 64 Wn. App. at 723.

22 In fact, this author could find no cases on point. However, there is an inter vivos transfer case alleging "fraud in the execution" that is instructive. *Pedersen v. Bibioff*, 64 Wn. App. at 710 (holding inter vivos transfer of property from father to son was result of undue influence, and fraudulent in the execution).

23 *Pedersen*, 64 Wn. App. at 721 (quoting Restatement (Second) of Contracts § 163 (1979)) (internal citations omitted).

24 *In re Estate of Gwinn*, 36 Wn.2d 583, 586, 219 P.2d 591 (1950).

25 The question to be decided is whether the testator, when he made his will, had an insane delusion or "false belief, which would be incredible in the same circumstance to the victim thereof were he of sound mind, and from which he cannot be dissuaded by any evidence or argument." *Id.* at 586 (concluding that because "the natural friendly relationship between father and son over the years had taken a sudden unnatural turn in the opposite direction" due to an insane delusion affecting the testator/father, the testator's will must be declared a nullity) (quoting *In re Estate of Klein*, 28 Wn.2d 456, 183 P.2d 526 (1947)).

26 RCW 11.24.030; *In re Estate of Black*, 153 Wn.2d 152, 161-63, 102 P.3d 796, 802 (2004); *In re Estate of Martinson*, 29 Wn.2d 912, 914, 190 P.2d 96 (1948); *In re Estate of De Lion*, 28 Wn.2d 649, 660, 183 P.2d 995 (1947); *In re Estate of Marks*, 91 Wn. App. 325, 333, 957 P.2d 235 (1998); *In re Estate of Gordon*, 52 Wn.2d 470, 476, 326 P.2d 470 (1958).

27 *In re Estate of Nelson*, 85 Wn.2d 602, 606, 537 P.2d 765 (1975) (superseded by statute on other grounds as stated in *Estate of Black*, 153 Wn.2d 152, 161, 102 P.3d 796 (2004)); *In re Estate of Meagher*, 60 Wn.2d 691, 692, 375 P.2d 148 (1962); *Pond's Estate v. Faust*, 95 Wash. 346, 347, 163 P. 753 (1917) ("courts will presume sanity until that presumption is overthrown by competent and reliable evidence to the contrary").