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Avoiding or Defeating Will Contest Actions
10 Effective Strategies

August 23, 2011

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Though will contest actions are rarely successful, they can be financially burdensome to the estate and non-contesting beneficiaries, and can be emotionally taxing for a decedent's family. A will can be invalidated based on undue influence or duress exerted on the decedent, fraud, a decedent's lack of capacity at the time the will is executed, or failure to follow the legal rules applicable to wills. Following are 10 strategies for defeating will contest action or cutting them short in the early stages of litigation.

1. **CONSIDER PASSING ASSETS PURSUANT TO A LIVING TRUST** – Contesting a trust is much more difficult than contesting a will. Will contests are a somewhat common occurrence, while trust contests are not. Will contests are also frequently taken on a contingency fee basis, meaning that the contestant has nothing to lose. Often times, weakly founded actions are filed in hope of settlement. Trust actions are less commonly taken on a contingency fee basis, meaning that the chances of prevailing must be significant enough for the contestant to fund the litigation. Finally, the right to information regarding a trust is limited to its beneficiaries and a trust need not be filed with the court. Thus, the privacy advantage over probate brings less attention to the disposition of the decedent's assets – and less attention to heir search firms.

2. **INCLUDE AN EXPLANATION WITH ESTATE PLANNING DOCUMENTS** – Writing a letter or explaining apparent inequities in the will itself can prove very helpful. Not only is such evidence of intent and competence, but it may also stave off claims by explaining, for example, reasons for donating to a charitable organization; or, why one child's share of the estate is less or more than their siblings. In the alternative, many trust and estate attorneys advise discussing the estate plan with the beneficiaries during their lifetime. While the end goal is the same as a written explanation to be given after death, lifetime discussions can create discord in the family and invasion of the testator's privacy.

3. **INCLUDE A NO-CONTEST/IN TERROREUM CLAUSE IN THE WILL**. A no-contest or in terroreum clause provides that a will contestant, if unsuccessful, forfeits her interest under the will. Because will contests are so rarely successful, without significant evidence of undue influence or lack of capacity, any good

attorney would advise a potential contestant that filing an action is likely to result in complete loss of inheritance. Without such a clause, beneficiaries are more likely to bring an action based on hopes of settlement and with a "nothing to lose" attitude.

4. **FILE THE WILL WITH THE PROBATE COURT** – Ohio permits wills to be filed in the appropriate probate court. Doing so creates no legal presumption. However, it can constitute evidence that the will so firmly reflects the testator's wishes that the testator took this unusual, extra step.

5. **DOCUMENT GIVING HISTORY AND PREPARE FOR CONFLICTS THAT ARISE AS A RESULT OF DRAFTING ATTORNEYS' RELATIONSHIPS WITH BENEFICIARIES**. A will that leaves a substantial portion of the estate to a non-profit organization, of which the drafting attorney is a board member, for example, invites claims of undue influence. In Cincinnati, many members of the probate bar sit on non-profit boards, particularly experienced and well-reputed attorneys. And, a testator with an affinity for an organization is likely to prefer an estate planning attorney affiliated with that organization. Key to avoiding litigation in this instance, is documentation of the testator's long-standing relationship with the organization and consistency in estate planning documents, so as to reflect a long-standing intent to name a certain organization as a beneficiary.

6. **AVOID SIGNIFICANT CHANGES TO A WILL DURING TIMES OF DECLINING HEALTH** – It is not uncommon for testators to make changes to a will, or make a first will, during their final illness. Execution of a will in a hospital, hospice or other setting, or execution in close proximity to death, invites heir search firms and disgruntled family members to file a will contest action and should be avoided if possible. Although an illness, even if severe and life-ending, does not overcome a will's presumption of validity, it could lead to expensive discovery and invasion of the testator's privacy through her medical records attorney files.

7. **BE CONSISTENT WITH LEGAL PROFESSIONALS** – If a testator has used the same estate planning attorney or firm for many years, using a different attorney or firm for a codicil, statement of personal property, or final will, could result in claims of undue influence. This is particularly true where the new attorney is a beneficiary or where a beneficiary or caregiver facilitates the use of the new firm. In this case, a will contest is particularly attractive where the attorney/facilitating beneficiary realizes increased benefits from the new documents.

8. **DOCUMENT THE TESTATOR'S EXECUTION OF THE WILL**. Particularly in times of declining health, execution of a will should be well documented. The attorney should take detailed notes of who was present, the content of conversation and other details that would inform as to the testator's competence and free will. The attorney may also ask a series of questions that would indicate competence. Videotaping the ceremony and examination by a physician just prior to signing are other methods of ensuring documented competence.

9. **ANTE-MORTEM PROBATE - Have THE WILL DECLARED VALID DURING THE TESTATOR'S LIFETIME** – Ohio Revised Code § 2107.081 allows a testator, during her lifetime, to have her will declared valid by the court. This is legal proceeding that all of the will beneficiaries and all heirs who would inherit through intestate succession be named as defendants. Although this alternative effectively forecloses the possibility of a successful will contest action, many testators are rightfully hesitant to make their private matters public record. In addition, this alternative could cause family discord or precipitate attempts at subsequent undue influence by devisees unhappy with the will's contents.

10. **FOLLOW THE LEGAL REQUIREMENTS FOR CREATING A WILL** - In Ohio, to be valid, a written will must be signed by the maker or in her presence and at her direction. The execution must be attested to by two witnesses.