

# Will Contests: Common Challenges and Strategies for Avoiding and Defeating Them

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## What is a Will?

- Written instrument\* to take effect upon death;
- Directing disposition, retention of property;
- Appointing fiduciary or making other provision or administration of estate; and
- Is revocable during lifetime.

EPTL § 1-2.19

- \*With narrow exception for oral and handwritten wills

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## What is a Will?

- Holographic Wills
- Digital Wills

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## Bases for Challenge

- Lack of Due Execution
- Lack of Capacity
- Undue Influence
- Fraud

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## Due Execution

### Compliance with Statutory Requirements

- Testator Must:
  - Appear Before at Least 2 Witnesses
  - Sign Will at End
  - Acknowledge Signature
  - “Publish” or Declare: Document as Last Will
- Witnesses Must:
  - “Attest” to Testator’s Signature
  - Sign Will at Testator’s Request
  - May Be Up To 30 days, if Not Concurrently

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## Due Execution

### Practice Tips:

- Attestation Clause
- Self-Proving Affidavit
- Avoid Short Cuts
- Keep Good Records
- Consistency in Practice

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## Due Execution

- Burden of Proof: Proponent
  - Preponderance of Evidence
  
- Presumption of Due Execution if:
  - Attestation Clause
  - Self-Proving Affidavit
  - Attorney Supervision of Signing Ceremony

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## Capacity

Having a Sound Mind and Memory

- Burden of Proof: Proponent
- Testator:
  - Nature and Consequence of Making a Will
  - Nature and Extent of Assets/Property
  - Objects of his or her bounty
- Focus: Time Period When Will was Executed
- Standard Lower Than for Other Contracts and Trusts

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## Capacity

### Relevant Facts and Circumstances

- Testator's Ability to:
  - Have Coherent Conversation;
  - Respond to Questions;
  - Conduct Business Affairs;
  - To Live on His/Her Own, Participate in ADL; and
  - Understand English (or language of Will).
- Testator's Appearance

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## Capacity

### Other Relevant Facts and Circumstances

- Testator's Medical Status
  - Frailty (old age, illness, etc.)
  - Mental Condition/Disorder (Alzheimer's, Dementia)
  - Use of Prescription Medication or Other Drugs
  - Treating v. Non-Treating Medical Experts
- Timing of Execution
  - Deathbed Instruments – Heightened Scrutiny
- Observations of Attesting Witnesses/Draftsperson

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## Capacity

### Practice Tips

- Inquire:
  - Family and Close Friendships
  - Nature and Extent of Assets
  - Medication Use
  - Medical Conditions
  - Current Events/Hobbies/Interests
- Observe:
  - Appearance
  - Speech
  - Awareness
- Listen:
  - Testator's Understanding of Key Provisions

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## Undue Influence

### Motive, Opportunity and Actual Exercise

#### The Standard:

1. Existence and Exercise of Undue Influence; and
2. Effective Operation of Undue Influence so as to Subvert the Mind of the Testator at the Time of Execution; and
3. Execution of a Will that, but for Undue Influence, Would Not Have Been Signed.

#### Burden of Proof: On Objectant:

Must Show by Preponderance of Evidence,  
Unless Confidential Relationship with Testator

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## Undue Influence

### Factors

- Isolation of Testator from Natural Objects of Her Bounty
- Involvement of Beneficiary, Person of Trust, or Proponent:
  - Selection of Attorney Draftsman
  - Instructions to Attorney Draftsman
  - Meetings with Attorney Draftsman
  - Execution Ceremony
- Physical and Mental Condition of Testator
- Similarity to Prior Testamentary Plan(s)
- Threat or Existence of Physical Harm (Duress)

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## Undue Influence

### Practice Tips

- Inquire:
  - Reason(s) for Appointment of Fiduciary
  - Reason(s) for Bequest(s)
  - Reason(s) for Other Instructions
  - Reason(s) for Selecting Attorney Draftsman
- Observe:
  - Physical and Mental Condition of Testator
  - Presence of Others
  - Role of Person(s) in Position of Trust
- Listen:
  - Who Provides Instruction(s) or Response(s)

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## Fraud

- Elements:
  - False Statement
  - Inducing Testator to Execute a Will
  - Disposing of Property Differently
  
- Burden of Proof:
  - Objectant
  - Clear and Convincing Proof

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## Fraud

- Fraud in the Execution:
  - Intentional Misrepresentation
  - Character or Contents of Executed Document
  - Does Not Reflect True Intent
  
- Fraud in the Inducement
  - Misrepresentation Causing:
    - Execution or Revocation of Will
    - Restraint from Executing or Revoking a Will
    - Inclusion of Term(s) Favoring the Wrongdoer

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Wills, Trusts & Estates, Dukeminier & Sitkoff at 317

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## Fraud

### Practice Tips

- Inquire:
  - Reason(s) for Disposition of Property
  - Reason(s) for Other Instructions
  - Need(s) of Recipient
  - Independent Corroboration
  
- Observe:
  - Role of Person(s) in Position of Trust
  - Source of Damaging Information
  
- Listen:
  - Does the story add up?

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## No-Contest Clauses

- No contest clauses in a will are specifically unenforceable in only two states
- Uniform Probate Code: clause is enforceable unless the contest is based on probable cause
- 14 states: clause is enforceable without regard to probable cause or good faith
- Several states enforce unless the contest is based on both good faith and probable cause
- Delaware – will enforce clause, unless the contest is successful

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## No-Contest Clauses

- Applicable to wills and trusts (in 21 states)
- Generally a suit to construe the terms of the instrument or determine a particular fiduciary action is consistent with the governing instrument does not result in forfeiture
- A no-contest clause must have teeth

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## Avoiding Probate and Will Contests

- Asset Ownership
- Beneficiary Designations
- Payable on Death/Transfer on Death

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## Interference With Expectation of Inheritance

- “One who by fraud, duress or other tortuous means, intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for the loss of the inheritance or gift.”
  - *Vechiola v. Fasanella*, No. CV10-5029378-S  
J.D. of Fairfield at Bridgeport

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## Interference With Expectation of Inheritance

- Not Recognized in Many Jurisdictions
- Traditional Probate v. Civil Litigation
- Controversial:

Abandonment of T&E Law & Remedies?

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## **Storm Clouds on the Horizon: Potential Indicators of Trouble**

- New Client Leaving Prior Counsel
- Referral Source with an Interest in Estate
- Isolation/Separation from Family
- Bequests to Caregivers and Non-Family Members
- Presence of Interested Person(s) at  
    Planning Meetings and/or Execution of Will
- Weakened Mental or Physical Condition

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**Questions?**

**Comments?**

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