# Will contests:
# A good offense is the best defense

When an elderly grandmother leaves all of her assets to a new beau, or Dad leaves everything to the child who visited most in the nursing home, a will challenge may be in the offing. Will contests generally are brought by unhappy family members who feel cheated out of their legacy. If they have something to gain if the will, or offending provisions, are set aside, a battle may ensue.

Will challengers generally have tough legal ground to plow and, as a practical matter, they rarely win in court. Instead, they are often "paid off" by estate representatives who want to minimize burgeoning legal fees and lengthy delays in distributing estate assets. Therefore, having the appearance of a valid claim and threatening to challenge a will may be enough to produce a settlement.

Wealthy people may be particularly susceptible to will challenges because of the assets involved. This possibility should be factored into estate plans and will drafting. As with many things in life, a good offense may be the best defense in reducing the risk of a will challenge.

**What is the basis for contesting a will?**

Although the unhappiness of disgruntled beneficiaries may be at the heart of a will contest, a legal basis is needed to move forward. These include charges that:

- The will signer (testator) was not mentally competent. To prove mental competence, most states require a person to understand: (1) the nature and extent of his or her assets and (2) his or her family relationships. A testator who cannot identify a spouse, child or a grandchild at the time that the will is executed, probably will lack legal ability to sign the will.
- The testator was overreached by some party who benefits under the will. This claim of "undue influence" may arise, for example, when a caregiver takes advantage of an infirm elderly charge by threatening to leave the individual alone and helpless, unless the caregiver is named in the will.
- The will was executed as a result of fraud or mistake and was not what the person signed or thought was signed. For instance, if a person signs the will at the end of the

document, and new pages are inserted in the will after it was signed, the will could be challenged.

- The will was not executed properly. For example, if state law requires two witnesses, and there was only one, the will may not be valid.
- The will being offered for probate is not the decedent's most recent will or was revoked prior to the decedent's death.

Each state has its own laws regarding what it takes to execute a valid will. What's more, state case law will affect determinations regarding mental capacity, undue influence, fraud, duress, mistake and whether a prior will has been revoked.

**What can be gained by those challenging a will?**

If a challenge is successful, all or part of the will may be disregarded, or a prior will reinstated. If the will is thrown out, and no prior will is revived, the estate is often distributed as if there were no will. These rules, known as laws of *intestacy*, generally distribute assets among the closest living blood relatives, a spouse and children, for example. More distant relatives (siblings, parents, nieces, nephews, aunts, uncles) may share if no closer relatives are still alive. Consider the following example:

An elderly grandmother, who has outlived her one child, is placed in a nursing home because she suffers from dementia. At her death she is survived by three adult grandchildren. They discover that while in the nursing home, their grandmother had written a new will. Under that will she left all of her property to a floor nurse who tended to her. The grandchildren challenge the will on two grounds: The grandmother either: (1) lacked mental capacity to sign a will or (2) was unduly influenced by the floor nurse. If the will is overthrown entirely, the three grandchildren would share equally in their grandmother's estate, because they are the closest living blood relatives.

**How can a will contest be avoided***?*

If capacity and undue influence are not at issue, good drafting and planning can go a long way toward avoiding a will contest. For those with significant wealth, wills should not be used as incendiary devices to disinherit relatives or make grand statements that invite discord and challenges. In addition, the more assets that are passed outside of a will (lifetime giving, trusts, etc.), the less there will be to argue about if a challenge arises. Consider the following:

- "Disinheriting" family members can be an outright call to arms for will challengers. For example, if a wealthy parent plans to disinherit two out of three children, or children of a first marriage, and those children likely will fight the result, it may be worth considering the costs of a will contest and whether small legacies make sense instead of outright disinheritance.
- Establish trusts while you're alive to provide for the transfer of assets to beneficiaries at your death and avoid having substantial assets pass under your will. Because trust beneficiaries generally are not subject to public scrutiny as part of probate, less discord may result. Also, it is more difficult to challenge trusts with independent trustees.
- Insert an "in terrorem" clause in your will. This clause prohibits an heir from challenging the validity of the will. Although these clauses are intended to prevent disgruntled heirs from taking part of an estate, many states will not enforce them because it may put good faith challenges to fraud, duress and undue influence at a disadvantage.



Any developments occurring after January 1, 2014, are not reflected in this article.