



Will Contests: How Do They Work?



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proceeding is required, and the Surrogates Offices are set up to make the Probate process simple and cost-efficient.

If a beneficiary of an estate has reason to think that the Will to be submitted to probate is not valid, it is critical that he or she contact a lawyer immediately following the death, as New Jersey law provides that the Will cannot be admitted to probate by the Surrogate until the eleventh (11th) day following date of death. During that 10 day period, anyone seeking to challenge the Will may file a Caveat, a simple statement of objection, which prevents the Surrogate from probating a Will for that Estate. If a Will is presented, the Surrogate advises the named Executor under the Will that he or she must file a Complaint and Order to Show Cause in the Superior Court, Chancery Division, Probate Part to have the Will admitted to probate by the Court.

If no Caveat is filed, and the Will is in proper form, the Surrogate may admit the Will to probate and issue Executor "Short Certificates" to the person appointed as Executor in the Will.

Because an Executor of the estate has tremendous power, it is critical to prevent the appointment of the Executor from the outset if there is a basis to challenge the Will, as most judges are hesitant to "remove" an Executor after he or she is appointed unless there is clear evidence that he or she has acted improperly.

If the Will has already been admitted to probate, you must still act promptly if you want to challenge a Will because in New Jersey a resident who has received Notice of Probate of the Will has only four (4) months to contest the filing of the Will; non-residents have only six (6) months. The reasons to challenge the validity of a Will, include:

- A** The Will was subject of a fraud;
- Q** The Will was not properly executed;
- T** The person who signed the Will (Testator) did not have "testamentary capacity" to understand or sign the Will; The Testator was coerced
- V** or unduly influenced to sign the Will.



Part 1 of 2

In New Jersey, the probate of a Will and the appointment of an Executor is most commonly not a formal procedure.

If a Will is properly executed and has two Witnesses and a Notary, the Will can be admitted to probate by the Surrogate's Office of the County in which the deceased resided. No court

A. Fraud

It is fairly unusual but possible that a Will was signed as a result of someone's fraudulent conduct.

For example, if a Testator is beguiled into signing a document without knowing what it is, what it says, or even that it is a Will. Other situations include where a beneficiary induces a Testator to execute a Will based on false facts (i.e. a suitor promises to marry the Testator if he is made a beneficiary under the Testator's Will, where the suitor has no intention of marrying the Testator).

In the context of a Will contest, fraud will not be presumed.

Moreover, if the Testator learns of the fraudulent conduct and does nothing to change the Will over an extended period of time, it may be argued that the Testator affirmed the contents of the Will and, as a result, it may be upheld.

B. Due Execution.

In New Jersey, a type-written Will must be witnessed by two (2) persons, over the age of eighteen (18) years,

both of whom witnessed the Will signing. It is helpful (but not necessary) for the Will to have a "self-proving affidavit" attached, which is signed by the Testator, the Witnesses, and a Notary.

If a Will is entirely in the hand-writing of the Testator (called a "holographic" Will), New Jersey requires no Witnesses but it cannot be admitted to probate to the Surrogate; it must be admitted by the Court, upon filing of a Complaint and Order to Show Cause.

- In the next issue, we will discuss the other two grounds to challenge a Will listed above: Lack of Testamentary Capacity and Undue Influence. In the meantime, if you believe that a Will should be challenged because it is defective, for one reason or another, you should hire a seasoned attorney, who has significant experiences in this area of law. Do not delay with your decision to engage an experienced attorney because the law allows only a narrow window of time during which a caveat and/or a Will contest may be filed.

Call Rice Elder Law to schedule your appointment today.

Nancy M. Rice Esquire, CELA

Certified as an Elder Law Attorney by the National Elder Law Foundation

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Nancy Rice has been practicing Estate Planning and Elder Law in New Jersey and Pennsylvania since 1986 She was Certified as an Elder Law Attorney in 1992 and has maintained offices in Camden and Cape May counties, specifically in Cherry Hill and Ocean City. Call 609-398-3447. www.RiceElderLaw.com



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The reasons to challenge a will:

B The Will was subject of a fraud; The Will was not properly executed;

T The person who signed the Will (Testator) did not have "testamentary capacity" to understand or sign the Will;

n The Testator was coerced or unduly influenced to sign the Will.

We discussed (A) and (B) in our last issue. Today, we will discuss Testamentary Capacity and Undue Influence.

C. Testamentary Capacity

The test for determining testamentary capacity is rather permissive. Indeed, the level of capacity needed to execute a Will is less than that required to enter into a contract. The key questions are whether the person who made the Will (called the "Testator") understood:

(1) the nature and extent of the property subject of the Will; in other words, what assets the Testator had and planned to leave under his or her Will; and

(2) the "natural objects of his or her bounty," that is, who are the Testator's next of kin (whether or not he or she wants to leave anything under the Will, the Testator needs to know who they are); and

(3) the effect of the Will; that the Will would dispose of property following death; and

(4) the relation of each of these factors to the other.

Notably, the law presumes that all Testators are of sound and competent mind when a Will is executed (assuming he/she was at least 18 years of age and has

not been declared by a court to be legally incapacitated). Overcome the presumption of capacity, the contestant must prove lack of testamentary capacity at the time the Will was executed, by clear and convincing evidence. It is important to know that it is not enough to show that the Testator was addicted to drugs or alcohol; you must prove that the person was under the influence of a substance at the time of the execution of the Will. Nor is it sufficient to show that the Testator was forgetful at time, so long as he or she had some capacity to manage his or her business affairs.

Undue Influence

Undue influence has been defined as any type of exertion, whether, physical, mental or moral that can prevent the Testator from following his/her free will. Mere suggestions, persuasions or the exertion of some influence is not enough to invalidate a Will. Ordinarily, the challenger has the burden of proving undue influence. If, however, the Will benefits one who enjoyed a special or "confidential relationship" with the Testator, and there are "suspicious circumstances" surrounding the execution of the Will, the burden of proof will shift to the defender of the Will.

A "confidential relationship" can be found where there is some special trust between the Testator

and a beneficiary under the Will, and where the nature of that special relationship creates some type of reliance or dependency. At times a special or confidential relationship has been found to exist between a Testator and an adult child, other relative, a healthcare provider, a neighbor, an attorney or an accountant. Notably, while a confidential relationship naturally exists between a husband and wife, the presumption of undue influence will not generally arise even when the Testator's children are disinherited.

As to the "suspicious circumstances" component of an undue influence Will contest, the evidence on this issue need be no more than "slight". Suspicious circumstances have been found where a beneficiary of the Will engaged his attorney to prepare the Testator's Will and where a nursing home patient was removed from the facility by the beneficiary of a Will that was signed a few days later.

If you believe that a Will should be challenged because it was not executed properly (i.e., it was forged, didn't have the correct number of witnesses, etc.) or because the deceased was not competent when he/she signed it or because the Will was the product of undue influence, you should hire a seasoned attorney, who has significant experience in this area of law. Do not delay with your decision to engage an experienced attorney because the law allows only a narrow window of time during which a caveat and/or a Will contest may be filed.

Part 2 of 2

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