# PROBATE LITIGATION FOR ESTATE PLANNERS AND PROBATE ATTORNEYS

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Deborah Newman is a Partner at The Newman Law Firm. She currently practices with her husband and partner Michael Newman along with their associates. Their practice focuses on various aspects of fiduciary litigation, including will contests.

She formerly resided in Kentucky where she graduated from the Brandeis School of Law in Louisville, Kentucky in 1983. She was a member and associate editor of the law review. After graduation she moved to Houston and became licensed in Texas. She joined Phelps Dunbar as a partner in 1984 where her practice focused on complex and catastrophic defense litigation. Deborah is AV rated and she was licensed in Texas in 1984.

Deborah started her career representing and defending railroads, which enabled her to gain extensive trial experience. She has settled and tried cases in many venues throughout Texas from Beaumont to El Paso and Longview to Eagle Pass. She taught other trial lawyers at the Trial Academy of the National Association of Railroad Counsel and was a frequent speaker for the Association.

Deborah's track record and extensive trial experience gained her recognition by Forbes Magazine as a "GO TO" attorney for major national corporations. She has argued successfully in the Courts of Appeals and the Texas Supreme Court. She has represented clients such as Exxon Mobil and Union Pacific Railroad. She is now applying her trial experience to the firm's probate litigation practice. She enjoys trying cases and most recently tried a prolonged will contest case in Harris County.

## What happens after the Testator dies?

This paper supplements my presentation. It highlights the issues I will discuss regarding probate litigation. Specifically, it focusses on will contests, why they occur, how the evidence is developed and presented and what to expect when YOU become a witness.

Will the last will and testament of your client be probated and the testator's wishes carried out by the executor and trustee, or will there be a dispute resulting in litigation? Will you have a role in the litigation? What will be the issue? Common themes arise in probate litigation, and they present in various forms. The following are common issues and circumstances:

Did the testator make informed, logical decisions?
Was the testator mentally capable of making the will?
Was the testator unduly influenced?
Are the executor and trustee named in the will appropriate for the positions?
Was the testator impaired?
Was the testator candid with the estate planning attorney?
Did the testator realize the future impact of his decisions?
Is a blended family involved?
Did common law marriages exist before or after the will?
Were any children born or adopted after the execution of the will?
Did family rifts affect the testator's decisions?
Will the beneficiaries accept that the will contains the wishes of the decedent?
Did the testator make promises regarding the disposition of assets that he did not keep in his will?
What are the beneficiaries' expectations as to the size of the estate, and are those expectations accurate?
Are the testator's beneficiaries and family members especially greedy, entitled or emotional?
Were there life insurance, retirement accounts or other significant non-probate asset transfers?
Did the testator fully or partially disinherit a family member?
Did the testator give substantially more to one beneficiary over several others similarly situated?
Do any family members suspect wrongdoing?
Is a third party involved with the testator and the estate planning attorney in consultation and will drafting?
To what extent has the estate planning attorney been informed of the above issues?

Whatever the reason for the will contest, and regardless of whether the litigation is pursued in good faith and with just cause; testamentary capacity and undue influence are the typical issues.

## Estate Planners Role

Although an estate planner's initial role is that of drafting attorney, once litigation ensues, the role of the estate planner becomes that of key witness, custodian of evidence and reluctant

deponent. The first notice that the estate planner may have as to involvement in probate litigation may be a deposition notice or trial subpoena.

In addition to being a lawyer, an estate planner is not usually a physician, an investigator, a family therapist or social worker. It is not always possible to know whether issues exist or will arise which might result in probate litigation. However, when the estate planners are deposed, they are frequently presented with questions relating to issues which they probably did not anticipate. They may also be presented with questions about "duties" that they may or may not actually have. To what extent can an estate planner anticipate and help prevent probate litigation thus preventing the deposition of the drafting attorney? To what extent can you rely on your memory? What is in your file?

The depositions of estate planners often stray beyond the lawyer's knowledge of information relating to testamentary capacity and undue influence. Even in the case of no wrongdoing by the planner, these questions can be challenging and uncomfortable. The following are examples of actual deposition questions estate planners have faced in will contests:

Q. What training do you have to assess a person's capacity to execute documents?

Q. Can you tell me any of the symptoms of Alzheimer's disease?

Q. How many times in your years of practice did you turn away someone who in your judgment lacked testamentary capacity?

Q. Didn't you ever meet with this client in person prior to the will execution ceremony?

Q. Did the client make the appointment with you himself?

Q. Have you represented a beneficiary under this will?

Q. Did anyone ever inform you that the testator had been diagnosed with Alzheimer's or dementia years before he retained you to prepare his will?

Q. Did you ask Mr. Testator whether he was on any medication?

Q. Did you know that two other estate planners refused to prepare a will for Mr. Testator because they perceived that he did not have testamentary capacity?

Q. Did you know that the testator's doctor informed him not to drive due to this mental state?

Q. Why doesn't your file contain notes of your impressions of the testator's mental capacity?

Q. You do realize that the sole beneficiary of the will is one of four adult children of the testator and that the sole beneficiary brought the testator to your office?

Q. Were there prior drafts of the will with substantially different bequests? If so, where are the drafts and what was the client's reason for the changes?

Q. Are you familiar with the Texas Lawyers Creed and did you deliver a copy of the Creed to the client?

Q. What opportunity did the will witnesses have to make a judgment as to the testamentary capacity of the decedent?

Q. Have your employees ever refused to witness a will because they did not believe that the testator had testamentary capacity?

Q. Are you telling me that this 87 year old man who worked as a bus driver and won the lottery understood the 44 page will that you drafted?

## Considerations When Litigation Appears Likely

### Burden of Proof

The burden of proof in a will contest case depends on when the suit it filed. The burden of proof on testamentary capacity in a will contest depends on whether the will has been admitted to probate. The burden of proof is on a will proponent if suit is filed before a will is admitted to probate; however, the will contestant must prove that the testator lacked testamentary capacity if suit is filed after the will is admitted to probate. *See* TEX. PROB. C. §88(b); *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968). Depending on the circumstances, a party may or may not want to have the burden of proof, so if you have control of the timing, consider your strategy.. The importance of the burden of proof may affect strategy because it determines which party goes first at trial and argues first and last in final argument.

### Standing

Will contestants must have the standing to bring their lawsuit.. Generally, any person interested in an estate may bring suit. However, the Probate Code clarifies that interested persons are heirs, devisees, spouses, creditors or any other person having a property right in, or claim against the estate. TEX. PROB. C. §3(r). Other issues to examine are the potential Contestant's motivation and ability to provide credible evidence to support their claim.

### Testamentary Capacity

The primary analysis in a will contest based on a challenge to the testator's capacity is the condition of the testator's mind on the day that the will was executed. *Lee*, 424 S.W.2d at 611. To possess testamentary capacity a testator must be capable of understanding the business he was

engaged in; know the nature and extent of his property; the persons to whom he meant to devise and bequeath his property; the persons dependent upon his bounty; the mode of distribution among them; and he must have had memory sufficient to collect in his mind the elements of the business to be transacted and to hold them long enough to perceive, at least, their obvious relation to each other, and to form a reasonable judgment as to them. *Prather v. McClelland,* 13 S.W. 543, 546 (Tex. 1890).

Potential beneficiaries' dissatisfaction with the terms of a will can often lead them to question the testator's capacity. A competent testator is presumed to know and understand the contents of the testamentary instrument he has signed, unless circumstances exist that cast suspicion on the issue. *Gilkey v. Allen*, 617 S.W.2d 308, 311 (Tex.Civ.App.—Tyler 1981, no writ). Moreover, "the will proponent need not produce evidence that the testator actually read and understood the will if he was of sound mind and not subject to undue influence. The fact that he signed it and requested witnesses to sign it, and acknowledged it as his last will is prima facie evidence of his knowledge of its contents." *Estate of Browne*, 140 S.W.3d 436, 439 (Tex.App.—Beaumont, no pet.).

When the courts interpret a will, their primary inquiry is determining the intent of the testator. *Gee v. Read*, 606 S.W.2d 677, 680 (Tex. 1980). A will construction suit does not challenge the validity of a will. *See, e.g. Wilson v. Phillips*, 459 S.W.2d 212, 214 (Tex.Civ.App.—Fort Worth, 1970, no writ). For example, *Davis v. Shanks* addresses a will ambiguity when a bequest of a house and "all contents therein" is interpreted. 898 S.W.2d 285, 286 (Tex. 1995). Did it include the stock certificate located in a bag inside of the house? *Id.*

**Undue Influence**

Undue Influence is a form of legal fraud. *Curry v. Curry*, 270 SW 208, 214 (Tex. 1954). A testator can be influenced by another, but if the testator is influenced by another and the result is that the will is not the plan of the testator but the plan of another who unduly influenced the testator, then there is undue influence. *Estate of Woods*, 542 S.W.2d 845, 848 (Tex. 1976). Undue influence can be shown by direct or circumstantial evidence, but simply the opportunity to influence a testator is insufficient. *Id.* at 847-848. Similarly, mere influence, unnatural disposition and advanced age alone are insufficient to establish undue influence. *Id.*

To prove undue influence, the contestant must prove, "the existence and exertion of an influence; the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and the execution of the testament which the maker thereof would not have executed but for such influence." *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).

**Tortious Interference with Inheritance Rights**

Courts recognized a cause of action for tortious interference with inheritance rights in order to provide a remedy for an invasion of a legal right which would have been incapable of being addressed otherwise. *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ). The court stated, ". . . equity will not suffer a right to be without a remedy." *Id.* Although *King* held that this cause of action exists, it only briefly explained the

tort. However, it did cite to the *Restatement (Second) of Torts* § 774B (1979), which defined the tort as:

> One who by fraud, duress or other tortious 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 loss of the inheritance or gift. ... Thus the rule stated here applies when a testator has been induced by tortious means to make his first will or not to make it; and it applies also when he has been induced to change or remake it. It applies also when a will is forged, altered or suppressed.

*King*, 725 S.W.2d at 754.

## Witnesses -- Fact and Expert

Fact witness testimony is often inconsistent. Disgruntled heirs, surviving spouses, will proponents, drafting attorneys, will witnesses, friends, acquaintances and family members frequently testify as to their observations of the decedent on the issue of testamentary capacity and undue influence, leaving the fact issue to the judge or jury. Although the testimony of the lawyer who supervised the will's execution carries great weight, it is not conclusive. *See Hamill v. Brashear*, 513 S.W. 602 (Tex.Civ.App.—Amarillo 1974).

Regardless of the opinion of an heir, a testator with testamentary capacity may, "dispose of his property by will without regard to the ties of nature and relationships, and may do so in defiance of the rules of justice or the dictates of reason." *In re Estate of Good*, 274 S.W.2d 900, 902 (Tex.Civ.App.—1955, writ ref'd n.r.e.). Some heirs refuse to accept the fact that they have been disinherited and contest the will. Another common situation arises when some heirs do not want to wait for a decedent's spouse to die in order to access a bypass trust. Other beneficiaries simply do not accept the effect of the will for one reason or another.

Expert testimony as to the mental capacity to make a will is not conclusive and must be evaluated along with all evidence. *Dubree v. Blackwell*, 67 S.W. 3d 286, 290 (Tex. App.—Amarillo 2001, no writ). When both sides present experts who disagree with the opinions and conclusions of each other, juries sometimes report that they disregard the experts – or at least they think that they do. Experts may testify based on examination of the testator during his lifetime, or they may do so retrospectively based on information reviewed in light of the education and experience of the expert. The expert is usually a psychiatrist and sometimes also a forensic psychiatrist.

The most valuable testimony of a medical expert as to the testator's mental capacity is established when the physician met and examined the testator around the time that the will was executed. Some experts recommend a mental status exam if there is doubt as to a testator's capacity. Some even recommend that the will execution ceremony be videotaped, although the estate planner may also have conflicting reasons for not doing so. In *Lindley v. Lindley*, examination of the testatrix five months after she executed her will enabled the doctor to express

an opinion based on reasonable medical probability as to testatrix's condition when she made the will. 384 S.W.2d 676, 682 (Tex. 1964).

Psychiatrists who form opinions retrospectively rely on various sources for information. These include the attorneys, the medical records of the decedent, the testimony of fact witnesses and examination of documents such as business records, banking records, records showing informed consent, contracts executed and checks written.

Medical records often present unexpected problems because there are many contributors to the records and the entries which may not be actual diagnoses. It is important to keep in mind that medical records were likely not made for the purpose of proving or disproving testamentary capacity. Physician records or entries may include notes of hospital and staff members which were not made with trial evidence in mind. Some physicians or nurses may simply record what they are told by others, which can be misconstrued as diagnostic by a subsequent reviewer.

Experts vary as to the extent that they are willing to advocate and the extent to which they are qualified to opine on the relevant issue. A cardiologist who notes in the patient's history that the patient has dementia is probably not diagnosing a condition but noting that he was told that the patient had dementia. It is necessary to negate this entry as an opinion of the physician, otherwise a jury could give a thoughtless notation by the doctor considerable weight in a determination of capacity.

The following questions (and some answers) are taken from actual depositions in which psychiatrists were retained by both parties:

Q. You do not ever meet with the contestants or the individual(s) defending the will?

A. I cannot remember ever doing it. I guess it could happen.

Q. Why not?

A. I usually go by the records that are supplied to me, and those are what I rely upon.

Q. If you have questions based on the records who do you ask?

A. I contact the lawyers.

Q. What do you have that you would like to have if you make a determination of a person's testamentary capacity after they are dead?

A. Probably in cases like this I recommend video of the will signing process to try to avoid the complications. I think I would be additionally helpful… I would like to know why the wife changed doctors, lawyers, investment accounts without consulting any heirs.

Q. If you find an inconsistency between testimony and discovery of the opposing parties, do you make a judgment as to who is accurate?

A. Yes

Q. How do you determine the truth if there are factual inconsistencies when both sides are under oath?

A. Usually it is the repetition, the overlapping of different individual's medical records to try to piece together the picture of the way the deceased was functioning.

Q. Do you determine whether facts are true or false?

A. Yes. They are provided to me and I study the papers and try to analyze and amalgamate the information and come up with an opinion.

Q. How do you describe a "lucid interval"?

A. It is an observation that an individual who has presented with memory loss, confusion, disorientation – it could be a variety of symptoms that present with agitation, paranoia, there is a long list. They have a moment when for reasons that are not really clear to us, they seem briefly to be back in touch with the world, at least in part, and they disappear back into that confusion: Alzheimer's.

Q. Do you literally mean a moment?

A. It could be a few minutes; it could be about 5 seconds; it could be an hour; it varies.

Q. Could it be a day?

A. It is possible, but that is getting pretty long for a lucid interval.

Q. Is there anything in those medical records that indicate to you that maybe he did have testamentary capacity?

A. No. They confirmed my impressions even more that the man was incapable of making a will.

Q. Do you put any credence in the affidavits of Ms. X [the estate planning lawyer] or Ms. Z [the will witness]?

A. Very very little. They were unaware that the client had suffered from dementia for at least three years prior to making her will.

Q. Are you doubting their honesty?

A. No. They told us what they did, but it was not complete enough. I would have conducted interviews differently, different style, asked additional questions, and ascertained in more detail whether the client had capacity to sign a will. I saw nothing in the record indicating that they had any knowledge of the client's mental disorder.

Q. If it is your opinion that someone was not unduly influenced, what information do you need upon which to base that opinion?

A. Evidence that they can act independently, make decisions, participate in decisions affecting their own life, that they are not extraordinarily dependent upon this other person who can wield influence over them and direct their behavior or their thinking.

Q. If a person is not able to make a decision on one issue, does that necessarily mean that they cannot make decisions on other issues?

A. Sometimes; there is usually a relationship, but not always.

## After the Verdict

On appeal, the party having the burden of proof from an adverse fact finding in the trial court should raise the point of error that the matter was established as a matter of law or that the jury's finding was against the great weight and preponderance of the evidence. If there is some evidence to support a verdict, it is extremely difficult to win on an appeal. *See O'Neil v. Mack Trucks*, 542 S.W.2d 112, 113-114 (Tex. 1978). In evaluating the trial evidence, the court of appeals considers only the evidence which, when viewed in its most favorable light, tends to support the court's finding and the court must disregard all evidence that would lead to a contrary conclusion. *Lindley*, 384 S.W.2d at 679.

Reversing a verdict based on factual insufficiency is extremely difficult. When reviewing a jury's finding based on factual insufficiency, an appellate court will set aside a jury's finding only if, after reviewing, weighing and considering all the evidence, the jury finding is so against the great weight and preponderance of the evidence that the verdict is manifestly unjust. *Miller v. Kendall*, 804 S.W.2d 933, 939 (Tex.App.—Houston [1st Dist.] 1995, writ denied). Therefore, the court may not substitute its opinions for that of the trier of fact – even if it would have reached a different conclusion. *Merckling v. Curtis*, 911 S.W.2d 759, 763 (Tex.App.—Houston [1st Dist.] 1995, writ denied). Why? This is because the jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Miller*, 804 S.W.2d at 939. But there must be more than a scintilla of evidence to support a verdict. Even if a jury could have reasonably reached a verdict for the other side based on the conflicting evidence (i.e. that the great weight and preponderance of the evidence is clearly wrong and unjust), the Court of Appeals will hold that the evidence is factually sufficient to support the jury's finding.