

Estate Planning Essentials: Begin with the End in Mind

In 'The 7 Habits of Highly Effective People,' Stephen Covey wrote that we should 'begin with the end in mind.' In the context of an estate plan, this means that we must consider how that plan will be carried out once it has matured.

I occupy a unique position on the Chambliss Law estate planning team as a planner who administers estates and litigates estate-related matters as the majority of my practice. Given my experience with hundreds of estate administrations over the course of my career, I am often consulted in the planning stages, especially when the client is planning with the end in mind. I am asked to review the circumstances of family issues, illness, possible incapacity, medical diagnoses, memory issues, and similar factors that could hinder the smooth administration of an estate plan. While there is no method to completely insulate an estate and prevent a will contest, there are steps that can and should be taken to support the likelihood that the estate plan will withstand a future challenge.

To understand how best to protect an estate plan, it is imperative to have a grasp of the legal arguments that a potential challenger would use to attack it, and plan with those arguments in mind. Challenges are brought against a person's will on a number of legal theories, including **improper execution, lack of testamentary capacity, fraud,** and/or **undue influence**. All of the following grounds for a will contest are fact dependent, meaning that testimony or other proof must be shown to assert these claims – and to properly refute them.

Common Challenges to Wills

A challenge based on **improper execution** asks whether the testator (the person making the will) signed the will in the presence of two disinterested witnesses. Is the signature on the will that of the testator's? If so, who all was present in the room to witness the signing? Did the witnesses sign at the same time or separately? Was the notary present in the room when the will was signed, or was the document notarized after it was signed?

A challenge based on lack of **testamentary capacity** asks whether the testator was of sound and disposing mind and memory, such that he/she had the ability to understand what he/she was doing when signing the last will. While the capacity required to make a last will is somewhat less than that required to enter into a contract, the testator must generally know the identity and location of personal assets, as well as understand the natural bounties of affection (even if not benefitting those individuals under the last will). What was the mental and physical status of the testator at the time of signing? If the testator had a diagnosis of mental decline, at what stage was that disease at the time of signing? This ground is more difficult to prove than some of the others because it is time-sensitive. There must be a showing of incompetence at the exact time of signing. It is well recognized that a person suffering from dementia may not experience a linear progression of memory decline, and can experience periods of lucidity in the midst of the decline that change from hour to hour.

A **fraud** challenge is straight-forward – was the testator aware that he/she was signing a personal will? Did the testator express intent directly to the preparer of the will? Was that intent accurately worded in the instrument? Was the testator accurately instructed regarding the contents of the will prior to signing?

Undue influence perhaps represents the most frequent challenge to a will. Challenges based on undue influence are subject to a 'burden shifting framework,' where the contesting party is first tasked with showing the existence of: (1) a confidential relationship between the testator and a person benefited by the purported will; and (2) suspicious circumstances. If those two elements are shown, the burden of proof then shifts to the supporters of the will to

demonstrate that the testator was not unduly influenced in the creation of the last will. Confidential relationships exist in two forms: (1) legal/per se; and (2) family or other close relationships that are characterized by a person's exercise of dominion and control over the testator. Notably, a legal/per se confidential relationship arises as a matter of law where a person benefits while acting as the testator's attorney-in-fact. Exercise of dominion and control form arises when the stronger, healthy person in the relationship seeks to influence the (physically or mentally) weaker person to the point that the weaker person can no longer exercise free will.

Tennessee courts have identified a number of factors that may constitute 'suspicious circumstances,' including:

1. The testator's physical and/or mental deterioration;
2. A beneficiary's active involvement in procuring the contested will;
3. Secrecy concerning the will's contents or existence;
4. Testator's advanced age at the time of the will's execution;
5. Lack of independent advice in preparing the will;
6. Testator's blindness or illiteracy;
7. Unjust or unnatural nature of the will's terms;
8. Testator in emotionally distraught state;
9. Discrepancies between the will and the testator's intent as expressed to others; and
10. Fraud or duress directed at the testator.

Once the challenger has established a confidential relationship plus one or more of these suspicious circumstances, the burden of proof then shifts to the proponent of the will, the executor, to prove the will was not a product of undue influence.

Minimize Challenges with Proactive Planning

What can we do at the planning stage to support the will? Thankfully, plenty! If the planning is done in the context of a dysfunctional family dynamic, communication is key. It is important to begin communicating early with your children, if possible, about your wishes. If you are married to someone who is not the parent of your children, please encourage transparency and include your spouse in those conversations, so your children and he or she are all informed of the same things at or near the same time. If possible, look for ways to foster those relationships and encourage harmony and visits to the extent possible.

Maintain relationships with others who will be witnesses in the event of a future will contest. The attorney who prepares the estate plan will be a valuable witness, as will those who sign the will as witnesses. If you work with a financial advisor, maintain that relationship and let the advisor know about any unusual aspects of your estate plan. Also, consider discussing the estate plan with close friends who could also prove to be valuable witnesses to support competency.

In addition to relationships, both professional and personal, continue regular medical checkups with a physician, as this trusted doctor may be asked to testify as to your competency and capacity.

Finally, document important events, conversations, and confrontations. A potential challenge may come years after some of these events have occurred, and it may be helpful to show a pattern of behavior or dysfunction, particularly if the estate plan treats children differently. If that difference can be explained as resulting from circumstances that occurred over time, you will need an accurate timeline of those watershed moments that brought about the change in the relationship.

While we all hope that the good planning we put in place will be smoothly administered, this is not always the case. Begin with the (possible) end in mind, and take small steps throughout the planning process to protect the estate plan

from future challenges. By maintaining relationships, acting transparently with spouses and children, and fostering harmony, you will reap a present-day benefit and improve everyday life, too!

The Chambliss Estate Planning team helps with simple wills all the way to highly complex wills involving trusts and special needs planning. If you or your loved one have questions regarding your estate plan, please contact me or a member of our team. We take a holistic approach to ensure our clients' needs are met now and well into the future.