INSIDE THE MINDS™

MANAGING DISPUTES OVER WILLS AND INHERITANCE

LEADING LAWYERS ON NAVIGATING CLIENTS THROUGH PROBATE CONTESTS

ASPATORE

Mary A. Akkerman, Lindquist & Vennum LLP
Shelly Wald Harris, Shutts & Bowen LLP
Russell J. Fishkind, Saul Ewing LLP
Andrea C. Chomakos, Parker Poe Adams & Bernstein LLP
Michael Yopp, Waller Lansden Dortch & Davis LLP
Allan C. Bell, Sills Cummis & Gross PC

A Legacy at Risk: Estate Planning versus Estate Litigation

Russell J. Fishkind

Partner

Saul Ewing LLP

ASPATORE

Introduction

Having drafted estate plans for a large cross-section of families and having resolved contested estate disputes for decades, I could not help but notice that there are themes and recurring fact patterns that could ultimately, depending in part upon the efficacy of the estate plan, mean the difference between eternal peace and a great divide. These recurring patterns are constants in every estate battle.

Those who spend time clearly expressing their intentions to their trusted advisors and then execute the appropriate estate planning documents are more likely to have survivors who will peacefully mourn the death of a loved one and amicably share in the decedent's legacy. Conversely, those who do not clearly express their intentions to their trusted advisors and do not have estate plans tailored to the needs of their families will likely have survivors who do not grieve normally and cannot embrace the decedent's legacy because they are consumed with litigating over it.

But likelihoods aside, the following six recurring fact patterns are the universal sparks to every probate litigation fire:

1. A second marriage with children from prior marriages
2. An elderly, infirm widow or widower who changed the disposition of his or her wealth shortly before death
3. Significant wealth, a family business, and a struggle for control
4. A dysfunctional family
5. A dilatory, tyrannical, or conflicted fiduciary
6. An antagonist who is more concerned with his motives than the decedent's intentions. Aptly dubbed "the officious interloper" by one judge who has seen it all, this actor can clog any courtroom calendar—and divide any family.

If any of these six recurring fact patterns exist and the estate plan was ineffective, the estate will be contested. It is a given—a universal truth—and this universal truth transcends time, knows no geographic border, and does not distinguish between rich or poor. You can read Bible stories or classic literature, watch movies or sitcoms, listen to your favorite tunes, enjoy an opera, or surf the Web, and you will recognize that when it comes

to inheriting the family wealth, brush fires spread like a wildfire; treasures are reduced to ash; and the legacy of a lifetime can go up in smoke.

Family Member Considerations in the Estate Planning Process

Your life story could be a book. Therefore, your estate plan can be effective only if the planner understands and appreciates what keeps you up at night, what makes you tick, the nuances of your family structure, the needs of your heirs, and your goals. To that end, you must be able to develop a rapport with your planner and talk frankly about family conflicts, struggles, jealousies, special needs, or special situations as conditions precedent to effective estate planning. Understanding the family dynamic, your goals, asset base, and titling of assets is a terrific start.

Documenting your wishes in a will, health care proxy, power of attorney, and, if appropriate, trusts, is surely important. When it comes to drafting your will, you should take a step back and think about how your fiduciary would interact with the beneficiaries of the estate. Would they work well together? Do they get along, or is there a history of animosity? Have family issues been suppressed by your presence that might bubble over after you are gone? Next, think about the skill set that an executor or trustee should have, such as diplomacy, fairness, reasonableness, and a comfort level working with attorneys, accountants, financial planners, and bankers. If you are going to name co-executors or co-trustees, will the decision making be shared equally, or will one executor or trustee antagonize the other or be domineering?

By way of background, executors are individuals or institutions nominated in a will and appointed by a court to settle the estate of the testator—i.e., to execute the provisions of the will. Once appointed by a court, the executor has the responsibility of collecting the estate assets, paying its debts and taxes, maintaining accurate books and records, and ultimately distributing the estate's assets as provided in the will. Being an executor is a thankless job and can entail a tremendous amount of work. You may choose as your executor a spouse, child or children, an accountant, lawyer, trust company, trusted family member, advisor, or any combination of them.

Every family has different needs. If you have been married a long time to your first and only spouse, and you trust each other, each spouse may be

named as each other's executor. If it is a second or third marriage, and there are children from prior marriages, or prior relationships, choosing a spouse as executor or in many cases, co-executor, is not a good idea. Once you introduce that spouse as a fiduciary who is supposed to work for the benefit of others, children from prior marriages tend to resent the situation and react to it with skepticism.

If you think your estate may be complicated or involves a business, or if you own assets that are difficult to value, wish to leave assets to heirs unequally, or involve a second spouse and children from prior marriages in your estate plan, think about hiring an independent individual executor or corporate executor. Appointing a corporate executor with an independent neutral third-party co-executor who understands the family dynamic typically prevents your heirs from fighting among themselves or second-guessing the actions of their step-parent. Some are reluctant to appoint a bank as a corporate executor or trustee and cite as their reasoning the fees involved or the institutional feel of such an appointment. The reality is corporate executor fees could, in the long run, save the estate money because a smoother estate administration is much more cost-effective than the costs of an estate in litigation.

Trinkets, bric-a-brac, and heirlooms provide yet more fertile ground for family disputes. Upon hearing that her mother passed, one daughter dropped everything, boarded a plane, and hours later, entered Mom's home to discuss arrangements with her sister, who was already in the home—"organizing things." After a quick look around the home and a peek inside the mother's china closet and jewelry box, the questions started: "Where's the candelabra and grandma's china and mom's engagement ring?" "What do you mean?" responded the organizing daughter, who, by the way, provided her mom's care for the past two years. "Mom gave me that stuff years ago. She said she wanted me to have it." Another fuse lit.

Inheriting money is one thing, and it is important. But heirlooms can define a legacy. And when an engagement ring, china, or photo albums are missing in action, emotions heat up quickly. The will has not even seen the light of day, at least for the daughter who just arrived, but you can see the steam coming out the ears of the surprised daughter. The visit may be brief, but the e-mails will be long and emotionally charged. So whether the heirlooms

are jewelry, candelabras, china, photo albums, or an invitation to the White House signed by a president, do not leave the disposition of prized possessions to chance. Most wills have a clause that governs the distribution of tangible personal property, and it is up to the executor to divide that property among the beneficiaries as equally as is practicable. When families are tight and get along well, this is usually not a problem. But when there is friction, and all the heirs are not on the same page, this standard clause is an invitation for litigation. When it comes to drafting a will, you should spend time on the distribution of personalities—a stitch in time saves nine.

You spend a lifetime building your reputation, your asset base, and your legacy. Your estate plan should be a natural extension of your life by providing appropriately for those you love and for causes near and dear to you, and it should be executed by those you deem most capable. The absence of a properly implemented estate plan is a prescription for chaos, bitterness, and dispute. Life is not stagnant. Changes in the law, your wealth, your health, your intentions, or your family structure will require your plan to be periodically reviewed by a team of advisors who embrace your priorities on an ongoing basis. Maintaining the plan's integrity, keeping it current, and considering the good advice of your trusted advisors are the keys often misplaced.

Business Succession Planning

A well-designed business succession plan that transfers the value of the business to the next generation in a tax-efficient manner will appoint a successor leadership team, structure gifts or sales of business interests to the next generation, preserve your income stream, and establish your children's post-transfer income stream to meet their needs and obligations, all while maximizing income, estate, and gift tax efficiencies and promoting family harmony. A tall order indeed, but once completed, such a plan protects and preserves your life's work.

Once the need for a business succession plan has been established and your needs assessed, a detailed proposal letter with an understandable flowchart should be circulated to you, your accountant, life insurance professional, financial planner, attorney, banker, and other trusted advisors, and, if

appropriate, shared with your heirs. A vetting of the plan can be an enlightening experience, one that sometimes reopens wounds and sometimes heals wounds.

Typically, business succession planning requires a valuation of an existing entity and the execution of a buy-sell agreement that will govern that entity. Sometimes the legal structure of the business merits the creation of new entities, such as limited liability companies (LLCs) or a family limited partnership that may serve as the springboard for planned sales or gifts of all, or a portion, of the underlying business interest. Passing value to loved ones is one thing; passing control is quite another. To strike that delicate balance, you must protect the golden goose first and then divide the eggs equally. Nominating the successor manager should be a decision based on what is in the best interests of the business; thereafter, the benefits of ownership should be apportioned equitably.

After a thorough analysis of all planning options, making a commitment to a detailed blueprint, followed by execution of documents edited for your needs, you can take comfort that you have done your level best. Selling or gifting your prized possession is an emotional act, and hopefully, your children will appreciate the significance of the moment, embrace the process, and thereafter preserve the burning torch for the next generation. Such is the "American Dream."

The Value of Careful Decision Making in the Estate Planning Process

Not until it was too late did King Lear realize his plan for bequeathing England's riches to only two of his three daughters was ill-conceived. Not until it was too late did Esau regret selling his birthright to his brother Jacob for a cup of hot soup. Themes of hasty decisions and ill-conceived gifts make for a fascinating read, but in our profession, we find that such themes cause agita and families to fall apart.

Where there is smoke, there is fire, and it generally does not take long after one's demise for the smolder to burst into flames. It may start with a disagreement over the planning of the funeral service, the location of the burial, whether to have an open or closed casket, the wording of the obituary, or a missing goblet, but make no mistake: such disagreements

stand as a harbinger of things to come. Expect thereafter a newly inked will, a surprise codicil, or an outdated will being offered for probate. Sometimes the issue is not the will at all, but rather a beneficiary designation form that was changed shortly before death, or odd financial transactions re-characterized as "gifts" by the donee. Allegations of promises made and promises broken are often lodged as a new lawyer enters the scene, and family members scramble to fight fire with fire. A caveat blocking the will from being admitted into probate may be filed, and the appropriate response may be an order to show cause seeking to vacate the caveat then docketed. Ultimately, a life's journey ends up on trial, subject to a discovery schedule, expert reports, motion practice, briefs, mediation, and a trial, all seeking to find the truth, which now lies buried—a treasure never to be found, but instead judicially constructed.

Too often the will is vague; the decedent's intentions are unclear; and the survivors all have expectations. Multiple marriages often involve children from both prior and current marriages. Once one parent dies and the surviving spouse and children find themselves on different pages, the fuse is lit. It should come as no surprise that estate litigation cases are on the rise, and once filed, the gloves come off. Though a prenuptial agreement would have been helpful, even without such an agreement, a well-designed estate plan could provide equitably for children from a prior marriage and a subsequent spouse. The amount left to each, the timing of the distributions, and the estate tax implications require thoughtful consideration of the following factors:

1. The financial needs of the children and the second spouse;
2. The ages of the children and the age of the spouse;
3. The estate tax implications of leaving money to a spouse or children;
4. The terms of a prenuptial agreement;
5. The length of the marriage and whether children were born to the marriage;
6. The relationship between the parent and the children from a prior marriage;
7. The need to hold the assets in a spousal trust or distribute outright to spouse and the need to hold assets in a discretionary trust or age-terminating trust for children or distribute outright;
8. The titling of assets to make sure they are consistent with the terms of the will;

9. The health of the spouse and children; and
10. Their respective abilities to manage money.

If an estate plan is created by an attorney who balances these needs such that the plan provides reasonably for each beneficiary class, then the likelihood of adequately protecting both your loved ones and your legacy goes up. But if the will is silent as to any class, perceived as overly generous to any one class, or harsh as to any one beneficiary, then the likelihood of probate litigation goes up dramatically.

Omitting a Child from a Will

Sometimes a child has chosen not to be part of the family or has been a thorn in the side of her parents for too long, has shown no love or respect, or is simply out of favor. Alternatively, as is often the case, a child has married a spouse who is not up to snuff or appears to be the cause of a divide. Though a child does not by law have rights to inherit the riches of her parents, simply omitting the child from a will is a mistake. Such an omission may leave the omitted child with nothing to lose and all to gain by contesting the will. Why? Because a will contest burdens the other surviving beneficiaries and the estate with the costs associated with litigation, will cause the executor or administrator to delay distributions to the heirs until the litigation is concluded, and will increase the tensions and anxieties for those who now need to fight the omitted child. Even if the omitted child has a weak case, the prospect of a long and costly litigation could force a settlement, particularly if the other heirs have no stomach to battle or resources to fund the war.

Simply omitting a child from your will, or providing the sum of $1 is not prudent planning. The better course of action is to name the child in the will and specifically address why the child is not to be included as a beneficiary. The goal is to let all who read the will, including potentially a judge, know that your decision was deliberate and intentional. Sometimes, in addition to the language in the will, a handwritten letter is helpful if it details your reasoning, as it could be introduced into evidence and quickly quash the antagonist's ill-conceived efforts.

For those who have meaningful assets, it may be prudent to include a modest bequest for the child, but not include her in the residuary or balance

of the estate. In addition to the bequest, the inclusion of a no-contest clause, or *in terrorem* clause, adds teeth and gives the antagonist cause for concern. This clause provides that in the event any beneficiary contests the will, his or her interest lapses and is distributable to the residuary beneficiaries. Even the most adversarial beneficiary would think twice before contesting the will, for to do so would put his or her bequest at risk. The combination of language specifically omitting the beneficiary from the residuary, providing a small but not inconsequential fixed bequest, an *in terrorem* clause, and possibly a handwritten letter of explanation and a videotaped will signing, all but disarm the antagonist from contesting a will.

Antagonist Caregivers

Whether a second spouse, child, friend, relative, neighbor, or health care provider, an antagonist caregiver typically has a false sense of entitlement, and a righteous justification for exerting his will over the will of the weakened prey. Any of these actors may dutifully attend to the daily needs of one so ill or dependent, but alas, the doer of good deeds may be a wolf in sheep's clothing. Perhaps the caregiver is thought to be so loving and thoughtful by one so dependent, that after traveling to the doctor, pharmacy, and post office, a stop at the bank or lawyer's office seems in keeping with what her priorities should be.

The antagonist may make a reasonable suggestion to visit a new, much better estate planning lawyer, offer a timely reminder of the estate owner's children's irresponsible tendencies, suggest that changes to a will are "required" to save estate taxes, or may make a host of other prompts, all at a time when one is fragile, dependent, or weak—and as a result, fortunes are diverted. Taken together, these prompts may cause a new will to be executed, or a new beneficiary form filed just days, weeks, or months before the estate owner's death, and surprise: the "doer of good deeds" has surfaced as a primary beneficiary and executor.

In some cases, however, the decedent is the antagonist, the last-minute change the final dig or last word; and the intended consequence is anguish. Those bearing the brunt of the message typically claim that the decedent was not of sound mind or lacked the requisite mental capacity to execute the proffered will or, more likely, that a sister, brother, or spouse influenced the antagonist to act so irrationally.

Probate Litigation and Will Contests

Probate litigation almost without fail is caused by the actions of an antagonist or the inaction of a decedent who failed to implement an effective estate plan coupled with one or more of the following recurring fact patterns: a dysfunctional family, a second spouse and children from prior marriages, significant wealth involving a family business, an elderly infirm widow or widower who allegedly changed his or her intentions shortly before death, and either a tyrannical or a dilatory fiduciary. Should these explosive conditions exist, after the funeral, unspoken words often lead to heated words, followed by less than diplomatic late-night e-mails. Thereafter, lines are drawn, alliances formed, and the best lawyer sought—all the precursors that lead to battle. These ingredients when mixed, battered, or boiled, result in a contested estate in which aggrieved heirs seek to:

1. Set aside a will as the product of undue influence, fraud, or lack of capacity;
2. Set aside the titling of investment management accounts or deed;
3. Set aside beneficiary forms for life insurance policies and retirement accounts;
4. Enforce the rights of income beneficiaries or remainder persons of an estate or trust;
5. Set aside the acts of the agent while supposedly authorized by a power of attorney;
6. Demand an estate accounting and then object to the accounting when produced;
7. Remove an executor or trustee for malfeasance or breach of fiduciary duty;
8. Demand a sale or distribution of estate assets; and
9. Appraise and properly distribute jewelry, photographs, and the contents of the home.

Threatening letters from lawyers may be exchanged, but rarely do such letters result in an amicable resolution. The next action may be the filing of a caveat, a one-paragraph warning to the court, in the county where the decedent resided. If the caveat is properly filed, typically within ten days from date of death or before the will is offered for probate, the will is blocked from being admitted to probate.

The filing of a caveat requires the proponent of the will to file an order to show cause seeking to set aside the caveat, thus allowing the will to be admitted to probate. Generally, both sides prepare and sign certifications telling their sides of the story, and then a court issues a return date for preliminary oral argument. If the court is persuaded that something is amiss and that perhaps there was wrongdoing, before vacating the caveat, the court will set the matter down for discovery, which includes interrogatories, depositions, exchange of paper discovery, expert reports, motion practice, and briefs, which typically are required to be completed within a six-month timeframe. Extensions are generally required, and court-ordered mediation is not unusual before a trial date is set. In the interim, the court may appoint an administrator of the estate who will be fair and impartial during the litigation.

The road to the estate's conclusion will occur either in mediation, in a settlement just before trial, or by a court after a trial. Some probate litigation cases are promptly resolved, while others, such as *Jarndyce v. Jarndyce*, as described in Charles Dickens's ninth novel, *Bleak House*, rumble on for years, decades, or generations, and the estate assets wind up absorbed by costs—a legacy lost.[1]

Undue Influence Issues

Claims seeking to set aside a will based on undue influence have become more prevalent over the last few years as the economy weakens and as more baby boomers reach the fragility of old age. Opportunities for children or others to take control of a senior's finances often lead to temptations that are too often acted upon to the detriment of the intended heirs and beneficiaries.

Generally, courts have found that undue influence exists when circumstances show a destruction of the free will and judgment of the person over whom influence is exerted, and consequently, the weakened testator yields to the will of another merely for the sake of peace or is mentally or morally coerced into doing something contrary to his or her own wishes. Undue influence can be established both by pressuring one who is in a weakened mental or physical state to yield to the influencer's control, or sometimes in a much subtler behavior pattern, by using acts of

[1] CHARLES DICKENS, BLEAK HOUSE (1853).

kindness to elicit guilt or dependence such that the weakened testator feels compelled to change his or her will or the titling of his or her assets in favor of the influencer.

To establish undue influence, a contestant will typically need to establish that there were suspicious circumstances at the time the will was executed and that a confidential relationship existed between the testator and the beneficiary. Some states require the objecting party to show also that the influencer had both the opportunity and the motive to influence the testator.

You will know if suspicious circumstances exist. In an unreported case, a distant son flew into New York allegedly to visit his dying father in the hospital. After an unsuccessful operation to remove cancer, the son requested time alone with his dad. The second spouse, tired and depressed, welcomed the chance to go home, and perhaps shower, sleep, and eat something. She returned the next day as the son was preparing to leave. Hugs were exchanged, words of encouragement offered to Dad, and off the son went. Only days later, Dad succumbed to illness, and, though the grieving process should have followed, it was cut short. After the funeral, the distant son reappeared and handed his stepmother a new will. The son had requested some quality time with Dad—i.e., some alone time—and instead, he seized the moment and orchestrated the execution of a new will. The will, prepared in advance of the son's visit, was signed by witnesses he arranged and kept a secret until Dad died. The will all but cut out the wife of twenty-two years, left the majority of the assets to the son, and named him as executor—a very different disposition from that of the husband's prior will. This fact pattern is not offered as an academic explanation, but is instead an example of a suspicious circumstance.

A confidential relationship may exist when circumstances make it clear that the parties do not deal on equal terms, that on one side there is an overpowering influence, and on the other, weakness, dependence, or trust such that the parties do not deal on terms of equality. For instance, if a daughter controls her mother's banking, pays her bills, manages her health care, cooks her meals, and talks with the accountant or estate planning attorney at a time when the mother is ill—and but for such help, Mom would be in a nursing home—a confidential relationship would likely be found to exist. Alternatively, if a child is an agent under a power of

attorney or a trustee of a trust, then that alone may allow a court to find that there exists a confidential relationship.

Though varying from state to state, and court to court, the following factors are generally considered in determining whether undue influence exists and who has the burden of proving it:

1. Whether the beneficiary was present at the execution of the will;
2. Whether the beneficiary recommended and/or arranged for the attorney to draft a will for the testator;
3. Whether the beneficiary, to the exclusion of others, reviewed drafts or provided comments prior to the will's execution;
4. Whether the beneficiary was involved with the decedent's bankers, money managers, accountants, or lawyers shortly before the decedent's demise;
5. Whether the beneficiary was in charge of safekeeping the will subsequent to its execution;
6. Whether the beneficiary secreted the will from others;
7. Whether the beneficiary isolated the testator from other family members;
8. Whether the beneficiary discouraged other family members from visiting the testator before his or her demise;
9. Whether a beneficiary was the day-to-day caregiver;
10. Whether assets were gifted or re-titled, or beneficiary forms changed shortly before the testator's demise;
11. Whether a long-term relationship with the family estate attorney was ended, and a new attorney hired shortly before testator's death;
12. Whether there was a history of a testator seeking to distribute assets equally, followed by actions that caused the estate to be distributed unequally;
13. Whether the decedent's health history indicates a mental or physical impairment;
14. Whether the decedent was taking medication or required another to care for him; and
15. Whether there were any suspicious acts that resulted in inequity.

If a court finds that a last will and testament offered for probate was the product of undue influence, then it will be set aside, as if it never existed, and a prior will may be admitted to probate.

There is clearly a variation of undue influence that is less frequently written about, but is occurring with increasing frequency. When someone dies, many look to the decedent's will to determine how the estate is to be distributed. However, the titling of the assets trumps the terms of the will. Generally, if an asset is titled jointly with a spouse, as an example, then upon one's demise, that asset passes to the surviving spouse. Similarly, certain assets, such as life insurance, individual retirement accounts, and annuities, have named beneficiaries. The beneficiary designation governs the distribution of the asset—not the will. Undue influence may not be present in the drafting and execution of a will, but may instead occur in the re-titling of assets while one is ill and dependent on another.

Joint accounts at first blush afforded certain statutory protections, and the courts will generally enforce the disposition of a joint account passing to the named surviving joint tenant. However, if someone challenges the titling of the account and alleges the beneficiary change form or a deed conveyance was the product of undue influence, then courts may look to two factors. The first is a determination as to whether the account was titled jointly as a matter of convenience only, or there was really donative intent. By way of example, it is not unusual for a checking account to be changed such that a daughter who lives nearby can pay bills for her aging mother. If the account was changed from just the mother's name into an account titled in the mother's name jointly with the daughter simply to enable the daughter to pay bills, then that is a change for convenience only, not an intention to transfer wealth. Accordingly, the joint disposition would likely be set aside. Alternatively, if that same mother called her attorney and advised that in the event of her death, she intends that a certain bank account or investment management account is to pass to her daughter, then donative intent can be easily established. But without a statement in writing or a witness, such intentions may be challenged and overturned by a court that has no proofs before it to establish donative intent.

In some cases, the re-titling of assets simply reeks of undue influence. The most common example begins with an ill or mentally compromised parent who is dependent on one of his children for all daily needs. Without such help from the child, the parent fears the only alternative is a nursing home. Fear and dependence change the balance of power. A parent may easily assent to a child's request to change the title of the investment account and

the home from the parent's name alone into a joint account, or a deed with the parent and the child jointly named on the title—simply because it is the right thing to do. The child may explain that by so doing, the assets will be protected from a nursing home, and therefore, the change is prudent and really protects everyone. The deed is done. Not until the parent dies will the other four children quickly learn that the titling of the account trumps the terms of the will, which provided for the children equally. The other four children protest in vain and then hire an attorney to challenge the re-titling of assets. The pleadings filed with the court claim that all such transactions should be set aside as a product of undue influence. The siblings may easily prove that their brother was involved in the parent's finances, was an agent under a power of attorney, or a trustee of a trust, and that alone may be enough for a court to find the son had a confidential relationship with the parent. In some states, that is enough to shift the burden of proof to the son to prove there was no undue influence. The son now has an uphill battle. If a court finds the child was in a position of dominance and the weakened father was dependent, the son may be unable to prove to a court, by clear and convincing evidence, that all was fair and that the playing field was equal.

Preparing for and Participating in a Will Contest Hearing

Typically, the changing of account ownership forms or deeds does not happen in one day, but occurs over time. Accordingly, the aggrieved siblings may ask a court for a reasonable amount of discovery to subpoena all banking records and medical records from the date of death back to the onset of the illness, seeking to show a nexus between the two. Then to prepare for a hearing, their lawyer will propound interrogatories on the alleged influencer, take his or her deposition, serve anyone with knowledge of the facts with interrogatories, and then take their depositions, as well. Once all the banking and medical records are received, experts are hired. Perhaps a forensic accountant will be engaged to quantify the re-titling of accounts and establish the amount of money in controversy, and a geriatric medical professional may be hired to attest to the decedent's weakened condition.

Prior to a trial, the court may suggest, and the lawyers may agree, to mediate their dispute. An experienced lawyer or retired judge may accept the role, review all the pleadings and discovery, and then host an informal mediation. You could cut the tension with a knife when all the family members are in

one room, each believing he or she is right and genuinely believing that the other heirs do not understand and never understood their deceased parent. The room may be filled with emotion, but a good mediator, reasonable lawyers, and family members looking to put an end to the divide may be able to reach a settlement at or shortly after mediation. If the case does not settle, pre-trial briefs are filed, and a trial date set such that a judge will be destined to determine what the decedent intended. A court may subsequently order that the re-titled assets that benefitted the influencer be reversed and be distributed as provided in the decedent's last will and testament, and sometimes the court is so enraged by the influencer's actions that he is ordered to pay the legal fees incurred by the siblings.

Most will contests involve allegations that the testator lacked sufficient mental capacity to execute the last will and testament. The standard for mental capacity is low and will be met if, at the time a will was executed, the testator understood:

1. The extent of his assets
2. Who his heirs are
3. That the will is meant to dispose of his assets at death
4. The terms of distribution under the will

At least initially, the witnesses and notary who watched the testator sign the documents typically have also attested that the testator, at that moment, had mental capacity. Are the witnesses psychologists? Probably not. Can a patient who suffers from early-onset Alzheimer's have a moment of clarity sufficient to sign a will? Probably. If heirs challenge not just the will, but also the three subsequent codicils and five gifts that took place over a two-year period, must mental capacity be established for each act? Although there is a presumption that a testator is of sound mind and competent when he executes a will, claims may often be filed seeking to set aside or invalidate a will or gifts claiming the testator lacked testamentary capacity. To prosecute such a claim, a psychologist will need to be retained to testify that the testator either had or lacked capacity at the time the will or codicil was executed. Witnesses to the execution of the will and the attorney draftsperson also become key witnesses in the litigation.

Many times, the estate planning attorney will take adequate precautions and document evidence of capacity in the client's file, or will videotape the will

signing if a will contest is expected. Some people know their wills are going to be contested and will actually hire psychiatrists or psychologists to opine in writing that the testators have capacity. Then someone will videotape the will signing. During the taping, the testatrix reads a prepared statement that might go something like this:

> My name is Contessa Capacita, and I have two daughters, Maria and Tina. Yesterday, I met with my accountants and reviewed my balance sheet, and I am aware that my assets total approximately $100 million. I am here today, in the presence of two witnesses and a notary, to sign my Last Will and Testament. I have read it, and it is consistent with my intentions. I have intentionally made no provisions for my daughter, Tina. It is difficult for a mother to cut her own daughter out of her will, but I am doing so knowingly and voluntarily. My reason for cutting Tina out of my estate is fairly simple. She has not acted like a daughter to me; she shows me no love or affection. She does not call or write and has, for too many years, only caused me pain. I have had enough. So as to protect my estate, my daughter Maria, and my legacy, I read this statement out loud, so there will be no mistake or inquiry about my intentions.

The lawyer then reviews the will with Contessa, and in the presence of the witnesses and notary, she signs the will. Tina has little to no chance of overturning the will—unless Maria was seen in the video, hiding behind a plant and snickering.

Guardianship Proceedings and Incapacity Issues

What should you do if your aging parent is succumbing to old age or illness, and either there is no power of attorney in effect, or a power of attorney is in place, but you suspect foul play? Consider commencing a guardianship proceeding. In such event, a family member with standing, such as a spouse, child, or beneficiary, may file a complaint on behalf of an incapacitated person seeking to be appointed as guardian. A court may appoint a guardian to make decisions on behalf of the incapacitated person,

including living arrangements and health care decisions. The court may also appoint a guardian over the property of an incapacitated person who will have the authority to make financial decisions subject to a later accounting.

A determination of incapacity may be accomplished if there are two disinterested doctors willing to opine that an individual is mentally or physically incapacitated. To aid in the decision making, a court may appoint an independent guardian *ad litem*, typically an attorney respected by the court, to meet with the alleged incapacitated individual, talk with the doctors and family members, and then file a report with the court. The report will include a summary and a recommendation as to whether a guardian of the person and/or property should be appointed. If family members disagree with the report, a court may hear from all parties and then issue an order. There are also degrees of incapacity, and a growing trend allowing courts to limit a guardian's powers based on the level of incapacity, thereby allowing the incapacitated person to retain whatever rights are deemed appropriate.

If one does have capacity, but other heirs may question capacity, post-mortem, you need to plan accordingly. Why pay experts, take up the court's time, and leave a legacy up to the discretion of the court? If you have meaningful assets, and you are concerned about an antagonist challenging your will, there are several precautionary measures to consider, but certainly an option often dismissed as being expensive or not necessary, is in fact, not expensive and is necessary—videotape the signing of your will. Since the signing ceremony will be on tape, you should not take an extra Xanax, or otherwise slur your words, as the videotape could then be used as evidence that you are incapacitated or under the influence of medication, providing just the crack in the door that the antagonist is looking for.

Conclusion

There are several constants in the American family quilt:

1. An inheritance can provide great warmth or leave some feeling out in the cold.
2. Ambiguity with respect to an estate plan opens the door to differing interpretations.

3. Differing interpretations, combined with a possible inheritance or heirlooms, too often lead to litigation.
4. Last-minute changes to a will may lead to a dispute.
5. There is a causal relationship between effective estate planning and protecting one's legacy.

Estate planning is about you, your life, and your legacy. Be aware of the universal sparks to probate litigation, and plan your estate to represent your intentions adequately and clearly. Should you smell smoke, react, be proactive, and stand up for what you believe to be true.

A partner in Saul Ewing LLP's Personal Wealth, Estates, and Trusts practice, Russell J. Fishkind focuses his practice on high net worth estate planning, business succession planning, family office consulting, estate administration and probate litigation. Prior to joining the firm, Mr. Fishkind served as chair of the Trusts & Estates Team at Wilentz, Goldman & Spitzer P.A. in Woodbridge, New Jersey. Following law school, he was a trust and estate administrator and financial officer for the United States Trust Company of New York. He was also the founding partner of Rudolph & Fishkind in New York City and East Brunswick, New Jersey.

Mr. Fishkind is an Assistant Adjunct Professor in New York University's Department of Finance, Taxation and Law where he teaches estate and business succession planning. He frequently writes and lectures about trusts and estates related issues. Mr. Fishkind is the author of Legacy of a Lifetime, *a layman's guide to understanding estate matters; a co-author of J.K. Lasser Pro's™* Estate Business Succession Planning—A Legal Guide to Wealth Transfer, *and the author of* Probate Wars of the Rich & Famous: An Insider's Guide to Estate Planning and Probate Litigation.