

Estate Planning

5 Things to Know About Will & Trust Contests



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1. What Is a Will or Trust Contest?

A Will or Trust contest is much what it appears to be—a fight over estate planning documents. A contest is a lawsuit that challenges the validity of a Will or Trust. For our purposes here, we will use the term contest to describe both a Will and Trust contest since the same ideas apply to both.

2. Who Can Bring a Contest?

In order to bring a contest, a person has to have “standing” to bring a suit. This means the individual or individuals have an actual interest in the case and will be affected by the case’s outcome. Practically speaking, this means a couple of classes of individuals. The first class are the “heirs at law.” Translated, this is the group of people that would take under your estate if you had not done any estate planning. These are the people that would receive your property if you died intestate. There is a sort of pecking order when it comes to intestate heirs; certain types of individuals have precedence over others. For example, individuals such as children and spouses have priority over siblings. An heir at law does not have standing to bring a contest if there is an heir on the intestacy ladder higher than themselves. We will not go through the order here since it is complex, but it is sufficient to say it adheres to common sense, with children and spouses having precedent over other family members.

There is one other class of individuals that has an interest in your estate, and may therefore contest your estate plan: beneficiaries. Beneficiaries exist when you have already done some estate planning. At the expense of stating the obvious, beneficiaries are the people that take a benefit under the estate planning you have done; they receive some of your property. Though there is often overlap, the class of beneficiaries can be broader than the heirs at law. Someone who is not an heir at law could be a beneficiary. Any beneficiary can bring a contest. This includes a beneficiary of an older plan that was removed when you created a new plan, or even a beneficiary of the new plan itself. When a beneficiary comes forth with a contest, it will be because they have been disadvantaged in some way in the new plan, usually having received less property.

3. How Long Does Someone Have to Bring a Contest?

The time in which to bring a claim varies from state to state, sometimes drastically. There tends to be consistency with Wills, but wide variance with Trusts. The good thing with these windows of time is that if an individual misses them, that person is barred from bringing a claim at a later date.



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The trickier thing with the windows is proper notices to beneficiaries and heirs need to be made in order to start the clock. If not, then contests are possible for a much longer time—though even then there is still a termination date after which no more claims can be brought. This is usually not an issue since an experienced estate planning attorney will make sure proper procedures are followed and notices are provided.

4. What Are the Reasons Someone Can Overturn a Will or Trust?

Contests can generally be shoe-horned into a couple categories.

The first of these is that the Will was not “executed” correctly. Execution is a term of art, but you can think of it as being similar to signing. The Will was not signed correctly. Sometimes this involves the signature of the person creating the Will, other times it involves the signatures of the witnesses (or notary), or even the identity of the witnesses themselves. This can seem nonsensical at times, but getting this wrong can really throw a wrench in the works and create some very real problems. It is also surprising how easily a mistake can happen. Nonetheless, this should never be an issue when an experienced attorney is involved.

A second reason an estate plan can be challenged is that the person who made the plan (and since deceased) did not have the capacity to make a Will or Trust. This is a question of mental functioning. The test for this can be boiled down into the following: (1) did the individual understand what property they had; (2) did they understand the natural objects of their bounty (namely, family); (3) did they understand what they were doing with their property; and (4) can they appreciate the consequences of their plan? As a practical matter, when you think of someone lacking mental capacity, you think of someone with advanced dementia or a severe mental disability. Despite the phrasing of the test, it is actually a very low bar. Almost anyone can create a Will; making mistakes, having mental defects, or early memory problems isn’t sufficient to take that away. Nonetheless, someone operating under a perceived slight will still try and argue a lack of capacity when they think there might be memory issues.

A third ground for bringing a contest is undue influence. It is a complicated test, but comes down to one person exerting such influence on a second that the second person creates a Will or Trust they would not have otherwise. Usually the person creating the estate plan is in some position to be taken advantage of; they may be physically or mentally vulnerable, and are often very old. The person applying the pressure is usually in a close and confidant-like relationship, such as a caretaker, advisor, or a child that lives close. The influence asserted also has to be of such a degree that it overcomes the free will of the person doing the estate planning.



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A fourth way to contest a Will is through an allegation that it was a product of fraud. This is a claim that a person signed the Will believing it was something else other than a Will, or that the provisions in the signed Will are different than what was represented by others.

A fifth claim that can be brought is “intentional interference with inheritance.” This is a tort claim (meaning it is in the same realm of lawsuits as negligence actions, personal injury, and product liability). The other actions mentioned above are about getting back to what the person who made the Will or Trust would have intended absent the wrongdoing. On the other hand, an intentional interference claim is personal to the individual who had their inheritance diminished. It is about how this person was harmed by being denied his or her expected inheritance or gift. This is not a new claim, but it is one that has become more prominent recently. It tends to be used as a contingency plan for attacking an estate plan if the traditional methods of contest do not work.

5. How Do You Avoid a Contest?

There is no sure-fire way to avoid a contest, but there are steps to take to minimize one. First, keep your estate plan current. By being actively involved with your planning, and keeping it current, you lend the strength of habit to the argument that the planning you did was the planning you wanted. It is much harder for someone to come along and argue undue influence with the recent revision of your Will when you had a pattern of updating your plan every couple years.

You may also want to consider communicating your plan with your family. Not all, but some contests are brought because of a misunderstanding. A child may have some grand expectations that are upset when the estate plan unfolds. Having a conversation today can help disarm that conflict ahead of time.

If you plan on disinheriting someone or anticipate someone being a problem, consider baiting the no-contest provision in your estate plan. A no-contest provision provides that if someone challenges your estate plan and loses, they will also lose their whole inheritance. However, this provision will only work if the person has something to lose. This means giving them just enough so that they can appreciate the risks of bringing a suit. You can even go a bit further by placing their inheritance in a Trust. In this way they will still have access to the funds, but someone else, like a bank, will control it.

Lastly, engage a qualified estate planner to do your planning. An experienced planner will avoid the easy mistakes and hidden pitfalls, and ultimately, put you in the best position to accomplish your goals at the end of the day.



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