# Contesting a will

By Joseph F. Verser, Heath, Overbey & Verser

As a litigator, I often receive calls from people who want to contest the will of a loved one. They are often shocked to learn what the will revealed. Or, the other typical scenario is that a person had a will for many years, but then, in the final days, decided to change it, to the great surprise of friends and family. What can be done? Are there grounds to contest the will? The threshold question is whether the will is even valid in the first place.

**The requirements for a valid will**

In Virginia, in order for a will to be valid and to be accepted in the clerk's office for probate, it must be in writing, signed by the testator in the presence of two competent witnesses, and signed by the two witnesses. What if someone decides to write out their will themselves without having any witnesses? If that occurs, then the requirements are that the will must be entirely in the handwriting of the testator and signed by the testator, and the testator's signature must be verified by two people after the testator dies.

There are many other technicalities and nuances that we could discuss, but this column is to provide some basic points. A valid will does *not* have to be notarized. Also, the witnesses that sign can be anyone; the only requirement is that they be competent. In fact, a witness can be someone named in the will as a beneficiary or an executor. (Virginia does not require the witnesses to be "disinterested.")

In the event that the above requirements are met, the next question is whether there is any other basis to challenge or contest the will.

**Mental capacity**

Was the testator of sound mind when the will was executed? Keep in mind that age, health, poor memory, poor judgment, alcoholism, addiction, etc., does not automatically disqualify someone from executing a will. Over the years, I've heard the following:

- "She was on morphine!"
- "She was on chemotherapy!"
- "She had been treated for dementia!"
- "She was being treated by a psychiatrist!"

These are all valid concerns, but none of these, by themselves, disqualify the will. Frankly, the threshold for having the requisite mental capacity to execute a will is very low. The person simply needs to be able to understand what he or she is doing (i.e., that they know they are executing a will), know what they own, know who they want to receive their estate, and understand what the will is doing. Even people who have been declared by the court as incompetent, and have a guardian appointed for them, can still sometimes qualify as competent for purposes of executing a will. The phrase in the law is that the person may have had a "lucid interval"—that one moment of clarity in which the person knew and understood what he or she was doing.

**Undue influence**

Perhaps the will was procured under dubious circumstances. Perhaps the person had been under the thumb of a controlling individual who now stands to inherit everything. In order for undue influence to invalidate a will, it must practically rise to the level of coercion or duress. Simply because someone was facing a hard decision does not rise to the level of undue influence. However, when someone is enfeebled or advanced in age and is close to someone (like a caregiver) and then makes a substantial change to his or her will (when there was a prior will that contained a completely different distribution), then a presumption can arise under the law that the person was subject to undue influence.

The lesson to be learned from all of this is to have your will prepared by an attorney. This is not self-advertising because while my law firm handles plenty of lawsuits involving wills and estates, we do not actually prepare wills—we refer those to qualified estate planning attorneys. Wills that have been prepared by an attorney are challenged far less often than other wills. I have seen plenty of wills prepared from the Internet end up in court. As the saying goes, you get what you pay for. Be advised. ◄

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