

OCTOBER 2018 NEWSLETTER

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GROUND FOR CONTESTING A WILL FIRM ANNOUNCEMENTS

A. NEW ASSOCIATE

Pozzuolo Rodden, P.C., is pleased to announce that Christina Snyder has been hired as an associate attorney at the firm practicing primarily in the area of estate planning and estate administration. Ms. Snyder graduated from Temple University Beasley School of Law and is currently enrolled in the Graduate Tax Program at Temple University Beasley School of Law to earn a LL.M in Taxation. Ms. Snyder is also an honor graduate from the Fox School of Business of Temple University.

B. BLOGS

1. The following are a few of the business, tax, employment, estate planning and business litigation blogs posted on our main website during the past month:
 - a. Can An Attorney Prepare A Will Or Estate Plan Jointly For A Husband And Wife? ;
 - b. Estate Planning And Probate Dictionary; and,
 - c. Motion To Enforce A Will Forfeiture Clause Denied In That There Was Probable Cause to Challenge Will.

Please visit our website www.pozzuolo.com for more information on these and other relevant business, tax, estates and employment topics.

2. The following are a few of the blogs posted on our family law website during the past month:

- a. High Income Child Support Cases Must Still Access The Reasonable Needs Of The Children;
- b. Shared Physical Child Custody Was In The Child's Best Interest; and,
- c. Untimely Petition To Open And Modify Marital Settlement Agreement Due To Fraud.

Please visit our website www.pozzuolofamilylaw.com for more information on these and other relevant family law topics.

Please visit our Facebook page to read all of our past and future blogs: Pozzuolo Rodden, PC

GROUND'S FOR CONTESTING A WILL

After a person dies, his/her Will is offered for probate by the Personal Representative/Executor named in the Will. The Register of Wills determines the sufficiency of the Will. Specifically, the Will is reviewed to determine whether it was signed by the decedent at the end of the document, whether there were witnesses who attested the signing and whether the person named as the Personal Representative/Executor is the person who is asking for letters of testamentary. Unfortunately, the Register of Wills does not review the Will to determine whether the asset distribution makes sense or whether the proper beneficiaries were named in the Will.

If you believe someone's last Will and Testament is invalid or the result of some wrongdoing, you may have the right to contest it. However, you cannot challenge a Will simply because you don't like its terms. There are five legal reasons for a Will contest in most states, and it can be very difficult, complicated, time consuming and costly from attorney and expert fees to court costs to prove any one of them. Courts don't often overturn experienced attorney-drawn Wills.

With that said, if a loved one died leaving a Will which: 1) appears to be the product of coercion or undue influence by some outside individual; or, 2) was executed after the decedent lost the mental capacity to sign a Will, it is extremely important to understand how to contest a Will and whether or not it might be cost effective and worth the struggle. In making this decision it will help to know something about the process of invalidating a Will and to discuss the following five legal grounds with a qualified estate litigation attorney.

Who Can Contest a Will

The Probate, Estates and Fiduciaries Code in Pennsylvania grants a right of appeal to any party in interest who is aggrieved by a decree of the Register of Wills. That is, one must be a party in interest to have standing to contest a Will. Standing to challenge a document should be established by looking at what benefit the contestant may have had if the challenged document was not admitted to, or offered for, probate. Simply put, any person whose share in the estate Will be larger if probate is not granted is party in interest and is aggrieved.

Grounds for Contesting a Will

A. Lack of Testamentary Capacity

The person executing the Will, called the “testator,” must be at least 18 years old and of sound mind. The testator has testamentary capacity if, at the time of execution of the Will, he or she had an intelligent knowledge regarding the natural objects of his bounty, of the property he possesses, and of what he desires to do with his estate, even though his memory might be impaired by age or disease. Some factors the courts consider to determine whether a testator had testamentary capacity include: knowledge of property and of what his estate consists, knowledge of relatives where some or all of them are beneficiaries, and understanding of the persons who are to share in the estate. The testator may have capacity although old, weak, and sick. Physical weakness will not create incapacity as long as sufficient mental capacity exists.

Proof of execution of the Will raises a presumption of testamentary capacity, which can only be overcome by clear, strong and compelling evidence. Court adjudicated incapacity does not command the conclusion that the Will is invalid for lack of capacity; however, it shifts the burden of going forward to the proponent who must show that the Will was executed during a lucid interval.

B. Undue Influence

Undue influence, which are the vast majority of Will contests, can be proven in two ways: (1) directly, by evidence of acts which prejudice a testator’s mind or destroy his free agency; and, (2) indirectly, through the shifting of the burden of proof.

To invalidate a Will through direct evidence, there must be imprisonment of the body or mind or threats or misrepresentations, or physical or moral coercion, to such a degree as to prejudice the testator’s mind, destroy his free agency or act as a present restraint upon him making the Will. The fact that the scrivener, (writer), of the Will was a reputable attorney will be accorded great weight in favor of validity.

Indirect proof of undue influence was addressed by the Pennsylvania Supreme Court in the estate litigation case of Estate of Alice G. Clark, Deceased. The Court held that where: (1) a person who is in a confidential relationship with the testator, (2) receives a substantial benefit under the proposed Will, and, (3) at or around the time the Will was executed the testator had a weakened mental intellect, a presumption of undue influence arises and the burden of proof shifts to the proponent to prove the absence of undue influence.

C. Forgery

Forgery may be the unauthorized signing of a Will by another, the fabrication of a dispositive scheme over the testator’s general signature, or the substitution of one page of a Will with another. Burden of proving forgery is on the contestant, and must be established by clear, direct, precise and convincing evidence.

D. Fraud

Fraud is a trick, artifice or management which induces a person to dispose of his property or to do some act contrary to his wishes or in such way as he would not do but for the fraud. To prove fraud, the contestant must show: (1) decedent had no knowledge of the concealed or misstated fact, and, (2) the decedent would not have made the same bequest had he known the truth.

E. Mistake

Mistake in the execution of the Will can happen in two ways: mistake in identity of the instrument executed and mistake in inducement for executing the Will. Mistake in identity of instrument occurs where testator executed his Will thinking he was signing some other document or where he intended to sign his Will but executed another document. There can also be mistake in contents or effect. This occurs when the Will as executed does not reflect testator's true intent.

Process to Contesting a Will

The contestant may initiate an attack on a Will by filing a caveat with the Register of Wills. The caveat requests the Register not to probate the Will until a hearing before the Register. The Register will determine the case himself or certify record to the Orphans' Court for hearing. If Register hears all the evidence, he may enter a decree refusing probate, may dismiss the caveat and probate the Will or certify the record to the Orphans' Court. Once a Will has been probated, the contestant must attack the validity of the Will by an appeal to the Orphans' Court.

In Terrorem (Forfeiture) Clause

Many times a testator will include an "In Terrorem" (Forfeiture) Clause in his Will to discourage Will contests. That is, if the Will is challenged by a beneficiary, he may be subject to losing all or a portion of the inheritance that was specified in the Will. Whether such a forfeiture clause can be enforced varies by state and the circumstance of each situation. In Pennsylvania, an in terrorem provision in a Will is unenforceable if "probable cause" exists for instituting proceedings. Probable cause exists when a reasonable person, properly advised, would conclude that there is a substantial likelihood that the Will contest will be successful.

Conclusion

If you believe you have reason to contest a Will based on any of the reasons or factors set forth above and would like to discuss the merits of your case and/or your rights and options in challenging a Will, you need to consult a qualified estate litigation attorney. Please feel free to contact us anytime to discuss how we can assist or guide you in having your rights vindicated with proper representation.

PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: <https://pozzuolo.com/e-newsletter-publications/>

Corporate/Tax Articles

- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend

- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants
- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory

Estate Planning Articles

- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage
- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

To subscribe, unsubscribe, or for any questions, please contact us at INFO@POZZUOLO.COM.