

## Anticipating Challenges in Estate Plans

Identifying High-Risk Client Scenarios, Using In Terrorem  
and Arbitration Clauses, Documenting Engagement

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# Anticipating Challenges to Estate Plans

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A Stafford Publications Presentation

**Presented by:**  
**Brian P. Corrigan and**  
**Joseph T. La Ferlita**

June 13, 2018

## Who are you defending against?

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- Intestate heirs (children, spouses, more remote, even “unknowns”)
- Beneficiaries who had a greater interest under a prior instrument
- Intended beneficiaries (otherwise avoidable disputes over the terms of the instrument or the administration thereof)
- Partners/shareholders/members with whom your estate/trust/beneficiaries will be in business

# What claims are you defending against?

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- Lack of capacity
- Undue influence/duress
- Improper execution (statutory formalities not satisfied)
- Fraud
- Mistake

## What claims are you defending against?

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- Claims brought by intended beneficiaries
  - Breach of fiduciary duty
    - Valuation-related
      - Division of tangible personal property
      - Division of family business
      - Impact on amount of estate tax owed



## What claims are you defending against?

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- Claims brought by intended beneficiaries
  - Breach of fiduciary duty
    - Investment performance
    - Discretionary distributions: timing, amount
    - Disclosure of trust information/existence to beneficiaries

## What claims are you defending against?

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- Claims brought by Partners/shareholders/members with whom your estate/trust/beneficiaries will be in business
  - Valuation based on buyout/redemption
  - Control over business entity

## Initial Client Meeting – Undue Influence, Duress and Fraud

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- How did the client come to meet with you (e.g., longstanding relationship, recent referral and, if so, by whom, etc.);
- Who set up the meeting; and
- Did anyone other than the client ask to, or seek to:
  - 
  - attend any meeting with you or
  - provide information or direction to you regarding the client's will.

# Initial Client Meeting – Undue Influence, Duress and Fraud

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- Meet with the client alone
- Exceptions for spouses...but not always
  - Joint representation
  - Blended families and divergent interests

## Initial Client Meeting – Capacity

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- Family/natural objects of the client's bounty
- Assets
- Understand the nature and consequence of executing a will

## Initial Client Meeting – Capacity

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- Record name, address, date of birth
- Document family history (parents, siblings, children, spouse(s) (current and former), grandchildren, nieces/nephews, aunts/uncles). Identify all distributees and the client's relationships to each (e.g., close, estranged, distant, never met).
  - Can you tell me about the important relationships in your family and others who are close to you?
  - Do you have a power of attorney or health care proxy? If so, who are the agents and why?
  - Can you describe the nature of any family or other disputes or tensions that may have influenced your distribution of assets?

## Initial Client Meeting – Capacity & Undue Influence

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- Explore the client’s health (recent changes, hospitalizations).
- Explore dependency on any particular person and whether he or she is a beneficiary or related to, or associated with, a beneficiary.
- Does anyone assist you with any of the following:
  - paying bills;
  - administering medication;
  - banking;
  - cooking;
  - routine traveling (e.g., grocery store, doctor’s appointments)?

# Initial Client Meeting – Capacity & Undue Influence

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- For a new client, how did you get my name?
  - Have you used a lawyer before for estate planning? If so, why the change?
- Have you spoken with anyone about what is to happen with your property when you die?
- Has anyone suggested/asked/insisted that you dispose of your assets in a certain way?
- Can you think of anyone who might expect to receive something from you when you die?
  - Why?



## Initial Client Meeting – Capacity & Undue Influence

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- Explore the client’s history of gifting, including any recent changes or patterns.
- Explore any loans made or forgiven by the client.
- Has anyone offered to pay for you to do a will?  
Do you expect someone else to pay for my services?

## Initial Client Meeting – Investigating and Documenting Capacity & Undue Influence

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- Explore assets. Begin with open-ended questions:
  - How much do you believe everything you own is worth? Tell me about your assets.
  - Do you own a home (establish awareness of debt or mortgage, if any, and if it is owned with someone else, e.g., spouse, partner, sibling).
  - Bank accounts, investments, retirement accounts, life insurance, etc.
  - Artwork, jewelry, collectables.
- Reconcile beneficiaries under existing documents (e.g., life insurance beneficiaries, Totten Trust/pay-on-death (POD) /joint survivorship account beneficiaries, retirement/ pension account beneficiaries) with those in the proposed will. Same?
  - If different, why?

## **Initial Client Meeting – Investigating and Documenting Capacity & Undue Influence**

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- Obtain the client’s authorization to have the client’s accountant and/or financial advisor provide information. Allows you to confirm accuracy.
- If no accountant or planner, consider obtaining the statements and other financial documentation from the client directly.

## **Initial Client Meeting – Investigating and Documenting Capacity & Undue Influence**

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- If there is a prior will, review it with the client and ask the reason(s) leading to the changes in the will.
- Why did you decide to divide the estate in this particular fashion?
- If there is an estrangement with a family member or natural object of the client's bounty, explore the duration and reason for the rift and whether anyone else is aware of it.

## Initial Client Meeting – Investigating and Documenting Capacity & Undue Influence

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- Is any part of your decision driven by information you received from someone else?
  - Are you basing this decision in any way on something someone told you about any of [insert natural objects of bounty]?
- Have you considered how \_\_\_\_\_ might feel about having been excluded from the will or receiving a significantly lower amount than (other children/nieces/nephews) or less than in your prior will?
- If a charity or other organization is favored, tell me why this charity/organization is important to you.

## Initial Client Meeting – Explore Confidential and Fiduciary Relationships

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- A suspicion of undue influence will arise if there is a gift to someone in a confidential/fiduciary relationship with the testator.
- What did the client advise you regarding:
  - the duration of that relationship,
  - the nature of the relationship,
  - the motivation for a legacy,
  - any other facts leading you to conclude the bequest is free of any undue influence or duress.

## Initial Client Meeting – Request Copies of Pertinent Ancillary Documents

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- shareholder agreements
- operating agreements
- partnership agreements
- tenancy-in-common agreements
- Prenuptial & postnuptial agreements
- Separation/divorce agreements

## Addressing a Disinheritance: Pre-Drafting Considerations

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- Disclosure during lifetime:
- Pro:
- The client explaining his/her intentions to those affected while alive may avoid or reduce any shock or disappointment after death.
- Manage expectations
- More witnesses who can attest to the client's state of mind.



## Addressing a Disinheritance: Pre-Drafting Considerations

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- Con:
- The client is in the better position to know his/her family and their reaction
- Will disclosure result in more harm/distress in life than benefit after death?
- The client, understandably, is concerned about losing any relationship he may have with the affected party/parties or otherwise straining the family relationship. That client may not wish to encounter the stress such disclosure will cause during his lifetime.

## Addressing a Disinheritance: Pre-Drafting Considerations

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- Address the treatment in some way.
  - Why that charity? Why not that child?
- Some specificity is appropriate and advisable in certain instances
- But not others
  - “I have considered my son John in making this Will, but for reasons best known to me, I make no provision for John [and/or any of John’s lineal descendants].”

## Clients with Diminished Capacity

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- Consider the length of the document.
- Is the judge or jury more likely to be convinced the client understood an instrument that requires quite some time to read?
- Cut out inapplicable boilerplate provisions

## **Be sure estate planning documents comport with business documents**

- Permitted transfer provisions
- Mandatory buyout / redemption
- Voting control & management of business
- Mechanism or procedure to value business

## **Be sure estate planning documents comport with prenup/postnup/sep. agrt.**

- Address client's contractual obligation to make certain testamentary provisions
- Would it be prudent to satisfy any such obligations during life and obtain appropriate releases?
- Are lifetime gifts allowed?

## Pre-execution

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- Send the client a draft in advance
- Review the will with the client before the execution ceremony.
  - If the client asks questions, they should be memorialized.
  - It will aid in showing the client considered what was presented to him for signing.

## Execution – Importance of Attesting Witnesses

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- Are they familiar with the statutory requirements for executing a will?

and/or

- Have they known the client for some time?

## Execution – Importance of Attesting Witnesses

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- Lay Opinion
- Although ordinarily the opinion of a lay witness is not admissible for determining soundness of mind, in probate proceedings, the testimony of a subscribing witness may be used for such purpose.
- Allow the witnesses ample opportunity to have a meaningful and substantive dialogue with the client before turning to execution of the will.



## Expert Medical Opinions

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- Treating physician opinion vs. non-treating physician expert opinion
- Objectant may be able to offer only the testimony of a *non-treating* expert physician
  - Reviewed the medical records of the examining physicians, but did not see or examine the client.
  - This is weak evidence.
  - May not be sufficient to even warrant submission of the issue of testamentary capacity to the trier of fact (judge/jury).

## Execution – Memorandum of the Ceremony

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- Usual practice or prepared because of the anticipated litigation?
  - Boilerplate vs. specifically tailored to the execution ceremony
- Memorandum describing the events of the execution ceremony, including
  - the client's statements;
  - conversation among the client and witnesses/supervising attorney;
  - and other points bearing on the client's mental capacity, and free and voluntary actions

## Drafting Provisions – In Terrorem or No Contest Provision

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- What is it?
- Is it allowed?
  - Will or trust
  - Good faith exception in some jurisdictions
  - Scope

## Drafting Provisions – In Terrorem or No Contest Provision

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- Considerations and discussions with the client ought to focus on:
- The personality and financial situation of each party targeted by the provision
  - Someone who is risk-averse and in financial need may be more inclined to accept a quick and certain amount of money.
  - Someone who has the resources and resolve to engage in a potentially long litigation to possibly receive more, or nothing at all, may not be deterred or require a greater incentive.
- The estimated value of the probate estate
- The estimated cost of litigation through summary judgment/trial

## Drafting Provisions – In Terrorem or No Contest Provision

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- The circumstances of the client at the time the will is made:
  - Is the client younger, active in her community, socially engaged, and undeniably enjoying good physical and mental health or older, ill, hospitalized, and experiencing episodes of confusion?
- The resolve and business judgment of the nominated executor.
  - The client will need to pick a fiduciary who can oversee and handle the imposition presented by the expected litigation.

# **Drafting Provisions – curtailing ability of problematic beneficiary to cause trouble regarding administration of will/trust**

- Specific bequest/general legacy vs. residuary bene of will;
- Timing of distribution; no entitlement to interest on delayed distribution; estate tax allocated to bene's bequest/share;
- Pot trust vs. separate trust;
- Trust distribution standard: ascertainable vs. absolute vs. annuity amount keyed to inflation adjustment

## Other Strategies: Obtaining a Release from a Potential Objectant

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- A present negotiation and consideration in support of a contractual release and waiver of a right to contest the client's will.
- Even if the effort is unsuccessful, the record evidencing the client's attempt to exclude the beneficiary from her testamentary plan, and purchase his relinquishment of his right to contest, may be helpful evidence against any later attack.

## Other Strategies: Lifetime Revocable Trusts and Joint-Survivorship/POD Accounts

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- If all of the client's assets are effectively transferred to a valid revocable trust (or otherwise pass by operation of law), there may not be a need to probate a will
  - Avoid issues with unknown heirs;
  - May avoid issues with heirs who are not proactive (statute of limitations)
- Benefits of a burden shift
- Does the client have diminished capacity?
  - Will the court impose a capacity standard higher than testamentary capacity to the trust agreement/account opening documents, i.e., contract level capacity?



## Other Strategies: Lifetime Gifting

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- Reduce the probate estate by making lifetime gifts to reduce the “pot” that an objectant may look to obtain in a will contest.
  - Risk: A client may outlive the reserve she retains after making such gifts.
  - Risk: Unless barred by statute of limitations, a distributee could pursue recovery of gifts made when the decedent allegedly lacked capacity or was unduly influenced
- Making a gift on the same date as the will to the party who may challenge the will or to someone closely related to the possible objectant?
  - Engaging in a transaction with that party

## Other Strategies: Periodic Reaffirmation of Overall Testamentary Plan

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- A client may change her will to increase a pre-residuary bequest to a charity, add another charity, remove a bequest to someone, and change fiduciaries, but each time expressly disinherit the person who is anticipated to object to her will.
- If the dispositions in the propounded will are similar to prior wills, it will more likely be viewed as part of the client's continued testamentary scheme suggesting independent and free action on the part of the client.
- If the propounded will is denied probate, the next prior will may be offered for probate.

## Other Strategies: Videotaping the Will Execution

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- To record or not to record?
- Who is going to relate the circumstances of the execution better, the lawyer/witnesses or a video?
  - The client may appear alert, robust, and competent to the attesting witnesses and supervising attorney at the execution ceremony, but may not appear the same on a screen to the judge/jurors accustomed to watching professionals on the screen.
  - The client may not be “photogenic” or may have certain health issues (such as drooling or being hard of hearing), but is otherwise perfectly competent.

## Other Strategies: Videotaping the Will Execution

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- Is the client going to make a statement into the camera? How?
- Without the aid of any notes?
  - Someone not used to extemporaneous speech may stumble over words or lose a train of thought and, thereby, appear less competent.

## Other Strategies: Videotaping the Will Execution

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- With notes or cue cards?
  - Subject to production in discovery
  - Why did the client need to rely on such material to speak about familiar matters, such as family, assets, and making a will?
  - Who prepared the notes? Was it the client on his or her own, or did someone assist?
    - If the latter, why was such assistance necessary in identifying the nature of assets and/or objects of bounty?

## Other Strategies: Videotaping the Will Execution

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- What if there is a “take two” or “take three”
- Spoliation? Duty to preserve?

## **Other Strategies – the business & problematic beneficiary**

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- Leaving problematic beneficiary non-voting, rather than voting, interests in business entities;
- Having different persons manage the business and serve as trustee to avoid trustee duties from being superimposed on business manager

## **Other Strategies – the business & problematic beneficiary**

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- Transferring business to “good” beneficiary during life
  - Via gift
  - Via sale, either to good bene outright or to IDGT for his/her benefit
- Allows client/parent to give imprimatur about valuation, clarifies intent



## Other Strategies – trusts & the problematic beneficiary

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- Consider absolute discretion over ascertainable standard
  - In some states, offers greater decanting flexibility, including to cut out problematic beneficiary
  - Easier for trustee to withhold distributions
- State purpose of trust
- State priority of beneficiaries (current vs. current, current vs. remaindermen)

## **Other Strategies – choice of fiduciary & the problematic beneficiary**

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- Consider not pitting one sibling against another sibling;
- Does a corporate trustee make sense?
- Should problematic beneficiary have power to fire and replace trustee? Only replace with a corporate trustee?

# Thank you.

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