

**SO YOU WANT TO CONTEST A WILL?
A SIMPLE ROADMAP THROUGH THE LITIGATION MAZE**

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I. REASONS TO CONTEST A WILL OR TRUST

Your mother, who was suffering from Alzheimer's disease, leaves all of her money to her male nurse. Your brother unduly influences your father into changing the title on his brokerage accounts to joint tenants with right of survivorship with your brother. Your 90 year old father amended his Trust one week prior to death and stated that he left you \$1 "for reasons best known to my son". What reasons? What happened between the time you last saw your father and the date he signed the Trust amendment?

The common denominator in most Will & Trust contests is the concept of fairness – it's not fair that someone else received a disproportionately larger share (or all) of your parent's estate. After all, didn't your mother tell you years ago that she was leaving everything to you and your sister? Unfairness leads to anger, and anger leads to lawsuits!

Your first reaction is one of **hurt**: "What did I do to cause my father to cut me out of his Will?" Next comes **anger** – anger at the person who received your parent's money. "How did she deceive my father into giving her all of his money?" "He wouldn't have done it on his own!" "What lies did she tell him about me?" Finally, **revenge**: You are not going to let that no good so and so get away with it! In our system of justice, we resolve our differences through the courts, i.e., litigation. This is where the litigation lawyer becomes an invaluable tool.

II. HIRING AN ATTORNEY

Now that you have decided to contest a Will or Trust, the next step is to hire an attorney to assist you. Contesting a Will or Trust can be extremely complex. For that reason, consider hiring an attorney that practices primarily in the area of Will & Trust litigation. The hourly rate may be higher than that of a general practitioner, but in the long run, it will be worth it.

How do you find an attorney? Ask your own attorney or accountant for a referral. Alternatively, you can find a lawyer on the internet at sites such as www.lawyers.com or www.martindale.com under the categories of Estate Litigation, Wills & Trusts, or Trust & Estates.

Twelve questions to ask an attorney:

1. How long have you been practicing law?
2. What is your Martindale-Hubbell Rating (AV, BV or CV)?¹

¹Refer to www.Martindale.com for a detailed description of the Ratings and the Rating process. Martindale-Hubbell Ratings take into consideration the standard of professional ability in the area where the lawyer practices, the

3. What percentage of your practice is Will & Trust litigation?
4. Have you handled matters like mine?
5. What are the possible outcomes of my case?
6. What are my alternatives in resolving the matter?
7. Approximately how long will it take to resolve?
8. How will you keep me informed of the progress of the case?²
9. What kind of approach will you take to resolve the matter - aggressive and unyielding, or will you be more inclined to reach a reasonable settlement?
10. Do you charge on an hourly basis, on a contingency fee basis (% of recovery), or a hybrid (part hourly, part contingency)? If hourly, what is your hourly rate, what is your minimum charge per hour, and how often will I receive a bill from you? If contingency, what is your % of the gross recovery and who pays the "costs" incurred in the litigation (copying, expert witness, faxes, travel, etc.)?
11. If you charge on an hourly basis, give me a *ball park estimate* of your attorney's fees through trial?
12. Will an associate attorney or paralegal in your office handle some of the administrative work at a lower hourly rate?

III. THE TRIAL PROCESS

Litigation is not for the weak of heart! Because of the many unknowns and your inability to control the case, litigation can be very stressful. The author, Ambrose Bierce, summed it up best: "Litigation: A machine which you go into as a pig and come out of as a sausage." Litigation is a very slow and cumbersome process. Although the trial may last only a day or two, it may take years to finally get to trial. As a result, the procedure can be physically and emotionally draining.

As a party to the litigation, you should have a general understanding of the legal issues involved. Throughout the litigation, you will hear terms like: testamentary capacity, undue influence, breach of fiduciary duty, fraud, mistake, rescission, reformation, and surcharge. All of these terms have a very specific legal meaning.

For example, a person is presumed to have **testamentary capacity** if at the time he signs his Will, he understands in a general way: (a) the nature & extent of his assets; (b) the natural objects of his bounty (i.e., his siblings, blood relatives, etc.); and (c) the nature and affect of the Will (the dispositive scheme of distribution). A person can be demented, drunk, and on drugs, but if he has a lucid moment at the time he signs his Will, he has testamentary capacity.

lawyer's expertise, and other professional qualifications. For example, an "AV Rating" shows that a lawyer has reached the height of professional excellence. He or she has usually practiced law for many years, and is recognized for the highest levels of skill and integrity.

² As a general rule, do **not** ask your attorney to send you copies of every document received/sent during the course of the litigation; the number of documents can be overwhelming and the copying & mailing costs can be very expensive. If you want to review your file, make an appointment to review the file at your attorney's office.

A person is **unduly influenced** if there is over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of his free agency and willpower. It goes without saying that a person suffering from dementia is more susceptible to undue influence than a person of sound mind. Take, for example, the situation where the care giver convinces your 90 year old grandfather who is suffering from Alzheimer's disease to give her all of his money on the verbal promise that she will give it to you and your siblings upon his death. The care giver unduly influenced your grandfather into giving her all of his money and should be held accountable for her actions.

A. TRIAL PREPARATION (LITIGATION = TRIAL)

Litigation attorneys are a different breed of lawyer. They enjoy the excitement of going to court – they enjoy arguing, the unknown, the drama. From the very first moment that you retain your lawyer, he is preparing for trial. He is looking for a theme – a common denominator that brings all of the facts and legal issues together into one cohesive and logical story. Give your attorney every document whether you believe it is relevant or not. Tell your attorney everything. Tell him the good with the bad; don't leave anything out. Let your attorney decide what is relevant and what is not.

You will learn a lot about what your attorney is doing by reading his monthly bills. You will see terms like: legal research, drafting, correspondence, attend deposition, draft interrogatories, trial preparation and the like. Keep in mind that his bill is merely a summary of his work product. Each word could easily translate into a twenty minute conversation about the services performed. Litigation is “behind the scenes” work – you never see the practice, only the final result.

B. MEDIATION

Mediation is an informal, process whereby the parties and their attorneys meet with an impartial third party (a mediator) to try and settle the case before trial. Mediation is not binding unless the parties agree to settle the case. At trial, you have a winner and a loser. The judge or jury decides your case and there is no way to guarantee the outcome. Not so with mediation – all parties can be a winner! The parties decide how to structure the settlement. It takes the element of risk out of the equation. As a result, most cases are settled in mediation.

C. THE TRIAL

Depending on the issues involved, you may have a jury or a non-jury trial. There is no average length for a trial. Your trial could last ten minutes or three weeks. Again, it depends on the issues involved. You should be present throughout the entire trial, so make the necessary arrangements ahead of time. Don't make the mistake of believing that after you testify, you are no longer needed. You don't want the judge or jury to see an empty chair. They want to see that you are involved in your case and that you care about the outcome.

D. ATTORNEY'S FEES/COSTS

There is no guarantee that you will be able to recover your attorney's fees and costs. Additionally, you may be required to pay the opposing party's attorney's fees and costs! Prior to filing a Will/Trust contest, think long and hard as to why you want to file a lawsuit. What is your ultimate objective? Is it to correct a wrong no matter what the cost? Is it to discover why you were excluded from your father's Will? Is it solely for monetary gain? Make your objectives known to your attorney from the very beginning. His trial strategy may depend on your objectives.

IV. SUMMARY

The litigation maze is very complex and full of dead ends. To successfully navigate through the maze, you must trust your attorney to guide you. Don't question your attorney's motives and strategy. Rely on his judgment and instincts while keeping the lines of communication open. If you have a question, ask him. Plan ahead for a lengthy and stressful journey. Remember, when you finally reach the end of the maze, life as you knew it continues anew.