

**Group Legal Services Association  
Solo, Small Firm, and General Practice Section  
2014 Annual Conference  
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**Preventive Will Drafting – Avoiding Will  
Challenges and Lawyer Liability**

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**Friday, May 2, 2014**

**2:10 pm – 3:10 pm**

**Presenter: Phil Bernstein, P.M. Bernstein P.C.**



## **Philip Bernstein**

Mr. Bernstein has been practicing law on Long Island for thirty nine years. After first working for the Legal Aid Society, he ultimately founded his own practice in 1978 and has been a solo practitioner since then. He runs a general practice but usually concentrates in family and matrimonial law as well as personal injury, labor and estates including will contests. He has also built a very successful lawblog, <http://www.nyprobate litigation.com/>

## Wills — Avoiding Pitfalls and Problems

Families fight over everything and anything. The relationships can be more bitter and intense. You can divorce your spouse but not your sibling.

A contested divorce is generally far less aggravating and expensive than a contested estate

You may not be able to stave off an estate contest but you can take steps to insure that you have not done anything to get caught in the middle of one.

Assume that every will you draft will be the subject of a contest.

1. Have your client fill out an asset inventory in advance
  - a. Even with more liberal tax treatment you should know the amount and description of client's assets and how they are owned
2. One potential element of a will challenge is the testator's failure to know the extent of his bounty. Having the client do the inventory also establishes that he or she is aware of the nature and extent of his or her bounty—one of the elements that a witness may have to establish.
3. Discuss executors, trustees and guardians in advance of the date of the will closing
  - i. Important to stress that executors must be trustworthy and able to qualify and can be depended upon to administer the estate.
  - ii. Trustees need to be competent and qualified. Not necessary to choose make executor and trustee the same person. Be sure to take the trustee's age and health into account... if a testamentary trust is drafted for young children, the testator's parents would be poor choices if they are going to be into their eighties when the children reach their twenties.
  - iii. Guardians—never take yes for an answer. Guardians can have a rough time with newly orphaned children. They should take some time to consider the weight of the commitment.

- iv. Consider also the possibility that a brother or sister might make a fantastic, loving guardian but your client might be uneasy about the trustworthiness of a spouse...solution is to not to have a guardian also serve as a trustee.
- 4. Bonds and Undertakings. We seem to always prepare our wills and the testamentary trusts within them with a provision that the fiduciaries serve without bond or undertaking. Is that really a good idea?
  - a. In the absence of such a provision, most jurisdictions will require bonds with annual premiums tied to the size of the estate.
  - b. Some nominees will not qualify for bonds. Those with bankruptcies, judgments or other serious credit impairing situations [felons are generally ineligible to serve in any event].
  - c. Weigh the cost of bonding and the difficulty of obtaining a bond with the protection it affords an estate or trust. \$2,000-\$3,000 annually is an insurance policy that the funds will be there for the beneficiaries. If the estate is very large, this might be a good thing for your client.
- 5. Know something about the client before the will closing
  - a. Be careful where you are called to do a will for somebody else
    - i. Ascertain that the testator is competent in advance...have a casual, intelligent conversation.....
    - ii. If you have any doubts about the independence of the testator, try to speak with them alone...put a memo of the conversation in the file. Especially important if a sibling is introducing you to a parent and the will is to disinherit other siblings. If that is the case, a conversation in the presence of another attorney and out of the presence of the sibling will allow you to determine

whether or not there is undue influence and you can then memorialize this with a memo.

- iii. A copy of a drivers license or some other photo id in the file is useful....if you are examined as the will drafter and you have only met the testator once [at the will closing] this may be the only way you will be able to establish that the person making the will in your office was the actual person described in the will.

6. The rite of due execution—a will is very difficult to successfully challenge where you see to it that the rite of due execution is strictly followed. In most states this almost insures the admission of the Will to probate...it is a somewhat stilted procedure which can be almost comical, especially when you are well-acquainted with all of those present....if you feel embarrassed, apologize to those in the room but explain that this is important and.....Do It Anyway! Don't cut corners. Ever.

- a. You, as a duly licensed attorney conduct the closing ceremony.
- b. First, make sure the testator has plenty of time to read the Will. Take the time to answer all questions and make any corrections which may be necessary. If you are at all concerned that the testator is having difficulty reading the will, inquire about his or her eyesight. If vision turns out to be a serious problem, include a provision in the witness statement that the will was read to the testator prior to execution....and of course read the will aloud to him or her.
- c. Have your witnesses come into the room and introduce them to the testator. Ask if he or she wants them to witness the will. Have a brief conversation in the presence of the witnesses so that they can later swear as to the competence of the testator and that he or she was aware of the extent and identity of his or her bounty and those chosen to

receive it. If a sibling is being disinherited, make sure this conversation is in front of the witnesses.

- d. Before signing the will, ask if the testator has read and understands it and that it recites what he or she wants.
- e. The witnesses sign the witness statement of the will in the presence of the testator AND Each other. Sometimes a secretary in a busy office signs, runs out to deal with other issues, and then the other witness comes in. Don't do this since they cannot now state that each saw the other witness the will..... In New York, this is a required statement.
- f. Have your witnesses sign a living –or self proving – affidavit.
  - i. The self-proving affidavit recites that the testator read and understood the will and was of sound and disposing mind and memory, that he or she knew the nature and extent of their bounty and that the witnesses signed in each other's presence. The affidavit should state that the will execution was conducted under the supervision of a duly licensed attorney....you.
  - ii. DO NOT SEND A SECRETARY OR PARALEGAL INTO THE ROOM TO DO THE WILL CLOSING! This is a good way to save your time for other things when you are doing a free will for a prepaid client but DON'T EVEN THINK OF DOING IT. You will be given the sullen and angry disinherited sibling a huge opening to challenge the will and through his parent into intestacy.....and you will be roundly embarrassed if this should come into your local probate court.
  - iii. In NY , the self-proving affidavit makes it possible to file the probate petition without first finding the witnesses and getting their affidavits after the testator has died. Where a witness has died or disappeared, this becomes an impossible task and leads to intestacy

In earlier days, lawyers used to omit this affidavit hoping that the relatives of the deceased would bring them the estate since they had control of the witnesses. Now most relatives will go to their own attorneys anyway...

- iv. A properly drawn and executed affidavit will virtually insulate a will from a successful challenge in most cases.
- v. Provide the client with an UNSIGNED copy of the will with all signatures conformed so you will know who the witnesses were years later when those folks no longer work for you and the testator has died. Make sure you tell those present that the ink-signed copy [if you do not keep it] should be stored in a safe, fire proof place and no other copy should be signed.
- vi. Warn your clients against making ANY alterations in the will or obliterating any portion. In NY, these will not be accorded any significance later on , but WILL void the will and put the decedent into intestacy if any portion of the will is made illegible by means of a redaction.

7. Wills executed at the testator's residence....

- a. Already raise an issue as to the health and competence of the testator since they were not well enough to come to your office.
- b. Residential wills present greater exposure and a greater chance they will be challenged. Charge more. Do it right.
- c. Try to meet the testator before the will closing. If he or she is a client of the office or known to you, have a phone conversation first to get as many details down in advance since corrections out of the office are harder to make. You don't want to go back to do it over. Be certain of spellings, relationships, etc. Also...this conversation gives you a

heads-up as to whether or not the testator is competent and should be making a will in the first place.

- d. Bring your witnesses with you to the closing. At the very least, bring your secretary or paralegal to augment a witness which may be supplied by the testator. In that case, suggest that a neighbor or friend be the witness . no relative with an interest in the will should ever be a witness.
  - e. Carefully observe the circumstances in the residence. Note medications in plain sight, whether the testator is ambulatory and alert. Do not be embarrassed to call the whole thing off if you do not believe the person is competent to make a will. have a conversation about any medications which may have been taken. For good measure, have a conversation about a non-related topic such as community affairs, politics, sports just so your witnesses and you can gauge the competence of the testator in case you should find yourselves on the witness stand later on. A residential will definitely merits a compete memo to the file when you return to the office.
8. Deathbed wills. If you need to do a will in a hospital follow the same basic protective steps as in the case of a residential will.
- a. If you can, visit the hospital administrator before going up to see the patient. Together you can review the patient's chart at the nursing station to make sure that competence has not been negated by pain killers or mind-altering medication.
  - b. Have a conversation at the patient's bedside if they cannot sit with you in a quiet room. make sure they are alert enough to make a will and make sure that they understand the will and that it does what they want it to do.



- c. If necessary, read the will aloud to the patient and include a provision in the witness statement that this was done prior to execution.
- d. Try to have one of the nurses serve as a witness.

Video depositions are useful in home and hospital. Office where competency or undue influence may be challenged.