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THE WILL CONTEST*

*Leon Jaworski***

I. IN GENERAL

IT HAS been said, and I think accurately, that a will is more apt to be the subject of litigation than any other legal instrument. Usually, it is the most important document executed in a person's lifetime. This immediately suggests that a will representing the true wishes of a testator of sound mind should be so prepared and executed as to be invulnerable, if possible, to an improper attack.

It will aid me in the treatment of my subject to refer to wills with which I have been associated. Inasmuch as I have represented the proponent in some cases and the contestant in others, it should not be difficult to present my views without prejudice or favor, and this will be my effort. In any event, I trust that you will forgive me for allusions to personal experiences.

In writing a will, a fundamental truth to be borne in mind is that the average jury, upon reviewing a will, is often tempted to rewrite it in accordance with their idea of what is fair and right, rather than testing its validity according to the instructions of the court. The juror, although generally conscientious, often has difficulty refraining from substituting his personal judgment for that of the testator. Moreover, in cases involving distributions considered prima facie unnatural, the juror is inclined to show a marked sympathy for the contestant. However, generally speaking, the tendency of the judge is to uphold the will; moreover, the appellate courts will scrutinize the evidence closely to make certain that a finding of invalidity by the jury is warranted.

II. QUALIFICATIONS OF THE DRAFTSMAN

In the preparation of a will, the draftsman's qualifications are important. It is generally not sufficient for the the scrivener to be well versed in the laws of descent and distribution, in property rights, in decedents' estates, and in taxes. The most serious and most frequent

* Although generally unreported and rarely the subject matter of formal legal training, the vast majority of legal controversies are resolved in the trial court or prior to trial. The significance of these controversies to the practitioner is apparent, though generally not considered appropriate for legal periodical comment. This article is based upon the personal experiences of a recognized authority in this field. The Board of Editors feels that the publication of Mr. Jaworski's comments in this form will be of significance to the readers.

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oversight occurring in the preparation of wills, especially those in which the dispositive clauses suggest the possibility of a contest, is the failure to invoke the aid of a lawyer with trial experience. It is my conviction that the time to prepare for the will contest from the proponent's standpoint is at the time of the preparation of the will—not when applying for the probate of the will. Paradoxically, wills involving large estates and dispositions suggestive of the possibility of contest are prepared by astute lawyers, experts in the fields of probate law and taxes, but who are generally not experienced in the trial field. Although the lawyer may exercise minute care in minimizing taxes, he may also be unaware of weaknesses in preparation and execution that render the will vulnerable to an attack in court.

For example, a man possessed of a large estate decided to disinherit one of his four children, a daughter. He prevailed upon his attorney, a very fine estate tax lawyer, to include in the will alleged reasons for the disinheritance that were not in full accord with the facts. He preferred not to make the real and inducing reasons for disinheritance a matter of record. In fact, the testator had ample ground for the disinheritance and was in position to assign good and sufficient reasons for his action. The scrivener did not regard these misstatements as being of great importance and had not warned the testator of the use that could be made of them in the courtroom. The daughter made these misstatements the basis for the claim that the testator was of unsound mind. On the trial, these erroneous statements, innocently though unwisely made, presented a serious and wholly unnecessary problem to the proponent. I have no doubt that a trial lawyer of experience, had he been consulted in the matter, would have advised the scrivener and the testator of the powerful weapon that was being placed in the hands of the disinherited child by the inclusion of these erroneous statements.

In another instance, the testator, a wealthy man and father of two children, had concluded to give his son only a small portion of his estate. The draft of the will had been completed when the draftsman obtained the permission of his client to review the will with a lawyer of trial experience. On the surface, the will appeared to be legally perfect. In making the insignificant bequest to the son, in contrast to the large and substantial bequest to the daughter, the testator undertook to assign as the reason for his actions the absence of need on the part of the son for a larger share. However, inquiry of the draftsman revealed the reason given to be untrue; the primary reason for the virtual disinheritance was that the son had turned out

to be a spendthrift—he had obtained large sums of money from his father in the past and had speedily dissipated these funds. The draftsman explained that the testator was very sensitive to having statements in his will that reflected the sad experiences with his son in the past; hence, he desired to assign a fictitious reason for leaving him such an insignificant bequest. This was a serious mistake. The will was changed to eliminate the erroneous statement. In its place, the testator recited that he had given large sums to his son in the past, that he had concluded that the amounts already given, together with what was bequeathed, were all that he desired to pass on to him, and that, therefore, more adequate provision was not made for him in the will. This simple truth would be easy to prove in court. Although testators find it embarrassing to reveal family secrets in disinheriting a child, the fatality to the will that can result from the inclusion of misstatements far outweighs other considerations. Furthermore, it is better to couch reasons for the disinheritance in factual terminology and avoid the use of extreme or bitter words.

III. PROBLEMS IN EXECUTION

Frequently, the difficulties confronting the trial lawyer in upholding a will are traceable to inadequate planning and resourcefulness at the time the will is executed. If the execution is poorly handled, it is most difficult to reconstruct the true facts at the time of the contest. For example, it is not uncommon procedure to use witnesses who have had no prior acquaintance with the testator; therefore, they have little basis, if any, for forming an opinion as to the soundness of the testator's mind. In some instances, elderly people are used to witness wills. Often, at the time the will is to be probated, the witnesses have either predeceased the testator or are so feeble and infirm as to offer little help in support of the will. Moreover, lawyers too often use anyone who may have the minimum legal qualifications as subscribing witnesses. Generally, trial lawyers appreciate the value of strong and convincing witnesses who make good impressions on the court and the jury.

In some cases, after the contestant's witnesses have described the testator's appearance and demeanor and the alleged circumstances surrounding the preparation of the will, a picture may be presented much different from the actual facts. Insignificant circumstances may be distorted into suspicious conduct, and what once were considered normal actions on the part of the testator may suddenly become mental deficiencies. Affections extended over a long period of time, properly and honorably, are transformed overnight into charges

of attempts to exert undue influence. Inequality of distribution as between children often gives rise to a hatred so strong and bitter that the complaining child spares no means in blackening the memory of his parent. The question thus arises: What can be done to preserve for the benefit of the court and the jury facts evidencing that the testator possessed the legal requisite of soundness of mind and was not under the subjugation of a preferred beneficiary? Careful planning will block partially, if not entirely, many of the avenues otherwise open to the contestant. Illustrative of such planning is the following case.

An elderly lady possessed of a considerable estate had three children—two daughters and a son. The daughters married and moved away, and the son remained at home with his mother. Although mentally strong, she was not in good health. Her son looked after her wants and cares, as well as her property. She previously had made a will leaving all three children equal shares. But as she became more dependent upon her son, the mother concluded that the son was entitled to a greater share and to certain special considerations not accorded to the daughters under the terms of her will. In view of the opportunities for the exercise of undue influence on the part of the son and the changing of the will from equal to unequal distributions, a factual situation existed suggestive of the possibility of a contest. The following steps were taken to assist in preserving the will: All discussions with the testatrix took place in the absence of the favored beneficiary, the son. After the initial conference with the testatrix, the attorney requested her to write a letter in her own handwriting, setting forth in detail the disposition she wished to make of her estate and the reasons that motivated her desire to provide more favorably for her son than for her daughters. Upon receipt of this letter, a draft of the will was prepared and forwarded to her by the attorney under a covering letter in which the testatrix was requested to give close and careful consideration to both the inequality of the disposition between her children and the reasons supporting such action. She was requested to transmit her final decision in her own handwriting. Upon completion of the second handwritten letter, the will was placed in final form. Four persons were then selected in whose presence this will was to be reviewed, explained, discussed, and executed. These four persons were carefully selected as to age and qualifications as witnesses. Two of them were used as attesting witnesses; the other two did not sign as attesting witnesses and would be used only in the event of a contest. Upon completion of the execution, each witness recorded the discussion that took place,

particularly the statements of the testatrix, for future reference in the event of a contest. After the testatrix died, one of the daughters considered contesting the will. During the investigation by the daughter's attorney, the elaborate steps that had been taken to discourage the filing of a contest were revealed. The attorney advised against a contest, and the will was probated. Subsequently, section 59 of the Probate Code has been adopted providing for "self-proved" wills. This affords additional opportunities for the availability of proof as to the facts surrounding the execution of the will. Moreover, circumstances might warrant an actual filming of the execution of the will if the estate is large and a contest is anticipated. No legal objection to the use of such a film is apparent, provided the proper predicate is laid as to its authenticity. Thus, unjust claims asserted by contestants as to the circumstances surrounding the execution of the will would be effectively rebutted through the use of such a film.

The presence of a psychiatrist during the execution of a will can also create problems. The wisdom of this practice is questionable, even in those instances in which the testator has a history of mental illness. The psychiatrist's very presence may be seized upon by the contestant as indicative of doubt as to testamentary capacity and may operate adversely to the proponent.

The use of simple, direct, expressive words in the will is often of great aid in jury trials. Testamentary dispositions usually are made by the use of legalistic terms, judicially tested and defined. The advisability of employing these words and phrases is recognized. Often, however, explanations and statements can be added in "jury language" which the juror can comprehend. Also, the use of such language assists the juror in understanding the reasons for the testator's actions. From the proponent's standpoint, the more light the testator sheds on the reasons for the dispositions, the more likely the jury will be to permit the dispositions to remain undisturbed. Moreover, simple words used in the dispositive provisions improve the chances of upholding a will in which the question of the testator's mental competence may be present. Medical witnesses may be willing to state that a testator had sufficient mental capacity to execute a document that is easy to understand, yet lacked the power to comprehend a complex instrument of legalistic terms.

In considering grounds for the contest of a will, lawyers usually think of mental incapacity, undue influence, forgery, and fraud. However, the possibility of raising the issue of the testator's lack of knowledge of the contents of the will as a separate ground for contest

is often overlooked. Although closely related to the claim of undue influence, Texas courts have indicated that in cases in which a showing has been made that the will was prepared at the direction of another person and that the testator was not familiar with its contents, the will may be vulnerable to attack. This particular case did not come to trial, but one of the largest settlements of a will contest made in Texas involved that very issue. The facts indicated that the husband arranged for an attorney to draw the wife's will; the attorney had no contact with the testatrix. The husband presented the instrument which contained complicated trusts to his wife for execution without explanation, and she signed it unaware of its contents.

Often, to avoid a contest, the testator inserts in his will a forfeiture clause—sometimes referred to as an *in terrorem* clause—which provides that if any beneficiary under the will should institute a contest of the will, that beneficiary forfeits his bequest. The bequest usually is substantial although generally less than what would be received by the beneficiary under the laws of descent and distribution. Such a forfeiture provision may serve as a deterrent to a contest. In some states, as appears to be true in Texas, if the contest is lost, the courts probably would avoid declaring a forfeiture in the event the contestant could show that he had probable cause to institute the contest and did so in good faith. There is value in the use of a forfeiture clause, provided it is reasonable in its terms. However, if the forfeiture clause is too severe in nature, the jury is apt to react unfavorably thereto. An example of a drastic forfeiture provision was a clause contained in the will of a wealthy man. This man undertook to cover any objection or contest of his wife's will and sought to make the forfeiture provision applicable to his wife's will as well as to his own. His will bequeathed substantial, although relatively minor, amounts to his grandchildren and to some of his children. He undertook to make the forfeiture provision operative against the children of any child contesting his will. It is my opinion that it is a mistake to embody a forfeiture provision so extreme and unreasonable in nature, even assuming its enforceability.

Wills should never be executed in duplicate unless it can be made certain that no complication can arise therefrom. Recently, a testator possessed of a large estate executed his will in duplicate. One copy—the typewritten original—was left with his attorney; the duplicate was retained by the testator. After the testator's death, the attorney's original copy was delivered to the named executor; the testator's copy could not be found. The will was contested by the next

of kin on the ground that the absence of the second copy indicated a revocation—in fact, it was contended that the missing copy raised a presumption of revocation. The contest was settled before the question reached the Texas Supreme Court. However, the asserted claim of revocation should not be considered lightly. Also, there is danger if duplicate wills have been executed, and the testator, intending to revoke the will, fails to destroy both executed copies. An issue may then be raised as to whether revocation was intended if only one copy is destroyed.

It is not unusual for a testator in the latter years of his life to make a new will although the major disposition of his estate is similar to a prior will or wills. The prior wills should not be destroyed. In the event of a contest, their contents may not only rebut some of the contentions asserted at the trial, but they may also have great importance to the proponent in the event the contest is successful. Under the laws of some states, should the later will be declared invalid because of mental incompetence, the prior will could be offered for probate on the theory that the testator must have been incompetent to revoke the former will.

IV. PREPARATION FOR THE PROBATE OF A WILL

Few contests are litigated in the absence of household servants and nurses serving in the capacities of witnesses. In such instances, written statements should be taken from them as soon as possible concerning such knowledge as they have of any statements of the testator bearing on his will, the condition of his mind, his physical condition, anything negating the exercise of any improper influence upon him by the preferred beneficiaries, and such other matters as may become issues. Particularly, such statements should be obtained, if possible, from servants and nurses who attended the decedent in the past and were no longer in his employ at the time of his death. There is a tendency for such parties to turn up in the camp of the contestant. Then, too, household servants are sometimes disgruntled because they were not remembered more abundantly in the will. For example, a man of great means had the same household servants in his employ over a long period of time. On several occasions, he made statements leading them to believe that they would be remembered bountifully in his will. Needless to say, he was able to retain them in his employ on very reasonable wages and obtained a high quality of service from each of them, especially in his latter days. When the will was read, much to the dismay of these faithful servants who had shown such marked devotion to their master for

so long a time, only a negligible bequest was left to each of them. I can assure you that after learning of the contents of the will there was considerable question in the minds of these servants as to the soundness of their master's mind.

Careful preparation of the proponent's case also requires the interrogation of every doctor who had attended the decedent within relevant proximity of the date of the execution of the will. Similarly, all hospital records should be examined minutely and interpreted by a competent physician.

From the contestant's standpoint, if the will was made late in life and the testator required the care of attendants or nurses, each of them should be interrogated in great detail. Former attendants and nurses furnish a particularly fertile field for testimony that will aid the contest. It is also true that if the testator was elderly, hospital records are often helpful to a contestant. The records may indicate that drugs were frequently administered, that the decedent was irrational at times, or that the decedent had a disease which sometimes affects the mind. Recorded facts of this kind are used by the contestant to embody in the hypothetical question he submits to the expert in undertaking to show an unsound mental condition.

The most difficult experience I ever encountered in undertaking to uphold a will resulted from the contents of a series of hospital and doctors' records. The testator had a physical ailment wholly unrelated to the condition of his mind. This ailment required considerable medical attention; consequently, he had been examined by a number of medical experts and had been a patient in several hospitals. Every doctor who had seen him thought that he was of sound mind. However, each of the hospital records, as well as the office records of the doctors, contained notations that could be construed by an expert testifying for the contestant as bearing unfavorably upon his mental condition. These notations were used as the basis for hypothetical questions, and the danger of raising an issue on mental competency became real.

If the testator consulted a psychiatrist during his lifetime, the proponent should expect to encounter some unfavorable comments in the records. It has been my observation that the psychiatrist will sometimes make notations, based on rank speculation, that can become dangerous in the hands of the contestant. True, the psychiatrist will assure you that the testator was of sound mind, but some of these notations frequently can be taken by the contestant as the basis for an expert's opinion to the contrary.

A difficult factual situation arises if the testator in fact was

eccentric and peculiar, although of sound mind in legal contemplation. Witnesses may appear who will magnify his idiosyncrasies. After his peculiarities are paraded from the witness stand, the jury may question the testator's mental health. An abundance of medical testimony showing that such traits do not constitute unsoundness of mind may save the will, but the result will necessarily be in doubt.

The value of a careful and painstaking investigation to uncover every available piece of evidence prior to trial cannot be over-emphasized. I know of no type of litigation in which the importance of thorough investigation is more significant and rewarding than in a will contest. Every effort should be made to locate all prior wills or copies thereof. They could prove to be of much importance in rebutting the grounds of contests. Nothing should be taken for granted as to the genuineness of the instrument. Illustrative of the importance of thorough investigation is a situation in which a professional man in his early forties died leaving his widow and his father as sole survivors. His estate consisted of a relatively small amount of personal property and some mineral interests. The surviving widow did not know if her husband had executed a will; she could find none and assumed that he died intestate. Subsequent to his burial, the decedent's father called on the widow and told her that several months prior to her husband's death the latter had executed a will and had left it with him. There were two subscribing witnesses, one of whom appeared at the time the instrument was offered for probate and gave the testimony necessary to qualify the will for admission to probate. The widow, although at first unable to rationalize her husband's actions, assumed her father-in-law's story to be true. The father-in-law subsequently died; nine years after the probate of her husband's alleged will, some of the mineral leasehold interests became valuable in oil. Because of the value of these mineral interests, the widow determined that a further investigation should be made into the circumstances surrounding the execution of the will and sought legal advice. Inquiry revealed that the witness who appeared and testified when the will was offered for probate was alive and was a laborer in the town in which the decedent's father had resided. An investigation also revealed that no one knew the other subscribing witness. The attesting witness was interviewed at great length, and he repeated the story which he told at the time the will was offered for probate. His written statement was taken under oath. Samples of the decedent's handwriting were then furnished to a handwriting expert along with a photograph of the will. The handwriting expert concluded that the signature was

not that of the decedent; the expert was requested to prepare an opinion in simple words giving his conclusion. The attesting witness was again interviewed, this time in the presence of the county attorney. He was shown the handwriting expert's opinion and urged to study it carefully; the county attorney explained to him the seriousness of swearing falsely. Within a few minutes, the attesting witness requested the return of his former written statement given under oath, stating that he wanted to make a "clean breast of the entire matter." He then explained that after the death of the decedent, the decedent's father had called him into his office and had asked him to subscribe his name to the instrument. Suit was immediately filed to set aside the probate of the instrument; the attesting witness' oral deposition was taken, and although he was cross-examined at great length, his testimony showing that the will was a forgery was clear, unequivocal, and conclusive—so much so in fact that it was unnecessary to try the contest.

In another instance, a woman possessed of considerable worldly goods had executed an elaborate will leaving substantially her entire estate to an educational institution, although she had two brothers. Suffering from an incurable disease which required hospitalization from time to time, she maintained her residence the last year of her life, when not in the hospital, in an apartment hotel. Her last illness was spent in the hospital. After her death, one of her brothers produced an instrument written on the stationery of the apartment hotel, which bore a date later than the will bequeathing the estate to the educational institution. Both instruments were offered for probate. It was determined from the attorney who had prepared the will for the testatrix that the decision to leave her estate largely to the educational institution was not motivated by any sudden impulse, but was the result of a planned and studied conclusion, arrived at after several conferences with her attorney. Thus, it was difficult to believe that the decision to eliminate the educational institution in her holographic will was the decision of an unimpaired and uninfluenced mind. The testimony of her physician as well as the contents of the hospital records disclosed that if the holographic will had been made within the last few weeks of her life, it might be set aside due to the condition of her mind at that time. She had been under heavy dosages of narcotics, and the ravages of her illness had definitely affected her mind at times. The hospital records showed periodically irrational conduct. The holographic instrument, however, bore a date several weeks prior to this last serious illness. The date appearing on the holographic instrument soon became the crucial

issue. Handwriting experts were ready to testify that the date on the instrument was not written with the same pen and ink as the rest of the instrument; furthermore, there was some doubt that it was written by the same person. If the date had been changed or an erroneous date had been used deliberately, the instrument might not be admitted to probate in view of the testatrix's condition in the latter weeks of her life. However, if the date was true and correct, the instrument probably would be admitted to probate. Inquiry was made at the apartment hotel as to the length of time that the particular type of stationery used by the testatrix had been available to guests of the hotel. It was learned that the date this instrument bore was prior to the time this particular type of stationery had been printed. Thus, persuasive proof had been assembled questioning the authenticity of the date on the holographic will, and the educational institution was able to conclude the matter by a favorable settlement.

Document examiners have perfected techniques of great value in will contests to establish facts other than the genuineness of handwritings. Their examinations and opinions can supply important proof on many related questions such as the time of writing of the document, the sequence in which documents were written, the sequence and other circumstances involving alterations and interlineations, the circumstances surrounding erasures, and the qualities of ink used. A good document examiner can point to possibilities of proof which sometimes do not occur to the lawyer.

V. TECHNIQUES FOR THE TRIAL OF A WILL CONTEST

The trial of a will contest differs little from other civil trials in which the issues are sharply drawn. There are a few rules, however, worthy of observation which have particular significance in will litigation.

The contestant probably will rely on medical experts who had no personal contact with the decedent and who give their testimony on the basis of hypothetical questions. The proponent, on the other hand, probably will use physicians who had occasion to observe the decedent and to administer to him. On cross-examination of the contestant's experts, emphasis should be placed on the advantage thus had by the proponent's medical witnesses. The admission usually can be gained from the contestant's expert that the testimony of the medical witness who had opportunities for observation and treatment of the testator is more reliable than that of the expert testifying purely in answer to hypothetical questions.

Moreover, the appearance and demeanor in the courtroom of contestant and proponent alike are of vast importance in a jury trial. In will contests, more so than in most other litigation, the jury is eager to "size up" the character of the respective parties. A poor showing by one of the litigants may be quite harmful to his cause.

It must be remembered that there exists in some states, including Texas, what is commonly referred to as the "Dead Man's Statute." Under its provisions, neither party to the suit is competent to testify to any transaction with the decedent, unless called to testify thereto by the opposing party. This prohibition has been interpreted by Texas courts to include an opinion as to the decedent's soundness of mind. Contestants sometimes seek to rely on their own testimony to assist in creating an issue of fact, and in states having such a statute, they may be considered incompetent to give such testimony. However, it may be desirable at times to waive the benefits of the statute. Needless to say, this should be done only after giving the matter serious consideration. I recently waived the statute in a contest now pending by taking the oral deposition of one of the adverse parties. The taking of a deposition, under Texas decisions, constitutes "calling" the incompetent witness and thus makes him competent to testify to transactions with the decedent. Although fully aware that the witness would testify that the testator lacked the mental capacity to understand the will in question, I was reasonably confident that I could draw damaging admissions from him of much greater value to my side than the benefit he, an interested party, would gain by testifying to the mental condition of the testator.

There is no special technique, different from other cases, employed in the trial of a will contest. Thorough preparation plays the same important role in the proper trial of this type of case. Save for the tragedy of bitterness and hatred among kith and kin, present in most will contests, this type of litigation has its fascinating aspects. On a few occasions, notes of humor are injected, and this is particularly true in holographic wills. The most unique that has come to my attention is a purported holographic will, allegedly filed for probate in 1934, in Texas. It reads as follows:

I am writing of my will mineself as lawyer ask to many ansers about the family. first think i want i dont want my brother oscar get a dam thing i got. he done me out of forty dollar fourteen years since. I want it that hilda my sister she gets the north sixtie akers where i am homing it now. i bet she dont get that loafer husband of her to brake twentie akers next plowing. she cant have it if she lets oscar live on it. i want i should have it back if she does.

tell moma that six hunnert dollars she has been looking for for ten

years is berried from the bakhouse behind about ten feet down. she better little frederick do the digging and count it when he comes up.

pastor lucknitz can have three hundret dollars if he kisses the book he wont preach no more dumhead talks about politicks. he should a roof put on the meeting house with and the elders should the bills look at.

mom should the rest get but i want it so that adolph should tell her what not she should do so no more slick irishers sell her vaken cleaners. they make noise like hell and a broom dont cost so much.

i want it that mine brother adolph be execter and i want it that the judge should please make adolph plenty bond put up and watch him like hell. adolph is a good busness man but only a dumkopf would trust him with a busted penny.

i want dam sure that oscar dont nothing got. tell adolph he can have a hundret dollars if he prove judge oscar dont got nothing. that dam sure fix oscar.

Legend has it that the last that was heard of the probate proceedings involving the will indicated that "Oscar don't got nothing."