

How to Avoid WILL & TRUST CONTESTS

Take Home
LIVING EXCLUSIVE
MAGAZINE FEATURE

■ **What does it mean to contest a will or trust?**

This is a lawsuit brought by an interested person, usually an adult child, who is unhappy with their share of a deceased person's estate, or in some cases, no share, as set forth in the deceased person's will or trust. These lawsuits usually cost several thousands of dollars in legal fees and can delay distribution of the estate assets by several months, if not years.

■ **Is it more difficult in a court of law to contest a trust than a will?**

No, the factors that a court looks at when deciding whether to invalidate a will or trust are the same.

■ **On what legal basis does a court invalidate or void a will or trust?**

There are essentially two theories of law that a will or trust contestant can use. First is the argument that the will or trust, or amendments thereto, should not be honored because the testator or trustor (the declarant in a will or trust) is found to lack testamentary capacity, or in other words is legally incompetent. Second is the argument that a testator or trustor was a vulnerable adult and that someone exploited that vulnerability by unduly influencing the testator or trustor for their own benefit. All of the rules discussed herein also apply to codicils to wills and amendments to trusts.

■ **What is the test to determine whether a testator or trustor had testamentary capacity?**

There is a presumption in Arizona law that the testator or trustor had testamentary

capacity so the contestant has the burden of proof to show any of the following occurred:

- That the testator or trustor didn't have a general understanding of the assets they had to be distributed on their death; or
- That the testator or trustor was not aware of the natural objects of their bounty, i.e., was not aware of their blood relatives or relations through their spouse; or
- That the testator or trustor didn't comprehend that by executing the will or trust that they were providing for what would happen to their assets when they died.

■ **If one has been diagnosed with dementia, does that in and of itself mean that a testator or trustor lacked testamentary capacity?**

No, but it is a red flag and it will be a factor that the court considers when testamentary capacity is at issue.

■ **What is the test to determine whether a vulnerable adult has been unduly influenced?**

The Arizona Revised Statutes define a vulnerable adult as "an individual who is 18 years of age or older and who is unable to protect himself from abuse, neglect or exploitation of others because of a physical or mental impairment". Factors that are reviewed to determine whether there was undue influence include:

- Whether there were any fraudulent representations made to the testator or trustor;

- Whether the person that benefited from the new will or trust was active in procuring the new will or trust;
- Whether the new will or trust was done hastily;
- Whether the new will or trust was concealed from others;
- Whether the testator or trustor was susceptible to undue influence as a result of being a vulnerable adult; and
- Whether the testator or trustor and the undue influencer had a confidential relationship or the influencer was in a position of trust and confidence.

■ **What can one do to minimize the chances that their will or trust will be contested?**

First, don't wait to do your estate plan until you have been diagnosed with the early stages of dementia or have been diagnosed with a terminal illness. Second, tell your estate planner that you are very concerned about a will or trust contest and ask him or her for suggestions such as in some cases, videotaping the execution of the will or trust and providing a written explanation for why a potential beneficiary is being excluded. Third, make sure your estate planner is educated in the field of estate planning and is licensed with the state of Arizona to provide estate planning services. It is likely that for less than \$1,000.00 you can have a seasoned professional do an estate plan for you that includes a trust to avoid probate court, and all of the ancillary documents including pourover wills, powers of attorney, deeds, etc.



This article is provided for general educational and informational purposes only and does not constitute legal advice. Publication of this information is not intended to create, and the receipt does not constitute, an attorney-client relationship between publisher and reader. These materials are intended, but not promised or guaranteed to be current, complete, or up-to-date. You should not act or rely on any information in this article without first seeking the advice of an attorney.