

**AVOIDING A WILL CONTEST--  
The Impossible**

**Dream?**

**I. Introduction**

epitaphs;           "Let's talk of graves, of worms, and  
                      Make dust our paper, and with rainy  
eyes                 Write sorrow on the bosom of the  
                      earth;  
                      Let's choose executors and talk of  
wills."

Shakespeare,  
Richard II                                III,     ii,     144  
(1595-1596)

"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."<sup>1</sup>

The estate planning lawyer faces many difficult tasks when attempting to draw a will. Usually, the client has a very definite plan in mind, and you're supposed to get it right on paper. Some of these plans may involve many complex goals, often to allow the client to control everybody from the grave.

In addition, the lawyer is watching to be

sure the technical requirements for the execution of wills are met. There may be minor children or handicapped devisees. And, of course, there's always the worry that Uncle Sam is going to take more than his fair share--which most clients would agree is nothing:

"Collecting more taxes than is absolutely necessary is legalized robbery."

Calvin

Coolidge (March 6, 1955)

Now add another worry--a possible will contest.

While more and more people are apparently avoiding the use of a will to transfer their property at death,<sup>2</sup> including the advent of revocable "living" trusts and easier transfer-on-death methods, will contests are still a major problem for the estate planner. One study suggests that one out of every one-hundred wills are contested, and this makes a will fight "rare"<sup>3</sup>, but a well-recognized expert in the area finds this disturbing:

"Because . . . there are millions of probates per year, one-in-a-hundred litigation patterns are very serious."<sup>4</sup>

In asking other lawyers if they see more estate disputes now, the usual answer is that fighting at death is much more common today. In addition, the fighting might not be over undue influence or testamentary capacity, but over related issues, such as interpretations of certain will or trust clauses, how and when the transfers are to take place, who's to be in charge, how the assets are to be distributed, the taxes, etc.

This paper primarily attempts to discuss will contests and ways to avoid them, but many of the questions addressed relate to other contested areas of estate administration, including transfers at death outside of the probate court.

## **II. The Problem**

"Will contests are a subtle form of malpractice

action in which disappointed relatives attempt to destroy a lawyer's handiwork because the lawyer drew a will for someone who did not meet the test for competency. Probate practitioners are victimized by gnawing fears that some overaggressive trial specialist will sabotage the well-laid testamentary plans of one of his or her solid and sensible clients by persuading a jury that the will was the result of undue influence or duress."<sup>5</sup>

### **A. The Statistics**

Most will contests occur because of undue influence or lack of testamentary capacity claims, although they may obviously involve lack of proper execution, forgery, altered documents, revocation, mistake, fraud, duress and insane delusion.<sup>6</sup>

Nebraska's experience includes undue influence and testamentary capacity, as well as improper execution of the will. However, it's difficult to successfully defeat a will according to the statistics. For a 1986 study, of the 42 Nebraska Supreme Court cases reviewed, only 9 decisions held that the contested will or deed was invalid.<sup>7</sup>

### **B. Spotting the Problem in the First Place--Some Warning Signs**

1. Size of the Estate? You might think that if you have a small claims court practice like mine, you won't have any will contests, because there's not enough to fight over. Conversely, if the clients you're drawing the wills for are rich, you need to be more careful about a possible contest. However, the data says "smaller estates generate at least as much, if not more, controversy than larger estates".<sup>8</sup> As an old lawyer who'd handled many large estates once told me, "The biggest estate fight I ever had was over a haystack."

2. Second Marriage? With everybody living longer, and wanting to hitch up again

when the first spouse croaks or runs off, it is much more common to encounter a husband and wife with children from a prior marriage--a situation made for a fight. You should be able to determine right away what lies in store by asking what the new spouse thinks of the other's children (which may also get somebody a good divorce, depending on the answer given). If the answer shows a good, close relationship with those children, the odds for a fight are much less than if they haven't been over for Thanksgiving dinner in years.

Therefore, not only does the second marriage show the need for a marital agreement between the spouses, but perhaps shows the need to get prepared for a fight at death. Many times, this fight may be over the least valuable items--such as household furniture, etc. You may need to pay special attention to where such items are to go at death, and specifically describe them. Pictures, lamps, china, etc., normally going to a surviving spouse, may need special attention so the children from the prior marriage will get what the deceased intended.

### 3. Who are the "heirs"?

One of the obvious important questions to ask is, who are a person's spouse, children, etc.? However, in today's world this may not be so straight-forward. Several spouses is common; many parents would like to forget they had certain kids; and there may be an illegitimate grandchild nobody talks about. Many people won't tell you about these things unless you ask, but unless you ask, you won't see the contest coming.

In certain cases, to protect yourself--and the future will--you may want to prepare a statement signed and acknowledged by the testator, listing the heirs.<sup>9</sup>

### 4. Is the will "unnatural"?

"A will leaving nothing or only nominal gifts to close family members, such as a spouse of many years or children, is ripe for a contest, especially if the beneficiaries are distant relatives, friends, or charities."<sup>10</sup>

Nebraska cases like "natural" distributions, as well:

"Unjust, unreasonable, or unnatural provisions of a will are matters for consideration by jury as evidence tending to throw light on testamentary capacity."<sup>11</sup>

However, the courts do recognize the right of a testator to make his own decisions:

"It is not for courts, juries, relatives, or friends to say how property should be passed by will, or to rewrite a will for a testator because they do not believe he made a wise or fair distribution of his property."<sup>12</sup>

Either way, you should expect a possible fight in such a situation. When you lose your parent, that's one thing, but when you lose your parents' money, that's another. What did they think you went to all those lousy Thanksgiving dinners for--love?

"A man can take with equanimity the loss of his father, but the loss of his inheritance will drive him to despair."

Machiavelli, *The Prince*

5. Are there "non-family" devises?

Today's lifestyles make for possible contests. People are living to older ages and striking up friendships and relationships in senior citizen centers, retirement homes, etc. Living together without marriage doesn't have the moral significance it used to have.

"[B]ecause of the temptation to immorality, each man should have his own wife and each woman her own husband."

Divorces are much more common, as are childless marriages. All of these factors increase the probability of devises to persons other than family members.

Such an estate plan should be an alert you're in for a fight down the road.

6. Are children treated unequally?

The argument that all children should be treated be equally may be persuasive to a jury, so if you're treating children in different ways, a fight may be brewing. Having said that, there are many obvious reasons to treat siblings unequally:

A. You may have a child who's active in the family farm or business, and must receive more than others in order to continue the operation;

B. One child may have done much more for a parent than another, and the parent wishes to recognize that;

C. One child may have special needs, such as a handicapped off-spring, a child who hasn't yet received the education the other children got; etc.

D. One child may be on government assistance, and the devise will just go to fund Uncle Sam;

E. One child may be a spendthrift or have other problems in keeping or spending money.

While this is similar to the "unnatural" dispositions discussed above, the Court does allow a testator to choose amongst his children:

"Judges may regret that a parent makes unequal disposition of his property among the natural objects of his bounty, but it is not always given to judges to know the reasons for the

action taken, and, were courts to set aside wills because property was not distributed in equal shares, the statute which expressly confers the right to make bequests and devises by will would be nullified." In re Stuckey's Estate, 105 Neb. 641, 181 N.W. 564, 566 (1921).

If you're making special provision for one child over another, there could be a meeting with the entire family, to explain the plan and why special provision is made--either with or without you. That may help avoid a fight, and also disclose who the contestant's going to be.

7. Does the estate plan change direction? If there's a major change in the direction of the estate plan from earlier wills, the possibility of a contest is obviously increased. This may be an indication of incompetence or undue influence.<sup>13</sup>

Likewise, if a prior will is similar to the new one, it's obviously of great help:

"A prior will is admissible in evidence, subject to the following rule: "'A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator (and grantor) had a constant and abiding scheme for the distribution of his property.'" In re Estate of Bose, 136 Neb. 156, 173-74, 285 N.W. 319, 329 (1939). See, also,

Blochowitz v. Blochowitz, 122 Neb. 385, 240 N.W. 586 (1932); In re Estate of Wahl, 151 Neb. 812, 39 N.W.2d 783 (1949). An essential element of this rule was pointed out in an earlier sentence in Bose wherein we noted that prior wills, 'as to which there are no substantial claims of testamentary incapacity,' may also be considered in determining the question of testamentary capacity. In re Estate of Bose, supra at 170, 285 N.W. at 327." In re Estate of Camin, 212 Neb. 490, 503-04, 323 N.W.2d 827, 836 (1982).

"The burden of proof is on the proponent to establish adequate foundation for the admission of a prior will in evidence. This

includes proof of testamentary capacity at the time the prior will was executed. In re Estate of Camin, supra."<sup>14</sup>

From a planning standpoint, the obvious lesson is to see how big a change in the prior plan is being made, and preserving prior wills and other estate planning documents may be essential.

"The following are reasons why it may be desirable to retain a will which has been revoked by a subsequent will:

1. The subsequent will may not be effective for some reason, and if that turns out to be the case, the testator would want the prior will to be operative.

2. The existence of a prior will which will be offered for probate if the subsequent will is

successfully contested may operate as a deterrent to a contest of the subsequent will where the contestant will benefit only if both wills are eliminated.

3. The prior will may be of assistance in the interpretation of the subsequent will."<sup>15</sup>

Even if the old will is destroyed, it may be effective on the ground it was destroyed with the intention of revoking it only on condition that the subsequent will was valid and effective. This is sometimes referred to as the "doctrine of dependent relative revocation."<sup>16</sup>

8. Are there restrictions on devises? If the testator is a control freak, he or she may wish to impose severe restrictions on how the devises are to be used--a hand rising from the grave. Examples would be restrictions on mortgaging or selling the devise, obtaining a college education before vesting, etc.

Similarly, and perhaps less contestable, are spendthrift trusts and other restrictions where a trustee watches the assets for a devisee. Nevertheless, any such restrictions give the devisee a reason to contest the provision, and try to get the gift immediately.

9. Elderly, disabled, or acting goofy? Is your testator feeble, suffering from disease, "up in years", ready to "buy the farm", almost "food for worms", etc.? All of these conditions spell a possible contest for somebody who's not happy with the will. Age, health, mental condition and physical capacity are all obvious factors in determining if a testator is competent or subject to undue influence. With almost everybody living to a ripe old age, we're getting a lot of clients that are too ripe and, sometimes, senile.

Everybody's somewhat nuts, but just how nuts is your testator? Is his conduct extremely goofy? Does he refuse to go out in public? Does he only date women from Clearwater? All of these traits may give dissatisfied heirs a basis for contesting the

will. However, the courts do go a long way to allow eccentric behavior:

"A man may believe himself to be the supreme ruler of the universe and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears that his mania did not dictate its provisions." Fraser v. Jennison, 42 Mich. 206, 232, 3 N.W. 882, 900 (1879).

"Gross eccentricity, slovenliness in dress, peculiarities of speech and manner or ill health are not facts sufficient to disqualify a person from making a will." In re Estate of Frazier, 131 Neb. 61, 267 N.W. 181, 187 (1936).

The Nebraska Supreme Court has varied in deciding how "eccentric" you must be, before you lose testamentary capacity. For example, if you make "contradictory statements" in order to "maintain peace and tranquility in the family," you are not necessarily of unsound mind.<sup>17</sup> Nevertheless, you may be "entirely sane upon one subject, or a number of subjects, and yet not have the mental capacity requisite to make a valid will."<sup>18</sup> And yet, a person who has "insane delusions", but is not "generally insane", could still be of sound mind.<sup>19</sup>

Whenever these types of facts appear, it may be necessary to do extra steps, including a medical exam, extra care with the witnesses, a more thorough investigation or other similar safeguards. For an example of a very "eccentric" testator that survived a will contest, see In re Estate of Scoville, 149 Neb. 415, 31 N.W.2d 284 (1984).

### **C. The Office Environment**

It would be especially embarrassing if somebody broke the will you drafted because you failed to take the necessary steps in getting it signed--the formalities. In

addition, how you get wills signed may bear on what evidence is available after death to show the testator was competent:

1. *The lawyer's role.* As the will gets signed, you're the obvious "captain" of this Titanic, so have a plan in advance, for use each time wills are signed:

A. The Environment. Try to have the signing in a relaxed atmosphere, to put the testator at ease. If you're videotaping the signing, keep in mind what the tape will show as the background, etc.

B. Before Signing. As you go over the will, trust or other estate planning documents with the testator, ask the testator's all of the necessary questions--(i) Name? (ii) Names of heirs and devisees? (iii) Assets testator owns (perhaps by referring to list you prepared with testator, and not actually listing the assets in front of the witnesses); (iv) Carefully read the will or trust and understand it? (v) Wish to make any additions, deletions, corrections or other changes? (vi) Does the will or trust give everything as the testator desires? (vii) Does the testator request [the witnesses' names] to witness the execution of the will?

C. Signing. Every lawyer may have his or her own procedure for signing a will that they've used for ages--a Valentine lawyer of years gone by allegedly turned down the lights when signing, and applied an actual seal to the will. Undoubtedly, the client thought he was checking out right there!

Subject to the requirements of Nebraska Probate Code Section 30-2327, discussed below, some basics should apply:

1. Have the testator sign or initial each page for a possible contest, to reduce any claim pages were substituted;

2. If possible, have the testator fill in any blanks in the will, such as their social security number or the necessary date. Some lawyers include the location where signing, and the testator could fill that in as well. If the testator doesn't fill in these blanks for any reason, be sure he instructs you, the notary or a witness to do it for him;

3. The testator signs the will (preferably at its end, although that's not

required under Section 30-2327), using the signature normally used for other legal documents (real estate deeds, etc.), so as to help prevent a contest based on forgery;

4. Although not required under Section 30-2327, so as to help eliminate claims about the execution of the will later, the witnesses should watch the testator sign and the testator should watch the witnesses sign;

5. Again, although not required under Nebraska law, to show the testator fully understands the will, it's wise to have him declare that the will is executed, after the signatures of the testator and the witnesses. If the will is self-proved, "make a clear demarcation between the actual will ceremony and the completion of the self-proving affidavit", since "a proper will is usually a prerequisite to an effective self-proving affidavit".<sup>20</sup> When doing this:

a. Explain the self-proving affidavit to the testator, and its purpose of easier probate at death;

b. Have the notary take the testator and witnesses' oaths; have the notary ask the testator and witnesses to swear or affirm according to the Nebraska statute. In this connection, prepare a list of questions for the notary to ask the testator and witnesses in order to meet Section 30-2329 of the Nebraska Probate Code; and

c. Have testator and witnesses sign the self-proving affidavit, followed by the notary's signature and seal.

2. *The Witnesses.* In any possible contest, it's essential that the will witnesses' memory be preserved, and a detailed memo made. The witnesses should obviously be disinterested, and someone that'll be available for any contest. The witnesses should make notes, so they remember this particular testator, and should be informed of the possible contests or problems in this estate plan, in front of the testator. Signed statements from the witnesses would be appropriate in many cases. It may also be wise to have witnesses that know the testator better than your office personnel do. Pay special attention to this part of the ceremony, as these are the witnesses for the later trial:

"Any new estate planner

whose mind rebels at such submission to ritual, might reflect that, all things considered, it is better to discipline one's mind than to ask attesting witnesses to lie under oath, later on, to validate the will."<sup>21</sup>

It's been suggested that a witness (1) read the attestation clause out loud to impress the will execution ceremony on everyone; (2) initial each page of the will, except the attestation page, to show no pages were substituted after the witnesses signed; (3) date the attestation clause; and (4) write their address under their signature for future reference.<sup>22</sup>

Section 30-2327 of the Nebraska Probate Code (Section 2-502 of the Uniform Probate Code) has eliminated much of the execution formality, simply requiring that

"Except as provided for holographic wills, [separate writings under § 30-2338], and [wills valid where the will is executed under § 30-2331], every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two

individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."

The Nebraska Comment to that section outlines how easy it's supposed to be:

"The formalities for execution of a witnessed will have been reduced to a minimum. . . . There is no requirement that the testator publish the document as his will, or

that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses."

In spite of this "easy" approach to the signing, in 1983 the Nebraska Supreme Court ruled that the witnesses must sign the will before the testator dies.<sup>23</sup> In that case the witnesses had witnessed the testator's signature in August of 1979. He died in September of 1979, and the witnesses finally signed in December of 1979. The Supreme Court said this wasn't sufficient:

"As a practical matter, we can think of no good reason for a delay in signing by witnesses until after the testator's death. Permitting witnesses to sign a will after the death of a testator would erode the efficacy of the witnessing requirement as a safeguard against fraud or mistake. We must bear in mind that we are dealing with an instrument allegedly signed or acknowledged by a man who is now dead. He is not present to confirm or reject it. Requiring completion of formalities of execution prior to death is likely to minimize miscarriages of justice."<sup>24</sup>

3. *The main beneficiary.* Sometimes it's very easy to forget the problems presented by the main beneficiary under the will, because that may be who recommended the testator come to you in the first place. Some obvious problems:

a. Don't let any beneficiary be in the room when the will is signed;

b. Bring up with the testator, in front of the witnesses, any facts that may mean undue influence--the beneficiary recommended you; the beneficiary physically brought the testator to your office; the main beneficiary is otherwise playing an important role in helping the testator.

c. Don't let any beneficiary pay your bill.

"As the age of the client increases, or as the client's physical condition declines, the attorney may wish to take more precautions in recording the events surrounding the execution of a will than would be usual in the attorney's practice." 67  
Michigan Bar Journal  
1125.

4. *Copies.* Make a photocopy of the signed will for your file, to be used as a reference later, and as a back-up, in case the original can't be found after death, and there's enough evidence to overcome the presumption of revocation when the original has disappeared.

5. *Miscellaneous.* Discuss with the client that the will must be kept in a safe place. Safety deposit boxes, safes or other similar places are obvious. A client once kept his will in the deep freezer in his basement, left for a trip to Minnesota and came home to his burned-down house, all melted around his freezer. If there'll be a contest, it's going to be especially important to have the will preserved, and some lawyers prefer to have the original in their safe. However, that's the client's choice--not the lawyer's.<sup>25</sup>

Instruct the testator to periodically reconsider the will, to be sure everything's up-to-date. Possible changes in net worth, family problems, births, deaths, divorces and health problems would perhaps call for a change in the will, as well as any major changes in the federal or state death tax laws.

Explain that no "informal" changes should be made in the signed will, such as writing on it, marking it up or making

interlineations, such as "I've decided I don't want this part now". A trip to your office is the appropriate way to make such a change.

The "formalities" of the will execution are sometimes forgotten in this fast-paced world. As a result, mistakes can be made, and the importance of the signing may be overlooked. Over the centuries, the signing of wills has been extremely important. In the Fourth Egyptian Dynasty, in approximately 2548 B.C., there's evidence of will ceremonies similar to today's, in which an instrument written on papyrus was witnessed by two scribes.<sup>26</sup> After the Norman conquest and before the Statute of Wills, one account shows a testator and monks gathering in a church, saying prayers for the dead, and then devising land upon a portable altar, to the accompaniment of chants and candle lighting.<sup>27</sup>

Keep all this in mind when rushing the ceremony to get to your next appointment. This is probably the most important document these folks will ever sign:

"When a client comes in to do something about his estate planning problem, he wants a lot of things. He wants solace because he is thinking about the day when he will not be here. He wants approval of what he has done and what he proposes to do. And he wants something else he almost never gets--a ceremony. Now, life offers very few opportunities for high ceremony. Birth is not a very good time. It is too laborious. Marriage is handled in rather a spectacular style. Nobody has been able to do much with divorce on the ceremonial side. For death, there is a ceremony, but it is hard for a decedent to be there to enjoy it. He is the principal.

The estate planning process . . . ought to be a high ceremonial occasion because a client should be

getting great intangible satisfactions about these significant decisions that he has made that were embodied in the instruments he leaves behind."<sup>28</sup>

#### **D. The Alleged Incompetent--Special Problems**

Most of the steps outlined here are designed to help defeat a claim the testator is incompetent--observance of the testator by several people, including the witnesses to the will; examination by medical experts, with a follow-up written report; statements from disinterested neighbors and other witnesses, etc. Here's a possible checklist:

"1. Get to know the client. This means finding out the 'why' of every bequest or devise and duly recording the reasons.

2. Determine the client's mental state. Doctors have a simple mental status examination for this purpose. In the difficult case, verify that the client knows where he or she is, the date and time, the client's date and place of birth, and some memory test of present and past events. Ask about close relatives and determine the testator's attitude toward them. This can be done unobtrusively so the lawyer is satisfied that the client is oriented.

3. Take extensive notes. Remember, the lawyer will be able to testify eloquently on behalf of the deceased client at a trial contesting the will.

4. Interview the client more than once. Avoid having the will signed on the same day. Two or more client interviews tend to bolster the lawyer's credibility.

5. Interview the client when no one else is present.

6. Probe for fears, anxieties and unnatural reactions.

7. Discuss generally the testator's assets and take accurate notes, because one of the essential requirements of testamentary capacity is knowing the extent and value of one's property.

8. Ask the client about previous physical or mental problems and the names of the treating physicians or other professions. Identify all drugs the client is taking. Determine if there have been any hospitalizations within the past year and whether any are expected in the near future.

9. Determine if any earlier will exists and why changes are being made. Are the changes reasonable under the circumstances? Any beneficiary in an earlier will is a potential will contestant."<sup>29</sup>

#### **E. The Possibly Unduly Influenced--Special Problems**

Several of the rules mentioned are to guard against the charge of undue influence. Learn to recognize someone easily influenced by others, and then take the steps mentioned to guard against the claim:

"In supervising the execution of any will, the attorney should assure an *independent atmosphere* which can rebut a charge of undue influence. The caregiver who drives a client to the attorney's office should not stay in

the meeting between the client and attorney. The attorney should have a discussion with the client, preferably in front of the other witness to the will, of the reasons for the client's desire to change the will at this time. If the object of the client's bounty is involved with the management of the client's assets, caring for the client's physical requirements, or is otherwise in a relationship, a frank discussion should be held with the client regarding the possibility that someone may accuse the caregiver of having improperly influenced the client to prepare the new will."<sup>30</sup>

As with an alleged incompetent, a medical exam of the testator may be appropriate, with the medical experts' written report they don't think the testator is someone susceptible to undue influence, and that no one is actually unduly influencing him or her.

#### **F. Should We Rely on the Will?**

While a will should always be a part of the estate plan, give consideration to whether you want to avoid its use at death, including (a) using a funded trust instead; (b) using joint tenancy in the appropriate situations; (c) using "beneficiary designations", such as payable-on-death, etc. arrangements now extensively available in Nebraska,<sup>31</sup> and pushed by banks and some investment firms; and (d) lifetime gifts--sometimes with a retained life estate.

These techniques should avoid a will contest and a jury, but would still be subject to claims of incompetency and undue influence. They also present other problems, in that a funded trust may be too complicated for the client, a joint tenant may have financial or other problems of his own, lifetime gifts may subject to the testator's assets to the claims of the donee's creditors, etc. With everyone living longer, the children may die, divorce or go busted before the parent, with the baggage

that follows.

### G. Videotape?

"The open society, the unrestricted access to knowledge, the unplanned and uninhibited association of men for its furtherance--these are what may make a vast complex, ever growing, ever changing, ever more specialized and expert technological world, nevertheless a world of human community."

J. Robert Oppenheimer  
"Science and the Common Understanding" (1953)

Most lawyers are a little slow to keep up with technology, priding themselves on their ties to history. Many of us used "dictating belts", then tapes and dictating machines, "Mag-card" machines and finally, computers.<sup>32</sup>

"The legal community utilized scribes until three hundred years after the development of the Gutenberg flatbed printing press."<sup>33</sup>

Therefore, it shouldn't be too great a surprise that we aren't wild about some new-fangled device that's supposed to help us draft a will-moving pictures.

Many commentators strongly recommend the videotaping of the will execution ceremony, as a safeguard against a will contest.<sup>34</sup> Some of these actively lobby for using a videotape as the actual will, itself. This would not be possible in any state having the Uniform Probate Code, including Nebraska, as the will document must be "in writing" to qualify as "a will".<sup>35</sup>

It's argued that a videotape has many advantages:

1. Accuracy. Witnesses are normally human, and so their recounts of what happened when the will was signed suffer from the

passage of time and memory. An unaltered videotape is highly accurate and reflects the events as they occurred. It can show the testator saying excellent how they wanted their property to pass, without "interpretation" by anyone.

2. Nonverbal Evidence. The videotape shows the testator-- often your best witness--and their demeanor, dress, facial expression, etc. This is all something a later "re-telling" by a witness can't do as well.

3. "Family" Reasons. The videotape can also allow the testator to explain to the family why the will is made the way it is. It may provide a "memory" of the testator that's valuable to other family members. This might be done on the videotape itself, or on a separate video.

4. Contest Use. Lastly, and perhaps most importantly, the videotape can be used to support the will itself, showing a testator who's not susceptible to undue influence, not under anyone's influence--undue or otherwise, and a testator fully competent, wanting his will to be carried out. As mentioned below, if you're not careful it can also portray a testator who's a nitwit, and out of his gourd.

5. Admissibility. Videotapes should be admissible into evidence to show several important points:

a. Due Execution of the Will. A videotape could show the testator signing the written will, and the signatures of the two witnesses, showing proper execution under Nebraska Probate Code Section 30-2327.

b. Testamentary Intent. The intentions of the testator must be determined from the complete will, construed in its entirety, or the "four corners" of the document.<sup>36</sup> Therefore a videotape you couldn't expand on the written will itself with a videotape, but could be used to eliminate ambiguities, and, most importantly, show the testator's intent:

"The superiority of videotape exists in its ability to present to the trier-of-fact an accurate depiction of the testator's objectives. . . A video recording of the testator

actually elaborating on intent would be much more persuasive and compelling than other forms of extrinsic proof."<sup>37</sup>

c. Testamentary Capacity. A video recording could show that the testator understood:

(i) she was signing a will. Telling this to the camera is strong evidence she understood the document;

(ii) the effects of executing a will. She could explain on videotape that the purpose of the will signing is to distribute her property upon her death;

(iii) the general nature and extent of her property. She could recite the type and description of her property for the video;

(iv) the persons who are the natural objects of her bounty. The family situation could be described by the testator, showing she fully knew what was going on;

(v) where the property was going under the will, including an appreciation of all of the above elements in relation to each other, and to hold them in her mind long enough to form an orderly desire as to the disposition of her property. A video could clearly show the testator understood how the property was to pass under the will, and explain why the disposition was made in this manner.

d. Lack of Undue Influence or Fraud. In her own words, the testator could explain why the dispositions under the will were being made, and that they're of her own free will. She could show the decisions were not influenced by overreaching on anyone's part. Questions could also be given to her, showing she was not someone who's susceptible to undue influence.

Statements made by a testator at the time of the execution of the will are generally admissible to prove whether or not fraud was practiced, as well as undue influence. These then show the motive or intent of the testator.<sup>38</sup>

e. Contents of the Will. There may be instances where portions of the will are illegible or have been tampered with. If the testator is able to actually recite the will, the video could be used as evidence of the will's contents. The will itself may be shown on the videotape. While signing, the video could make a close-up shot of the testator initialing each page, to avoid a claim that pages were substituted.<sup>39</sup>

Under the Federal and Nebraska Rules of Evidence, a "photograph" includes "video tapes".<sup>40</sup>

"Videotapes are quickly become indispensable in various courtroom situations. Both attorneys and judges have begun to realize that video technology is extremely useful and sometimes essential. . . . A videotape's admissibility generally depends on the following considerations: 1) relevance; (2) fairness and accuracy; (3) the exercise of discretion as to whether the probative value of the recording outweighs the prejudice or possible confusion it may cause; and (4) other evidentiary considerations such as the presence of hearsay."<sup>41</sup>

Reports of statements made by the testator during the will execution may be hearsay,<sup>42</sup> but would be admissible under several hearsay exceptions, such as "present sense impression";<sup>43</sup> "then existing mental condition";<sup>44</sup> or a "catch-all exception".<sup>45</sup> For general discussions of placing videotapes into evidence, and how to do it, see the texts cited at Footnote 25.

"A few courts have structured an admissibility formula under which the following elements must be demonstrated: (1) the videotape recorder was technically capable of recording testimony; (2)

the video machine operator was competent; (3) the recording was not altered; (4) the videotape was appropriately preserved; (5) the recording was both visually and audibly clear so as not to be unintelligible or misleading; (6) the recorded testimony was voluntary; and (7) the speakers on the videotape can be identified."<sup>46</sup>

In the Nebraska case of State v. Radcliff, 188 Neb. 236, 196 N.W.2d 199, 122 (1972), the Supreme Court laid out the general rule that a photographs may be placed in evidence if they are "true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry", and then made a comment that might apply to videos of will executions:

"It is difficult to imagine, considering the precise nature of the offense charged, a case in which photographs would be more relevant in aiding the jury in understanding the facts as testified to by the witnesses and in resolving the basic issues before it under the court's instructions."

In other will contests, the Nebraska Supreme Court has allowed comparable evidence:

i. In the case of In re Bowman's Estate,<sup>47</sup> the Court pointed out that the "declarations of testator are admissible to show his state of mind and consequent susceptibility to undue influence."

ii. In the case of In Re Noren's Estate,<sup>48</sup> the Nebraska Supreme Court appeared to allow considerable indirect evidence to show undue influence by a confidential adviser, as well as improper prompting and manipulation.

iii. In the case of In re Kaiser's Estate,<sup>49</sup> the Supreme Court liberally defined a "will" as several different sheets of paper,

and allowed parol evidence to link the separate pages.

iv. In the case of In re Dimmitt's Estate,<sup>50</sup> the Supreme Court allowed the testator's intent to be shown by circumstances surrounding the drafting of the will:

"[D]eclarations of the testator may be admissible, not to show direct expressions of his intention, but to show the facts and circumstances surrounding the situation under which he executed the will."

6. Problems. Despite the great possibilities for videotape, there are obvious pitfalls:

A. If the testator acted awfully stupid during the taping; said some really stupid things you weren't aware of, or otherwise acted goofy, you've just created an exhibit for the contestants. In a 1986 Oklahoma case, and other cases, the Court said the videotape of a will execution ceremony supported a finding of undue influence.<sup>51</sup> In addition, the entire video may appear "staged" and artificial, if not handled carefully.<sup>52</sup>

B. There are several problems to be overcome in the videotaping. Many people are nervous "on camera" and may not behave as they would normally. The actual videotaping may be cumbersome and not easily done. Extra expense has been added to the whole process, and the bill:

"Law offices must decide whether to conduct videotaping sessions 'in-house' or to contract with private services. Either option may be quite expensive unless the firm obtains a sufficiently large volume of potential 'videotape clients' to offset costs. . . . Lack of production acumen presents the most significant barrier to the in-house route. The most frequent criticisms of videotaped

depositions are the degree of amateurishness in the production, poor lighting and positioning of witnesses and cameras, unsatisfactory site locations for recording, and inadequately or improperly applied make-up."<sup>53</sup>

C. You must have a good system of preserving the video for use at a later date--perhaps years later.

"All Americans born between 1890 and 1945 wanted to be movie stars."

*Pink Triangle and Yellow Star* (1982)  
- ) Gore Vidal (1925)

#### **H. In terrorem clause?**

It is possible to include a clause in the will or trust that penalizes anyone who contests the document. These are somewhat common and may be useful. However, they definitely have their limitations. Equity doesn't favor forfeitures, so such clauses have been narrowly construed.<sup>54</sup> In addition, under the Nebraska Probate Code, an *in terrorem* clause is void if there was "probable cause" for instituting the proceedings:

"A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."<sup>55</sup>

Under the Restatement, Second, on Property, "probable cause" is defined as follows:

"As used in this Restatement, the term 'probable cause' means the existence, at the time of the initiation of the proceeding, of evidence which would lead a

reasonable person,

properly informed and advised, to conclude that there is a likelihood that the contest or attack will be successful."<sup>56</sup>

Query: Would a Nebraska contestant always be able to avoid the *in terrorem* problem by having his lawyer testify there was "probable cause"? What lawyer in that situation (his right mind) would say there wasn't "probable cause"? Is the contestant's lawyer a "reasonable person, properly informed and advised" called for under the Restatement?

### **I. Include an explanation for the devise?**

Some lawyers attempt to avoid a contest by explaining in the will why the devises are made, or not made. This may be a good idea, if you're sure of the facts and the testator's version of them, but this could also come back to haunt you. The will is the central document in any will contest, and its contents will be read and re-read by the jury. As a result, if any of the justification outlined in the will is wrong, you're in trouble. Your client may give you the wrong facts for a variety of reasons, including a desire to hide the truth or the habit of repeating his version of what had happened:

"[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 reason for disinheritance a matter of record. . . . The daughter made these untruths 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."<sup>57</sup>

In addition, mean or bitter language in a will may show a jury your client is a mean and bitter person as well--and also unfair, antagonistic, or even nuts. In a 1930 case, the Nebraska Supreme Court found a testator's "deep resentment" and "great dislike" for his brother had a bearing on his testamentary capacity, when "the entire record contains no evidence which even suggests any reason for this feeling".<sup>58</sup> It's also been suggested that if you defame an individual in a will, you may open yourself to "testamentary libel", with some courts holding the estate liable for damages caused by the libelous material.<sup>59</sup>

**J. Make a "holographic" will to go along with the one you made?** Under § 30-2328 of the Nebraska Probate Code (§ 2-503 of the UPC), an unwitnessed handwritten will is valid as "holographic" if the

"signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator."

The date may be missing "if such instrument is the only such instrument" or if there's no "inconsistency with any like instrument" or if you can determine the date "from the contents of such instrument, from extrinsic circumstances, or from any other evidence."

It's been suggested that if your testator made such a will, it might show his ability to write, and an inherent desire for his plan. If done before your attested will, the handwritten will could serve as an unrevoked prior will, if yours falls through. In addition, it would be evidence to support the will you drew, showing testamentary intent, mental competence and an ability to care for oneself.<sup>60</sup> Obviously, if the testator can't write well, or the holographic will would otherwise show some infirmities, its use would be stupid.

**K. Affidavits of friends or acquaintances?**

It's possible you should get affidavits from people who've seen the testator around the time the will or trust is executed, showing they think he's competent:

"One way of preserving this valuable evidence is to obtain affidavits from these people detailing the testator's conduct, physical and mental condition, and related matters. Affidavits of attesting witnesses, individuals who spoke with the testator on a regular basis, or health care providers (doctors, psychiatrists, nurses) who examined the testator close to the time of will execution, will protect this potentially valuable testimony for use should a will contest arise."<sup>61</sup>

Such affidavits could be very useful in showing the positive evidence in support of the will, in the event of a will contest.

For various cases on the use of nonexpert witnesses in a Nebraska will contest, see, e.g., In re Cheney's Estate, 78 Neb. 274, 110 N.W. 731 (1907) (error for lay witnesses to testify whether testator was "able to make a last will and testament", on the date the will was signed); In re Bartness' Estate, 128 Neb. 408, 258 N.W. 877 (1935) (proper for lay witnesses to give their opinion on whether deceased "was able to transact ordinary business affairs" and "knew the nature and extent" of the ordinary business transactions).

See also the Nebraska cases of In re Estate of Inda, 146 Neb. 179, 19 N.W.2d 37 (1945); In re Goist's Estate, 146 Neb. 1, 18 N.W.2d 513 (1945); In re Estate of Johnson, 149 Neb. 34, 30 N.W.2d 70 (1947), In re Bale's Estate, 155 Neb. 500, 52 N.W.2d 325 (1952), and In re Estate of Witte, 145 Neb. 295, 16 N.W.2d 203 (1944), on rehearing, 145 Neb. 305, 17 N.W.2d 477 (1945), where the Court says nonexpert witnesses may state their opinions of the mental condition of the deceased when he signed the will, if the witness is shown to have had a more or less intimate acquaintance with the deceased, but the facts and circumstances upon which the opinion is based must be shown. In addition, the nonexpert witness "must have in mind the quality of mental capacity essential to the making of a valid will, that is, whether or not the testator understood the nature of the acts,

knew the extent of the property, understood the property disposition, and knew the objects of the bounty."

**L. Make a significant gift to the disinherited heir, when the will is executed?**

One commentator suggests making a gift to the disinherited person, when the will is made, so as to help eliminate the claim the testator was incompetent. If he was incompetent for the will, he was incompetent for the gift, and the acceptance of the gift is evidence the donee thought the donor was competent:

"This gift should be substantial but, of course, far less than the amount the heir apparent would take via intestacy. After the testator's death, the heir is less likely to contest the will on the basis of lack of testamentary capacity. By asserting lack of capacity, the contestant would be forced to concede that the contestant accepted property from a person who lacked the capacity to make a gift or establish a trust. In addition, should the contest succeed, the heir would be required to return any property already received to the estate or use it to offset the intestate share."<sup>62</sup>

A like tactic would be to draft similar wills over a period of time that give the potential contestant successively larger amounts. In this way, if the contestant is successful against the last will, he must contest a will that gives him less than the one he just defeated. He gets his intestacy share only if he successfully beats all of the wills.<sup>63</sup>

**M. Self-Proving Wills.**

Under the Uniform Probate Code Section 2-504, adopted in Nebraska as Section 30-2329, the testator and witnesses to the will are permitted to sign an affidavit, in front of a notary public, raising the presumption the mechanical elements of the will have been met.

The statute even gives you the form.

This eliminates the need for the witnesses' testimony at any informal probate hearings. However, as the Comment to Section 30-2329 states, a self-proved will "may be contested (except in regard to signature requirements)."

"As an evidentiary device for establishing testamentary capacity, the self-proving document simply creates a hollow presumption

which, once controverted by will opponents, crumbles uselessly into mere surplusage."<sup>64</sup>

#### **N. Miscellaneous**

Other suggestions include a good "will maintenance system"; separate representation for a spouse when they're not receiving what they might otherwise take; possibly a separate lawyer for the main devisee to show somewhat of a "contractual" relationship with that devisee; a contract to make a will, allowed under the Nebraska Probate Code, if the will is to compensate for help given; and telling the family what you've done--to be exercised with caution.<sup>65</sup>

### **III. The Solution?**<sup>66</sup>

#### **A. Why will contests survive:**

##### 1. Unhappy Children?

"You will find as the children grow up that as a rule children are a bitter disappointment--their greatest object being to do precisely what their parents do not wish and have anxiously tried to prevent."

Victoria (1819-1901)

The Crown Princess

of Prussia (January 5, 1876)

Queen

Letter to

If the will cuts out a spouse, the Nebraska Probate Code has the UPC protections that essentially allow her to "break" the will. A spouse is entitled to an "elective share" (Section 30-2313) up to one-half of the "augmented estate", defined in Section 30-2314.

Therefore, depending on the facts, the surviving spouse doesn't need to have a "will contest", since her rights under the augmented estate must be met. However, there may be situations where she would do better if she contested the will. For example, if the deceased had no children, the spouse would normally inherit the entire estate if there were no will--instead of her share of the augmented estate. See Section 30-2302, for example.

There are no similar protections for children:

"The oldest, more durable, and most pervasive system of limitations on testation are rules that save some of a man's property for his wife. These are, now, for the most part, administered without sexual discrimination, but historically they were a system of protection for widows. . . . There is no parallel system of protection for children--not even for minor children."<sup>67</sup>

This statement isn't completely true under the Nebraska Probate Code, which does allow (1) a "homestead allowance" up to \$7,500 total for "each minor child and each dependent child of the decedent" if there's no surviving spouse (Section 30-2322); (2) "exempt property" of \$5,000 to "children of the decedent", jointly, if there's no surviving spouse (Section 30-2323), and (3) a "family allowance" of \$9,000 for a "surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him" (Sections 30-2324 and 30-2325). However, the total amount is somewhat minimal--\$21,500, and mainly benefits dependent children.

This omission is apparently an American phenomenon:

"American law is unique in how little it cares to protect children against disinheritance-- or, put differently, in how strongly it values the parent's right to disinherit the child. Continental legal systems commonly provide children with a minimum fraction of a parent's estate (*legitimate, Pflichtteil*). In the English and Commonwealth systems, the so-called 'family provision' statutes empower the court of equity to make discretionary provision for children (and others) if the court determines that the testator disinherited them unfairly."<sup>68</sup>

As Professor Langbein points out, this creates a ready class of plaintiffs in a will contest suit. They're eager to break the will, if not because of just the money, but they probably hate their stepmother's innards.

Should the law be changed to prevent the testator from disinheriting his children? There's a strong desire to let a person make his own will, no matter how stupid:

"It is said that less mental faculty is required to execute a will than to enter into any other legal instrument; that the testator's property was his own, he had the power to do with it as he chose, and while he may have had delusions, that does not of itself constitute incapacity, for a delusion affects testamentary capacity only when it enters into and controls its exercise. . . ." In re Frazier's Estate, 131 Neb. 61, 267 N.W. 181, 187 (1936).

Given this propensity, just remember if

you're cutting out the children, somebody's knocking:

"There's a whining at the threshold--

There's a scratching at the floor--

-

To work! To work! In Heaven's name!  
The wolf is at the door!"

The Wolf at the Door, st. 6  
Charlotte Perkins Stetson

Gilman (1860-1935)

## 2. Juries?

"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."<sup>69</sup>

At English common law, because the right to make a will and testament was enforced by ecclesiastical law, you had no right to a jury in a will contest. Therefore, there is no constitutional right to a jury trial in such cases, but a state legislature may grant the right to a trial by jury, to the same extent the right exists at common law--or with restrictions.<sup>70</sup> Under Nebraska law, a will contest would normally entitle the contestant to a jury.<sup>71</sup> Assuming the contestant isn't eliminated by a summary judgment, he therefore gets to evoke the jury's sympathy for his cause:

"Trying a will contest to a panel of lay persons invites litigation such as the Seward Johnson case [a Johnson & Johnson multi-millionaire], in which the strategy is to evoke the jurors' sympathy for disinherited offspring and to excite their likely hostility towards a devisee such as Basia [the deceased's new wife], who

can so easily be painted as  
a homewrecking  
adventurer."<sup>72</sup>

As stated by the Queen's Bench in 1870:

"[The] power of disposing  
of property in anticipation  
of death has ever been  
regarded as one of the most  
valuable of the rights  
incidental to property."<sup>73</sup>

So the law favors allowing a testator to give  
the property where he wants, but this  
proclivity of juries opens the case to possible  
conflict between the jury's sympathy and the  
law:

"Our fundamental value in  
the law of wills is freedom  
of testation, but the inner  
tendencies of civil jury  
trial put our procedural  
system in conflict with out  
substantive law. Jury  
trial necessarily places  
testamentary freedom

at risk, because jurors who  
decide without giving  
reasons have such latitude  
to substitute their wishes  
for the testator's."<sup>74</sup>

However, this tendency of juries must be  
weighed against what happens to a contestant's  
win on appeal. As mentioned above,<sup>75</sup> for a 1986  
study, of the 42 Nebraska Supreme Court cases  
reviewed, only 9 decisions held that the  
contested will or deed was invalid. A 1981  
Indiana study shows similar results:

A. Of 13 cases involving a second wife and  
a claim of undue influence by her, ten trial  
decisions were in favor of the contestant and  
three were in favor of the proponent. However,  
after appeal, ten proponents were winners and  
only three contestants won.

B. Of 26 cases involving alleged undue  
influence by a brother or sister of the  
contestant, 17 lower court decisions favored  
the contestants, but 15 appellate decisions  
favored the proponents.

"Of all will contests in which undue influence was alleged, 37.7% were trial decisions for the proponent and 62.3% were trial decisions for the contestant. The results after appeal were exactly reversed. The implication of this is that the Indiana appellate courts have applied the brakes to trial court decisions which invalidate wills."<sup>76</sup>

In spite of the odds the proponent will win, the contestant's ability to get to the jury, and the long appeal process, means much time and money will have been spent to preserve the testator's desire.

"Post-mortem probate creates a situation in which excluded heirs are invited to challenge the will and use the testator's expressed intentions to destroy the instrument, question

the giver's sanity, and line their own pockets with property that was never intended to be theirs."<sup>77</sup>

### 3. The Judiciary?

While the probate of a will would normally take place in the county court, it is possible, and common, for a will contest to be transferred to the district court under Nebraska's version of the Uniform Probate Code.<sup>78</sup> Therefore, while it is true a judge may be more inclined to follow a testator's wishes than a jury might,<sup>79</sup> the district judge may not have had experience in the probate or real estate area, or be otherwise unreliable for a will contest. New York mayor Fiorella LaGuardia called the New York probate court, "the most expensive undertaking establishment in the world."<sup>80</sup>

Therefore, in handling a will contest with a jury, the district judge might not be the

help you could expect in the county court, or in a case that isn't a will contest--such as the interpretation of a trust, discussed below. He may be less inclined to grant you summary judgment, even though there is little or no evidence by the contestants to prevent it.<sup>81</sup>

#### 4. Who pays the Costs?

As mentioned, an obvious problem with a will contest is the cost of the litigation. Let alone the lawyer cost, expensive expert witnesses may be needed, as well as expensive depositions, and other similar costs. Like most other states, Nebraska does not assess those costs to the loser of the contest. If the contestant's case is "frivolous", costs could be recovered<sup>82</sup> but this is difficult to prove.<sup>83</sup>

This aspect of the will contest area has been criticized as encouraging a fight:

"From the standpoint of comparative law, the most striking peculiarity of American civil procedure is that we lack the 'loser pays' principle for allocating the costs of litigation. Some scheme for charging the loser with the winner's costs is universally followed outside the United States. The American rule of leaving the parties to bear their own costs encourages contestants who . . . are pursuing a farfetched claim. . . . Making contestants pay an estate's costs of defending an unsuccessful challenge would help to deter contestants from bringing such lawsuits."<sup>84</sup>

"Under the majority of post-mortem procedures, the plaintiff, after losing a spurious will contest, is not required to reimburse the decedent's estate for attorney's fees and court costs expended while

defending the unjustified claim. This practice encourages a potential heir to attempt to 'strike it rich' because even if the attack is unsuccessful, the penalty suffered will be little more than disappointment."<sup>85</sup>

#### 5. Worst Evidence Rule?

One of the most obvious problems a will contest gives the lawyer who drew this gorgeous testamentary instrument is the fact the best witness--the testator--is dead. No doubt you've sat in court and listened to contestants paint a Dorian Gray portrait of your client that not even the client's pet dog would recognize.

Suddenly your perfectly competent client of many years becomes a babbling idiot. And the witness says it with a straight face, under oath.

"[O]ur probate procedure follows a 'worst evidence' rule. We insist that the testator be dead before we investigate the question whether he had capacity when he was alive."<sup>86</sup>

Videotaping the will, extensive written statements, good witnesses to the will and other similar tactics may help minimize this problem, but nothing would beat having your testator present, and forcing the disinherited siblings to confront the testator.

"I don't know what Scrope Davies meant by telling you I liked children, I abominate the sight of them so much that I have always had the greatest respect for the character of Herod."

1824) Lord Byron (1788-  
August 30, 1811 Letter of

#### **B. Ante-Mortem Probate**

Recognizing these difficulties, there has been a small movement to enact "ante-mortem" statutes that allow a testator to bring an action during their lifetime, declaring their will to be valid, even though they're not dead yet. From 1977 through 1979, North Dakota, Ohio and Arkansas enacted versions of such a statute. All three allow a testator to obtain a declaratory judgment concerning his or her will, on issues ranging from formalities, such as signatures, to testamentary capacity and undue influence<sup>87</sup>. Here's a part of Ohio's statute:

"A person who executes a will allegedly in conformity with the laws of this state may petition the probate court of the county in which he is domiciled, if he is domiciled in this state, or the probate court of the county

in which any of his real property is located, if he is not domiciled in this state, for a judgment declaring the validity of the will."<sup>88</sup>

Under all three statutes, the testator may make a new will, and revoke the prior will that was the subject of the ante-probate proceedings.

The North Dakota and Arkansas statutes apparently aren't used to any great extent, perhaps because a testator doesn't wish to disclose the contents of their will.<sup>89</sup> The Ohio statute has received much more litigation, and is apparently used most frequently when an attorney has prepared a will for a person who is under guardianship or who is elderly.<sup>90</sup>

The procedure obviously has some drawbacks--it's a lawsuit, so there are costs and expenses; the testator has to disclose the will; and there may be disruptions in the testator's family as a result. However, many commentators urge such an approach:

"Practitioners in states with ante-mortem probate legislation should seriously consider using

this progressive technique to prevent will contests. Because the validity of the will is determined before the testator's death when all relevant evidence is before the court, will contests should be greatly reduced. In addition, ante-mortem probate may lead to more efficient use of scarce and valuable resources as less court time is expended dealing with spurious will contests and few estate funds are dissipated defending those contests."<sup>91</sup>

### **C. Conservatorship or Trust Lawsuits during Lifetime?**

Under present Nebraska law, without an ante-mortem statute, can a lawsuit be brought to somehow determine the validity of person's will, during their lifetime? Without specific statutory authority, it isn't possible for a will to be "probated" during a person's lifetime:

"Until a man dies it is not known who his heirs will be, even though he dies intestate. It is possible that he may spend his entire estate during his lifetime and have no estate to be passed by will or otherwise to his heirs at the time of his death. . . . Clearly, therefore, since this is not a justiciable matter, the courts of this State do not have the power to determine the validity of the will of a living person."<sup>92</sup>

"In this case, Lloyd attempted to have his will established during life in the probate court . . . . Judicial proceedings to probate a will while the

testator is living, are unheard of in this country or in England . . . . The maxim that the living can have no heirs is as well settled by statute as by common law. Until a man dies it can never be known who will succeed him, even if intestate, and whatever may be the probability there is no certainty that a single one of the persons who have come in here to oppose the will may survive the testator."<sup>93</sup>

However, there may be at least two possible avenues out of such a morass:

1. Through a Conservatorship? Under Sections 30-2637(3) and (4) of the Nebraska Probate Code<sup>94</sup>, in a conservatorship proceeding, the court has all the powers the protected person has over his estate and affairs, "which he or she could exercise if present and not under disability", except the power to "make or alter an estate plan". However, the court can enter certain orders relating to the protected person's estate plan, such as:

- a. Make gifts;
- b. "convey or release his or her contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy";
- c. Create revocable or irrevocable trusts;<sup>95</sup>
- d. Exercising or releasing powers of appointment;
- e. Renouncing interests;
- f. Making gifts "in trust or otherwise exceeding twenty percent of any year's income of the estate"<sup>96</sup>; or
- g. Change beneficiaries under insurance and annuity policies.

The same section says the appointment of a conservator has "no effect on the capacity of the protected person to make or alter an estate

plan". Does this section open the Conservatorship Court's jurisdiction to questions concerning such an "estate plan"?

In a 1994 Nebraska case<sup>97</sup>, four of the testator's six children had tried to place her under conservatorship, but failed. The case was appealed to the Nebraska Supreme Court, which upheld no conservatorship. Mother thereafter wrote a will that cut those four children out, leaving everything to the two that hadn't joined in the conservatorship. This will was offered for probate after Mother died, and one of the four filed objections to the it, claiming the mother lacked testamentary capacity and was under undue influence. The proponent of the will was given a summary judgment, on the grounds the prior Supreme Court decision established the mother was competent. However, the Supreme Court held the elements for the appointment of a conservator were different than those for testamentary capacity. In addition, collateral estoppel didn't apply to the issue of undue influence. Therefore the conservatorship proceedings didn't decide anything in the later will contest.

However, in a 1993 case interpreting the UPC version of this section, a Utah Court refused to allow the elimination of a beneficiary under a protected person's life insurance policy after his death, where the trial court "had never been asked to act to eliminate beneficiary while conservatee was alive," thus apparently ruling the trial court had the power to change the beneficiary if the protected person had been alive.<sup>98</sup>

What about problems in a conservatorship where there aren't sufficient funds for the protected person's care, without selling assets that would disrupt his or her estate plan? Can an order be entered to sell the protected persons's assets, keeping the protected person's estate plan in mind--similar to abatement at death?<sup>99</sup>

In this regard, Section 30-2656 of the Nebraska Probate Code<sup>100</sup> specifically requires a conservator to keep the protected person's estate plan in mind:

"In investing the estate,  
and in selecting assets of  
the estate for distribution  
[for the upkeep of the

protected person, or as gifts], in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person."

Interpreting this section, a 1994 Florida court refused to allow the guardian of an incapacitated person to "rewrite" the ward's estate plan by contesting the ward's revocable trust on the basis of undue influence:

"[U]ndue influence is not an available remedy to revoke a settlor's revocable inter vivos trust where the settlor is still alive at the time the action for revocation based upon undue influence is initiated."<sup>101</sup>

However, a 1993 North Dakota Supreme Court used this section as authorization to review the protected person's will to see if his homestead should be sold during his lifetime.<sup>102</sup>

It would appear there is some authority for using the conservatorship statutes to approve certain aspects of an estate plan made by the protected person. To what extent such an order is binding on all interested persons concerning testamentary capacity and undue influence in the event of a later will contest, waits to be seen.

"You can only predict things after they have happened."

Rhinoceros (1959)

Le

Ionesco (1912-1994)

Eugene

2. Through Trust Litigation? Could you avoid a will contest by bringing a declaratory judgment action concerning a living person's will or trust? As mentioned above<sup>103</sup>, without an ante-probate statute, the "probate" of a will for a living person is impossible. The "heirs" don't exist until the testator's death.

But what of a declaratory judgment action to construe a trust, instead of a will? What Court has jurisdiction? Under section 30-2405 of the Nebraska Probate Code, the county court has "jurisdiction of all proceedings to determine how *decedents'* estates subject to the laws of this state are to be administered, expended and distributed." Under Section 30-2806 of the Nebraska Probate Code, the county court has jurisdiction "of proceedings initiated by interested parties concerning the internal affairs of trusts." The Comment points out the Legislature struck the word "exclusive" before "jurisdiction", thereby inferring the district court has concurrent jurisdiction over such matters.

The Nebraska declaratory judgment statute also applies to all courts, "within their respective jurisdictions".<sup>104</sup> An example of the Nebraska district courts' jurisdiction concerning trusts is found in the case of Larson v. Vyskocil<sup>105</sup>, in which the Supreme Court upheld a daughter's attempt to compel her father to convey property to a trust, resulting from her father and mother's divorce.

In attempting to uphold a trust during the settlor's lifetime, a *revocable* trust suffers from the same problem as the will:

"[A] revocable trust cannot be contested until the death of the settlor. . . . The reasoning behind this rule is that the devisee of a revocable trust does not have any control over ownership of the trust property until the settlor's death. . . ."

Since the settlor has the absolute right to end the trust at any time and to distribute the trust property in any manner, those named as beneficiaries are merely potential devisees."<sup>106</sup>

However, what if the trust was *irrevocable* and funded? Nebraska's declaratory judgment statute provides as follows:

"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree."<sup>107</sup>

The Nebraska Supreme Court has held that the Act is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered."<sup>108</sup>

In fact, Section 25-21,152 specifically applies the declaratory judgment statute to trustees, allowing a "declaration" to direct a trustee "to do or abstain from doing any particular act in their fiduciary capacity", or to "determine any question arising in the administration of the . . . trust, including questions of construction of wills and other writings." For a discussion of the application of this form of statute to the trust area, see 22A Am. Jur. 2d "Declaratory Judgments " § 140, at 791 (1988).

In the case of Phillips v. Phillips,<sup>109</sup> the Nebraska Supreme Court applied the declaratory judgment statute to construe a *deceased's* will, and In re Reynolds' Estate,<sup>110</sup> the Court upheld a life insurance trust, *after* the insured died. The Reynolds case sets out some interesting rules:

1. The Court recited who could be the

plaintiff in such a suit:

"No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust."  
(Quoting the Restatement of Trusts).

Note this case was decided in 1956, before Nebraska enacted the Uniform Probate Code, and before Section 30-2806, giving all "interested persons" the right to "initiate" proceedings concerning trusts.

2. Again citing the Restatement, the Court said no settlor of a trust could maintain a suit against the trustee to enforce the trust, nor could someone who is only "incidentally" benefited by the trust, but isn't a beneficiary.

3. As mentioned, this lawsuit came after the settlor had died, and the Supreme Court said the beneficiaries in this case were members of a particular class, but they didn't become "certain as to identity and definite as to their respective interests" until the settlor died. Therefore, by implication, the lawsuit couldn't have been brought until the settlor died.

However, it's not clear if the trust was revocable or irrevocable, and, by its terms, one of the reasons for the trust appears to be to pay debt at the settlor's death, so some of the beneficiaries couldn't be determined *until he died*.

Nevertheless, the case points out the limitations of a declaratory judgment action during lifetime for certain types of trusts. For example, any lifetime action to uphold a trust that distributes assets to beneficiaries that would be determined as of the settlor's date of death would be subject to attack because you couldn't make all "interested persons" parties:

"It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to

the proceeding.'"<sup>111</sup>

In addition, other general rules about declaratory judgment actions may present problems for the "ante-mortem trust" lawsuit:

1. The plaintiff must have a "legally protectible interest" in the trust that's the subject matter of an action for a declaratory judgment";<sup>112</sup>

2. A "representative" or class action may be maintained for a declaratory judgment involving a trust;<sup>113</sup>

3. All of the rules about the joinder of necessary parties, who such parties are and the effect of their omission apply to declaratory judgment actions involving trusts;<sup>114</sup>

4. Cases from other jurisdictions say the trustee is a necessary party to the action;<sup>115</sup>

5. The general rules of pleading and the sufficiency of a declaratory judgment petition apply when used with trusts;<sup>116</sup>

6. Who has the burden of proof in a trust declaratory judgment action depends on the relief requested and the issues in the lawsuit;<sup>117</sup>

7. If the "res" of the trust is located in the state where the trust estate is to be administered, the courts of that state have jurisdiction to entertain an application for a declaratory judgment with respect to the trustee's authority to invest the trust funds;<sup>118</sup>

8. In order for an action for a declaratory judgment on a trust to be maintained, it's essential there be an "actual controversy" that relates to the "legal rights and duties of the parties involved in the trust."<sup>119</sup> Query: In a lawsuit to determine the validity of an irrevocable trust during the settlor's lifetime, is it necessary to have an independent trustee, for there to be an actual "controversy? The lawsuit obviously appears more legitimate with an independent trustee.

For examples of Courts wrestling with some of the issues we've discussed on trusts, undue influence, testamentary capacity and other related problems, take a look at:

1. Arkansas. In Dopp v. Sugarloaf Min. Co.,<sup>120</sup> a lawsuit after the death of the settlor, claiming forgery or fraud in making the trust, was successful.

2. Kansas. In Olson v. Harshman,<sup>121</sup> after the death of her parents, a daughter unsuccessfully attempted to set aside a trust that favored her brother. The case applies and discusses the "confidential" relationship between the brother and the parents, and applied it to the trust situation. The case places great reliance on the testimony of the attorney who drafted the trust.

3. Massachusetts. In Nickerson v. Fiduciary Trust Co.,<sup>122</sup> the settlor brought an action to set aside an *irrevocable* trust, on the grounds of undue influence, and the Appeals Court refused to invalidate or reform the trust.

4. Nevada. In Coleman v. First National Bank of Nevada,<sup>123</sup> the daughter of a deceased settlor brought an action to set aside a trust set up by her father. The Nevada Supreme Court upheld the trust, saying trust didn't violate the Statute of Wills, merely because the settlor reserved the right to revoke or amend the trust, and retained a beneficial interest during his lifetime.

5. Texas. In Brinker v. Wobaco Trust Limited,<sup>124</sup> the Texas court allowed the trust of a deceased settlor to be reformed, because of a possible mistake in the its drafting.

There are several reasons a client may not be willing to bring such a lawsuit:

1. The Expense. There is the obvious expense of the lawsuit. Even though the lawsuit would perhaps save much litigation expense after death, the client isn't paying it at that point--his beneficiaries are. Most clients got their money by saving it, not spending it.

"I'm tired of Love: I'm  
still more tired of  
Rhyme.

But Money gives me pleasure all the time."

"Fatigued" (1923)  
Hilaire Belloc  
(1870-1953)

2. The Clean Air of Day. As in the discussion on ante-mortem lawsuits, such a case would require the testator to disclose her estate plan to the world. One of the touted advantages of funded revocable trusts is their "secrecy"<sup>125</sup>. To bring a lawsuit over the plan isn't very secret.

3. Family Problems. Many families believe in the "Don't Talk About It" syndrome. If you don't mention the family troubles, they might go away. To bring a lawsuit over the estate plan discloses completely what's to happen at the client's death, and how he hates this kid, but loves that one. No more family reunions for these folks. Many clients would be unwilling to face that problem during their lifetimes. Let the beneficiaries clean up the mess.

4. The Thought of Death. As you know, it's very difficult to get people to think about death. They really aren't going to die, so why plan for it. To bring a lawsuit over your estate plan brings you directly to the realization you're going to buy the farm someday--perhaps soon.

"Personal death is a thought modern man will do almost anything to avoid."<sup>126</sup>

#### IV. CONCLUSION

Probably in no other area of the law can a future dispute be avoided as well as in the drafting of a will. In most cases, we can spot where the fight's going to come from. In addition, the lawyer can prepare for that fight--he gets to know the client very well in gathering the information needed for the will; he may have represented the family for years; the clients normally trust the lawyer to know the family secrets; and we may have years to get ready for the contest.

However, it is also the area where really horrible documents are drawn. Perhaps they're

done because of insufficient time taken; perhaps because of a lack of knowledge (client's and lawyer's); perhaps a failure to realize a contest is in the making.

Irregardless, the lawyer needs to appreciate what a will contest really is, and its consequences. You can then be alert for the possible contest, and do the necessary to prepare for it. As a former Attorney General said:

"I know of no type of litigation in which the importance of thorough investigation is more significant and rewarding than in a will contest."<sup>127</sup>

Nebraska has seen fit to protect the will-drafter from malpractice claims from disgruntled heirs after the client's death<sup>128</sup>, but he can't sleep well at night if he knows there was more he could have done to carry out his client's wishes.

The relationship between a "family will-drafter" and a client probably most closely approaches that of a family physician and patient. Don't let those folks down by not preparing for a possible contest. Instead of an estate, you may end up with a disaster. Remember:

"Any bird can build a nest, but it isn't everyone that can lay an egg."

-- Piet

Schreuders

For an interesting "Little Will Contest on the Prairie", see the article from the January 23, 2000 Omaha World Herald on a fight over Laura Ingalls Wilder, who died on February 10, 1957, followed by a persistent will fight in a Missouri federal court. The attorney for the plaintiff was Harold "Topper" Glass of Springfield, Missouri.

<sup>1</sup>Leon Jaworski, "Preparation and Trial of the Will Contest", 10 Baylor L. Rev. 87 (1958).

<sup>2</sup>Jeffrey A. Schoenblum, "Will Contests--An Empirical Study", 22 Real Prop., Prob. & Tr. J. 607 (1987) (Only 22.4 percent of people dying in study had a will filed for probate); "Contemporary Studies Project, A comparison of Iowans' Dispositive Preferences with Selected Provisions

of the Iowa and Uniform Probate Codes", 63 Iowa L. Rev. 1041 (1978) (60% of the people studied died with a will); Dunham, "The Method, Process and Frequency of Wealth Transmission at Death", 30 U. Chi. L. Rev. 241 (1963) (In the study, 75% of all males and 86% of all women had no will). These studies would obviously leave out the situations where there was fighting but a settlement was reached before the court became involved.

<sup>3</sup>Schoenblum, *supra* note 2, at page 614.

<sup>4</sup>John H. Langbein, "Will Contests", 103 The Yale Law Journal 2039, 2042 (1994).

<sup>5</sup>Thomas J. Reed, "Breaking Wills in Indiana", 14 Ind. L. Rev. 865 (1981).

<sup>6</sup>Stephen C. Simpson, "Avoiding a Will Contest: Estate Planning and a Legislative Solution", 37 Houston Lawyer 36 (Aug. 1999); and Schoenblum, *supra* note 2, at 646-52.

<sup>7</sup>Collins, "Will Contests in Nebraska: Incompetency and Undue Influence", UNL College of Law, 12th Annual Institute on Estate Planning (July 17-18, 1986).

<sup>8</sup>Schoenblum, *supra* note 2, at 615. The large percentage of contested wills were in estates having a value of less than \$50,000. In the Tennessee county studied, wills disposing of large estates were almost never challenged.

<sup>9</sup>Morton John Barnard, "Anticipation of Contests", Ill. B.J. 148 (Nov. 1973).

<sup>10</sup>Gerry W. Beyer, "Drafting in Contemplation of Will Contests", 38 The Practical Lawyer 61, 62 (1992).

<sup>11</sup>In re Estate of Wahl, 151 Neb. 812, 826-27, 39 N.W.2d 783 (1949).

<sup>12</sup>Stephen v. Coleman, 533 S.W.2d 444, 445 (Tex. Civ. App. 1976, writ ref'd n.r.e.), quoting Farmer v. Dodson, 326 S.W.2d 57, 61 (Tex. Civ. App. 1959, no writ).

<sup>13</sup>See, e.g., In re Estate of Noren, 119 Neb. 653, 658, 230 N.W. 495 (1930).

<sup>14</sup>In re Estate of Flider, 213 Neb. 153, 328 N.W.2d 197, 200 (1982).

<sup>15</sup>1 A. Casner, 173, n.15 (5th ed. 1984).

<sup>16</sup>See Warren, "Dependent Relative Revocation", 33 Harv. L. Rev. 337 (1920); 1 A. Casner, 174 (5th ed. 1984).

<sup>17</sup>In re Estate of Thomason, 144 Neb. 300, 13 N.W.2d 141 (1944).

<sup>18</sup>In re Estate of Kubat, 109 Neb. 671, 192 N.W. 202 (1923).

<sup>19</sup>In re Kerr's Estate, 117 Neb. 630, 222 N.W. 63 (1928).

<sup>20</sup>Beyer, *supra* note 10, at 70-71.

<sup>21</sup>T. Waterbury, Materials on Trusts and Estates 244 (1986).

<sup>22</sup>Beyer, *supra* note 10, at 70-71.

<sup>23</sup>In re Estate of Flicker, 215 Neb. 495, 339 N.W.2d

914 (1983).

<sup>24</sup>215 Neb. at 497, 339 N.W.2d at 915.

<sup>25</sup>In State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972), the Court said the lawyer could retain the original will only "upon specific unsolicited request of the client."

<sup>26</sup>Beyer, "The Will Execution Ceremony--History, Significance, and Strategies", 29 So. Tex. L. Rev. 413, 416 (1987).

<sup>27</sup>Beyer, *supra* note 26, at 418.

<sup>28</sup>"Estate Planning for Human Beings", 3 U. Miami Inst. on Est. Plan. § 69.1902 (P. Heckerling ed. 1969) (statement of Dean Willard H. Pedrick, panelist).

<sup>29</sup>John L. Carroll and Brian K. Carroll, "Avoiding the Will Contest", 8 Probate & Property 61-62 (May/June 1994).

<sup>30</sup>67 Michigan Bar Journal 1125 (emphasis added).

<sup>31</sup>See, e.g., Sections 30-2715 through 30-2746 of the Nebraska Probate Code, for payable on death and other similar types of ownership.

<sup>32</sup>Some of us even have old wax cylinders in our basement, used by more distinguished, dead, members of the firm.

<sup>33</sup>Beyer & Buckley, *infra* note 34, at 43.

<sup>34</sup>There are many excellent articles on videotaping the will execution ceremony, including Beyer, "Videotaping the Will Execution Ceremony--Preventing Frustration of the Testator's Final Wishes", 15 St. Mary's L. J. 1 (1983); Beyer & Buckley, "Videotape and the Probate Process: The Nexus Grows", 42 Okla. L. Rev. 43 (1989); Beyer, "Video Requiem: Thy Will Be Done", Trusts & Estates 24 (July 1985); Buckley & Buckley, "Videotaping Wills: A New Frontier in Estate Planning", 11 Ohio No. Univ. L. Rev. 271 (1984); and Nash, "A Videowill: Safe and Sure", 70 ABA Journal 87 (Oct. 1984).

<sup>35</sup>See Nebraska Probate Code Sections 30-2327 and 30-2328. For a discussion of Nebraska's history of requiring wills to be in writing, see In re Charles' Estate, 118 Neb. 634, 225 N.W. 869, 870 (1929), Godfrey v. Smith, 73 Neb. 756, 103 N.W. 450, 454 (1905) and Maurer v. Reifschneider, 89 Neb. 673, 132 N.W. 197, 198 (1911) (discussing noncupative wills). See Buckley & Buckley, *supra* note 34, at 273 for a discussion of the statutory requirements for wills, and the Uniform Probate Code.

<sup>36</sup>Jacobsen v. Farnham, 155 Neb. 776, 53 N.W.2d 917, 920 (1952).

<sup>37</sup>Beyer & Buckley, *supra* note 34, at 55.

<sup>38</sup>Oral declarations of the deceased may be offered if they "show his state of mind and consequent susceptibility to undue influence." In re Keup's Estate, 145 Neb. 729, 18 N.W.2d 63 (1945).

<sup>39</sup>See Beyer, *supra* note 34, at 12.

<sup>40</sup>Fed. R. Evidence 1001; Nebraska Rule of Evidence

1001, Section 27-1001.

<sup>41</sup>Beyer, *supra* note 34, at 22.

<sup>42</sup>Fed. R. Evidence 801(c); Nebraska Rule of Evidence 801(1), Section 27-801(1).

<sup>43</sup>Fed. R. Evidence 803(1).

<sup>44</sup>Fed. R. Evidence 803(3); Nebraska Rule of Evidence 803(2), Section 27-803(2).

<sup>45</sup>Fed. R. Evidence 807; Nebraska Rules of Evidence 803(22) and 804, Sections 27-803(22) and 27-804(2) (e).

<sup>46</sup>Beyer & Buckley, *supra* note 34, at 62.

<sup>47</sup>143 Neb. 440, 9 N.W.2d 801, 803 (1943).

<sup>48</sup>119 Neb. 653, 230 N.W. 495, 498 (1930).

<sup>49</sup>150 Neb. 295, 34 N.W.2d 366, 369 (1948).

<sup>50</sup>141 Neb. 413, 3 N.W.2d 752, 757 (1942)

<sup>51</sup>In re Estate of Seegers, 733 P.2d 418, 421-22 (Okla. Ct. App. 186). See also In re Purported Last Will and Testament of Stotlar, No. 1149 (Del. Ch. 1987) (LEXIS, Del. Library), *aff'd without opinion*, 542 A.2d 358 (Del. 1988) (videotape of a will execution ceremony supported a finding of lack of testamentary capacity); and Trautwein v. O'Brien, No. 88AP-616, slip op. (Ohio Ct. App. 1989) (LEXIS, Ohio Library) (videotape of will execution ceremony "most compelling evidence presented on the issue of testamentary capacity," with court finding lack of requisite capacity).

<sup>52</sup>Beyer, "Video Requiem", *Supra* note 25, at 27.

<sup>53</sup>Buckley & Buckley, *supra* note 34, at 280-81.

<sup>54</sup>See discussion at William J. Bowe & Douglas H. Parker, Page on Wills Section 181, at 248 (Bowe-Parker rev. ed. 1960 & Supp 1999).

<sup>55</sup>Section 30-24,103 (UPC § 3-905).

<sup>56</sup>Restatement, Second, Property, Section 9.1, Comment j.

<sup>57</sup>Jaworski, *supra* note 1, at 88.

<sup>58</sup>In re Estate of Noren, 119 Neb. 653, 658, 230 N.W. 495 (1930).

<sup>59</sup>See discussion of this phenomenon at Beyer, *supra* note 10, at 66-67.

<sup>60</sup>Beyer, *supra* note 10, at 67.

<sup>61</sup>Beyer, "Drafting in Contemplation of Will Contests", 38 *The Practical Lawyer* 61, 79-80 (1992).

<sup>62</sup>Beyer, *supra* note 61, at 81. See also Simpson, *supra* note 6, at 37, where the author suggests writing a check to the potential contestant on the day the will is signed, and then keeping the cancelled check as evidence.

<sup>63</sup>Simpson, *supra* note 6, at 37.

<sup>64</sup>Beyer & Buckley, *supra* note 34, at 56.

<sup>65</sup>See, generally, Beyer, *supra* note 10.

<sup>66</sup>This section is greatly indebted to a wonderful article by Yale Professor John H. Langbein, reviewing the book *Undue Influence: The Epic Battle for the Johnson & Johnson Fortune*, by David Margolick, cited *supra*, at note 4. The article is found at 103 *The Yale Law Journal* 2039 (1994).

<sup>67</sup>Shaffer, *The Planning and Drafting of Wills and Trusts*, 74-78 (1979).

<sup>68</sup>Langbein, *supra* note 4, at 2042.

<sup>69</sup>Jaworski, *supra* note 1, at 87.

<sup>70</sup>See discussion at William J. Bowe & Douglas H. Parker, *Page on Wills* Sections 26.85 and 26.86, at 180-81 (Bowe-Parker rev. ed. 1960 & Supp 1999).

<sup>71</sup>See Section 30-2429.01. What if you don't transfer it? Is there still a jury trial in the county court? Section 30-2429.01(4) says after transfer, the "district court may order such additional pleadings as necessary and shall thereafter determine whether the decedent left a valid will. *Trial shall be to a jury unless a jury is waived by all parties who have filed pleadings in the matter.*"

<sup>72</sup>Langbein, *supra* note 4, at 2043.

<sup>73</sup>*Banks v. Goodfellow*, 5 Q.B. 549, 564 (1870).

<sup>74</sup>Langbein, *supra* note 4, at 2043.

<sup>75</sup>See note 7, *supra*.

<sup>76</sup>Reed, *supra* note 5, at 897.

<sup>77</sup>Leopold and Beyer, "Ante-Mortem Probate: A Viable Alternative", 43 *Ark. L. Rev.* 131, 137 (1990).

<sup>78</sup>Section 30-2429.01, R.R.S. 1943.

<sup>79</sup>Jaworski, *supra* note 1, at 87 ("Generally speaking, the tendency of the judge is to uphold the will . . . .").

<sup>80</sup>Goldstein, *Once More, Surrogate Talk*, *N.Y. Times*, Sept. 4, 1977, at E5.

<sup>81</sup>See the discussion of how a poor trial judge helped the contestants get a good settlement in John Langbein's article, *supra* note 4, at 2044-45.

<sup>82</sup>See Nebraska Statute Sections 25-824 and 25-824.01, R.R.S. 1943 and *Shanks v. Johnson Abstract & Title, Inc.*, 225 *Neb.* 649, 407 *N.W.2d* 743 (1987).

<sup>83</sup>See, e.g., *Daily v. Board of Educ. of Morrill County School Dist. No. 62-0063*, 256 *Neb.* 73, 94, 588 *N.W.2d* 813, 826 (1999), for a discussion of the authorities and prior case law.

<sup>84</sup>Langbein, *supra* note 4, at 2043 (Citations omitted).

<sup>85</sup>Leopold & Beyer, *supra* note 77, at 135 (Citations omitted).

<sup>86</sup>Langbein, *supra* note 4, at 2044.

<sup>87</sup>See N.D. Cent. Code Sections 30.1-08.8-01 to 04; Ohio Rev. Code Ann. Sections 2107.081-.085; and Ark. Code

Ann. Section 28-40-202(a).

<sup>88</sup>Ohio Rev. Code Ann. Section 2107.081.

<sup>89</sup>Leopold & Beyer, *supra* note 77, at 175.

<sup>90</sup>Leopold & Beyer, *supra* note 77, at 174. For a discussion of other forms of ante-mortem probate besides such statutes, see Note, "Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives", 32 Case Western L. Rev. 776 (1982).

<sup>91</sup>Beyer, *supra* note 10, at 82.

<sup>92</sup>Cowan v. Cowan, 254 S.W.2d 862 (Tex. Ct. Civ. App. 1952). See also 22A Am. Jur.2d, "Declaratory Judgments", § 138, at 789 (1988); Howard Hughes Medical Institute v. Lummis, 596 S.W.2d 171 (Tex. Civ. App.); Davidson v. Brate, 44 Ohio App. 2d 248, 73 Ohio Ops. 2d 253, 337 N.E.2d 642; Pond v. Faust, 90 Wash. 117, 155 P. 776 (1916).

<sup>93</sup>Lloyd v. Wayne Circuit Judge, 56 Mich. 236, 23 N.W. 28, 30 (1885)

<sup>94</sup>Section 5-407 of the Uniform Probate Code.

<sup>95</sup>For a very interesting and informative case interpreting this portion of the UPC, and allowing the creation of a revocable living trust for a protected person, see Matter of Conservatorship of Sickles, 518 N.W.2d 673 (N.D. 1994).

<sup>96</sup>This provision is similarly found under §5-425(b) of the UPC (§ 30-2654(b) of the Nebraska Probate Code).

<sup>97</sup>In re Estate of Wagner, 246 Neb. 625, 522 N.W.2d 159 (1994).

<sup>98</sup>Matter of Estate of Leone, 860 P.2d 973 (Utah App. 1993).

<sup>99</sup>Under § 3-902 of the UPC (§ 30-24,100 of the Nebraska Probate Code), shares in an estate "abate" or reduce in the following order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; and, finally, (4) specific devises.

<sup>100</sup>Section 5-426 of the UPC.

<sup>101</sup>Ullman v. Garcia, 645 So.2d 168 (Fla. App. 3 Dist. 1994).

<sup>102</sup>Matter of Conservatorship of Kinney, 495 N.W.2d 69, 72 (N.D. 1993).

<sup>103</sup>See discussion at note 84, *supra*.

<sup>104</sup>Section 25-21,149.

<sup>105</sup>245 Neb. 917, 515 N.W.2d 660 (1994).

<sup>106</sup>Ullman v. Garcia, *supra* note 101, at 169. There is an excellent article (apparently unpublished) furnished to me by Jack Challis, a St. Louis, Missouri member of the American College of Trust and Estate Counsel, concerning Florida law, setting out Florida law and when trusts could be set aside after death for testamentary capacity and undue influence, entitled Belcher, Adams & Galbraith, "Revocable Trust Litigation: When? By Whom? What For?"

That article points out Florida has a specific statute governing trust contests, saying an action to contest the validity of a trust "may not be commenced until the trust becomes irrevocable."

<sup>107</sup>Section 25-21,149, et. seq.

<sup>108</sup>Slosburg v. City of Omaha, 183 Neb. 839, 165 N.W.2d 90 (1969).

<sup>109</sup>163 Neb. 282, 79 N.W.2d 420 (1956). See also Hipsley v. Hipsley, 162 Neb. 518, 76 N.W.2d 462 (1956); and Rohn v. Kelley, 156 Neb. 463, 56 N.W.2d 711, cert. denied, 346 U.S. 854, 74 S. Ct. 68, 98 L. Ed. 368 (1953), overruled on other grounds, Lambie v. Stahl, 178 Neb. 506, 134 N.W.2d 86 (1965).

<sup>110</sup>268 N.W.480 (1936).

<sup>111</sup>Phillips v. Phillips, *supra* note 109, 422.

<sup>112</sup>See 26 C.J.S. "Declaratory Judgments", § 119, at 272 and Bernheimer v. First Nat. Bank of Kansas City, 225 S.W.2d 745, 359 Mo. 1119 (applying this rule to trusts and trust estates).

<sup>113</sup>See 26 C.J.S. "Declaratory Judgments", § 120, at 277 and City Bank Farmers Trust Co. v. National Cuba Hotel Corp., 133 N.Y.S.2d 8 (trustee could sue as a representative for judicial construction of covenant in trust).

<sup>114</sup>See 26 C.J.S. "Declaratory Judgments", § 123, at 283 and Ben B. Wood Realty Co. v. Wood, 132 Neb. 817, 273 N.W. 493 (1937).

<sup>115</sup>See 26 C.J.S. "Declaratory Judgments", § 127, at 293 and Fletcher v. Stanton, Prob., 124 N.E.2d 495, appeal dismissed in part, App., 124 N.E.2d 493 (Ohio).

<sup>116</sup>See 26 C.J.S. "Declaratory Judgments", § 136, at 319 and Spaulding v. Hotchkiss, 56 N.Y.S.2d 168; Sessions v. Skelton, 163 Ohio St. 409, 127 N.E.2 378 (Ohio); Sullivan v. San Francisco Art Ass'n, 225 P.2d 993, 101 Cal. App.2d 449.

<sup>117</sup>See 26 C.J.S. "Declaratory Judgments", § 148, at 351 and Gibson v. Gibson, 106 N.E.2d 102, 122 Ind. App. 559 (Ind.).

<sup>118</sup>See 26 C.J.S. "Declaratory Judgments", § 112, at 253 and Neff v. Cleveland Trust Co., 7 Ohio Supp. 136.

<sup>119</sup>See 26 C.J.S. "Declaratory Judgments", § 101, at 230-31 and Caldwell v. Rosenberg, 47 Cal. App.2d 143, 117 P.2d 366.

<sup>120</sup>288 Ark. 18, 702 S.W.2d 393 (1986).

<sup>121</sup>233 Kan. 1055, 668 P.2d 147 (1983).

<sup>122</sup>375 N.E.2d 357 (Mass. App. 1978).

<sup>123</sup>506 P.2d 86 (Nev. 1973).

<sup>124</sup>610 S.W.2d 610 (Tex. Civ. App. 1980).

<sup>125</sup>Even though the disposition must be disclosed for Nebraska inheritance purposes.

<sup>126</sup>Shaffer, "The 'Estate Planning' Counselor and Values Destroyed by Death", 55 Iowa L. Rev. 376, 377

(1969).

<sup>127</sup>Jaworski, *supra* note 1, at 93-94.

<sup>128</sup>St. Mary's Church of Schuyler v. Tomek, 212 Neb.  
728, 325 N.W.2d 164 (1982).