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Will Contests and How to Avoid Them

By James S. Rizzo, Esq.*

We've all heard stories of hotly contested celebrity estates. Battles over the estate of legendary guitarist Jimi Hendrix were still going on as recently as last year, a shocking 45+ years after his death. The news that musician Prince, who was known to be controlling and astute in his business affairs, surprisingly died without an estate plan immediately spawned litigation which will no doubt go on for years. However, you do not need to be a celebrity or millionaire to become embroiled in, or be the subject of, an estate battle.

Disputes can and do arise not just over money, although that usually tops the list, but over the family home, camp or other real property, business ownership interests and an array of personal property items such as family heirlooms, antiques and classic vehicles. Battles over estates are usually very costly, irrevocably destroy family relationships and generally end up with all sides upset. The cost of getting your affairs in order is far less than the thousands an average litigation can cost. While books can be written on what can and does go wrong with an estate after a person dies, here are several tips that can either eliminate or make any challenge to your final wishes very difficult:

1. Get your Will and Estate Plan Complete! An obvious but very critical point. If you want your family and loved ones to be provided for and get specific items of your legacy, you need to avoid procrastination, put pen to paper of your intentions for assets and property when you die and see an attorney to complete your plan. Do not be "paralyzed by perfectionism" as there will rarely be a perfect time to complete a plan. Do your best under the circumstances you are in and let a legal professional guide you to finalize your core estate documents (Will, Power of Attorney and Health Care Proxy and a trust if warranted).

2. Utilize an Attorney. Yes, there are forms one can find on the Internet for most anything but is that how you want to entrust a lifetime of assets, the ongoing care for your spouse, significant other and/or minor or disabled child? Everyone wants to save money but remember, ***"You get what you pay for!"*** Most people go to a doctor for an illness or an expert mechanic for a necessary repair job and completing an estate plan is no different. An attorney should be trained on all the requirements specific to New York State and should be able to effectively guide and answer all the, "What if …?", questions that arise when completing your plan. Spending what usually equates to an average car repair to complete a Will can potentially avoid years of litigation and many thousands of dollars spent by your family members later if there is a dispute over your estate.

3. Communication with family members goes a long way. Open and honest communication with family regarding estate plans is all too rare. Our firm always offers and encourages people to bring in their children or other beneficiaries when designing and completing a plan so everyone understands what is intended and to avoid subsequent disputes. I've seen estate plans change dramatically in a very positive way when one child speaks up that he or she would like to maintain the family house or business or desires specific items the parents otherwise thought he or she had no interest. There are a variety of reasons why people keep their assets and affairs private but clear communication can avoid years of bitterness among your children or other family members after your passing.

4. Be clear with your intentions. Ask your attorney questions. Do not leave things to chance or assume because you told a person they will get a personal item when you die (without specifying it in a Will) that it will actually happen. An attorney should map out what will happen upon your death as well as the terrible circumstance if your children or other beneficiaries die before you. You should also list "remote contingent beneficiaries" in your Will who are the people and/or entities/charities who would inherit if all your named family members or beneficiaries pass before you. It is called estate "*planning*" for that reason, to plan for any number of contingencies or circumstances, however tragic or unlikely they may seem.

5. Include a "No Contest" clause in your Will or Trust. In legal speak this term is called the "in terrorem" clause, which is Latin for " in fear". I refer to it as the "Don't mess with me!" clause. Generally, this is a clause in a Will or trust designed to instill "fear" that if anyone challenges your wishes and loses, that person loses any bequest they would otherwise be entitled to under the Will or trust. Example: son Johnny is not happy he was "only" left 20% of his Mother's estate and his other two siblings were left 40% each. Johnny launches an unsuccessful challenge to overturn the Will. With a properly worded No Contest clause, Johnny now ends up with zero (0%) for putting everyone through his unsuccessful challenge. Such a clause thus acts as a deterrent for many such Will contests.

6. Complete your Estate Plan while you are healthy! All too common is the situation where people are compelled to complete a Will when they are very ill or in failing health. While it is always better to complete a plan late than never, President John F. Kennedy expertly summarized it: *"The time to repair a roof is when the sun is shining."* The most common challenge to a Will is that a person lacked mental capacity to sign and understand the Will, and/or was unduly influenced by another individual into leaving a disproportionate amount of assets to a specific person. The courts are filled with litigants arguing their parent(s) could not have understood their estate documents when they signed them because they were on various medications, suffered from Alzheimer's or dementia or had other mental or physical ailments which clouded their judgment and made them susceptible to a greedy caregiver.

These cases become very costly and can, among other things, require the retention of medical experts and the review of voluminous medical records and reports. Even with some proof of physical impairment, memory loss or lack of capacity, all the facts surrounding the creation and signing of the Will need to be examined, which further adds to the length and cost of litigation. Completing an estate plan in a time of good health and clear thinking eliminates any such arguments when you are gone.

7. Make sure your Will is signed and witnessed properly. While this is a legal requirement your attorney should know, follow and be responsible for, be aware that if a Will is not properly executed it is subject to challenge and may later be found invalid. If your attorney does not explain the proper signing protocol, ask about it. In New York State, a Will, among other things, needs to be signed in front of two independent witnesses who must also sign their names on your Will. Additionally, although not required, it is always a good practice for the attorney to have the witnesses sign an accompanying affidavit indicating they properly witnessed the Will in the event the witnesses die or are unavailable if and when a Will is later challenged.

8. Your Attorney should ask you questions in front of the witnesses before you sign your Will. Your witnesses (one of which can be the attorney) must be able to later verify or sign an affidavit that you had mental capacity and understood what you were signing. Therefore, prior to signing your Will the attorney should ask you a series of questions in front of the witness(es), such as: "*Are you over the age of 18? Are you of sound mind and memory? Did you take any drugs or alcohol [the day of the signing] that would effect or impair your ability to understand your Will? Is anyone forcing or pressuring you to sign the Will? Do you understand the nature of your bounty (i.e., the nature of your assets and how they are to be distributed upon your death); Is it your intention to revoke any prior Will you have in place by signing this new Will? Do you wish [name the witnesses] to be your witnesses on your last Will and Testament?"* While these questions may sound overly formal, following this protocol substantially wards off challenges that a Will was not properly executed or that the signer lacked mental capacity.

Although the above is not an exhaustive list of safeguards, it highlights the necessity of having things done properly and leaving nothing to chance. The peace of mind an estate plan should provide must be weighed against the lasting hurt and severed family relationships once the damage has been done due to a nonexistent or sloppily put together estate plan.

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Last Revised: June 1, 2017