WILL CONTESTS

by Curtis E. Shirley

It is the rare circumstance where a plaintiff files a will contest because he or she received what would otherwise be an intestate share. Children who inherit equally rarely force the high attorney fees or emotional cost of litigation. When a testator signs a will or trust which treats heirs differently, watch out. Although no person deserves to inherit, history, feelings, and emotions say otherwise. The reasons for a diminished inheritance might be apparent. But reasons sometimes do not help resolve the family turmoil left behind.

In recent years will contests and trust contests have increased for several reasons. Starting in 1960s society changed its standards resulting in many more step parents, step children, and blended families. Baby boomers are passing away. Which set of kids inherit usually depends on which parent survives the longest. The elderly have more choices in a nursing home or in home care. With kids not handling day to day responsibility, care takers are inheriting more than ever. The ethical standards of fiduciaries also appears on the decline. Witnesses to wills inherit. Powers of attorney control too much. Even attorneys are drafting documents benefitting themselves or members of the attorney's family.

STANDING

To have standing to complain about an inheritance, the petitioner or plaintiff must be an interested person.

> "´Interested persons´ means heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved." *I.C. 29-1-1-3(a) (13).*

This includes a family member who would inherit under the laws of intestacy if there was no will or trust, and a beneficiary under a prior or later document. *See Rayle v. Bolin, 782 N.E.2d 1063 (Ind.App. 2003).* A beneficiary under the probated will or trust, and a named fiduciary in a document other than the probated Will might be able to file a complaint to start the case; but they must in the end have something to gain for the complaint to survive. *See Estate of Yeley, 959 N.E.2d 888 (Ind.App. 2011)*; *cf., Simon v. Simon, 957 N.E.2d 980 (Ind.App. 2011).*

OBJECTIONS TO PROBATE

If a beneficiary believes a will exists that should be contested, he or she may file an objection to its probate.

> "Prior to the admission of a will to probate, written objections to its probate alleging that such objections are not made for vexation or delay may be filed in the court having jurisdiction over the probate of the will by any interested person. No notice of the filing of such objection need be given. The clerk shall note such filing of an objection in the estate docket and copy such

> objections in the will record. If such will is thereafter offered for probate, it shall be impounded by the clerk, copied in the will record, and its probate continued for thirty (30) days. If an action to resist the probate of such will is not commenced within thirty (30) days, such will may be admitted to probate without notice." *I.C. 29-1-7-16*.

Although such an objection to probate is usually filed soon after a death, it can be filed before the testator has passed away. This is more common where the testator is a ward under guardianship and contested plans are discovered or signed.

Objections to probate have an interesting history. Prior to 1954, if objections were filed, the Probate Code placed the burden of proof on the petitioner who wanted to probate the will in the first place. Since 1954 the Probate Code places the burden of proof on the contestant, whether or not framed as objections to probate, an action to resist probate, or a will contest.

> "In a suit: (1) objecting to the probate of a will under section 16 of this chapter; or (2) testing the validity of a will after probate under section 17 of this chapter, the burden of proof is upon the contestor." *I.C. 29-1-7-20*.

One benefit to filing objections to probate verses a will contest is the court usually appoints a special administrator rather than simply rubber stamp the executor nominated in the will who files a petition to open the estate. *I.C. 29-1-10-15*. Keep in mind, however, courts may look at the executor nominated in the contested will in selecting a special administrator.

One drawback to filing objections to probate is an action to resist probate may have to be filed within 30 days of the Clerk impounding it, rather than the ordinary three month time period to file a will contest.

SOME WILL CONTESTS ARE NOT WILL CONTESTS

A complaint for breach of contract to devise a Will is not the same as a Will Contest. If the complaint alleges the decedent promised to sign a Will but did not, it is important to file the complaint as a timely claim. The same applies if the decedent promised to keep a Will but revoked it. *See Keenan v. Butler, 869 N.E.2d 1284 (Ind.App. 2007)*. If the decedent promised to pay a caretaker in an estate plan, or leave a farm as payment to the farmer, the failure of the decedent to make such a Will should also cause the caretaker or farmer to file a claim for services.

If a Will Contest will not make the plaintiff whole. Another potential action is the tort of interference with an inheritance. *See Keith v. Dooley, 802 N.E.2d 54 (Ind.App. 2004)*.

TIPS FOR WILL CONTESTS

Governed by statute, plaintiffs have a statutory road map in filing a will contest:

1. A complaint must be filed within three months of the court's order probating the will.

> "Any interested person may contest the validity of any will in the court having jurisdiction over the probate of the will within three (3) months after the date of the order admitting the will to probate by filing in the court the person's allegations in writing verified by affidavit, setting forth:
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> > (1) the unsoundness of mind of the testator;
> > (2) the undue execution of the will;
> > (3) that the will was executed under duress or was obtained by fraud; or
> > (4) any other valid objection to the will's validity or the probate of the will.
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> The executor and all other persons beneficially interested in the will shall be made defendants to the action." *I.C. 29-1-7-17.*

2. The complaint must include summons and a filing fee. *Smith v Estate of Mitchell, 841 N.E.2d 215 (Ind.App. 2006).* Some plaintiffs file the complaint under the estate's caption and cause number; better to avoid a motion to dismiss for failing to pay a filing fee. In Marion County, Indiana will contests are filed in the probate court. In other counties, plaintiffs may file will contests with an eye toward which judge will ultimately preside.

The Indiana Supreme Court has rendered recent and strong precedent that the trial rules have real teeth. *See IC. 29-1-7-18*. *See Avery v. Avery, 953 N.E.2d 470 (Ind.. 2011).* In *Avery* the Indiana Supreme Court held that all defendants in a will contest must file an answer. Not discussed in the opinion is whether the personal representative, charged with a fiduciary duty to represent all heirs, can file a single answer. The result of this opinion is a slight change in the effect of Trial Rule 76. Prior to *Avery* defendants in a will contest had thirty days to file a motion for automatic change of judge because the case was one that did not require a responsive pleading. After *Avery* any defendant has only ten days from when the pleadings are first closed to file the motion.

3. The complaint must name as defendants the executor and all persons named in the will. The petition to open the estate in the first place should provide all of this information in detail. If the plaintiff files against one defendant, case law has allowed the plaintiff to amend and include any omitted defendants. Case law has also allowed amendments to add plaintiffs, and allowed plaintiffs and defendants to switch sides. *See Johnson v. Morgan, 871 N.E.2d 1050 (Ind.App. 2007); Estate of Helms, 804 N.E.2d 1260 (Ind.App. 2004).*

One tricky situation is the case where a beneficiary has the court probate a will (sometimes called spreading the Will of record) but there is no petition to open an estate. This is more common where a trust owns all of the property and no estate was really contemplated. Three months come and go and any will contest is barred, even though the only way to discover the will's probate is to contact the clerk. To contest such a will, the defendants would include all those named in the will and I suggest you file a petition for the court to appoint a special administrator to defend it – then amend to include the newly named administrator.

4. The text of the complaint should copy the language of Indiana Code Section 29-1-7-17. The most common reason for contesting a will alleges the testator was of unsound mind when he or she signed it. Others include undue execution, the will was a product of duress, fraud, undue influence, an insane delusion, or the existence of a later will.

5. Trial Rule 9 applies, so the complaint should attach a copy of any contested documents, and plead fraud with particularity. *E.g., Estate of Parlock, 486 N.E.2d 567 (Ind.App. 1985).* Obviously fraud and undue influence do not happen in public places. So I suggest simply quoting the statute and in the face of any motion to dismiss for not being more particular, ask the court for more time so discovery might disclose the particulars. Defendants can also file motions for more definite statements, motions to strike, etc. In short, all of the trial rules of procedure apply.

6. The plaintiff should verify the complaint. *I.C. 29-1-20-1.* In fact the Probate Code requires petitioners to verify almost everything. But such a requirement is often overlooked and when noticed can be cured without a jurisdictional problem. Better for the attorney not to sign the verification for fear of making himself a witness who cannot serve as the attorney in the future.

7. The plaintiff must post a bond, although this is not a jurisdictional issue. *Harper v. Boyce, 809 N.E.2d 344 (Ind.App. 2004).*

> "At the time of filing a verified complaint under section 17 of this chapter, the plaintiff in the action, or some other person on the plaintiff's behalf, shall file a bond with sufficient sureties in an amount approved by the court, conditioned for the due prosecution of the proceedings and for the payment of all costs if in the proceedings judgment is rendered against the plaintiff." *I.C. 29-1-7-19.*

In calculating a reasonable bond amount, the Court does not include litigation expenses, the costs of deposition transcriptions, acquisition of medical records, photocopies, nor should it include attorney fees. "Costs" is a term of art that includes only filing fees, statutory witness fees, and jury fees.

> "the bond required under IC 29-1-7-19 is not intended to compensate the Estate for any and all expenses and/or delay losses that it might incur because of an unsuccessful will contest; rather, it is to cover costs." *Wiley v. McShane, 875 N.E.2d 273 (Ind.App. 2007).*

Although costs are relatively minimal, the trial court has been held to not abuse its discretion in assigning a bond of $2,500. *See Zelek v. Jankowski, 598 N.E.2d 596 (Ind.App. 1992).* $75,000 is way too much. *Wiley v McShane, 875 N.E.2d 273 (Ind.App. 2007).*

8. Without dispute, will contests may be tried to a jury if timely requested. *Lamb v. Lamb, 5 N.E. 171 (Ind. 1886).*

9. The trial court or Jury does not have the option of splitting the baby in half.

> "If such determination be against the validity of such will or the competency of the proof, the court shall refuse or revoke the probate thereof; but if it be in favor of the validity and due execution of such will, probate thereof shall be admitted or ratified." *I.C. 29-1-7-21.*

The Will is either valid or not valid. Only in mediation and settlement may parties seek a different result.

10. Attorney fees are allowed from the Estate for the defense of the Will Contest. In some circumstances the Estate is also responsible for the attorney fees of the plaintiffs.

> "When any person designated as executor in a will, or the administrator with the will annexed, or if at any time there be no such representative, then any devisee therein, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees in such proceedings." *I.C. 29-1-10-14.*

The policy behind this is to prevent a race to the courthouse. *Estate of Goldman, 813 N.E.2d 784 (Ind.App. 2004)* (successful plaintiff entitled to attorney fees). If the plaintiff is attempting to probate a prior or later Will, the plaintiff's attorney fees are paid by the Estate. *Estate of Clark, 568 N.E.2d 1098 (Ind.App. 1991)*(personal representative defending Will must have good faith defense)*; Fickle v. Scampmorte, 183 N.E.2d 838 (Ind. 1962)* (even if plaintiff has a contingency fee). It is open to debate whether an unsuccessful plaintiff is entitle to attorney fees where the plaintiff is asserting intestacy.

11. The settlement of a Will Contest is quite different from the settlement of more common types of litigation. If the goal of the Probate Court is to follow the wishes of the decedent – after all it is the decedent's property which is being distributed – then the trial court stands as the final gatekeeper to prevent heirs from simply ignoring the decedent's wishes. While most litigation can be settled out of court, settlement of probate matters is usually done with petitions and orders open to public view.

> "(a) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons having interests or claims which will or may be affected by the compromise, except those who may be living but whose present existence or whereabouts is unknown and cannot after diligent search be ascertained.
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> "(b) Any interested person may then submit the agreement to the court for its approval and for the purpose of directing the agreement's execution by the personal representative of the estate, by the trustees of every testamentary trust which will be affected by the compromise, and by the guardians of the estates of minors, of incapacitated persons, of unborn and

> unascertained persons, and of persons whose present existence or whereabouts is unknown and cannot after diligent search be ascertained, who might be affected by the compromise." *I.C. 29-1-9-2.*

See Krick v. Farmers & Merchants Bank, 279 N.E.2d 254 (Ind.App. 1972) (failure to comply with the Adjudicative Compromise Statute creates a voidable agreement); *Vernon v. Acton, 732 N.E.2d 805 (Ind. 2000)* (court cannot enforce settlement agreement where the mediation rules require a writing signed by the parties).

12. While a Will Contest is pending, the personal representative administers the Estate consistent with the Will and the laws of intestacy.

> "Prior to the adjudication of a pending will contest any general personal representative or any special administrator, within the limits of his authority, shall proceed to administer the estate pursuant to the law respecting intestate estates, so far as the same may be done consistent with the terms of any such will." *I.C. 29-1-10-16.*

I would also raise the additional point that any prior Will should also be considered.

13. If a Will Contests is successful, the doctrine of dependent relative revocation may revive a prior Will. *See Estate of Oliva, 880 N.E.2d 1223 (Ind.App. 2008)* (allowing it); *Roberts v. Fisher, 105 N.E.2d 595 (Ind.1952)* (not allowing it).

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