

## To Discourage Challenges, How You Create Your Estate Plan Is As Important As What's In It

Estate challenges launched by heirs of the rich and famous are common. But the heirs of us “regular folks” are not shy about suing when they feel they’ve gotten less than they deserve, too.

Challenges often rest on allegations that the decedent was pressured to make certain dispositions, and/or that the decedent lacked capacity to do planning. Therefore, creating an estate plan that is unlikely to be successfully challenged goes beyond what is actually *written* in your plan. ***The circumstances under which the plan was created, and documenting them, are also essential.***

Documentation starts the moment you arrive at your estate planning lawyer’s office. Ideally, you should come alone. If you are accompanied by an adult child, a girlfriend/boyfriend, caregiver—anyone, really—your lawyer should initially talk with you privately. I always politely explain that a private conversation is

necessary to determine that the client is not being pressured by the person waiting outside. After that private conversation, we will invite that person into the consultation if the client wishes and I agree it is appropriate.

By way of example, a client came to my office accompanied by her second husband, who she’d recently married. He insisted on participating in the meeting and made it clear everything was to go to him and nothing to her children from her prior marriage. I could not determine if this is what the client wanted, and said I could not represent her, as he was making a perfect case for a future estate challenge based on undue influence.



Joseph S. Karp, C.E.L.A.

If mental capacity may be a potential issue, we generally recommend that the client see a physician to determine competency. Even if someone has been diagnosed recently with Alzheimer’s or similar condition, that person may still have sufficient

lucidity. Some people want to videotape the meetings, but in our opinion, physician’s documentation of capacity, along with our observations during the time spent talking with the client, are more compelling documentation.

Just as a technical error can get a criminal case thrown out of court, so can a technically flawed document give challengers grounds for a successful lawsuit. Whether will or trust, your plan must conform

to all legal requirements, including proper execution. Also, do not believe that a “no contest” clause in your documents is a magic bullet to discourage would-be challengers; these clauses are not valid in Florida. Be sure to see an experienced, knowledgeable estate planning/elder law attorney so your planning meets all the necessary legal requirements.

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Read The Florida Elder Law and Estate Planning Blog at [www.karplaw.blogspot.com](http://www.karplaw.blogspot.com).

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