

**ESTATE (PLANNING) LITIGATION POINTERS:
A LITIGATOR'S PERSPECTIVE**

**R. Kevin Spencer
SPENCER & JOHNSON, PLLC
500 N. Akard Street, Ste 2150
Dallas, Texas 75201
(214) 965-9999
(214) 965-9500 – Fax
kevin@dallasprobate.com**

www.dallasprobate.com

BOK FINANCIAL

March 22, 2018

**ESTATE (PLANNING) LITIGATION POINTERS:
A LITIGATOR'S PERSPECTIVE.**

I. INTRODUCTION: This presentation and paper is designed to inform fellow attorneys about some of the evidence we seek in our will contest cases, which in turn informs estate planners about the diligence necessary to avoid will contests. The goal is to provide angles for attacking Wills, which, at the same time, will give estate planners knowledge to help avoid those attacks. Right out of the chute, estate litigators search for evidence that proves a lack of testamentary capacity or undue influence. Within that evidence, estate litigators search for evidence that allows them the opportunity to make arguments to a jury for finding a Will¹ invalid. While I do not intend to give away all of our secrets, much of the content of this speech and paper covers seemingly obvious propositions that are either wholly or mostly ignored. I will give real life examples of evidence we have seen or developed in our own will contests (identities will be protected). The information provided will, hopefully, allow estate planners to prepare themselves and their file to support and defend their work product, in turn, helping defense attorneys defend their work product. Estate litigators will hopefully get some helpful hints about things to search for in their quest to represent their will contest client as best as possible. In short, the goal of this presentation is to assist both sides of the will contest bar.

II. ESTATE PLANNING – ESTABLISHING A PROCESS:

As an estate litigator, the first thing we do to investigate or determine whether the testator was

in ill health or was susceptible to undue influence or was in a position to be unduly influenced is to look at the estate planner's process. Every estate planner a/k/a estate scrivener² should focus on the process of developing and preparing the estate plan and following through with that process through the execution of the Will. Again, the number one piece of advice to estate planners to avoid a will contest is to develop the process and establish standards and procedures in the process that are followed in every case to the end.

“The Strength of Your Process Will Dictate the Excellence of Your Product.”

A. What is the Process?

What is the process? The answer is there is no exact process and the establishment of your process is what can separate you from your competitors. It can and should be your trademark – that “it” factor that makes you different than the guy down the street and that helps protect you from malpractice claims. It can make or break your credibility when testifying in support of your work product. It can be the “Wall of China” between you and an estate litigator trying to find a way to set aside a Will that you believe is valid. The process requires you to set up procedures and standards – usually, high standards – that should be followed, as a general rule, in your practice. Of course, every client and every client's situation is different, so the process cannot be so rigid that you cannot adapt to the desires, property or plan of the particular client.

The process requires you to establish standards of excellence in your practice that makes you above reproach or as far above

¹ I capitalize the term “Will” when used to describe a Last Will & Testament because it is a formal document and it differentiates it from the normal use of the term “will”, such as “I will...”.

² The term “scrivener” means the “scrivener attorney”, i.e., the estate planning attorney. Of course, a testator can go and purchase or prepare their own “store-bought” Will form, but if someone besides the testator is preparing the testament, they are expected to have a law degree. Preparing a Will without a law license is considered the unauthorized practice of law. *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 164 (Tex. App.—Dallas 1992), writ denied (Sept.

9, 1992) (“Drafting and supervising the execution of wills is, we believe, practicing law. By a will legal rights are secured. In giving instructions, confidential communications regarding family relations are often necessary. There is no phase of the law which requires more profound learning than on the subject of trusts, powers, the law of taxation, legal and equitable estates, perpetuities, etc. These duties cannot be performed by an unlicensed person, not an attorney, and who is untrained in such complex legal subjects.” *Palmer v. Unauthorized Practice Comm. of State Bar*, 438 S.W.2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969) (emphasis added).

reproach as possible. The process requires you to meticulously follow the requirements of the law, to consider every client is as important as the next and to not cut corners. This includes documenting the process well enough to respond to inquiries about it. Do you do enough – in every case – to make sure you understand the testator's desires? Do you make and keep notes about your client's desires? Do you ensure the desires communicated by the testator are his or her desires and not those of someone else? Do you make sure no one has an opportunity to unduly influence the testator at the time of the execution? If you do not, your process is broken. If you have a broken process, you leave the door open for a good estate litigator to poke holes in your work product, if not set it aside completely.

B. Documenting the Process – Taking and Keeping Notes.

Take and Keep Notes. It cannot be stressed enough how important it is for the scrivener attorney to take notes throughout the entire process; it is even more important to keep and preserve those notes. A scrivener attorney should document the process as if he or she is writing a sketch or outline for a book they are about to write for their client. The goal is not actually write the book, but to have good enough notes that you could write a book about your client, their situation and their desires for the estate plan when called upon by a major publisher to do it. Of course, you would never write the book because everything your client tells you is privileged (until after death subject to the exception at TEX. R. CIV. E., Rule 503(d)(2)). The point is to take notes and make it a habit to do so. You will be glad you did.

I have seen on many occasions where a scrivener testifies they took notes, but it is not "their practice" to keep them. Even worse, they only keep them for a period of time, i.e., "I kept them, but it is my practice to destroy them after X number of years." Wait, seriously? You took notes, kept them, but then arbitrarily destroyed them? "When did you destroy them? Oh, I do not remember." At best, it casts doubt on the entire preparation process. At worst, it seriously harms the credibility of the scrivener and suggests spoliation and could subject the scrivener to damages or sanctions for spoliation.

PRACTICE TIP: Make notes and keep them. You will not regret it.

C. Preparation of the Will.

It goes without saying that a Will is one of the most important documents a person will ever sign and should be treated as such. It is the document that speaks after the person dies, essentially the Decedent speaking from the dead and directing disposition of his or her property. Therefore, it should be the testator's statement, not the attorney's. If an attorney wants to avoid a will contest, he or she needs to be deferential to the testator and not take over or control the process. Often scriveners believe they are smarter than the testator and that they know what is best for the testator. **Injecting yourself into the desires as opposed to communication of the desires is the worst an estate planner can do to the process and will, most definitely, put you on the wrong end of an uncomfortable cross-examination.** Nothing is worse for a scrivener when defending his or her work product than to have to admit, under oath, that the document he or she prepared for the client does not comport with the testator's desires. More particularly, that the Will – the attorney's work product – does not match up with the intent of the testator. In other words, you have to admit you did not perform the most basic part of your job, correctly expressing your client's testamentary desires.

It is incredibly important to have thorough discussions with the testator about his intent and desires, particularly, if a person, who would be a natural object of the testator's bounty, is disinherited. The scrivener attorney should meet with the testator as many times as it takes to be certain of the testator's desires. If the scrivener attorney is not willing to have these meetings and discussions, he or she should find a different business.

D. Be Prepared to Defend Disinheritance.

For some, even the thought of disinheriting a natural object is totally foreign and unthinkable. However, for others, it is more natural than leaving anything to the natural object of their bounty. Executing a natural (normal disposition) Will to family and bloodlines is almost understood, so deviating from such disposition –

generally understood as being aberrational – causes instant consternation and curiosity. Why would someone do such a thing? What is a reasonable explanation for the disinheritance? Most of the time, if there is a good or reasonable excuse for disinheritance, an outsider looking in – more accurately, a juror – usually can shrug their shoulders and agree or concede that doing so makes sense or is reasonable. However, without such explanation, immediate doubt is cast on the entire process and the Will becomes, instantly, suspect. Disinheritance is the one instance where the burden almost shifts to the proponent of a Will to provide evidence to explain the deviation. Of course, it does not shift from a legal perspective, but without a reasonable explanation from the proponent, a juror is going to be left to wonder why – to ponder or guess about possible reasons for such an aberration. The “mommy loved me more” or “he or she got enough already” excuses generally do not suffice. Of course, if these excuses are all the proponent has to justify the disinheritance, well then there better be some evidence to prove such feelings by the testator were, in fact, the case. The proponent saying it or guessing about it because there is no other reason, will, usually, not carry the day.

When there is a disinheritance, the jury usually turns to the proponent to explain “why,” which is exactly why the scrivener of the Will needs to prepare for defending such disinheritance. Many scribes believe their only obligation to their client is to hear what they say and then regurgitate what the client tells him/her that he/she wants to do with his or her property. Of course, putting down the client's desires is the ultimate goal, but it has to be done within the context of the process. A client can go on LegalZoom or a similar website and simply input (regurgitate) their own Will. It is the attorney's job to delve deeper into the testator's desires in order to prepare for what may come when a natural object is disinherited. Scribes should be prepared to answer the question, “Why did the testator disinherit his child?” Most of the time, the answer is either “I do not know” or “I have no idea, but that is what he told me he/she wanted to do.” The problem with these responses is, if a will contest is filed, a jury is going to want an explanation. The jury will want to hear that there is something justifying such disparate treatment of a child. It is one of the few situations

where the proponent, even though the burden of proof does not shift, better have a good explanation or there will be doubt that the Will is the right result, i.e., was intended. Without a good explanation, the “equity scale” shifts in favor of the contestant. The scrivener should be the one to convey the “why” about the disinheritance. It is not only embarrassing when you cannot explain it, but it does a disservice to your client because the validity of the testator's true desires depends upon how well those desires can be supported. I believe it is a breach of fiduciary duty to fail to support your client's desires; particularly, if the Will is contested and set aside.

In my opinion, “he/she told me to do it” is not a sufficient explanation or excuse to something aberrational within the estate plan. Obviously, some practitioners will disagree with my opinion, which is fine. Remember, this paper is written from the perspective of an estate litigator and is designed to educate scribes on what we look for in a will contest, in order to better prepare the scrivener to defend their work product. Most of these are practice tips, so, if you do not want to heed my advice, better for me and my clients. If you disagree, then that is what this great country we live in is all about. But, rest assured, if I am on the other side of you in a deposition or at trial, I am going to question you *ad nauseum* about it and I expect and the jury will expect a good explanation.

Some better reasons to explain disinheritance are: (i) the testator and the child hated each other, (ii) the child was convicted of a felony, such as murder or child molestation, (iii) the child is a drug addict or (iv) the child is a horrible person and they never got along. One of the best reasons for disinheritance is a total lack of relationship or little to no relationship. We had a case where the child had zero relationship with her father after her high school graduation. They did not see each other, talk on the phone, send letters, Christmas cards, birthday cards, e-mails or do anything that even resembled an actual relationship. He left his entire estate to a young friend he was mentoring. We contested the Will, but had almost no evidence supporting why he would never have cut his daughter out of his estate plan. Usually, we can argue there was a loving relationship and it makes no sense,

logically, for the testator to have excluded his child. However, when there is no relationship, it becomes logical for the testator to disinherit a child. Logic goes a long way in will contests. An illogical Will – one that does not make sense – based upon the relationship, preponderates against its validity.

Explore relationships. Every life has a history and within that history are relationships. Relationships are the most meaningful thing in most people's lives; a lack of relationship tells a lot about people or a family as well. Explore the relationships of the testator and the parties and document them. Even when there is no dissension or foreseeable contest, it is important to find out about your client and how they feel about family members. Did the testator and beneficiaries love each other (both directions)? Did the testator and the beneficiary or beneficiaries have a close relationship or were they estranged? Did they have frequent fights, disputes or quarrels? Was their relationship rocky, i.e., they had a love-hate relationship where there is no question they loved each other, but they also had fights that caused temporary separations? Did they enjoy each other's company? There are situations where a parent loves their child unconditionally, but never sees them, either due to location or dissension or just plain ole' inconvenience. Does distance make the heart grow fonder? A parent and a child live miles apart and rarely see each other, but they talk on the phone almost every day, surely every week, and adore each other when they finally do get together. Is a married couple actually married? Does the married couple love or even like each other? Has the husband and wife been separated? Estranged? Would the testator want the surviving spouse to receive any part of his estate in a million years? Is it a love each other, but cannot live with each other situation?

E. Testing Capacity and Protecting Against Undue Influence.

There can be no doubt that a scrivener attorney has a fiduciary obligation to his estate planning client. Within that fiduciary obligation, is the duty, in those cases where there might be a question, to test and ascertain the testator's

capacity and the duty to protect that client from undue influence.

i. Testamentary Capacity. Normally, testamentary capacity may not be an issue and no alerts or "red-flags" arise causing the scrivener to even make inquiry about the capacity of their client. However, the older or more infirm the client is the more diligent a scrivener must be in making sure the client is of sound mind – meaning, has testamentary capacity. In those cases where clear bells are going off that the testator might lack capacity or that his or her capacity might be suspect, a scrivener should take the extra steps to satisfy him or herself that the client is of sound mind. Sometimes the latter involves the scrivener asking simple questions, like who the President is or to verify the day of the week. Other times, it may require the attorney to send the client to a doctor or psychiatrist, i.e., someone qualified to perform a mental status exam, to confirm the client has his or her capacity. A scrivener, who sees signs of incapacity, and does nothing, is not only doing a disservice to his or her client, but is committing malpractice because the testator's final wishes are being changed when there is no capacity. Translated: the testator's final wishes are not being upheld because it will be easier, if not easy, to set the Will aside as invalid. Of course, the scrivener is protected from suit by potential beneficiaries by the holding in *Barcelo v. Elliot*,³ but it is malpractice nevertheless and *Barcelo* does not protect the scrivener from suits by the personal representative of an Estate, if the malpractice causes harm to the Estate.⁴

ii. Protect Against Undue Influence. Just as an attorney has an obligation to make sure his or her client has testamentary capacity, he or she must also make sure the client is not susceptible to or subject to undue influence. There is no reason to involve an attorney, if the attorney is not going to protect the client from over-reaching. If the attorney allows the over-reaching and the testator signs a Will he or she would not have otherwise signed, but for that influence, then the attorney has committed malpractice. The testator hires the attorney to assure his or her desires will be memorialized and, if the scrivener allows the

³ *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996).

⁴ *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

testator to sign a Will that does not meet the testator's desires, that scrivener has taken action or allowed action that is directly contrary to his client's wishes. Again, the testator's final wishes are not being upheld because it will be easier, if not easy, to set the Will aside as invalid.

To protect against undue influence, particularly, if the client may be susceptible to it, due to a health problem, medication, a head injury, a psychosis or, general, weak mindedness, the first rule is to talk to and meet with your client. In the case of *In re Estate of Blakes*, 104 S.W.3d 333 (Tex. App. – Dallas, 2003, no writ), the scrivener attorney never once talked to his client, but, instead, used his friend, a mutual friend of the testator and a CPA, as the intermediary. The testator was in the hospital in Dallas and the CPA mutual friend drove back and forth to the scrivener's office in Arlington shuttling directions and ultimately the Will to be signed by the testator in his hospital bed. We won the will contest and the fact that the attorney never once spoke to his client was a crucial fact in favor of the contestant's case.

The scrivener must take notice of each client's situation. For instance, if the testator is unable to drive and is being brought to all meetings at the attorney's office, by the child, who stands to benefit the most or entirely by the Will, that is a "red flag" for possible undue influence. In such a situation, the scrivener can make sure to only take directions from the client and ensure that no one else (other than the scrivener and his staff) is present during all discussions about the specifics of a Will. After determining the client has capacity, the scrivener should go over the Will page by page and the dispositive provisions and executor appointment provisions one-by-one to make sure the client knows what the Will contains and that such provisions comply with the testator's wishes. If there is any hint that the testator is frightened, has been threatened, or has been denied access to children or that pressure has been exerted over that client, then the scrivener should take a step back and look at the details of the situation and make sure the Will is right. A client who pays you for a Will he or she did not intend is a waste of money and, arguably, subjects the attorney to malpractice liability and disgorgement of fees, if the client, later, figures it out.

PRACTICE TIP: Take the time and make the effort to determine your client's capacity, whether he is susceptible to undue influence or whether undue influence is occurring to avoid a Will (your work product) from being set aside as invalid.

F. The Execution – Performing the Will Execution.

The last process procedure that should be put in place is to recognize the importance of the will execution ceremony. A lot of lawyers believe the will execution ceremony is not a ceremony at all and that they have done so many that there is no need to make a "big deal" out of them. Scriveners tend to treat the will execution ceremony as a very informal and unnecessary event. The latter could not be further from the truth. First, the scrivener has to remember that, often, this is the first Will ever for their client, which makes it a big deal (to them)! Second, as part of reviewing the process of the scrivener, in determining the validity of any Will, an estate litigator turns to and reviews whether the formalities and solemnities are followed. Last, if the execution is not a big enough deal for you to take the time to perform it correctly and follow good procedure, then neither is the client, the fee check received or the scrivener's law license. What else is the scrivener there for, but to make sure things are done correctly, proper statements are made and that procedure is followed? Harken back to the statement made in the *Palmer* case (*supra*),

There is no phase of the law which requires more profound learning than on the subject of trusts, powers, the law of taxation, legal and equitable estates, perpetuities, etc. These duties cannot be performed by an unlicensed person, not an attorney, and who is untrained in such complex legal subjects. *Id.*, at 376.

A court would never make such a statement, if a Will and the legal rights affected were not so important. The statement also makes clear that signing a Will is more than the testator writing his or her signature on a document in the presence of two witnesses. A simple contract does not require

two witnesses to be present when the Parties sign; neither does a trust; neither does a Directive to Physicians or a Declaration of Guardian in the Event of Incapacity. There is something special about a Will – as stated, it is the testator speaking from the grave, so it is a special right that must be taken seriously. The more lackadaisical a scrivener is, the less likely that testator's statement is going to stand, which, by definition, is a "big deal."

PRACTICE TIP: Make every Will execution ceremony a "big deal" and establish procedures to assure it is as important as the planning process itself. If you do, the ability to question whether everything the law requires was done correctly is largely diminished, if not eliminated.

What are formalities and solemnities? First, the testator must have testamentary intent – meaning, he or she must know and intend to sign the Will for the purpose of disposing of his or her property. Second, simply put, is that all of the facts contained in the self-proving affidavit must be met, namely (summarized):

The testator declared to the witnesses in their presence that said instrument is his/her Last Will and Testament, and that he/she had willingly made and executed it as his/her free act and deed for the purposes therein expressed. Each witness acknowledges the testator declared unto them that said instrument is his/her Last Will and Testament and that he/she executed same as such and wanted each of them to sign it as a witness and each of them did sign it as a witness and both of them are, at least, over the age of fourteen (14). That the testator was at that time eighteen (18) years of age or over (or being under such age, was or had been lawfully married, or was then a member of the Armed Forces of the United States or of an auxiliary thereof or of the

Maritime Service) and was of sound mind.

If any one of those requirements are not met the "formalities and solemnities" have not been honored and the Will is not valid, by statute. Usually, "formalities and solemnities" is not an issue, but it comes up more often than not because scriveners do not perform a will execution ceremony *per se* and requirements get missed or forgotten. The one formality or solemnity that comes up the most out of all of them is whether the testator was of "sound mind." It has always been curious that this prong is allowed to be proven by the affidavit of witnesses that, often, have never met the testator, know nothing of his or her physical or mental health or what prescriptions the testator may be taking and seldom spends any amount of time with the testator to be able to determine the soundness of the testator's mind. The better practice, short of finding witnesses that know the testator, would be to prove-up all of the other requirements and make the proof to establish soundness of mind part of the probate process.

Of course, the goal is to make probating Wills more simple, not to make contesting them more easy. Adding to proof already required for a self-proven Will could require presentation of evidence by witnesses acquainted with the testator or, worse (from an expense standpoint) testimony from a doctor. The reason the standards are relaxed is to promote the probating of Wills, the creation of independent administrations and the efficient and economic administration of estates. It requires a will contestant to come forward with more than just a claim the contestant does not like the contents of the Will, but to require proof that the Will is invalid. All of which comports with the policies stated, but, also, emphasizes the importance of following procedure and actually having a will ceremony. None of the benefits stated above can be enjoyed, if a technical requirement of execution is forgotten and a will contestant can set the Will aside on a technicality rather than a substantive will contest claim.

G. Annual Reviews and Document History.

Exploring relationships as stated above and, most importantly, documenting relationships is

very important because, like a doctor, we want to have repeat, long-term clients. When you draft an estate plan for a client, you want them to come back again and again for an annual review or bi-annual reviews, for codicils and for future estate plans. Not only does this help sustain your business as an estate planner, but it also is a sign of a great process: a scrivener that cares about the client and that the client's affairs are in order and up-to-date. The client should be happy you want to have an annual follow-up (like an annual physical with the doctor) to make sure nothing has changed and the estate plan still comports and complies with the then current law. Maybe you give them the first annual "check-up" free, with future ones paid. The best part of the annual review is, if nothing else, you get to update your file on your client and, again, document his or her history.

In searching for evidence in favor of the invalidity of a Will, one of the most discouraging finds for an estate litigator is a well-documented file. The establishment of a long history of wanting the same thing during a time when the testator unquestionably had capacity is one of the poorest facts to find as an estate litigator. How do you argue a Will is aberrational and the jury should set it aside, when there are multiple estate plans establishing the same testamentary intent and many years of documenting the file confirming that intent? It is very difficult to argue the Will offered for probate was not the testator's true intentions and desires because he would have never disinherited a son or daughter, when the scrivener can testify not only is that what the testator wanted, but he confirmed it on ten different occasions over fifteen years. If you can testify and cite, for example, to a lack of relationship, that a child and a parent were angry at each other and the testator disinherited that child in multiple Wills as confirmed by many years of scrivener attorney notes, you are closing the door to arguments good estate litigators use to set aside a Will.

PRACTICE TIP: Establish as part of your estate planning process a regular, annual review of your client's estate plan, even if it is nothing more than a phone call to confirm nothing has changed in the way of the law, taxes, desires or relationships.

III. PRACTICE STRATEGIES.

A. Complications of Multiple Wills/Documents.

Similar to documenting history, it is always more difficult to contest multiple documents. This is not an endorsement for executing multiple Wills that say the same thing, because the latter creates arguments of incapacity. Why would he execute an identical Will years later? Did the testator forget he had a Will? Did the testator forget what it said? Was the testator confused about the whether the previous Will was invalid? You never want to be in a situation where these types of questions are asked. But, people do change their mind and change their Wills and Dependent Relative Revocation gives the strong advantage to the proponent in such situations, when the multiple Wills only make slight dispositive changes or alter the Executor appointment. Remember, a Codicil republishes the Will it modifies, so you have to address each document and its own invalidity, if you are seeking to set aside same.

In a jury trial out in West Texas, specifically, in Matador, Motley County, Texas, a Will and 3 codicils were admitted to probate. Client had not seen his mother in 19 years, but had talked to her on the phone a couple of times. She had a consistent estate plan and a severe lack of relationship, but it was undisputed the testator loved her son (our client) and there were numerous mistakes in the Will and Codicils that cast doubt on the entire estate plan. We were successful in convincing the jury the Will was invalid and the 2nd Codicil and 3rd Codicil were invalid, but they found the 1st Codicil to be valid. In speaking with the jury after the trial, they said "the 1st Codicil was the only one signed at a lawyer's office, so we figured he must have explained it to her." The lawyer never testified and there was no evidence of where it was signed or that the lawyer said anything to her. The lesson learned was to address the evidence and all potential problems or inferences related to every document and never assume a fact is too minor or unimportant. Juries can either pick up on missing facts or infer and create their own.

In another case, the testator had a stroke and over the course of 14 years executed 18 Wills,

Codicils, Trusts and Trust Amendments. The opposing side never dreamed we would be able to set aside that many documents over such a long period of time and refused to make any reasonable settlement offer pre-trial. After a three week trial, the jury set aside every one of those 18 documents, despite having prominent scrivener witnesses supporting them. The jury was convinced the testator was never the same after the stroke and that his wife and various attorneys working for her influenced him to divert his third generational family wealth outside of the family lineage. This was certainly a hard fought legal battle and “knocking-out” 18 documents seemed monumental task, but juries want to make things right, as a general rule. When something does not fit, a jury will attempt to make things right, the best they can. In this case, generally speaking, it was reasonable for him to provide for his wife of 35 years, but the jury did not think it reasonable for the family fortune to be diverted outside the family to a corporate entity.

B. Avoid Mistakes in the Will.

Everyone makes mistakes, but we as lawyers are not supposed to and keeping them to a minimum is what separates bad lawyers from good lawyers and good lawyers from superior lawyers.

Clients are not required to fully understand how a Will, technically, works, but they should be able to understand the scrivener's explanation of how it works. It is important for the scrivener to explain how an estate plan works and use diagrams, charts and graphs as much as possible, particularly, when the Will is very complicated. A testator should be able to understand the basic contents of his or her own Will. If there is a mistake or, worse, a bunch of mistakes, the testator's ability to understand the Will becomes suspect. If the mistake is on the part of the scrivener, then, unless the testator reads the Will and understands its terms and “catches” the mistake, the scrivener's mistake will be imputed to the testator.

At a minimum, the math in the Will should work. Simple math should not be a problem for the testator and, certainly, should not be a problem for the scrivener. We had a case where

the scrivener had notes reflecting the testator wanted to leave 25% of her Estate to her grandsons. However, the scrivener in trying to write 12.5% each, wrote the two grandsons should split 12.5%, which was not the testator's intent. Instead of conforming the Will to his client's wishes, he simply conformed his testimony to support his mistaken document.

The rules of construction require us to glean and determine the intent of the testator from the four corners of the document. If the four corners contain mistakes, the ability to construe or to construe the testator's intent properly is impaired and makes room for the will contestant to argue lack of capacity. Why would it ever be acceptable to prepare a Will for a client that requires a Court to construe the testator's intent? It should be written in clear, unambiguous terms, so the testator can understand it, as well as the executor and beneficiaries following death.

One of the elements of testamentary capacity is the testator be able to hold all of the elements in his mind long enough to formulate a reasonable judgment about them. How could a testator have possibly formed a reasonable judgment about the contents of the Will, if the Will contains mistakes? Exactly the opposite is true, it would be impossible for the testator to do so. When a Will makes errors in relation to these fundamental elements, then it becomes easier to argue to a jury one or more of the elements did not exist at the time the Will was executed.

Another common mistake we see is where the testator “intended” to dispose of all of his property, but because of the way the Will was written it did not; thereby, leaving some of the Estate by intestacy – meaning, leaving some of the Estate to one of those disinherited children – supposedly, NOT testator's intent.

Mistakes can also indicate undue influence. For instance, a testator is supposed to know who his or her family members are, but, when an undue influencer conveys information to a scrivener regarding the testator's family and does not know about a child or how to correctly spell a child's name or calls the child by a different name, then the scrivener takes that information

and injects it into the testator's Will.⁵ If the testator does not "catch" it or does not read the Will, then he or she has incorrectly named his own family in his Will. The first element of testamentary capacity is that the testator know his or her family, i.e., the natural objects of your bounty. In such a scenario, the rational explanation is that the scrivener did not know and the testator was either (i) out of it and could not see his family was incorrectly described or (ii) the undue influencer had a hand in the Will.

C. Logic Must Prevail.

When drafting, interpreting and determining whether a Will is valid, logic must prevail. Does the Will make sense? Is the end result something the testator would have done, if he knew what he was doing? A good example is disposition of generational property. When property passed down from generation to generation, you would expect it continue on the next generation. After all, the younger generations usually did not earn the wealth. When generational property is all of a sudden diverted out of the family by the testator – a testator who was proud and proud of his name and his ancestry – then "red-flags" go up and questions are instantly raised because doing so makes absolutely no sense; is illogical. There better be a good and well-documented reason for such an aberrational result or the contestant(s) will have a "field day" with it. A jury will not like the end result and could seek to change it and the proponent will wind up on the losing end of a jury verdict.

A good example is a case we had where the testator was on his third marriage to a woman he did not like very much and he hated – absolutely hated paying taxes. Yet, after inheriting and then accumulating an enormous estate, the testator did absolutely zero estate planning. The scrivener of the Will took no notes, was not aware of the property of the Decedent and the Will was two pages long, despite the Estate being worth in excess of \$20,000,000.00 with enormous prospects for oil and gas income. The Will did not provide for any of his children, left everything to his wife and included a provision that the testator's wife was instructed to consult with the

testator's son regarding investments. This was a son he had disinherited. Why would such a clause exist? His son was a good investor? No evidence of that. It appeared to us he intended his Wife hold and manage the ancestral property for the benefit of the entire family and that it pass down to all of the kids when she died.

Based upon the above, we argued the testator did not have the ability to tell his attorney what he owned, which is why he did not estate plan. We argued he did not know what the Will did or how it disposed of his property and that his wife, the manipulator, probably put the clause in the Will because she promised him she would take care of the family or to trick him into believing his children would be involved or both. It made no sense and all of it played right into our hands as contestants. We were also able to argue the language on Page 2 of the Will created a "Secret Trust" and the wife was obligated to hold the entirety of the assets in trust for the benefit of herself and the children. *See Pickelner v. Adler*, 229 S.W.3d 516, 527 (Tex. App.–Houston [1st Dist.] 2007, pet. denied).

Unbelievably, there was absolutely no tax planning done. This was an estate worth \$20M with prospects of millions more in income. In fact, the wife received over \$10M in O&G royalty income between 2005 and 2010. The testator's estate tax exemption was not utilized and lost. The testator had 10 kids and numerous grand-kids and no annual exclusion gifts were utilized. None of that growth was preserved for future generations – could have taken advantage of the GST exemption. Lots of lost opportunity, which was contrary to the testator's intent – he hated the government and hated paying the government. He would have wanted to and could have saved a tremendous amount of money by avoid transfer taxes. These are pitfalls that could have been avoided, if the attorney had a process in place.

D. Swaying a Jury.

The single most important evidence in any will contest is medical records and care-givers notes, if they exist. Medical records can make or

⁵ We have seen myriad cases where the undue influencer has forgotten a child, called a known child by the wrong name or misspelled the child's name.

break a will contest – meaning, they can support capacity and the validity of the Will or the opposite. Usually, the most important evidence for the contestant is good medical evidence and a good physician or psychiatrist expert to testify and make sense of the medical evidence. Typically, in order to prove a testator lacked testamentary capacity, there should be indication of some infirmity in the testator's medical records. The infirmity must have existed and played a role in the testator's inability to understand the Will and the business in which he or she is engaged.

If you lack medical records or an expert that can credibly testify and give an opinion that the testator lacked capacity, then the focus must turn to other evidence, such as an aberrational result or mistakes in the Will or illogical Will or a defective or broken process on the part of the scrivener. The single most important evidence, after the medical records, is to have a good, reputable and credible scrivener. The latter can sometimes mean the difference between a valid Will and an invalid Will. If the medical evidence is lacking, the contestant has to hammer the mistakes in a Will. A jury expects a person that signs a Will to be able to read and understand the basic parts of the Will. But, most importantly, a jury expects the Will to conform to the wishes and desires of the testator. If it does not or contains a mistake, a jury will question the testator's ability to understand the Will.

If the testator does not want a child to inherit under any circumstance, but there is a provision in the Will allowing that child to take under some circumstance, then such a mistake could, alone, prove a lack of capacity. This is because the testator should know something that basic and it is an illogical result based upon the other evidence indicating the opposite; but, mainly, because the testator's intent is not properly expressed in the Will.

In one case we have, the daughter of the testator's girlfriend was the scrivener of the Will, which is an inherit issue in and of itself. According to her, the testator wanted to leave a \$100,000.00 bequest to his girlfriend (her mother). We all know what happens in this scenario, the Will provided for the girlfriend, but because the scrivener was girlfriend's daughter

and not related to the testator, the gift was void. When I asked if that was what the testator wanted – meaning, did the testator want the gift to her mother to be void, she had to testify “no”. The scrivener also testified she was not aware of the statute voiding the bequest until after it was executed. She also later committed perjury by testifying the documents she produced – her file – were true and correct copies of her business records. Turns out, she had doctored, at least, one of the records. She found out the hard-way that deleting, altering or changing the content of your version of an e-mail does not delete, alter or change the recipient's version.

Moral. Do not participate in the drafting of the Will for a client that wants to benefit a family member and, most importantly, if you do, do not cover it up by doctoring records.

In a trial before a jury, all of these things matter, regardless of whether a mistake was unintentional or innocent and regardless of whether an attorney believes routine matters are routine. As soon as a scrivener gets lazy or cuts corners in his or her process, the door for an estate litigator opens more and more to attack their work product increasing the probability of setting aside their client's wishes.

IV. ERROR CORRECTION IN PROBATE.

A. Purpose of error correction in Probate.

Error correction is available in probate because the whole probate (and guardianship) administration is considered one proceeding that is *in rem*. TEX. EST. CODE §22.002(d). *See also Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) (*probate proceedings are in rem*); *In re Estate of York*, 951 S.W.2d 122, 126 (Tex. App.–Corpus Christi 1996, no writ) (*guardianship proceedings are in rem*).

The Texas Supreme Court has established the significance of *in rem* proceedings holding that they bind all persons unless set aside in the manner provided by law. *Mooney*, 622 S.W.3d at 85; *Soto v. Ledezma*, 529 S.W.2d 847, 850 (Tex. App.–Corpus Christi 1975, no writ). “*In rem*” is a term applied to proceedings or actions instituted against the thing, that is, an action taken directly against property or brought to enforce a right in

the thing itself. *Stephenson v. Walker*, 593 S.W.2d 846, 849 (Tex. Civ. App.–Houston [1st Dist.] 1980, no writ). A judgment *in rem* affects the interests of all persons in designated property. *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). *In rem* judgments bind the whole world, and that is so whether the persons who have rights in the proceeding's subject matter were personally served, answered or not. *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 336 (Tex. 1968); *Soto*, at 529 S.W.2d at 850. As a result, any interested person is entitled to appear and be heard on any matter affecting the property (thing). This right is statutory:

A person interested in an estate may, at any time before the court decides an issue in a proceeding, file written opposition regarding the issue. The person is entitled to process for witnesses and evidence, and to be heard on the opposition, as in other suits.

TEX. EST. CODE §55.001.

Further, as *in rem* proceedings regarding wills, “[a] judgment admitting an instrument to probate as a will fixes and confirms the rights of those who are named as devisees and legatees and for those who take under them.” *Stovall v. Mohler*, 100 S.W.3d 424, 428 (Tex. App.–San Antonio 2002, writ denied).

As *in rem* proceedings, fundamental property rights of interested parties are affected by every decision made in probate, regardless of notice or appearance in the case. Decisions affecting property and binding upon the entire world are enormous in magnitude with extreme constitutional significance; particularly, deciding title to property as to all parties or affecting the future of incapacitated persons for all time. Getting probate decisions correct is not only the duty of the court, but is an imperative. This fact has not been lost in our legislature and the law in this area has developed to emphasize this necessity. The state legislature, clearly, recognizes the importance of inheritance and guardianship, as seen by the elevation over the years of probate courts to concurrent jurisdiction with district courts, direct appellate court appeals

and the progressive expansion of probate jurisdiction. This includes not only a statutory probate courts' ability to transfer cases affecting administrations into probate court, but also the development of direct attack probate error correction procedures. A direct attack is an attempt to alter an order in a proceeding brought for that purpose. *In re Estate of Morris*, 577 S.W.2d 748, 752 (Tex. Civ. App.–Amarillo, 1979, writ ref'd n.r.e.). Experience obviously spawned greater concern for the legitimacy of probate rulings and orders, and the changing probate law and jurisdiction makes the legislature's concern in this area self-evident.

Error correction is so important that the Texas Supreme Court has modified the rules for determining whether orders in probate are appealable and relaxed the “one-final judgment” rule. “A probate proceeding consists of a continuing series of events, in which the probate court may make decisions at various points in the administration of the estate on which later decisions will be based.” *Logan v. McDaniel*, 21 S.W.3d 683, 688 (Tex. App.–Austin 2000, pet. denied). As a result, a probate appeal can be taken once a decision adjudicates substantial rights and ends that particular phase of the proceeding. *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995). A probate matter is appealable if the order finally disposes of the issue or controverted question for which the particular part of proceeding was brought. *Spies v. Milner*, 928 S.W.2d 317, 318 (Tex. App. – Fort Worth 1996, no writ). A probate order is appealable if it finally adjudicates a substantial right. *Id.* The decision need not dispose of the entire probate proceeding [to be appealable]. *Ayala v. Brittingham*, 131 S.W.3d 3, (Tex. App.–San Antonio, 2004, no writ); *Crowson*, at 781-82; *Christensen v. Harkins*, 740 S.W.2d 69, 72 (Tex. App.–Fort Worth, 1987, no writ).

“Although TEX. R. CIV. P., Rule 301 provides that ‘[o]nly one final judgment shall be rendered in any cause except where it is otherwise specially provided by law,’ the Texas Estates Code provides that ‘[a]ll final orders of any court exercising original probate jurisdiction shall be appealable to the courts of (civil) appeals.’ TEX. PROB. CODE, §5(e) (Vernon 1980).”⁶

⁶ Now, TEX. EST. CODE §32.001.

Christensen, at 72. Guardianships are also subject to direct appellate court appeals. TEX. EST. CODE §1157.058. “The need to review controlling intermediate decisions before an error can harm later phases of the proceedings has been held to justify modifying the ‘one final judgment rule’” in probate proceedings. *Ayala*, at 131 S.W.3d at 7-8; *Logan*, 21 S.W.3d at 688; *see also Christensen*, at 740 S.W.2d at 72.

Error correction, in the form of probate bills of review or one of the other methods, is now well established to compel compliance with “clear statutory requirements” and promote the “need to ensure the validity of testamentary dispositions.” *Matter of Estate of Jansa*, 670 S.W.2d 767, 768 (Tex. App.—Amarillo 1984, no writ).⁷ Passage of title and determination of incapacity elevates the gravamen of proper decision making, not to a higher standard, but to high expectation and places a heavy burden on judges. Recognizing this burden, the law allows a number of methods for correcting error and getting decisions right.

B. History of Error correction, including Statutory Probate Bills of Review.

The bill of review procedure in probate has its origins dating as far back as not long after the original Texas constitution. In *Heath v. Layne*, 62 Tex. 686 (1884 WL 8985 (Tex. 1884)), the Court stated:

It would seem that a proceeding in the nature of a bill of review might be instituted in the county court to revise and correct any proceeding therein had, provided it was done within the time prescribed for bringing suit by bill of review. And an appeal would be given to the district court from any final judgment by the county court in such proceeding rendered. The statute gives to any person interested in the estate the right to appeal to the district court from any decision, order, decree or judgment of the county court in matters of probate. The party has the right also to institute

his proceeding in the county court to revise and correct any proceeding therein had, within two years from the time the proceeding was had, and he also has the right of appeal from any judgment rendered therein.

Heath, 1884 WL 8985 at *3.

It continued as to the issue before it, the sale of real property out of an estate:

...the doctrine has become firmly established in this state that the court has jurisdiction of the estate, and that orders of sale of real property without the notice prescribed are not void, but are irregular and voidable. And that such orders may be vacated and set aside by those interested in the estate, by direct proceeding for that purposes instituted in the tribunal and within the time prescribed by law.

Id. at *4.

Recognizing the need to examine the probate of wills and get them right, the Court further stated: “That a proceeding to revoke the probate of a will may be instituted in the court in which the will was probated, within the time prescribed as recognized in *Franks v. Chapman*, 61 Tex. 576 (1884 WL 8823 (Tex.)).” *Id.* at *7.

For a great outline of the history and policies behind probate error correction, see *Waters v. Stickney*, 94 Mass. 1, (1866 WL 4792 (Mass)), cited by *Franks v. Chapman*. The court in *Waters*, cited the opinion in *Stetson v. Bass*, 26 Mass. 27 (1829 WL 2695 (Mass)), where the justice wrote:

We think there can be no doubt of the right and authority of a judge of probate to open an account settled, for the purpose of correcting manifest mistake. In the proceedings of all courts errors and mistakes will occur, and frequently without the fault of either party, and

⁷ The quoted statements are dicta, but are instructive of some of the policies behind effectuating proper probate.

justice requires that some method should be provided for the correction of such errors and mistakes, in whatever court they may occur. In courts of common law jurisdiction, the remedy is by writ of error, motion for new trial or application for writ of review; but these remedies are not applicable to the proceedings of a court of probate. In that court, when a mistake is made in the settlement of an account, the course is to apply to the judge of probate for the correction of the mistake, by petition, or to state the amount claimed in a new account; unless when the mistake is discovered the party has a right of appeal by which it may be corrected in this court. This practice seems to be well settled, and in several cases has received the sanction of this court. It is indeed essentially necessary for the furtherance of justice, and ought not to be too strictly limited.

Based on this, the *Waters* Court wrote:

The authority of courts of probate to correct errors in their decrees on administration accounts, even when in terms final, upon clear proof of fraud or mistake in a point not once actually presented and passed upon, has been repeatedly sustained by this court and by the highest courts of Vermont and New York, and is now affirmed in this state by statute.

Texas followed this lead and allowed for error correction in probate. Statutory error correction was, for years, mainly isolated to guardianship proceedings and certain specific probate scenarios. It appears that the right of a probate court to review its decisions was based mainly upon common law as set out in the *Heath* case above, for fraud or was tied to invalid orders of sale of land out of probate administrations. See *Heath* and *Jones v. Sun Oil, Co.*, 153 S.W.2d 571,

574 (Tex. 1941) (*see list of cases at 574*). “It seems to be the settled law of this state that although there is no statutory provision for the Bill of Review in probate matters not covered by Article 4328, R.C.S. (which apparently applies alone to guardianship matters), in the absence of intervening rights of innocent third persons, erroneous judgments entered by the probate court may be reviewed and set aside under certain conditions.” *Union Bank & Trust Co. of Fort Worth, et. al. v. Smith, et. al.*, 166 S.W.2d 928, (Tex. Civ. App.–Fort Worth 1942, no writ) (*citing Fortson v. Alford*, 62 Tex. (1884 WL 8967 (Tex.)); *Jones v. Sun Oil, Co.*, 153 S.W.2d 571, 574 (Tex. 1941).

However, in 1955, the legislature enacted TEX. PROB. CODE §31 to apply to all probate actions and that statute remained unchanged until 1993. The changes have been to remove the specific tolling provision in the 1955 statute for minors and incapacitated persons and omit unnecessary language, otherwise the 1993 statute read the same as the 1955 statute. The former TEX. PROB. CODE §31, is now TEX. EST. CODE §55.251 and reads, basically, the same as the 1993 version.⁸ The well-grounded policies of error correction remain and are as strong as ever.

C. Methods of Direct Attack.

A probate judgment is binding on everyone until it is set aside by direct attack. *Estate of Hutchins*, 829 S.W.2d 295, 297 (Tex. App. – Corpus Christi 1992, writ denied at 838 S.W.2d 547 (Tex. 1992)). There has been a metamorphosis of our probate and guardianship laws developing numerous methods of directly attacking probate decisions, within certain time frames. The four (4) main methods of directly attacking a probate judgment are as follows: (i) motion for new trial (TEX. R. CIV. P., Rule 329b), (ii) statutory bill of review (TEX. EST. CODE §55.251), (iii) a will contest (TEX. EST. CODE §256.204), and (iv) if all conditions are met, a restricted appeal (f/k/a writ

⁸ Compare TEX. EST. CODE §55.251 below, to former, TEX. PROB. CODE §31, which provides:

Any person interested may, by a bill of review filed in the court in which the probate proceedings were had, have any decision, order, or judgment rendered by the court, or

by the judge thereof, revised and corrected on showing error therein; but no process or action under such decision, order or judgment shall be stayed except by writ of injunction, and no bill of review shall be filed after two years have elapsed from the date of such decision, order or judgment.

of error) to the appellate court (TEX. R. APP. P., Rule 30).

i. Motion for New Trial. Motions for new trial must be filed within thirty (30) days from the date the judgment to be revised, corrected, reformed or set aside is signed. A motion for new trial can be filed in relation to both substantive and form errors. It basically tells the court something was done wrong and asks the court to reconsider the ruling and correct it quickly.

A Court can grant new trial within its period of plenary power for any reason or for no reason at all, except in limited circumstances. *Atascosa County Appraisal Dist. v. Tymrak*, 815 S.W. 2d 364, 366 (Tex. App.–San Antonio, 1991, writ granted, aff'd 858 S.W. 2d 335). Granting a new trial in the interest of "justice and fairness" is not an abuse of discretion. *Id.* at 720 (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985)). Orders may be set aside (*and/or modified*) at any time prior to the expiration of thirty-days following their entry, i.e. during the Court's plenary power. *Womack-Humphreys Architects, Inc. v. Barrasso*, 886 S.W.2d 809, 813 (Tex. App.–Dallas 1994, writ denied); *Fruehauf Corp. v. Carillo*, 848 S.W.2d 83, 84 (Tex. 1993); *Jackson v. Van Winkle*, 660 S.W.2d 807, 808 (Tex. 1983).

Invoking this method of direct attack and using it to correct error in probate, invokes the other rules and requirements that flow from it, i.e., the appellate timetables. TEX. R. CIV. P., Rule 329b and TEX. R. APP. P., Rule 26.1(a). A motion for new trial, must be filed within the thirty (30) days following the judgment, and a hearing or decision must be obtained within seventy-five (75) days of the judgment or order, else it be deemed denied by operation of law. TEX. R. CIV. P., Rule 329b(c). The reason is because a motion for new trial is a mechanism to attempt to prevent appeal and extends deadlines to perfect an appeal. TEX. R. APP. P., Rule 26.1(a). It is essentially the same as a bill of review in the sense that it seeks the same result, i.e., to modify, correct, reform or set aside an order or judgment.

Its disadvantage is shortened timetables as compared to a statutory probate bill of review (2 years). However, for some cases a quick decision

may be advantageous. It is unclear whether a denial of a motion for new trial would allow a probate bill of review proceeding under TEX. EST. CODE §55.251. No case addresses this issue. If a probate bill of review is filed timely after the denial of a motion for new trial, passage of time in pursuing the probate bill of review could preclude further relief via the motion for new trial. By the time the trial court decides the issue of trying the decision reversal issue twice or decides the bill of review, the appellate timetables would probably have run in relation to the motion for new trial. Based upon the policy against trying the same issue twice, an ordinary appeal filed within the appellate timetables is the safest route.

Granting a motion for new trial does not subject the ruling to an appeal, but merely reinstates the case into its pre-judgment or pre-order status. The case continues until a final judgment is made. Denying a motion for new trial requires action to perfect an appeal and obtain error review and correction. The main point here is, since a statutory bill of review extends the probate court's plenary power to reconsider its orders for up to two years, utilizing a motion for new trial really gains no advantage other than speed. An analysis must be made to determine if speed is the goal or a bill of review trial after ample discovery is the desired course.

ii. Statutory Bills of Review. Probate bills of review are statutory and are unique to probate allowing for error correction. The probate bill of review statute, TEX. EST. CODE §55.251, provides:

An interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable. Any person interested may, by a bill of review filed in the court in which the probate proceedings were had, have any decision, order, or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein; but no process or action under such decision, order or judgment shall be stayed except by writ

of injunction, and no bill of review shall be filed after two years have elapsed from the date of such decision, order or judgment. (*See* FN 9 above).

The purpose of a bill of review is to revise and correct errors, not merely to set aside decisions, orders, or judgments rendered by probate court. *Jackson v. Thompson*, 610 S.W.2d 519, 522 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). Setting aside orders is allowed, but revising or modifying them is favored. The court has the power to do whatever it thinks is in the best interest of the estate, the administration and the estate's beneficiaries.

iii. Will Contests. A will contest may be brought pursuant to TEX. EST. CODE §256.254, which provides as follows:

- (a) After a will is admitted to probate, an interested person may commence a suit to contest the validity thereof not later than the second anniversary of the date the will was admitted to probate, except that an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date of the forgery or fraud was discovered.
- (b) Notwithstanding Subsection (a), an incapacitated person may commence the contest under that subsection on or before the second anniversary of the date the person's disabilities are removed.

A will contest under the latter statutes is a direct attack upon the order admitting the will to probate. *Estate of Devitt*, at 607; *Estate of Morris*, at 752; *A&M College of Texas v. Guinn*, 280 S.W.2d 373, 377 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.). The decree is voidable and subject to attack. *Ladehoff*, 436 S.W.2d at 340. A Will contest is, essentially, a bill of review proceeding. A will contest addresses more of the facts surrounding the testator's condition and treatment at the execution of the Will and whether it is valid, rather than the technical requirements of how it was executed or proven up. Will contests primarily involve

whether the testator had testamentary capacity at the time the will was executed or whether the testator was unduly influenced to execute the will or both. It may also involve evidence of forgery, fraud or other grounds, but these are less common.

It is important to remember that in proving or disproving issues of capacity, testamentary capacity at the time the will was executed is seminal. *In re Estate of Blakes*, 104 S.W.3d 333, 336 (Tex. App.—Dallas, 2003, no writ) (*citing Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968)). Evidence of the testator's state of mind at other times can be used to prove his state of mind on the day the will was executed provided the evidence demonstrates a condition affecting his testamentary capacity was persistent and likely present at the time the will was executed. *Id.* (*citing Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983)).

Lay opinion testimony regarding the soundness of the testator's mind at the time the will was executed is admissible. *Carr v. Radkey*, 393 S.W.2d 806, 813-14 (Tex. 1965). Additionally, medical expert testimony is desirable and is likewise admissible. It is reversible error to deny admission of medical expert testimony in a will contest. *Id.*

The statute of limitations on filing a contest to a will is two years from the date it is admitted to probate. TEX. EST. CODE §256.204. If a will contest is not filed within two years of the date it is admitted to probate, the contest is forever barred. This is still based upon expansion of the probate court's plenary power to reconsider *in rem* proceedings, and *res judicata* still applies. Because probate proceedings are *in rem*, the timely filing of a will contest (within two years) tolls the statute of limitations as to all other interested persons, who might otherwise be barred by the two-year time limitation stated in TEX. EST. CODE §256.204. In other words, if an interested party timely files a will contest, as long as the will contest is still pending after the two years have run, any other interested person may also file a will contest and/or enter their appearance in the action. *In re Estate of Robinson*, 2004 WL 1406099, at *15 (Tex. App.—Corpus Christi June 24, 2004).

Will contests under TEX. EST. CODE §256.204 are the most common form of error correction and it is the statute most pursued in probate litigation. As a result, a dissertation about the procedures and elements of testamentary capacity or undue influence is readily available in case law and will not be addressed further in this particular paper.

iv. Restricted Appeal (f/k/a Writ of Error).

A restricted appeal (formerly known as a writ of error) is available, has been used, but is rare. It is a direct appeal to the appellate court, pursuant to TEX. CIV. PRAC. & REM. CODE §51.012 and TEX. CIV. PRAC. & REM. CODE §51.013 and pursuant to TEX. R. APP. P., Rule 30, formerly TEX. R. APP. P., Rule 45.

A restricted appeal was formerly known as a writ of error. However, new Texas Rules of Appellate Procedure were adopted by the Texas Supreme Court effective September 1, 1997. The writ of error procedure was repealed in favor of what is now known as a restricted appeal. The requirements of a writ of error, pursuant to the former TEX. R. APP. P., Rule 45, were as follows:

A party may appeal a final judgment to the court of appeals by petition for writ of error by complying with the requirements set forth below:

- (a) Filing Petition. The party desiring to sue out a writ of error shall file with the clerk of the court in which the judgment was rendered a written petition signed by him or by his attorney and addressed to the clerk.
- (b) No Participating Party at Trial. No party who participates either in person or by his attorney in the actual trial of the case in the trial court shall be entitled to review by the court of appeals through means of writ of error.
- (c) Requisites of Petition. The petition shall state that names and residences of the parties adversely interested, shall describe the judgment with sufficient certainty to identify it

and shall state that the appellant desires to remove the same to the court of appeals for revision and correction.

Elements necessary for Court of Appeals to review case by writ of error are mandatory and jurisdictional and cannot be waived. *C&V Club v. Gonzalez*, 953 S.W.2d 755 (Tex. App.—Corpus Christi 1997, rehearing overruled). The requirements for a restricted appeal are much the same as the former TEX. R. APP. P., Rule 45, but are referenced in different rules.

Restricted appeals, which replace the former writ of error procedure, are a direct attack. *Fazio v. Newman*, 113 S.W.3d 747, 748 (Tex. App.—Eastland 2003, writ denied). The elements necessary to succeed on a restricted appeal are: (1) the notice of restricted appeal must be filed within six months after the judgment is signed, (2) by a party to the lawsuit, (3) who neither participated in the hearing that resulted in the judgment nor filed a timely post-judgment motion or request for findings of fact and conclusions of law, and (4) the face of the record must disclose the claimed error. *Roventini v. Ocular Sciences, Inc.*, 111 S.W.3d 719 (Tex. App.—Houston [1st Dist.] 2003, no writ).

In determining whether the error is on face of the record, as element of restricted appeal, “face of the record” consists of all papers on file in an appeal, including the reporter’s record. *Westcliffe, Inc. v. Bear Creek Constr., Ltd.*, 105 S.W.3d 286 (Tex. App.—Dallas 2003, no writ). The error need not be affirmatively established, but need only be apparent. TEX. R. APP. P., Rule 30; *Brown v. Brookshires Grocery Store*, 10 S.W.3d 351, 353 (Tex. App.—Dallas 1999, pet. denied) (citing *Norman Communications v. Texas Eastman, Co.*, 955S.W2d 269, 270 (Tex. 1997)).

A restricted appeal is available for the limited purpose of providing a party that did not participate at trial with the opportunity to correct an erroneous judgment. *TAC Americas, Inc. v. Boothe*, 94 S.W.3d 315, 318 (Tex. App.—Austin 2002, no writ); *In re E.K.N.*, 24 S.W.3d 586 (Tex. App.—Fort Worth 2000, no writ); TEX. R. APP. P., Rule 30. An appeal by writ of error is typically an appeal of a default judgment, in which participation (or lack thereof) is rarely disputed.

The question becomes more difficult when a party participates in some but not all of the proceedings in the trial court. The policy behind the nonparticipation requirement is to deny appeal by writ of error to those who should reasonably resort to the quicker method of appeal. *Texaco, Inc. v. Central Power & Light Co.*, 925 S.W.2d 586, 590 (Tex. 1996). Absence of participation is a well-established mandatory requirement for appealing by writ of error. TEX. R. APP. P., Rule 45(b) (Vernon 1997) (*now repealed*); *Serna v. Webster*, 908 S.W.2d 487, 491 (Tex. App.–San Antonio 1995, no writ). This same mandatory rule applies today in restricted appeals. See TEX. R. APP. P., Rule 30.

An appellate court may not consider evidence in a restricted appeal unless it was before the trial court when judgment was rendered; such prohibition is appropriate because an appeal by writ of error directly attacks the judgment rendered and prevents this court from indulging in presumptions in support of the judgment. *Campsey v. Campsey*, 111 S.W.3d 767, 770 (Tex. App.–Fort Worth 2003, no writ); TEX. R. APP. P., Rule 26.1(c).

A party pursuing reversal of a probate decision may pursue a restricted appeal (formerly a writ of error), without availing themselves to the remedies provided by TEX. EST. CODE §55.251 and TEX. EST. CODE §256.204. See *Hutchins*, 829 S.W.2d at 297. This allows for a direct attack on the probate judgment in the appellate court, but it is rare because of the prerequisite to file the action. See *Sales v. Passmore*, 786 S.W.2d 35 (Tex. App.–El Paso 1990, no writ) (probate writ of error) *Specia v. Specia*, 292 S.W.2d 818 (Tex. Civ. App.–San Antonio 1956, writ ref'd n.r.e. at 312 S.W.2d 589) (probate writ of error).

In *Lee A. Hughes Custom Homes, Inc. v. Shows*, 2003 WL 21235512 (Tex. App.–Fort Worth 2003), an interesting, unreported case, the Fort Worth Court of Appeals held that the “pendency of a restricted appeal does not preclude pursuit of a bill of review in the trial court simultaneously when the matters raised in

the bill of review proceeding are not apparent on the face of the record and thus could not be addressed in the restricted appeal.” (i.e., the error appears outside the record). The cases cited in the *Lee A. Hughes Custom Homes, Inc.* case are *Tri-Steel Structures, Inc. v. Hackman*, 883 S.W.2d 391, 395, n.2 (Tex. App.–Fort Worth 1994, writ denied); *Voskamp v. Arnoldy*, 749 S.W.2d 113, 127-128 (Tex. App.–Houston [1st Dist.] 1987, writ denied); *First Nat'l Bank v. Kelley*, 278 S.W.2d 350, 351 (Tex. Civ. App. – Eastland 1955, no writ). All of these cases involve an equitable bill of review proceeding going forward while a restricted appeal proceeds. The premise for this double proceeding procedure is that the restricted appeal requires error to be apparent on the face of the record. It cannot, then, entertain an appeal where the error is outside the record, the theory upon which an equitable bill of review is based.⁹

In probate, however, this double proceeding idea turns upon the type of probate bill of review filed. Because a probate bill of review can be based upon error apparent on the face of the record, if the desired proceeding is to correct error that is apparent on the face of the record, the party must elect what procedure to pursue to correct the error, either a restricted appeal or a probate bill of review. A restricted appeal and a probate bill of review seeking correction of error apparent on the face of the record cannot be pursued side-by-side, based upon preclusion of the same case proceeding in two different courts.

But, if a restricted appeal is filed based upon error on the face of the probate record, a probate bill of review based upon other issues outside the record may proceed as to the exact same judgment. The proceedings seek the same remedy, but on different theories. The restricted appeal focuses on error that is in the record, whereas a probate bill of review or will contest focuses on evidence that must be presented (at trial) to obtain relief. If the error is shown in either scenario, the judgment can be reversed, set aside, revised or modified.

⁹ As the Texas Supreme Court recently held in *Valdez v. Hollenbeck*, an equitable bill of review is no longer a recognized form of relief due to the availability of the statutory bill of review which holds a shorter, two-year, statute of limitations. *Valdez v. Hollenbeck*, 465

S.W.3d 217, 227 (Tex. 2015); See, e.g., TEX. CIV. PRAC. & REM. CODE §§16.002–.072 (prescribing limitations periods of one to five years for various common-law causes of action).

Based upon concern for waste of judicial resources, pursuing two error correction proceedings at the same time is probably not the best avenue to pursue because one or the other can obtain the result. The appellate court or the trial may take offense to such pursuits. While allowed, as a practical matter, the better course is to choose one or the other, unless a claim preclusion issue arises. Since the restricted appeal must be filed within six months of the judgment, it is unlikely that the two-year claim preclusion period in TEX. EST. CODE §55.251 will become an issue. The potential to pursue the proceedings consecutively rather than concurrently is available, keeping in mind that if the appellate court takes some time in making its determination, then the two year limitations might run for the probate bill of review or will contest and the action must be filed to preserve the claims.

D. Benefit and Effect of Bill of Review.

We have had numerous cases where the defects in the probate process invalidated the prior probate of Wills and we utilized the bill of review procedure to get Wills set aside before even getting to the substance of a will contest based on testamentary capacity or undue influence. The proof requirements to probate are mandatory and, if not followed, the entire probate has to be redone. What is the benefit? As an estate litigator it offers a huge benefit. If the contest is post-probate and the proponent is sitting “fat and happy” in the driver’s seat having a Will found to be valid and appointed as the Executor, setting the probate aside on a probate bill of review can cut the legs right out from under that proponent. The set aside of the probate order, removes the Will from probate, removes the finding of validity and the presumptions that go along with it and removes the proponent as Executor. The latter shifts the burden back to the proponent to prove the Will is valid, but, most of all, it removes from the proponent control of the estate – meaning, the proponent, who was the executor, can no longer use estate assets to fund the defense of the will contest. Let me assure you, this changes the dynamic of the proceeding.

In one case, the probate was done via a foreign witness (lived in New Jersey) and the use of deposition on written questions without a commission. The problem was the deposition on written questions lacked all of the proof required to probate the Will and the commission procedure was not properly followed. The probate of the Will was completely invalid. Initially, we convinced the judge it had to be redone, but, after some small town politics, he reversed his ruling and allowed the probate to remain. We appealed and the Beaumont Court of Appeals held that, since the goal of the Bill of Review was to set aside the Will, which is the same goal of a, then, §93, will contest, the case was not final under *Crowson v. Wakeham* (supra) and dismissed the appeal for lack of jurisdiction. The case later settled.

In another case, the Will was proven up as self-proven, but the Will witnesses had switched places when signing the self-proving affidavit to the Will. One signed the affidavit and the other Will witness became the notary to the affidavit, rather than the affiant. The problem is that Tex. Est. Code §251.104(b) strictly requires the testator and the will witnesses sign the self-proving affidavit. This probate was easily set aside on bill of review, because non-self-proven wills require extra proof that was not presented when the Will was probated.

In yet another case, we set aside the probate of a Will upon a bill of review over two years after the probate because it was proven up as a self-proven Will and only that proof was presented. We were able to prove in the bill of review trial, while the will witnesses signed the self-proving affidavit, the signatures on the attestation were forged. As a result, under the *Boren* rule,¹⁰ the signatures on the affidavit were sufficient to serve as witnesses to the Will, but it lost its self-proving character. Because the proof requirements are mandatory, the Court had no choice, but to set aside the probate.

¹⁰ Codified under Section 59(b) of the Texas Probate Code (now Section 251.105 of the Texas Estates Code).

V. CONCLUSION:

An estate planner has an obligation to defend his or her work and owes a fiduciary duty to the client to express the testator's intent and to assure no undue influence by protecting the client from opportune situations from such influence. I have given examples of how estate planners can protect themselves from having to explain shoddy work, which, but for *Barcelo v. Elliot*, would

expose them to liability to the beneficiaries, but certainly exposes them to liability to the client and, later, their estate for loss or damage occasioned by malpractice. Estate planners should always keep in mind that the strength of your process will dictate the excellence of your product.

R. Kevin Spencer
SPENCER & JOHNSON, PLLC
500 N. Akard Street, Suite 2150
Dallas, Texas 75201
(214) 965-9999
(214) 965-9500 - Fax
kevin@dallasprobate.com

EDUCATION:

THE UNIVERSITY OF SOUTH DAKOTA – SCHOOL OF LAW, Vermillion, SD – Juris Doctorate, 1992
AUSTIN COLLEGE, Sherman, TX – B.A. in Business and B.A. in Psychology, 1989
CISTERCIAN PREPARATORY SCHOOL, Irving, TX – High School Diploma – 1985

PROFESSIONAL BACKGROUND:

PRINCIPAL, SPENCER & JOHNSON, PLLC – January 1, 2018 – Present
PRINCIPAL, SPENCER LAW, P.C., Dallas, Texas – September 1, 2011 – December 31, 2018
PRINCIPAL, SPENCER & WATERBURY, L.L.P., Dallas, Texas – Sept. 1, 2007 – Aug. 31, 2011
PARTNER, THE HARTNETT LAW FIRM, Dallas, Texas – Jan. 1, 2001 – Aug. 31, 2007
ASSOCIATE, THE HARTNETT LAW FIRM, Dallas, Texas – Aug. 1, 1992 – Dec. 31, 2000

Licensed to practice law by the State Bar of Texas, May 7, 1993

CERTIFICATIONS:

Mediator – Certified – November 2012
Certified, Guardianships/Attorney Ad Litem

HONORS/RECOGNITIONS:

Martindale-Hubbell – AV Rated, since September 2003
Listed in Bar Register of Preeminent Lawyers – Trusts and Estates Section – 2011 – Present
Texas Super-Lawyer – Estate and Trust Litigation – Texas Monthly Magazine – 2011 – Present
Texas Rising Star (Best Lawyers in Texas Under 40), Texas Monthly – 2004, 2005, 2007
Best Lawyers in Dallas Under 40 – D-Magazine – May 2006

PRACTICE AND BIOGRAPHICAL INFORMATION:

As the Principal and Owner of SPENCER LAW, P.C., Kevin practices in litigation and appeals in all Texas Courts with a focus on all aspects of probate, trust, fiduciary and guardianship litigation and estate administration, including will contests, trusts contests, guardianship contests, fiduciary liability, as well as ancillary probate jurisdiction litigation, heirship and paternity-inheritance disputes, post-death common-law spouse disputes, civil litigation and civil appeals.

LAW RELATED SPEECHES & PUBLICATIONS:

AUTHOR/SPEAKER:

KEN STREET LAW SYMPOSIUM AT AUSTIN COLLEGE – Sherman, Texas–February 12, 2018
Topic: Social Media, Millenials and the Vanishing Jury Trial: Issues of the 2018 Trial Lawyer

AUTHOR/SPEAKER:

ADVANCED FAMILY LAW COURSE – San Antonio, Texas – August 10, 2017
Topic: Estates Code and Estate Planning Issues Affecting Your Family Law Practice

AUTHOR/SPEAKER:

DALLAS BAR ASSOCIATION – FAMILY LAW SECTION – Dallas, Texas – March 8, 2017
Topic: Estate (Planning) Litigation Pointers: A Litigator's Perspective

AUTHOR/SPEAKER:

FIDUCIARY LITIGATION SEMINAR – Houston, Texas – December 1-2, 2016
Topic: It's Not Over Yet! Resignation, Removal & Successor Fiduciaries

AUTHOR/SPEAKER:

DENTON COUNTY PROBATE BAR – Denton, Texas, November 4, 2016
Topic: Estate (Planning) Litigation Pointers: A Litigator's Perspective

AUTHOR/SPEAKER:

AMARILLO AREA PROBATE BAR – Amarillo, Texas, September 23, 2016
Topic: Estate (Planning) Litigation Pointers: A Litigator's Perspective

AUTHOR/SPEAKER:

COLLIN COUNTY PROBATE BAR – McKinney, Texas, April 8, 2016
Topic: Estate (Planning) Litigation Pointers: A Litigator's Perspective

AUTHOR/SPEAKER:

ADVANCED FAMILY LAW COURSE – San Antonio, Texas, August 6-9, 2007
Topic: (Family vs.) Probate Regarding Children – August 8, 2007

AUTHOR/SPEAKER:

PROBATE LITIGATION SEMINAR – Fort Worth, Texas – September 17, 2004
Topic: Bill of Review and Error Correction in Probate

AUTHOR/SPEAKER:

THE TAFLS TRIAL INSTITUTE – New Orleans, Louisiana – January 15-17, 2004
(Texas Academy of Family Law Specialists)
Topic: Divorce and Trust Litigation: Can you trust the Trust?

AUTHOR:

“Probate Issues Affecting Divorce Attorneys and their Clients” – Family Law Forum Newsletter,
Vol. 18, Issue 1, Texas Academy of Family Law Specialists, December 2002

AUTHOR/SPEAKER:

ADVANCED FAMILY LAW COURSE – Dallas, August 5-8, 2002
Topic: Probate: Dead or Alive, We will be Splitting the Estate, and Other Cross-Over
Issues – August 6, 2002

SPEAKER:

HOW TO OFFER & EXCLUDE EVIDENCE SEMINAR – Houston, Texas
Topic: Self-Proving Evidence – February 9, 2001

ASSOCIATIONS/ACTIVITIES:

Texas State Bar - 1993

State Bar CLE Planning Committee Member – Advanced Estate Planning Seminar – 2017-2018

Committee Member – Dallas Bar Association – Probate Section – 2016, 2017

Dallas Bar Association:

Section Member:

- Probate Section
- Trial Skills Section
- Family Law Section
- Appellate Section
- Alternative Dispute Resolution Section

Texas Trial Lawyers Association – 2013, 2016-Present

Dallas Trial Lawyers Association, 2016

Mentor, UNT College of Law – L.A. Bedford Mentor Program– Dallas – 2016, 2017

Member, College of the State Bar of Texas – 2007, 2008

Sustaining Life Fellow, Dallas Association of Young Lawyers (“DAYL”) Foundation

DAYL – Leadership Class – Class of 2002

Attorney, Dallas Volunteer Attorney Program

President, Cistercian Preparatory School Alumni Association, 1998-2002