

Florida Fellows Institute
American College of Trust and Estate Counsel

Will and Trust Contests

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TIME LIMITATIONS: CONTESTING WILLS

(Including Testamentary Trusts)

- 1. No limitations periods begin until there is a probate proceeding because will contest is defensive matter raised in opposition to petition to probate will or to revoke probate.**
- 2. Deadlines applicable to asserting invalidity of will in probate proceeding:**

WILL CONTEST DEADLINES IN PROBATE PROCEEDINGS

A. If formal notice of petition for testate administration has been served:

Defenses (i.e., will contest) must be served within **20 days** after service of formal notice – validity of will or testacy of decedent may not be challenged later.
Rule 5.040(a)(1); §733.2123

WILL CONTEST DEADLINES IN PROBATE PROCEEDINGS

B. If will admitted to probate without service of formal notice of petition for testate administration, petition to revoke probate (i.e., will contest) must be filed by the earlier of:

3 months after service of notice of administration [§733.212(3); Rule 5.240(a) and (d); what about later discovered will?], or

Entry of an order of final discharge [§733.109(1); §733.212(3); Rule 5.270(a)]

WILL CONTESTS TACTICAL BONANZA

Caveats by “interested person other than creditor.”
§731.110; Rule 5.260

- 1. Filing stops admission of will to probate and appointment of PR until proceedings after service of formal notice of petition for admin.**
- 2. May be filed before death of the decedent, but expires 2 years after filing.**
- 3. Will contest as caveat? *Crescenzo v. Simpson*, 239 So. 3d 213 (Fla. 2d DCA 2018)**

WILL CONTESTS

IMPORTANT CONSIDERATION

Effect of Probating Will:

“In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence, and that the will was unrevoked on the testator’s death.” §733.103(2)

[*Res judicata*, collateral estoppel, etc.]

TRUST CONTEST DEADLINES

NOTE: No action to contest validity of revocable trust may be brought until trust becomes irrevocable (by its terms or settlor's death) except by guardian of property of incapacitated settlor. §736.0207(2). Accordingly, there is no limitations period applicable to contesting a trust while it is revocable.

TRUST CONTEST DEADLINES

For Trusts Revocable at Settlor's Death:

1. If trustee sends copy of trust instrument and notice of trust's existence, trustee's name and address, and the 6-month period within which to contest trust's validity: **6 months** from sending notice. §736.0604(2)

TRUST CONTEST DEADLINES

For Trusts Revocable at Settlor's Death:

2. In absence of such a notice: **4 years** from settlor's death, subject to the delayed discovery doctrine in the case of undue influence or other species of fraud. §736.0604; §95.11(3)(j) and (p); §95.031(1) and (2)

TRUST CONTEST DEADLINES

For Trusts Irrevocable Prior to Settlor's Death:

4 years from occurrence of last element of cause of action (i.e., creation of the irrevocable trust), subject to the delayed discovery doctrine in the case of undue influence or other species of fraud. §95.11(3)(j) (“legal or equitable action founded on fraud”); §95.11(3)(p) (“Any action not specifically provided for in these statutes”); §95.031(1) and (2)

TRUST CONTEST DEADLINES

Delayed Discovery Doctrine:

All legal or equitable causes of action founded on fraud are subject to a delayed discovery doctrine under §95.031(2). Under that doctrine, the 4-year limitation period does not begin to run until facts giving rise to the cause of action are discovered, or should have been discovered with the exercise of due diligence. In any event, the action must be filed within 12 years after the date of the fraud.

TRUST CONTEST DEADLINES

Delayed Discovery Doctrine (Continued):

Because **undue influence** claims are governed by the statute of limitations applicable to actions founded on fraud, they are subject to the delayed discovery doctrine found in §95.031(2). *Flanzer v. Kaplan*, 230 So.3d 960 (Fla. 2d DCA 2017)

TRUST CONTEST DEADLINES

Delayed Discovery Doctrine (Continued):

Facts giving rise to a cause of action based on undue influence do not become discoverable by the exercise of reasonable diligence until termination of the underlying undue influence. *In re Guardianship of Rekasis*, 545 So.2d 471 (Fla. 2d DCA 1989)

TYPE OF PLEADING – WILL CONTEST

- 1. Before Issuance of Letters (i.e., formal notice of petition for administration has been served) – Answer to petition for administration stating grounds for invalidity as a defense. §733.2123; Rule 5.040(a)(1)**
- 2. After Issuance of Letters (i.e., will already admitted to probate without service of formal notice of petition) – Petition for revocation of probate stating grounds for invalidity. §733.109(1); Rule 5.270(a)
[This is a permissible collateral attack.]**

TYPE OF PLEADING – TRUST CONTEST

Judicial proceedings concerning trusts, including those to determine the validity of all or part of a trust, are commenced by filing a **complaint** and are governed by the Florida Rules of Civil Procedure. §736.0201(1) and (4)(a)109(1)

WILL CONTEST – WHO HAS STANDING?

Only an “**interested person**” has standing to challenge the validity of a will. §733.2123; §733.109(1). An “interested person” is “any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved,” including a contingent beneficiary. §731.201(23); *In re Estate of Watkins*, 572 So.2d 1014 (Fla. 4th DCA 1991)

WILL CONTEST – WHO HAS STANDING?

More on Standing/Interested Person:

1. Classic test of “interest” or “standing” is whether the petitioner will benefit financially, if successful. See *Cates v. Fricker*, 529 So.2d 1253 (Fla. 2d DCA 1988).

WILL CONTEST – WHO HAS STANDING?

More on Standing/Interested Person:

- 2. Even where the contestant would receive the same share of the estate, standing may be based on other legally cognizable interests other than economic or financial benefit, such as:**

WILL CONTEST – WHO HAS STANDING?

- A. Opportunity to remove PR
- B. Question PR's qualifications or suitability (e.g., adverse interest to estate or adverse interest or hostility to those immediately interested in estate)
- C. Opportunity to seek appointment of another PR

Delbrouck v. Eberling, 226 So.3d 929 (Fla. 4th DCA 2017).

WILL CONTEST – WHO HAS STANDING?

More on Standing/Interested Person:

3. Contestant has right to obtain prior estate planning documents and related information through discovery to prove standing. *Boren v. Rogers*, 243 So.3d 448 (Fla. 5th DCA 2018).

WILL CONTEST – WHO HAS STANDING?

More on Standing/Interested Person:

4. Contestant has burden of pleading and proving interest or standing (i.e., not an affirmative defense). Rule 5.270(a); *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002, 1005-1006 (Fla. 5th DCA 2005)

WILL CONTEST – WHO HAS STANDING?

More on Standing/Interested Person:

5. Typically, person with standing is beneficiary under prior will or heir-at-law.

6. Personal representative under prior will also has standing to contest later will. *Wheeler v. Powers*, 972 So.2d 285, 289 (Fla. 5th DCA 2008); *Engelberg v. Birnbaum*, 580 So.2d 828 (Fla. 4th DCA 1991)

WILL CONTESTS – WHO HAS STANDING?

More on Standing/Interested Person:

7. “**DDRR**” may affect standing. If an otherwise valid revocation of prior will or devise (by formal document or act) is “conditional” because done in connection with invalid replacement devise, beneficiary under prior will or devise may still have standing. *In re Estate of Murphy*, 184 So.3d 1221 (Fla. 2d DCA 2016; *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002 (Fla. 5th DCA 2005)

TRUST CONTEST – WHO HAS STANDING?

1. Civil actions may be prosecuted in name of real party in interest. Civil Rule 1.210(a).
2. Test of “interest” or “standing” to bring trust contest should be same as for will contest.
3. No one has standing to contest validity of a trust that is revocable other than guardian of property of incapacitated settlor. §736.0207(2)

BURDEN OF PROOF – WILL CONTESTS

1. Initial Burden – Will proponent must establish *prima facie* formal execution and attestation by:
 - A. Live testimony of attesting or non-attesting witness,
 - B. Self-proving affidavit executed in accordance with §732.503, or
 - C. Oath of attesting witness executed as required in §733.201(2).

BURDEN OF PROOF – WILL CONTESTS

2. If proponent satisfies initial burden, contestant then has burden of establishing grounds on which probate of will is opposed or revocation sought.
§733.107(1)

BURDEN OF PROOF – TRUST CONTESTS

The contestant has the burden of establishing the grounds for invalidity. §736.207(1)

GROUNDS FOR CONTESTING WILL OR TRUST

Incapacity/Insane Delusion of Testator/Settlor

Capacity required to create or amend revocable trust same as that required to make will. §736.0601

Lack of Due Execution:

Wills - Subject in their entirety to statutory requirement of due execution. §732.502

GROUNDS FOR CONTESTING WILL OR TRUST

Lack of Due Execution:

Revocable Trusts – Formalities for execution of wills in Florida are applicable to “testamentary aspects” of revocable trusts or amendments executed on or after 10-1-95 by a settlor domiciled in Florida. §736.0403(2)(b) and (4). No requirement as to revocation.

GROUNDS FOR CONTESTING WILL OR TRUST

Lack of Due Execution:

Trusts Irrevocable at Creation – No requirement of execution with formalities required for wills. Note: Statute of frauds for real estate.

Procured by Fraud. §732.5165 and §736.0406

Procured by Duress. §732.5165 and §736.0406

Procured by Mistake. §732.5165 and §736.0406

GROUNDS FOR CONTESTING WILL OR TRUST

Procured by Undue Influence. §732.5165 and §736.0406

Influence that overcomes or destroys a person's free agency or willpower and substitutes the will or wishes of another for the will of that person. It may also be described as influence that so controls or affects the mind of a person that he or she is not left to act intelligently, understandingly, and voluntarily, but is subject to the will or purposes of another.

UNDUE INFLUENCE

The doctrine of undue influence is based on the idea that a person is induced by various means to execute a document such as a will, trust, or trust amendment which outwardly appears to be her document, but in reality does not reflect her will or wishes and instead reflects the will or wishes of another that have been substituted for her's. *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015)

UNDUE INFLUENCE

Undue influence may result from (citations in outline):

Insidious influences (i.e., sneaky, subtle, or underhanded)

Artful or fraudulent contrivances (i.e., plan or scheme that is cunning or devious)

Persuasion

Overpersuasion

UNDUE INFLUENCE

Pressure

Duress

Force

Whether influence is “undue” is always measured by the impact of the particular influence on the victim.

PROVING UNDUE INFLUENCE

Direct Evidence

Circumstantial Evidence:

Presumption of Undue Influence

Other Circumstantial Evidence

PRESUMPTION OF UNDUE INFLUENCE

If a substantial beneficiary of a gift or devise:

- 1. Occupies a fiduciary or confidential relationship of trust and confidence with a decedent; and**
- 2. Is active in procuring the gift or devise,**

**Florida law rebuttably presumes that the gift or devise is the product of undue influence.
(Citations in outline.)**

PRESUMPTION OF UNDUE INFLUENCE

Confidential Relationship:

Arises whenever one person trusts in and relies upon another person who accepts that trust.

The term is very broad and includes all cases in which trust and confidence has been reposed and accepted.

Origin of the relationship is immaterial.

PRESUMPTION OF UNDUE INFLUENCE

Confidential Relationship (Continued):

The relation need not be technical, formal or legal; it may be informal, moral, social, domestic, or merely personal.

(Citations in outline.)

PRESUMPTION OF UNDUE INFLUENCE

Active Procurement:

Significant involvement in facilitating the transaction.

PRESUMPTION OF UNDUE INFLUENCE

Active Procurement (Continued):

The following factors and warning signals have been identified as evidence of undue influence or active procurement of a gift or devise (citations in outline):

Beneficiary discussing document or its contents with decedent prior to it being prepared or signed.

Beneficiary's knowledge of contents of decedent's prior documents being changed or replaced.

PRESUMPTION OF UNDUE INFLUENCE

Active Procurement Factors (Continued):

Beneficiary recommending attorney to prepare the document.

Beneficiary discussing document or contents with attorney preparing document.

Beneficiary giving instructions to attorney preparing document.

PRESUMPTION OF UNDUE INFLUENCE

Active Procurement Factors (Continued):

Beneficiary bringing client to attorney's office to discuss or sign document. Note: This factor alone will not prove active procurement.

Beneficiary being present when document or contents discussed by decedent and attorney.

Beneficiary knowing contents of document prior to signing.

PRESUMPTION OF UNDUE INFLUENCE

Active Procurement Factors (Continued):

Beneficiary securing presence of witnesses to document.

Beneficiary present at signing of document.

Beneficiary possessing document after signing.

PRESUMPTION OF UNDUE INFLUENCE

Active Procurement Factors (Continued):

No particular number of factors have to be proven to show active procurement. It would be a rare case in which all of them are present. (Citations in outline.)

The “factors” are examples of facts that show active procurement or undue influence. The facts giving rise to the presumption are themselves circumstantial evidence of undue influence. (Citations in outline.)

PRESUMPTION OF UNDUE INFLUENCE

Reasons for the Presumption:

Because of the secret nature of the dealings between the beneficiary and the decedent, undue influence is rarely susceptible of direct proof. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); *Gardiner v. Goertner*, 149 So. 186, 190 (Fla. 1933); *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015)

PRESUMPTION OF UNDUE INFLUENCE

Reasons for the Presumption (Continued):

Undue influence is not usually exercised openly in the presence of others, so that it may be directly proved, hence it may be proved by indirect evidence of facts and circumstances from which it may be inferred. *Gardiner v. Goertner*, 149 So.186, 190 (Fla. 1933)); *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015)

PRESUMPTION OF UNDUE INFLUENCE

Reasons for the Presumption (Continued):

Implements a public policy against abuse of fiduciary or confidential relationships.

§733.107(2)

PRESUMPTION OF UNDUE INFLUENCE

Effect of the Presumption:

- 1. Implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under the Evidence Code. §733.107(2); §§90.301-303**

PRESUMPTION OF UNDUE INFLUENCE

Effect of the Presumption (Continued):

- 2. Because the presumption is rebuttable, it may be overcome by other evidence, but the burden is on the party against whom the presumption operates to prove, by a preponderance of the evidence, that the will, trust, or devise was free from undue influence. (Citations in outline.)**

PRESUMPTION OF UNDUE INFLUENCE

Effect of the Presumption (Continued):

- 3. If the person against whom the presumption operates fails to prove that the will, trust, or devise is not the product of undue influence, the presumption controls and a finding of undue influence is required. §733.107(2); §§90.301-303**

OTHER CIRCUMSTANTIAL EVIDENCE OF UNDUE INFLUENCE

1. **Meretricious Relationship Presumption** - *Beatty v. Strickland*, 186 So. 542, 544 (Fla. 1939). (“Transactions Inter Vivos between parties living in illicit sexual relations where the consideration is inadequate or wanting altogether are generally presumed prima facie to have resulted from the practice of undue influence on the part of the one deriving the advantage.”); *Benner v. Pedersen*, 143 So.2d 722, 726 (Fla. 2d DCA 1962)

OTHER CIRCUMSTANTIAL EVIDENCE OF UNDUE INFLUENCE

- 2. Susceptibility - Age - Physical & Mental Condition** - *In re Estate of Aldrich*, 3 So.2d 856, 858 (Fla. 1941) (. . . “it is well known that a person in feeble health or with a weak mind is more susceptible to improper influences than one of robust health and strong mind.”); *Gardiner v. Goertner*, 149 So. 186, 189-190 (Fla. 1933); *Washington Loan & Trust Co. v. Hutchinson*, 144 So. 343, 344 (Fla. 1932); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925)

OTHER CIRCUMSTANTIAL EVIDENCE OF UNDUE INFLUENCE

3. **Other Acts or Transactions** - Evidence of undue influence in one transaction between the parties may be considered in determining the existence of undue influence in a prior or subsequent transaction, even if far removed in time. *Hopkins v. McClure*, 45 So.2d 656, 657 (Fla. 1950); *Gardiner v. Goertner*, 149 So.186, 190 (Fla. 1933)

OTHER CIRCUMSTANTIAL EVIDENCE OF UNDUE INFLUENCE

4. **Opportunity to Exercise Undue Influence** - *Gardiner v. Goertner*, 149 So. 186, 190 (Fla. 1933)
5. **Motive to Unduly Influence** – *Id.*
6. **Dramatic Change in Plan** – *Id.*
7. **Character of Devise (Reasonableness/Natural)** – *Id.*; *In Re Estate of Starr*, 170 So. 620 (Fla. 1936); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925)