

# What's NEXT: Law



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# Plan for the best, prepare for the worst

## Creating an estate plan that prevents future litigation

Everyone – regardless of age, family structure or net worth – should have an estate plan. Through estate planning documents, you can direct how your assets will be distributed after you pass away. Depending on your situation, however, your heirs or others may disagree with your decisions and may attempt to contest your directives in Surrogate’s Court. Forchelli Deegan Terrana LLP partners Stephanie M. Alberts and Cheryl L. Katz-Erato are tax, trusts and estates attorneys who advise clients on developing an estate plan that not only meets their personal objectives, but helps prevent or deter future litigation regarding such plan.

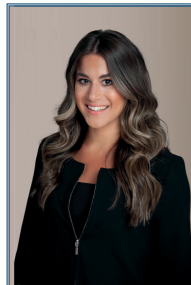
**Wills:** Your last will and testament provides for the disposition of assets that are in your name alone without a designated beneficiary on your passing. “It is important to understand that a will is just a piece of paper until a judge says it is valid,” Katz-Erato said. “If you are using a will to distribute assets in a way that your family does not think is fair, you are almost inviting litigation by disposing of your assets through a will.” Assets directed through a will are subject to the probate process, which requires that all parties who are in line to inherit receive notice. “For example, you are the father of two children – a daughter and a son. Your wife predeceased you,” Katz-Erato said. “You get along with your daughter, but not your son, so you want to give your as-



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sets to your daughter and disinherit your son. After your death, your son is going to be notified of this alleged will through a probate proceeding and may challenge the validity of it.” Wills can be contested on various grounds, including lack of due execution, lack of testamentary capacity, fraud, forgery, undue influence, duress or mistakes.

**No-Contest Clauses:** One technique used to deter litigation is the inclusion of a no-contest clause in your will. “Take the same example as above. Let’s say the father gives his entire \$2 million estate to his daughter through his will, but leaves

nothing to his son. He is almost inviting litigation by doing this,” Katz-Erato said. “Alternately, he could leave \$1.5 million to the daughter and \$500,000 to the son and include a no-contest clause in the will which states that if any beneficiary fights the will’s validity and loses, they lose all interest given to them under the will. With this included, the son may say, ‘Is it worth it to fight this, or should I just take my \$500,000?’ The no-contest clause is not a guarantee, but it’s a deterrent we like to use.”

**Trusts and Beneficiary Designations:** Another technique is to develop a plan

whereby your assets pass outside of probate. “If there are no assets in your name alone without a designated beneficiary, there is no need for probate,” Alberts said. “By placing assets in a trust and/or designating beneficiaries on assets, you can contract around the law and make it more difficult for someone to contest your directives.” Simply creating the trust is not sufficient. “Once the trust is established, you need to complete the transfer of assets into the trust,” Alberts said. “If you anticipate that your estate plan may be contested, be sure to appoint a responsible trustee who would engage the right professionals to defend against any litigation.” Depending on your situation, the trustee might be an attorney, family member or friend. “A beneficiary can also be the trustee,” Alberts said. “If you have two children who get along, you can appoint them as co-trustees. If they don’t get along, don’t put one in charge; pick someone else.”

In summary, an estate plan is not “one size fits all,” Alberts said. Work with an experienced estate attorney to create a unique plan that will allow you to meet your goals. Further, if you are concerned that your plan may be contested, include a trusts and estates attorney with litigation experience in the planning process. “They understand what is legally required to overturn estate planning documents,” Katz-Erato said.

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