The Law and You
Will Contests

This month's column treats the subject of will contests. It is timely for me because I am in the midst of a serious legal battle over which of the deceased's wills is valid.

The Probate Code governs some general rules about wills to ensure their validity and to prevent unfounded claims for a share of the deceased's estate. After all, the deceased can't testify how he or she intended to distribute his or her estate. The primary and usually only evidence we have is the testator's will.

Although a will meets all of the formalities required by the Probate Code, someone can still challenge it.

To be a self-proved will, two witnesses must observe the testator sign his or her will and then those witnesses must sign the will in each other's presence and in the presence of the testator. Finally, the testator must also sign the will again in the presence of the witnesses attesting to the presence of the witnesses.

If the will is self-proved, however, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are also presumed, subject to rebuttal.

But even if a will was in fact signed by the testator in the presence of two witnesses, a challenge can be made that the testator was not competent when the will was signed. This kind of challenge most often avoids the term "competent." Rather, the challenger claims that the testator lacked "testamentary capacity."

The general rule is that a testator is presumed competent to make a will, and the burden of proof of testamentary incapacity is on the contestant of a will

Now the standard for testamentary capacity is much lower than a person's capacity for other activities of daily living.

For example, a person may lack sufficient capacity to transact his ordinary business affairs and yet have capacity to make a will.

That is, a decedent's inability to manage his ordinary business affairs does not justify a presumption of testamentary incapacity. This is because contractual capacity and testamentary capacity involve two separate legal standards. The standard for testamentary capacity is lower than that required to transact business.

Challenges to wills are often based on the testator's capacity at the time the will was signed. But even though a guardian or conservator may have been appointed for the testator at the time the will was signed, the testator may still have had testamentary capacity.

Where all that has been adjudicated is the testator's inability to contract or manage his or her on-going financial affairs, testamentary capacity may still exist.

Another common challenge is undue influence. Assuming that a testator has testamentary capacity, the challenger will claim that the testator was subject to undue influence when the will was signed.

Undue influence is difficult to prove, but if proven, the will can be found by a court to be invalid. The burden of proof, however, is on the challenger of the will.

Claims of undue influence most often

arise when a testator leaves his or her estate to someone outside the family. It also arises when a family member named in the will is to receive a substantially disproportionate share of the testator's estate.

When a child or other family member provides substantial care for a testator and is then the recipient of all or most of the testator's estate, other family members suspect undue influence has occurred.

But mere opportunity, interest, confidential relation or a weakened physical condition of the testator do not by themselves give rise to undue influence. Undue influence requires more than mere suspicion. It must be based on substantial facts.

Will contests are very difficult cases. This is particularly true when the will is self-proved and prepared by an attorney who also is present during the signing.

And the Probate Code requires that contestants of a will have the burden of establishing lack of testamentary capacity or undue influence. Nonetheless, if you are involved in a will contest, you should consult a knowledgeable Elder Law Attorney. Check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at *www.naela.com*.