

**WHEN PUSH COMES TO SHOVE:
AVOIDING WILL AND TRUST CONTESTS**

**STEP ISRAEL 2018 ANNUAL CONFERENCE
June 19 – 20, 2018 -- Dan Tel Aviv Hotel**

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I. Common Scenarios

- A. Marrying the Trophy Wife -- jealousy
- B. Marrying the Care Taker – undue influence
- C. Deathbed Marriage -- capacity
- D. Balancing Multiple Families
- E. Treating Children Differently
- F. Successioning the Family Business
- G.. Living Too Long
- H. Real Estate Families – Lack of Transparency
- I. Trusting the Wrong Person
- J. Tax Problems
 - 1. Created by Principal
 - 2. Created by Advisors

II. Lifetime Options

- A. Antemortem Probate
- B. Guardianship
- C. Issues
 - 1. Validity
 - 2. Wisdom
 - a. Better be right
 - b. Low standard of capacity
 - c. Create basis for retaliation
 - d. Better not to show hand and rather to build case

III. Bases for Contest

- A. Improper Execution – but N.B. foreign wills, particularly holographic

- B. Capacity
 - 1. Wills
 - 2. Trusts
 - C. Undue Influence
 - D. Statute of Limitations
 - 1. Wills
 - 2. Trusts
- IV. In Terrorem Clauses
- A. States where they are invalid
 - B. States where they are invalid if probable cause
 - C. Attacks in states where they are valid
 - 1. What actions trigger – *Matter of Singer*, 13 N.Y.3d 447 (2009)
 - 2. Construction proceeding – *Hallman v. Bosswick*, 15 N.Y.3d 706 (2010)
 - 3. Claims
 - a. Marital/Elective share
 - b. Family/Forced Share
 - c. Creditor (e.g., separation agreement)
 - 4. Contrary to Public Policy
 - D. Dependent Relevant Revocation
- V. Testamentary Substitutes
- VI. Agreements
- A. Prenuptial Agreements
 - B. Postnuptial Agreements

- C. Separation Agreements
- D. Trusts
- E. Cohabitation Agreements
- F. Contract to Make Will
- G. Business Agreements
 - 1. Shareholder
 - 2. Partnership
 - 3. Buy/Sell
- VII. Fees/Costs
 - A. American Rule
 - B. *Matter of Hyde*, 15 N.Y. 3d 179 (2010)
- VIII. Malpractice Liability
 - A. Majority Rule
 - B. *Schneider v. Finmann*, 15 N.Y.3d 306 (2010)
- IX. Avoid Surprises