

Tips & Traps to Avoid: Estate Litigation



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TIPS & TRAPS TO AVOID: ESTATE LITIGATION

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Prepared for D'Amico Family Wealth Management Group

Topics

- Some General Statistics
- Ask Lots of Questions and Listen to the Answers
- Elderly Client Issues
- Testamentary Capacity
- Pointers in Assessing Capacity
- After the Will is Signed
- Appointment of Liquidators
- Some Particular Issues to Consider



Some General Statistics

Over **1,100,000 Canadians** with a net worth of **\$1M or more** and this is projected to rise to about 1.8M Canadians by 2021 (Credit Suisse Annual Global Wealth Report).

The biggest inter-generational wealth transfer in history, with about **\$1Trillion** changing hands over next two decades is about to arrive (BMO Investorline).

62% of Canadians do not have a will and of those that do, **12% say it is out of date** (Legalwills.ca).

And for people over 65, it is **50% with no will** and **21% of those who have a will say it is out of date.**

Ask lots of questions and listen to the answers!

- Every family has a lifetime of history, including all the ups and downs that come along with that.
- Consider all the personalities and relationships involved.
- Resentment can occur between siblings if a person distributes assets unequally without a good reason.
- Document reasons for inequality.
- Careful estate planning is the obvious starting point.



Elderly Client Issues

- See the testator alone, without third party assistance and be wary about family or friends who may be keen to inform or interpret wishes of testator.
- Verify if the testator has his own lawyer or professionals but has been diverted from them to bypass advice already received;
- Be alert to the possibility of undue influence. Take extra care where presumptions of undue influence will be relevant, such as age, frailty or illness, reliance upon relatives or care givers for day to day care, assistance or transportation;
- Where instructions received are in writing, always arrange to meet testator to obviate the possibility of fraud, assess the testator's capacity and ensure that comprehensive instructions are freely obtained;

Testamentary Capacity

- Testamentary Capacity and mental capacity are not one and the same;
- Generally testator must understand
 - nature of act and its effects
 - extent of property he is disposing
 - comprehend and appreciate the claims to which he ought to give effect.
- Details of assets, their nature, extent and value;
- Vulnerable or needy family members; have any received more benefits than others; do any have a closer or more caring relationship;

Pointers in Assessing Capacity (1)

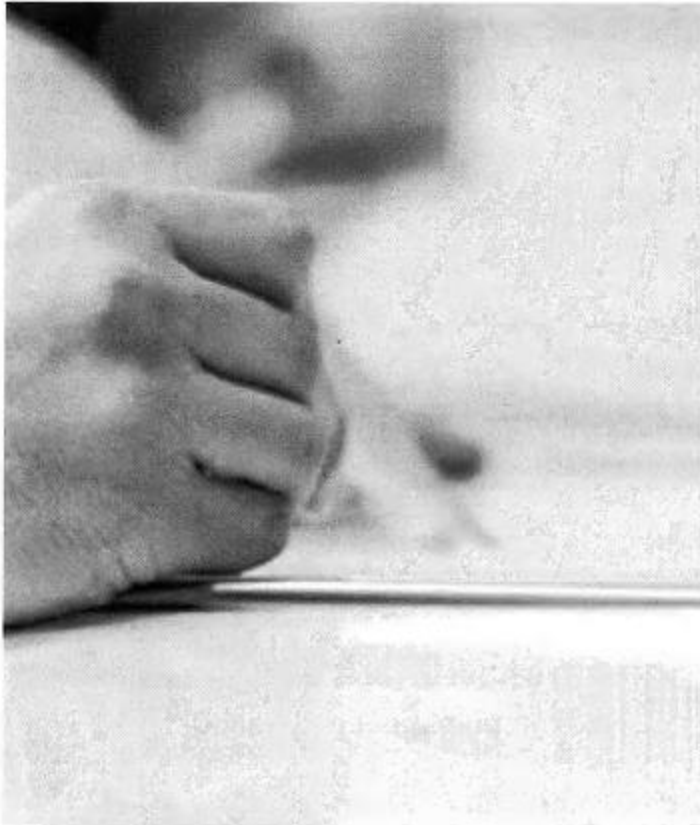
- **Determine** if the testator fully understands the nature and effect of what he is doing and comprehends all necessary background information, including details of family members,
- **Obtain** corroborative information where necessary, including a diagnostic assessment of the client (that is, medical evidence),
- Treat any medical evidence obtained as **supplemental to**, and not a substitute for, the legal tests for capacity,
- **Be fully aware** of the legal test for assessing the capacity required in the particular context;
- **Ensure** that the nature and effect of the will is explained to the client in broad terms and simple language,

Pointers in assessing capacity (2)

- After a reasonable time frame, **establish** whether the client can paraphrase in broad terms the explanation given earlier
- **Avoid** being misled by a client's preserved social skills into believing that they have the necessary capacity to make a particular decision or complete a particular transaction. Give consideration as to whether it is necessary to review the assessment of capacity at an additional meeting in the near future
- **Be aware** of the danger in asking questions that give rise to the answer 'yes' or 'no'
- **Do not regard** an individual as lacking capacity because of an apparently imprudent decision
- **Ensure** that immediate and comprehensive notes are made of any assessment of a client's capacity.

Pointers in assessing capacity (3)

- If in doubt, a **medical opinion** should be sought before proceeding. However, it is the solicitor's obligation to determine whether or not the client has testamentary capacity. Medical evidence may be of assistance, but is not a substitute for a legal determination of capacity.
- **Careful notes** should be made and recorded where the client lacks sufficient capacity and a solicitor concludes that it is not possible to obtain instructions.
- Similarly, **where there is a doubt** as to capacity but a solicitor proceeds to draft a will on the basis that there is capacity, very careful and detailed notes setting out the full circumstances should be made, with a contemporaneous attendance of the circumstances surrounding the taking of instructions and the preparation and execution of the will.



After the Will is Signed

Make a **detailed memo** as to what was actually said during the consultation as evidence of the instructions given that gave rise to the drafting of the will and in establishing that the will of the testator was made in the absence of undue influence.

The memo should address the **testator's mental state**, particularly so where there may be a doubt about capacity to make the will and, where relevant, to explore any changes or alterations from earlier wills.

Consider arranging for a **medical report** regarding testator's cognitive ability after will is executed.

Consider **video taping**

Appointment of Executors

- The advantages in the appointment of the testator's spouse (if any) as sole or co-executor, unless circumstances indicate good reason to do otherwise. This will avoid the possibility of the surviving spouse's wishes or interests being overridden or manipulated by others.
- Further, where the surviving spouse is an executor, he or she will be best placed to exercise his or her right to the legal right share.
- The potential for conflict of interest in the appointment of certain executors, such as the step-parent of the testator's children, and the effect this may have on the administration of the estate.
- The need for extra care in the choice of executor where the testator wishes to make special provision for needy children or other family members (such as elderly siblings).

Some Particular Issues

- Renunciation to family patrimony and/or partnership of acquests;
- Estate with assets located outside Quebec (condo in Florida; U.S. bank accounts);
- Independent Trustee rule, remuneration and replacement
- Encroachment on capital clauses



FOR ANY QUESTION

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