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MASSACHUSETTS LAWYERS WEEKLY

October 15, 2007 36 MLW 378

Trusts & Estates Special Feature

Contested wills: an expert's view on challenges for attorneys

By Sanford I. Finkel

We are experiencing an unprecedented transfer of wealth from the elderly generation to their baby boomer progeny. The current elderly possess substantial assets — appreciated homes, farmland and equities. The fact that people are living longer means that more will die with dementing illnesses, such as Alzheimer's disease, as well as other medical, neurological and psychiatric illnesses. Thus, we can assume that there will be a concomitant increase in the number of contested wills.

As an expert witness and consultant in dozens of will contests, I have seen firsthand the problems and pitfalls attorneys face in the drafting and litigation of wills. This article is intended to provide lawyers with psychiatric insights.

Drafting of wills

Believing that the testator is competent when he is not

Testators who may be able to answer yes or no to questions about the natural objects of their bounty and whether they possess certain assets may not have the ability to respond accurately to open-ended questions, such as:

- Who are your next of kin?
- Who do you want to receive your assets?
- What is a will?
- What are the implications of your disposition to your closest family members and friends?

The inability to respond to open-ended questions is especially important in people with Alzheimer's disease. In the earlier stages of the illness, the testator may be friendly, co-operative and sociable. However, for questions that call for recollections, understanding and ability to manipulate information and consider options, some demented clients are unable to provide such information.

Underestimating the complexity of the will

A mildly demented person may understand the treatment of pneumonia (antibiotics), but not a complicated neurosurgical procedure. Similarly, a person might execute a will with a simple disposition (e.g., leaving his estate to a child), but not a will that has many beneficiaries or complicated arrangements).

Proceeding with the will execution with someone who has the elements of testamentary capacity, but also has "insane delusions" on which the will is based

Though refusal to proceed may result in the loss of such a client, proceeding may result in significant embarrassment — or worse.

Videotaping the execution of the will without input from a clinical expert

Videotaping suggests the will may be challenged, perhaps because competency questions will arise. The lawyer may state, "This is what you want, right?" and the testator mostly answers with "yes" or "no." There may be an absence or paucity of detailed questions. Questions may be leading intending to obtain the desired answer. Although this may play well to a jury, an expert can show nuances that will challenge the existence of capacity. The best remedy is a preventive one — to have the expert present for and/or conduct the video interview.

Working primarily with a family member

This may raise accusations of undue influence, even in situations where the testator is competent and has given permission for that family member to represent him. There are contests where no interaction has occurred between testator and the drafting attorney until the actual execution of the will, and all faxes, phone calls, meetings and payment are via the beneficiary.

Misinterpreting medical information

The drafter may assume that a person who has signed an informed consent for a medical procedure has testamentary capacity. Such consent is generally considered to exist at a higher level. However, many times the patient will do what the physician recommends without fully understanding the procedure or its consequences. It is important to be aware of sensory deficits, which may significantly increase the time needed for explanation and execution. In and of themselves, medical illnesses or very old age are not per se a deterrent to executing a valid will.

Preparing a deathbed will

A will that is drafted hastily with significant changes from prior wills presents a higher risk for challenge. Dying patients often experience extreme dependency, as well as significant psychological reactions, including fear of abandonment, regression and denial, any of which could have a bearing on

capacity or susceptibility to undue influence.

Being unaware of prior wills

If the new draft differs from the testator's historic values and intent, there is greater likelihood of a contest. Personality traits generally remain stable through one's life span. If the new will demonstrates a critical departure, ask for a detailed rationale and take thorough notes, as well as a professional consultation.

Not explaining the possibility of a later charge of undue influence

Most testators are not knowledgeable about the concept of undue influence and cannot imagine themselves being such a victim. However, in the case of a potentially controversial will, the attorney will do best in convincing the client to obtain a professional evaluation for the benefit of the testator and lawyer alike.

Not seeking professional consultation from a clinical expert

If an attorney knows there will be a challenge to a will, failure to obtain a professional consultation may result in an invalidated will, professional censure and even a malpractice suit. Ideally, an evaluation should take place on the day the will is executed. If your client refuses your recommendation and wants to execute a potentially controversial will anyway, obtain a clinical expert consultation for yourself. The expert should be able to help you understand the clinical aspects of the case, including differential diagnosis, medical and psychological issues, family dynamics and personality traits.

Litigation of wills

Believing that an expert cannot be a valid witness without having seen the decedent

Besides the extensive caselaw supporting the testimony of such witnesses, the concept of a psychological autopsy is well accepted in the medical field. Retrospective reviews of medical records of the deceased, as well as a review of completed suicides, have been conducted and accepted for years.

Waiting too long to retain your expert

Key fact witnesses and other expert witnesses may be deposed before the expert is retained. Thus, critical opinions and information, which can be vital at trial, are lost. The attorney who does not retain his expert early on limits his understanding of the key medical or psychiatric aspects of the case.

Assuming that the attending physician's opinion is determinant

Some erroneously assume that the treating physician's opinion is stronger than that of the expert who has not seen the patient. First, the treating physician rarely has the full picture —the depositions, correspondence, even prior medical records. Second, the physician may not have the training, expertise or background to understand the medical-legal issues involved. Finally, there may be a natural physician-patient bias that interferes with clinical judgment.

Withholding information from the expert

This occurs because the attorney believes that the information is not important or the additional review is not worth the time and money. However, the expert is in the best position to determine the potential relevancy of the documents and needs to be provided the option of what to review. In extreme cases, information from fact witnesses is not provided (e.g., via depositions), but rather the attorney chooses to provide a "summary" of this information. This can seriously backfire.

Not retaining the right expert

The ideal expert is clinically experienced, currently practicing and board-certified with excellent credentials, including a senior academic appointment and publications. He should also have references and experience with will contests.

For dementias: lack of awareness of the importance of staging

Over the last three decades, there has been increased research on staging of Alzheimer's disease. Cognitive screens during the decedent's lifetime, functional status staging of the illness with correlates to function, and developmental concepts provide evidence — sometimes overwhelming — regarding the testator's capacities.

Lack of awareness of decedent's values and history

Many a will contest becomes understandable when issues of personality, religion and ethics are highlighted. Cases have been settled once the contestants can understand the decedent's decisions in this context.

Not factoring in the impact of psychiatric illness

For example, depression is associated with impaired judgment, pessimism and diminished concentration, all which might negatively impact capacity. Psychosis may interfere with multiple cognitive abilities. However, in and of themselves, mental illnesses do not preclude testamentary capacity.

Assuming that those present at the signing will be sound witnesses

In the considerable majority of cases, the signatory witnesses are present pro forma. They rarely ask meaningful questions, nor do they have qualifications to make mental assessments.

Assuming it's all about money

If a parent has made a disproportionate will, or leaves out a child or children entirely, the disinherited may be fighting for self-esteem and the wish to feel loved. Sometimes, the love issue, more than the financial one, prevents the contestants from settling. An understanding of this issue may facilitate resolution.

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