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The Role of the Geriatric Specialist in Regards to the Marginal Testator:

Consultant Before Death and Expert Witness After Death

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The number of controversial wills executed and contested will increase significantly as the US population ages. In 1990 there were three million Americans over the age of 85. By 2020 that number will increase to eight million, and by 2050 there will be 15 to 18 million. At age 60, one percent of the population suffers from a degenerative dementing illness, such as Alzheimer's disease. This percentage doubles until age 85. Almost half of the community-based (non-institutionalized) elderly population suffers from Alzheimer's disease at age 85. Other mental illnesses, such as depression, psychosis, substance abuse and delirium may also compromise "soundness of mind." However, even elderly with no serious mental or physical illness may become victims of undue influence.

Over 70 percent of the country's wealth is concentrated in the hands of those over 50, with three quarters of older men and women owning the homes where they live. We are about to view the largest transfer of assets from one generation to another in world history, creating challenges for the legal professionals involved in the process. A geriatric specialist can play a key role in helping attorneys recognize and deal with the challenges presented by marginal testators. The following three cases illustrate these challenges.

Case 1

Mr. A.B., age 90 and a life-long bachelor, has lived alone in the same house, which he owns, for the past 70 years. He continues to pay his bills and drive to restaurants several times a day. He is known as an unfriendly and eccentric man. The neighbors have had to bring him to court for his mean behavior. He has one brother who lives out of state, whom he has seen once in the last 40 years, as well as a nephew he sees annually. He doesn't like either very much. He has not had contact with other relatives for decades. He has never had a will.

Recently, he has become more forgetful and once he actually entered a neighbor's home, mistaking it for his own. He has also had more difficulties arranging necessary repairs for his house.

An amiable neighborhood worker befriends him and they begin to have dinner three times a week. Mr. A.B. has told his doctor that his new friend is the best thing that's ever happened to him. Two years later, the friendly worker found an attorney in the Yellow Pages and took Mr. A.B. to see him. The newly drafted will leaves Mr. A.B.'s million-dollar estate to Mr. Friendly Neighborhood Worker.

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Case 2

Ms. C.D., age 91, has lived alone since her siblings died. Her only relatives are three 85-year-old cousins who live 400 miles away and who visit her annually for her birthday. She is hospitalized following a transient ischemic attack (TIA), a reversible shut-off of sufficient oxygen to the brain, but calls her family after 24 hours, demanding that they bring her to where they live. The cousins agree and make the 800-mile round trip in one day, and she enters a retirement facility.

In the middle of the night, she runs outside half-naked in zero-degree temperatures, demanding to return to her home. Her cousins duly drive her home. Upon her return, Ms. C.D. files a police report against her cousins for "stealing her clothes" and "breaking into her safe deposit boxes." She also hires an attorney, who, though he believes that her accusations against her family are not true, drafts a will in which she disinherits them.

Case 3

Mr. E.F., age 87, has Alzheimer's disease. He has two relatives: a sister who has been like a mother to him throughout his life, and a nephew of whom he is fond, but who recently moved out of state. Because his condition has deteriorated, his sister, with whom he had been living, has placed him in a nursing home.

A senior attorney drafts a new will in which, upon the sister's death, Mr. E.F.'s estate goes to several charities, some of which the attorney either represents or is a significant donor. The sister is also involved with some of these charities. The nephew is disinherited. Witnesses to the will indicate that Mr. E.F. did not say a word, but nodded affirmatively and smiled in response to the attorney's questions. He could not sign the will or initial the pages, but allegedly made an "x," indicating that he was executing the will. The sister pre-deceased this testator.

What do these three cases have in common? In each situation, the drafting attorney is confronted with a "marginal client," one whose capacity is compromised by a mental illness. All three clients were elderly, unmarried and childless. In all three cases, the wills were challenged, and expert witnesses were retained by both the plaintiff and the defense. We'll review the results of these cases later in the article.

Challenges

The assessment and execution stage can present challenges for attorneys drafting wills. Only three percent of wills are contested, with most cases settled prior to trial. The presence of mental illness—including dementia, substance abuse and depression—may raise questions about lack of testamentary capacity and/or vulnerability to undue influence. Other wills executed by incompetent testators are not challenged for many reasons: insufficient funds to warrant the cost of a will contest, happy beneficiaries, lack of interest on the part of attorneys, heirs not knowing their rights, or the inability to locate a beneficiary or potential heir.

A very common reason for litigation is that people, by reason of family relations, history or emotion, expect to become beneficiaries and are either not so named or are given less than they expected. An example is the progressively impaired testator who becomes increasingly dependent on a particular caregiver who subsequently inherits a substantial amount of the estate, thereby reducing the distribution to family beneficiaries.

Other causes for challenges include deathbed wills, hastily executed wills in which the testator makes a radical shift from prior wills, and subsequent marriages in which biological children of the deceased are disinherited. In many situations, the courts have placed weight on consistency and compatibility with the testator's long-term goals.

Assessing capacity

How does the attorney know how and when to assess a testator's capacities? Though lawyers who specialize in estate planning may have protocols that routinely address key issues, most wills are drafted by non-specialists. Thus, attorneys may miss asking crucial questions of the testator that would assist in determining testamentary capacity, such as:

- What is a testament (will) and what does it do?
- What are your assets, and about how much is your net worth? If you're not sure, how can you find out?
- Who are your family members? Who should receive or not receive your assets, and why or why not? What are your other important relationships?
- Regarding the people whom you have disinherited or decided to reduce their expected share, how do you think they would feel? If you are angry with them, why? Would it help to talk things over with them?
- Why did you decide to divide your assets in this particular way? What impact do you expect your will to have on those closest to you? What are the economic and emotional implications? What are your options?

An older person may need more time to reflect upon and answer these questions, particularly if there are also sensory deficits, such as impaired vision and/or hearing. However, each testator must demonstrate the ability to understand relevant information, appreciate the situation and consequences, organize and analyze the information in a logical manner, and communicate choices.

In contrast, testators may be asked questions in such a way that cues the answer. "You want to give everything to your son, not your daughter, isn't that right?" People with moderate-stage Alzheimer's disease may be able to function at the cognitive level of a five-year-old and answer "yes" or "no," but do not possess the level of understanding necessary for testamentary capacity.

Further, these yes-no questions may be asked by attorneys who have worked with other family members or other

beneficiaries who actually hired them and actively worked with them to finalize the document. Such a situation can potentially create problems—in the form of challenges—down the road.

When a geriatric expert can help

Attorneys can utilize the geriatric expert in a variety of complex situations, including videotaping, interpreting medical information, and evaluating a client.

Videotaping: When videotaping the execution of a will, the geriatric expert consultant can play an important role in advising the attorney about questions to ask during the interview, or actually conduct the interview. Besides eliciting the elements of testamentary capacity, the expert can request questions that will suggest the presence of a mental disorder. If dementing illness such as Alzheimer's disease is present, the expert can determine what stage of disease the patient has reached and the person's level of functioning.

Interpreting medical information: Experts can help in interpreting and explaining medical information. Does the testator have a psychiatric or other medical problem that can interfere with capacity? Are any current medications having a negative mental effect? Does the testator suffer from delirium, and, if so, are there lucid intervals during which capacity may exist? What is the clinical evidence and basis for such opinions?

The client with dementia may maintain social skills, even with significant cognitive decline. Friendliness, cooperation and sociability should not be mistaken for capacity.

The need to understand medical information is especially important in the execution of hastily drafted deathbed wills. The testator suffering from a terminal illness is more vulnerable to impaired memory and judgment and may be especially vulnerable to undue influence. This is a time of extreme dependency, fear of abandonment, regression and denial. Further, the dying testator may even lack the energy to answer questions. A contemporaneous evaluation by a geriatric expert is highly desirable in such situations.

Evaluation by a geriatric expert: When an attorney is aware that a will is likely to be contested, it is best to have the testator evaluated by a geriatric expert on the day the will is executed, or as close as possible to that date. If the client balks, he or she must be educated as to the possible basis for a contest, and how best to protect against challenges. Many older testators are amazed that someone would think that they could be unduly influenced. This is true for intact clients, as well as those who, because of their dementia, have poor insight. If the client still refuses such an evaluation, the attorney can receive her own expert consultation on relevant clinical and medical information, family dynamics, psychological issues and personality traits.

Challenges to attorneys during litigation

A key to integrating the expert's understanding into your own case is hiring the right expert at the right time. The ideal expert is currently practicing with board certification, is clinically experienced with excellent credentials (including teaching experience and publication), and has prior experience in will contests and references from other lawyers.

Five issues commonly arise regarding the use of geriatric specialists.

1. How can the expert who has not seen the client render an opinion?

The concept of psychological autopsy, supporting a retrospective psychological portrait of the decedent, is accepted in the medical field. Considerable case law supports the validity of such witnesses.

2. On what basis can the expert disagree with the treating physician, who has seen and presumably knows his patient?

Treating physicians rarely have the whole picture. Not only are they missing the complaint, interrogatories, and fact witness depositions, but they often are missing the records and depositions of other physicians and health care professionals, including hospital and nursing home records. Such an incomplete picture lessens the validity of their conclusions. The treating physician often lacks either the time or the background and experience to conduct a meaningful mental evaluation. Finally, the physician may want to help one or more parties, which can result in her rendering a biased opinion.

3. Can the person with a form of dementia, such as Alzheimer's disease, execute a valid will?

Courts have ruled that it is possible, and the medical literature supports this stand for those in the early stages of the illness (mild or mild/moderate). Though there may be occasional exceptions in the moderate to moderate/severe stage, people at this level of illness generally lack testamentary capacity. Thirty years of research has yielded descriptions of the stages of Alzheimer's disease, as well as the functional and cognitive correlates and reverse developmental stages the patient goes through. It may be possible for individuals with moderate dementia to execute an uncomplicated will ("I have a house and stock and want my wife to have it all"), while someone very early in the dementing process may lack capacity to execute a more complex will (e.g., leaving various percentages to multiple organizations and people).

4. What other factors may be relevant to the decision-making process?

Cultural and religious beliefs, as well as long-standing personality traits, often must be incorporated into the overall understanding of the case. Basic personality traits generally do not change over a lifetime. Further, family dynamics —often lingering from decades past— may play a key role in will contests. Who was the favored child? Who is the most deserving? In some will contests,

these issues are more prominent than the obvious financial ones. Many charges of "undue influence" arise from complex family dynamics. The attorney benefits by understanding the nature and substance of these issues, as well as what line of questioning will elicit the psychological contributors to the litigation.

5. Does the presence of mental illness suggest a lack of testamentary capacity?

The presence of psychiatric or related medical issues does not necessarily compromise testamentary capacity, though depression, psychosis, substance abuse, delirium, severe medical illness and medication may all result in diminished capacity, rendering the testator more vulnerable to undue influence and reduced cognitive functioning.

Case results

Keeping all of the above in mind, let's look at how the three cases turned out. Mr. A.B.'s case went to trial. The judge ruled that he possessed testamentary capacity, and held that the will was valid.

Ms. C.D.'s case settled on the eve of the trial. The defendant's expert would have needed to portray the 85-year-old cousins as thieves, or, alternatively, demonstrate that the belief that they were thieves did not play a role in the execution and substance of the will. The attorney understandably was relieved that he did not have to testify about why he allowed a will to be executed by a woman who he believed had an "insane delusion."

Mr. E.F. had severe Alzheimer's disease and had lost his ability to talk. He was functioning at the level of a one-year-old and could nod and smile. The case settled quickly after the experts' depositions were taken.

Conclusion

With the elderly population growing and controlling more assets, we are likely to see an increase in the number of contested wills. With more dementia and other mental illnesses affecting this population, geriatric specialists must understand the legal issues surrounding will contests and how to assist attorneys in understanding the key issues. Similarly, attorneys should continue to learn how to utilize such experts effectively.

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