

ADVISOR.CA

PREVENT ESTATE BATTLES

James Dolan / May 7, 2013



No matter how well someone crafts her estate plan, ex-spouses, disgruntled business partners, estranged children and misguided family members can still challenge her wishes. Estate professionals must anticipate such backlash.

AN IMPORTANT ISSUE

Bulletproofing an estate against potential disputes is a serious concern, says Dana J. Nelko, partner at Fillmore Riley LLP in Winnipeg. However, challenging a will is not easy.

“There’s a high onus on people who seek to change a will,” Nelko notes. “The courts are reluctant to set aside what the testator has said—those are his last wishes. Manitoba courts can only set aside certain bequeaths where a financially dependent spouse or child’s financial needs, for example, have not been properly considered.”

That said, if the mental capabilities of the testator are in doubt, courts will jump in.

“Roughly 90% of the challenges you see to wills in Manitoba relate to issues of capacity or undue influence,” he says. “If the court is satisfied the person didn’t know what he was doing when he executed his will, or his affections were poisoned, or he was unduly influenced to put in provisions, the court will set [it] aside.”

For this reason, consider capacity or influence when working with elderly clients.

“When [a client] is 75, it’s likely she’s not looking for a new lawyer [or advisor],” he says. “She’s being brought in by a relative who believes she needs to change things or be protected. And that raises a whole bunch of red flags.”

For clients in the early stages of dementia, independent capacity assessments may help clarify their positions. But

AVERT AN ESTATE CHALLENGE

- 1. Know the rules:** Some jurisdictions (e.g., B.C.) allow family members

for others, those assessments may have the opposite effect.

“If you have somebody who’s healthy and independent and there’s no debate about cognition, then it might actually hurt the case for an estate planner to ask him or her to go get an assessment,” says Caroline Abela, partner at WeirFoulds LLP in Toronto.

ONE SIZE DOES NOT FIT ALL

Not every strategy is appropriate for every client. For those intent on unequal distributions to close relatives, Abela recommends drafting a memorandum of wishes in conjunction with a client’s will.

“It [can] explain, for example, why one child received 95% of the business and the voting shares while the other child only received 5%—because Child Number One has been involved in the business for the last 40 years,” she says.

Still, Abela says the most effective solution may be communication. By informing heirs well ahead of schedule, clients can often diffuse conflict before it begins—or at least get an idea of who’s likely to initiate a challenge.

“If family members are unhappy about the bequests, address those grievances” at a family meeting, Abela says. “Often the issue is not that an unhappy beneficiary will run havoc, but rather that the beneficiary who perceives there has been unequal treatment does not say anything until after the testator’s death.

“[One of] the reason[s] to meet is to help illustrate the fact that the unhappy beneficiary had an opportunity to express himself—but chose not to do so.”

James Dolan is a business writer based in Vancouver.

considerable leeway for mounting estate challenges. Others (Manitoba) make it much more difficult. Others lie between the two extremes. In Ontario, judges may examine claims based not only on financial obligations, but also on legal, moral and ethical obligations.

2.

Consider an evaluation: An independent evaluation of capacity may be a good idea with some clients; with others, less so.

3.

Write a statement of wishes: A statement of wishes spelling out reasons why certain people were disinherited can be a great help in case of litigation.

MYTHBUSTER

CAPACITY ASSESSMENTS ARE ALWAYS GOOD IDEAS

Not so. For healthy clients, they can raise unnecessary suspicions.



Originally published in Advisor's Edge

Read this article and full issues on the iPad - [click here](#).