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Troubleshooting an eldercare law practice: Testamentary Capacity, choice of executors and warring in-laws

I was recently asked what the three most pressing issues in my Solicitor's Estates practice were. My short answer was Testamentary Capacity, Choice of Executors and Warring In-Laws.

There is no single definition of capacity. There is no general test for capacity. Capacity is issue specific, time specific and situation specific. Capacity can change. There is a legal presumption in favour of capacity.

Generally, in order for a Testator (I use the term Testator to also cover Testatrix), to have the legal capacity to make a Will, they must be able to both understand the information relevant in making the Will and the ability to appreciate the consequences of their decision as to where their Estate's assets are going. The so called "golden rule" regarding capacity to make a Will was set out in the 1869 English case of *Banks v Goodfellow:*

> *A testator must understand the nature of the will and its effect. This does not require a full understanding of the legal terminology of the will, however a broad understanding of the will's effect is essential.*
>
> *A testator must have some idea of the extent of the property of which they are disposing. This need not be an inventory which breaks down into an intricate detailed list, but the testator must appreciate the extent of their wealth.*
>
> *A testator must be aware of the persons for whom he would usually be expected to provide (even if he chooses not to) and must be free from any delusion of the mind that would cause him reason not to benefit those people.*

Capacity is therefore the ability to understand consequences of wishes expressed in the Will. It is not the wisdom of the testator's choice that counts. In our free and democratic country, we have the right to make foolish decisions. In Estates law, after our Testator is gone, the only person who can really explain the contents of a contested Will is gone too.

Historically, Judges have tended to pay all lawyers' fees directly from the Estate for this reason. However, in Ontario there has been a movement towards "loser pays" costs. If Mom left everything to the Church of Scientology in a Will made just before she died, one or more of her children may well take a run at the Estate, alleging that she lacked mental capacity at the time the Will was signed.

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I have several clients who are over 100 years old. Some have dementia. Some have Alzheimer's disease. This is where the "free from any delusion of the mind" in the aforementioned golden rule case becomes problematic. The presence of a mental disorder does not preclude the ability to make a Will. My 100+ year old clients have good days and bad days. They can be capable one day, but not the next.

If I am nervous about the possibility of an attack on the Estate of my elderly client after they are gone, I will make sure I "paper the file" in order to protect myself against a claim alleging Solicitor's negligence. I will ask my clients some of the following questions:

> *Why did you decide to divide the Estate in this particular fashion?*
>
> *Do you understand how individual A might feel, having been excluded from the Will or having been given significantly less than previously expected or promised?*
>
> *Do you understand the economic implications for individual B of this particular distribution in your Will?*
>
> *Can you tell me about the important relationships in your family and others close to you?*
>
> *Can you describe the nature of any family or personal disputes or tensions that may have influenced your distribution of assets?*

As long as they show me that they are able to understand the consequences of their decisions, I am happy to take instructions to draft a Will reflecting their wishes. If they want to leave it all to the Church of Scientology, because it is the only thing that gives their life meaning and they are estranged from their children, that's their capable decision and they have the right to do so.

Turning now to the second pressing issue, Choice of Executors (I use the term Executor to cover other terms such as Estate Trustee and Executrix). My main advice is to appoint the person you trust the most. I have had doting mothers who have sons who are financial wizards and my client is convinced that they are best suited to be the Executor. However, later it becomes apparent that the golden boy son has a gambling habit, or a drinking problem or a drug addiction. When placed in a position of trust the temptation to dip into trust funds to fund their own nefarious deeds overwhelms them. In cases like these hindsight tells us that the dutiful "stay at home Mom" daughter would have been a better choice. Being an Executor is not rocket science. It entails reading a Will and following the wishes expressed therein.

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In cases where our Testator is reluctant to choose a family member to act as Executor, at the end of the day they often choose a trust company, which is only too happy to get the business. An advantage there is the the trust company can be the "bad cop" and say "no" to the "rogue son" who is pestering the Executor for an immediate distribution of the Estate.

When I am acting as Executor, I take no risk and make sure I have more than enough money held back in order to pay any outstanding taxes that may be owed to Canada Revenue Agency ("CRA"). It can take months to get the final Clearance Certificate from CRA which "estops" them from coming back on the Executor (who has unlimited personal liability for unpaid taxes).

Many times, I have had occasion to act a co-Executor of an Estate where one child lives in the U. S. and the other lives in Canada and Mom wants both to be Executors. After I am appointed as well, we have two out of three Executors living in Canada and thus Mom's Estate is a Canadian trust for tax purposes, thus avoiding the negative tax implications when the situation consists of two Executors, one in the U. S. and one in Canada.

The final serious land mine that I encounter in my Solicitor's Estates law practice lies in the area of warring in-laws. It is often not the siblings themselves who cause problems, but their spouses. When Mom's son Harry marries Janet, it immediately becomes apparent that Janet does not like Mom's other son John's wife Susan. Even though the Will states that everything goes fifty/fifty to each of Harry and John, in no time at all Janet and Susan are fighting over Mom's jewelry, even though the jewelry in fact accounts for less than one percent of Mom's Estate's value. In cases such as these, the Executor must be a skilful negotiator. The fallback position is usually for all Estate assets to be sold and the resulting dollars divided in two.

However, if the jewelry (or cottage, or car) is what is desired and not the cash, then the chore is then to get a value assigned to the "chattel" and offer to sell it to the highest bidder within the family. Everyone grieves differently. Everyone's marriage dynamics are different. Every sibling relationship is different. In the emotional times after the death of a loved one, things can go off the rails quickly. One argument sets off World War III. Estate litigation ensues. Lawyers fees drain the Estate's assets. There is little left for the rightful beneficiaries. These sad states of affairs happen far too often.

When these controversial and contentious issues arise, because of my experience as a mediator, my first recommendation to clients is to avoid litigation if at all possible. At the very least my advice is try mediation. You have nothing to lose. Mediation should be seen as an opportunity to avoid litigation. I explain to clients that litigation is costly, time consuming and unpredictable.

There are indeed many other issues facing Estates Solicitors practising in Ontario today but Testamentary Capacity, Choice of Executors and Warring In-Laws are the three that seem to crop up the most in my day to day law practice.