The Butler Bulletin

Butler Wills and Estates **7/1/2016** Edition 1, Volume 10

If someone is in palliative care, is it too late for them to make a will?

We recently had a client call us to make an appointment to visit her husband so that he could make a will. Unfortunately, he was in palliative care.

Oftentimes when people find themselves in a situation such as this, they begin to think about getting their affairs in order. While we wish everyone would have their planning done ahead of time, this isn't always the case.

When someone is in palliative care, it is possible for them to make legal documents such as a will, Enduring Power of Attorney, or Advance Healthcare Directive. However, in order for these documents to be legally valid the maker needs to have his or her mental capacity both on the day of the meeting and when signing the documents.

Losing one's mental capacity can happen a couple different ways, and it doesn't only happen to seniors. In some situations, capacity is lost due to a disease such as Alzheimer's. In others, the mind is healthy but the person is unable to think clearly due to medication. In either situation, the person would be unable to make a legal document.

Of course, this does not mean that there are no options.

Many people with Alzheimer's have good days and bad. Meeting with someone on a good day, when he or she can remember details such as their wedding date, children's names and ages, or past experiences, is the same as meeting with someone who has their mental capacity. As the person needs to have capacity on two days (the initial meeting and the signing), two good days are required to have the documents made properly.

In situations where a patient has lost his or her capacity due to medication, it may be possible to lessen the dose or have the doctor prescribe another medication with fewer side effects. This situation is tricky, as it is unethical to cause the person any pain or suffering.

WHEN A LAWYER IS VISITING A CLIENT IN A SITUATION SUCH AS PALLIATIVE CARE OR LONG-TERM CARE, IT IS IMPORTANT TO BE ALERT FOR SIGNS OF INCAPACITY.

Either way, it is important that the lawyer make comprehensive notes about the visit with the client. This is necessary because if there is ever any doubt in the future about whether or not the client had capacity when making these documents, the notes will provide a concrete answer. Items in the notes could include things such as:

"I met with *client name* at *location* on *date*. He was able to recall all of the assets and debts with ease" or,

"When I met with *client name* she asked many intelligent questions which showed she was able to see how all the documents work together".

If there is any doubt about whether or not the client has capacity, the lawyer should clearly state this in the notes.

Most Commonly Made Mistakes in Homemade Wills

Homemade wills are more common than people think. Here are some of the most commonly made errors in homemade wills:

1. No executor designation. The executor is the person who looks after your estate once you've passed. In homemade wills, people tend to focus on passing on their assets. While this is definitely part of making a will, you need to designate someone to do the actual work.

2. No residue clause. Once the taxes have been paid and the specific items mentioned in your will have been accounted for, what's left is called the residue of your estate. Homemade wills often don't consider what will happen with the residue, which means only part of the estate has been taken care of.

3. The witness is a beneficiary. The will needs to be signed by the person (the testator) in front of two witness who watch him or her sign the document. Then they watch each other sign, and one of them signs an affidavit swearing all of the formalities have been followed. If one of the witnesses is a beneficiary of the estate, the gift you had intended to leave to that person is invalid. This will upset the person, and potentially leave you in a state of partial intestacy.

4. Partly in someone else's writing. If your homemade will is 100% in your own handwriting, you don't need witnesses. So to avoid possibly ruining the will with a beneficiary as a witness, have someone with neat writing write it for you and save the trouble, right? WRONG. If your will is even partially in someone else's writing (or typed), it is invalid.

   This problem is most often seen with wills made from kits. Either the forms have been supplied and filled in by the person, or typed online and printed. Either way, they still need witnesses.

Are Online Will Kits a Good Choice?

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Quite a few people turn to online will kits when they want to write their own will. The idea of a kit is that it is put together by someone who knows what they are doing, and will save you the trouble of researching all the different aspects of the document. When done properly, kits can be very helpful.

The problem with online will kits is they tend to be designed as one size fits all, which most of know from clothes shopping actually means "one size fits nobody". For the most part they account for the most basic of circumstances, and don't address concerns such as capital gains tax, witness regulations, or possible mistakes you have already made (e.g. intergenerational joint property). The questions you answer to complete an online will barely scrape the surface of your situation.

While an online will kit might be good enough for an extremely simple, straightforward estate, the truth is most estates are not as simple as people think they will be. Family situations are complicated.

Besides, when it comes to your family, is something "good enough" what you want?

LISTEN FOR US ON VOCM, WEEKDAYS AT 1:30!

The "No Contest Clause"

What do you do if you want to stop someone from contesting your will? There is no sure-fire to prevent someone from contesting your will if they really want to, although there are steps you can take to discourage them. Often this issue arises when the person wants to leave someone out of their will entirely, or leave them a significantly smaller share than everybody else.

The easiest thing you can do is to put a sentence or two in your will stating why you want to leave this person nothing or very little. It doesn't need to be a full explanation of every thought you put into the matter, as long as it is clear that you thought through the decision.

Secondly, you can include an *in terrorem* clause in your will, which is better known as a "no contest" clause. This clause states that if someone contests your will, he or she will forfeit their share of the inheritance and it will go to someone else.

These clauses are not bulletproof; however, they make it incredibly difficult for someone to argue that you are arbitrarily treating them unfairly.

IS IT TRUE THAT IF YOU LEAVE SOMEONE A DOLLAR, THEY CANNOT SUE YOUR ESTATE FOR A LARGER SHARE?

In short, no. No matter how much you leave someone, if they feel it is unfair they can contest your will. Whether or not they will win is a different story.

In order to contest a will, the person must apply to the courts and have them decide that the will in invalid. To be successful, the person must have sufficient evidence to prove that the will is invalid.

There are three main categories these cases fall into:

1. Undue influence. This includes proving that the person who made the will was forced to create the document.
2. Lack of mental capacity. The person must be able to prove the deceased person did not have the ability to understand what (s)he was doing.
3. Problems with the documents. This would include not following the regulations for signing, no witnesses, etc.

WHAT IF THE WILL IS VALID?

In these cases, there are some people who automatically have the right to sue for a larger share, based on the concept of "dependent relief".

Essentially, anyone who is dependent upon the deceased person is obligated to support all of his or her dependents.

Dependents include:

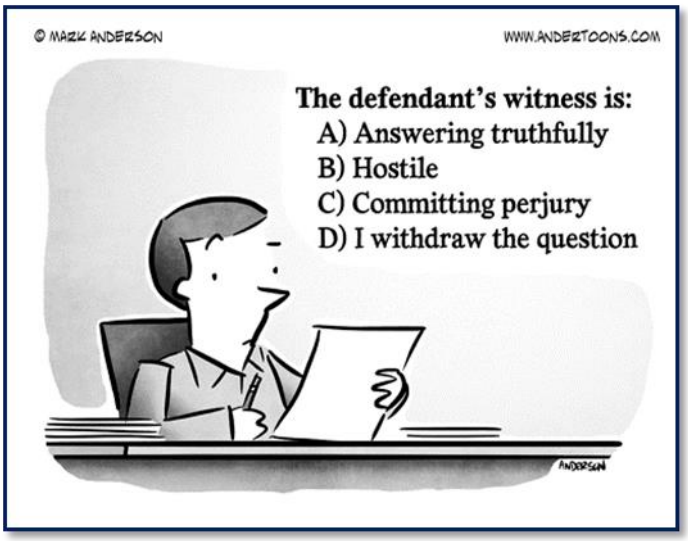
- Minor children
- Adult children with a mental or physical disability that prevents them from earning a living
- A legally married spouse (some provinces include a common-law spouse) without other adequate support e.g. house, life insurance, RRSP, etc.

We strongly recommend preparing documents that appoint a guardian or trustee for an aging parent. These documents appoint someone to look after your aging parent when he or she is no longer able to do it. However, we don't always know when it is time for these documents to take effect.

If your aging parent is exhibiting any of these behaviors, it may be time for a guardian or trustee to take over.

- is unable to safely prepare meals for himself or herself
- fails to recognize people he or she has known for a long time
- forgets to take essential medication or treatment, or because of memory loss, takes too much medication
- is unable to maintain his or her home in a safe, hygienic manner
- forgets to shop for food, toiletries, and other essentials
- hoards items (e.g. newspapers) to the point that they become a hazard
- often puts things in the wrong place, such as putting the telephone in the refrigerator
- does not know how to make appointments
- has problems remembering how to carry out other daily tasks that used to be familiar

If you have a parent who is showing these or similar signs of needing a guardian, consider talking to an estate planning lawyer. He or she will be able to help you figure out the best plan of action to keep everybody safe and protect your assets.



Did You Know…?

If you are married and inherit from your parents, there is no federal law that states whether or not your spouse has a right to it in the event of a divorce. While divorce laws are federal, estate and matrimonial property laws are provincial, so the rule varies from province to province.

Our first fall seminar has been scheduled!

On **Thursday, September 8 @ 6:00** we will be holding a session of Executor Boot Camp.

This 2-hour seminar covers everything you need to know about being an executor, including probate, how to stay out of trouble, where to start, and common errors.

The package includes a copy of the presentation, and a ledger you can use for your records.

Please feel free to share this newsletter with others.

If you have any questions, comments, would like to suggest a topic, or would like to unsubscribe, please email us at chelsea@butlerwillsandestates.com