Will Challenges

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The "Hot Buttons" and How to Avoid Them

Many people consider it a right to dispose of the assets that they have accumulated over their lifetime as they see fit. However, the freedom to make testamentary choices is not absolute and litigation against your estate may significantly derail your plans. In order to conduct your estate planning effectively it is important to know what types of claims a "put out" relative or friend may bring against your estate if they are not satisfied with the distribution of your assets. The simple act of putting your plan into writing does not ensure that your assets are distributed in accordance with your wishes; however when advising clients concerning their estates, an important part of our role is to advise and assist the client to set up a plan which achieves their objectives and which avoids the pitfalls which may lead to a Will challenge.

Due Execution of Your Will

The final step in estate planning involves recording your bequests in a formal Last Will and Testament. Sections 3 and 4 of the *Succession Law Reform Act* set out the formal requirements for the execution of a Will. These include:

1. the Will is in writing;
2. the Will is signed at the end after it has been completed;
3. the Will is signed in the presence of two or more witnesses; and
4. the witnesses signed in the presence of the testatrix and each other.

An individual who is a beneficiary or the spouse of a beneficiary should not be a witness to the Will, nor should the estate trustee or the spouse of the estate trustee. If a beneficiary or the spouse of a beneficiary is a witness, the validity of the gift that is left to that individual or the spouse of that individual, may not be valid and may be challenged.

Unlike some other provinces Ontario has not enacted "substantial compliance" provisions which allow the court to give effect to Wills even if the document is not strictly executed in compliance with the formal requirements.

Lack of Testamentary Capacity

An individual must be of sound mind, memory and understanding when making a Will. In order to avoid a challenge on the basis of lack of testamentary capacity, one of our roles as your lawyer is to ensure that you have full and complete understanding of the following:

1. the nature and extent of your property;
2. the individual(s) to whom you may have an obligation, such as dependents;
3. that making a Will revokes any prior testamentary dispositions that you had in place; and
4. the consequences of making the particular dispositions that have been included in your Will.

In order for such a challenge to succeed the claimant would have to adduce medical and expert evidence. In addition, the claimant would need other evidence from those familiar with you and your circumstances at the time that the Will was completed.

When advising clients concerning their estate, we will make careful notes to support our conclusion if there is any reasonable risk of a challenge on this basis. If we are not sure we may insist on obtaining a “capacity assessment”, which is an expert opinion of capacity to make a Will. This may be a difficult realization but it is in your best interests to have documented support of your testamentary capacity. This is especially important if there is a high likelihood of a challenge to the Will.

Lack of Knowledge and Approval of the Contents of the Will

Another possible basis for challenging your Will is a claim that you did not have full knowledge and approval of the contents of the testamentary document. This challenge may be made where the Will is not prepared in your first language or where you have a disability, such as blindness, and the document is not prepared in a manner that addresses your specific circumstances. It is important to ensure that the drafter is proactive and takes steps to protect the estate.

Undue Influence

If it can be proven that you did not make the Will of your own free-will and volition, it may be possible to have it set aside. Undue influence is more than persuasion and any evidence propounded in support of a challenge on this basis would have to demonstrate that your free-will was overcome by coercion or fraud.

It normal to consult with one or two people who you are close with and who you feel comfortable with prior to preparing a Will. This could be a spouse, a child or even a friend and, since that person is your confidant, it is also very likely that that person will be a beneficiary under your Will.

Will challenges based on undue influence are common when a beneficiary was also a caregiver, nurse or other person on whom the deceased was dependant. Undue influence is also often alleged between an elderly parent and a child, especially if that child was providing shelter and care for the deceased when the Will was made.

These relationships are normal and a necessary part of life. When advising on your estate planning, we are especially alert to the existence of such relationships and will take various steps, including careful notes, to rebut a challenge that the relationship was abused to the extent that undue influence was exercised.

Forgery or Fraud

Such a challenge would allege that the signature on the Will is not yours which is easily avoidable if your witnesses are uninterested third parties who swear affidavits of execution. Allegations of fraud are considered to be the most extreme allegations with respect to the challenge of a Will and it is a very difficult allegation to substantiate.

Dependant Relief Claims

When making your Will you must be mindful of legal and moral obligations to your "dependants" because those obligations do not end on death. As defined in *The Succession Law Reform Act*, your dependants include your spouse, parents, children, siblings or any other person, but only if you were either providing support or under a legal obligation to provide support immediately before your death.

If you do not make "adequate provision" for the proper support of your "dependants" upon your death then they may commence an application for support to be paid from your estate and the court may order such provision as it considers adequate. Once notice of the application has been served on the estate trustee any distributions of the estate are held in suspense until the court has heard the dependants relief claim. This will take months, and perhaps much longer.

When advising clients, we are alert to situations in their personal circumstances which could give rise to a dependant's relief claim, in which case we will help our client structure his or her Will (and assets like life insurance) to minimize or completely avoid the risk of a serious dependant's relief claim.

Claims by Your Spouse

Generally speaking, your spouse is entitled to half of the net wealth accumulated during the marriage and the *Family Law Act* ("**FLA**") permits your spouse, upon your death, to elect to take under your Will or in accordance with the division of assets pursuant to the FLA. This election creates uncertainty in estate planning unless the provision for your spouse in your Will is greater

that the amount that he or she is entitled to pursuant to the FLA. The potential of a spouse's FLA claim can be very troublesome when setting an estate plan. Most commonly, the problem arises when, with the agreement of the spouses, the estate is to be set up as a trust for the surviving spouse, usually due to a fear of the potential influence of a second spouse and how that influence many impact the inheritance of the children of the marriage. In such situations, there is no way to know when the Will is signed whether the value of the trust on the date of death will be greater or less than the value of the spouse's FLA claim. When informed of the potential for a spouse's FLA claim, some spouses abandon the plan to set up spousal trusts, while others agree to move forward with a Marriage Contract, the sole purpose of which is to waive the ability to make a FLA claim.

Constructive Trusts

While common-law spouses do not have the same automatic property rights as legally married spouses, there are alternative avenues available to them for making claims against your property, namely a claim of constructive trust. The court could impose a constructive trust on a particular piece of property or could make a monetary award. However, irrespective of the type of award, a finding of a constructive trust would obviously result in a significant disruption of your overall estate plan.

Conclusion

As can be seen, a multitude of claims can be made against your estate. Whether successful in part or in full, following a trial of the issues or a negotiated settlement, a claim has the potential of either partly or completely disrupting your estate plan.

It is important to obtain quality legal advice and guidance in the preparation of your estate plan from a trusted advisor who is attentive to the various challenges and who can anticipate potential claims and protect your estate. Although good legal advice cannot prevent an aggrieved relative or friend from bringing a claim against your estate, the level of success of a claim is greatly tempered by the involvement of a lawyer in the preparation of the estate plan.

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