Factors Affecting Testamentary Capacity

There are several factors that can impact someone's capacity to create a will that accurately reflects his or her true wishes . These include:

- √ Physical illness
- √ Emotional illness
- √ Undue influence

Physical factors center around brain dysfunction and/or the impact of certain medications on the client's ability to think clearly. The most effective ways to pre-empt will challenges on this basis are to have a letter from the client's physician attesting to the patient's clear cognitive status and (particularly in cases with large estates or with a history of family discord) a copy of a psychological or neuropsychological evaluation examining that cognitive status. Obviously, such a letter should be as close in time to the date of the will signing as possible.

With respect to mental health issues, it is important to note that the mere presence of mental illness does ***not*** necessarily mean the client is incapable of creating an accurate will. Different mental illnesses have different affects on the ability to think and plan rationally, and there is no one-size-fits-all answer to the question of whether this particular client's emotional problems are impeding testamentary capacity.

One of the most explosive dilemmas any attorney writing a will faces is a situation in which she or he suspects that there may be "undue influence" impacting the client's testamentary decisions. If a client is brought to a competency evaluation, Regan and Gordon (1997) suggest that the following behaviors may be clues that "undue influence" is being brought to bear:

- √ The individual who asks for the examination states that the evaluation is merely "routine" owing to the testator's age
- √ Someone other than the testator (or his or her attorney) makes the appointment for the evaluation
- √ The person transporting the testator to the appointment is reluctant to permit her or him to be interviewed privately
- √ Details about the will are absent, or the testator appears vague about specific items in the will.
- √ The testator is hesitant about providing information about the potential heir and his or her relationship to that person

It goes almost without saying that the best strategy for avoiding any will challenges is done prior to the reading of the will! Attorneys who feel that their client's will may be challenged may wish to use any or all of these suggestions made by Sprehe and Kerr (1996):

- √ If close family members are being excluded from the will, inquire about their omission
- √ Have the client have a mental health evaluation as close to the date of the will execution date as is feasible
- √ Have the witnesses to the will participate in both the preliminary will conference and the conference just before the will is executed
- √ Write detailed memoranda of both the preliminary conference and the execution conference, including memoranda by the witnesses
- √ If any circumstances arise which *might* cause a challenge to the will, conduct all proceedings as if the challenge were a certainty. Preserve all documentation and contemplate videotaping the conferences
- √ Records should be kept in perpetuity.

Sprehe and Kerr emphasize the value of videotaping both wills and advance directives. Buckley (1988) also urges videotaping, stating that such a recording "provides a visual nexus between declarant and document so that intentions are crystallized and mental competency is undeniably demonstrated."

Utilizing the strategies and suggestions given above will greatly increase the likelihood that the attorney will be able to fulfill his or her duties---advocating for the wishes of the client---to the maximum extent possible.

References

Drogin, E.J. (2003) Substituted judgment: Roles for the forensic psychologist. In Forensic Psychology (2004) Goldstein, A. Ed. John Wiley & Sons.

Regan, M.W. and Gordon, S.M. (1997) Assessing testamentary capacity in elderly people. *Southern Medical Journal, 90,* 13-15.

Sprehe, D.J. & Kerr, A.L. (1996) Use of legal terms in will contests: Implications for psychiatrists. *Bulletin of the American Academy of Psychiatry and the Law, 24,* 255-265.