

ASSESSMENTS CAN HELP WITH WILLS FOR THE ELDERLY

Every competent person has the right to decide what happens to their property after they die.

However, the elderly may not completely understand what is involved in making a will or changing an existing one. Unscrupulous people who try to sway them in making gifts in their favour may easily influence them. This can cause pain for those whom the elderly truly wish to benefit.

Sometimes, older people also insist on doing things that are not necessarily practical or safe. One example of this is driving a car with failing eyesight.

It is necessary to balance the right of the elderly to make their own decisions with the recognition that some of their choices may cause pain or do harm to others.

Special care is required in preparing wills for ill, handicapped or frail individuals. A lawyer generally cannot act on the instructions of a person who is mentally incompetent. But who decides if they are mentally incompetent or not?

Here is an example of a situation that might occur:

Fred is 86 years old. He had a stroke that affected his memory and left him susceptible to confusion. He now lives in a nursing home. In the mornings, he is quite alert and fairly clear in his thoughts. As the day passes, he becomes more and more confused, and has difficulty finding his room or recognizing people.

Fred tells his oldest daughter, who is his executor, that he wants to change his will. He is very upset at several people to whom he has left a gift. He originally thought that they were very good friends, but they seldom, if ever, visit him. Therefore, he wishes to

revise his will leaving more to his family members, including his oldest daughter who often visits and helps in many ways. Although he is sometimes forgetful about other matters, he is insistent about wanting to change his will and often raises this matter with his daughter. She finally gives in and arranges for Fred to consult with his lawyer.

The lawyer is concerned that Fred may not be capable of making a will. She observes that Fred cannot remember what is in his existing will and is concerned about his fluctuating level of alertness and clarity of thought. She thinks it is quite possible that the beneficiaries Fred wishes to cut out will later contest any new will that is prepared. She wants to be confident that if she prepares a new will, it will stand up.

What should the lawyer do?

She should tell Fred and his daughter about her concerns. After all, if the will is challenged, it might not stand up. She should recommend that Fred be assessed by a qualified psychologist or psychiatrist experienced in assessing the competency of the elderly. If the results are positive, she can go ahead and prepare the will, supported by the fact that an experienced professional has formed an educated opinion on which she can rely.

It is normal for Fred and his daughter to be upset about this. It can be expensive and time-consuming. But the purpose of the assessment is to support Fred's right to change his will. What Fred and his daughter must realize is that in this situation, an assessment of his capacity is necessary to substantiate the lawyer's opinion of Fred's mental competence. The report will be evidence of Fred's capacity to make a will should someone decide to challenge it.

Situations such as this happen frequently. A person has the right to decide what he wishes to do with his property on his death. But does that person have enough knowledge of his assets? Can he properly make a decision on who might receive a

gift? Can he decide what assets or how much money he will leave to his beneficiaries?

Where these concerns exist, it is important to obtain an opinion from a professional who is qualified to make an assessment. This can be a basis for deciding whether to proceed with the will. It will also help deal with concerns regarding competency.