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Wills: knowledge and approval of content

Anneta Sguigna, an 86-year-old immigrant to Canada, spoke very little English. She hired an Italian-speaking lawyer and told him to make a Will giving all her assets to her son Fred. The Will was signed, but no one translated it for Anneta before execution. The court accepted that the Will was drafted in accordance with her instructions. Arguably, since Fred was the only surviving son, the Will made logical sense. The court accepted that Anneta knew and approved of the main provision of the Will: that all her money was to go to her son Fred. Nevertheless, disappointed relatives successfully challenged the Will.

For a Will to be considered valid there are certain technicalities including where the testator must sign and how it is to be witnessed. When complied with, these 'formalities' as set out in Ontario's Succession Law Reform Act, create a legal presumption that the person making the Will knew and approved of its contents.

Normally, after the testator dies, the person named as executor applies to court for probate. The judge formally certifies that the Will has been validated which, from that point on, allows the executor to exercise his powers with the approval of the court. So what happened when Fred applied for probate?

The disinherited relatives hired a lawyer specializing in estate litigation.

The lawyer pointed out that because Anneta could not read English there were suspicious circumstances surrounding the execution of the Will. That coupled with the fact that no one translated it to her made it impossible for her to have had knowledge and approval of the contents. The court agreed and would not admit the Will to probate because Anneta did not "…understand the complete chain of the dispositive provisions…" – i.e., The Will provided that if her son Fred predeceased her, then his estate would be the beneficiary.

The judge decided to refused to grant probate, despite the fact that the court believed that the primary bequest – that Fred get all the money – complied with Anneta's wishes. The common law is clear in that a person making a Will must understand and approve of all, not most of, but all the contents of the Will.

Re Sguigna Estate,1994 Carswell Ont 3298, [1994] O.J. No. 1612 (Ont. Gen. Div.) is a case that has major implications for first-generation immigrants including those from Russian, Israeli and Chinese communities who, while functionally illiterate in English, still achieved financial success.

It is equally important for the lawyers who do their estate planning. A testator's inability to understand written English raises a red flag and rebuts any legal presumption regarding his or her knowledge and approval of the contents of a Will. It is imperative that those propounding a Will be able to show that the testator had knowledge and approval of the contents of the Will. Some lawyers videotape both the instructions and execution process and others engage the services of professional translators to translate the Will to the testator and then swear an affidavit evidencing the translation. Without taking proper steps to ensure that the testator understands and approves of the content of the Will, the gifting provisions are open to challenge by the disinherited and the lawyers who drafted them are potentially liable to disappointed beneficiaries.

Going to court to challenge a Will can be very complicated. Despite the temptation to jump to conclusions, it would be a mistake to substitute this case review for substantive legal advice. For those considering this option, there is no replacement for hiring a competent solicitor whose own research, analysis and judgment should be canvassed before going to court.

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