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BACK TO THE BASICS

Recent Tennessee cases that address issues in estate planning have served as a reminder for attorneys to revisit some basic concepts as we prepare estate planning documents for our clients. Over the last year, our appellate courts have reminded us that . . .

. . . witnesses' signatures on a Last Will & Testament may not necessarily count as witnesses' signatures. The issue here is proper execution of a will. Tennessee courts have long required strict compliance with the statutory formalities for executing a will, as found in Tennessee Code Annotated Section 32-1-101, *et seq.*[1] The testator must sign the will in the presence of two attesting witnesses, and the witnesses must sign the will in the presence of the testator and each other.[2] The problem addressed in last year's case *In re: Estate of Morris* concerns a will which contained a self-proving affidavit signed by two witnesses, as allowed by Tennessee Code Annotated Section 32-2-110, but the witnesses did not sign the actual will as required by Tennessee Code Annotated Section 32-1-104, causing the court to find the will invalid.[3] The Tennessee legislature responded fairly quickly to the *Morris* decision by amending Tennessee Code Annotated Section 32-1-104, which now allows for witnesses' signatures on a self-proving affidavit to act as signatures of witnesses attesting to the will if the signatures otherwise comply with Tennessee Code Annotated Section 32-1-104(a). This helps to avoid the unfavorable result of invalidating a will that a testator and witnesses intended to execute.

However, two important caveats to this amendment exist. First, the witnesses' signatures cannot serve double-duty as attesting to the will and acting as a self-proving affidavit, and second, the amendment only applies to wills executed ***prior to*** July 1, 2016. The practical effect of the amendment is to give practitioners a mulligan on wills that may not have been properly witnessed prior to July 1, 2016, while maintaining the policy of strict compliance with statutory formalities for executing wills going forward. The basic take-away for us: make sure the forms you are using to prepare wills have both an attestation clause for witnesses to sign ***and*** a self-proving affidavit for witnesses to sign.

. . . a properly witnessed and executed Last Will & Testament may not necessarily be a valid Will. The critical issue here is testamentary capacity. A natural consequence of an increased life span enjoyed by our society is that individuals are potentially living longer with diminished mental capacity. While advanced age or infirmity does not equate to diminished testamentary capacity[4] – (indeed, just this month I met with a 91-year-old client who drove himself to Knoxville from Crossville to make revisions to his estate plan, and who made me covet his mental acuity) – attorneys must not overlook or take lightly the issue of documenting whether our clients have the requisite mental capacity to execute estate planning documents. A properly executed will may be challenged on the basis that the testator's mind was not "sufficiently sound to enable him or her to know and understand the force and consequence of the act of making the will" at the time the will was executed.[5] In addition, a properly executed will may be challenged on the basis that the testator was subject to the undue influence of another in executing the will.[6] It is the time of the execution of the will that is the focal point in assessing testamentary capacity.[7]

The recent appellate decisions are not noteworthy for their continued citation of long-standing law governing testamentary capacity and undue influence, but rather for their extensive reliance on testimony and evidence from the attorneys who participated in or were present at the time of the preparation and execution of estate planning documents.[8] The basic take-away for us: estate planning lawyers would serve our clients well (and do our litigation colleagues a favor) by documenting the estate planning file with clear and convincing evidence of the soundness of the testator's mind and the absence of undue influence, particularly if potentially suspicious circumstances exist.[9]

I hesitated to write about such seemingly basic concepts as the execution requirements for a will or the importance of confirming testamentary capacity; however, these are concepts to which our appellate courts have recently devoted considerable time and attention. We should probably take note as well.

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[1] *Eslick v. Wodicka*, 215 S.W.2d 12 (Tenn. Ct. App. 1948).
[2] Tenn. Code Ann. § 32-1-104(a).
[3] *In re Estate of Morris,* 2015 Tenn. App. LEXIS 62 (Tenn. Ct. App. Feb. 9, 2015).
[4] *In re Estate of Davis,* 2016 Tenn. App. LEXIS 185, *57 (Tenn. Ct. App. Mar. 14, 2016) ("The testator must have an intelligent consciousness of the nature and effect of the act, a knowledge of the property possessed and an understanding of the disposition to be made. While evidence regarding factors such as physical weakness or disease, old age, blunt perception or failing mind and memory is admissible on the issue of testamentary capacity, it is not conclusive and the testator is not thereby rendered incompetent if her mind is sufficiently sound to enable her to know and understand what she is doing.")
[5] *Id.*
[6] *Id.*
[7] *In re Estate of Malugin,* 2015 Tenn. App. LEXIS 408, *8 (Tenn. Ct. App. May 29, 2015).
[8] *See, e.g., In re Estate of Davis,* 2016 Tenn. App. LEXIS 18; *In re Estate of Dukes,* 2015 Tenn. App. LEXIS 733 (Tenn. Ct. App. Sept. 11, 2015); *In re Estate of Malugin,* 2015 Tenn. App. LEXIS 408.
[9] Courts have refrained from prescribing the type or number of suspicious circumstances that may warrant invalidating a will on the basis of undue influence, but examples of suspicious circumstances may include advanced age, physical or mental deterioration, a beneficiary's involvement in procuring the will, the existence of a confidential relationship between the testator and a beneficiary, seemingly unjust or unnatural nature of the terms of the will, or the testator being in an emotionally distraught state. *See In re Estate of Davis,* 2016 Tenn. App. LEXIS 185, *64.