

## Challenges to estate plans on the rise

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Litigation over wills is becoming increasingly common, says Suzana Popovic-Montag, managing partner at Hull & Hull LLP, a Toronto-based law firm that specializes in estate and trust planning.

“Coupled with the tremendous increase in wealth that we have seen over the last few years, people are living longer,” she said. “As people live longer, they are, statistically, far more likely to develop a cognitive disorder or to experience cognitive decline.”

The result, she says, is that estate plans are sometimes challenged “on the basis of a lack of testamentary capacity or undue influence.”

Those are just two of several grounds for disputing a will. Challenges can also be brought on the basis of improper execution – the will is unsigned or not properly witnessed – or the testator’s (will writer’s) lack of knowledge and approval of its contents, or simple fraud.

“The ones you see all the time are undue influence and lack of capacity,” said Lynne Butler, an estate lawyer in St. John’s and author of several books about estate planning.

Not anyone, however, can mount a challenge. In most of Canada, only a spouse and dependent children can contest a will that has disinherited them. Otherwise, said Ms. Popovic-Montag, “the basic test in Ontario is that you have to have a financial interest in the estate in order to have standing to challenge a will.”

“That means the challenger has proof that he or she had been named in a prior will,” she said, “or, for example, that the testator once promised to include you if you agreed to take care of them.”

The key there, Ms. Butler said, “is there had to have been a promise that a reasonable person would see as a reasonable promise. And you have to have passed up other opportunities or made decisions to your own detriment because you thought you would eventually get that [legacy]. It is basically a fairness type of concept.”

Each province has its own laws concerning wills. British Columbia’s Wills, Estates and Succession Act is unique in that it also allows adult children to make a claim. Although there are no legal obligations to provide for them in a will, there is a moral obligation to do so if there are sufficient assets.

Most people see challenges to wills as a purview of the wealthy. But even modest estates are increasingly becoming the subject of challenges, lawyers say.