

Battle Of The Mall Heirs

March 4, 2010 | by Einhorn Barbarito

Recently, Melvin Simon, the founder of Simon Property Group (the largest mall operator in the United States) died. It was reported that his estate was valued at about one billion dollars. According to the Wall Street Journal, citing court filings, seven months before he died, he "altered his will during a three-hour meeting in Asherwood, his palatial home near Indianapolis. A financial adviser had to hold and guide his hand as he signed the revised document."

As a result of that revision, his second wife, Bren Simon, is now involved in a heated contest against the children of his first marriage. It appears that the last will greatly increased Bren's share of her husband's estate, to the detriment of his children. In the prior will, Mr. Simon's widow was to receive one-third of the estate, his children were to receive one-third, at Mrs. Simon's death, from a trust that paid her the income for her life, and the final third was to go to charity. The new will gave Mrs. Simon one-half of the estate, and the other half was to go into charitable trusts after Mrs. Simon's death, with the children of Mr. Simon taking the remaining balance of the charitable trusts after 12 to 15 years. Thus, Mrs. Simon's inheritance was significantly increased and the inheritance of Mr. Simon's children was greatly reduced.

A court will now have to decide if Mr. Simon possessed the necessary capacity to execute a new will.

In New Jersey, in order to execute a valid will, an individual must possess "testamentary capacity." The requirements for testamentary capacity are minimal: the testator must be an adult (age 18 or older) and must be capable of knowing and understanding in a general way (i) the nature and extent of his or her property, (ii) the natural objects of his or her bounty, and (iii) the disposition that he or she is making of that property, and must also be capable of (iv) relating these elements to one another and forming an orderly desire regarding the disposition of the property. Unfortunately, whether an individual does, or does not, possess the necessary level of capacity is uncertain.

Every 71 seconds, someone in America develops Alzheimer's disease - the most common cause of dementia. The Alzheimer's Association estimates that about 14 million baby boomers can expect to develop dementia, including Alzheimer's disease, in their remaining lifetime. Often, dementia goes undiagnosed. Moreover, there are many different levels of dementia. What legal issues arise when a loved one suffers from dementia or Alzheimer's disease, leading to decreased mental capacity? Is that individual, per se, incapable of possessing the necessary level of capacity to execute a new will?

This question may arise in various circumstances. For instance, a loved one may be in the early stages of Alzheimer's and he or she has not executed a will, or perhaps has executed a will, which is now lost. How can he ensure that his testamentary wishes are accomplished? May he execute a valid will given his diminished mental capacity? The issue of mental capacity under these circumstances is paramount for at least two reasons: (i) the presence of dementia raises the greater likelihood of a will contest and (ii) current New Jersey law may prevent the probate of a will executed by an individual who is adjudicated incapacitated.

In order to minimize the potential for a will contest, an experienced attorney must determine if the testator has the requisite mental capacity. If mental capacity is in question due to dementia, the attorney and physician must be well-informed of the diagnostic steps and stages of the disease to determine testamentary capacity. Attorneys might seek a written opinion from doctors and other health care workers as to the capacity of an older person. When a doctor is asked for an opinion on mental capacity, the basis for the opinion, whether negative or positive, must always be clearly recorded since the facts upon which he relies may later be challenged during a will contest. It may also be prudent to videotape the will execution as evidence of the testator's mental capacity. In addition to witnesses signing the will, the witnesses may also execute a certification specifying their relationship to the testator and affirming their observations of the testator which support the testator's lucidity during the will execution ceremony. Finally, the attorney may also draft a memorandum to the testator's file concerning the will execution in case there is future litigation.

If you or a loved one is suffering from a form of dementia such as Alzheimer's disease, it is important to evaluate the need and available options for estate planning. While Alzheimer's disease is a progressive dementing illness, persons in the mild or mild to moderate stages may retain the capacity

to execute a valid will, power of attorney and/or living will. There are also additional measures necessary to reduce the likelihood of a will contest and/or to support the validity of the will if a contest does in fact, take place.

To learn more, go to <http://www.einhornharris.com> or contact our office at 973-627-7300.