

ELDER LAW

by Hugh S. McLellan

Elder Law is both a practice area (i.e. the nature of a lawyer's work) and a substantive area (i.e. laws and cases dealing with matters affecting older persons) of law. The significant practice difference between Elder Law and other areas of law, is in the manner in which an Elder Law lawyer would approach a client's situation.

Elder Law is a recent development in Canada, although it has been recognized in the United States for many years. Of course, the U.S. health and social security system is different from Canada (at least at present). Nevertheless, issues such as planning for incapacity, housing options, abuse of seniors, etc. are important topics wherever there is a senior population.

With the increasing number of older citizens, comes an increasing number of citizens with cognitive problems. According to the Alzheimer's Society, Alzheimer's type dementia affects about one person in 50 between ages 65-74; one person in nine between ages 75-84; and one person in three over age 85. These statistics have considerable implications for lawyers practicing Elder Law.

As stated above, the significant difference between Elder Law and Wills and Estates Law, is in the manner in which an Elder Law lawyer would approach a client's situation. Typically, a Wills and Estates lawyer would consider the client's instructions and prepare documents to deal with that matter. An Elder Law lawyer often uses a multidisciplinary, holistic approach. This means the lawyer looks at the client's whole situation and determines if the client can benefit from the involvement of other professionals, such as, accountants, financial planners, social workers, care providers, and medical personnel.

For example, a client may come into a lawyer's office saying that she needs to do a new Will because she has just moved into the home of one of her children; some of her money was used to pay for renovations to the child's house and the client now wants to change her Will to make a bequest to her other child of a similar amount that she paid to her

child for the renovations. A pure Wills approach would result in the lawyer making a new Will incorporating those instructions. An Elder Law lawyer would also be investigating the arrangements for the private care and considering whether this needs to be formalized. Housing and care concerns are often the most important issues for senior clients, but may be the least familiar to wills lawyers. The budgeting for those care costs might require expert assistance. Elder Law lawyers are not expected to provide such expertise themselves, but must be ready to make referrals to professionals and government departments.

There are a number of issues that the Elder Law lawyer must pay particular attention to in practice. Capacity to instruct a lawyer and to undertake the legal task at hand, be it a house transfer or make a Will or sue to recover assets, is often a concern. An Elder Law lawyer must pay particular attention to possible undue influence on the client by family members who may or may not be well meaning. As well, potential conflicts between the client and others can arise which would require a referral to another lawyer for independent legal advice.



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