Too Young for a Will?

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Mark Glover, Rethinking the Testamentary Capacity of Minors, 79 **Missouri L. Rev.** 69 (2014).

The primary goal of the law of wills is to allow individuals to decide how to distribute their property upon death. Yet, the vast majority of states prohibit minors under the age of 18 from distributing their property through a will. Interestingly, few scholars have questioned the reasons underlying this categorical denial of testamentary capacity to minors.

In his 2014 article, *Rethinking the Testamentary Capacity of Minors*, Professor Mark Glover examines the possible rationales for the rule and concludes that none of these justifications warrant denying all minors testamentary freedom. First, he addresses the justification most often cited by courts—the need to protect minors from the consequences of their own foolish decisions. Although no one would dispute that children do not always consider the potential consequences of their decisions (neither do adults), Professor Glover quickly illustrates that the testamentary context is probably the one area in which children need the *least* protection from the consequences of their imprudent decisions. To put it bluntly, a will only takes effect upon the testator's death. As such, a child testator (like other testators) will not be alive to suffer the consequences of her foolish testamentary decisions.

Professor Glover also illustrates the inconsistency in the law's treatment of minors in the testamentary context as compared to other situations. For example, minors need protection when they enter into contracts that are not in their best interests or make inter vivos gifts that they cannot afford. In those contexts, unlike the testamentary context, children will be alive to experience the consequences of their decisions. However, the law does not deny children the ability to enter into contracts or make lifetime gifts, but instead allows them to revoke or disaffirm contracts and lifetime gifts. Until then, the contract or lifetime gift is valid. In contrast, a will, which is always revocable, and thus provides children (and all testators) with the protections that lawmakers have deemed sufficient in cases involving contracts and lifetime gifts, is automatically void if executed by a child testator.

Professor Glover analyzes two other possible justifications for denying minors testamentary capacity. He explores whether lawmakers might be treating the age of majority as a proxy for the minimal mental competency that the law requires of all testators. He also examines whether, by denying minors testamentary capacity, lawmakers intended to create a forced parental inheritance given that parents are generally the intestate heirs of their minor child's estate unless the minor is survived by a child or spouse.

Professor Glover demonstrates that these possible justifications do not support a categorical age restriction on testamentary capacity. First, he argues that while young children and *some* adolescents lack the mental capacity to understand the nature and extent of their property, who their family members are, and how their property will be distributed under the will, many adolescents *do* possess the requisite mental capacity. However, with few exceptions—for example, if a minor is married, emancipated, or a member of the armed services—the vast majority of states do not give legal effect to a will executed by a minor even if the minor possessed the requisite mental capacity to execute the will.

Second, Professor Glover concedes that parents may arguably deserve to receive part of their deceased child's assets given their financial and intangible contributions to the child, and the likelihood that they contributed to the child's ability to accumulate wealth. Nevertheless, he convincingly argues that the law can compensate parents for their contributions by creating an explicit forced parental share (similar to the forced spousal share) rather than categorically denying all minors testamentary freedom.

I was thoroughly persuaded by Professor Glover's arguments rejecting the possible justifications for the age restriction on testamentary capacity. As I read the article, I thought of other areas where the law has determined that children have the mental capacity to make decisions that, in my opinion, have much greater significance than disposition of one's property upon death. Lawmakers have determined that minors possess the mental capacity to commit serious crimes. They have also determined that minors have the mental capacity to consent to medical treatment for sexually transmitted infections, substance abuse, and mental health. The law has also determined that minors have the mental capacity to make the irrevocable decision to place a child for adoption. Lawmakers have also decided that a girl who is found by a court to be a mature minor has the mental capacity to consent to an abortion. A few courts have also held that mature minors have the mental capacity to refuse lifesaving treatment—a decision with greater dire consequences (death) than executing a will.

I was also persuaded by Professor Glover's main proposal that lawmakers adopt a rebuttable presumption of incapacity for minors that could be rebutted by evidence that the minor possessed the requisite mental capacity to execute a will. If we are concerned that minors may unjustly disinherit parents who have supported them and made it possible for them to accumulate wealth, Professor Glover suggests that lawmakers give parents a forced share of the minor's estate rather than the current result whereby parents receive the child's entire estate when minors are denied testamentary capacity.

I am somewhat skeptical about Professor Glover's alternative proposal. Professor Glover recognizes that lawmakers may be unwilling to abolish the categorical age restriction for testamentary capacity so he suggests an alternative approach that might gain lawmakers' support. He proposes that minors be allowed to execute a valid will if their parents consent. Although I am sympathetic to this pragmatic alternative proposal, I fear that parents' current position (in most cases) as the intestate heirs of their child's estate creates a potential conflict of interest that may color their assessment of the child's mental capacity to execute a will. In addition, while executing a will requires the testator to confront his own mortality, a task that may be particularly difficult for children, it is infinitely more difficult for a loving parent to entertain the possibility that the minor child will die. As such, some parents will not allow a child to execute a will regardless of the child's mental capacity.

I agree that lawmakers may be more amenable to granting children testamentary capacity if their parents consent so it is important that scholars and lawmakers explore approaches that include parents in their minor child's decision to execute a will but also address parents' potential conflict of interest and difficulty grappling with the possibility of their child's death. Professor Glover's article is a great start to this important conversation.

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