CHILD-PROOFING YOUR WILL: Recognizing and Avoiding Common Traps for Solicitors

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INTRODUCTION

Errors and omissions that solicitors make when drafting wills for their clients can lead to will challenge litigation and even negligence claims. For practitioners in Wills and Estates, it is vital to have a thorough understanding of the requisite standard of care and best practices.

This paper will highlight the ways the ways a will can be challenged at law, followed by the duty of care of a drafting solicitor and practical steps they can take to discharge it. Regarding estate planning, guidance on several drafting tools will be discussed.

An invalid will can also lead to a negligence claim against the solicitor. This paper will highlight instances of claims made against solicitors. Finally, eState planner will be examined, which can help streamline the estate planning process and avoid unnecessary mistakes.

Recent Trends

Based on projections and recent national census data, seniors aged 85 and over are one of Canada's fastest growing demographics. It has been reported that the number of citizens over 85 has more than doubled since the 2001 census.[1] Further, recent census data also indicates that "more than 20 per cent of the working age population is now between the ages of 55 and 64".[2] As a result of Canada's ageing population, estate plans are more frequently compromised due to higher risks of vulnerability and later life illness. This has led to an increase in will challenges based on testamentary incapacity or undue influence. With estate claims clearly on the rise, it is vital that solicitors are drafting wills correctly.

Currently, too few Canadians have a will in place or have plans to draft one. In 2018, a Angus Reid Institute poll revealed that half of Canadians (51%) say they have no last will and testament in place and only one-third (35%) say the one they have is up-to-date. Quebec and British Columbia were revealed as the only provinces in Canada where a majority say they have a will in place (58% in Quebec and 54% in British Columbia). A majority (55%) of high-income earners (households making over $100,000 per year) indicate that they have a will, while just over two-in-five of those making under $50,000 say the same thing (44%).[3]

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[1] Michael Ranger and The Canadian Press, "Canada faces rapidly aging population, record retirements: 2021 census" April 27, 2022, *CityNews*, online: https://toronto.citynews.ca/2022/04/27/statistics-canada-2021-census-data/

[2] *Ibid*.

[3] Angus Reid, "What 'will' happen with your assets? Half of Canadian adults say they don't have a last will and testament" January 23, 2018, Online: http://angusreid.org/will-and-testament

A recent poll conducted by Ipsos on behalf of RBC Royal Trust reveals how younger generations are focusing on digital concerns.[4] In Canadians aged eighteen to thirty-four, 48 per cent said they were more likely to direct their executor on how to handle their digital assets after they die, compared to one int three who are fifty-five and over. Only nineteen per cent of the same age group said they did not have a will because they don't believe they have enough assets to leave behind.

Changes to Beneficiary Designations

Following the Supreme Court's landmark decision in *Pecore v. Pecore*, 2007 SCC 17, the law was unclear as to whether the doctrine of resulting trust applies to beneficiary designations. Specifically, it was unclear whether assets distributed through a beneficiary designation were gifts or were to be held in trust by the beneficiary for the benefit of the estate of the deceased person.

In 2021, however, a series of decisions issued in Ontario, Nova Scotia and Alberta confirmed that the doctrine of resulting trust does not apply to beneficiary designations. In *Mak (Estate) v Mak*, 2021 ONSC 4415, the Ontario Superior Court of Justice held that the doctrine only applies to *inter vivos* transfers as compared to testamentary dispositions, and does not apply to beneficiary designations.[5]

With this clarification, estate planners and drafting solicitors can more confidently assist clients in the distribution of assets through beneficiary designations, such as Registered Retirement Income Funds (RRIFs), Registered Retirement Savings Plans (RRSPs) and Tax-Free Savings Accounts (TFSAs).[6]

Electronic Wills

In 2021, British Columbia became the first Canadian province to authorise probating electronic wills. Under the *Wills, Estates and Succession Act*, SBC 2009, c 13, an electronic will has three components: it is recorded or stored electronically, it can be read by a person, and it is capable of being reproduced in a visible form. The legislation

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[4] RBC Wealth Management, "More than half of younger Canadians are including charitable giving in wills: RBC Royal Trust Survey" July 19, 2022, online: https://www.rbcwealthmanagement.com/en-ca/newsroom/2022-07-19/more-than-half-of-younger-canadians-are-including-charitable-giving-in-wills-rbc-royal-trust-survey.

[5] The decision in *Mak (Estate)* was followed by the Alberta Court of Queen's Bench and the Nova Scotia Supreme Court respectively in *Roberts v Roberts*, 2021 ABQB 945 and *Fitzgerald (Estate) v Fitzgerald*, 2021 NSSC 355.

[6] Ian M. Hull, Suzana Popovic-Montag, and Nick Esterbauer, "Private Wealth 2022 – Trends and Developments" 2022, online: *Chambers and Partners*, online: https://practiceguides.chambers.com/practice-guides/private-wealth-2022/canada/trends-and-developments

specifies that an electronic will cannot be altered and that an inadvertent deletion of an electronic will does not constitute evidence of an intention to revoke.

No other provinces have followed; however, the Uniform Law Conference of Canada ("ULCC") recommends legalizing electronic wills. In 2021, the ULCC amended Canada's model wills legislation, the *Uniform Wills Act*, to include provisions which govern the creation and revocation of electronic wills. While there has been relatively little conversation from the other provinces, some decisions, like that in the Alberta Court of Appeal's decision in *McCarthy Estate (Re)*[7] demonstrate some flexibility in the law where a will was prepared by a deceased person on their personal computer, printed out and physically signed by the deceased.

Digital Assets

In early 2022, Prince Edward Island became the second province in Canada to enact legislation permitting fiduciaries to handle digital assets.[8] This legislation follows Saskatchewan, which enacted similar legislation in 2020.[9] While only two Canadian provinces have legislation expressly governing access to digital assets, the ULCC has also created model legislation for its inclusion. Additionally, New Brunswick is considering whether to enact legislation and the Alberta Law Reform Institute announced that in late 2020, they began a digital assets project.

1. CHALLENGING THE VALIDITY OF A WILL

First, it is important to be familiarized with the ways a will can be challenged at law. There are five grounds for challenging a will, which are as follows:

(1) failure to comply with the statutory requirements for **due execution** of a testamentary document;

(2) lack of **testamentary capacity** of the testator;

(3) the presence of **undue influence**;

(4) lack of **knowledge and approval** of the contents of the Will; and

(5) **fraud or forgery**.

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[7] 2021 ABCA 403

[8] See the *Access to Digital Assets Act*, SPEI 2021, c A-1.1.

[9] See the *Fiduciaries Access to Digital Information Act*, SS 2020, c 6.

It should be noted that the onus is on the propounder of a Will (the person who wishes to prove the validity of the last Will) to prove the will is valid. This must be done on a balance or probabilities, in open court upon notice to all parties who have a financial interest in the estate. The Will must be duly executed in compliance with the formalities as set out in the provisions of the Succession Law Reform Act ("*SLRA*").

There is a presumption of capacity if the requisite formalities under the *SLRA* are complied with. However, this presumption is rebuttable, and it is exhausted where "suspicious circumstances" are found to exist. This in turn causes the propounder to reassume the burden of proving that the testator had knowledge and approved of the contents of the Will. Suspicious circumstances are not a ground for challenge, but rather an evidentiary consideration.

1.1 Due execution

The onus regarding due execution falls to the propounder of the Will. Section 4 of the SLRA sets out the legal requirements and formalities for a duly executed testamentary document. Formal Wills are governed by Sections 3, 4, and 7 of the SLRA. Section 5 sets out the requirements for a duly executed Will of a member of the Canadian Forces.

The Will must be in writing[10]; must be signed by the testator at the end after it has been completed[11]; the testator must sign the Will or acknowledge a signature in the presence of two or more attesting witnesses present at the same time[12]; and the witnesses must also sign the Will in the presence of the testator.[13]

The requirements for Holograph Wills and their validity are set out in Sections 6 and 7 of the SLRA. A testator may make a valid Will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation, or signature of a witness.

Recently in Ontario, the *SLRA* was amended to include a validating provision, providing the court with the discretion to dispense with formal validating provisions in probating a will. The newly added section of the *SLRA* reads as follows:

> **21.1(1)** If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a Will of the Deceased, the Court

[10] *SLRA*, R.S.O. 1990, c. S.26, s. 3

[11] *Ibid* at s. 4 (1) (a)

[12] *Ibid* at s. 4(1)(b)

[13] *Ibid at* s. 4(1)(c)

may, on application, order that the document or writing is as valid and fully effective as the Will of the deceased, or as the revocation, altercation or revival of the will of the deceased, as if it has been properly executed or made.[14]

1.2 Testamentary Capacity

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted. Determining whether a person is or was capable of deciding is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.

The question of testamentary capacity is almost wholly a question of fact. The assessment or applicable criteria for determining requisite testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator can understand the following:

a) The nature of the act of making a Will (or testamentary document) and its effects;
b) The extent of the property of which he or she is disposing of; and
c) The claims of persons who would normally expect to benefit under the Will (or testamentary document)[15]

Further elements of the criteria applied for determining requisite testamentary capacity are:

- A "disposing mind and memory" to comprehend the essential elements of making a Will; A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property.[16]

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[14] *Ibid* at s. 21(1)(1).

[15] *Banks v Goodfellow* (1870) LR 5 QB 549 (Eng QB).

[16] See *Murphy v Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v Schwartz*, 10 DLR (3d) 15, 1970 CarswellOnt 243, [1970 2 OR 61 (CA); *Hall v Bennett Estate* (2003) 64 OR (3d) 191 (CA); *Bourne v Bourne Estate* (2003) 32 ETR (2d) 164 (Ont. SCJ); *Key v Key* [2010] EWHC 408 (ch).

It is important to note that it is not only the terms of the Will that the deceased must be capable of appreciating, but also the facts of the general situation in which the Will is made. The deceased must have had a clear apprehension of the meaning of the Will submitted to her, she may have approved of it, and yet if she was at the time, through infirmity or disease, so deficient in memory that she must have been oblivious to the claims of her relations, and if that forgetfulness was an inducing cause of her making the decisions made, then the Will must be set aside.

The legal burden of proving capacity is on the propounder of the Will, assisted by a rebuttable presumption of capacity, described in *Vout v Hay*[17]*.* While the onus is on the propounder of the Will, the Challenger may raise evidence of suspicious circumstances that call into question testamentary capacity. In essence, there is a shifting of the burden of proof where suspicious circumstances are prevalent.

To successfully challenge a Will on the grounds of lack of testamentary capacity, substantial and persuasive medical evidence must be obtained substantiating the allegations of lack of testamentary capacity. In many cases, the services of an expert witness will be engaged to give a "retrosactive opinion" on capacity after death.

1.3 Undue influence

Testamentary undue influence requires coercion. Coercion requires that the testator is pressured into doing something they do not want to do, Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence". Persuasion is allowed, but where one person can dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power, undue influence will be found[18].

The case of *Kohut Estate v Kohut*[19] elicited the principles that apply to the standard of proof relating to undue influence:

> "*The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause*

[17] *Vout v Hay*, [1995] 2 SCR 876 at p. 227.

[18] *Dmyterko Estate v Kulikovsky* (1992) CarswellOnt 543.

[19] (1993), 90 Man R (2d) 245 (Man QB) at para 38.

the court to intervene but as had been said, the will must be "the offspring of his own volition and not the record of someone else's."[20]

Whereas the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder of the Will, the burden of proof for undue influence rests with the challenger.[21] The court must examine all the surrounding circumstances, mere influence by itself is insufficient.[22]

Courts will look at the **relationship** that exists between the parties to determine whether there is an imbalance of power. However, dependency is not always an indicator. As individuals grow older or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.[23]

In cases where **multiple planning instruments** have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence[24].

The Divisional Court in *Tate v Gueguegirre* considered the following factors to constitute "significant evidence suggesting that [a] Will was a product of undue influence":

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator's dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;

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[20] (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*

[21] *Goodman Estate v. Geffen* (1991) 42 E.T.R. 97

[22] *Kohut v Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38.

[23] See for example *Hoffman v. Heinrichs*, 2012 MBQB 133 in particular paragraph 65: a brother who was close to his sister could have accessed her fuds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.

[24] See for example *Kohut Estate v Kohut*, where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

- The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed; There were documented statements that the testator was afraid of the respondent.[25]

1.4 Knowledge and Approval

As with testamentary capacity, upon establishing due execution of a Will, there is a corresponding presumption that the testator had knowledge of and approved of the contents of the Will. However, where suspicious circumstances are alleged or demonstrated, the propounder of the Will has the burden of proving that the testator had knowledge of and approved of the contents of the Will.

There is a presumption of knowledge and approval if the testator read the Will and appeared to comprehend it[26]. This presumption is rebuttable if the challenger successfully demonstrates that the testator did not understand the contents of the Will even after having read it or having had it read.

1.5 Fraud or forgery

Before making an allegation of fraud or forgery, the challenger must ensure that there is substantive evidence to support the legal allegations made. The propounder of the Will must prove that the signature of the testator on the Will document is authentic.

Allegations of forgery and fraud are serious, and failure to substantiate such a claim with substantive evidence could lead to serious unfavourable costs consequences. Accordingly, parties should strongly consider if there is sufficient evidence to support a claim of fraud or forgery.

Obtaining the evidence of the two witnesses to the Will often dispels allegations of fraud. The onus is on the person alleging the fraud, to prove the fraud. Some allegations, depending on the circumstances, warrant engaging the expertise of a handwriting analyst/expert to ascertain with a greater degree of certainty whether the signature on the Will document is in fact that of the deceased.

1.6 Suspicious circumstances

Suspicious circumstances are not a ground for challenge. Rather it typically refers to any circumstances surrounding the execution and the preparation of a planning document. It may loosely involve circumstances surrounding the preparation of the Will; circumstances

[25] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.

[26] *Vout v. Hay* [1995] 2 S.C.R.

tending to call into question the capacity of the testator; or, circumstances that show that the free will of the testator was over-borne by acts of coercion or fraud.[27]

Examples of suspicious circumstances include:

- physical/mental disability of the testator;
- secrecy in the preparation of the Will;
- seemingly "unnatural" dispositions;
- preparation or execution of a Will where a beneficiary is involved;
- lack of control of personal affairs by the testator;
- drastic changes in the personal affairs of the testator;
- isolation of the testator from family and friends;
- drastic changes in the testamentary plan; and
- physical, psychological or financial dependency by the testator on beneficiaries.[28]

Where suspicious circumstances exist, the presumption is spent and the propounder of the Will reassumes the legal burden of proving knowledge and approval. As noted above, if the suspicious circumstances relate to capacity, the propounder of the Will reassumes the legal burden of establishing requisite testamentary capacity.

Those who propound a Will must establish that the testator knew and approved of its contents, since such knowledge and approval is a proposition applied in the assertion that the Will was made by the testator. Furthermore, this burden is considerably increased where the Will constitutes a marked departure from previous testamentary dispositions, and where there is evidence of cognitive impairment. Under ordinary circumstances, the knowledge and approval of a Will by a testator is sufficiently established by proof of requisite testamentary capacity and that it was signed, but if there are circumstances in connection with the execution that raise the suspicion of the Court, more cogent evidence will be required.

2. STANDARD OF CARE OF A DRAFTING SOLICITOR

The general standard of care of a solicitor is that they will be held to the standard of the reasonably competent solicitor, the ordinary competent solicitor or the ordinary prudent solicitor. The standard is one of reasonableness, not perfection. The relevant question is

[27] *Vout v. Hay, supra*, at page 226

[28] See Mary MacGregor, "2010 Special Lectures – Solicitor's Duty of Care" at 11.

not whether the solicitor made a mistake, rather whether a reasonably competent lawyer, practicing in the same community, at the time in question, would not have made the error?

The factors to consider in determining the reasonableness of the solicitor's conduct when drafting a will are as follows:

- The terms of the lawyer's retainer: for example whether a precise timetable was agreed upon between the lawyer and client;
- Whether there was any delay caused by the client;
- The importance of the Will to the testator;
- The complexity of the job – for example, the more complex the Will the more time is required;
- Any circumstances indicating the risk of death or onset of incapacity in the testator; and
- Whether there has been a reasonable ordering of the lawyer's priorities.[29]

A drafting solicitor owes a duty of care to the intended beneficiaries of a will, as established in the case of *White v Jones*[30]. This duty requires a solicitor to satisfy the will is valid through due execution, requisite testator capacity, no undue influence, fraud and that the testator had knowledge and approval of the will.

Thus, *White v Jones* requires solicitors to "make the enquiries necessary to satisfy himself that the wishes of the testator will be honoured and given proper legal expression through the provisions of the will"[31]. Importantly, this includes inquiring into any signs of suspicious circumstances to ensure the will is the wish of the testator. If the will is not executed properly, the solicitor is liable to a potential negligence claim by disappointed beneficiaries if the will is put aside. The following is practical guidance for solicitors to deduce a testator's capacity and potential signs of undue influence.

2.1 Capacity

As capacity is decision, time and situation specific, a drafting solicitor must understand the specific requirements for testamentary capacity.

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[29] *Rosenberg Estate v Black,* 2001 CarswellOnt 4504 (SCJ) at para 42; *McCullough v Riffert*, 2010 ONSC 3891 at para. 50

[30] *White v. Jones* [1995] UKHL 5

[31] *Ibid*.

One of the leading cases in the area of capacity is *Hall v Estate of Bruce Bennett*[32], citation at the Ontario Court of Appeal. The court stated that "the law is equally clear that a solicitor who undertakes to prepare a will has a duty to inquire into his or her client's testamentary capacity". In doing so, the court referred to the Supreme Court of Canada case of *Murphy v Lamphier*[33]:

> "A solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property" (emphasis added).

Hall v Bennett concerned a solicitor who properly declined to draft a will for a testator who lacked testamentary capacity. The testator could not remember the full extent of their estate and were not alert enough to sign the Will document. The court concluded that there was no duty owed by the solicitor to the beneficiaries as there was no retainer agreement in place.

However, difficulties arise for solicitors who are retained and are unsure how to proceed when they suspect the testator lacks capacity. The difficultly is if they refuse to prepare the will under retainer, they may be held liable to disappointed beneficiaries for not fulfilling the agreement. The courts have awarded damages to disappointed beneficiaries where solicitors have improperly refused to prepare a will[34]. Alternatively, if the solicitor prepares the will for a testator who lacks capacity, they may be liable for costs to set aside the will as well as to the disappointed beneficiaries.

In situations like this, a solicitor should consider discussing with the client about obtaining a decisional capacity assessment. It may also be appropriate to request the opportunity to speak to or receive information from a primary care provider, review medical records where available or obtain permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns. It is important that the solicitor obtains the requisite instructions and directions before doing so from the client, given issues of privilege.

The prudent approach for any will drafting solicitor is to document everything on file. As stated in *Scott v Cousins*[35], the solicitor must make a serious attempt to determine a testator's capacity and if there is any doubt or reason to suspect the will might be challenged, a memorandum or note of the observations and conclusions of the solicitor

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[32] *Hall v. Estate of Bruce Bennett*, 2003 CanLII 7157 (ON C.A.) at para 22.

[33] *Murphy v. Lamphier* (1914), 31 O.L.R 287 at para 23.

[34] LawPRO "Landmines for Lawyers When Drafting Wills" (2019) available online: https://www.practicepro.ca/2019/06/landmines-for-lawyers-when-drafting-wills/

[35] *Scott v. Cousins* [2001] O.J. No. 19.

should be kept on file. Extensive notes should be taken on all aspects of the will preparation, including on issues relating to capacity.

There is a strong link between capacity and undue influence in claims challenging the validity of wills. Both should be considered in tandem, especially if there are indicators of suspicious circumstances.

2.3 Undue Influence or Fraud

Undue influence must be considerable. The case of *Hussey v. Parsons*[36], dealt with a claim against a solicitor where undue influence was a factor. Justice Puddestar found no actual evidence of undue influence but noted that there were 'indicia of undue influence' present which "suggested that the situation as a whole was one which called for an extra degree of care and inquiry by the [solicitor] in terms of exactly what were the interests, intentions and understandings of the plaintiff".[37]

Solicitors must be able to recognize the common indicia of Undue Influence and coercive behaviour, which includes:

- Assuming control and management of another's affairs[38];
- others being present at the execution, individuals reviewing drafts of and directing provisions for another's will;
- attending to self-dealing transactions;
- individuals poisoning the mind of the testator against a potential beneficiary[39];
- individuals threatening to withdraw assistance to one in complete dependence[40]; and,
- individuals who are completely controlling their environment (going so far as to even listen in and monitor private conversations).

It is imperative that drafting solicitors conduct thorough and fulsome interviews, asking the right questions while recording their interaction, noting any suspicious circumstances or signs that something is not right.

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[36] *Hussey v. Parsons*, 1997 CarswellNfld 349 (T.D.) ["*Hussey*"].

[37] *Ibid.* para. 633

[38] See *Dmyterko Estate v. Kulikowski*, (1992) 47 E.T.R. 66 (Ont. S.C.J.) at 94; See also *Hutchinson v. Hutchinson*, (2006) 2006 CarswellOnt 4874 (S.C.J.).

[39] *Pocock v. Pocock*, [1950] O.R. 734 (H.C.)

[40] *Marsh Estate, Re* (1991), 104 N.S.R. (2d) 266, 283 A.P.R. 266, 41 E.T.R. 225, 1991 CarswellNS 95 (N.S. C.A.).

The first contact with a client or potential client is critical. Establishing how the testator chose the solicitor is important, were they suggested by the testators family? The solicitor may wish to note impressions about the testator: how were they were dressed? Did they use eyeglasses, hearing aids, or require assistance with mobility? The drafting solicitor should also note mannerisms or physical ailments. The use of a recording device with consent of the testator can help by creating documentation of the interview in real time. The audio and/or video documentation may become helpful evidence if ever called upon.

Location is another key consideration. Conducting the interview in a location where a potential influencer is present, even in another room, is not advisable. It should also be noted how the testator arrived at the meeting – were the accompanied by anyone else? Are they reliant on another participant to bring them? Where it concerns other participants, drafting solicitors must be especially cautious when the testator requests someone else participate at all in the interview. It is important to note whether the other participant was the one who suggested staying in the room or if the suggestion came from the testator. The solicitor should carefully note when another person was present and when he or she left the room.

In considering which topics to approach in the interview, best practice is to use open ended questions rather than leading the testator. However, the solicitor must be careful to cover important topics, including:

- Family history
- Family dynamics
- Extent of assets
- Medical history
- Rationale for will instructions
- Previous wills
- Management of finances
- Living arrangements

While it is critical that the drafting solicitor exercise caution in covering all important topics, it is not enough to simply document what the testator says without further probing. Repeated and detailed questioning is recommended. Some of the most crucial areas to probe include:

- Asking why is testator not going back to previous solicitor?
- How did testator select you?
- Was there a family falling out? If so, why did it occur? Probe for specific details regarding the circumstances. Be alert to allegations of theft or that a family member no longer visits
- Probe to determine the frequency of contact with family members

- Ask why the testator is benefiting one person more than another
- Probe further to determine how the testator has learned about specific information. Are they giving you independently sourced information? Or have they been told by the person benefitting from the change in will?
- How does testator expect the excluded beneficiaries to react to changes?

3. ESTATE PLANNING TIPS

3.1 Estate Planning with a Husband and Wife

Issues can arise in an estate planning practice when a lawyer represents both a husband and a wife.

Mirror Wills for Husband and Wife

Estate planning solicitors often have to draft 'mirror wills' for a husband and wife. The wills provide for all of each others' assets to pass to the respective spouse in the event of their death. To this end, a long-standing debate has ensued: what does the solicitor who wrote the will do if one of spouse come back to that solicitor and requests changes to the "mirror will", which affects the surviving spouse adversely? Does the solicitor tell the other spouse? This is an ethical dilemma that may give rise to a negligence claim and there is no simple answer.

The solicitor is caught in a position of conflict between the spouses and unless they have received prior instructions on this exact issue then they are faced with a dilemma. There are serious implications here where it concerns the relevant Rules of Professional Conduct.[41]

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[41] See Rule 3.3(1) - A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless
(a) expressly or impliedly authorized by the client;
(b) required by law or by order of a tribunal of competent jurisdiction to do so;
(c) required to provide the information to the Law Society; or
(d) otherwise permitted by rules 3.3-2 to 3.3-6.

See also, Rule 3.4(1) - A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

See also, Rule 3.4(5) - Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that
(a) the lawyer has been asked to act for both or all of them;
(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

When “caught” in this circumstance, a solicitor can refuse to draw new will, however, this is not a satisfactory solution as the client can simply go to another lawyer. What’s more, this solution does not solve the problem as to whether or not the solicitor has an obligation to inform the other spouse of the wishes of the other spouse. If the solicitor informs the other spouse of the change, there is the potential liability for breach of trust and negligence or acting in conflict of interest.

There is a list of considerations that counsel can refer to when they are meeting with a husband and wife to draw up mirror wills – these suggestions should be recorded in the notes taken and be referred to in their reporting letter:

1. The option of asking the couple to see their own counsel when drawing wills – not a realistic or practical solution
2. When couple comes to see you, advise them that their wills can be changed by either of them at a later date and that they should consider entering into an agreement not to change their wills without the consent of the other
3. Solicitor should advise both clients that he/she is acting jointly for both, that the information between them is not confidential and if a conflict arises in future, the solicitor is obliged to advise the other spouse
4. Good idea – remind the clients that in the event of one of the spouses dying, it may be that the surviving spouse will want to change his or her will and review some of the scenarios with respect to the possibility of a second marriage –

When considering the fiduciary duties of a solicitor, it is not sufficient to simply consider your clients’ interests. It is necessary to consider as well, parties that will be affected by your work and your duty to third parties.

In considering whether you can act for both the husband and the wife, they should ask themselves the following questions:

1. Did the husband and wife come to you jointly and ask you to prepare their estate plans?
2. Did one of the parties come to you and say, “I would like you to prepare wills and trusts for me and my spouse?”
3. Have you already represented either the husband or wife in another capacity? Is there any relationship between your firm and one of the spouses which might affect your ability to treat the spouses equally?
4. Is either the husband or wife a relative of another client of yours whose interest may be affected?
5. Did either of the spouses tell you that it is not necessary for you to talk to his or her spouse as to what he or she wants?
6. Have you considered any fiduciary duty of yours which may arise with respect to some third party to whom you owe a duty either of care or disclosure?

By recognizing conflicts and fiduciary duties, considering their implications and dealing with them in a reasoned way a solicitor can avoid becoming a target for a claim arising out of breach of fiduciary duty.

As a result of the difficulty arising from such a situation, in February of 2005, Convocation of the Law Society of Upper Canada, as they then were, amended the Rules of Professional Conduct to add a Commentary to the Rule respecting joint retainers for spousal wills:

> Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.
>
> A lawyer who receives instructions from spouses or partners as defined in the *SDA* to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advises the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:
>
> > (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
> >
> > (b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
> >
> > (c) the lawyer would have a duty to decline the new retainer, unless;
> >
> > > (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
> > >
> > > (ii) the other spouse or partner had died; or
> > >
> > > (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with sub rule (8).

3.2 Forfeiture of Gifts in a Will (*In Terrorem* clauses)

Sometimes, a testator will want to discourage beneficiaries from bringing unwanted challenges to a will. Often this is accomplished by providing a clause in the will that if the

validity of the will is challenged by the beneficiary who received the gifts, then that beneficiary's entitlement to the gift is forfeited.

The clauses are often referred to as a no-contest or an "in terrorem" clause and is essentially a condition imposed by the will maker on the gift. In law, this refers to a testamentary conditional gift where the condition is a mere threat without any consequence. Establishing a clause as *in terrorem* could invalidate a no-contest clause.[42]

In the decision in the case of *Kent v McKay*[43] it was held that there are three criteria which much be satisfied in order for the doctrine of *in terrorem* to apply:

1. Legacy must comprise personal property or a mixture of real and personal property
2. Condition must be in restraint of marriage or one which forbids challenges to the will; and
3. The threat must be "idle," meaning the recipient of the gift must be prevented from undertaking what the condition prohibits:

In *Bellinger v. Fayers*[44] it was held that "the gift must be accompanied by an effective gift over which vests in the recipient on the condition being breached. If there is no gift over, then the condition will be treated as merely *in terrorem*, that is a mere threat, and will be found to be void. And nothing short of a positive direction of a gift over, of vesting in another, even in the case where the forfeited legacy falls in the residue, will suffice. There must be an express disposition made of what is to be forfeited."[45]

While it is true that, like all clauses of forfeiture, the courts will construe such a clause strictly, such clauses must be approached with great care and some trepidation if a challenge to the will is being considered by the beneficiary who receives the gift.

Conditions like this can be effective in avoiding litigation in situations where the will maker has designated unequal gifts among their children for instance.

In preparing a no-contest clause, the drafter must exercise caution, ensuring that they limit the condition to challenges to the validity of the will and not to proceedings relating to interpretation or related matters which the Court has exclusive jurisdiction, otherwise the clause may be ineffective. Clauses of forfeiture are not illegal or invalid unless it goes so far as to attempt to oust the jurisdiction of the Court to determine questions of

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[42] Joshua Cohen and Holly LeValliant, "No-Contest Clauses and the *In Terrorem* Doctrine" (2019) Law Society of Ontario Six Minute Estate Lawyer, online: https://store.lso.ca/Content/pdf/2019/CLE19-00406/CLE19-00406-pub.pdf

[43] (1982), 139 DLR (3d) 318, [1982] 6 WWR 165, 38 BCLR 216

[44] 2003 BCSC 563 [*Bellinger*].

[45] *Bellinger*, *supra* at para. 9.

construction which it would not normally be held to do; or unless it purports to prevent a legatee from taking proceedings necessary for the protection of his or her rights, in which case it would be repugnant to the bequest.[46]

A no-contest clause restricting a beneficiary from seeking direction from the court with respect to the interpretation of a will is void for being contrary to public policy. However, it should be noted that in the decision in the case of *Harrison v Harrison*[47] the court held that a bene had not forfeited his gift where he had commenced a proceeding for construction of the will and not to modify or change the will. Therefore, an application for construction or interpretation of the will should not trigger a no-contest clause.

3.3 Drafting Discretionary Trusts

Solicitors are often tasked with preparing Wills that make provisions for beneficiaries with special needs or disabilities, requiring them to prepare what are known as discretionary trusts. In these circumstances, the drafting of a discretionary trust must be done carefully to enable the trustee to plan distributions from the trust so that the government and other benefits received by the special needs trust individual are not affected.

A discretionary non-vested trust should be considered when the person creating the trust wants to ensure that the income beneficiary's rights to income and capital during the term of the trust are not vested. In this event, the trustee is given absolute discretion over how much, if any, income or capital is paid for the benefit of the person with a disability.[48]

The leading decision on discretionary trusts established for a special needs beneficiary is the Ontario decision in *The Minister of Community and Social Services vs Henson*.[49]

In *Henson*, the Court held that a discretionary trust established for a disabled beneficiary would not result in a loss of government benefits by a beneficiary as the beneficiary had no vested right to receive either income or capital from the trust.[50]

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[46] Canadian Forms of Wills, Sheard Hull Fitzpatrick, 4th Edition, Carswell at page 119, see Feeney on Wills, paragraph 16.61.

[47] 1904 CarswellOnt 131 (Ontario Trial)

[48] Jordan M. Atin, "Role of the Lawyer When Preparing a Will for a Vulnerable Testator"

[49] (1987), 28 E.T.R. 121, 26 O.A.C. 332 (Div. Ct., affirmed) (1989) 36 E.T.R. 192 (Ont. C.A.) [*Henson*].

[50] Note: In Alberta, pursuant to Section 5.4 (2) of the Assured Income for the Severely Handicapped Act, R.S.A. 1980, c. A-48 ("AISH") the Province of Alberta requires special planning considerations. Pursuant to the AISH, the director may deem that an AISH recipient has an interest in the income or capital with fully discretionary trust in certain circumstances.

4. SOLICITOR'S NEGLIGENCE

Solicitors owe a duty of care to their clients and in drafting wills, to the intended beneficiaries. If a solicitor is deemed to have fallen below the required standard of care, then disappointed beneficiaries can bring a negligence claim against them.

4.1 Common Negligence Claims

In Ontario, LawPRO provides primary errors and omissions insurance coverage for lawyers. LawPRO recently reported that Wills and Estate claims are ranked the fourth highest claim area by cost and the third highest claim area by volume. LawPRO has identified seven main categories of Wills and Estate claims: inadequate investigation, communication issues, errors of law, time management issues, clerical and delegation errors, conflict of interest issues, and other claims.

The leading malpractice claim brought against drafting solicitors concerns inadequate investigation. Solicitors have been held liable where there has been a proven failure to ask the testator what their assets are, to ask about the existence of a prior will or to inquire in greater detail as to the status of past marital relationships, other children or stepchildren, or whether a spouse is a married spouse or common law spouse.

The second leading malpractice claim brought against drafting solicitors surrounds communication issues. Claims were brought due to a solicitors' failure to compare the draft will with the instructions notes to ensure consistency, to ensure that the client understands what you are telling them and that you understand what they are telling you, particularly if there is a language barrier.

The third leading Wills and Estate malpractice claim represents errors of law. These claims are characterized by solicitors not being aware of key provisions of the *Income Tax Act* (and not obtaining the appropriate tax advice), drafting a will involving sophisticated estate planning without having the necessary expertise, and failing to properly execute documents.

Time management issues are the fourth leading malpractice claim brought against solicitors in Wills and Estates. Claims and are often brought where the solicitor misses the six-month deadline for making an election and issuing the necessary application under section 6 of the *Family Law Act*, causes a delay in preparing a will, or causes a delay in converting assets into cash in an estate administration.

The remaining claims are clerical and delegation errors and conflict of interest claims.

Risk Management Tips

Considering the severity and cost of Wills and Estate claims, LawPRO also released four helpful risk management tips worth considering.

The first risk management tip offered by LawPRO is to ask the client probing questions. According to the insurer, some lawyers are not asking the questions that could unearth facts that could become problematic later. Solicitors are also not making it clear what information their client needs to provide them with. By way of example, LawPRO found that some solicitors are not confirming with their clients whether all the beneficiaries have been identified correctly, about considerations dealing with gift-overs, whether all assets have been identified and how those assets are registered, or whether there was a previous marriage or even a prior executed will. LawPRO recommends that solicitors ask a lot of questions and then send their clients a reporting letter to confirm everything that was discussed.

LawPRO states that solicitors are often not taking the time to compare the drafted will with their notes. The insurer reports seeing claims where the will does not adequately reflect the instructions of the client or has overlooked some important contingencies. Many of these errors can be spotted by simply reviewing the notes from their meeting. The insurer suggests that it can also be helpful to have another lawyer proofread the will or even to set it aside for a few days and reread it with a fresh set of eyes, considering the will from the position of the beneficiaries or disappointed would-be beneficiaries. The key according to LawPRO is to ask yourself, if you were going to challenge this will, on what basis would you do so?

The next risk management tip is critical given our societal and demographical context. With Canadians living longer than ever and rapidly rising rates of cognitive decline and dementia, solicitors must be wary of capacity concerns and the undue influence of vulnerable testators. LawPRO recommends that solicitors confirm as best they can the capacity of the testator, while also watching for undue influence. A solicitor can satisfy themselves that they've taken the appropriate steps by meeting with the client separately from those benefitting from a will change. They should document with written proof that the client understands what they are asking and the advice provided to them, and documenting the steps taken to satisfy that the client's capacity has been verified. If there are capacity concerns, these should be well-documented.

Finally, LawPRO recommends as a risk management tip, that solicitors avoid acting for family members or friends. LawPRO is seeing a rise in claims where solicitors fail to make the proper enquiries or to properly document because they assume they have a good knowledge of their family or friends' personal circumstances. The insurer says that it's best not to act for them, but if you must, a best practice is to treat them as if they were strangers. The important thing to remember is that if a claim arises it will likely not come from the friend or family member, but rather, from a disappointed beneficiary with no personal relationship to the solicitor.

While these risk management tips are helpful and should be known by all drafting solicitors, they may not go as far as a solicitor would like in the prevention of common errors often committed when drafting wills. Solicitors should consider adopting technology that can help address some of these mistakes before they happen. A legal technology that can help alleviate drafting errors is eState planner, which will be discussed at the end of this paper.

4.2 Case examples

Geluch v Geluch Estate

In *Geluch v. Geluch Estate*[51], the sole daughter of the deceased testator, represented by the Public Guardian and Trustee of British Columbia (the "PGT"), brought a claim contending that her mother's wills of January 20, 2016 and January 12, 2016 were invalid.

Prior to the death of the testator, the testator's brother and niece met with a drafting solicitor to update the testator's will and add the niece to the testator's investment account as a joint account holder. The drafting solicitor did not meet the testator privately to discuss these matters. There were also a series of emails from the testator's brother to the lawyer, providing instructions on what they would like done. Under cross examination, the drafting solicitor expressed zero concern over the lack of directions from the testator.

The drafting solicitor met with the testator at her home on January 12, 2016.[52] The notes of the drafting solicitor did not indicate whether he discussed with the testator the amount of the residue of her estate, or whether he asked her if she wished to make her niece her residual beneficiary.

The testator in her will, was bequeathing $900,000.00 to various charities. At no point did the solicitor point out that in doing so, she was disposing of over half of her estate. The Court held that "the only credible explanation for Jean's scrupulous attention to the Charitable Bequests and Individual Bequests, and her lack of attention to her residue, is that she had no idea of the magnitude of the residue of her estate."[53]

While the Court was satisfied that the testator was capable of making choices with respect to her testamentary dispositions in January 2016, it was not satisfied that she knew or approved of the choices that she purportedly made. *Geluch* is an example of a drafting solicitor failing to comply with basic requirements for a valid will.

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[51] 2019 BCSC 2203 [*Geluch Estate*].

[52] *Ibid*, at para. 62.

[53] *Ibid*, at para. 158.

Daradick v. McKeand Estate

In *Daradick v. McKeand Estate*[54], an application was brought to rectify the last will and testament of Ruth Caroline McKeand. The drafting solicitor took instructions from the Testator with respect to her will. In his affidavit, the solicitor swore that he drafted the will of the Testator and that he took instructions from her on May 25, 2010. At paragraph 11 of his affidavit he stated the following: "I recall that during the meeting, Mrs. McKeand instructed me that the Residence was to be gifted to Ms. Daradick. Accordingly, I wrote "house moms name - 165,000 to go to Virginia" on the reverse side of the Sheet".

According to solicitor, his secretary did not see this note and prepared the will without reference to the bequest. He did not attend the signing of the Will and later wrote a letter to the executor, David McKeand on January 25, 2011 where he acknowledges the error. In a February 1, 2011 reply, the lawyer for the executor stated he would not consider rectifying the will because of the error.[55]

The court summarized the possible courses of action including suing the drafting lawyer for negligence, suing the estate for the amount of money and time that the applicant has provided to the mother and the matrimonial home, or applying to the courts for a rectification of the last will. Counsel at the hearing opted to proceed only on the issue of rectification. The Court held it can delete or add words to a will where a word or words or omitted but also where an incorrect word or words are contained therein, the decision found that the error of the solicitor can and should be corrected.[56]

Undue influence negligence cases

Whether or not a solicitor may be successfully sued for negligence if their client was unduly influenced is not clear and is likely dependent on the evidence and finding in the particular circumstances.

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[54] 2012 ONSC 5622 [*McKeand Estate*].

[55] *Ibid*, at paras. 21-26.

[56] In either case, before a court can delete or insert words to correct an error in a will, the Court must be satisfied that:
(i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;
(ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;
(iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and
(iv) The proposed correction of the mistake, by the deletion of words, the addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.

In the complex and lengthy decision of *Hussey v. Parsons*[57], an elderly widow sued her former solicitor alleging that he knew or ought to have known that she was being unduly influenced to transfer her property to her nephew. Justice Puddestar concluded that there was no actual undue influence exerted by the nephew and that regarding any presumption of undue influence which might arise in the circumstances, the surrounding facts were such as to rebut that presumption. As stated in section 1, this is the source of the 'indicia of undue influence; laid out by Justice Puddestar. If indicia exist, then it is "suggested that the situation as a whole was one which called for an extra degree of care and inquiry by the [solicitor] in terms of exactly what were the interests, intentions and understandings of the plaintiff"[58].

In *Tulick Estate v Ostapowich*[59], children of a widower sought damages against their father's solicitor in negligence, alleging that the lawyer drafted a transfer of property from the widower to his nephew and that the nephew had unduly influenced their father to do so. The lawyer had also acted on behalf of the nephew in the past. However, while the court concluded that the lawyer had not provided independent legal advice to the widower, no undue influence existed. As no undue influence existed, "the claim for damages against [the solicitor] cannot succeed and it must be dismissed"[60].

Similarly, in *Doyle v Valente*[61], the court dismissed a negligence claim against a solicitor when it held that the testator had freely changed his mind and no undue influence was found. Justice Spencer concluded that [i]t follows that [the] action against the solicitors must also be dismissed because [the testator] knew what he was doing. There is no obligation at law, nor was any suggested, for a solicitor to protect the interest of a former beneficiary from a testator's properly formed intention to change his mind"[62].

5. HOW eSTATE PLANNER CAN HELP AVOID COMMON MALPRACTICE ERRORS

eState Planner is a planning program used to assist solicitors in wills and estates. It was created by Jordan Atin of Hull and Hull LLP and can help to streamline the process and reduce the likelihood of lawyer errors and omissions.

The program streamlines the traditional process of drafting wills and other testamentary documents. Where a lawyer may consult with a client, asks questions and draft

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[57] *Hussey*, *supra* note 36.

[58] *Ibid* at para 633

[59] *Tulick Estate v. Ostapowich et al.,* (1988) 91 A.R. 381 (QB)

[60] *Ibid* at para 41

[61] *Doyle v Valente*, (1993) CarswellBC 2971 (SC)

[62] *Ibid* at para 36

documents later, eState planner transforms it into a process where the lawyer and client create the estate plan together in real time while software records the interaction.

Through eState Planner, practitioners can collect information from a digital questionnaire which the client completes. The questionnaire populates the client's information into the system which allows the solicitor to monitor the client's progress in and shows them any follow-up questions that require their attention. Instructions from clients can be implemented by the solicitor in real-time with the ability to drag and drop assets to easily create bequests. The system also allows clients to see the implications of their decisions. For instance, clients will be able to see tax payable and the impact that one bequest can have on other assets available for distribution to other beneficiaries. All of this is provided to the solicitor and client in an easy-to-read format.

The program automatically generates the documents required by clients and the software generates graphic and text summaries of the client's will. Additionally, eState Planner can assist the lawyer by providing Advisor Alerts: prompts for lawyers on a number of issues (such as a missing gift-over provision or an *Income Tax Act* implication).

There is also an added level of trust and security. All the data on the platform is encrypted both in transit and at rest while the system itself is actively monitored using real-time threat detection. Lawyers can securely access their client's data at anytime on any device. The program also actively monitors the current regulatory landscape to ensure compliance with all relevant privacy standards (such as PCI DSS, GDPR, etc.).

The program itself is not only easy to use but also customizable. The only thing that is required to operate eState planner is a browser with internet access. The program easily allows for the creation of Short Wills for straightforward scenarios. These are produced in a 6-page, condensed format with easier to understand uses and simplified provisions. Where it concerns flexibility, eState Planner features custom precedents for lawyers and firms who prefer to use their own clauses but also access to Hull and Hull LLP precedents and wills. Finally, eState Planner will allow a lawyer to create multiple wills and separate those assets requiring probate from those that do not to avoid paying probate taxes on assets that do not otherwise require it.

5.1 How eState Planner reduces the likelihood of malpractice errors

Because of the eState Planners' efficacy, it reduces the likelihood of malpractice errors by solicitors.

Where it concerns inadequate investigations, eState Planner offers detailed questionnaires, checklists and alerts. Through the system, each asset type prompts the lawyer for detailed information. As previously mentioned, the Advisor Alerts feature instantly prompts the lawyer to request prior documents. To help with the ease of reference in complicated matters, eState Planner produces a detailed family tree to easily

distinguish complex relationships and automatically highlights special circumstances such as estrangement and disability. The client can review the plan in a visual form as it is being created.

Communication issues have notably plagued drafting solicitors. To help alleviate these concerns and ultimately, malpractice claims, eState Planner provides visualization and document generation. The program automatically generates a will based on the instructions provided by the client without the need to transcribe these from solicitor's notes. This ensures a stronger understanding as the will plan is developed graphically in real time, allowing the client to visualize the effect and impact of the lawyer's advice and the client's instructions.

Errors of law are often committed because the drafting solicitor either lacks the expertise or has simply overlooked legislative changes or important decisions. To help avoid some of these mistakes, eState Planner provides frequently updated checklists and advisor alerts. These come in the form of contextual reminders about income tax implications in real time based on the client's specific circumstances. The system warns the lawyer about planning decisions that may have negative ramifications for the client but also, prompts the lawyer when they need to obtain foreign advice. The built-in features of eState Planner also provide Advisor Alerts which are specific to each client's particular circumstances. These alerts are constantly updated according to changes to case law and legislation with warnings provided when certain actions may trigger certain consequences. The system will alert the lawyer to inquire about previous wills, marriage status, *Income Tax Act* considerations, and whether a transfer may be subject to the presumption of resulting trust.

Adding to its efficacy, eState Planner also helps with solicitor time management issues by featuring automatic document generation. Within seconds lawyers can generate Wills, Powers of Attorney, and other documents – saving the client valuable legal costs in the time it takes to draft these documents. The likelihood of committing clerical and delegation errors is greatly reduced using eState Planner. The program features unique data collection capabilities which allow all names and genders to be automatically matched, ensuring fewer typos. With information no longer being transcribed by a lawyer, eState Planner directly inputs information into the portal by the client to be reviewed by the lawyer.

CONCLUDING THOUGHTS

Best Practices

So, what should drafting solicitors in wills and estates practitioners do to avoid or defend against a will challenge or negligence claim? Consider implementing a “best practice” set of guidelines in every case and consider including some of those outlined below. These are just a few considerations, not an exhaustive or comprehensive list:

- TIME CONSIDERATIONS: Do not miss time limits or cause inordinate delay in carrying out your client’s instructions. Death may visit any of our clients at any time, but especially those who may be sick or ill or of an advanced age. Understand the urgency from a client who might be severely ill, i.e., time is of the essence. Come to an agreement regarding the time frame for completing the will at the outset with the client. However, also be vigilant when *unreasonable* time limits are imposed by the client. Decline to act where timelines are unreasonable and prevent you from consulting fully with the client and other third parties or giving a matter appropriate time and attention.
- RETAINER: Consider the use of retainer agreements. Through these agreements the specific terms and conditions of a solicitor’s employment can be agreed upon.
- COMMUNICATION: Be clear in communications with your clients, other solicitors, or third-party beneficiaries. Manage your client’s expectations through clear communications. Ask probative, open-ended and comprehensive questions which may help to elicit important information involving the psychology of the client executing the planning document. First and foremost, always take comprehensive and detailed notes.
- HIGH-RISK SITUATIONS: Be aware of high-risk situations including estate planning for spouses which impact matrimonial and family property rights; or estate freezes by parents, including where only one child may benefit from the freeze and receive the benefit of future equity growth; or estate planning involving the lawyer’s family members. Be vigilant during “death-bed” planning or pre-nuptial Wills “on-the-way-to-the-alter” etc.
- AVOID POTENTIAL FOR UNDUE INFLUENCE: Set in place “best practices” to avoid the potential for undue influence:
    - Interview the client alone;
    - Obtain comprehensive information from the client, determine relationships between the client and family members, friends, acquaintances and draw a family tree; determine recent changes in relationships or living circumstances etc.

- Consider indicators of undue influence including whether there is an individual who tends to come with your client to his or her appointments. If so, what is the nature of that relationship?
- Is your client well-supported? Or does that support come from one family member? Or, is your client socially isolated? Is your client independent with respect to personal care and finances or does she rely on one particular individual? Is there conflict within the client's family?
- Are there any communication issues? Medical issues? Physical impairment of sight, hearing or mobility? These are just a few.

- USE CHECKLISTS: the use of checklists can help avoid a variety of errors, ranging from smaller clerical errors to larger failures to deduce undue influence or capacity.
- USE REPORTING LETTERS: when possible, confirm with the client's instructions in writing. Document phone calls, e-mails and prepare extensive reporting letters. It may be that a reporting letter that confirms instructions for a new will and the reasoning for the instructions can provide a legitimate defense to a claim from a disappointed beneficiary.

Conclusion

Certainly, the required standard of care for a drafting solicitor are high and the case law is illustrative of a need for heightened awareness and diligence. There is a defined duty of care owed by the estate planning solicitor. Solicitors must exercise diligence in avoiding acts or omission which may be detrimental to the testator/client and the intended beneficiaries. This is where eState planner can be of assistance in estate planning.

Kimberly A. Whaley, Whaley Estate Litigation Partners

Ian Hull, Hull & Hull LLP *November 2022*

WILL DRAFTING CHECKLISTS

The question of testamentary capacity is almost wholly a question of fact. The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

Capacity Checklist	
	✓
The nature of the act of making a Will (or testamentary document) and its effects	☐
The extent of the property of which he or she is disposing of	☐
The claims of persons who would normally expect to benefit under the Will (or testamentary document).	☐
Further elements of the criteria applied for determining testamentary capacity that the testator must have, are:	
A "*disposing mind and memory*" to comprehend the essential elements of making a Will	☐
A sufficiently clear understanding and memory of the nature and extent of his or her property	☐
A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate	☐
A sufficiently clear understanding and memory to know the testamentary provisions he or she is making	☐
A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property	☐
There exists a rebuttable presumption that an adult client is capable of instructing counsel. To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. **In order to have capacity to instruct counsel, a client must:**	
Understand what they have asked the lawyer to do for them and why	☐
Be able to understand and process the information, advice and options the lawyer presents to them	☐
Appreciate the advantages, disadvantages and potential consequences of the various options.	☐

Red Flags for Incapacity Checklist	
	✓
Be alert to cognitive, emotional or behavioural signs such as memory loss, communication problems, lack of mental flexibility, calculation problems or disorientation of time person and/or place	☐

Hesitation or confusion on the part of the client, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension	☐
Short-term memory problems: repeats questions frequently, forgets what is discussed earlier in conversation, cannot remember events of past few days (but remember there is a difference between normal age-related forgetfulness and dementia)	☐
Communication problems: difficulty finding words, vague language, trouble staying on topic or disorganized thought patterns	☐
Comprehension problems: difficulty repeating simple concepts and repeated questions	☐
Calculation or financial management problems, i.e. difficulty paying bills and Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns	☐
Significant emotional distress: depression, anxiety, tearful or distressed, or manic and excited, feelings inconsistent with topic etc.	☐
Experienced recent family conflict, family bereavement, or inability to readily identify family members	☐
Irrational behavior or reality distortion or delusions: may feel that others are “out to get” him/her, appears to hear or talk to things not there, paranoia	☐
Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed	☐
Lack of responsiveness: inability to implement a decision	☐
Recent and significant medical events such as a fall, hospitalization, surgery, etc. and Physical impairment of sight, hearing, mobility or language barriers that may make the client dependent and vulnerable	☐
Does the substance of the client’s instructions seem rational? For example, does the client’s choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?	☐

The Court in the 2013 decision of *Gironda v Gironda* provided a (non-exhaustive) list of indicators of undue influence:

Understanding Undue Influence – Indicators Checklist	
	✓
The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs	☐
The testator is socially isolated	☐
The testator has experienced recent family conflict	☐
The testator has experienced recent bereavement	☐
The testator has made a new Will that is inconsistent with his or her prior Wills	☐
The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.	☐

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present.

In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present.

In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Detecting Indicators of Undue Influence – Circumstantial Inquiry Checklist	
	✓
Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?	☐
What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?	☐
Is there conflict within your client's family?	☐
If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?	☐
If the client is isolated, does he/she live with one particular individual?	☐
Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?	☐
Based on conversations with your client, his/her family members or friends, what are his/her character traits?	☐
Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?	☐

Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?	☐
If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.	☐
Have numerous successive planning documents of a similar nature been made by this client in the past?	☐
Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?	☐
Has the client had any recent significant medical events?	☐
Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?	☐
In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?	☐
Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?	☐
Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?	☐
Involvement of Professionals	
Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependancy? Is the client in some way susceptible to external influence?	☐
Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?	☐
Have any previous lawyers seemed overly or personally involved in the legal matter in question?	☐
Substantive Inquiries	
Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?	☐
What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?	☐

Is the client making a marked change in the planning documents as compared to prior documents?	☐
Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?	☐
Does the client have a physical impairment of sight, hearing, mobility or other?	☐
Is the client physically dependant on another?	☐
Is the client vulnerable?	☐

When taking instructions from a client in respect of a planning document, there are some checklist recommended guidelines to assist in minimizing the risk of the interplay of undue influence:

Avoiding Undue Influence Checklist	
	✓
Interview the client alone	☐
Obtain comprehensive information from the client, which may include information such as: (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents; (ii) Any previous planning documents and their contents, copies of them.	☐
Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context)	☐
Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants	☐
Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability	☐
Address recent health changes	☐
Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions	☐
Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence	☐
Determine whether the client have any physical impairment? Hearing, sight, mobility, limitations …?	☐
Consider evidence of intention and indirect evidence of intention	☐
Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.	☐

These checklists are intended for the purposes of providing information only and is to be used only for the purposes of guidance. These checklists are not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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