

Child Proofing Your Will: Recognizing and Avoiding Common Traps for Solicitors

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Barristers and Solicitors



Today we will discuss

- Recent trends impacting will-making in Canada
- Common traps faced by solicitors
- Tips for success, including ...
- e-State Planner

2022 – Recent trends

- Recent surveys which reveal Canadians perceptions on will-making
- Post-*Pecore*: new decisions which provide clarity on the application of the doctrine of resulting trust and beneficiary designations
- Electronic/digital considerations for will-making

What the surveys say

2018 Angus Reid Poll

- Half of Canadians have no will

2022 RBC Royal Trust Poll

- Almost half of young Canadians likely to direct executor on handling digital assets

Post-*Pecore* decisions implications

- SCC's 2007 *Pecore* decision = unclear whether assets distributed through a beneficiary designation were gifts or held in trust
- 2021 decisions in Ontario, Nova Scotia and Alberta: the doctrine of resulting trust does not apply to beneficiary designations

Electronic considerations

- 2021 – British Columbia authorizes probating electronic wills
- 2022 – Prince Edward Island enacts legislation defining digital assets and permitting fiduciaries to access the digital assets of an account holder

Ontario's validating provision

- Recently amended *Succession Law Reform Act*:
 - **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 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, alteration or revival of the will of the deceased, as if it has been properly executed or made

Standard of care of a drafting solicitor

Central Trust Co. v Rafuse [1986] 2 SCR 147

- “. . .reasonable care, skill and knowledge to the performance of the professional service . . .”
- A reasonably competent lawyer, practicing in the same community at the time in question
- Not perfection

Discharging your Duty of Care

White v. Jones 1995 ALL ER 692 (HL)

- Solicitor must satisfy the will is valid
- A solicitor owes a duty of care to intended beneficiaries of a will
- Duty owed despite no privity of contract

A lawyer's obligations

Millican v Tiffan Holdings Ltd. [1967] SCR 183

- Skilful & careful
- Advise clients on all relevant matters
- Protect interests
- Carry out instructions
- Consult
- Keep client informed

Testamentary Capacity

- No single legal definition for “capacity”
- Capacity is decision, time and situation-specific
- Lawyer’s duty to assess capacity is particularly significant if the client is elderly, infirm, dependant or if instructions vary substantially from previous documents

Testamentary Capacity

Banks v. Goodfellow (1870) L.R. 5 Q.B. 549

- a) Ability to understand the **nature and effect** of making a will;
- b) Ability to understand the **extent of the property** in question; and
- c) Ability to understand the claims of the persons who would normally **expect to benefit** under a will of the testator

Undue influence and/or fraud

- Such influence on testator that his/her decisions are not wholly independent
- Diligent and alive to indicia
- Asking the right questions / recording interactions, noting any suspicious circumstances

Acting reasonably in preparing Wills

***Rosenberg Estate v. Black*, 2001. O.J. No. 5051**

- **6 factors** to consider in determining whether a lawyer acted reasonably in preparing Wills:

1. Terms of retainer	2. Whether any delay caused by client	3. Importance of the Will to the testator
4. The complexity of the job	5. Any circumstances indicating risk of death / incapacity	6. Whether there was a reasonable ordering of the lawyer's priorities

Drafting issues that may arise

Estate Planning with a Husband and Wife

- Know when the retainer is at an end
- Record, report, advise
- Recognize conflicts and fiduciary duties

Drafting Issues that may arise

No-contest or *in terrorem* clauses

- A condition imposed by the will maker on the gift
- Three criteria for the doctrine to apply
- Establishing a clause as *in terrorem* could invalidate a no-contest clause

LawPRO: common claims

- Main categories of Wills and Estate claims:
 - Inadequate investigation: the leading malpractice claim against drafting solicitors
 - Communication issues: ensure that the client understands what you are telling them

Case examples

Geluch v Geluch Estate, 2019 BCSC 2203

- example of a drafting solicitor failing to comply with basic requirements for a valid will

Daradick v McKeand Estate, 2012 ONSC 5622

- Rectification of solicitor's mistake

Risk Management Tips

- Use checklists when assessing capacity and undue influence
- Ask the client probing questions: ask a lot and send a reporting letter of what was discussed
- Avoid acting for family members or friends

e-State Planner: Reducing errors

COMMON MALPRACTICE ERRORS



Inadequate investigation - 36%

- Failure to ask the testator what their assets are
- Failure to ask about the existence of a prior will
- Not digging into more detail about the status of past marital relationships, other children or stepchildren, or whether a spouse is a married spouse or common law spouse

Communication - 26%

- Failure to compare the draft will with the instructions notes to ensure consistency
- Failing 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
- In estate litigation: failing to communicate and document settlement options

Errors of law - 14%

- Not being aware of key provisions of the *Income Tax Act* (and not obtaining the appropriate tax advice)
- Drafting a complex will involving sophisticated estate planning when you do not have the necessary expertise
- Failing to properly execute documents

Time management - 7%

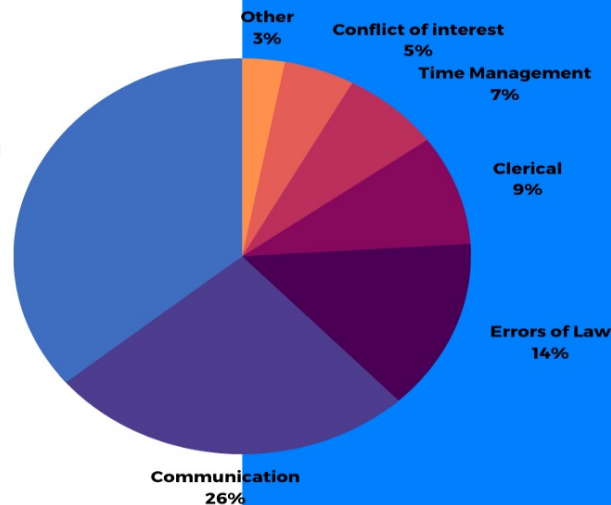
- Missing the six-month deadline for making an election and issuing the necessary application under Section 6 of the *Family Law Act*
- Delay in preparing a will
- Delay in converting assets into cash in an estate administration

Clerical and delegation - 9%

Conflict of interest - 5%

Other - 3%

Inadequate Investigation
36%



*All claim figures from 2010 - 2020. All cost figures are incurred costs as of April 2019.

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How e-State Planner Can Help

Detailed Questionnaires, Checklists and Alerts

- Each asset type prompts for detailed information
- Advisor Alerts prompt lawyer to request prior documents
- Produces detailed family tree to easily distinguish complex relationships and highlights special circumstances such as estrangement and disability.

Visualization and Document Generation

- Automatically generates Will based on the instructions without the need to transcribe from notes
- Ensures understanding as the Will plan is developed graphically in real time allowing the client to visualize the effect of your advice and their instructions

Frequently Updated Checklists and Advisor Alerts

- Contextual reminders about income tax implications in real time based on the client's specific circumstances
- Lawyer is warned about planning that may have negative ramifications for the client and when to get foreign advice.
- Affidavits of Execution and Execution Checklists are built in.

Automated Document Generation

- Wills, Powers of Attorney and other documents can be generated in seconds.

Data Collection

- All names and genders are automatically matched to ensure fewer typos.

Conflict of interest - 5%

Other - 3%

Drafting Checklist

Capacity Considerations		Indicators of Undue Influence	
Red flags for spotting incapacity	<input type="checkbox"/>	Indicators of undue influence	<input type="checkbox"/>
Best practices for documenting capacity concerns	<input type="checkbox"/>	Circumstantial inquiry checklist	<input type="checkbox"/>
Clerical error check - e-State Planner	<input type="checkbox"/>	Best practices for avoiding Undue influence and/or fraud	<input type="checkbox"/>
Ask a lot of probing questions	<input type="checkbox"/>	Send a reporting letter	<input type="checkbox"/>

QUESTIONS?

THANK YOU!