TAB 13

Part 6: How Vulnerable to Attack is a Power of Attorney and Will?

Preparation of Powers of Attorney and Wills to Withstand Attack

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A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

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Preparation of Powers of Attorney and Wills to Withstand Attack

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A. Introduction

The estate planning lawyer faces numerous difficult tasks when attempting to draw a will or power of attorney. Firstly, the lawyer must capture and accurately set out the testator's wishes in written form so that these wishes can be carried out. The lawyer must ensure that all technical requirements are met when the will is executed. The lawyer must take proper steps throughout the retainer to ensure that the testator's intentions are not frustrated through a will contest.

It seems that more and more wills and powers of attorney are becoming the subject of attack.[1] The estate planning lawyer needs to be particularly careful given that he or she will almost certainly be drawn into the litigation where the will or power of attorney is being challenged. The drafting solicitor may find him or herself being compelled to produce the estate planning file, compelled to give evidence as a non-party witness under Rule 30.10 of the *Rules of Civil Procedure* and, if the case proceeds, compelled to give evidence at a trial. All of this is very time consuming and it cannot be lost by the solicitor brought into the family battle that it remains a possibility that following the will challenge or attack on the power of attorney he or she may become the target of one of the family members in a solicitor's negligence claim.[2] Some commentators have even referred to a will challenge proceeding as a "subtle form of malpractice action." [3]

Accordingly, every time that an estate planning lawyer is retained to draft a will or power of attorney, that lawyer must turn his or her attention to the prospect of a challenge to the validity of that instrument. The lawyer must consider the testator's or grantor's capacity, knowledge of and approval of the document's contents, and the presence of suspicious circumstances. In many cases, such as a young couple engaging in their first estate planning, there will be little concern and the drafter will spend less time concerned with issues of capacity and undue influence. However, there are situations where the lawyer may be required to spend a great deal of time considering these issues. The lawyer must be attuned to recognizing these situations and, in such circumstances, take appropriate steps to ensure that the will or power of attorney is capable of withstanding attack.

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[1] Ontario statistics are not reported. However, it is reported that one in every one hundred probated wills in the United States is the subject of an attack (Creighton Law Rev., Dennis W. Collins, Avoiding a Will Contest – pg. 8, citing John H. Langbein, Will Contests, 103 Yale L. J. 2039, 2042 n.5 (1994).

[2] Schnurr, Estate Litigation, *Solicitor's Negligence in Estate Matters* p. 21-9.

[3] Dennis W. Collins, *Supra* note 1 at 8.

B. The Warning Signs

There are often recurring circumstances giving rise to will challenges and attacks on powers of attorney. The estate planning lawyer must recognize those warning signs and take appropriate steps to ensure that the testator's or grantor's expressed true wishes are upheld, either before or after the testator's death. In the case of will, these circumstances include:

1. an elderly testator;
2. a testator in poor health;
3. a testator preferring a spouse from a second marriage over children from a first marriage or the converse;
4. a testator not including his heirs at law or not preferring the natural objects of his bounty but preferring more distant relatives, friends or charitable causes;
5. a testator preferring some children over others;
6. a significant dispositive change from an earlier will;
7. testamentary schemes that are restrictive or impose conditions;
8. the involvement of a beneficiary in the estate planning process;
9. the involvement of care providers in the estate planning process; and
10. the unwillingness or inability of a testator to provide the estate planning lawyer with detailed information regarding his assets, liabilities and family.[4]

Many of these warning signs apply equally to the preparation of powers of attorney. Additionally, however, the lawyer should consider the following areas which often give rise to disputes involving powers of attorney:

1. the grantor's choice of attorney;
2. the number of attorneys;
3. any provision for alternate attorneys;
4. the attorney's willingness and ability to perform his or her duties, presently or in the future;
5. any triggering event which allows the attorney to act under the power of attorney;
6. the scope of the attorney's powers; and
7. any material change to the choice of attorney(s), triggering event or scope of powers from earlier powers of attorney.

The presence of any of the above factors and circumstances requires that the estate planning lawyer take appropriate steps, within the scope of the retainer, to ensure that the grantor's or testator's true intentions are being communicated and, then, to ensure that this true intention can be carried out upon the activation of the power of attorney or the testator's death.

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4 The size or value of an estate is not, in the writers' experience, a factor that is taken into account when a will challenge is contemplated. Unhappy family members are content to fight over family photos, tea sets and father's tools as readily as fighting over millions of dollars.

C. The Retainer

The steps, which are addressed in this paper, require the lawyer to do more than he or she might do when preparing the simple reciprocal wills for a young couple. More time must be spent with the testator; often several appointments might be necessary. A referral to a doctor or capacity assessor may be required. Discussions with family members or family meetings might be deemed appropriate. Audio or video recording may be considered as well as numerous memoranda to file, all with a view to ensuring that the testator's or grantor's true intentions are clearly memorialized. Most lawyers who draft wills and powers of attorney tend not to charge a great deal for the service. Some lawyers draft wills and powers of attorney as a complementary service when retained to undertake a real estate transaction for a very modest additional cost. Others still treat the will retainer as a loss leader, hoping to be retained by the executor upon the testator's passing to provide legal services in the administration of the estate, which it is assumed is more lucrative. Certainly, the steps that can be taken, or that should be taken by the estate planning lawyer, must be in accordance with the testator's or grantor's willingness to pay for the service provided but the estate planning lawyer should consider what is expected of him or her, at a minimum, as part of the retainer and ensure that these steps are taken in all cases where the warning signs are present. The lawyer might have regard to the prospect of a will challenge, or an attack on a power of attorney after the grantor's incapacity, and what time commitment that might require of the solicitor, all of which might be unpaid (except for attendance money). Where the lawyer has identified the warning signs and finds that a client is unwilling to pay for the service that the lawyer feels is appropriate, the lawyer might consider declining the retainer or, if that is impractical, clearly limiting the scope of the retainer in a letter to the client. Such a step might be of assistance to the estate planner at a later date, in the event that the will is ultimately challenged, when, upon the conclusion of the will challenge the disappointed or prospective beneficiary or estate trustee turns his or her attention to the question of solicitor's negligence.

D. The Solicitor's Duty of Care

A solicitor retained for the purposes of drafting a will owes a duty of care to the testator:

> [T]o make the enquires necessary to satisfy himself that the wishes of the testator will be honoured and given proper legal expression through the provisions of the will. Unusual circumstances, if presented, must be enquired into, their results analyzed, consults taken where appropriate, all to ensure that the will that is ultimately prepared meets the wishes of the client, while at the same time minimizing adverse consequences that can legally be avoided by due diligence.
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> To suggest that it is a sufficient discharge of a solicitor's duty to a testator in circumstances such as these to simply enquire of him what he wishes and then to record and thereafter prepare the will without anything further is to relegate a solicitor and his

> obligations comparable to that of a parts counterman or order taker. The public is entitled to expect more from the legal profession[5]

A solicitor's duty to the testator is to ensure that the will expresses the true testamentary expressions of the testator.[6] In the furtherance of fulfilling the lawyer's duty of care consideration must be given to the warning signs and circumstances enumerated above and then undertake the necessary investigation so as to be satisfied that the will does represent the testator's true testamentary intentions. Furthermore, where there are one or several of the circumstances that suggest that additional inquiry is appropriate, the solicitor should anticipate the possibility of a will challenge and take necessary steps and preserve evidence that will assist in having the will withstand an attack.

It is generally accepted that the same duty of care applies to solicitors engaged in the preparation of powers of attorney.[7] Additionally, it has been suggested that solicitors drafting powers of attorney have an obligation to make some assessment of their client's mental capacity.[8] Solicitors, however, typically lack the skills necessary to make such an assessment, particularly where a person's incapacity is not obvious. Some guidance can be taken from the jurisprudence on this subject, which will be discussed later in the paper.

In order to properly protect a power of attorney from attack, it is first necessary to understand the most common bases for a challenge, including any unique circumstances which might give rise to a dispute in any particular case. The following issues typically drive disputes involving powers of attorney:[9]

1. due execution of the power of attorney;
2. the validity of the power of attorney, which can turn on the grantor's capacity to make a power of attorney, the exercise of undue influence, and the existence of suspicious circumstances in the procurement of the power of attorney;
3. the scope of the attorney's powers arising from general language in the instrument or a specific grant of powers;
4. the choice of attorney;
5. the conditions or escrow terms governing the coming into effect of the power of attorney;
6. uneven treatment of children, or favouring a stranger over family, in the choice of attorney or the attorney's exercise of discretion;
7. accounting discrepancies, misappropriation of property and other questionable conduct on the part of the attorney;

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[5] *Earl v. Wilhelm* (1997), 18 E.T.R. (2d) 191 (Sask. Q.B.) at 209.

[6] S. M. Grant and L. R. Rothstein, *Lawyers' Professional Liability* (2d ed.) (Toronto: Butterworths, 1998) at 140.

[7] B. A. Schnurr, *Estate Litigation* (2d ed.) (Toronto: Carswell, 1994) vol. 2 at ch. 21.

[8] L. Hollaman, *Challenges to Powers of Attorney*, OBA Trusts and Estates Section Program "Challenges to Powers of Attorney", October 25, 2005, at p. 7.

[9] Compiled in part with reference to ibid. at p. 5.

8. disagreements among family members, or between family members and the attorney, concerning the grantor's capacity and the attorney's actions or inactions; and
9. dispute resolution between joint attorneys, including the failure of one attorney to adequately involve the other in the administration of the power.

A solicitor engaged to prepare a power of attorney should consider these issues in addition to exploring the client's particular circumstances and the client's reason for seeking a power of attorney. In an effort to anticipate the possible challenges to the power of attorney, a prudent solicitor will spend considerable time trying to understand the nature and extent of the client's property and health care issues which are likely to fall under the administration of the proposed attorney. The typical broad language used in a power of attorney can be useful, and even necessary, to permit the attorney to effectively conduct her or his administration. However, adding specific instructions or qualifying the attorney's authority with respect to certain assets or decisions can help avoid a dispute, particularly where one can be reasonably anticipated.

A challenge to the validity of a power of attorney usually takes the form of an application to appoint a guardian pursuant to the provisions of the *Substitute Decisions Act, 1992*.[10] The court will appoint a guardian to replace an attorney where the attorney no longer serves the person's best interests.[11] However, courts today are reluctant to displace the person selected by the capable grantor as their attorney. In the absence of evidence of mismanagement or impropriety by the attorney, courts will not normally appoint a guardian. Having said that, guardianship may be appropriate where joint attorneys cannot agree on a course of action.[12]

E. Providing Proper Advice

Rather than simply documenting the file in preparation for the family fight to follow the incapacity or death of the client, the lawyer should properly advise the client regarding the challenges that might arise in administering certain assets or making certain personal care decisions, the consequences of a proposed dispositive scheme and the selection of attorneys and executors. By engaging in a frank discussion of the issues and an exchange of ideas with the client, the solicitor will gain insight into the client's particular circumstances and may identify areas where there is a potential for conflict among relatives, beneficiaries and other interested parties. The solicitor can then make recommendations that might avoid future conflict among and between those relatives, beneficiaries and interested parties.

By way of illustration, a testator may provide instruction that he wishes his eldest of four children to be named as the executor of his estate and divide the estate equally among the four children. The testator feels that the responsibility of executor should properly

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[10] S.O. 1992, c. 30 ("SDA").
[11] See e.g. *Cates* v. *Forbes* (2003), 1 E.T.R. (3d) 185 (Ont. S.C.J.).
[12] See e.g. *Sedgewick* v. *Henry* (1996), 14 E.T.R. (2d) 171 (Ont. Gen. Div.).

fall to the eldest child. The testator may not fully appreciate the role of the executor. The testator may not appreciate the time commitment involved or understand what the duties of an executor include. The testator may not have any regard for the type of discretion left to the executor that is provided for in the boilerplate provisions of his will or that the executor is entitled to claim compensation for acting. The testator may not appreciate that being named as an executor may carry with it a certain honour that elevates one child while denigrating those not endowed with that responsibility. By naming the eldest child as executor there is a possibility that other children will feel slighted. The lawyer should canvass all of these issues with the testator and consider various options including, in the above example, the possibility of naming an unrelated professional such as a lawyer, family accountant or trust company as executor instead of a child. The lawyer might recommend naming all of the children as co-executors with an appropriate provision to deal with the possibility of deadlock. It is the estate planning solicitor's role to advise and make appropriate recommendations to the testator and not simply record the testator's instructions, particularly where the solicitor recognizes that the initial instructions may potentially lead to conflict between family members down the road.

Providing advice to clients extends well beyond the choice of executors. A testator may wish to retain control of his estate or bequests following his death. He or she may wish to grant life interests rather than make an outright distribution; spendthrift trusts may be contemplated; as well as trusts for minors. A testator may wish to make certain bequests upon certain conditions being met. There may be very appropriate reasons to create a trust rather than distribute outright. Imposing a condition might be paramount to the decision to include a certain bequest. However, any limitation upon a bequest may lead a beneficiary to consider a challenge to a will. The will drafting solicitor should carefully review the rationale for such limitations being imposed on bequests. The will-drafting lawyer should caution against an estate plan that delays distributions for many years. The lawyer should document the discussion with the testator in his notes whether or not the lawyer is able to persuade the testator to amend the plan.

The estate planning lawyer needs to review with the testator the nature of all of his or her assets and the manner in which they are owned. A checklist or questionnaire sent to the testator in advance of the meeting and to be completed by the testator prior to the initial meeting with the lawyer is a useful estate planning aid that requires the testator to turn his attention to his assets and liabilities. Such a document completed in the hand of the testator may be useful in overcoming allegations that the testator lacked knowledge regarding his estate assets. Of course, having the testator complete the questionnaire is the first of several parts of this exercise. The lawyer must review the questionnaire with the testator and steps should be taken to verify the information provided by the testator where there may be some question as to ownership or the ability to transfer an asset upon death. The estate planning lawyer needs to consider and review with the testator the nature of his liabilities, including tax obligations that will arise on death in particular, from the deemed disposition of all of the testator's property. The estate planning lawyer needs to review the dispositive scheme of the testator having regard to the above to ensure that the testator's plan is effective and not frustrated by something that wasn't considered by the testator that can materially affect

the estate plan. The failure of an estate plan because of unforeseen tax obligations or the failure of gifts, or unclear language in the will can lead to will contests advanced by a beneficiary detrimentally affected by the failed plan. Furthermore, such failures can possibly lead to liability in damages owed directly to the disappointed beneficiary.

Similarly, the lawyer must discuss limitations on testamentary freedom with the testator. Judgments and orders imposing support obligations, marriage contracts, partnership and shareholder agreements must be reviewed with the testator to ensure that the testator's testamentary plan is in accord with his or her contractual obligations. The estate planning questionnaire should make reference to such agreements. The lawyer should get the testator to produce them and they should be reviewed together with the client as part of the interview process.

Has the testator made adequate provision for the proper support of his dependants? If not the lawyer must review with the testator his or her obligations owed to dependants and confirm that this has been discussed in the lawyer's notes and a confirming letter to the testator. Where the lawyer is concerned that adequate provision for proper support is not being made for a spouse the lawyer should address the problem with the testator and carefully explain the testator's obligations and limitations placed upon his or her testamentary freedom. In cases where the testator maintains that adequate provision was being made, the lawyer should review with the testator the nature of the dependant's own funds, the amount spent on support, the manner in which the family shares expenses. All of this information should be recorded in notes and referred to in the reporting letter to the client. It may also be appropriate that the testator write a letter or memorandum to be appended to his or her will confirming the reason that he or she believes adequate provision is made for the proper support of dependants. This letter may be presented to the court in the event a dependant claiming support commences a proceeding.[13]

The preparation of powers of attorney present different, but no fewer challenges than the preparation of a will. Similarly, though, a thorough discussion with the client will allow the solicitor to anticipate the potential pitfalls and draft the instrument to avoid certain disputes.

There are three types of powers of attorney in Ontario: a general form of power of attorney which is governed by the *Powers of Attorney Act*,[14] a continuing power of attorney for property made pursuant to the provisions of the SDA and a power of attorney for personal care made pursuant to the provisions of the SDA. A power of attorney for property is a continuing power of attorney if it is intended to be exercised

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[13] S. 62(3) and (4) of the *Succession Law Reform Act* provide:

> (3) The court may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant, as the case may be, including any statement in writing signed by the deceased.
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> (4) In estimating the weight to be given to a statement referred to in subsection (3), the court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement.

[14] R.S.O. 1990, c. P.20.

during the grantor's incapacity to manage property.[15] This is to be distinguished from a power of attorney which is granted for a single purpose where the grantor is unavailable to take a certain action personally.

A client who wishes to make a power of attorney for property should consider, with his or her solicitor, the reason for that power of attorney. If the power of attorney is needed to deal with certain affairs for the grantor while the grantor is out of town on vacation or otherwise unavailable to deal with those affairs then a continuing power of attorney may not be necessary and, indeed, may be inappropriate. Similarly, if the purpose of the power of attorney is to allow the attorney to complete a transaction, for example a real estate closing, on behalf of the grantor then the grantor may not want the authority conferred by the power of attorney to extend beyond the grantor's capacity to oversee that transaction, even indirectly. In such cases the power of attorney can take effect for a limited duration or the scope of the authority conferred by the power of attorney can be restricted to dealing with a particular transaction.

Alternatively, if the client is planning for his or her incapacity which might arise as a result of disease, injury or old age, a continuing power of attorney will be necessary. In that case, it is equally important to consider the triggering event for the power of attorney to take effect as it is to consider the scope of the grant of authority. A continuing power of attorney for property takes effect upon its proper execution unless it provides that it only comes into effect on a specified date or when a specified contingency happens.[16] The power of attorney can be held in escrow by a solicitor or other person with specific instructions that it be released to the named attorney only upon presentation of a certificate of incapacity, doctor's note or other evidence of incapacity. Some clients will prefer that the power of attorney be held by the solicitor until the occurrence of a certain event, such as the grantor's incapacity. This desire may be fueled by a concern that the power of attorney will be misused without the grantor's knowledge (although it should raise warning flags for the solicitor if the grantor does not trust her or his named attorney not to misuse the power of attorney). More often, the alternate power of attorney will be held in escrow by the solicitor with instructions to release that power of attorney upon presentation of proper documentation that the primary attorney is unable or unwilling to continue acting in that role. In drafting such escrow terms, the solicitor should carefully consider whether there will be any significant difficulty, cost or delay in obtaining the necessary waiver, capacity assessment or medical opinion for the primary attorney, particularly if the solicitor has no relationship with the primary attorney.

The solicitor should also consider whether the client has assets or plans to reside outside Ontario for an extended period, for instance if the client plans to retire for part of the year at a property in another country. The grantor may become incapable or require hospitalization while in the foreign jurisdiction and the laws of the foreign jurisdiction might not recognize the Ontario power of attorney. In that case the solicitor should consider advising the client to engage counsel in the foreign jurisdiction to prepare a form of power of attorney which complies with the laws of that jurisdiction and the

[15] Ibid. at s. 7.
[16] Ibid. at s. 7(6) and (7).

solicitor should work with the foreign lawyer to ensure that the grantor's Ontario and foreign powers of attorney are consistent with one another.

In deciding what contingency to plan for, a client may want the power of attorney to take effect on the first appearance of incapacity to manage property, and subsist unless and until it is revoked by the grantor. This may be appropriate where the attorney is a trusted friend or relative who is unlikely to use the power of attorney without the grantor's knowledge or consent if the grantor subsequently regains capacity. Alternatively, the solicitor and client should together consider whether the incapacity might be cyclical in nature, permanent or terminal and provide for the power of attorney to take effect accordingly. The solicitor and client should also consider that the client might completely lose the ability to communicate and the power of attorney should include the appropriate degree of discretion in dealing with the grantor's property. Specific provisions can also be included in the instrument if the grantor has obligations to support dependants or wishes to continue supporting a charitable organization.[17]

The solicitor should also consider the client's assets which will be subject to administration by the attorney. Special expertise or professional management may be required to manage certain assets, such as an income property. The power of attorney should address the attorney's ability to seek professional advice in the administration of the grantor's property.

There is often a temptation to put property, particularly bank accounts, into joint ownership to ease of administration. Solicitors should consider the resulting trust which could be imposed on the jointly held property. A power of attorney may be a better option in order to avoid any later dispute over ownership of the jointly held property.

Where there is any question about the proposed attorney's ability to manage the property under administration, or any doubt that the client's plan will be properly carried out, the client might consider establishing an *inter vivos* trust. The proposed attorney(s) can be appointed as trustee to manage the property, together with the client. The client can take steps to ensure that the trust is being managed according to her or his wishes. One advantage of this trust arrangement is that the issue of the client's capacity, which is ordinarily the focal point of disputes, can be removed from the equation: the trustees can involve the client in decision and administration of the trust for as long as the client remains capable and phase out the client as she or he loses capacity. This use of a trust can have the added advantage of facilitating the administration of the trust property after the client's death since the management plan will already be in place.[18]

The personal care decisions which are normally contemplated by a power of attorney for personal care include decisions about medical treatment decisions, admission to nursing homes and care facilities, food, hygiene, clothing, recreation, safety, and social services, to name a few.[19] As will be discussed later in this paper, personal care

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[17] These general concerns are identified and discussed in more detail in J.P. Allen and W.P.G. Allen, *Estate Planning Handbook* (3d ed.) (Toronto: Carswell, 1999), ch. 10.

[18] Ibid.

[19] Ibid. and also L.A. Histrop, *Estate Planning Precedents: A Solicitor's Manual* (Toronto: Carswell, 1989).

decisions lend themselves well to advance discussions with family members, in appropriate cases, to avoid disputes which can arise during medical emergencies when emotions are running high.

F. Proper Drafting

Wills and powers of attorney containing typographical errors, omitted words, improper paragraph references or misspelled names can contribute to the decision to challenge the validity of that instrument. It is often argued, where a name of an attorney or beneficiary is misspelled, that the grantor or testator obviously did not have knowledge of or approve the contents of the instrument as, had the grantor or testator done so, he or she would known that the favourite niece's name was misspelled. A contrary argument is often advanced where an error is caught at the time of execution and corrected by hand and initialed by the grantor or testator and witnesses. In at least one case, errors in the power of attorney document which the grantor failed to notice was one factor which the court cited for its conclusion that the grantor lacked capacity at the time the power of attorney was made.[20] It is obviously better to proofread the will or power of attorney several times including all paragraph numbers, wherever referred to in the instrument. Where a clause refers to a specific provision in the will or power of attorney, proofread to make sure that the reference continues to be accurate as paragraph numbers can change as a result of revisions.

When meeting with a client to execute a will or power of attorney, read and spell each name contained in the instrument, each time that the name appears, and have the client confirm that it is spelled correctly and in accordance with his or her intentions. Similarly, where a paragraph number is referred to in the text of the will or power of attorney, turn up the referenced paragraph with the client when reviewing the instrument prior to its execution and confirm that the correct clause is referenced. There are enough reasons for people to challenge wills and powers of attorney. Sloppy drafting should not be the cause or contributing factor in such a challenge.

G. Talk to the Family

Most people do not like to think about death or incapacity, particularly their own. Similarly, many don't like to think about their own family conflicts, which are better kept safely under the proverbial rug. As part of the estate planning process, lawyers want to be assured that their client has spoken with his or her intended executor or attorney and that the proposed person has confirmed a willingness to take on that responsibility. Frequently, it is recommended that the client advise the named executor or attorney of his or her appointment as well as the location of the will or power of attorney. A testator might even provide a copy of the will to the executor.

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[20] *Folman* v. *Niedzwiecki* (November 8, 1996), Doc. 03-002/96 (Ont. Gen. Div.) as cited in Schnurr, supra note 7 at ch. 9, fn 26.

The same advice is less frequently given when it comes to the dispositive provisions in a will. Many testators prefer secrecy regarding the contents of their wills. Others, may tell different family members different things about their testamentary intentions.

Similarly, while a testator may be very much aware of family conflicts, a common refrain from a testator is that "I will be dead" and therefore the potential problems created by the dispositive scheme are of no concern to him or her. Perhaps, if it is impressed upon the testator that such an approach may cause the testator's estate and beneficiaries to incur substantial financial and emotional costs, estate planning can become more of a family affair and family problems can be addressed during the testator's lifetime rather than in the courtroom following the testator's death. Convening a family conference is an estate planning tool that might be considered, especially in situations where there are significant assets, both economic and sentimental, or where there are succession issues surrounding a family business or family cottage.[21]

The family conference route is a mechanism that can be employed to achieve consensus among the family members regarding the testator's estate plan. If consensus cannot be reached, at least the testator has had an opportunity to express his or her estate planning objectives to the family members. A dissatisfied family member may have to contend with the notes, memoranda, agreement and oral evidence of other attendees at a subsequent will challenge should one be commenced.[22]

Although not as often considered in the context of preparing powers of attorney, a family conference might be appropriate where the choice of attorney is likely to be controversial, where the assets under administration are complex or where the personal care decisions may be divisive (e.g. the choice of medical treatments, the decision to move to an assisted living facility).

A testator might prefer to express his or her wishes to his or her beneficiaries through the written instrument, rather than through a family conference, or perhaps through audio or video/digital recording (more about which will be discussed below).

It is often recommended where a testator intends to exclude one of the natural objects of his bounty from sharing in the estate, that the person be expressly mentioned in the will and, in some cases, provide in the will a brief explanation regarding the rationale for excluding that individual. The rationale for including the individual's name in the will is simply to make it clear that the individual's exclusion was not an oversight by the testator or the will drafter.

There is considerable debate about the appropriateness of setting out the rationale for the exclusion of an individual in the will. For example, wills sometimes include clauses such as the following: "I have not made any provision for my son John in this my will as I made adequate provision for John during his lifetime." If, in fact, the testator did make

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[21] I. M. Hull, *Advising Families on Succession Planning* (Lexis Nexis, Canada 2005) Mr. Hull's book explains the process of a family conference and as the title states "The High Price of Not Talking."

[22] *Id.,* at 94-95.

significant advances to John during the testator's lifetime (relative to the size of the estate) such language may be of assistance in impressing upon John that he was not forsaken by his loved one, but for fairness to prevail, it was time to benefit others. Alternatively, the language in the will might impress a trial judge that the testator had knowledge of and approved of the contents of his or her will and possessed the requisite capacity. Certainly the testamentary document itself is the central document in any will contest and is of significant evidentiary value in proving a will.[23]

Such language however may have the opposite effect if the information is false or imprecise. Sticking with the above example, it may be that "John" received loans rather than gifts, or that the testator provided loan guarantees, which loans "John" had repaid. Perhaps the generosity of the testator in making gifts of $50,000 to "John" during her lifetime, pales in comparison to an estate worth in excess of $2.0 million, upon the testator's death. Accordingly, including the rationale for a bequest or exclusion in a will may have advantages but the testator must be truthful in providing an explanation and an estate planning lawyer must explore the rationale and make careful use of language in the body of the will.

As indicated earlier the expressed rationale of a testator regarding his or her views as to whether he or she has adequately supported his or her dependants may be introduced in evidence in dependant support proceedings under the SLRA.[24] Such evidence might also be admissible in a will contest or, to be made available to the beneficiaries, explaining the rationale for the dispositive scheme with a view to preventing a will contest from being commenced. The greatest concern of the estate planning lawyer in preserving such evidence is that it is factually correct and, accordingly, in order for it to be used most effectively the estate planning lawyer should review the background facts carefully with the testator and obtain as much supporting documentation as may be available to corroborate the facts provided by the testator.

In preparing powers of attorney, the choice of attorney is of central importance. Many of the same considerations that factor in the choice of estate trustee apply to the choice of attorney. For instance, if there are complex assets to administer, the attorney for property should have the experience or sophistication to make decisions about those assets. Similarly, the grantor should consider whether the person chosen as attorney for personal care will make decisions which are consistent with the grantor's values and beliefs. Differences in religion, culture and upbringing, among other things, can have a significant impact on the choice of medical treatment, living arrangements and quality of life.

While the chosen attorney does not have to live in the same city (or even country) as the grantor, the attorney's distance from the grantor and the assets under administration could make it difficult or impossible to effectively carry out the attorney's duties.

It is also important to consider whether a joint and/or alternate attorney should be named. The named attorney cannot be expected to be constantly available to attend to

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[23] *Dennis W. Collins,* supra note 1, at 27.

[24] Supra note 13.

the grantor's property and personal care. At some point the attorney may be unavailable as a result of vacation or travel commitments, injury or other unforeseen personal circumstances. Joint attorneys can coordinate amongst themselves to ensure that he grantor's needs are provided for at all times. Additionally, naming an alternate attorney can avoid leaving third parties without direction in the event that the primary attorney becomes unwilling or unable to carry out her or his duties.

It is tempting to name the primary attorney(s) as well as an alternate in the same instrument. However, this practice can lead to delays in the transition to the alternate attorney. If the power of attorney provides that the alternate attorney is to take over in the event of the primary attorney's or inability or unwillingness to act, the alternate attorney will likely have to get some evidence of the primary attorney's reason for not acting under the power of attorney and produce that evidence to third parties whenever the alternate attorney needs to exercise his or her powers. This can be avoided by preparing separate powers of attorney with the second instrument being held in escrow with clear instructions for its release. Caution must be taken, though, to ensure that the second power of attorney clearly states that it does not revoke the first power of attorney.

H. *In Terrorem* Clause

It remains fairly common where a testator prepares a will that he or she recognizes may be unpopular with some family members to include a provision in a will that penalizes a person for contesting the will. Such clauses are very narrowly construed and are not favoured by courts of equity.[25] However, such a clause may still have a chilling effect on a partially dissatisfied beneficiary. In order for such a clause to have any chance of being effective, a gift must be given to the beneficiary with whom there is concern about a potential challenge. This gift must be of sufficient size that it causes the recipient of the gift to consider the consequences of a challenge to the will in the face of a forfeiture clause. There must be a gift over to another in the event of a challenge to take the forfeited gift. The effect of the gift over must be unsatisfactory to recipient of the gift in the will. It is not likely that a forfeiture clause will deter the intended beneficiary if the gift over is to the wife or issue of that beneficiary.

I. Medical Notes and Capacity Assessments

The estate planning lawyer is required to reach his or her own conclusions regarding the capacity of the testator or grantor and the presence of undue influence. However, there are cases where the lawyer is unsure as to the degree of capacity. There are also cases where the lawyer is satisfied that the client has the requisite capacity but anticipates a challenge to the validity of the will or power of attorney on grounds that the client lacked such capacity.

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[25] See A.H. Oosterhoff on Wills and Succussion, (6th ed.)(Thomson Canada, 2007) at 713-717; *Re Kent*, [1982] 6 W.W.R 165, 13 E.T.R. 53 (B.C.S.C.)

Where an estate planning lawyer has concerns about the testator's or grantor's capacity, or the risk of a subsequent challenge to the instrument on that basis, the lawyer should consider obtaining a medical opinion in support of a finding of capacity. Medical evidence can be obtained from the client's treating physicians, nurses and social workers. Additionally, the lawyer can recommend that the client meet with a geriatric psychiatrist or neurologist who specializes in capacity assessments. The specialist will typically meet with the client at least once and review the client's medical history. The specialist might also want to interview the client's treating physicians. The client will have to consent to any disclosure of medical information to the lawyer. The lawyer should, if possible, obtain copies of relevant medical records, any capacity assessments completed as part of treatment, and review them. Information from a family doctor regarding medical history may be very useful and should be obtained.

The estate planning lawyer must be careful however about the quality of the medical assessment obtained. A note from the family physician indicating that the client "is capable of making a will at this time" may not be particularly helpful if it is later discovered that the family physician is not familiar with the legal test for testamentary capacity or did not meet with the client for the purpose of assessing capacity but provided the note on the request of a family member; or, perhaps, provided the opinion after administering a mini mental state examination (MMSE) and conducting no further inquiries. Accordingly, the assistance of the family physician, in particular in situations where the lawyer is uncertain as to capacity, requires the lawyer to take extra steps including ensuring that the medical opinion that is to be relied upon is given by someone who is competent to provide such an opinion; is free of any bias or influence; and is given after a thorough examination and/or assessment.

The request for a medical opinion should come from the lawyer and not the testator or the testator's family members. The request should explain the purpose for which the opinion is sought. The lawyer should request a detailed opinion including a discussion of the applicable standard, the testing protocol, and a detailed account of the particular statements or test results on which the opinion is based. The lawyer should provide a draft of the will or power of attorney to the medical specialist and, if that is not available, an explanation of the intended dispositive scheme, including an explanation of any significant changes from a previous estate plan.

The 1997 decision in *Re Koch*[26] is instructive for both solicitors and medical professionals involved in conducting capacity assessments. This case involved an appeal by Linda Koch from a decision of the Consent and Capacity Board which found her incapable of managing her financial affairs and property, and incapable of consenting to placement in a care facility. In setting aside the Board's decision, the court was particularly critical of the assessments performed by the evaluator and assessor appointed under various statutes upon whose opinions the Board's decision was based.

This decision is illustrative of the standard to which professional capacity assessors will be held in investigating a person's capacity. Lawyers who are required to satisfy

[26] (1997), 33 O.R. (3d) 485, cited to 1997 CarswellOnt 824.

themselves of their clients' capacity are well advised to familiarize themselves with the court's comments. Most significantly, this decision emphasizes the need to probe the reasons behind a person's conduct and not simply accept that conduct on its face as evidence of capacity or incapacity. In this case, the Board based its finding of incapacity, in part, on Ms. Koch's failure to attend one appointment and an incident of confusion over a bus. The court was critical of the evaluator for failing to ask more probing questions in order to give Ms. Koch an opportunity to explain these events. The court considered a number of reasonable explanations for the missed appointment and the bus incident and pointed out that the evaluator automatically drew adverse inferences from these events when she should have sought independent verification. The court had this to say about the investigative exercise: "[p]robe and verify – two elementary requirements of reliable fact-gathering."[27]

The evaluator cited additional facts which she said tended to point to a finding of incapacity but in most cases the court held that the evaluator did not probe the issue sufficiently to understand the reason for Ms. Koch's behaviour. The court noted that "the individual observations of [the evaluator] do not gain strength by accumulation."[28]

Ultimately, the evaluator's failure to conduct a thorough investigation detracted from her credibility. The court criticized the evaluator and assessor for confusing their own view of the best interests of Ms. Koch with her mental capacity, the former being irrelevant, although well intentioned. The court noted that "[i]t is mental capacity and not wisdom that is the subject of the SDA and the [Health Care Consent Act]."[29]

The standard questions which solicitors ask their clients in order to assess their capacity to give testamentary instructions or make a power of attorney are well known and do not bear repeating here. Additionally, sections 8 and 47 of the SDA set out the criteria for capacity to make a continuing power of attorney for property and a power of attorney for personal care, respectively.

Although the standard for competence to make a power of attorney is lower than the standard for testamentary capacity,[30] this does not affect the solicitor's or medical professional's obligation to conduct a thorough investigation of a person's capacity in order to most effectively protect a will or power of attorney from future attack.

J. Use of Audio, Digital recording or Videotape

Commentators have for many years advocated the use of audio, digital or videotaping of the interview process to record the client's instructions and the actual execution of a will or power of attorney. Such a recording enables those with an interest in the estate, or who might contest the validity of the instrument, the opportunity to observe the testator's or grantor's expression and demeanor at the time of giving instructions and

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[27] Ibid. at para. 35.
[28] Ibid. at para. 46.
[29] Ibid. at para. 17.
[30] See e.g. *Dubois* v. *Wilcosh* (1997), 31 E.T.R. (3d) 309 (Man. Q.B.).

executing the instrument.[31] Unfortunately there is a dearth of authority in Canada where such evidence has been introduced in court proceedings challenging the validity of such instruments.[32] It seems that videotape evidence is used more readily in the United States and at least one State has passed legislation allowing for the use of videotaped wills in some circumstances.[33]

In a situation where a client is concerned about a challenge and there are no concerns regarding capacity, the use of videotape evidence might be very useful. The evidence can help demonstrate due execution of the instrument. This might avoid any questions about forgery. Knowledge of and approval of the contents of the instrument can be established with reference to the videotape and issues regarding influence and capacity can be addressed through the detailed interview conducted between the drafting lawyer and the client.

The issues becomes more difficult where there are questions about capacity or where the lawyer is satisfied but objectively there are causes for concern. The videotape, viewed by the trier of fact, might lead the trier of fact to the opposite conclusion than what the recording was intended to show. In one case, where videotape evidence was admitted at trial, the Court held:

> As noted in [*3] plaintiff's brief at page ten, the most compelling evidence presented on the issue of testamentary capacity in the trial court was a videotape of the testator at the execution of the purported will. That tape discloses a man near the end of his life

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[31] Schnurr, Estate Litigation, *Supra* note 2 at 21-12.

[32] Only two reported cases in Canada have been found where videotape evidence has been introduced in will challenge proceedings to assist in propounding the will. In both cases the videotapes were made by family members and not by lawyers. See *Tucker v. Robertson* 2009 CanLII 1664 (Ont. S.C.J) where videotaped evidence of the testator filmed by the son who benefitted under the impugned will was rejected. While the tape is helpful to the court in demonstrating due execution, the statutory requirements clearly being met, the presiding Judge found:

> "[16] The video was filed as an exhibit on the trial. In a small kitchen, with six people present, William is shown to direct the proceedings in the video. He asks his mother his father's regiment number, to which she responds promptly and apparently correctly. William is loud and appears to be "overacting", perhaps as a result of the tension of his excitement at the moment. William recounts and old family story asking if his mother recalls it and she confirms that she does. She is seated, appears calm, and engages in some repartee with Donald. She is able to follow the instructions that William gives her in connection with the will."
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> "[39](xv) The making of the videotape itself is suspicious. I find if all were aboveboard and there were no concerns about health, capacity, or influence, a video would not have been contemplated. It is clear that every effort was made to ensure that the will was deemed to be valid and that evidence existed of knowledge and capacity. To watch the videotape is to almost watch a play."

See also Re Jessie May Coleman (Estate), 2008 NSSC 396, where video taken at the testatrix 99th birthday party, shortly before the will was executed was introduced. The video showed a "very pleasant but deaf, disorientated and confused person."

[33] Christopher J. Caldwell, *Should "E-Wills" be Wills: Will advances in Technology be recognized for Will Execution?* 63 U. Pitt. L. Rev. 467 (2001-2002) at 468; J. K. Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. Mich. J. L. Reform 105

> suffering the debilitating effects of a series of severe strokes; a man who at times appears totally detached from the proceedings. Viewing the tape clearly reveals the testator's inability to comprehend all that was going on about him. Certainly, one would seriously question his ability to dispose of several million dollars in estate assets by means of a complicated will and trust arrangement. Further, it is apparent from the tape that the whole proceeding was directed and controlled by the decedents attorney. Mr. O'Brien's total participation was prompted by the use of leading questions. The tape further shows that the decedent lacked an accurate understanding of the extent of his property and holdings, his estimates ranging from five to eight million dollars.[34]

If concerned that the testator's appearance may lead a trier of fact to an erroneous conclusion regarding capacity, the solicitor may consider an audio tape which is easier to set up and may still have significant probative value. Certainly, if videotape evidence is to be used it must be set up carefully. That is not to say that the room should be "staged" and that most certainly will be a concern where a videotape is being introduced into evidence. However, the camera angle must be appropriate so as to capture what is going on in the room. The lighting must be appropriate so that the testator and witnesses are clearly visible. The sound must be checked and picked up. While everything is being filmed, the parties have to conduct themselves normally and not be caught "acting as if in a play."[35] Any recording, whether by video or audio alone, should be continuous and uninterrupted. Any break in the recording might lead to an adverse inference being drawn about the sincerity or accuracy of the recording.

On balance, videotape and audiotape evidence should be considered in appropriate circumstances. Such evidence must be carefully prepared, uninterrupted and unedited.

K. Notes and Memoranda

Throughout this paper and in many others on the topic the importance of a solicitor maintaining his or her notes and carefully documenting the file is stressed. No estate planning lawyer wants to find him or herself in the position of having a will or power of attorney challenged with no notes retained or nothing other than a comment such as "t/c o.k" and no independent recollection on how such a conclusion was reached by the lawyer. At a minimum, the estate planning lawyer will be embarrassed when giving evidence at a trial where the instrument is attacked. Liability should be a real concern to such a solicitor who is able to testify as to nothing other than his or her usual practice. Where there are warning signs which suggest an inevitable challenge, the lawyer must do more. The lawyer should make a note each time he or she meets or speaks with the testator concerning the estate planning process, and the duration of each meeting. Obviously, the note should be dated. The note should record who is present (if it is an office or home visit). The note should record the time of day and the duration of the meeting. The note should detail the nature of the discussion. The lawyer's conclusion in the absence of any record of the discussion, including the questions asked and answers given, is of limited value. Such additional steps are as likely, if not more likely, to prevent an attack as to preserve the will in the event of an attack.

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[34] *Trautwein* v. *O'Brien*, No. #88 AP-616, 1989 Ohio App. Lexis98.

[35] Supra, note 32.

When dealing with an elderly client or where capacity is an issue, time should be spent engaging the client in general conversation. Is the testator oriented as to time and place. Is the client conversant on the topical issues of the day and current events in the news. Time must be taken with the client to ascertain such information and record it in a detailed manner. A note providing a reference to the success of the various political parties in the by-election of the previous week and the views of the client are much more useful than "client and lawyer discussed recent election", in particular given the fact that when the note is produced in a legal proceeding, it is much more likely that the estate planning lawyer will have no independent recollection of the discussion.

The estate planning lawyer must be fully informed regarding the contents of any previous will or power of attorney. If possible, the earlier instrument or a copy of it should be produced and a copy retained in the file. The earlier instrument should be reviewed and, where meaningful changes are being made, the reason should be recorded. Again, a general statement regarding the proposed change is insufficient. The lawyer's notes should be as detailed as possible regarding the reason behind the change and the client should be pushed to be specific as possible regarding that reason. In some cases, clients are reluctant to be forthcoming. Experience suggests that explaining to the client that the purpose behind the detailed questioning and the note taking is to protect the integrity of the document is sufficient to overcome any client's resistance to discuss such issues.

In addition to handwritten notes, file memoranda should be made following any significant planning meetings and after the instrument is executed. It is simple enough to dictate a file memo to be transcribed and retained with a file that such a step should become the norm as opposed to the exception in a lawyer's practice in any case where warning signs point to an imminent challenge. The memo should record the meeting in detail and should include particulars that are often left out of notes such as where the meeting was held; the dress of the testator; and the demeanor of the testator. Such memoranda may be very important when the testator is elderly or infirm, in particular, where the instrument is executed in hospital or the lawyer is required to make a home visit because of the client's infirmity.

It may also be appropriate for others to be present at meetings when an instrument is being executed. These friends or relatives can make and retain their own notes of the events. Where law clerks, legal secretaries or other lawyers are involved in the estate planning or the execution of the instrument, these individuals should prepare contemporaneous memoranda recording their observations of the client and the circumstances of their involvement. These precautions are intended to protect and confirm the due execution of the document. The estate planning lawyer should be sensitive, however, to avoid inviting any beneficiaries or other interested parties to this meeting as this could attract or encourage allegations of undue influence.

Good note keeping and detailed memoranda are very helpful in avoiding trials. Where wills and powers of attorney are challenged, the lawyer's file is produced very early on in the litigation. A well documented file will cause the challenger and his or her lawyer to think very hard about continuing with the litigation. In many cases a carefully documented file will cause a legal proceeding to be abandoned.

L. Conclusion

It is impossible to avoid challenges to wills and powers of attorney altogether: the estate planning lawyer can not, and is not responsible to, ensure that there are no disappointed or frustrated relatives and other interested parties. The solicitor's responsibility is to anticipate the potential problems in a proposed estate plan or substitute decision arrangement and advise the client how best to avoid those problems and draft around them. The suggestions in this paper are designed to avoid surprising those close to the client when the contents of the will or power of attorney are revealed. To the extent that those interested people are not able to address their concerns with the client in advance, the authors have suggested methods to ensure that the client's wishes are clear and that his or her intentions are upheld. Will challenges and challenges to powers of attorney are a fact of life and practice and a reasonable investment of time and effort at the planning stage can protect the interested parties, the lawyer and, ultimately, the instrument, in the event of a later challenge.