

Roles and Responsibilities of the Wills and Estates Solicitor

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Drafting Wills and Trusts

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ROLES AND RESPONSIBILITIES OF THE WILLS AND ESTATES SOLICITOR¹

LEGAL SERVICES: GENERAL STANDARD OF CARE

When providing legal services generally, a lawyer must bring reasonable care, skill and knowledge; this standard of care has been referred to as “that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor”.² This is also expressed in the Law Society of Alberta *Code of Conduct* (the “Code of Conduct”): “A lawyer must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer.”³ The Commentary on this Rule explains that a client is “entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client’s behalf” as the lawyer is “held out as knowledgeable, skilled and capable in the practice of law.”

WILL PREPARATION: THE SPECIFIC STANDARD OF CARE

When drafting a will, a solicitor must go beyond merely inquiring what the testator’s wishes are and recording them; she must make the necessary inquiries to ensure that the provisions of the will honour and give proper legal expressions to the testator’s wishes.⁴

The case law illustrates that the inquiries required by a lawyer depend on the circumstances and will vary from case to case.

Inquiries into Capacity

A lawyer must satisfy herself that the client has the requisite capacity at the time of providing instructions for the preparation of the will, as well as at the time of executing the will.

If a lawyer suspects there may be capacity issues, the lawyer should question the testator in a non-leading way to confirm that the testator is capable of providing instruction in his own words.⁵

The lawyer has a duty to ensure the testator has capacity by making sufficient inquiries and recording her observations so that the will would be admitted to probate; this duty coincides with the duty to ensure the testator’s wishes are accurately reflected in the will.⁶

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² *Central Trust Co. v. Rafuse* [1986] 2 SCR 147, p. 208

³ Law Society of Alberta *Code of Conduct*, Rule 3.1-2

⁴ *Remedies in Tort* (Klar, Linden et al) Vol. 2 para. 59.2

⁵ *McCardell Estate v. Cushman* [1989] AJ No 1394 (ABQB), para. 168