Prudent Practice: Acting for the Aging Client

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Capacity and Influence

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PRUDENT PRACTICE: ACTING FOR THE AGING CLIENT

With special thanks to Randy Mitchell, student-at-law

In the hopes of not offending anyone I do think that being a solicitor in the practice of wills, estates and trusts is one of the more challenging aspects of the practice of law. Litigators have the benefit of having all the facts. The situation, whatever it is, has concluded. Their job is to piece the facts together to develop their argument and pitch their conclusion. The litigator's job is retrospective and forensic in its approach. The solicitor though is at a disadvantage. Facts haven't occurred, situations are not clearly defined, and influences have not coalesced such that we do not necessarily see the big picture. Our job incorporates being part private investigator, psychologist, fortune teller, actuary, confidant, lawyer, judge and litigator so we may serve our client to the standard of care we are held to. Essentially we need to figure out fairly quickly that there is a reason to be suspicious and to then figure out the proof required to ensure the evidence is proportionate to the gravity of the suspicions raised. It is a tall order to fill.

1. INITIAL MATTERS

(a) Who is the client

You get the call from the daughter and she has been asked by her mother to arrange a visit to your office to update her will. We have all received this call. I am not a suspicious person but perhaps a bit jaded in my faith in humanity. I am fine with the call but I do not engage in a discussion with the family member. It is important to ensure that your initial contact with the client or their representative that you realize 'who is the client' as you have not met her yet. I have the benefit of having an excellent assistant who fields the majority of these calls. She is graceful, polite and professional. She sends out my intake document (preferably to the client directly but perhaps to the representative), sets an appointment then gives me a 'head's up'. I am already on notice and preparing for the interview.

We get our work through a variety of marketing activities. Your best marketing opportunity is doing good work for your clients. The happy client will go off with a handful of your cards and encourage their friends and families to give you a call. Be mindful when doing work for your happy but past client's family. I have done the will for the parent and a will for one child but the files do not overlap. I do not take instructions from the child. This is difficult because often the client is somewhat dependent and will be absolutely trusting of their child. Make sure you explain yourself to the client as to why it is important to talk to them only and to confirm instructions from them only. If the client is adamant that drafts be provided to the child you can refuse the retainer. I was taught to create

your own standard by which you conduct your interviews, share drafts and sign. I have a framework that I follow and I do not deviate significantly. I do not let anyone in the room when instructions are given. I do not let any interested person into the signing. I seat them on the waiting room and let them know we will be about 45 minutes to an hour. I review the documents with my client and we chat about their intentions. In essence we summarize the intake interview at signing and what was discussed at the intake interview. This takes time but by building in a framework you will take comfort that some routines will assist you when you are faced with a difficult file.

(b) Running the meeting

A number of factors were set out in the case of *Vout v. Hay*[1] by Justice Sopinka when considering whether or not suspicious circumstances surround the making of a will:

1. The extent of physical and mental impairment for the testator around the time the will was signed;
2. Whether the will in questions constituted a significant change from the former will:
3. Whether the will in question generally seems to make testamentary sense;
4. The factual circumstances surrounding the execution of the will;
5. Whether a beneficiary was instrumental in the preparation of the will.[2]

By considering these factors you can then construct your approach to this difficult situation, protecting the client and their testamentary freedom.

In the event a family member of friend brings the client to your office or arranged the meeting on the client's behalf I do take the opportunity to meet the people who are waiting to see me. I invite them in for a general chat, asking them how they got my name and the purpose of the meeting. I do this to try to gather some general observations: Is the client reliant on this person on a day to day basis? Who is doing the talking? Is the client looking to their driver for direction? Has the meeting been called by the client or their driver? I do not take instructions rather I am observing and trying to flush out these initial considerations. I answer any general questions the driver might have but then ask the driver to leave the room explaining that it imperative that the client be provided every opportunity to have a frank and honest conversation with the lawyer.

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[1] (1995), 7 E.T.R. (2d) 209 (S.C.C).

[2] As summarized in B.A. Schnurr, "Challenging the Validity of Wills, Estate Litigation, Vol 1, 2nd Ed." (Toronto: Thomson Carswell 2002) at page 2-5.

Take the time to review the client's existing will at the beginning of the meeting. Understand the highlights by reviewing executorship, division of residue, cash gifts, and bequests before you jump into taking instructions. This will give you a starting point from which to work from when taking instructions from the client. Significant departures from an existing will should concern you. Is the client being coached? Are you concerned about inappropriate influences? Do you have any suspicions or concerns about ideations focused on a particular person? Is their potential for that person to exploit the situation? Careful probing of the client's instructions at the initial interview will help you apply the testamentary capacity test and make further discovery into the client's intentions.

Also ask why the client did not go back to the original lawyer who drafted their will. I find will drafting to be very personal. I ask extremely personal questions and feel that I become a confidant. I try to impart my impartiality and to be non-judgmental with respect to the decisions and comments a client makes with respect to their family and friends. I attempt to build a relationship of trust with my client. I assume this to be the case with other wills and estate lawyers so I think it is fair to ask why they have come to you.

(c) Setting expectations

At the outset the lawyer should recognize that by accepting employment to render legal advice or other such services, they impliedly agree to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possessed and exercise such skill in the performance of the tasks they undertake.[3]

Not only set your own expectations but set your client's expectations and explain the process and the reasons for your actions. If the child is in the room with you tell them why you must insist they leave and makes notes. Certainly make note of any objections if made. It is fair to assume that if someone has transported the client to your office that they are likely to have a health problem whether physical or otherwise. Ask about their health and make notes on their answers. Some clients may deny any health concerns but be gravely ill. Make note of their responses and your observations. Set deadlines, ask about travel plans, ask about pending surgical procedures. Explain the process of how a draft will be sent to the client. Explain why you do not want to send the draft of the will to the driver. By setting expectations your client will appreciate your professionalism and respect for the importance of creating their estate plan.

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[3] *McCullough v. Riffert*, 2010 ONSC 3891 para 46.