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PAPER 4.1

Screening for Capacity and Undue Influence

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SCREENING FOR CAPACITY AND UNDUE INFLUENCE[1]

I offer this advice to lawyers and notaries public engaged in estate planning: conduct a thorough interview of your client, without the presence of family members or others who may anticipate to benefit from your client. This advice applies whether your client is contemplating making a will, settling a trust, or making a large gift during her lifetime.

There is no substitute for a thorough interview. You may, of course, recommend that your client be assessed by a psychiatrist, a psychologist, or other healthcare professional. But such a referral should be in addition to conducting your own interview. Ultimately, in cases of doubt, the onus will be on you to decide whether to go ahead with the will or other document or transaction. You cannot delegate this. Ultimately, if the document or transaction is challenged, you may have to tell the court what questions you asked, how your client responded, and what advice you gave your client. You cannot delegate this either.

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1 Portions of this paper were originally published as *Undue Influence: Identify, Minimize the Risk, Document the File*, by the Legal Education Society of Alberta, for courses on Capacity and Influence in Edmonton and Calgary, in March, 2017. I have added comments on capacity to my earlier paper, and have edited the discussion of undue influence.

Let's start from the perspective of giving testimony in court. If you are called to testify about a will you drew or a transaction you assisted your client with, what types of information will be helpful to the court in determining whether your client had capacity or was subject to undue influence. Logically, to answer that question, it is necessary to look at the law.

I. Law of Capacity

At its most general level, capacity is transaction specific. Is your client "capable of understanding what he did by executing the deed in question when its general purport was fully explained to him"? (*Ball v. Mannin* (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241 HL, 33 Digest (Repl) 592 (Irish Court of Exchequer).

The courts have developed more specific criteria for testamentary capacity. As set out by Mr. Justice Laskin then of the Ontario Court of Appeal, in *Schwartz v Schwartz*, 1970 CarswellOnt 243,

> These elements were enumerated by Cockburn, C.J., in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 at p. 565, in the following words:
>
> > It is essential to the exercise of [testamentary] power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties . . .
>
> In more contemporary terms, they have been stated as follows: The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property: see *Atkinson on Wills* (1953), 2nd ed., p. 232; 39 Hals., 3rd ed., pp. 855-6.

Similar criteria may be applied to *inter vivos* gifts if the nature and value of the assets are such that the gift disposes of a significant portion of the transferor's wealth, pre-empting the distribution under her will (*Re Beaney*, [1978] 2 All E.R. 595 (Ch D.), *MacGrotty v. Anderson*, 1995 CarswellBC 825 (S.C.) at paragraph 20).

II. Law of Undue Influence

What is undue influence? A very succinct statement of undue influence was offered by Madam Justice Southin (dissenting on other grounds) of the British Columbia Court of Appeal in *Longmuir v. Holland*, 2000 BCCA 538 at paragraph 71, in which she defined undue influence in the context of a challenge to a will:

> It is influence which overbears the will of the person influenced so that in truth what she does is not his or her own act.

Many of the cases equate undue influence with coercion. But the coercion need not be physical or overt.

For example, in *Tribe v. Farrell,* 2006 BCCA 38, psychological pressures were sufficient to establish undue influence where the will-maker feared that his caregiver would leave him if he did not make certain testamentary as well as *inter vivos* gifts to her.

A much earlier statement recognizing that undue influence is nuanced is that of Sir James Hannen in *Wingrove v. Wingrove* (1885) 11 P.D. 81 (Eng. Prob. Ct.) at 82-3:

> To be undue influence in the eye of the law there must be - to sum it up in a word - coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.
>
> The coercion may of course be of different kinds, and may be the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

The cases suggest that the distinction between influence and undue influence is not always a bright line. The distinct circumstances of the person whose mind is allegedly overborne is a key element to determining if undue influence is present. The level of coercion required to affect the conduct of a healthy, strong-willed person is likely to be quite different than that required to affect the conduct of someone who is frail and highly vulnerable.

In some cases there may be a presumption of undue influence. In most of Canada, the presumption only arises in cases of *inter vivos* wealth transfers, and not to wills. The presumption arises where the person attacking the transaction establishes that the relationship between the person alleged to have exercised undue influence and the transferor is such that there is a potential for domination of the transferor. The presumption may apply as a result of certain traditional relationships of confidence, such as solicitor and client, and doctor and patient. The courts will also apply a principled approach to determining whether the relationship has the potential for domination. There are no closed set of categories of relationships in which the presumption may be applied. Once the person challenging the transfer establishes such a relationship, then the onus is on the person alleged to have exercised undue influence to establish that the transferor acted on the basis of his or her own "full, free and informed thought." A leading case is *Goodman Estate v. Geffen*, 1991 CarswellAlta 557 (SCC).

In British Columbia, legislation has imported a presumption of undue influence to will challenges. Section 52 of the *Wills, Estates and Succession Act*, which came into effect March 31, 2014, provides that if

there is a potential for dependence or domination of the will-maker the burden shifts to the person seeking to defend the will, or provision in it, to establish that no undue influence was exercised.

The presumption of undue influence is of course rebuttable. How? In *Stewart v. McLean*, 2010 BCSC 64, Mr. Justice Punnett dealing with an *inter vivos* transfer summarized some of the ways at paragraph 97 as follows:

> To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own 'full, free and informed thought': *Geffen* at 379. A defendant could establish this by showing:
>
> a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
>
> b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
>
> c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
>
> d. the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
>
> e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).

The outcome of an undue influence claim may pivot on the advising lawyer's evidence. Some of the factors a court may consider when assessing the strength of the lawyer's evidence are neatly outlined in the Newfoundland case, *Coish v. Walsh*, 2001 NFCA 41,. As set out at paragraph 23 of Chief Justice Wells' decision:

> 23 The trial judge also correctly set forth the law respecting the manner in which such a presumption may be rebutted. In particular, he identified, from the comments of Green J., in *Fowler Estate* [(19960, 13 E.T.R. (2d) 150 (Nfld T.C.),] factors to be taken into account in considering whether or not evidence of legal advice given to the granting party is sufficient to rebut the presumption. At paragraph 24 of *Fowler Estate*, Green J. identified factors which <u>may</u> affect the character of legal advice to be as follows:
>
> 1. Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed: *Goguen et al. v. Goguen et al.* [(1988), 92 N.B.R. (2d) 158]; *Green v. Perley* [(1989), 103 N.B.R. (2d) 181].
>
> 2. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence: *Burrell v. Burrell* [(1991), 106 N.S.R. (2d) 171].
>
> 3. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial

implications with the grantor: *Donnelly v. Jesseau* [(1936), 11 M.P.R. 1 (N.B.S.C.)].

4. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place: *Green v. Perley* [(1989), 103 N.B.R. (2d) 181].

5. Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her: *Donnelly v. Jesseau* [(1936), 11 M.P.R. 1 (N.B.S.C.)].

See also Mr. Justice Rooke's reasons for judgment in *Cope v. Hill*, 2005 ABQB 625, appeal dismissed 2007 ABCA 32, which provide a good analysis of the functions of independent legal advice at paragraphs 208 through 216.

III. Back to the Interview

The starting point when interviewing a client who wishes to make a will, or engage in other estate planning, is to follow a checklist to elicit the information required to establish that the will-maker meets the *Banks v. Goodfellow* criteria.

I like to ask my client about her family first. Are you married? Do you live with anyone? Do you have children? What are their names? Where does each live? What kind of work does each do? Do you have grandchildren? What are their names? How old is each one? Do you have other close relatives? Brothers and sisters? Does anyone in your family have a disability?

Next you may go through your client's assets. Do you own your own home? You recall the most recent assessed value? Is it mortgaged? Is it in your sole name? You own any other real estate? Do you have any investments? Are they in your sole name? Are any of them joint? Do you have any registered plans? Do you recall the approximate value? Who's the beneficiary of your registered plans? Do you have life insurance? Have you named a beneficiary? It is always prudent to do a title search of real property. It's also a good idea to confirm how investments are held, and confirm the beneficiaries of any benefit plans. In some cases, this will be a fairly simple exercise. In others, for example if your client has large active business interests, this will be more complex.

If your client is able to recall her family and others close to her, set out her assets, and provide at least approximate values, this information will go a long way to establishing capacity. It also provides the necessary background information for you to give advice, and explore different estate-planning options.

Then, I like to see my client's current will and other estate-planning documents before I ask whom she wants to benefit and how.

Once you have received the above information, you will have a context in which to discuss your client's estate planning goals. Start with more open-ended questions. Who do you wish to benefit? What types of provisions do you want to make for each beneficiary?

If the answers are a marked departure from what you would expect in similar circumstances, or represent a significant change from your client's previous estate plan, ask why? For example, if your client has three children, and wants to disinherit one, or provide significantly more for one than for the others, why? Does your client provide you with an answer? Do the reasons make sense ("my daughters are financially secure, but I want to provide more for my son who is struggling")? Or might the answers lead to suspicion of some impairment or undue influence? If the answer is "my daughter is trying to poison me," it is your client's affections that are likely poisoned by delusions (unless of course, her daughter really is trying to poison her). Usually it's more subtle than that. Your client tells you she her son doesn't care about her anymore, and she wants to cut him out. On further questioning, she tells you her son lives in Halifax, phones her weekly, and visits her in-person two or three times a year.

With most of my client interviews, I find no reason to suspect that my client lacks capacity, or is subject to undue influence. My client has no difficulty identifying family, telling me her assets, she expresses rational goals, and is able to consider different estate planning options, including how to structure gifts in a will. She appears able to consider and weigh the pros and cons of will substitutes.

Other times, you will notice risk factors (red flags). These may relate to capacity, undue influence, or both. Your client may have trouble remembering family members, and identifying her assets and liabilities. She may not provide rational answers to questions about why she is making changes or doing what she wishes to do in her estate plan. She may have difficulty comprehending choices.

With respect to undue influence, when present the flags are likely to center on both your client's apparent vulnerability, and instructions to leave what might be considered a disproportionate gift to a beneficiary. For example, it may be apparent during the interview that your client is suffering from ill health, and needs assistance. Your client wishes to significantly change her will to leave a large portion of her estate to a person who has recently been assisting her, and who booked the appointment and took her to the appointment with you. This is not to say that there necessarily is undue influence, but these flags will require further questioning.

The British Columbia law Institute, in its publication entitled *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*[2] (which I will refer to simply as "BCLI *Recommended Practices*") sets out a comprehensive list of red flags for undue influence. Because of the length I am not going to quote all of the flags, but recommend that all estate-planning practitioners read the report (which is very readable and also has a good summary of the law of undue influence, and the recent change in respect of wills in British Columbia). The flags are organized under the following categories:

- Someone in whom the will-maker invests significant trust and confidence is – or is connected to – a beneficiary
- Physical, psychological and behavioural characteristics of the will-maker

2 Vancouver, British Columbia Law Institute, 2011.

- Isolation resulting in dependence on another person to meet physical, emotional, financial, and other needs
- Circumstances relating to the making of the will and the terms of the will
- Characteristics of influencer in testator's family or circle of acquaintances
- One's 'gut-feeling' that undue influence is going on

Although I have written largely from the perspective of a lawyer taking will instructions, I argue that conducting a thorough interview along these lines is even more critical for a significant *inter-vivos* transfer. If the transfer is of a significant asset such as a home, whether the transfer is of all of the interest, or a transfer into a joint tenancy, the transfer may significantly impact your client's estate plan. Additionally, the transfer will deprive your client of wealth during her lifetime, and unlike a will, your client cannot unilaterally revoke a gift. With proposed *inter vivos* transfers, it is necessary to make sure that your client understands the implications, such as, for example, that the asset transferred will be subject to the claims of the transferee's creditors, and that your client has considered alternatives (such as just leaving it in her will).

IV. Meet with Your Client Alone

To quote from the BCLI *Recommended Practices* at page 29,

> The cardinal common-sense practice for averting undue influence is to take the will instructions and an interview with the will-maker alone.

There are a number of readily apparent reasons it is the "cardinal common-sense practice" to meet with your client alone. Here are a few:

(1) If a person whom your client may benefit (let's assume it is your client's son) is in the meeting with your client, her son may very well do the talking. You will not know whether you are receiving instructions of your client's wishes, of what her son thinks are your client's wishes, or of what the son wishes.

(2) It will be more difficult for you to assess capacity if your client's son answers questions, or assists his mother in answering questions, about her family, assets and estate-planning goals.

(3) Even if your client is doing the talking, how do you know whether your client is expressing her true wishes, or what she believes her son wants to hear?

(4) Your client may not be as candid with you if her son is present. This may be because of pressure from the son, or it may be simply that your client may be embarrassed or does not wish to offend her son. Apart from undue influence, this may hamper good estate-planning. If, for example, the son has a gambling problem, it may be more appropriate

to create a trust for the son than an outright gift, but it is less likely that your client will disclose her concerns in her son's presence.

(5) If may not be apparent to your client that you are acting for her alone, and that she may speak to you in confidence. Your client's son may also not appreciate that you are not his lawyer.

(6) You will not realistically be able to explore whether there are indicia of undue influence, and if so, to take steps to counter the undue influence, or alternatively to satisfy yourself that your client is acting freely and voluntarily.

I do not think that any of these points are controversial. Yet, in my estate-litigation practice, I have frequently come across files in which it is clear that the lawyer or notary public allowed the main beneficiary of a will, or a person receiving a gratuitous transfer of a significant asset, to be present throughout the interview. If the will or transaction is challenged, the lawyer or notary's evidence in such circumstances is not going to meet the criteria in the *Coish* decision set out above.

Nor, in my view, is it adequate for a lawyer to take instructions from the will-maker or transferor in the presence of the main beneficiary, and then subsequently meet alone with his or her client in order to confirm those instructions. One of the difficulties is that the lawyer is less likely to have clearly communicated to the client the confidential nature of the client and solicitor relationship. Will the client truly appreciate that the lawyer will not discuss any changes in the instructions with the main beneficiary? Furthermore, the client may be reluctant to make substantial changes to the instructions she has provided perhaps a few minutes earlier.

Why do some lawyers and notaries allow a significant beneficiary of an estate plan to be present during much of or throughout the estate-planning process? In many cases, it is likely because it is awkward to exclude that person from the room. When you go out to the meeting room to greet your client and her son, the son may be quite insistent in attending with his mother--which is itself a flag for potential undue influence. Your client may say "why can't my son come in? He always comes with me."

In many cases, a short explanation will suffice. You may say "in my wills practice, I always meet with the person who is making the will alone. That way, I know for sure that I am following her wishes." Sometimes you may need to go further and say, "if some day somebody challenges one of the wills that I draw up, it will more likely be upheld if I can say that I met with the will-maker alone, and this is what she told me that she wanted to do."

I also keep in my waiting room a pamphlet entitled "Why Am I Left In the Waiting Room? Understanding the Four C's of Elder Law Ethics." It was prepared by the American Bar Association Commission on Law and Aging, and it is available at http://elder-clinic.law.wfu.edu/resources/elder-law-resources/.

I sometimes hand the pamphlet to the person who wishes to be present during my meeting with my client. The pamphlet is written in plain language, and explained some of the reasons it is important for a lawyer to meet alone with his or her client. The Four C's are:

(1) Client Identification. The pamphlet notes that "all lawyers have an ethical obligation to make it very clear who their client is."

(2) Conflicts of Interest. This is described as "lawyers have an ethical obligation to avoid conflicts of interest."

(3) Confidentiality. In other words, "lawyers have an obligation to keep information and communications between our client and us confidential."

(4) Competency. To quote the pamphlet, "lawyers have special ethical responsibilities in working with clients whose capacity for making decisions may be diminished."

I like to start explaining the process before my clients attend their appointments with me. I send, either by email or by mail, a letter providing them with an overview of my process for estate-planning and that I generally charge by the hour. I include in my letter the following:

> I will then meet with you alone, without other family members or others that may anticipate receiving an inheritance or other benefit from you present during at least the first part of my meeting. I do this because I consider it very important that each of my clients understand that everything he or she tells me may be kept confidential from other family members or anyone else. I want to be satisfied that each of my clients is telling me what he or she wishes. I want to make sure that you feel absolutely free to confide in me. In addition to my experience in estate-planning, I also have experience in both challenging and defending wills and other documents in court proceedings. It is far easier to defend a will if the lawyer who drew it met alone with the will-maker than if one of the beneficiaries was present during the interview.

I also ask my staff to advise that I will be meeting alone with my client if someone other than my prospective client books the appointment.

Joint spousal retainers present unique challenges. It is not unusual for one spouse to do the majority of the talking. This makes it more difficult to assess the capacity of both clients. A spouse may also exercise undue influence over another. From the perspective of assessing capacity and controlling for undue influence, it would be preferable for each spouse to retain separate counsel in estate-planning. But many lawyers (including the writer) consider that the advantages of accepting joint retainers and developing a coherent estate plan for the spouses outweigh the risks. When conducting an interview with spouses in a joint estate-planning retainer, it is important to direct questions to each of them to attempt to assess capacity and to gauge whether both agree on their instructions. If there is any indication that one is exercising undue influence over the other, then each should be referred out for independent legal advice to separate lawyers.

V. Concerns about Capacity or Undue Influence

If you have concerns about your client's capacity or you notice flags of undue influence, the first step is to dig a little deeper in the interview.

For example, if your client is having trouble describing her assets, try to determine the cause. Is it because of a cognitive problem, or is it because someone else has been managing her assets for her? If the latter, then it may be easy for her to review her assets and return for another interview. Ask your client if she has been diagnosed with any health including mental health diseases. If so, ask how it affects her. I have found clients will often talk openly about memory problems. Try to gauge the extent of any diminished capacity. Just because someone has been diagnosed with a dementia, doesn't necessarily mean he or she cannot make a will or engage in other estate planning.

Explain your concerns to your client. John E.S. Poyser, in his text *Capacity and Undue Influence*[3]--which I highly recommend—writes,

> Once the lawyer has discovered the concern, and taken a few moments to assess it, the lawyer should express it to the client. These discussions are only awkward when they are made awkward. Getting permission to deal with it head-on opens doors that otherwise remain closed or awkward to squeeze through. No one wants to leave a legacy of litigation. When warned of that possibility, a client will generally commission a series of steps to deal with the underlying concern. [4]

Poyser also suggests that it is appropriate to ask blunt questions. He uses the following as illustrations of questions to ask when you have concerns about undue influence:

- Is this your idea?
- Did your son suggest it?
- Did your son try to convince you to do this?
- How?
- Do you feel under any pressure to do this?
- Will anything happen to you if you do not?
- Have you promised to do this?
- Why are you doing this?[5]

VI. Clinical Assessments and Contacting Others

You may ask your client if she will agree to a capacity assessment by a psychiatrist, psychologist or other professional experienced in capacity assessments. The advantage is that you will have input from a

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3 Toronto: Carswell 2014.

4 Poyser, ibid. pp. 732

5 Poyser, ibid., pp. 733-34

medical or psychological professional who will have significantly greater insight than a lawyer into cognitive or other mental health problems. If the opinion lends support to the view that your client has capacity, then it will likely carry significant weight with the court if the document or transaction is later challenged, and may discourage any legal challenge in the first place. The disadvantages are the expense, and arranging for an assessment, especially in smaller communities.

You may ask your client's consent to contact her physician. There are advantages and disadvantages in asking your client's own physician to assess capacity. The advantage is that it may be easier to arrange for your client to see her own physician, and the physician may know your client very well. One disadvantage is that your client's physician may have little or no training in conducting capacity assessments. A second disadvantage is that your client's physician may be concerned that expressing concerns about her patient's capacity may jeopardise the physician-patient relationship.

A physician or other health care professional is not in a position to opine as to whether another is exercising undue influence over her patient, but she may be able to provide an assessment of medical, psychological and cognitive vulnerabilities.

I have seen quite a few letters asking for an opinion about whether a client "has capacity to make a will," with little or no other information provided. I don't think this is very helpful. Remember that the legal criteria for capacity is transaction specific. Furthermore, we should not expect health care professionals to be familiar with those criteria. It is far better to provide some background information about what specifically your client is proposing to do, and set out the relevant legal criteria for capacity. For example, if your client is providing you with will instructions, you might quote the criteria from *Schwartz v Schwartz* or *Banks v. Goodfellow*. Then ask the person doing the assessment to comment in light of those criteria. Poyser provides a number of precedent letters in chapter 12 of his text.

You may also contact other parties with your client's permission, such as financial advisors, accountants and social workers. If you have concerns about undue influence, someone who knows your client well may have observations concerning the relationship your client has with someone who may be in a position of dominance.

If your client has consulted other lawyers concerning the will or proposed transactions, you may request your client's authorization to speak to the other lawyers (who will also need authorization from the client to speak to you). They may have additional information or concerns.

VII. To Sign or Not To Sign?

After you have completed one or more thorough interviews, and taken other steps you consider appropriate to determine if your client has capacity to proceed with the estate-planning documents or transactions, and that she is acting in accordance with her own true wishes, but you are unsure, do you go ahead? In part this will depend on your degree of concern. There is also a distinction between significant *inter vivos* gifts, and testamentary instruments, which I will discuss below.

A. Inter Vivos Transfers

You should have a fairly high degree of confidence that her client has capacity and is acting freely and voluntarily before completing an *inter vivos* transfer, or other documents such as a power of attorney, that may be used to deplete the client's wealth or otherwise harm her security. As Poyser writes:

> *Inter vivos* transactions have immediate effect, and that effect is often potentially victimizing for the client. The lawyer should err on the side of the person they are obliged to protect.[6]

B. Testamentary Instruments

Poyser notes that there is an important distinction between an *inter vivos* transaction and a will, because the consequences to the client are different.[7]

If the lawyer is unsure as to her client's capacity to make a will or whether her client's instructions represent the client's true wishes, and declines to proceed with the execution of the will, the client may be deprived of her ability to make a new will in accordance with her wishes if she has capacity and is not in fact a victim of undue influence. Unless the client goes to another lawyer or notary, or makes a will herself, her intentions will have been defeated.

On the other hand, if the lawyer goes ahead with the will, then the affected parties may have the question as to whether her client has testamentary capacity or whether the will, or a gift in it, has been procured by undue influence before the court. If the court finds that the new will is invalid, then the beneficiaries of the previous will, or the intestate heirs as the case may be, will receive the estate as they should. On the other hand, if the court upholds the new will, then the client's true intentions (found by the court) will be given effect.

By declining to proceed with the will when the lawyer is unsure, the lawyer is effectively taking away the ability to have the question of capacity or of undue influence decided by the court.

Poyser suggests that when in doubt the lawyer may use a codicil rather than a completely new will to make the change to the client's estate plan. By using a codicil, the earlier will is preserved. If a new will is made, and the previous will is destroyed, the beneficiaries under the previous will may never become aware of its terms.

VIII. Documenting Your File

Irrespective of whether the client goes ahead with the transaction, it is very important to document your file. It will be of little assistance to the court 20 years from now if you are called upon to testify when you have little record and perhaps no recollection of what occurred. Notes and memoranda setting out our discussions with our clients, including in some cases the verbatim questions and answers to key questions, notes of what others have told us, and copies of any letters from physicians or other third parties need to be kept on file and be available.

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6 Poyser, ibid. pp. 755-56

7 Poyser, ibid. pp 736-37

If you are concerned that someone may later attack a will or a transaction on the basis of undue influence, consider videotaping your interview with your client (with permission). This can easily be done with a Smartphone.

IX. Conclusion

There are grey areas of capacity and influence in which we cannot act with certainty. We cannot see into the minds of our clients. What we can do is be thorough, observant and document our files.

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