Late-life marriage and will amendments: Lawyers, proceed with caution

It's common for clients, as they grow older, to take an increased interest in their estate planning. Absent warning signs, lawyers should feel free to assist older clients with wills that conform to their intentions as those evolve.

However, where the lawyer learns that an older client has entered into a recent, late-life marriage, a degree of caution is recommended.

Advances in medicine and other factors have led to longer lifespans. This, in turn, means that late-life marriage is more common today than it was when the law governing both marriage and wills first evolved.

In *Capacity to Marry and the Estate Plan*[1], prominent estate litigator Kimberly Whaley and co-authors Michael Silberfield, Heather McGee and Helena Likwornik explain their belief that the existing doctrines governing capacity to marry and capacity to make or revoke a will have fallen out of step with the realities of modern family life. Their conclusions are summarized as follows:

> "…the test for the capacity to marry has been held to be much less stringent than the one for testamentary capacity or capacity to manage property. The result of this is that where a person is incapable of making or revoking a will, and one has been found incapable of managing one's own financial affairs, this will not preclude the person from entering into the contract of marriage. The further implication of this state of affairs is that a person may do indirectly what one cannot do directly: one may revoke a will through the act of marriage, when one cannot revoke it otherwise." (Page 117.)

The most significant implication of this problem, of course, is that a recently-married person who lacks will-making capacity will die intestate. Under intestacy rules, the spouse at the time of death (the new spouse – who is not likely a parent of the deceased's children, and who may only have been in the deceased's life for a short time) will be the primary beneficiary of the estate – possibly contrary to the intentions of the deceased (at least as they were at the time of the making of the revoked will). Short of challenging the testator's capacity to marry (not easy, because of the low standard), there is little that a lawyer will be able to accomplish, by way of remedy, on behalf of the parties who would have inherited under the revoked will.

But what about a situation in which a person who has married late in life DOES appear to have will-making capacity… but also appears to be under the significant influence of the new spouse? This is a situation in which the lawyer MAY be in a position to mitigate later problems, and so these retainers must be handled with special care.

We spoke with Kimberly Whaley recently about the issues, and asked for her practical recommendations for lawyers working with wills clients who have married late in life. As

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[1] *Capacity to Marry and the Estate Plan*; Canada Law Book, Aurora, Ontario; 2010.

an estate litigator, Whaley does not draft wills: Rather, her perspective on the issues comes from her experience challenging or defending wills that have wound up in litigation.

Do not ignore the issue of capacity

As a basic recommendation, Whaley reminds lawyers that they cannot simply ignore the issue of capacity, particularly when working with older adult clients. In her litigation practice, she has seen cases where there are clear indications that there was a capacity issue at the time the will was drafted, but where the lawyer drafted the will anyway, perhaps without documenting concerns or observations (including, for example, in 'death-bed' circumstances). In some cases, when questioned, these lawyers asserted that they saw it as their duty to carry out the client's instructions, without questioning capacity. This approach, Whaley warns, is inconsistent with the *Rules of Professional Conduct*, which require that a lawyer consider the issue of legal capacity, and take certain steps where he or she has concerns about a client's capacity.[2] Ignoring the issue of capacity so that the lawyer can accept a fee from a client who lacks capacity under the guise of "honouring his wishes" is a clear violation of the rules as well as being incompatible with the client's ability to give instructions. In *Banton v. Banton* (1998 CarswellOnt 3423, 164 D.L.R. (4th) 176, 66 O.T.C 1998 (Gen.Div.), Justice Cullity made comments on the challenges facing lawyers who act for allegedly incapable persons in *SDA* proceedings, as follows:

> 91. The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the *Substitute Decisions Act, 1992* is potentially one of considerable difficulty. **Even in cases where the client is deemed to have capacity to retain and instruct counsel pursuant to section 3(1) of the Act, I do not believe that counsel is in the position of a litigation guardian with authority to make decisions in the client's interests. Counsel must take instructions from the client and must not, in my view, act if satisfied that capacity to give instructions is lacking.** A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court.[3]

In *Banton*, the court found that counsel for the person whose capacity was at issue allowed himself to be unduly influenced when not taking instructions from the client, engaging in discussions about representation of the alleged incapable person with another interested party rather than his own client's interest, and the Court felt that counsel should have been alert to the presence of undue influence. Although Mr. Banton had retained his own counsel and not section 3 counsel, the Court noted that the counsel had exhibited "excessive zeal."[4]

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[2] See *Rules of Professional Conduct*, commentary to Rule 2.02(6) "Client under a disability"; available at: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159.

[3] Emphasis added.

[4] *Banton, supra* note 44 at paragraph 92.

Whaley also notes that incapacity can be subtle or can fluctuate from day to day, and that it may take more than a single meeting with a client to detect a problem.

Where the lawyer has concerns about capacity, he or she will have to decide whether to recommend to the client to consider an assessment of the requisite capacity associated with the decision being made and explain the potential merits of having one – " a difficult decision", she notes, "because assessments can have consequences, including certain of the client's rights arguably being taken away". The possibility of such consequences is not necessarily, however, a reason to avoid the potential protections afforded by assessments in every case, because there is no requirement that the results (or the fact) of an assessment be reduced to writing. Much will depend on the planning concerns of the client and the protections which he/she may wish to avail of, and whether the risks might confer a benefit. "In many cases," she explains, "it may never need to be disclosed." Of course, the practical reality is that those clients who may be most in need of assessment perhaps to protect their planning initiatives from attack, will often, when subjected to undue influence, refuse consent: They will often report the lawyer's request for the assessment to the influencer, who will advise them not to return to that particular lawyer.

Undue influence can be present even where client has capacity

Incapacity and undue influence often work together to invalidate a will, but it is important to understand that it is possible for undue influence to be present even where the client's mental capacity is not compromised.

While cognitive impairments can make a client vulnerable to undue influence, so can physical impairments, says Whaley: " a client can be *physically* vulnerable, or dependent. They may be housebound, or wheelchair-bound – they may need someone's help to obtain food, or to go places. This vulnerability can leave them open to undue influence." She has seen cases in which caregivers/family members seeking to manipulate clients have said "look, if you don't do this [for example, change a will], I'm not going to stay here. We're just going to put you in a [retirement] home."

Courts, Whaley explains, have recognized this. In recent decisions, "…judges have refused to restrict the undue influence analysis to cases of incapacity, instead requiring that the testator's circumstances as a whole be scrutinized to determine if undue influence was exerted."

Determining influence requires asking questions

When serving clients who may have legal capacity but may be vulnerable in other ways, Whaley recommends that the lawyer who has suspicions about influence ask questions in an attempt to understand the client's circumstances. She points to the British Columbia Law Institute (BCLI)'s "Recommended Practices for Will Practitioners Relating to Potential Undue Influences: A Guide"[5] as a source of some good questions. Examples in

[5] Available at: http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

the guide include: “has anything changed in your living arrangements recently?” and “are there people you like to see? Have you seen these people or done things recently with them?”

These questions can help substantiate a lawyer’s suspicion that an influencer is actively working to isolate the testator, or to alienate him or her from relatives and friends – a common pattern in predatory relationships.

While Whaley feels the BCLI guide is a useful resource, she questions whether clients would tolerate some of the more intrusive questions. “The drafters of these recommendations are drawing them from court decisions,” she explains, “and some of them are pretty extreme” in terms of the burden they purport to place on lawyers, especially considering the fees that clients are willing to pay for will drafting. In reality, she notes, clients are often resistant to what they perceive as intrusive questions, and even a diligent lawyer may find that many questions are “off-limits”.

Corroboration of details can be a challenge

A common area of client resistance is with respect to details of assets. While the jurisprudence has made it clear that determining the nature and value of the client’s assets is part of the standard of care for will-drafting lawyers, clients may deny requests by the lawyer for permission to investigate the details of assets. Whaley has seen more than one case in which the client has refused a request for corroboration on the grounds that these details are “none of your [the lawyer’s] business.” But this resistance does not excuse the lawyer from making the request in the first place. Whaley recommends that a request for access – and subsequent denial – be recorded in the notes to the lawyer’s file.

Notes to file and reporting letters provide important context

In fact, making – and preserving − good, detailed notes may be the single most important thing a lawyer can do when handling a retainer in circumstances where there may be undue influence. Whaley recommends that lawyers document, in the form of detailed notes:

- any suspicions they have about incapacity and/or undue influence;
- questions asked of clients in an attempt to clarify or dispel these suspicions, as well as clients’ answers to those questions;
- details of requests (for example, a request to verify asset values) and details of the client’s response to those requests; and
- details of advice given.

Some of these matters can also be covered in reporting letters, which Whaley finds are surprisingly uncommon in wills matters. She notes, for example, that a lawyer can avoid a later allegation that he or she failed to investigate assets by including a paragraph in a reporting letter that states, for example: “I requested your permission to verify the value of X. While you declined that permission, I’d like to remind you that establishing the

value of your estate at the time you make your will can minimize later challenges to the will. If you change your mind about my request, please let me know."

Whaley is surprised not only about the sparsity of notes in lawyers' files, but also how often those notes (and copies of reporting letters) have disappeared or been destroyed by the time an estate is litigated. By ensuring that notes are preserved, a lawyer can avoid having to testify later about what he or she did on a particular file – something that is easily lost to memory.

Not only can notes help protect lawyers, Whaley explains, but they can help defuse the litigation itself. "Often, people [for example, would-be beneficiaries] just want to know the story. You get the sense that if they could only find out what happened [the circumstances of a change to a will], that would be the end of it." But if the file contains no notes to tell the story, the door is left open for theories and speculation.

Difficult cases make it dangerous to dabble

Family relationships have become much more complex. As the population ages and older adults enjoy better health, late-life marriages become more common. Wills made in the context of a late-life marriage can be complicated. For this reason, this is an area in which lawyers should not dabble. Whaley believes that some of the dabbling comes from the fact that lawyers simply grow old along with their clients. As clients age, the need for wills arises, and a lawyer who did not include will-drafting in his or her mainstream practice may nevertheless be tempted to prepare wills to help long-standing clients.

"Unfortunately," Whaley notes, though these lawyers may be experts in their usual practice areas, when it comes to wills "they just don't have the expertise." Complex domestic relationships, late-life marriages, and children from former marriages complicate a wills practice, and being a competent will drafter requires maintaining a thorough, up-to-date knowledge of the legal implications of all these modern issues.

Key steps

In summary then, when accepting a will-drafting retainer from a client who has gotten married late in life, a lawyer who would like to avoid will challenges (and malpractice claims!) should do the following:

- consider the testator's capacity, and act on suspicions of incapacity;
- remember that a client with capacity can nevertheless be subject to undue influence if he or she is vulnerable for other reasons: Ask probing questions;
- make detailed notes of suspicions/observations, questions asked, client answers, requests made, client responses to requests, and of the details of your advice in the context of what you've learned;
- send a detailed reporting letter that includes not only details of the work you've done, but also details of your requests, the client's responses to those requests, and details of your advice (even when the client hasn't acted on it);

- preserve your will files; and
- don't dabble in wills practice if you lack – or are unwilling to develop – a detailed knowledge of the area.

Nora Rock is corporate and policy writer at LAWPRO. She interviewed Kimberly Whaley of Whaley Estate Litigation on September 24, 2012.