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Wills, powers of attorney and the elderly: a practitioner's perspective

by Jan Goddard

Preparing wills and powers of attorney for elderly clients involves a number of challenges. As a lawyer who works at both the document preparation and the litigation end, I see the issues up front – and the fallout when the wills and/or powers of attorney are misused or challenged. The common threads between these two events are the importance of determining that the client is acting free of undue influence, has the capacity to understand and does in fact understand what he or she is doing when the document is signed.

The lawyer preparing a will and powers of attorney for a client has an essential role in determining if the client is freely and capably giving his own instructions. This role is especially vital when you are working with an elderly client who may be experiencing some degree of physical or cognitive impairment. It is equally essential that a client who wants to make a will and powers of attorney and is capable of doing so, is not denied the opportunity because of the interference of others or your uncertainty about what to do.

Who's the client?

A lawyer's first challenge can come before the first meeting with the client even happens. The initial call about an elderly person who wants to make a will and powers of attorney will frequently come from a family member, rather than the prospective client. Usually the caller is trying to be genuinely helpful to the older person, but this situation still requires caution on the lawyer's part. The caller often will give their opinion on the elderly person's testamentary capacity, tell how the elderly person wants to dispose of assets, who should be the executor and what special issues need to be addressed on behalf of the beneficiaries. This information can at times be helpful, but it is no replacement for meeting and observing the client and taking the client's instructions directly.

Sometimes the caller is an existing client who now wants you to meet with a relative. This kind of referral has to be screened carefully. There is great potential for conflict of interest. It could be blatant, but it also could be a more subtle social pressure, which can lead to compromises that would not normally happen. It may be better to thank the client for thinking of you, and refer the relative to another lawyer.

The bottom line is that if you are already confused before the first meeting about who the client is and who wants to call the shots, it may be best to pass on the retainer.

Meet with the client in private

The next challenge can arise when the elderly client arrives at the appointment with an escort and an expectation that they will both meet with you. A variation on this is a third party present during a home visit. It is important to manage expectations by making it clear when the appointment is made that the meeting will be held in private, just you and the client.

Making wills and powers of attorney can be an intimidating prospect. Some clients do want emotional support from a loved one, or simply rely on that person to help them remember and say what they want. Your client will need an explanation as to why it is better for everyone for if you meet the client alone, so have it ready.

Beware the client who has a script

Some clients arrive with a set of typed or handwritten instructions ready to present to the lawyer. Lawyers usually encourage this kind of advance preparation. However, you need to ask who prepared these for your elderly client. Even if they are in the client's handwriting, they may have been dictated to the client. Your use of this "script", once it has been handed to you, can affect your perception of the client's understanding of the instructions. For example, if you read the instructions out loud to the client, and the client agrees with each item you read aloud, have you actually verified that these are the client's instructions, or has the client demonstrated her agreeable nature?

Do not confuse social skills with capacity

It's not unusual for a person with dementia to have well-preserved social skills. A client may be nicely groomed and present well, smiling, shaking hands and responding to small talk about the weather. If you're at his house, he may offer you a cup of tea. He may respond to simple questions appropriately, especially ones that require a yes or no answer. This does not mean that the client understands the question. Other signs of cognitive impairment or short-term memory loss may include repetition of statements or an inability to initiate conversation, ask a non-routine question or introduce a new topic.

Do not confuse diagnosis with incapacity

Just because a client has been diagnosed with dementia is not definitive of incapacity. A few years ago, I was consulted by a client who was troubled by the conduct of the persons to whom he had granted his powers of attorney. He told me he had been diagnosed with a specific form of dementia.

I described three options to him at length, during which time he showed a remarkable ability to remember and use the information I was giving him. He clearly exhibited some memory deficits, but also understanding. He had gathered information he wanted to present to me in advance of our meeting so that I would understand his situation. He asked many questions, and when the time came to make a decision he asked me if it would work if he instructed me to do a hybrid of two of the options, describing exactly which parts of each he wanted to use. He had a great idea, and I followed his instructions in the drafting of his new powers of attorney with great confidence in his capacity.

It is helpful to know that your client has a diagnosis of dementia so that you can be even more thorough in your interview of the client, not so that you give up on the client without ascertaining whether he has capacity.

Ask open-ended questions

When you ask questions that require the client to provide information rather than say yes or no, you will begin to test the client's knowledge and ability to think. For example, you ask, who do you want to be your executor? But that is not all. You ask, why have you chosen this person? And, what does an executor do?

Know the definitions of capacity

These open-ended questions need to be targeted specifically at the knowledge the client needs to demonstrate in order to have testamentary capacity and the capacity to grant or revoke a power of attorney. In this regard, "she knew what she was doing," an assertion we often hear after the fact when a will or power of attorney is challenged, does not meet any sort of standard for a well-informed opinion.

Regarding testamentary capacity, the test was established in *Banks v. Goodfellow*, an English case decided in 1870 that remains relevant today. The client must understand what it means to make a will, the effect of the will, the extent of his property and the claims of others he ought to consider. It is towards these areas of the client's knowledge that your questions need to be directed. To the extent it is possible, the client's answers to some questions, such as the extent of his property, should be verified independently.

The capacity to grant or revoke a continuing power of attorney for property or a power of attorney for personal care are specific legal tests as well, set out in detail in the *Substitute Decisions Act*.

In order to be capable of granting a continuing power of attorney for property, a client must demonstrate knowledge of the following key concepts:

1) the nature and extent of her property,
2) her obligations to any dependents,
3) that the attorney can do anything with her property except make a will,
4) that the attorney must account for dealings with her property,
5) that if she is capable she can revoke the power of attorney, and
6) that unless the attorney manages the property prudently it could decline in value, and that the power of attorney could be misused.

Everyone talks about powers of attorney, but not everyone understands them. These concepts need to be reviewed with the client and her understanding of them tested through the use of open-ended questions.

The capacity to grant a power of attorney for personal care has been described as lower, given that it involves a twofold legal test:

- the client must have the ability to understand whether the proposed attorney has a genuine concern for his welfare, and
- the client must understand that he may need the attorney to make personal care decisions for him.

These may be relatively simple concepts to understand, but the actual selection of an attorney for personal care and execution of the document can have larger implications for the client.

I am sometimes consulted in litigious situations where there are what I describe as "dueling powers of attorney" for personal care. This is when various family members have repeatedly taken an elderly person to different lawyers to make a succession of powers of attorney. If you are the third or fourth lawyer the client has seen about his powers of attorney, perhaps the client would be best served by exploring with him ways of bringing the underlying family conflict under control. If you can't do that, perhaps you should decline the retainer.

Don't get drawn into the drama

Family members often impose a sense of urgency and necessity to the preparation of wills and powers of attorney for an elderly client. Mom has had a recent "episode," or a daughter has arrived from California to find Dad's fridge bare and the bills unpaid, or the current attorney for property has allegedly done some dodgy things with Aunt Mabel's bank account. Due to the still prevalent and incorrect belief that "the government" will take over everything if you don't have a will or power of attorney, panic sets in.

You do not have to be part of that panic. The work may need to be done, and soon, but it also needs to be done well. This may include the need to meet with the client a few times, check background information and, if warranted, obtain an expert opinion as to the client's capacity.

The making of powers of attorney, in particular, should not be done in a rush. The choice of the attorney, and the authority given, can have serious effects on the most personal aspects of your client's life: where she lives, who she sees and how her money is spent, even in relation to the most basic of her needs and wants. Disputes about these kinds of decisions made by attorneys are ending up in court more and more often.

At the end of the day, there can be worse results for your client than ending up incapable without powers of attorney. When it comes to making a will for a client, the conventional wisdom is that if you are in doubt, it is better to make the will. I question this as the correct approach when one is talking about assisting a client of doubtful capacity to make a power of attorney. The actions of an attorney affect a client during his or her lifetime, and challenging the validity of a power of attorney can be an expensive and lengthy process.

Seek out a value-added expert opinion on capacity

Capacity to make a will or powers of attorney is a legal test. It can be very helpful to seek an opinion from a medical doctor or capacity assessor regarding the client's capacity, but if you aren't careful about what you request and who you are requesting it from, you end up with an unhelpful result. The average medical doctor has received almost no training in capacity assessment. If you do not explain the legal tests and ask specific questions of the expert, based upon your own observations of your client, it is unlikely that you will receive a useful opinion.

The expert opinion is only helpful to the process if the expert is qualified to give the opinion and has the information she needs on which to base her opinion. You add value by seeking the right expert and providing the necessary information and questions. And the expert opinion should be second to you making your own inquiries of the client's knowledge and understanding. You are the one who knows the law and has prepared hundreds of previous wills and powers of attorney. Sending the client to her family doctor to get a letter saying she's capable before you even meet with the client will be of no help.

An elderly client of mine with dementia once telephoned and asked me to come see him at his retirement home to talk about some changes he wanted to make to his will. We set a date. He hadn't seen me in over a year, and a few days later, when I showed up at the home, he was waiting in the lobby, but didn't recognize me. When I reminded him of my name, it was obvious it rang no bells for him. Yet he told me he knew he had an appointment at two o'clock that day and was waiting for his guest.

Once we established that I was his guest and went to a private room to talk, I asked him why he wanted to see me. He couldn't remember. I asked a few times, but he was stuck. I could have dismissed the whole idea of meeting him about his will at that point, but he had asked to see me, and I had made the trip at his expense, so I felt I should prompt him. Sure enough, when I asked him whether he wanted to talk to me about his will, he remembered that he did, and started telling me about changes he wanted to make.

The main change involved writing a "black sheep" son back into the will, after he had previously been written out. I reviewed with the client what he had done in his previous will and the reasons he had given me at the time. I asked him what his reasons were for changing his mind. He told me what they were in concrete terms that made sense.

We reviewed the effect the change would have on his overall estate plan and he instructed me regarding some adjustments that would have to be made after being presented with options. We took a few minutes to review a recent statement from his financial adviser to remind ourselves how much money we were talking about. Finally, I asked him to tell me in his own words what he had instructed me to do, and he gave me a clear summary.

Despite the shaky start to our meeting, I came away satisfied that my client had testamentary capacity and was not being unduly influenced by anyone regarding the changes he wanted to make to his will. I was helped enormously in making up my mind by the fact that I had known the client for a few years and we had discussed the situation with his son before. I was also only the client's lawyer – I had never acted for anyone else in the family.

I still arranged for a capacity assessor to meet with the client. I had seen previous reports from this assessor and knew that she understood the legal test for testamentary capacity. I gave her background information about the client and told her what he had instructed me to do and why. After interviewing the client, she advised me that it was her opinion as well that he had testamentary capacity. He told her exactly the same instructions he had given me and gave the same reasons. The assessor told me that she thought the short-term memory problems my client had exhibited at the start of our meeting were secondary to his obvious ability to understand the nature of a will and its effect, state his instructions and give reasons for these.

It's not a simple process

Lawyers know that clients always want a simple will. A simple will is one of those things that, like a unicorn, can be believed in, but can't be found.

An elderly client has more than an average lifetime of experiences that may be weighed in the balance as decisions are made about making a will and powers of attorney. These can include serious illnesses, the death of a spouse, second marriage, ups and downs with children and grandchildren and in-laws, a desire to remain living at home, increasing dependency on others, personal or business failures or successes and a host of other formative events. In addition, the client may have physical frailties and a progressive dementia.

This client, with all her baggage, comes through the door of your office seeking assistance with important planning for her life and death. To provide real assistance will never be a simple process. As described above, it involves getting to know the client and applying your knowledge of the law to her unique situation. In doing so, you have to resist the pressure from others and prejudice about elderly clients. It is challenging and very, very satisfying work.

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