

HOW TO PLAN FOR TOMORROW TODAY



Questions and answers about the changing practice of wills & estates law

A conversation with LAWPRO counsel and leading wills & estates lawyers about how the practice is changing

The number of seniors aged 75 and over in Ontario is projected to double by 2046 to 2.6 million from 1.3 million in 2023, suggesting an unprecedented impending wealth transfer in the province.*

Wills and estates law is already growing and will be even more in-demand in the years to come. We want to give lawyers tools and resources to keep up with this demand and practice safely. There are also risks and opportunities - some shaped by the COVID-19 pandemic and the “new normal” - that are worth exploring.

Recently, LAWPRO hosted a gathering of wills and estates experts to discuss the changes we expect to see in the near future. Below are some key highlights from this question between Juda Strawczynski (JS); Chris Stankiewicz (CS), Senior Claims Counsel at LAWPRO; Rebecca Fisch (RF), lawyer and founder of RSF Law; and Pia Hundal (PH), partner at Bales Beall LLP.

Do you always need a written retainer when drafting someone’s will?

JS: Yes. If you do not have a template retainer, templates are available at practicepro.ca. So, you can use those as a starting point, and then fill in what you are being retained to do. In a typical retainer, if you’re doing both wills and powers of attorney, you should say that you have been retained to do the will and the powers of attorney and you should spell out which powers of

* <https://www.ontario.ca/document/ontarios-long-term-report-economy-2024/chapter-1-demographic-trends-and-projections-2024>

attorney. Not everyone is necessarily going to want both a power of attorney for property and a power of attorney for personal care, for example. You should clearly define the scope of the service being provided, and expressly exclude things the client has instructed you to not do. For example, if you offered to provide a client with both a will and powers of attorney, but the client only wants you to draft their will, you can write in the retainer that you have been retained to provide a will, that you discussed the option of also obtaining powers of attorney, but that the client declined them. A retainer is also where you will want to indicate your fees for the service.

Can you limit your retainer to drafting a will based on a client's instructions without inquiring about their assets or their situation?

RF: I really don't believe that you can. I do not think that you can draft a will for somebody without knowing their full assets. I get pushback on that, but I take a firm line on it. Sometimes I have clients who say that no lawyer has ever made them do an in-depth retainer before, so there's no reason that they feel they must do this. And what I kindly say is, "I'm sorry that this is a new requirement for you" and stress that I can't open a file without it." It's a non-starter for me.

PH: My perspective, as a litigator, is that I deal with these cases when they go sideways. You know, there are no shortcuts. As far as investigations, I think even things that used to be considered best practice, but not necessary, are becoming more and more necessary. For example, something I've seen recently is a testator thought that the title to their house was held one way like just joint tenancy, and it was tenants in common. Then you have two sets of beneficiaries that are now upset, and it ends up costing tens of thousands of dollars to litigate, when a simple title search by the lawyer would have solved that problem. It really does thwart their whole estate plan. If a will is challenged, you can end up in court and there will be a lot of stress involved.

What if someone says they won't disclose all their assets?

RF: My response would be that I would advise you not take the retainer. I take a hard line on that.

What should lawyers do if somebody has assets internationally, but they only want the lawyer to consider their Canadian assets?

JS: Well, my response is that this person may want to hide assets, and we have no idea what the potential implications of that are. It may be that international tax advice may be required. You would need to explain that to a client and say that we need to develop a complex estate plan for you. If you know that somebody has

assets, and they're telling you they have them, but instruct you not to consider certain assets, that's a red flag. We always want to make sure that we feel comfortable. And the only way to feel comfortable is if you get the documents. There is lots of due diligence that needs to happen. And that's why inadequate investigation is the number one issue in wills and estates. The best thing you can do is to get all the documents, spend the time with your clients to dig deeper, and explain the process to them.

How do you assess capacity?

RF: We operate from a presumption of capacity but as soon as capacity is challenged, that presumption is spent, and then we must prove it. So, you want to keep in mind what the capacity test is:

- understanding the nature and act of making a will and the effect of the will,
- understanding the nature and extent of the property that they are disposing of, and
- comprehending the consequences of any gift in the will.

You need clients to disclose their assets to have a complete file, and this is also a good way to assess capacity. Typically, clients are submitting that asset form ahead of time. If I have any doubts about capacity, I operate from a position that they did not complete it themselves. I ask them to confirm the contents of the form to me in person or on Zoom - I don't really do stuff over the telephone because I can't properly do a capacity assessment over the phone. I want them to have a sense that for instance, they have some accounts at TD, and some accounts at BMO. They need to know: did they have \$80,000? Or did they have \$800,000? I want in my notes that they have an idea. So, the asset form, in addition to being part of the file, really helps you with an assessment of capacity.

There are limits to what we can do. Obviously, we're not certified capacity assessors, and in my mind, it is not reasonable to send every client for capacity assessment. If I'm not confident in my own ability to do a formal capacity assessment, I want one in the file. But that can be a burden. It's a financial burden, and it's an emotional burden to say to a client that they must have a capacity assessment. So, I take extensive notes.

I always note, if they've come to my office, how did they get here? Did someone pick them up and bring them? Did they find their way through the maze from my parking lot into my office? Then, I look at what we talked about. Everything they know about what was happening in the world, to me, bolsters the file. The flip side is they can have early onset Alzheimer's and not know anything about the world, and not remember who I am from time to time, but they can still have capacity to do a will. So, in those cases, where there is questionable capacity, I meet with people several times. If their instructions are the same every single time we meet, I make sure that's in my notes.

When you see a shift in capacity, what should the next steps be?

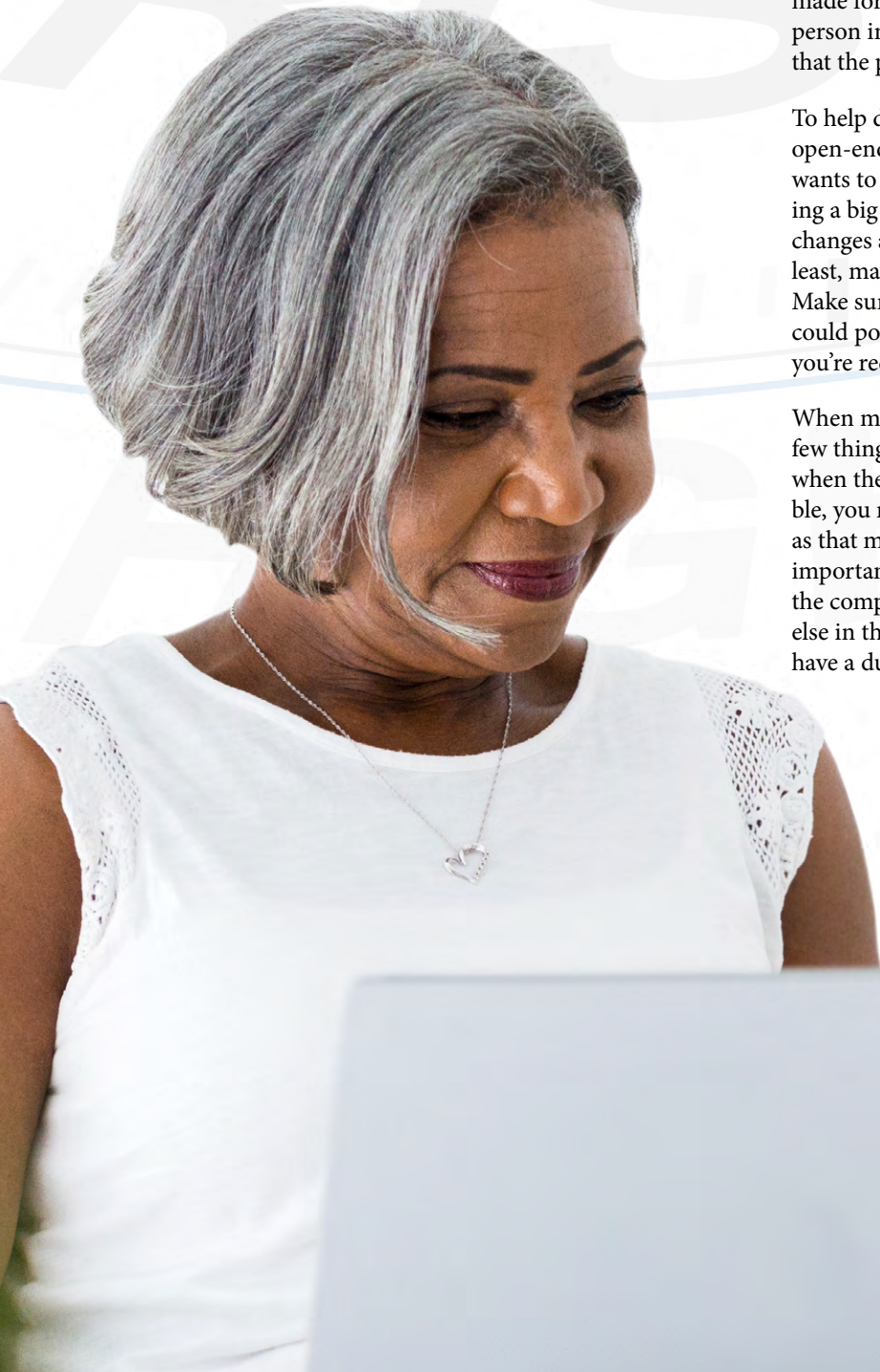
PH: I think a shift in capacity is one of those situations where it might be appropriate to request a capacity assessment, even if it is an invasive process. Usually, that's because there's some time that has elapsed. If the client is not willing to do it, then I think it's incumbent on you to maybe step back from the retainer and explain and document why you have done so.

What ways do you assess undue influence?

PH: Undue influence can be difficult to prove. Essentially, the will or the independence of the testator must be overborne by another person. So, it represents a degree of influence from some external source that dominates otherwise voluntary actions of the testator. Examples of undue influence I have seen are a vulnerable or elderly person who is potentially completely dependent on somebody, so either a spouse or an adult child, and that person can threaten to stop supporting them. They may have exacerbated the vulnerability of that person by isolating them from other people. Those are the kinds of situations where you will see claims can be made for undue influence. It's not just necessarily cases where the person influencing the testator is seeking to benefit, it might be that the person wants somebody else cut out of the will.

To help detect undue influence, document everything, ask a lot of open-ended questions to ensure you understand why your client wants to make a will, or make a change to the will. If they're making a big change, it's important that you're very satisfied that the changes are one hundred percent the decision of the testator. Or at least, maybe they saw an accountant, or they got your advice first. Make sure that the beneficiaries, estate trustees, or anybody that could potentially benefit from the will is not in the room when you're receiving instructions, or when you're signing the will.

When meeting remotely and with clients via Zoom, there are a few things you can do. Ensure that the client can get some privacy when they're speaking to you via videoconference. If it is impossible, you might need to do an in-person meeting, as inconvenient as that might be. If there is a private space for the client, I think it's important during any significant meeting to have the client turn the computer or the camera around to ensure that there's no one else in the room. It can be awkward but remind them that you have a duty to them as their lawyer and to no one else.



What are some practice management or technology tips that have been helpful in our new-normal of remote work and remote communications with clients?

RF: I'm a sole practitioner. I have run a paperless office since I went out on my own eight years ago. I use Clio as my practice management software, which I think is phenomenal software. Clients can upload their assets directly to the asset list. My form is now directly in Clio, and clients are given a link instead of being asked to fill out a paper form. Lots of clients don't feel secure sending things back and forth by email. See the article in March 2024 edition of LAWPRO Magazine discussing the advantages of client portals.

PH: I'm a big fan of DocuSign. Now, for affidavits, I meet with my client on Zoom. I've taken the time to familiarize myself with technology overall. I also like to pick up the phone these days. Frankly, something that might turn into eight emails could be a three-minute phone conversation. Just as a practice point, I think sometimes we need to remember to use the phone a bit more often.

What are some strategies to minimize the risk of claims in wills and estates law?

CS: Well, first, dig deeper and ask probing questions, get documents to verify the information that you're receiving, do that work up front to make sure you have all the information that you need to advise the client properly, and that the information that you're getting is correct. And second, document, document, document. Take good notes, take extensive notes, memos, reporting letters, all those things will help you assist the client and make sure that you're flagging the right issues, discussing the correct things, and it will help you if you're ever faced with a claim.

Know who your client is and who you're taking instructions from. It's not uncommon for a relative of the client to make the first contact with your office. But you need to make sure that the person you're getting instructions from is that client and not the relative that's contacting your office. If anybody other than the client, the named estate trustee if the client is incapacitated, or the power of attorney is requesting copies of your file or your notes, report it to LAWPRO right away. There's no financial impact and submitting a claim notice report does not cost you anything. ■

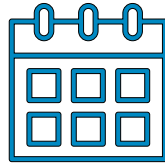
To watch the full CPD discussion which is eligible for 1.5 hours of LSO professionalism and LAWPRO's risk management credit visit the [practicepro.ca](https://www.practicepro.ca) CPD page

* At the time of this conversation Juda Strawczynski was the Director, practice-PRO at LAWPRO. He is currently the CEO and Registrar, CPATA (College of Patent Agents & Trademark Agents)

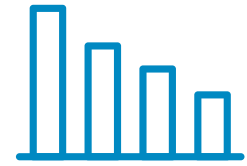


3 claims area by cost

- average total cost \$9.1 million per year



Average 328 claims per year



3 claims area by count

RISK MANAGEMENT TIPS



Ask client probing questions

Some lawyers are not asking the questions that could uncover facts that could cause problems later. They also do not make it clear what information the client needs to provide. Are all the beneficiaries identified correctly? What about giftovers? Were all assets identified and how are they registered? Was there a previous marriage? Ask, ask, ask. And then do a reporting letter to confirm everything that was discussed.



Take time to compare the drafted will with your notes

It sounds like obvious advice, but we see claims where the will did not adequately reflect the client's instructions, or overlooked some important contingencies. Many of these errors can be spotted by simply reviewing the notes from the meeting with the client. It can help to have another lawyer proofread the will, or set it aside for a few days and reread it with fresh eyes. When you review it, consider the will from the position of the beneficiaries or disappointed would-be beneficiaries. Ask yourself if you were going to challenge this will, on what basis would you do so?



Confirm as best you can the capacity of the testator and watch for undue influence

With greater numbers of elderly clients, lawyers need to be vigilant about these issues. Meet with the client separately from those benefiting from a will change, and have written proof that the client understands what they are asking and the advice you've given. And while it is difficult to be completely certain of capacity, be sure to document the steps you've taken to satisfy yourself that the client's capacity has been verified.



Don't act for family members or friends

We see claims where lawyers didn't make proper enquiries or make proper documentation because they assumed they had good knowledge of their family or friends' personal circumstances. It's best not to act for them, but if you must, treat them as if they were strangers. Remember, if a claim arises it will likely not be from the friend or family member, but from a disappointed beneficiary with no personal relationship with you.

COMMON MALPRACTICE ERRORS: WILLS AND ESTATES

Inadequate investigation - 38%

- Failure to ask the testator what their assets are
- Failure to ask about the existence of a prior will
- Not digging into more detail about the status of past marital relationships, other children or stepchildren, or whether a spouse is a married spouse or common law spouse

Communication - 25%

- Failure to compare the draft will with the instructions notes to ensure consistency
- Failing to ensure that the client understands what you are telling them and that you understand what they are telling you, particularly if there is a language barrier
- In estate litigation: failing to communicate and document settlement options

Errors of law - 13%

- Not being aware of key provisions of the *Income Tax Act* (and not obtaining the appropriate tax advice)
- Drafting a complex will involving sophisticated estate planning when you do not have the necessary expertise
- Failing to properly execute documents

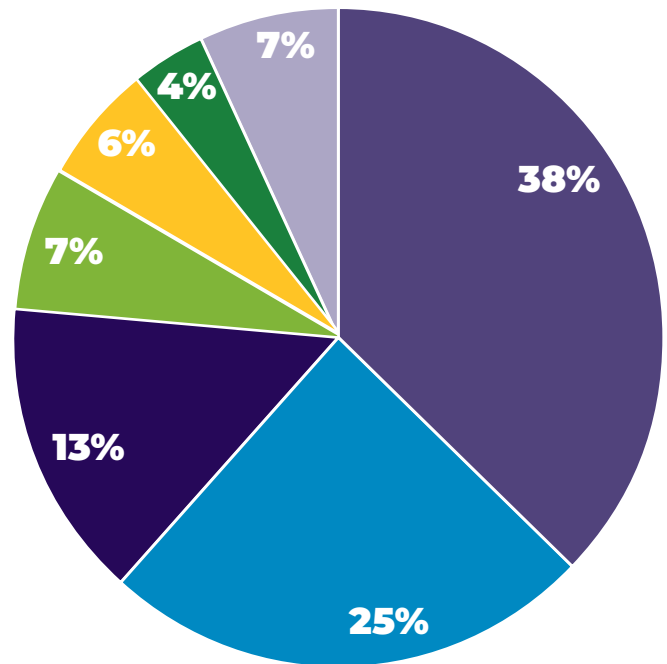
Time management - 7%

- Missing the six-month deadline for making an election and issuing the necessary application under Section 6 of the *Family Law Act*
- Delay in preparing a will
- Delay in converting assets into cash in an estate administration

Clerical and delegation - 6%

Conflict of interest - 4%

Other - 7%



Visit practicepro.ca for resources including checklists, precedents, practice aids and more

*All claim figures from 2013-2023. All cost figures are incurred costs as of June 2024

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