



HULL & HULL LLP
Barristers and Solicitors

The Golden Rule

When meeting with a client to take instructions for a will or to have it executed, it is worth considering whether there are any indicators that the will might be challenged at a later date on the basis of a lack of testamentary capacity. The lawyer should gather and record information on family dynamics, recent medical history, and other indicators of risk by asking probing, open-ended questions of the testator and taking careful and detailed notes.

Where there are red flags, such as advanced age, a diagnosis of a condition associated with dementia, or a disinherited child, the lawyer might be wise to refer the testator to a medical professional or a capacity assessor to obtain evidence of the testator's capacity that is contemporaneous with the timing of the will. This is referred to in the jurisprudence as the "golden rule".

Where there is no such evidence and the will is later challenged after the testator's death, it may be necessary to obtain a posthumous opinion from an expert in order to propound the will. Such opinions are largely based on a review of medical history and information provided by family and friends. Although they can be probative and can be helpful in supporting (or attacking) a will on the basis of capacity, evidence of an expert who met with the testator at the time of the will is likely to be preferred by a court.

When a testator's circumstances raise concerns that the will might be challenged some day, remember the golden rule and consider getting the evidence needed to rebut a possible future challenge while the testator is alive and present.