



HULL & HULL LLP
Barristers and Solicitors

The Importance of Due Diligence

A Last Will and Testament is intended to express the intentions of the testator, not a beneficiary or third-party who is influencing the instructions being provided by the testator. Failing to investigate whether a testator is being unduly influenced into establishing or amending an estate plan in a certain way can result in estate litigation after the testator's death. It is important to ensure that the wishes being communicated to the solicitor and recorded within a will are those of the testator himself or herself, rather than those of a third party. Lawyers may wish to familiarize themselves with potential "red flags", which include signs of elder abuse, sudden changes in beneficiaries for no apparent reason, the payment by a beneficiary for the will drafting services, dependence of the testator on a beneficiary in whose favour the will is being altered, an overly helpful or persistent beneficiary, and suspected mental incapacity of the testator. If a testator appears to be unduly influenced and/or lacks testamentary capacity, it may be a good idea to refuse the retainer to prepare a will.

It is important to establish (1) that a testator possesses testamentary capacity, (2) that the testator is aware of the contents of the will, and (3) that the testator is acting independently. It is suggested that any suspicions or concerns be well-documented.

Suggested checklist questions for drafting solicitors include the following:

- Interview the testator alone with use of open-ended questions;
- Whether the testator is in a relationship of dependency, domination, or special confidence or trust;
- Whether the testator is a victim of abuse or neglect in other respects; and
- Obtain relevant third-party information, if testator consents, and consider obtaining a medical assessment.