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Barristers and Solicitors

Knowledge and Approval

Although less frequently pleaded than lack of testamentary capacity or undue influence, allegations that a testator did not have knowledge of and/or did not approve of the contents of his or her will can also threaten the validity of a will.

Certain factors that may increase the difficulty of establishing that the testator knew and approved of the contents of a testamentary document include any combination of the following:

- The presence of suspicious circumstances;
- Scarcity of notes of the drafting solicitor;
- The presence of drafting errors (especially those that likely would have been noticed by the testator upon a careful review of the document) in the final version of the will;
- Visual impairment, if the drafting solicitor's notes do not indicate that the will was read to the testator;
- Impaired hearing, if the contents of the will were explained only or primarily to the testator orally;
- Evidence suggesting diminishing mental capacity of the testator; and
- Marked departures from an estate plan established within prior testamentary documents.

Typically, the best evidence that a testator knew of and approved the contents of his or her testamentary instrument will be that it reflects the instructions that the testator provided to the drafting solicitor (these should be documented by the drafting solicitor) and/or that the will was read to the testator (which fact also ought to be documented in the drafting solicitor's notes). In certain provinces, the standard form of an affidavit of execution is typically amended to include an additional paragraph, which indicates that the document was read to the testator, in the event that the testator is legally blind.

Ultimately, on a challenge to a will on the basis of an alleged absence of knowledge and approval of its contents by the testator, it is the role of the courts to determine if a testator knew what he or she was

doing in executing his or her will. However, the presence of detailed notes of the drafting solicitor regarding the instructions received from the testator and the review of the will with him or her can represent invaluable evidence in support of its validity.