

Film your elderly clients to reduce risks of litigation

By Anthony Grant, Trusts & Estates Litigator

As parents live longer, their children increasingly look with envy on their wealth and may be tempted to take it by promoting wills that favour them, having gifts made in their favour, having asset transfers made in their favour and by other means.

The elderly, weakened by failing cognition and creeping infirmity, are being exploited as never before.

I am involved more and more in cases involving allegations of testamentary incapacity, undue influence, unconscionable conduct and other causes of action that can be used to assist people who have been financially exploited.

Although we live in an era of smartphones, cameras and cheap videography, these disputes are typically tried without the benefit of any of them.

Instead, judges are stuck with centuries' old procedures. They are given affidavits – statements made years after the event, often drafted poorly and unconvincingly, with second-hand descriptions of what a person was like.

The medical experts whose evidence is required are given access to medical records, from which they try to piece together what a person's state of mind was like on a precise day in the past.

Typically, they never saw or met the person concerned and often the person whose mental state is in issue had not been the subject of any cognitive testing.

The whole process is riddled with uncertainty. The predictable outcome of this process is that the outcome will be unpredictable.

An obvious way to overcome these evidential deficiencies is for the lawyers who prepare wills and other documentary dispositions to interview their clients on camera. A smartphone will do. A video camera is better.

This is what has happened with some Police forces. To overcome the evidential conflicts that the Police typically face, they are given body cameras. The technology is cheap and efficient and, where it has been adopted, it has done away with much of the sterile and expensive disputes about Police behaviour. Similarly, cameras in cars are helping to resolve disputes about traffic accidents.

I now advise solicitors who think a transaction may give rise to future dispute to film their clients when they are making their wills and other documentary dispositions. The technology is small, unobtrusive, and not distracting.



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If a will is to be made, ask the client to describe his or her understanding of a will, the assets in his or her estate, who the potential beneficiaries are, and why he or she has decided to make the dispositions being proposed.

Ask with open questions.

None of this should deter solicitors from seeking capacity assessments from appropriately qualified medical practitioners when they suspect that a will or other documentary disposition may be challenged. Indeed, it may be negligent not to do so.

A film of a person is likely to be of much more value to a judge than words in an affidavit, especially since psychiatry is such an imprecise science.

In case some readers think I am being a little hard on psychiatrists, let me expand on that a little.

Most other forms of medical science have objective means for assessing a person's condition. I refer, for example, to X-rays, MRI scans, blood tests and a host of other diagnostic devices. Psychiatry tends not to employ any of these which is why, in most disputes about a person's capacity, one expert can be found who will say that he or she had capacity while another will say the opposite.

The fact is, film is generally much more convincing than print. You can see the person and assess the body language.

If you think a transaction may give rise to future dispute, film your clients. It may avoid a lot of unnecessary litigation. ❖