JUST BECAUSE YOU CAN, IT DOESN'T MEAN YOU SHOULD

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It is a conversation that most wills and estates lawyers have had more times than they wish to count. It happens at cocktail parties, at the hair salon, and family reunions. Strangers, clients and family members want to know – do I really need a lawyer to do my will? It's a valid question. After all, even lawyers can think of more fun ways to spend their hard earned dollars than on legal fees. But as any lawyer in this area will say, just because you can write your own will, doesn't mean that you should.

The recent case of *Christensen v. Bootsman*, 2014 ABQB 94, is instructive not so much in the substantive elements of law that are discussed, but rather as an example of how easily a relatively straightforward holographic will can become the root of costly litigation.

The testator, Joan Christiansen, had a formal will dated August 31, 1976 ("the formal will"), as well as a holographic will dated June 28, 2010. The testator had named her daughter, Yvonne, as the executor in the formal will, and then named her daughter Sandra as the executor in her holographic will. The testator passed away on October 30, 2010 at 80 years old and a trial ensued regarding the validity of the holographic will, which was propounded by Sandra and contested by the deceased's other three children.

Sandra had been her mother's caregiver for the last 10 years of Joan's life. There was no evidence to refute that she committed a substantial amount of time to addressing Joan's needs, even after Joan moved into assisted living. It was clear that she was financially supported to some extent by her mother, which had never been concealed from the other family members, even before Joan died. Despite the assistance that Sandra provided to her mother, including managing her care and accommodation, transporting her to medical appointments, taking her out for meals and walks and running errands for her, Joan always did her own banking.

The opponents of the holographic will alleged that the deceased was subject to undue influence by Sandra. The facts that came out in the trial, however, do not paint an extraordinary picture of incapacity or duress. It appears from Justice Gill's decision that Sandra was a diligent and hardworking caregiver for her mother, rather than a "gold digging" schemer who had coerced her mother into leaving her a larger share than her siblings received.

Indeed, the Court found that none of the opponents of the will could provide any facts to support their allegation that Sandra exerted any undue influence upon Joan, let alone the level of coercion that would be required in order to succeed in denying the validity of the will.

The concerns that gave rise to the children's opposition to the will were entirely circumstantial, and were certainly not sufficient to cause any concern to the trial judge. Some of those concerns included the following:

- Why did Joan not go to a lawyer's office to make a new will, as she had in 1974?
- Joan did not speak in the same manner, or use the same type of language as was used in the holographic will
- The rest of the family (other than Sandra) did not know about the holographic will until after Joan's death
- If Joan wrote the holographic will, why did she sign another will (improperly) in front of her doctor 17 days later?

The opponents of the holographic will also alleged that the deceased lacked capacity at the time that it was signed. This appears to have been dealt with in a fairly summary manner by the trial judge, who again found that there was no evidence to suggest that Joan lacked testamentary capacity. The Court again pointed out that not even the parties who opposed the holographic will could point to any evidence that she lacked the capacity to manage her own financial decisions while she was living, nor that she lacked capacity to create a will at the relevant time.

Given what appears to be extremely limited evidence propounded by the opponents to the holographic will, it appears, at least on the face of the judgment, that this action should never have required a trial to determine the issues of capacity and undue influence. It is trite to state that estate litigation is often driven by emotion and longstanding, complex family relationships, and perhaps that is the case here. However, the four day trial, and then preparation of written submissions, likely put a fairly sizeable dent in the value of the estate.

What lessons then are to be gleaned from this case? No new principles of law were enunciated, and the facts were certainly not extraordinary or especially scintillating. This case, instead, should operate as a warning to lay people who do not recognize the value of having a formal will prepared by a lawyer as a neutral third party.

With the benefit of 20/20 hindsight, one wonders whether the opponents of the will would have pursued their concerns all the way through a trial if the testator had retained a lawyer to prepare a formal will, even if it had all of the exact same terms as her holographic will contained. The fact that the will would have been signed before two witnesses, and could have been accompanied by assurances from the lawyer that capacity had been addressed and instructions had been sought without Sandra's involvement, likely would have been enough to convince the opponents of the will that it was valid.

Joan's investment of perhaps $1,000 to prepare a new formal will could very easily have avoided the expenses incurred by the two parties to take the matter through four days of trial. That $1,000 was likely spent within the first meeting that each party had with their respective counsel, and was spent many more times over as the matter progressed through years of litigation. Although it can be difficult for lawyers to explain the value that they add to the estate planning process, and it is certainly true that no will is immune to even baseless claims of invalidity, the case of *Christensen v. Bootsman* should serve as a helpful example of the risks of relying on a holograph will. Even when it is executed properly, and there are very limited grounds on which to contest its validity, it is not safe from the perils and expense of litigation pursued by suspicious parties.