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THE WILL TO DECIDE – WHAT TO DO WHEN THE CAPACITY IS IN QUESTION

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Introduction

The courts have long recognized varying levels of capacity for different transactions¹. The ability to make choices or decisions is assessed in relation to the particular decision that an individual is actually called on to make. The test increases as the nature of the transaction changes and requires a higher level of understanding from the donor or testator. For instance, the threshold is low for marriage, somewhat higher to grant a power of attorney for personal care, even higher to grant a power of attorney for property, and highest to make a Will. In *Calvert v. Calvert*², Madame Justice Benotto referred to the different capacities as follows:

...The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend ... If marriage is simple, divorce must be equally simple....

There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding. The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a Will...

In addition to capacity being transaction-specific, it can also be time-specific. People have been held to have capacity even when suffering from schizophrenia³, delusions⁴, and other mental problems⁵. A court will determine the question of capacity at the time the act in question is

¹ See *Re: Park Estate*, [1953] 2 A.L.L. E.R. 1431, [1954] p.112 (C.A.); *Re: Koch* (1997), 33 O.R. (3d) 485, 35 O.R. (3d) 71 (Ont. Ct. (Gen. Div.)); *Calvert (The Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281; (1997), 26 O.T.C. 81; (1997) 27 R.F.L. (4th) 394; appeal dismissed, see *Calvert v. Calvert*, 37 O.R. (3d) 221 (Ont. C.A.); leave to appeal refused Supreme Court of Canada [1998] C.C.C.A. No. 161; see Jordan M. Atin, "Revocation of Wills by Marriage", (1998) 18 E.T.P.J. 13, where the author looks at the question of revocation of Wills by marriage and considers the question of consent and mental capacity in the context of the contract of marriage; see also full review of the various levels of capacity in Howard J. Feldman, "Elders in Family Law: Older and Wiser: Wrinkles and Boomer and Elder Law", presented on May 3rd, 1999 at the Canadian Bar Association, Ontario.

² *Ibid.*

³ *Lovell v. Lovell*, [1941] 58 T.W.N. 93.

⁴ *Kaczmarz v. Kaczmarz*, [1967] 1 All E.R. 416.

⁵ *Re: Olenchuk Estate*, [1991] O.J. 1224.

made, such that a person who suffers from a cognitive impairment can be found to be competent as long as Will instructions were given during a lucid interval.⁶

Capacity may also be jurisdiction specific. For instance, while in Canada the test of capacity to make a Will is fairly similar across provinces, statutes that address capacity issues during one's lifetime are different in every province.⁷

In this paper, I touch upon the principles that we can glean from the case law regarding a lawyer's obligations when he/she is unsure of a testator's capacity. I also address some of the practical steps that solicitors can take when faced with this situation, and review a possible new ground upon which to challenge a Will.

Testamentary Capacity and The Obligation to Inquire

A testator must have a "sound disposing mind" to make a valid Will, which means:

- a testator must understand the nature and effect of a Will;
- a testator must recollect the nature and extent of his or her property;
- a testator must understand the extent of what he or she is giving under the Will;
- a testator must remember the persons that might be expected to benefit under his or his Will; and
- where applicable, a testator must understand the nature of the claims that may be

⁶ *Banks v. Goodfellow*, (1870), L.R. 5 Q.B. 549.

⁷ For example, the *Ontario Substitute Decisions Act*, 1992, S.O. 1992, c. 30, as amended, governs issues of capacity during one's lifetime and there is no identical legislation in any other province (although British Columbia has passed a similar Act), and each province handles this issue in a slightly different way: Hull, Ian, "Dealing With Clients with Diminished Capacity", presented at the Ontario Bar Association 2008 Institute of Continuing Legal Education.

made by persons he or she is excluding from the Will.⁸

Testamentary capacity is assessed at the time of giving instructions. Also, when the Will is executed, the testator must understand what document he/she is signing and that the document has been drawn in accordance with the instructions given.

The solicitor has a duty to inquire into and document evidence of capacity or, if there is none, to decline the retainer.⁹ Much has been written about counsel's failure to fulfil this duty. In their article, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity",¹⁰ Litman and Robertson list six major deficiencies in this regard:

1. The failure to take steps to test for capacity.
2. The failure to make an adequate inquiry into whether suspicious circumstances exist.
3. The failure to obtain a medical examination in cases where it appears the testator might be incapable.
4. The failure to interview the testator in a sufficiently thorough manner.
5. The failure to maintain adequate records of the interview with the testator.
6. The failure to ensure that the setting in which the interview takes place is such that the solicitor can receive reliable information from the testator.

⁸ *Banks v. Goodfellow*, *supra* at note 6; *Hall v. Bennett Estate*, [2003] O.J. No. 1827.

⁹ *Harrison v. Fallis*, (2006), 149 A.C.W.S. (3d) 49, [2006] O.J. No. 2336 (S.C.J.); see also *Hall v. Bennett*, *ibid*, at paras. 55 to 60, where the Court of Appeal considers the issue of duty of care and states that the existence of a retainer is fundamental to the question of a duty of care, as it creates the necessary proximity between solicitor and client and third party. However, the Court also comments as follows at para 61: "However, I find it important to note, if only for guidance in future cases that, in my view, it is at least questionable whether Frederick, regardless of his opinion of Bennett's capacity, could be found to be under any legal obligation to accept the retainer to prepare Bennett's will. If, for example, the facts had been otherwise and Frederick had been of the view that Bennett was able to make a will but nonetheless declined the retainer, the exigent circumstances would undoubtedly give rise to a serious question of professional conduct and, depending on all the circumstances, could form the basis of disciplinary proceedings."

¹⁰ M.M. Litman & G.B. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *Canadian Bar Review* (Volume 62), December 1984, 457 at 493.

In cases where a lawyer fails to take adequate steps to verify capacity and the Will is later challenged (successfully or otherwise), the lawyer may face a negligence claim by the disappointed beneficiaries. A comprehensive review of the case law regarding the scope of a solicitor's duty to inquire into a client's testamentary capacity and the implications for failing to discharge that duty can be found in Suzana Popovic-Montag's paper "Taking Care in Taking Instructions".¹¹ Some key points that can be drawn from her analysis are as follows:

- in order to breach the standard of care a lawyer's error need not be egregious - unreasonable conduct as a whole will suffice;¹²
- it is insufficient to simply take down and give expression to the words of the client with the inquiry into capacity being limited to asking the client if he understands the words;¹³
- the solicitor is required to make the inquiries necessary to satisfy him/herself that the wishes of the testator will be honoured and given proper legal expression through the provisions of the Will; unusual circumstances, if presented, must be inquired into;¹⁴
- an important duty is to take and retain comprehensive notes of observations - if a solicitor's evidence is not confirmed in writing, it will not be easily accepted;¹⁵ and
- even if the solicitor doubts capacity, as long as the necessary inquiries regarding capacity were made (and comprehensive notes taken in that regard), it is proper to draw the Will.¹⁶

¹¹ Presented at Hull & Hull LLP's January 17, 2007 Estates, Trusts and Capacity Law Breakfast Series.

¹² *Ristimaki v. Cooper*, (2006), 79 O.R. (3d).

¹³ *Danchuk v. Calderwood*, (1996), 15 E.T.R. (2d) 193 (B.C. S.C.).

¹⁴ *White v. Jones*, [1995] 1 All E.R. 691 (H.L.).

¹⁵ *Turi v. Swanick*, [2002] O.J. No. 3595.

¹⁶ *Scott v. Cousins*, (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.); *Hall v. Bennett*, *supra* at notes 8 and 9.

As these principles indicate, the obligations of counsel practicing in the area of estate planning are onerous, particularly when dealing with capacity issues. It seems that when capacity is in question one is retained, on occasion unwillingly, to draw a Will where it is evident that litigation will arise upon the testator's death. Below I discuss steps lawyers can take to obtain and document the testator's evidence so as to assist in preserving the Will and protecting themselves against negligence claims.

Questions to Ask

When faced with a client whose Will you understand is at risk of being challenged or whose capacity you are unsure of, it is a good idea to make observations about the testator's physical appearance and presentation, the way in which the meeting was arranged and whether the testator was accompanied by anyone. It is also important to enquire as to general matters, like education, employment background, marital history, medical history and medications currently being taken and relationships with the family members that the testator wishes to include and exclude from the Will. In addition, questions about prior Wills, the nature and extent of the testator's assets and the reasons for wishing to make such dispositions are, of course, a must. Since the overall objective is to promote the effectiveness of the Will, it helps to keep in mind that all this information may be before a judge one day, and that by retaining as much information as possible the judge will get a more fulsome picture of events and will be better equipped to adjudicate upon the issue of capacity.

While I can not be exhaustive in this paper about all inquiries that a lawyer should make, attached as Appendix "A" is a detailed checklist prepared by Rodney Hull¹⁷, which may be of greater assistance.

¹⁷ Hull, Ian, Challenging the Validity of Wills, Carswell, 1996.

Methods of Documenting Instructions

As noted above, taking detailed notes of your discussions with the testator is critical. Preparing an extensive memorandum to file and confirming correspondence to the client setting out the details of the notes taken at the time of the interview is also recommended, particularly when capacity is in question or a Will challenge is expected.

Some suggest that the instructing solicitor should audiotape or videotape the Will instructions so that it may be used as an extra piece of evidence in defence of a Will challenge. If you intend on implementing either of these methods, it is important to explain the reasons for asking the client to be on tape or video and to obtain the client's consent before doing so.

The benefit to using these methods is that they may represent the only other direct evidence of a testator's intentions regarding his/her estate. A court will, no doubt, want to hear and/or view such evidence in a Will dispute. From a lawyer's perspective, though, the questions asked (and not asked) of the testator will be clear to all listening and/or watching. This may act as an extra incentive to be as comprehensive as possible, but it may also provide opposing counsel with a better opportunity to criticize the lawyer's conduct.

While audio taping interviews with a testator appears to be a practice implemented in Ontario, videotaping does not seem to have made its way into mainstream estate planning in this province. This may be because it presents some dangers that exist to a greater degree than audio tapings, including the following:

- a person's discomfort with being on video can impact upon their presentation;
- well-trained estate litigators and medical experts can use various clues from a videotape to confirm a testator's mental frailty; and

- a testator's weak physical state or appearance may give rise to concern as to mental incapacity and possibly undue influence.¹⁸

Therefore, if one uses videotape evidence one should be very careful generally, including about the following:

- try to ask primarily open-ended questions and refrain from asking leading questions;
- do what is possible to avoid the videotape itself looking like a manipulation of the testator's conduct (i.e. if answers are short or if the testator appears to be acting unnaturally this may lead a psychiatrist to give an opinion that the testator's conduct was symptomatic of dementia);
- if the videotape instructions are obtained in an office environment, the video should be done by a professional camera operator who records all persons present; and
- try to corroborate the videotape Will instructions and capacity by videotaping the testator in their home environment at a relatively contemporaneous family event (i.e. a birthday party) where the testator is seen engaging comfortably with those around him/her.¹⁹

It will be interesting to see if these methods of documenting instructions become more integrated into our day-to-day practice, and how they ultimately impact upon capacity decisions by the courts.

¹⁸ Ian M. Hull, "The Use of Videotape When Taking Will Instructions", *Probater* (Volume 7, Number 1), January 2003.

¹⁹ *Ibid.*

The Capacity Assessment

As solicitors we often spend more time with the testator than an assessor does, and are called upon to make determinations about capacity, notwithstanding that many solicitors do not have the formal training to do so. If, after you have explored capacity with the client and remain in doubt, or if you have reason to believe that a Will challenge is likely, you may wish to suggest that an assessment be done with a capacity assessor before preparing the Will.²⁰

The general parameters for assessing capacity are the ability to communicate a choice, to understand relevant information, to appreciate the consequences, and to rationally manipulate the information.²¹ While assessing capacity involves a complex analysis, the key question for the assessor seems to be: of there is an impairment, can it be overcome?

In order to assist the assessor in completing his/her analysis, information sharing is important and can be the key to obtaining a more precise report. Dr. Michel Silberfeld states that it is particularly helpful for assessors to understand as much as possible about their legal direction and objective insofar as the assessment is concerned.²² Dr. Silberfeld suggests that the following information be provided:

- the triggering event for the need for the assessment;
- what the indications of incapacity were, if any;
- a discussion of the type of assessment required; and
- which legal capacity should be assessed that will meet the legal objective.

²⁰ A list of assessors (by location) can be obtained from the Capacity Assessment Office of the Office of the Public Guardian and Trustee by calling 416-327-6766 or 416-327-6424 or toll-free at 1-866-521-1033.

²¹ Ian M. Hull, "Dealing With Clients with Diminished Capacity", *supra* at note 7, pages 10 and 11.

²² Dr. Michel Silberfeld, "A Collective Approach to Capacity Assessment: Lawyers and Assessors Working Together", presented at the Ontario Bar Association 2008 Institute of Continuing Legal Education, at page 6.

Dr. Silberfeld notes the following about tailoring the information to the nature of the transaction:

- for capacity to manage property, it is generally important to have independent corroborative information about income and expenses, and knowledge of any failures in the management of property;
- for capacity to give a power of attorney for property, the same kind of information is helpful;
- for capacity to make a Will, corroborative information about the nature of the assets is important, as well as providing copies of previous Wills, if available; and
- for capacity to make a Will, providing a draft of the proposed new Will may also be of assistance, as it can provide the assessor with information upon which to test the client.²³

Dr. Silberfeld also stresses the immense aid the medical information can provide, i.e. recent medical records, list of medications and list of diagnoses from the attending physician.²⁴

Providing the assessor with the appropriate legal, medical, and relevant historical information, as well as the contact information for family members and/or friends that can provide corroborative information, will assist in obtaining a more accurate and timely report.

Reverse Undue Influence – A New Ground Upon Which to Challenge a Will?

It is clear that counsel's duty to substantiate testamentary capacity is particularly important where indications of undue influence and/or suspicious circumstances exist. What is unclear, however, is what steps a solicitor should take, if any, when there exists what I would describe as

²³ *Ibid*, at pages 6 and 7.

²⁴ *Ibid*, at page 6.

“reverse undue influence”. That is, a situation where a testator is being prevented from signing a Will.

An example of such a situation may be where you meet with your elderly client at her home to take Will instructions and you thereafter draft the Will. When you attempt to re-attend at your client’s home to have the Will executed, you are obstructed by a family member. This raises the question - is there a positive onus on a solicitor to make further inquiries or take other action in this situation? The answer is unclear.

In an old English decision²⁵, the defendants brought a motion to amend their statement of defence to include an allegation that the testator was prevented from executing a new Will that was prepared by her instructions. The Court permitted the amendment, and adjourned the hearing. However, the case then settled as between the parties, such that there was no ruling on the merits of the litigation.

While at this time the allegation of reverse undue influence is not recognized in Canada as a ground upon which to challenge a Will, if we start to see cases where this type of claim is advanced in Will challenge and/or other types of litigation, it will be interesting to see how, in the estates context, the courts will deal with such cases and what impact that will have, if any, on a solicitor’s duty regarding testamentary capacity.

²⁵ *Betts and Nother v. Doughty and Others*, PDAD, (1879-80) LR 5 P.D. 26.