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TAKING CAREFUL WILL INSTRUCTIONS

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EXAMINATION QUESTIONS

GENERAL QUESTIONS:

Education of deceased;

Employment of deceased;

Relationship of interested parties to deceased;

Particulars and production of previous wills and other pertinent documents such as separation agreement, inter vivos settlements, letters, etc;

Names of prior solicitors;

SPECIFIC QUESTIONS:

Ability of deceased to understand the will;

Ability of deceased to understand the language;

Any hearing problems;

Ability of deceased to read the will;

Dependency of the testator on persons interested and vice versa;

Statements by the testator concerning testamentary intention or acts;

Names of acquaintances with whom the testator had a close relationship;

Idiosyncrasies of deceased;

Statements or facts relating to the testator's feelings towards a beneficiary or other person interested;

Medical evidence:

- (a) Known physical capacities or incapacities;

- (b) Known mental capacities or incapacities;

- (c) Expert evidence determined after death, for example psychiatric evidence based upon evidence obtained from relatives or friends without an actual examination of the testator as dealt with under the heading of Medical Evidence;

- (d) Hospital records or autopsies;

- (e) Any medical opinions as to testamentary capacity or mentality at the time of execution;

- (f) Any fact which would indicate senility or mental illness;

Particulars of execution:

- (a) Sequence of signing;
- (b) Position of testator;
- (c) Position of witnesses;
- (d) Ability of witnesses to see testator;
- (e) Actual or implied acknowledgment of signature;
- (f) Request by testator for witnesses to sign;

Facts relating to instructions given to solicitor on preparation and execution of will;

- (a) Length of testator's acquaintance with solicitor;

- (b) Who made the arrangements for the appointment;

- (c) Was the solicitor of the testator his ordinary solicitor or was he the solicitor of choice of the beneficiary or a solicitor spuriously chosen at the last moment;

- (d) Person accompanying testator to solicitor's office;

- (e) Presence or absence of persons in solicitor's office at time for instructions or execution and at time of interviews with the deceased;

- (f) Extent of solicitor's acquaintance with the deceased;

- (g) Production of solicitor's notes of meetings with the testator;
- (h) Details of questions put to testator concerning assets;
- (i) Questions put to testator concerning relatives (born out of wedlock);
- (j) Questions put to testator re other persons who might benefit, for example a housekeeper or as suggested by solicitor taking instructions;
- (k) Evidence of questions put to testator concerning prior wills;
- (l) Evidence of questions put by solicitor to testator to explain changes in wills;
- (m) Testator's reasons for changes in wills;
- (n) Testator's memory as to recent events;
- (o) Testator's memory as to remote events;
- (p) Other tests conducted by the solicitor for testamentary capacity;
- (q) Evidence of testator's questions concerning cloistering of testator;

- (r) Ability of testator to be influenced - strength of mind;
- (s) Ability of testator to influence others - strength of mind;
- (t) Historical events or afflictions which might influence the testator's mind in relation to the making of a disposition;
- (u) Ability of beneficiary to coerce testator;
- (v) Evidence of any acts of physical or mental cruelty either by or against the testator;
- (w) Inducements held out by the beneficiary of the testator;
- (x) Inducements held out by the testator to the beneficiary;
- (y) Any other tests conducted by the solicitor in relation to undue influence;
- (z) Particulars of any discussion between solicitor and testator as to tax or Succession Duty implications of the will;
- (aa) The manner in which the instructions for the typing of the will were given by the solicitor to his staff;

- (bb) Length of time elapsing between first meeting with testator and meeting at which testator executed will;
- (cc) Persons accompanying the testator to solicitor's office on the second visit for the execution of the will;
- (dd) Persons present at the solicitor's office at the time of the second visit for the purpose of executing the will;
- (ee) Evidence of reading over of the will to the testator;
- (ff) Particulars of items especially discussed with the testator;
- (gg) Statements made by deceased after execution, eg. glad that the ordeal was over;
- (hh) Any notable changes in testator's behaviour, mental or physical health before and during the time that the will was being prepared and upon the second visit for the purpose of executing the will;
- (ii) Any correspondence by or from the testator to the solicitor;
- (jj) Any suspicious circumstances.

List of Cases

1. *Ettore Estate, Re*, (2004) 11 E.T.R. (3d) 208 (Ont. S.C.J.).
2. *Scott v. Cousins*, (2001) 37 E.T.R. (2d) 113 (Ont. S.C.J.).
3. *Streisfield v. Goodman*, (2001) 40 E.T.R. (2d) 98 (Ont. S.C.J.).
4. *Dmyterko Estate v. Kulikowsky*, (1992) 47 E.T.R. 66 (Ont. C.J. (Gen. Div.)).
5. *Burke Estate v. Burke Estate*, (1994) 1994 CanLII 7442 (Ont. Small Cl. Ct.).
6. David J. Hayton, Underhill and Hayton, *Law of Trusts and Trustees*, 17th ed. (Markham: LexisNexis Butterworths, 2006).
7. Irwin N. Peer, "Wills, Testamentary Capacity & Undue Influence" (1980) *Bulletin of the APL* Vol. IX, NO. 1:15.
8. Kenneth I. Shulman, et al., "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (May 2007) 164 *Am J Psychiatry* 5.
9. Lawrence A. Frolik., "The Biological Roots of the Undue Influence Doctrine; What's Love Got To Do With It?" (1996) 57 *U. Pitt. L. Rev.* 841.
10. Lawrence A. Frolik, "The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are we protecting older testators or overriding individual preferences?" (2001) 24 *Int'l J.L. & Psychiatry* 253.
11. Nelson Enonchong, 2006, *Duress, Undue Influence and Unconscionable Dealing*, (Carswell: Toronto).