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Suicide, Suicide Notes, and Testamentary Capacity

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**SUICIDE,
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TESTAMENTARY CAPACITY**

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The Prevalence of Suicide

According to the World Health Organization, someone around the globe commits suicide every 40 seconds. Globally, 815,000 people committed suicide in 2000, more than double the number who died in armed conflict (306,600). For people between 15 and 44, suicide is the 4th leading cause of death, and sixth leading cause of disability and infirmity.

In Canada, the suicide rate was 15 per 100,000 people in 2000, according to the Canadian Mental Health Association, or 11.6 per 100,000 people in 2005, according to Statistics Canada. Suicide rates are higher for certain specific groups, including the elderly.

Suicide may also be a growing problem. Between 1997 and 1999, suicide rates increased in Canada by 10%.¹

¹ Suicide statistics from Canadian Mental Health Association and Statistics Canada.

Suicide

Until just recently, suicide and attempted suicide were treated as blameworthy, both morally and legally. Attempted suicide was a criminal act in England until 1961, and was not decriminalized in Canada until 1972.² At the time, then Minister of Justice stated that "We have removed the offence of attempted suicide, again on the philosophy that this is not a matter which requires legal remedy; that it has roots and its solution in sciences outside the law and that certainly deterrence under the legal system is unnecessary."

The criminality of suicide is said to have been tied to church doctrine, and the belief that man's life is not his own. 19th century psychiatry was influenced by these religious concepts, and suicide was seen as a sign of moral and mental weakness.

At common law, and until 1823, an individual who committed suicide was denied burial on consecrated ground. Instead, they were buried at night, at a crossroad, with a stake through their heart. Their possessions were confiscated by the Crown.³

Recent psychiatry and legal thinking has moved away from attaching blame to the person attempting or committing suicide, as reflected in the decriminalization of the act of attempted suicide. The suicidal person is no longer viewed as a criminal, to be dealt with by the legal system, but as a troubled person to be handled by the mental health system.

However, as suicide remains a mental health issue, the fact that a person committed suicide impacts on the potential validity of the person's will: the validity of which depends upon having requisite mental capacity.

² Jacobs and Klein-Benheim, *The Psychological Autopsy: A Useful Tool for Determining Proximate Causation in Suicide Cases*, Bull Am Acad Psychiatry Law, Vol. 23, No. 2 1995, and *Suicide in Canada, Update of the Report of the Task Force on Suicide in Canada*, Health Canada, 1994

³ Jacobs and Klein-Benheim, *The Psychological Autopsy: A Useful Tool for Determining Proximate Causation in Suicide Cases*, Bull Am Acad Psychiatry Law, Vol. 23, No. 2 1995, p. 165

Testamentary Capacity

Testamentary capacity is a prerequisite to the making of a valid will. A person must have a sound and disposing mind at the relevant time. "From time immemorial it has been the law of England that no person of unsound mind is capable of making a will."⁴ The rule is designed to protect the person who suffers from unsoundness of mind and her assets, as well as her potential heirs.⁵

The basic rule is set out in the oft-cited *Banks v. Goodfellow*⁶ decision, and is also known as "Lord Cockburn's rule". In order to be found to have testamentary capacity, the testator must:

1. have an understanding of the nature of a will or a codicil;
2. have knowledge of the general extent of one's assets;
3. have knowledge of the natural object of one's bounty;
4. have an understanding of the impact of the distribution of the assets of the estate; and
5. be free from any delusion specifically affecting the distribution of the estate.

Suicide and Testamentary Capacity

Where there is a suicide at or about the time of the will, an issue arises with respect to whether the deceased had the requisite testamentary capacity. As suicide is seen as a mental health issue, the mental capacity of the deceased to make a will at the time of death may be questioned.

⁴ Hull and Hull, *Probate Practice*, 4th ed., p. 32

⁵ Shulman, Hull and Cohen, *Testamentary capacity and suicide: an overview of legal and psychiatric issues*, *International Journal of Law and Psychiatry*, 26 (2003) 403 at p. 405

⁶ (1870) L.R. 5 Q.B.

However, the fact of suicide is not in and of itself proof of a lack of testamentary capacity. The test as set out under *Banks and Goodfellow* must still be applied. The fact of suicide is admissible as a consideration, but is not conclusive.

As stated in *Re Topp*,⁷ "... suicide, in itself, does not show testamentary incapacity, although it is a circumstance to be considered."

What the court must engage in is a review of all of the background facts in order to determine whether testamentary capacity existed.

In *Gaudet v. Young Estate*,⁸ the deceased left a suicide note that left his entire estate to a son. Alas, the note was not signed, and therefore did not meet the technical requirements of the *Succession Law Reform Act*, discussed below. However, the note was considered relevant to the dependant support claim of the son. In relying on the note, the court stated:

While the note does demonstrate that [the deceased] was suffering from severe grief at the time, the clarity of the note and the lack of any other evidence to the contrary leads me to the conclusion that [the deceased] did not lack the mental capacity to know what he was writing."⁹

Applying Quebec law, the Court of Appeal in *Girard c. Cloutier*¹⁰ held that a presumption exists in Quebec law that a testator is sane and capable of disposing of property by a will. The fact that the testator committed suicide on the day that the will was signed did not displace this presumption. There was no evidence that the suicide reflected mental illness. Presumably, the same reasoning would be applicable in a common law jurisdiction.

⁷ 1983 CarswellSask 355 (Sask. Surr. Ct.) at para. 11

⁸ 1995 CarswellOnt 86 (O.C.J.(G.D.))

⁹ Supra, at para. 9.

¹⁰ 1991 CarswellQue 54 (C.A.Q.), leave to S.C.C. refused.

Factors considered:

a. Alcohol

Alcohol and chronic alcohol use has been seen to be a contributing factor towards suicide. High alcohol consumption increases suicide rates.¹¹

However, in assessing the presence or absence of testamentary capacity, it is not enough to show that the testator was an alcoholic, or drank heavily. For example, in *Re Pommerehnke Estate*,¹² the deceased was said to have increased her drinking following her separation from her husband. She took her own life, and had a very high level of alcohol in her blood at the time of her death. Notwithstanding this, the court was not able to conclude that she was impaired and therefore without testamentary capacity at the time she signed a suicide note containing testamentary dispositions early that day.

b. Depression

Depression has an obvious link to suicide. The question that the court has to consider is whether the depression was so serious so as to affect the testator's capacity to make a will.

In *Quirk v. Wernicke Estate*¹³, the deceased committed suicide on April 18, 1982. It was alleged that a handwritten will dated August 25, 1981 was invalid due to lack of testamentary capacity. The court heard expert evidence from a psychiatrist that the deceased was so depressed that he was incapable of making sound judgments. However, evidence from two psychiatrists who had treated the deceased was also heard to the effect that the deceased was rational, lucid, free from hallucinations and delusions, and that his judgment was unimpaired. The evidence of the treating psychiatrists was preferred over the evidence of the expert psychiatrist who did not see the deceased.

¹¹ Centre for Addiction and Mental Health, news release, September 8, 2006

¹² 1979 CarswellAlta 187 (Alta. Surr. Ct.)

¹³ [1983] S.J. No. 586 (Sask. Surr. Ct.)

c. Reasonableness of the terms of the Will

The courts have long held that it is not their function to declare a will void just because the testator excludes his children from his bounty. Testamentary freedom, assuming that there is capacity, is to be respected. As stated in *Boughton v. Knight*¹⁴,

The law does not say that a man is incapacitated from making a will if he proposed to make a disposition of his property moved by capricious, frivolous, mean or even bad motives... . He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.

Having said that, the nature and extent of the gifting in the will is a factor that the courts will consider. Generally, a court will look more favourably at the question of testamentary capacity when the will of the testator committing suicide are to those beneficiaries who would naturally enjoy the bounty of the estate.¹⁵

In *Re Topp, supra*, the court held that the deceased had a rational basis for the provisions in his will, and thus his will was found to be valid, notwithstanding the fact that he had committed suicide, and one daughter who had been left out of his will had suggested that he suffered from insane delusions about her.

Similarly, in *Re Pommerehnke, supra*, the court reviewed the dispositions made by the deceased and her reasons for them. The court set out the deceased's situation at the time of the will and her death. In particular, the court noted that the deceased felt shut out by her own family, and felt rejected by the persons that she had loved. The court concluded that the deceased had reason for making the dispositions that she did. She was not suffering from a disease or unnatural disorder of the mind.

¹⁴ (1873), L.R. 3 P&D 64 at p. 66.

¹⁵ Shulman, Hull and Cohen, *Testamentary capacity and suicide: an overview of legal and psychiatric issues*, International Journal of Law and Psychiatry, 26 (2003) 403 at p. 409.

d. Delusions

Often, suicide victims exhibit signs of delusions.

Not all delusions will be said to effect testamentary capacity. Unless the delusions affect the testator's capacity to comprehend the essential elements of will-making ("property, objects, just claims to consideration, revocation of existing dispositions, and the like"¹⁶), they may be disregarded. What is required is a finding that the delusions influenced or affected the dispositions actually made.¹⁷

In *Brown v. Thomas Estate*,¹⁸ the deceased left a will that excluded one of her daughters. The daughter objected, asserting that the deceased suffered from insane delusions regarding her daughter. The court rejected the suggestion. It found that the deceased was otherwise capable. It also found that the beliefs of the deceased regarding her daughter were not unfounded. The deceased shared these concerns with others, but not inappropriately or obsessively. Finally, the court found that the terms of the will were not unreasonable (see above re: reasonableness of the terms of the will).

On the other hand, in *Onofrichuk v. Onofrichuk*, *supra*, the deceased had believed for years that his wife was attempting to poison him by poisoning his food, the water or the air. The deceased repeated this to other family members on many occasions, and took to boiling his water, sleeping in the barn, sleeping in a tree, etc. There was no suggestion that there was any basis for the allegations. The court held that these delusions resulted in the will that did not provide for the wife. The will was not admitted to probate.

In *Onofrichuk*, the court referred to a number of cases on insane delusions, and warned about "the danger of fitting the facts of one case to another."¹⁹

¹⁶ *Onofrichuk v. Onofrichuk*, [1974] S.J. No. 13 (Sask. Surr. Ct.) at para. 25.

¹⁷ Hull and Hull, *Probate Practice*, *supra*, at p. 34.

¹⁸ [2008] N.S.J. 119 (N.S. Prob. Ct.)

¹⁹ *Supra*, at para. 27.

e. Other factors

Of note from the *Re Pommerehnke Estate* decision is the other factors that the court considered in coming to the conclusion that the deceased had testamentary capacity notwithstanding the fact that she committed suicide.

The court relied on the fact that the handwriting in the note was legible and understandable. This was used to refute the suggestion that the deceased was under the influence of alcohol.

The court also relied on the fact that the deceased put her suicide note in her purse, which was hung on the latch of a gate at the rear of her house. The deceased had set fire to her basement and died in the fire. The fact that she had the wherewithal to put her note in a place where it wouldn't be burned was an indication that she had testamentary capacity.

As can be seen, the factors relevant to determining whether the deceased possessed testamentary capacity are many, and are determined on a case-by-case basis. Evidence of medical practitioners is of prime relevance, if available.

Another practical tool is the use of a "psychological autopsy". A psychological autopsy reconstructs a biography of the deceased through psychological information gathered from personal documents; police, medical and coroner records; and first person accounts from family, friends, coworkers, school associates and physicians. "One of the major contributions of psychological autopsies 'has been to introduce the psychosocial context into decisions about the cause of death since examinations of post-mortem remains tell only what the patient died with, not what he died from.'"²⁰ Such information can be invaluable in informing a court on the issue of testamentary capacity.

²⁰ Jacobs and Klein-Benheim, *The Psychological Autopsy: A Useful Tool for Determining Proximate Causation in Suicide Cases*, *supra*, at p. 167.

Suicide Notes

Assuming that the deceased had requisite testamentary capacity, a question that sometimes arises is whether a suicide note constitutes a valid testamentary instrument.

A suicide note can be a valid testamentary instrument if it meets the technical requirements of validity as set out in the *Succession Law Reform Act*.

If the note is not a handwritten one, it must be signed at its end by the testator, or in his presence and by his direction, in the presence of two or more attesting witnesses present at the same time, and two or more of the witnesses must subscribe the will in the presence of the testator.

In the case of suicide, this is rarely the case. What is more common is for the deceased to leave a handwritten note. The handwritten note may be considered a valid testamentary instrument under s. 6 of the *Succession Law Reform Act*. Section 6 provides:

6. Holograph wills -- A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

Different rules apply in the case of members of the Canadian Forces on active service, members of any other naval, land or air force while on active service, and a sailor when at sea or in the course of a voyage. There, no witness is required, even if the will is not holographic.

In addition, the note must have testamentary intent. There must be "*animus testandi*". The note must disclose an intention regarding the posthumous destination of the deceased's property. In Hull and Hull, *Probate Practice*,²¹ the requirements are said to be, firstly, that it was the intention of the writer to convey benefits by the instrument, and secondly, that death was the event that was to give effect to it. If those requirements are found, then the note may be considered testamentary and admitted to probate.

²¹ 4th ed., at p. 53.

Precatory instruments and letters considered to not express a deliberate and final intention will not be admitted.²²

In *Quirk v. Wernicke Estate, supra*, the deceased left a handwritten will signed August 25, 1981, about eight months before he took his life on April 18, 1982. This will was signed by two witnesses, and left the deceased's estate to his wife of over twenty years. However, the deceased contemplated suicide, and on September 24, 1981, the deceased left a signed note that read: "Mary, good 'by my love I leave everything to you & the boys". The issue was whether this later note was testamentary, thus changing his earlier intention to leave everything to his wife. The court found that the note was not testamentary. The first "will" was witnessed by two witnesses, whereas the later note was not: the court held that if there was testamentary intent, the deceased would have had the note witnessed, as he had earlier. The court also noted that the note was taken by the police following a suicide attempt, and the deceased did not make any effort to retrieve it. The court reasoned that if the note was intended to be a will, the deceased would have made an effort to get the note back. In addition, the earlier will was kept by the deceased along with his other important papers. Finally, the deceased referred to the earlier will in the weeks before his death, and made no reference to the note. The court concluded that the propounders had not discharged the burden of proving that the later note was intended to be a testamentary instrument.

In *Re Holyk Estate*,²³ the deceased left a note that appears to set out various names, and descriptions of various pieces of property. There was also a name with the notation "ex" beside it (presumably "executor"). At first instance, the court rejected the submission that the note was a valid testamentary instrument. The court referred to various authorities to the effect that "A holograph will is not testamentary unless it contains a fixed, final and deliberate expression of the intention as to the disposal of property on death"²⁴. At first instance, that was not found. The document was merely a list of names and property, which seemed to indicate some desire to make a gift. Upon appeal, the court heard further evidence from a neighbour. The neighbour indicated

²² Hull and Hull, *Probate Practice*, 4th ed., pp. 54-55.

²³ [1992] S. J. No. 400 (Surr. Ct.)

²⁴ *Williams on Wills*, Vol. 1, 5th ed. at p. 76.

that the deceased was suicidal. The deceased gave a key to his house to the neighbour, and told him what documents he would find there. Upon searching the house, the neighbour found the note, and memoranda on preparing a will. The court accepted this evidence, and admitted the will to probate. This evidence was said to be “convincing evidence that the writing in question expresses the last testamentary intent of the deceased person.”

In the case of a beneficiary designation, again, different rules apply. Section 51 of the *Succession Law Reform Act* provides:

51. (1) Designation of beneficiaries — A participant may designate a person to receive a benefit payable under a plan on the participant's death,

(a) by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of those methods.

(2) *Idem* — A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.

Case law has held that a beneficiary designation “may be made without any formality other than that it must be in writing by the insured, with or without a witness. Unwritten or unsigned designations are of no effect.”²⁵

In *Gossman v. Gossman*²⁶, a letter from the deceased to his employer, written on the day he committed suicide, and requesting a change of beneficiary from his wife to his brother was accepted as being valid. The fact that the note requested the change “if possible” was said to not affect or derogate from the designation.

²⁵ *Rainsford v. Gregoire*, 2008 BCSC 310 at para. 25, citing *Norwood on Life Insurance in Canada* (2nd ed.) at p. 22.

²⁶ [1985] B.C.J. No. 203 (B.C.S.C.)

Declarations of Death and the Absentees Act

Under the *Declarations of Death Act, 2002*, where a person has disappeared in circumstances of peril, an "interested person" (being the person's estate trustee, person entitled to apply to be appointed administrator of the estate, the person's spouse, next of kin, guardian for personal care or property, person in possession of property owned by the deceased, life insurer, life insurance claimant, or committee under the *Absentees Act*) may apply to the court for a declaration that the person has died.

The court may make the declaration in two circumstances: where the person disappeared in circumstances of peril, or where the person has been absent for over seven years.

In the former case, the applicant must show that:

- (a) the individual has disappeared in circumstances of peril;
- (b) the applicant has not heard of or from the individual since the disappearance;
- (c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance;
- (d) the applicant has no reason to believe that the individual is alive; and
- (e) there is sufficient evidence to find that the individual is dead.

The *Act* also allows the court to limit the scope of the declaration so that it applies only for certain purposes, and provides a mechanism for deeming what the date of death is.

"Circumstances of peril" is not defined in the *Act*. However, in the case of *Poole v. Poole*,²⁷ the court held that severe depression and risk of suicide constitute "circumstances of peril". There, the individual was severely depressed at the time of his

²⁷ 2008 CarswellOnt 4103 (Ont. S.C.J.)

disappearance. His psychiatrist noted that he was in real danger of harming himself just three days prior to his disappearance. Prior to his disappearance, he left all of his identification, his will, and a suicide note on his kitchen table. He had previously tried to commit suicide, and advised his psychiatrist that on his next attempt, "he would do it right". Based on this evidence, the court was satisfied that the individual had disappeared in circumstances of peril.

Another option is to proceed under the *Absentees Act*.²⁸ This Act allows the court to make a declaration that a person is an absentee if it is shown that due and satisfactory inquiry has been made, or may direct that further inquiry be made. An "absentee" is defined as being a person who, having had his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts is unknown, and as to whom there is no knowledge as to whether the person is alive or dead.

The court may make an order for the custody, due care and management of the property of an absentee, and may appoint a committee for that purpose.

In *Kamboj v. Kamboj*,²⁹ Justice Quinn considered the quality and type of evidence that will be required before the court will make an order under the *Absentees Act*.

It would appear that an application under the *Absentees Act* would be more appropriate where the available evidence was not so strong so as to satisfy the "circumstances of peril" test under the *Declarations of Death Act, 2002*. However, the relief available under the *Absentees Act* is much more limited than that which would flow from a declaration of death.

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²⁹ 2007 CarswellOnt 2785 (Ont. S.C.J.)