

THE TWO MILLION DOLLAR CHEQUE: PRACTICAL ISSUES ON CAPACITY

-Brenda Hildebrandt, Q.C.

April 6, 2017


Law Society of Saskatchewan CPD


Capacity fluctuates


Capacity can be regained

Capacity is not a once for
all determination



- ▶ Depending upon the nature of the transaction undertaken, the requisite mental capacity varies.
 - ▶ “There can be no doubt there are degrees of capacity.”
 - ▶ Re Park Estate [1953] 2 All E R 1431
- 

- ▶ Banton v Banton [1998] 164 DLR (4th) 176
 - ▶ “ . . . The difficulty is accentuated in this case by the existence of different legal tests for determining capacity to marry, testamentary capacity, capacity to manage property, capacity to give a power of attorney for property, and capacity for personal care.
- 


- ▶ Each of these is relevant in varying degrees to the issues in this case. It is clear that capacity or incapacity for one such purpose does not necessarily determine the question for other purposes”
- 

- ▶ “. . . While there is no reason to doubt the appropriateness of having different tests for different capacities, the task of reaching conclusions—even on the balance of probabilities—on the basis of rather fine distinctions when the issues relate to the deteriorating mental state at a particular time of an elderly person now deceased, is not easy.”



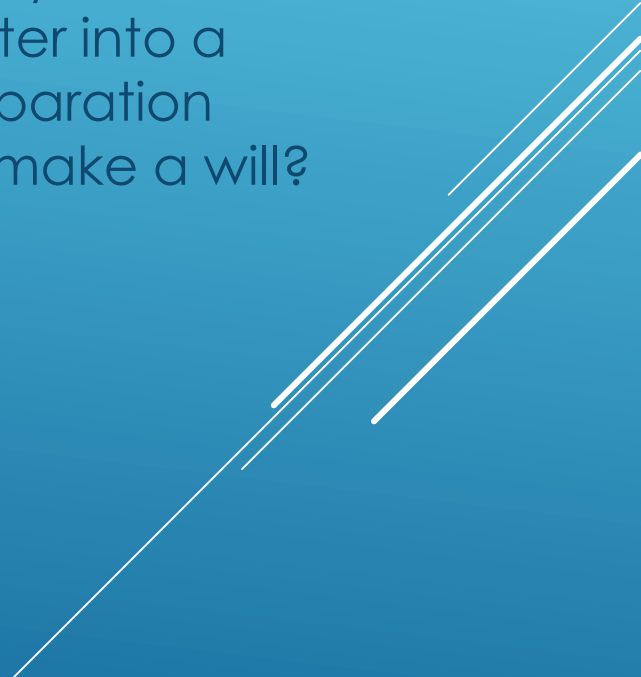
- ▶ Various statements of the differing tests have been put forward in the cases. For example, in *Calvert v Calvert*, (1997) 32 O.R. (3d) 281, Madam Justice Benotto, stated:



- ▶ “To be competent to make a decision, a person must:
 - ▶ 1. Understand the context of the decisions;
 - ▶ 2. Know his or her choices;
 - ▶ 3. Appreciate the consequences of these choices.
- 

- ▶ Analyzing *Banton and Calvert*, Howard J. Feldman suggests a “hierarch of capacity from highest to lowest”:



- ▶ Testamentary Capacity
 - ▶ Capacity to Instruct Counsel re Divorce (Property Division and support)
 - ▶ Highest Degree of Capacity Required
 - ▶ Quaere whether this is the same level of capacity required to make a POA regarding property? Is the capacity required to enter into a marriage contract or separation agreement less than to make a will?
- 

- ▶ Capacity to make POA for property


- ▶ Capacity to marry or divorce

- ▶ Capacity to separate

- ▶ Capacity to grant proxy for personal care


- ▶ Lowest degree of capacity required

A decorative graphic consisting of several parallel white lines of varying lengths and orientations, located in the bottom right corner of the slide.

- ▶ Respecting Autonomy
 - ▶ The general principle is that capable people have the right to take risks where incapable people have the right to informed decision-making based on their prior capable wishes or best interests.
 - ▶ Hiltz and Szigeti, 2010, *A Guide to Consent and Capacity Law in Ontario*
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.

- ▶ Conceptually, issues of consent, capacity and involuntary committal addressed by the legislation may be grouped into four broad areas of property, treatment/placement, detention and personal health information. These categories correspond to areas of decision-making autonomy that capable individuals enjoy *regardless of the wisdom of the choices . . .*



- ▶ As Hiltz and Szigetia emphasize:
 - ▶ There is no substitute for reading the legislation.
- 

▶ *Ontario Health Care Consent Act, 1996*

Prof. Starson had been found incapable and forced to follow a course of treatment, including mood stabilizers and neuroleptics

He appealed the physician's determination of incapacity to the Ont Consent and Capacity Board. There was then judicial review of that board's decision.

STARSON V SWAYZE, [2003] 1 SCR 722

- ▶ SCC: “. . . the board improperly allowed its own conception of [Prof. Starson’s] best interests to influence its finding of incapacity.”



- ▶ The Court emphasized that the board's mandate was not to determine the best interests of the patient, but to adjudicate the capacity of the person at issue.



- ▶ Respecting the autonomy of the individual must be borne in mind when considering issues of capacity . . . and when advising our clients.



- ▶ With this backdrop, let's turn to the practical steps—both medical and legal—in considering these issues.

