Assessment of Capacity: A Legal Perspective

Webinar for the Law Society of Saskatchewan
Continuing Professional Development

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Introduction

- This presentation will discuss the lawyer's role/obligation when taking instructions from a client to prepare a Will, Power of Attorney and similar documents such as a Health Care Directive.
- The Webinar will include a discussion of the legal definitions of "capacity", the duty of care owed by a solicitor to the client and others in the preparation and execution of certain documents.
- The presentation will discuss some of the practical difficulties that may be faced by a solicitor when receiving instructions from an individual whose capacity may be in question.

Capacity

- Depending on the nature of the document you are preparing, the test for capacity may vary. The capacity test may be in the case law or in a governing statute.
- In the case of Powers of Attorney, *The Powers of Attorney Act*, 2002 c. P-20.3 requires that a grantee of a Power of Attorney understand the nature and effect of an Enduring Power of Attorney.
- This is stated in section 4 which reads:

> **Who may grant an enduring power of attorney**
>
> **4** Any adult who has the capacity to understand the nature and effect of an enduring power of attorney may grant an enduring power of attorney

- The same language is carried forward in the Legal Advice and Witness Certificate form prescribed in the Regulations to the Act that is to completed by the witnessing lawyer.
- The Certificate requires the lawyer to certify as follows:

  > (e) that in my opinion the grantor was an adult who could understand the nature and effect of an Enduring Power of Attorney at the time that he or she signed the above-mentioned Enduring Power of Attorney.

- Note the requirement upon a lawyer under the Act to certify his opinion that the grantor understands the nature and effect of the document. This imposes an obligation upon the lawyer to make the necessary inquiries so that their opinion is reasonably well informed.

- The Powers of Attorney Act, 2002 has a broader definition of capacity in section 2 which does not relate to the capacity of the grantor to give a power of attorney:

> "**capacity**" means, other than in section 4, clause 19(1)(b) and section 21, the ability:
>
> (a) to understand information relevant to making decisions with respect to property and financial affairs, as the case may be; and
>
> (b) to appreciate the reasonably foreseeable consequences of making or not making a decision referred to in clause (a);

- The section 2 definition relates to the following:

  (a) The capacity of the individual appointed as the Power of Attorney (section 6(1)(a)(i));

  (b) A contingent appointment based on the lack of capacity of the grantor (section 9);

  (c) A declaration of incapacity by prescribed professionals or the Court (section 9.2);

  (d) The execution of a Power of Attorney by another individual at the direction of the grantor (section 11);

  (e) Capacity of a witness to the Power of Attorney (section 12).

- *The Powers of Attorney Act* allows for the appointment of both a personal attorney with respect to the grantor's personal affairs and a property attorney with respect to the grantor's property and financial affairs.

- The Power of Attorney can be restricted to one or the other or a combination of the two. This is a relevant consideration as to whether the grantor understands the nature and effect of the Power of Attorney they are signing.

- *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015,* SS 2015 c. H-0.002 defines capacity as:

  > "**capacity**" means the ability:
  >
  > (a) to understand information relevant to a health care decision respecting a proposed treatment;
  >
  > (b) to appreciate the reasonably foreseeable consequences of making or not making a health care decision respecting a proposed treatment;
  > (c) to communicate a health care decision with respect to a proposed treatment;

- Unlike *The Powers of Attorney Act*, there is no express requirement on a lawyer when acting as a witness to the making of a healthcare directive to certify the capacity of the individual making the directive.

Wills

- In order to make a valid Will, the testator must be of sound mind, memory and understanding.
- The classic legal test for testamentary capacity is set out in the case of *Banks v. Goodfellow*, (1870), L.R. 5QB549(QB) by Cockburn C.J. as follows:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

- The Ontario Court of Appeal in *Hall v. Bennett Estate* 2003 CanLii 7157 distilled the test from the *Banks* case as follows:

> [14] Numerous cases have dealth with the question of testamentary capacity. It has often been repeated that a testator must have "a sound disposing mind" to make a valid will. The following requirements can be extricated from the case law. In order to have a sound disposing mind, a testator:
>
> - must understand the nature and effect of a will;
>
> - must recollect the nature and extent of his or her property;
>
> - must understand the extent of what he or she is giving under the will;
>
> - must remember the persons that he or she might be expected to benefit under his or her will; and
>
> - where applicable, must understand the nature of the claims that may be made by persons he or she is excluding from the will.

- The manner in which the test is set out in *Hall* is of practical assistance to a solicitor in determining the type of the questions that should be asked by the solicitor of the client in taking instructions for a Will.
- The fact that the testator may wish to make a bequest that might be viewed as eccentric does inevitably mean a lack of capacity.
- Ian M. Hull, in his textbook Challenging the Validity of Wills (Carswell, 1996), makes the point as follows at page 19:

> While there is much jurisprudence about what is and what is not testamentary capacity, they can generally be rolled into my own definition: to know and understand that one is executing a testamentary document disposing of assets, the general value and nature of which are known to the testator or testatrix, after having considered all persons having a moral claim to the assets being disposed of.
>
> Generally speaking, if one has that knowledge and strength of mind one can dispose of one's assets by a will as one pleases. While it has been held that a testator or testatrix may be eccentric, in my view such eccentricity might be short of whimsy.

- The Supreme Court of Canada in *Leger v. Poirier*, [1944] S.C.R. 152 adopted a high standard for proving testamentary capacity stating at pp.161-162:

> . . . There is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; this has been recognized in many cases . . .
>
> Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole . . .

- The fact that a testator may have the capacity to communicate testamentary wishes is not determinative, in and of itself, of the capacity.
- In *Hall*, the Court stated as follows at page 5:

> [15] It is also clear from the jurisprudence that the test to be met to prove testamentary capacity is a high one and the onus falls on the propounder of the will. The jurisprudence abounds with statements that it is not sufficient simply to show that a testator had the capacity to communicate his or her testamentary wishes. Those wishes must be shown to be the product of a sound and disposing mind as described above.

Duty and Standard of Care of a Solicitor

- It is well established in Canadian law that the solicitor owes a duty of care to the testator, the Estate and, in certain circumstances, the beneficiaries in taking instructions to prepare a Will or other testamentary document.
- In the case of testamentary capacity, the law is clear that a solicitor who undertakes to prepare a Will has a duty to inquire into his or her client's capacity.
- The oft cited case of Murphy v. Lamphier [1914], 31 O.L.R. 287 (Div. Ct.), aff'd (1914), 32 O.L.R. pp. 318-19 states:

> A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease, and particularly in the case of one labouring under both disabilities, the

solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property. The solicitor is brought in for the very purpose of ascertaining the mind and will of the testator toughing his worldly substance and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty.

- A succinct description of the duty is set out in *Scott v. Cousins* [2001], 37 E.T.R. (2d) 113 (Ont. S.C.J.), as follows at para. 70:

  The obligations of solicitors when taking instructions for wills have been repeatedly emphasised in cased of this nature. At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and, if there is any possible doubt – or other reason to suspect that the will may be challenged – a memorandum, or note, of the solicitor's observations and conclusions should be retained in the file:

- In *Hall v. Bennett*, supra, the solicitor, Frederick, received a telephone call at his home early Saturday morning to attend at the hospital to see a terminally ill patient who wished to make a will.
- The solicitor, Frederick, had no previous knowledge of the testator, Bennett.
- Frederick met Bennett at the hospital and spent approximately 65 minutes interviewing him to determine his testamentary wishes. During the course of the interview, Mr. Bennett drifted in and out of consciousness. The end result was that Frederick determined that he could not prepare the will because Bennett did not have the capacity to do so. One of the individuals to whom Bennett had expressed an intention to leave part of his Estate, brought an action against Frederick which was successful at trial. The trial decision was likely based on a finding that Bennett did have capacity.

- On appeal to the Ontario Court of Appeal, the decision was overturned. The Court noted that, with respect to the liability of the solicitor, as follows:

  > However, on the issue of liability, the relevant question with respect to testamentary capacity was not whether Bennett in fact was capable of making a will but whether a reasonable and prudent solicitor in Frederick's position could have concluded that he did not.

- In dealing with the solicitor's duty to substantiate testamentary capacity in suspicious circumstances, the Ontario Court of Appeal quoted with approval the following statements from M.M. Litman and G.B. Robertson in "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", [1984], 62 Can. Bar Rev. 547 at p.470:

  > The solicitor's duty to substantiate capacity is particularly important in cases of suspicious circumstances. By suspicious circumstances is meant any circumstances surrounding the execution or preparation of a will which individually or cumulatively cast doubt upon the testator's capacity to make a will or his knowledge and approval of the will's

contents. Suspicious circumstances are innumerable in form and cannot be listed comprehensively.

In the context of testamentary capacity cases, serious illness in a testator, especially where the testator is elderly and his illness is capable of affecting his mental state, is one of the most extreme of suspicious circumstances. Few other circumstances demand of the solicitor greater care and caution.

- The case law agrees that in situation where the solicitor is relatively certain that an individual lacks capacity, the Will ought not to be executed. There will be cases where question of capacity remains in doubt. In those cases there is authority that the solicitor should supervise the extension of the execution of the Will.

- In *Scott*, supra, at page 20, Cullity J. states:

  > Some of the authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel perfection and imposed to having a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God – or even Judge – and will supervise the execution of the will while taking, and retaining comprehensive notes of their observations on the question.

- In *Hall*, supra, the Court determined that in the circumstance it was clear that the individual lacked capacity and agreed that it was the duty of solicitor to decline the retainer.

Practical Considerations

- The extent that a solicitor may have to undertake investigation or assessment into capacity may vary depending on the circumstances. By way of example, a fuller inquiry may be needed if the solicitor has not had a previous relationship or dealings with the individual.
- In their article; solicitor's liability for failure to substantiate, supra, the authors, after conducting a review of the case law, enumerated the following circumstances in which liability for professional negligence in the preparation of a will was found against the solicitor:

    1. The failure to interview the client in sufficient depth;
    2. The failure to properly record or maintain notes;
    3. The failure to ascertain the existence of suspicious circumstances;

4. The failure to react properly to the existence of suspicious circumstances;

5. The failure to provide proper interview conditions (eg. the exclusion of interested parties);

6. The failure to obtain a mental status examination or to take adequate steps to test for capacity.

- In order to avoid liability, the following practise tips are recommended for the solicitor in taking instructions where the issue of capacity is in doubt:

1. Meet with the individual separate and apart from any person who may have an interest in the Estate. It may also be useful to have in attendance during your interview with the individual one of your colleagues or an uninterested party;

2. Make inquiries as to the health status of the individual to determine if they have any health condition or are on any medication that may impact or impair their capacity;

3. Determine if a capacity assessment has been completed by a health care professional and, if practicable, obtain a copy;

4. Prior to discussing the Will, have a general conversation with the client to ensure that they are oriented to place and time and identity;

5. Question the individual in a manner that requires him/her to provide specific information rather than simply yes/no responses;

6. Make specific inquiries as to the individual's marital status and family members;

7. Make specific inquiries as to the nature and extent of the individual's property;

8. Provide a clear explanation as to the nature and effect of the Will as well as the role of the Executor and ask follow-up questions to ensure that the individual has understood the explanation;

9. If there are any concerns regarding the answers given by the individual in relation to family or assets, attempt to verify the information through other sources;

10. If there are issues with language, a competent translator should be obtained. This should not be an individual who may have an interest in the Estate;

11. Ensure that your notes documenting the interview(s) are comprehensive and are retained on the file. In cases where the individual does not object, a recording of the conversation may be considered;

12. Where there is real doubt, a formal assessment by an appropriate health care professional ought to be considered;

13. If the individual is departing substantially from previously expressed intentions or not providing for a disposition to a close family member, this ought to be specifically questioned.

- Ultimately, a solicitor must take the care that the circumstances may require. The greater the doubt as to the capacity, the greater the obligation on the solicitor to investigate the matter.