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Testamentary Capacity Issues

by

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I. What is Incapacity?

In England, the jurisdiction which esteemed individual property rights, it was recognized early on that a will made by a person not of "sound" mind would not be a valid will. As was once said in a significant 19th century decision: in the case of a "raving mad-man" or of a "driveling idiot," there is no difficulty in determining capacity. But:

> Between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.

To assist the Court in determining whether a testator had the requisite capacity to make a will, a set of governing principles were laid out in the 1880 case of *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549. These are:

(a) the testator must understand the nature of the act and its effect;

(b) the testator must understand the extent of his property;

(c) the testator must be able to understand and appreciate the claims of those around him, to which he should be giving effect; and

(d) there is no "disorder of the mind that shall poison his affections, pervert his sense of right, or prevent the exercise of 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 case is significant because the court holds that there is a standard of "morality" to which most testators naturally ascribe. If expected natural affection of the testator is displaced by an "insane delusion," then the testator is held to be of unsound mind and those portions of the will which were directed by that unsoundness will fail. At the same time, however, the 19th century position, still cited in the context of incapacity challenges today, holds that:

> The law does not say that a man is incapacitated from making a will if he is 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

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> charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.

This statement, while accurate in the context of a challenge based on incapacity, is subject to other legislative restraints such as dependants relief legislation.

The essential point is that today, in the common law jurisdictions, it is difficult to challenge a will based upon incapacity. The reluctance by the courts to embrace a determination of incapacity is in some measure a fairly consistent judicial message that wills should not be attacked because of perceived eccentricities of the aged or transient mental disturbances. The courts were always careful not to give a blank cheque to unhappy relatives to re-write wills. There was and continues to be recognition that often the only power the elderly hold is in disposing of their estate and the courts were and still are reluctant to undermine that power.

Having said that, however, it may be that the high threshold that must be met in attacking a will for lack of capacity continues to be applied by the courts because they know that there are other avenues available to address manifest unfairness in a will without having to "throw out" the entire document.

II. Two Common Types of Incapacity Cases

Despite the above-noted reluctance of the Courts to set aside wills based on incapacity, many such cases are still brought today. There are two common types of cases based on incapacity. The first is incapacity as a result of delusions and the second is as a result of senile dementia.

A. Delusions

It is of note that the four elements of the *Banks v. Goodfellow* test are all required to be met before the Court will find that a testator had the required capacity to execute a will. With respect to the fourth element, the Court must find that the testator was suffering from no delusions with respect to any of the persons one would expect him to provide for in his will, such as his spouse and children.

Delusion has been defined as:

> A false belief, seen most often in psychosis (for example schizophrenia).[1]

Delusion is an irrational belief in a state of facts which no rational person would believe. However, in order for that delusion to render a person incapable of making a will, it must influence the testator in the making of the will. In other words, the delusion must relate to the testator's property or the persons to whom it is bequeathed, or ought to be bequeathed. In the *Banks v. Goodfellow* decision, the testator there was found to be suffering from certain delusions relating to "evil spirits", however, the Court found that since there was no connection between

[1] On-Line Medical Dictionary, Published at the Dept. of Medical Oncology, University of Newcastle upon Tyne.

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the specific delusion suffered by the testator and the contents of the will, the delusions did not render the testator incapable of making a will.

Clearly, each case will depend on its facts. However, one interesting case where the Supreme Court of Canada found that the testator was suffering from a delusion with respect to his wife which rendered him without capacity to make a will is *Ouderkirk v. Ouderkirk* [1936] S.C.R. 619 ("*Ouderkirk*").

In *Ouderkirk*, the trial court found that the testator was "labouring under delusions" as to the character of his wife, specifically, that she was "entertaining men for immoral purposes". The wife was 70 years old, had raised eleven children with the testator, and the trial court found that the "evidence was that she had lived a moral and respectable life". The trial court further found that such delusions were "fantastic and preposterous" and "would affect the making of the will". The trial court therefore ordered that the will not be admitted into probate, due to incapacity on the part of the testator (p. 620). However, the Ontario Court of Appeal overturned the trial court's judgment, without providing reasons. The Supreme Court of Canada allowed the appeal, and restored the trial court's decision. The Supreme Court of Canada held:

> We are clearly of the opinion that these delusions did affect the mind of the testator to such an extent, and at the relevant time, that he was unable to make the will, and the appeal will, therefore be allowed…(p.624)

Even had the testator been of sound mind otherwise, the unfounded beliefs or delusions relating to his wife's conduct were sufficient to render him incapable of making a will because they related directly to and would influence on a person who ought to be a beneficiary of his estate.

B. Dementia

The second broad category of cases where the will is challenged as to capacity is where the testator is alleged to suffer from dementia.

"Dementia" has been defined as:

> a loss of intellectual abilities to a degree which interferes with social and/or occupational functioning. Many higher brain functions are involved as reflected by deficits in memory, judgement, and abstract thought. Changes in personality and behavior will be seen and may vary from accentuation of the usual premorbid personality to marked alterations from the previous personality style.[2]

It is also described as:

> An organic mental disorder characterised by a general loss of intellectual abilities involving impairment of memory, judgment and abstract thinking as well as

[2] *Lawyers' Medical Cyclopedia of Personal Injuries and Allied Specialities*, 3rd. ed., vol. III (Indianapolis: The Allen Smith Company, 1983) at p. 22.

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> changes in personality. It does not include loss of intellectual functioning caused by clouding of consciousness (as in delirium) nor that caused by depression or other functional mental disorder (pseudodementia). Dementia may be caused by a large number of conditions, some reversible and some progressive, that cause widespread cerebral damage or dysfunction. The most common cause is Alzheimer's disease… [3]

As you see, dementia is often not reversible, and can be progressive in that it causes an on-going deterioration of the person afflicted. This is particularly true of senile dementia, such as Alzheimer's disease. Given that many wills are made, or re-made, by elderly persons, it is not surprising that wills are challenged on the basis that the testator was incapable of making a will due to senile dementia. The Court must determine whether the testator was capable at the time the will was executed. This, of course, can be difficult, since the determination by the Court is made after the will has been executed, and the testator has since died. It is common as well that the testator's mental abilities declined over a period of time, at some point passing the point wherein he was capable of making a will. The Court must therefore look back to the time the will was executed, and review whatever evidence is available for that time period.

The Courts are careful to distinguish between diminished capacity and lack of capacity to make a will. A person with diminished capacity may still be able to make a will, provided that he or she is capable

> of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.[4]

In the 1944 Supreme Court of Canada decision, *Leger v. Poirier* [1944] S.C.R. 152, the Court considered whether a testatrix had the requisite capacity to execute a will. There was conflicting testimony, some from a grand-niece who had been taking care of the testatrix, and evidence of the solicitor who took the will. The Court resolved the conflict by finding that:

> …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.[5]

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[3] On-Line Medical Dictionary Published at the Dept. of Medical Oncology, University of Newcastle upon Tyne.
[4] *Leger v. Poirier* [1944] S.C.R. 152 at 161.
[5] *Leger, supra,* at p.161.

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Essentially, the Court found that while the testatrix may have appeared to have capacity during the execution of the will, the whole of the evidence was such that the Court found that she did not in fact have the requisite capacity.

A second case involving conflicting testimony as to capacity is *Bates v. Finley* 2002 BCSC 159. In that case, the testator underwent surgery and was recuperating at the defendant's house. The defendant was the nephew of the testator, and the testator had several nieces and one other nephew as well. While at the defendant's house, and knowing that he had a terminal illness, the testator asked the defendant to obtain a "will kit" for him and to assist him in completing it. This was done, and the defendant became the major beneficiary. The nieces and other nephew received gifts of $10,000 each. Those nieces and nephew (save one) challenged the will, and alleged that the testator was without capacity. The Court heard conflicting evidence as to the testator's state of mind at the time the will was executed, but ultimately preferred that of the disinterested neighbour who had witnessed the will.

Note that the two categories discussed herein, namely dementia and delusions, are not mutually exclusive. In the recent British Columbia Supreme Court decision, *Flurry v. Fuller Estate* 2002 BCSC 1571, the Court found (based on expert medical evidence) that the testator's dementia "produced profound and disabling delusions in his mind" (para. 27). The expert evidence also established that the testator suffered dementia of the Alzheimer's type, however with atypical symptoms. Typically, persons with Alzheimer's experience a "significant impairment of their social skills", however, in this case, the testator's social skills were not affected.

The facts in the *Fuller* case were that the testator was a "very religious fellow" who had three adopted children. He owned certain property on which there was timber. He sold the land for over two million dollars, and shortly thereafter, gave $200,000 as a gift to each of his children, and $240,000 to the church as a tithe. His will in 1993 left 80% of the estate to the children, and 20% to his church. In 1997, the testator and his daughter had a falling out due to some concerns she expressed about his church. He thereafter consulted a solicitor to change the terms of his will, and essentially disinherit his three children, leaving the bulk of his estate to the church. The solicitor, concerned over the testator's expressed intention to radically alter his will in this manner, asked that he obtain a medical opinion with respect to his capacity. That was obtained, and he then executed the new will. Despite this, the Court found that "at least as early as 1995 Mr. Fuller was prone to delusional thinking and that his grip on reality of the world around him was slipping" due to Alzheimer's. However, this was not easily identifiable by others because his social skills had not otherwise deteriorated. The Court ultimately held that Mr. Fuller was without capacity to make a will as a result of the delusions, and set aside the 1997 will.

III. Signs to Alert Solicitor to Incapacity Issues

Clearly, the above-noted cases illustrate the difficulty of the Court in determining on particular facts whether the testator had capacity to make a will at the time in question. This means that the solicitor drafting the will must be prepared to assist the Court in making the determination. It also means that the solicitor must be alert to the possibility of incapacity in a client for whom he or she is drafting a will, and diligent in recording the discussions had with the client.

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Often, a solicitor is asked to prepare a will for a new client with whom the solicitor has no previous dealings. What indices might that lawyer search for in that client, and if finding any such indices, what steps ought to be taken?

A. Indices

While each case must turn on its own facts, those cases in which the will is challenged based on incapacity have some features in common:

(a) The elderly testator resides with the main beneficiary under the new will.

(b) The main beneficiary under the new will drafted the new will, or retained or instructed counsel to draft the new will.

(c) The new will contains a significant change from previous will, especially disinheriting spouse or children.

(d) The client resides in a care home, or has previously been diagnosed with dementia or as suffering from delusions.

(e) The client suffers other health problems.

(f) The new will unduly favours one person over other persons of the same "class" (i.e. one nephew over the other nieces and nephews).

"Self-protection" by the solicitor can include the following steps:

(a) obtaining instructions directly from the testator, or alternatively, confirming instructions with testator privately. This is particularly important where you have been contacted by a major beneficiary of the testator;

(b) ensuring that you have accurate and complete records of instructions, including explanations of any disinheritances or gifts favouring one or more members of the same "class" of beneficiaries (see "Retention of Estate Planning Files" at tab 4 for further discussion of required file materials);

(c) exploring with the testator or others whether capacity may be in issue. If so, ensure detailed notes are taken of conversations with the testator, including specifically the method in which information was elicited from the testator (i.e. leading v. open questions) and what the particular responses were;

(d) if capacity may be in issue, seek an opinion from a medical professional, whether it is the family doctor or a specialist. If health concerns are noted wherein patients have "good" days and "bad" days, such as senile dementia, seek an opinion of the medical professional for the same day (or as close as possible) as the will is executed. You may also wish to have the doctor present at the actual

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execution itself. Finally, note that some doctors may not be familiar with the exact requirements for testamentary capacity, and you ought to confirm with him or her what precisely these are; and

(e) if capacity is in issue, ask the witness(es) to the will to record the conversations had and their observations of the testator during the signing of the will as accurately as possible, and then retain a copy of that memorandum in the file.

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