TAB 2

Part 2: Establishing the Professional Relationship with the Older Client and their Family

Setting the Stage: Interviewing the Older Client

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Special Lectures 2010
A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

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INTERVIEWING THE OLDER CLIENT

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INTRODUCTION

Advanced age is not itself a sign of incapacity. Any presumption to the contrary would violate our basic human rights and our fundamental right of self-determination. As individuals, we are entitled to make decisions for ourselves, and like the criminal presumption of innocence, are presumed capable of doing so unless proven otherwise. This has important implications in an estate planning context, particularly considering our aging demographic. Although incapacity is not a necessary by-product of age, it is nevertheless true that the older client may have certain needs and vulnerabilities which demand an awareness of these implications.

Capacity is said to be task-specific. One may be perfectly capable for certain purposes, while not so for others. Not surprisingly, then, the test for capacity relates directly to the task at hand. Ultimately, the test is not a medical one, but a legal one, since the outcome necessarily impacts the fundamental dignity of the individual. As such, the Court is the ultimate decision-maker on the issue of capacity. Notwithstanding this, both medical and legal practitioners play a critical role in providing the necessary evidence to assist the Court in making its determination. While emphasizing this collaboration between the legal and medical professions, the following paper focuses on the legal aspects of testamentary capacity, providing an overview of the established test and its various component parts. This overview then serves to introduce a practical discussion about interviewing challenges, and suggested approaches, when dealing with an elderly client.

OVERVIEW OF TESTAMENTARY CAPACITY

Test in *Banks v. Goodfellow*

As with most complex matters, it is useful to start with basic principles. The recognized test for testamentary capacity remains as enunciated over a century ago in the seminal case of *Banks v. Goodfellow*[1]. This case is still a leading authority in Canada, the U.S. and the Commonwealth.

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* The research assistance of Stephanie Yarmo, student-at-law, McCarthy Tétrault LLP, is gratefully acknowledged.

[1] (1870), L.R. 5 Q.B. 549 (Eng. Q.B.).

In short, the *Banks v. Goodfellow* test requires that a testator have "a sound disposing mind". More specifically, the criteria by which this is gauged are expressed in the following words:

> [H]e ought to be 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, the persons who are the object of his bounty, and the manner in which it is to be distributed between them.[2]

This test has been repeatedly and consistently applied since the case was first decided. As set out in the more recent decision of *Hall v. Bennett Estate*[3], for example, the Ontario Court of Appeal confirmed that in order to have a sound and disposing mind sufficient to make a valid Will, the testator must:

1. understand the nature and effect of a will;
2. recollect the nature and extent of his or her property;
3. understand the extent of what he or she is giving under the will;
4. remember the persons that he or she might be expected to benefit under his or her will; and
5. understand, where applicable, the nature of the claims that may be made by persons he or she is excluding from the will.

With reference to the second and third criteria noted above, it is not necessary for the testator to know the exact value of his or her assets. Rather, it is sufficient to know what they are and their relative value.

Delusions

There is a considerable body of case law addressing the effect of delusions on an individual's testamentary capacity. The facts of *Banks v. Goodfellow*, for instance, involved a testator who suffered from certain fixed delusions. He believed he was being pursued by someone who had actually died years before, and by devils and evil spirits. In spite of these delusional beliefs, the Court held that because they had no impact on his specific testamentary wishes, they did not affect

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[2] *Ibid.* at 567, quoting *Harrison v. Rowan*, 3 Wash. C.C. 580 (U.S.) at 585, referred to in *Sloan v. Maxwell* (1831), 2 Gr. Ch. 563 (Prerog. Ct. N.J.) at page 570.

[3] (2003), 64 O.R. (3d) 191 (C.A.), 277 D.L.R. (4th) 263.

his ability to make a Will.[4] The Will was therefore upheld, with the Court confirming the finding in *Dew v. Clark*[5] that delusions will not necessarily invalidate a Will unless they directly influence the testator in the disposal of his or her property. However, if "insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its function, and to lead to a testamentary disposition, due only to their baneful influence", then a Will made under such circumstances cannot stand.[6]

Dementia

Where a testator suffers from some form of dementia, this may bear on the issue of testamentary capacity as well. Although the onset of dementia is not, in itself, conclusive evidence that the testator lacks capacity, at some point in the progression of such a condition, testamentary capacity may be affected. This will be determined not by the fact of the dementia alone, but by its noted impact on the elements necessary for testamentary capacity. Certain types of dementia, for instance, may affect the testator's memory. To the extent such memory impairment bears directly on the ability to understand and recollect the nature of assets, the persons who might be the natural objects of the testator's bounty, or the effect of the decisions contemplated, testamentary capacity may well be compromised. As such, dementia should be considered a capacity risk and thus explored in further detail.

Bereavement

In an intriguing new twist on an old test, the High Court of Justice for England and Wales (Chancery Division) just released its decision in the case of *Key v. Key*[7] in late March, 2010. The reasons of Mr. Justice Briggs open with reference to the "golden rule" to be followed by solicitors when drafting Wills for vulnerable clients, which he summarized as follows:

> The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been

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[4] *Banks v. Goodfellow*, *supra* note 1.

[5] (1826), 3 Add 79.

[6] *Banks v. Goodfellow*, *supra* note 1 at 566.

[7] *Key v. Key*, [2010] EWHC 408 (Ch.) (BaiLII).

> seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings. [References omitted] [8]

He went on to state, however, that:

> Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope. [9]

This is followed by a detailed examination of the evidence in the case of a 90 year-old testator, who had recently lost his wife of 65 years. Within two weeks after her death, he changed his Will in favour of his two daughters, both of whom had returned home to care for him immediately following their mother's death. While the changes may have resulted in a more equitable distribution of his estate, from an objective perspective, they nevertheless represented a marked departure from his earlier Will, in which his two sons were heavily favoured. The Court recognized that all family members had attempted to be as truthful as possible in their evidence, but the reliability of their views on their father's capacity was necessarily affected by the partiality which had inevitably developed between the sons, on the one hand, and the daughters, on the other. Outside evidence, including both legal and medical evidence, was therefore a critical factor in the Court's review.

In reference to the Golden Rule, however, the Court was critical of the solicitor, who took scant notes, failed to inquire more closely into the testator's circumstances and was, on the whole, "wholly unaware of the gravely deleterious effect upon Mr. Key's powers of decision-making constituted by the combined effects of cognitive impairment and the affective disorder caused by his bereavement."[10] Indeed, it is the Court's assessment of the effect of the testator's bereavement that is perhaps the most interesting aspect of this case. In essence, the Court recognized its potential to affect capacity by virtue of its impact on the testator's decision-making abilities. Though he was seemingly able to satisfy the first part of the *Banks v. Goodfellow* test, in the view of the Court, Mr. Key's bereavement made him unable to satisfy the second which requires a sound, disposing mind.

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[8] *Ibid.* at para. 7.

[9] *Ibid.* at para. 8.

[10] *Ibid.* at para. 82.

The following passage summarizes the analysis applied in finding the Will invalid for lack of testamentary capacity:

> Without in any way detracting from the continuing authority of *Banks v. Goodfellow*, it must be recognised that psychiatric medicine has come a long way since 1870 in recognising an ever widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision making, quite distinctly from old age and infirmity. The mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example recognised by psychiatrists, as both Dr. Hughes and Professor Jacoby acknowledged. The latter described the symptomatic effect of bereavement as capable of being almost identical to that associated with severe depression. Accordingly, although neither I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the *Banks v. Goodfellow* test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the 19th century.
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> *Banks v. Goodfellow* was itself mainly a case about alleged insane delusions. Many of the cases which have followed it are about cognitive impairment brought on by old age and dementia. The test which has emerged is primarily about the mental capacity to understand or comprehend. The evidence of the experts in the present case shows, as I shall later describe, that affective disorder such as depression, including that caused by bereavement, is more likely to affect powers of decision-making than comprehension. A person in that condition may have the capacity to understand what his property is, and even who his relatives and dependants are, without having the mental energy to make any decisions of his own about whom to benefit.[11]

Thus, in recognizing advancements in psychiatry, and in the understanding of various conditions and their impact on one's thoughts and decisions, *Key v. Key* serves to update the classic test for testamentary capacity in a way that seems more consistent with developments in the field since *Banks v. Goodfellow*. Arguably, however, this leaves a window wide open for a potentially endless variety of conditions which may have a similar effect on the testator's reasoning. This, in turn, would seem only to make the solicitor's task that much harder. Though the solicitor is not a medical

[11] *Ibid.* at paras. 95 and 96.

expert trained to assess these conditions, *Key v. Key* emphasizes the need for caution in any situation suggesting vulnerability.

Undue Influence

Undue influence is another element which affects the validity of a Will. A valid Will must reflect the actual intentions of the testator, but where undue influence has been exerted on the testator, the Will cannot be said to represent his or her free and unfettered wishes. In the *Canadian Law of Wills*[12], undue influence is described in the following terms:

> It is not enough to show mere persuasion; the influence exerted on the testator must amount to coercion to be undue influence. Coercion has been defined to mean that the testator has been put in such a condition of mind that if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it."

Undue influence must therefore be such as to overpower the free will of the testator. A Will that is the product of such influence cannot be considered valid since it is not a true representation of the testator's own wishes.

Although no particular relationship will automatically give rise to a presumption of undue influence, caution is nevertheless advisable where there exists a relationship with the testator in which another person is clearly dominant. The solicitor must be alive to factors which might suggest that such influence is at work, and must probe further in order to determine whether there is, in fact, an issue.

Suspicious Circumstances

Suspicious circumstances is a term used to describe a host of different factors which, in the context of a particular case, tend to cast a shadow on the validity of the Will, either because they suggest weakened capacity or, alternatively, because they bear on the issue of undue influence. Since it is a "catch-all" category, it is impossible to enumerate every conceivable circumstance that could be considered suspicious, but typical examples might include any one or more of the following:

- rapid physical or mental deterioration by the testator;
- preparation of the Will in secret;

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[12] Thomas G. Feeney, *Canadian Law of Wills*, 4th ed., looseleaf (Toronto: Butterworths, 2000) at p. 42.

- unusual dispositions, or dispositions that represent a marked departure from prior Wills; and
- involvement by beneficiaries in the Will preparation process.

The list is far from exhaustive, but serves to illustrate the types of factors which the Court will demand be addressed before a Will can be pronounced as valid.[13]

Knowledge and Approval

When a Will has been duly executed, the testator's knowledge and approval of the contents are presumed. However, where suspicious circumstances exist, this presumption is said to be spent and as a result, the suspicions must be removed by the party propounding the Will. In *Vout v. Hay*[14], the Supreme Court of Canada confirmed that the burden of proof rests on the propounders of a Will to remove any suspicion before the Will can be pronounced valid. In his decision, Sopkina, J. also addressed the extent of proof necessary to succeed in this regard, and stated that it would vary with the gravity of the suspicion and the circumstances. However, in the more recent case of *Re Henry*[15], Newbould, J., in *obiter*, questioned whether this pronouncement was still good law. Referring to the decision in *F.H. v. McDougall*[16], he noted that the Court's interpretation in that case favoured only one standard:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending on the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.[17]

In the end, Newbould, J. was not required to decide the point, but his comments may well suggest that the same level of scrutiny will be required regardless of the gravity of the circumstances.

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[13] See *Barry v. Butlin* (1838), 2 Moo. P.C. 480.

[14] [1995] 2 S.C.R. 876.

[15] 2009 CanLII 12329 (Ont. S.C.).

[16] [2008] 3 S.C.R. 41.

[17] *Ibid.* at para. 45.

Solicitor's Assessment

Armed with an appreciation of the necessary elements of testamentary capacity, it is the solicitor's responsibility to explore the testator's capacity, and to be satisfied that he or she can make a Will. In *Hall v. Bennett Estate*[18], the Ontario Court of Appeal confirmed that a lawyer's duty, when undertaking the preparation of a Will, is to inquire into the testator's testamentary capacity. As noted, the determination is ultimately one for the Court to make; however, the lawyer must make necessary inquiries and document the process appropriately so as to provide sufficiently useful evidence to assist the Court in its determination, if required. In this regard, the relevant test appears to be whether a reasonable and prudent solicitor could have concluded that the testator was capable of making a Will.[19]

When a solicitor concludes, after considering all the evidence, that the testator lacks capacity, but the testator still wishes to make a Will, it is a matter of judgment whether to proceed or not. Recognizing that the Court is the ultimate arbiter of the issue, all evidence of incapacity is mere opinion until the Court has ruled on the matter. For this reason, it is often said that the testator should be given the benefit of the doubt.[20] In *Scott v. Cousins,*[21] Cullity, J. provided this useful guideline to any solicitor faced with doubt in similar circumstances:

> Some of the authorities go further and state 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 of perfection and impose too heavy 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.[22]

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[18] *Hall v. Bennett Estate, supra* note 3 at para 22.

[19] The solicitor in *Hall v. Bennett Estate* had refused to make a death bed Will for the deceased, having not been satisfied that he consistently demonstrated the requisite capacity throughout the initial interview, despite lucid moments. The Court of Appeal, however, reversed this decision, confirming instead that the evidence of lack of testamentary capacity was overwhelming. Moreover, it was also noted that in any event, the solicitor had not accepted the retainer to prepare a Will. He had only agreed to meet with the individual to determine whether he could, in fact, take instructions, and ultimately concluded that he could not.

[20] Brian A. Schnurr, *Estate Litigation*, 2d ed., Vol. 2, looseleaf (Toronto: Thomson Carswell, 2007) at 21-7.

[21] (2001), 37 E.T.R. (2d) 113 (Ont. S.C.).

[22] *Ibid.* at para. 70.

In summary, a solicitor who is asked to prepare a Will for a client must understand the specific test for capacity to perform this task, and must make efforts to probe and question in order to gather sufficient evidence to substantiate testamentary capacity. These efforts will support the solicitor's own conclusions and will also provide useful evidence to assist the Court in its determination, should capacity ever be challenged.

With this background in mind, we can now consider, on a more practical level, the interview itself, the particular challenges it might present with an older client, and how best to address these.

CLIENT INTERVIEW

Time and Place

It is probably fair to say that regardless of the activity, most people tend to perform better when they are comfortable. This is certainly true for a client, particularly an elderly one, providing Will instructions to a lawyer. It follows that the lawyer for a testator should make every effort to ensure the client's comfort level. Much can be accomplished in this regard even before the actual interview takes place. For example, careful consideration should be given to the time and venue for the meeting. If the client has limited mobility, it may be preferable to meet in the client's home. Not only would this eliminate the need for potentially difficult transportation arrangements, but it would also ensure the client has the necessary support and comfort available and at hand.

As to time of day, ask the client in advance if there is a preference. Most people, regardless of age, function better at one time of day than another, so ideally, the meeting should take place at the client's preferred time.

Some thought should also be given to any special needs the client may have, and how these might be accommodated. A client who is visually impaired, for example, might benefit from large or bold typeface when reviewing documents. Similarly, a client who is hard of hearing will best follow a lawyer who speaks slowly, clearly and at a sufficient volume. If there is a stronger ear, it helps to sit on that side of the client. Indeed, clients will often make this request. It is generally easy to determine what will work best for the client by simply asking.

If a client has exhibited some short-term memory impairment (again, not itself a conclusive sign of incapacity), it is worthwhile calling before the meeting, as a reminder.

If the client is taking medication, some effort should be made to determine for what purpose and at what time it is taken, as well as any side effects the client may experience. This can also assist in determining the best time for the meeting by avoiding times when the client might be drowsy or, alternatively, in pain.

During the course of the interview, the client should be as physically comfortable as possible. Depending on circumstances, this may mean sitting in a favourite chair, or in a favourite position at a table, or being seated up, well supported, in bed. The client should also be well hydrated, with water handy.

Discussion with Client

Since it is the solicitor's duty to make an initial assessment of capacity before proceeding, it is useful to establish a "baseline", by which to gauge information pertaining to the Will. This can usually be accomplished through initial discussions with the client about other matters. Talking about current events, and engaging in general conversation about the client's family, friends, health and pursuits, will assist the lawyer in assessing the client's orientation as to time, place and person. It can also give a good indication of the client's general comprehension and responsiveness. If there is already a pre-existing solicitor/client relationship, the conversation will also provide an opportunity to assess whether there has been a change in the client's ability to communicate, reason or recall. Caution, however, is always necessary since "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 and some degree of appreciation as a whole".[23] In other words, simply being able to carry on a conversation will not itself establish testamentary capacity. In fact, it has been noted that:

[23] *Leger v. Poirier*, [1944] S.C.R. 152 at 162.

> The personality of old people is often well-preserved and, at a casual interview, they may give every appearance of being capable of making a will although, in fact, they lack capacity.[24]

However, casual conversation will give the lawyer a general sense of the client's understanding and cognition, which will assist in framing the balance of the interview. It will not, of course, obviate the need to question the testator specifically on issues relating to the Will, or to sufficiently probe the answers given.

Leading questions should be avoided, wherever possible, since they offer no opportunity to assess the client's independent thought and comprehension. A person with weakened mental capacities may be more suggestionable, in which case, an answer to a leading question will not cut to the root of their own views and intentions. Better, instead, to ask open-ended questions and permit the client an opportunity to respond in his or her own words. Questions and concepts should be kept reasonably simple, however, so that the client has an opportunity to focus on one specific issue at a time.

Just as a lawyer should avoid suggesting an answer to a client, so too should he or she avoid accepting all answers at face value. Rather, responses should be questioned and tested, so as to understand the thought process behind a client's instructions or, the motivation behind certain behaviours, particularly where these may not seem objectively logical.[25] Open-ended questions will assist in this regard, offering the client an opportunity to explain. Examples of such questions might include the following:

1. Can you tell me the reason(s) that you decided to make the changes in your Will?
2. Why did you decide to divide the estate in this particular fashion?
3. Do you understand how individuals might feel, having been excluded from the Will or having been given a significantly less amount than previously expected or promised?
4. Do you understand the economic implications for individual B of this particular distribution in your Will?

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[24] *Scott v. Cousins, supra* note 21 at para. 73, quoting from Sir. E.V. Williams, Clifford Mortimer, J.H.G. Sunnucks, *eds. Williams, Mortimer and Sunnucks: Executors, Administrators and Probate*, 17th ed. (London: Sweet & Maxwell, 1993) at 163.

[25] See *Re Koch* (1987), 33 O.R. (3d) 485 (S.C. Gen.Div.).

5. Can you tell me something about the important relationships in your family and others close to you?

6. Can you describe the nature of any family or personal disputes or tensions that may have influenced your distribution of assets?[26]

Presence of Others at the Meeting

As a counsel of perfection, it is preferable, in most instances, to meet with the testator alone. This offers the best opportunity to ensure the independence of the information and instructions provided, and allows the solicitor to explore issues of influence, as appropriate, outside the presence of anyone who may be exercising it. However, meeting alone is no guarantee that the client is not still subject to influence, or sufficiently conditioned to it that even outside the presence of the perpetrator, they fear expressing their own wishes. By the same token, the presence of someone else at the client interview is by no means an automatic sign that undue influence is at work.[27] There are many instances in which the presence of another, even one who may be in a position to exercise such influence, is necessary for the comfort and welfare of the client. One such obvious person may be an adult child. In many instances, a child may have assumed primary responsibility for the care of an elderly parent, who naturally comes to rely on their son or daughter for their basic needs. To have them present at a meeting, or just accessible in a room close by, may well give the client a greater sense of security, knowing support is at hand. On a more practical level, it could also be the case that a client with mobility impairment will have to rely on the child to retrieve certain records or documentation required as part of the discussion with the lawyer. These are the sorts of issues that the lawyer will necessarily have to assess. In any situation where there is a genuine concern, however, it would be appropriate to request that the child (or other person) not be in the room at the time the interview takes place. If the client insists, the lawyer should proceed, but should make clear and careful observations of the testator's behaviour, and ensure that responses come from the client, not the other person present.

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[26] Kenneth I. Shulman, Carole Cohen, Felice Kirsh and Ian Hull, "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007) Am. J. Psychiatry 772.

[27] See, e.g., *Sappier v. Canada (Indian Affairs and Northern Development)* (2007), 309 E.T.R. 306, 2007 F.C. 178 (CanLII) in which the testator received assistance in the preparation of her Will from family members who benefitted under it. An allegation of undue influence was raised, but in considering all the evidence, the Court found that it fell short of establishing that the testator was coerced by one or all of those present.

When in Doubt

As with the issue of capacity, the client is certainly entitled to the benefit of the doubt but if there are indicia of influence, coupled with other classically suspicious circumstances, it is advisable to probe further in order to verify the information given, and the independent thought and intention behind it. Ultimately, whatever determination is made should be documented, and supported by another if possible. If, for example, the other person present tends to take charge of the conversation, or if the client defers to the other for response, or for confirmation of a response given, this may signal the need for a private and independent conversation. So, too, may a change in attitude or demeanour in the presence of that other person. A concern should also arise if the other person makes it difficult to arrange a meeting alone with the testator.[28] In the end, the lawyer must make the final judgment call and take the best steps possible in the circumstances to obtain independent instructions.

There are a number of such steps which the solicitor could consider to confirm the determination in cases of doubt, or even cases where it is possible that issues may arise subsequently. These may include any one or more of the following:[29]

Notes of Meeting

It is trite to say that the lawyer must keep meticulous notes. Ideally, these should be created contemporaneously with the client meeting, or shortly thereafter. Such notes should record not only the testator's specific instructions, but also the details of the conversation between the parties, including reference to matters discussed that were not related directly to the estate planning exercise. In the end, if a determination of capacity or undue influence needs to be made by the Court, these details will be of greater value than a bold conclusion by the solicitor that the testator had capacity and that undue influence was not a factor.[30] This was also discussed by Cullity, J. in *Scott v. Cousins* in which he stated:

> The obligations of solicitors when taking instructions for wills have been repeatedly emphasized in cases of this nature. At the very least, the solicitor must make a serious attempt to

[28] Other such circumstances may include the client's isolation from others, dramatic changes in prior dispositions, without a valid explanation, or favouritism toward the other person in particular.

[29] See Brian A. Schnurr, *supra* note 20 at 21-11-21-12.

[30] *Ibid.*

> 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.[31]

Assistance from Colleagues

In addition to documenting discussions, a solicitor may wish to engage the assistance of another colleague who can provide an independent view of the testator's capacity, the presence or absence of undue influence and any other factors relevant to the validity of the Will. In such cases, it would be useful for both solicitors to meet with the client and to prepare independent memoranda to retain in the file.

Recording the Process

Some solicitors find it useful to record meetings with the client to substantiate their notes and recollections, and ultimately to provide objective, independent evidence of the testator's condition. Clearly, it would be necessary to obtain the consent and approval of the client before doing so, and to verify the recording procedure so as to preclude, in advance, any objection that the recording may have been doctored in any way.

Capacity Assessments

In cases of doubt, or where there is a real risk of challenge, it may be useful to obtain confirmation from the client's doctor, or other care providers, of his or her condition. This may take the form of a simple letter or acknowledgment from a general practitioner for the client, or may instead be in the form of a more formal assessment. As noted by Harvey, J. in the case of *Danchuk v. Calderwood*[32]:

> Whether the testator's mind was sound is a practical question. It does not depend on scientific or medical definition. Medical evidence is not required nor necessarily conclusive

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[31] *Scott v. Cousins*, *supra* note 21 at para. 70.

[32] (1996), 15 E.T.R. (2d) 193 (B.C. S.C.).

> when given. The question may be answered as well by laymen and good sense.[33]

Again, the key is to provide the best evidence possible. If this requires a more formal capacity assessment, it could take the form of an assessment under the *Substitute Decisions Act, 1992*[34] ("SDA") or alternatively, could consist of a private assessment arranged through a qualified physician. Either option has implications. In the case of an SDA, an assessment, a finding of incapability could, in turn, trigger a statutory guardianship under Section 17.[35] By contrast, an assessment performed by a qualified physician will not have such immediately formidable consequences. However, there nevertheless remain certain fundamental rights at issue since a finding of incapability could have a ripple effect for the client's financial management generally and, specifically, for their ability to make a Will.

Assuming the client understands and agrees to it, the principal benefit of an assessment is the contemporaneous evidence of capacity it provides, in contrast to a retrospective assessment (which may be required post-mortem, based on the best information available at the time of the testator's death). While the conduct of the assessment itself is clearly within the realm of the medical profession, it is important for the solicitor to be aware of two things in particular. First, the comments made relating to the ideal conditions for the client interview apply equally to the assessment. The client should be comfortable and should be given the best opportunity to perform at their peak. Second, the lawyer does have an important role to play in arranging for the assessment. In this regard, not only is it critical to choose the right professional, with the necessary background, qualifications and experience, but it is equally important to ensure that this person is properly instructed on the nature and purpose of the assessment required. This will usually necessitate a detailed discussion beforehand about the specific test for capacity to make a Will, so as to ensure that the assessor understands the purpose behind the assessment and conducts it accordingly.

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[33] *Ibid.* at para. 113.

[34] S.O. 1992, c.5.

[35] This process is not the focus of this paper.

Mini-Mental State Examination

It is also worth mentioning one further step that a solicitor could consider taking. Specifically, this involves the administration of the Mini-Mental State Examination ("MMSE"). The MMSE is a short cognitive screening test which evaluates basic mental functioning in areas such as orientation, recall, and ability to write and calculate numbers. It is scored out of 30 and generally, any score below 26 suggests some level of impairment.[36]

Arguably, the MMSE has its limitations. First, it is not a test of decisional capacity in the legal context[37], although it does provide yet another piece of relevant evidence for a Court to consider in making the ultimate determination of capacity. The results of the test, however, may not identify the actual ability of the client to create a Will or to satisfy the criteria for testamentary capacity. Moreover, lawyers are typically not trained in administering the test or, indeed, in interpreting its results.[38] A language barrier could skew a score, and the test is not necessarily reliable for those who are illiterate or who have learning disabilities.[39] Finally, there are limitations based on the ability of the MMSE to track cognitive changes over time. Nevertheless, many practitioners still prefer to have such a test in the file, for others to interpret, if and when required.

In summary, it is necessary for the solicitor to test and record his or her conclusions in an appropriate fashion since case law has made it clear that the failure to do so can lead to liability. Such liability is typically premised on the argument by a disappointed beneficiary that had the solicitor provided appropriate evidence to substantiate capacity, or lack of undue influence, the Will (and hence, his or her bequest) might not have failed.[40] Any of the following might therefore constitute an actionable omission on the part of the solicitor:

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[36] Shulman, Cohen, Kirsh and Hull, *supra* note 26.

[37] Judith Wahl, Capacity and Capacity Assessment in Ontario, online: http://www.practicepro.ca/Practice/PDF/backup_capacity.pdf.

[38] *Ibid.* at p. 3.

[39] Hull and Hull LLP, "Limitations of the Mini-Mental Status Examination", online: http://estatelaw.hullandhull.com/2009/02/article/topic/estate-trust/limitations-of-the-minimental-status-examination/.

[40] See M.M. Litman and G.B. Robertson, "Solicitors' Liability for Failure to Substantiate Testamentary Capacity" (1984) 62 Can. Bar. Rev. 457.

- Failure to obtain a mental status examination
- Failure to interview the client in sufficient depth
- Failure to properly record or maintain notes
- Failure to ascertain the existence of suspicious circumstances
- Failure to react properly to the existence of suspicious circumstances
- Failure to provide proper interview conditions
- The existence of an improper relationship between the solicitor and the client (e.g. preparing a Will for a relative)
- Failing to take steps to test for capacity[41]

CONCLUSIONS

Capacity issues are complex. They are also becoming increasingly prevalent in an aging population. Add to this the fact that what constitutes capacity will differ depending on the specific task in question, and the result is a confusing melange of diverse ingredients, with no detailed recipe to follow. As such, particularly in the estate planning context, there is much to be gained from the multi-disciplinary perspective afforded by both the medical and legal professions. While the ultimate determination of testamentary capacity is a matter for the Court to decide, valuable evidence can be provided by both a testator's doctor and lawyer. Such evidence is typically gathered from meetings, discussions and interviews with the testator, thereby underlining the importance of these interactions. How, when and in what circumstances they are conducted can either supply such necessary evidence, or alternatively, can deprive the Court of its benefit, in either case influencing the outcome for the testator and for his or her beneficiaries. Thus, equally as important as the test for capacity are the steps taken to gauge it and the efforts made to document such steps. Just as the test for capacity is itself task-specific, and therefore necessarily fluid in nature, so too are these steps, some of which may prove more useful or relevant when dealing with the older client. In any circumstance, however, a solicitor must rely heavily on personal judgment, making efforts to back this up with the best evidence available. The client interview is instrumental in both respects and should be approached and conducted accordingly.

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[41] *Ibid.*, as referred to in *Hall v. Bennett Estate*, *supra* note 3 at para. 26.

TAB 2a

Part 2: Establishing the Professional Relationship with the Older Client and their Family

Issues and Approaches to Interviewing the Older Client

Hilary E. Laidlaw, C.S.
McCarthy Tétrault LLP

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Special Lectures 2010
A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

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Issues and Approaches to Interviewing the Older Client

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McCarthy Tétrault LLP

Barbara Clive M.D., FRCPC
Credit Valley Hospital

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Variability of Aging

Barriers to Communication

- Hearing loss
- Visual loss
- Cognitive changes

3

Hearing Loss:

24%	65 – 74 yrs
40%	$\geq$ 75 yrs

- Usually bilateral and high frequency sounds

4

- Ask about hearing aid or use Pocket Talker
- Sit face-to-face
- Light on your face
- Remove background sound
- Enunciate clearly with only slight increases in volume
- Adjust pace of interview
- As "yes/no" questions

5

Vision Loss

- Ask if wear reading glasses
- Good lighting
- Larger print documents

6

The Doubling Rule (Think 2) For Dementia Risk

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< 65	1%
65	2%
70	4%
75	8%
80	16%
85	32%

- Risk Doubles every 5 years.

- But each additional risk factor approximately doubles the risk

- +ve family history doubles the risk.

Mini-Mental State Exam

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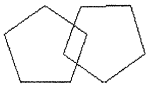
The Mini-Mental State Exam

Patient _____ Examiner _____ Date_____

Maximum	Score	
		Orientation
5	( )	What is the (year) (season) (date) (day) (month)?
5	( )	Where are we (state) (country) (town) (hospital) (floor)?
		Registration
3	( )	Name 3 objects: 1 second to say each. Then ask the patient all 3 after you have said them. Give 1 point for each correct answer. Then repeat them until he/she learns all 3. Count trials and record. Trials _____
		Attention and Calculation
5	( )	Serial 7's. 1 point for each correct answer. Stop after 5 answers. Alternatively spell "world" backward.
		Recall
3	( )	Ask for the 3 objects repeated above. Give 1 point for each correct answer.
		Language
2	( )	Name a pencil and watch.
1	( )	Repeat the following "No ifs, ands, or buts"
3	( )	Follow a 3-stage command: "Take a paper in your hand, fold it in half, and put it on the floor."
1	( )	Read and obey the following: CLOSE YOUR EYES
1	( )	Write a sentence.
1	( )	Copy the design shown.



____ Total Scoury

ASSESS level of consciousness along a continuum _____

Alert Drowsy Stupor Coma

(From Folstein, M.E. and Folstein, S.E. Mini-mental state: A practical method for grading the cognitive state of patients for the clinician. *Journal of Psychiatric Research* 12:189-198, 1975. Reprinted with permission of Pergamon Journals Ltd.)

Clock

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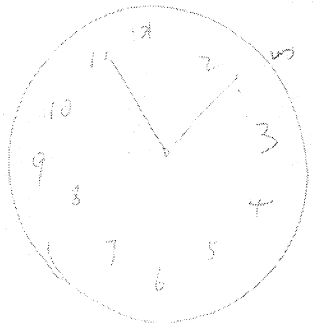

Signature: _____ Date: 4/05

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MONTREAL COGNITIVE ASSESSMENT (MOCA)

Date of birth :
Education :
Sex :

NAME :
DATE :

VISUOSPATIAL / EXECUTIVE	CLOCK (ten past eleven)	/3
NAMING		/3
MEMORY	FACE VELVET CHURCH DAISY RED	/5
ATTENTION	Subject has to repeat them in the forward order: 2 1 8 5 4 Subject has to repeat them in the backward order: 7 4 2 F B A C M N A A J K L B A F A K D E A A A T A M O F A A B Serial 7 subtraction starting at 100: 93 86 79 72 65	/6 /1 /3
LANGUAGE	Repeat : I only know that John is the one to help today The cat always hid under the couch when dogs were in the room Fluency / Name maximum number of words in one minute that begin with the letter F	/2 /1
ABSTRACTION	Similarity between e.g. banana - orange = fruit; train - bicycle; watch - ruler	/2
ORIENTATION	Date Month Year Day Place City	/6
	TOTAL	/30

Geriatric Depression Scale

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Date / /	Please tick ✓
1. Are you basically satisfied with your life?	Yes ☐ No ☐
2. Have you dropped many of your activities and interests?	Yes ☐ No ☐
3. Do you feel that your life is empty?	Yes ☐ No ☐
4. Do you often get bored?	Yes ☐ No ☐
5. Are you in good spirits most of the time?	Yes ☐ No ☐
6. Are you afraid that something bad is going to happen to you?	Yes ☐ No ☐
7. Do you feel happy most of the time?	Yes ☐ No ☐
8. Do you often feel helpless?	Yes ☐ No ☐
9. Do you prefer to stay at home, rather than going out and doing things?	Yes ☐ No ☐
10. Do you feel you have more problems with memory than most?	Yes ☐ No ☐
11. Do you think it is wonderful to be alive now?	Yes ☐ No ☐
12. Do you feel pretty worthless the way you are now?	Yes ☐ No ☐
13. Do you feel full of energy?	Yes ☐ No ☐
14. Do you feel that your situation is hopeless?	Yes ☐ No ☐
15. Do you think that most people are better off than you?	Yes ☐ No ☐
TOTAL SCORE	

11

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Activities of Daily Living

- Ambulation/transfers
- Dressing
- Eating
- Toileting
- Bathing

12

13

Instrumental Activities of Daily Living

- Shopping
- Housekeeping
- Finances
- Food preparation
- Transportation

14

Driving and dementia

References

- Folstein MF, Folstein SE, McHugh PR (1975) Mini-Mental State: A practical method for grading the state of patients for the clinician, Journal of Psychiatric Research, 12: 189-198
- Ziad S. Nasreddine, MD, et al. The Montreal Cognitive Assessment, MoCA: A Brief Screening Tool For Mild Cognitive Impairment. JAGS 2005;53:695-699.
- Yesavage J.A., Brink T.L., Rose T.L. et al. Development and validation of a geriatric depression screening scale: a preliminary report. J. Psychiatry. Res. 1983; 17:37-49.
- Herrmann, N., M.D., FRCP(C) , Silver, I, M.D., FRCP(C) (1991) The Geriatric Cognitive Screen for Medical Students
- Lachs, MS, M.D., et al, (1990) Annals of Internal Medicine. A Simple Procedure for General Screening for Functional Disability in Elderly Patients
- Capwell, RR et al., November 1982 Modern Medicine of Canada. The clinical history and physical examination in the older patient