TAB 5

Part 3: Protecting Yourself While Serving Your Clients

The Standard of Care for Lawyers Engaging in Estate Planning

Mary L. MacGregor
Dickson MacGregor Appell LLP

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

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CONTINUING LEGAL EDUCATION

2010 SPECIAL LECTURES - SOLICITOR'S DUTY OF CARE

Mary L. MacGregor
DICKSON MacGREGOR APPELL LLP
Barristers & Solicitors
306-10 Alcorn Avenue
Toronto, Ontario
M4V 3A9
Tel: 416-927-0891 ext. 124
Fax: 416-927-0385
Email: macgregor@dicksonlawyers.com

I. Purpose of this Paper

A Will is invalidated on a Will challenge. The lawyer who made the Will could not substantiate the client's capacity to make this Will due to negligence and breach of his or her duty of care. The disappointed beneficiaries are robbed of the evidence they need to substantiate capacity, and therefore the Will which might well have been valid fails.

This paper is not an extensive examination of the law relating to testamentary capacity. Nevertheless, it is basic to the understanding of the lawyer's duty of care because the lawyer will be liable to disappointed beneficiaries if the lawyer's breach of his or her duty has caused the Will to be declared invalid when the lawyer's neglect deprives the proponents of the Will of the evidence which might have proved capacity. The onus will be on the lawyer to show his or her neglect was not the cause of the beneficiary's loss. This is a very difficult duty to be discharged.

II. Testamentary Capacity

Numerous cases have dealt with the question of testamentary capacity. It has often been repeated that a testator must have a "sound and disposing mind" to make a valid Will. A discussion of the cases follows, but essentially, the following five requirements for a sound and disposing mind are as follows:

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

(b) the testator must recollect the nature and extent of his or her property;

(c) the testator must understand the extent of what he or she is giving under the Will;

(d) the testator must remember the persons that he or she might be expected to benefit under the Will;

(e) the testator must understand the nature of the claims that may be made by persons he or she is excluding from the Will.

The test to be met to prove testamentary capacity is a high one and the onus falls on the person propounding the Will. It is not enough to show that a testator had the ability to communicate his or her testamentary wishes, but that these wishes must be shown to be the product of a sound and disposing mind. You are referred to the following cases:

(a) ***MENZIES*** v. ***WHITE*** (1862), 9 Gr. 574 at p. 576 says : "....that sane memory for the making of a Will is not at all times when the party can speak, read, or write, or had life in him, nor when he can answer to anything with sense, but he ought to

have judgment to discern, and to be perfect of memory; that it is not sufficient that the testator be of memory when he makes his Will, to answer familiar and usual questions, but he ought to have a **disposing memory** (*emphasis mine*), so as to be able to make a disposition of his property with understanding and reason, and that such a memory which the law calls sane and perfect memory."

(b) ***MURPHY*** v. ***LAMPHIER*** (1914), 32 OLR 287 (Div. Ct.) affirmed on appeal. The plaintiffs were seeking to establish, as the Will of the deceased, a Will executed a year before the deceased died at the age of 80, at a time when she was frail and progressively impaired. The Will was a sweeping change from her earlier Will. In addition to the case providing guidance for identifying the necessary elements that constitute capacity (*see above*), it is also useful for appreciating that the mere capacity to communicate testamentary wishes is not determinative of the issue. The court said "the testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extend of his property and that nature of the claims of others whom by his Will he is excluding from all participation in that property". In part this Will failed because of the inadequacy of the test of capacity employed by the solicitor who had not probed the testatrix to ascertain her powers of recollection.

(c) ***LEGER*** v. ***POIRIER***, [1944], SCR 152. Mr. Justice Rand said that there was no

doubt that it is possible to have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters...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. Merely to be able to make a rational response is not enough nor 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."

(d) ***SCOTT*** v. ***COUSINS*** (2001), 37 ETR (2d) 113 (Ont. SCJ) Mr. Justice Cullity said that the profession has been warned on numerous occasions that the fact that an elderly person suffers from a form of dementia, and has lost capacity, may not be immediately apparent to those who are not closely associated with her. And he quoted the Murphy case as follows: 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 persona greatly infeebled 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 touching his worldly substence and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty.

III. Role of Suspicious Circumstances

I am greatly indebted to a paper published by M.N. Litman and G.B. Robertson nearly 30 years ago entitled ***Solicitor's Liability for Failure to Substantiate Testamentary Capacity*** (1984), 62 CAN. BAR REV. 457. The authors say "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 (at page 470). And at page 474, "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.

IV. Common Errors

Litman and Robertson then identify solicitors' common errors that have either been the

subject of criticism by the courts or the basis of liability for professional negligence in the preparation of a Will.

These include:

a. the failure to obtain a mental status examination;

b. the failure to interview the client in sufficient depth, the failure to properly record or maintain notes;

c. the failure to ascertain the existence of suspicious circumstances ;

d. the failure to react properly to the existence suspicious circumstances;

e. the failure to provide proper interview conditions; (eg the failure to exclude the presence of an interested party);

f. the existence of an improper relationship between the solicitor and the client (eg. preparing a Will for a relative); failing to take steps to test for capacity.

HALL v. ***BENNETT***. 2003 CanLII 7157 (Ont. C.A.): This case very succinctly shows the issue of lucidity versus capacity, which was referred to at length in ***Menzies***, ***Murphy***, and ***Leger***. Briefly, in the case of ***HALL*** v ***BENNETT***, the solicitor had been found at trial to be liable to a prospective beneficiary for his failure to prepare a Will in accordance with instructions given to him by a terminally ill patient in a hospital. The solicitor did not prepare the Will because, in his assessment, the instructions were incomplete and the patient lacked testamentary capacity. At 8:00 am, the lawyer was called by a social worker requesting that he attend at the hospital to see a terminally ill

patient who wished to make a Will. He agreed and on the way to the hospital purchased a Will form in case he had to act quickly. The social worker was present in the hospital room. The nurse on duty was also in the hospital room. Neither the lawyer nor the social worker had ever met the patient, Bruce Bennett, before that day. The nurse had been taking care of Mr. Bennett during his hospital stay and simply knew him as the operator of a store in the area. The only thing that the lawyer knew about Bennett was that he had been informed that Bennett was terminally ill.

The interview lasted 65 minutes. Bennett kept drifting in and out of consciousness and could be roused by loud voices and hand squeezing. The lawyer left without having prepared a Will because in his view he could not safely draw a Will. Bennett did not have a complete sense of what was to happen to his estate and would not have been able to maintain alertness long enough to review and execute a Will. Bennett died that evening, intestate.

Bennett had been able to say that he was estranged from his daughter and grandchildren. He did not know that his daughter had predeceased him. He left $100.00 to each of his daughter and granddaughter. He left a legacy to another family member and his store to the respondent in the proceedings, Peter Hall.

The evidence of both the lawyer and the nurse was that Mr. Bennett was capable of making simple directives, as set out above, but with regard to any complex thoughts

regarding his net assets, debts, or the exact value of the property or the bank accounts, he did not have any real capacity. He did not understand that if he could not say what he wanted with the residue of his estate his daughter would inherit everything that was not specifically given. He did not seem to care.

The very well known Dr. Michel Silberfeld, and our co-chair, Brian Schnurr, gave expert evidence.

Dr. Silberfeld said that among other things, some physical conditions are compelling with respect to a person's capacity. One of them is the question of consciousness. He said "if a person is not conscious, clearly he cannot express wishes. If he is drifting in and out of consciousness, that means that his brain is severely impaired to the point that he is not aware either of himself or his surroundings and I believe that with that kind of evidence being evident to "the lawyer", I think it was compelling for him that there were compelling reasons on the grounds of his disability for the lawyer to doubt Mr. Bennett's capacity.

When asked whether the lawyer should have contacted a doctor, Dr. Silberfeld was doubtful that any expert opinion on Bennett's mental capacity could have been formed given Bennett's extreme state.

Brian Schnurr testified, quoting from the case, that it was his opinion that the lawyer

"...owed a duty to Hall to use reasonable skill, care and competence to attempt to ascertain the testator's wishes and to give effect to those wishes in a Will if that was possible to do". In his view, the lawyer did not obtain sufficient information to prepare a Will. It was also his view that the lawyer's conduct accorded with the requisite standard of care of a reasonable and prudent solicitor."

V. The Lawyer's Duty in a Contract

No duty of care can arise with respect to the preparation of a Will in the absence of a retainer between the solicitor and the client. The retainer is usually the very basis of the relationship. Insofar as the client is concerned, the absence of a retainer will usually be a determinative, and no duty of care will arise in respect of the preparation of the Will. There can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform.

If the solicitor does undertake the retainer, his or duty of care is owed primarily to the client in performing the work for which he or she was retained. The solicitor who is negligent may be liable not only in contract to the client but also in tort in respect of others to whom a duty of care can be shown to exist. We will examine that duty of care.

VI. The Lawyer's Duty in Tort

Insofar as the potential liability and negligence to a third party is concerned, the existence of a duty of care will depend on the presence of both foreseeability and proximity.

In the absence of a retainer, the injury to the third party beneficiary by the failure to make a Will may still be foreseeable, but absent exceptional circumstances, there would be insufficient proximity between the parties to give rise to a duty of care.

Primarily, the lawyer's duty of care means executing the basic tasks necessary to effect a valid Will - proper attestation by competent witnesses, adducing and documenting evidence about testamentary capacity - because part of the solicitor's general duty is to support his client's will.

In ***MAW*** v. ***DICKEY*** (1974), 52 DLR (3d) 178, a decision of then Ontario Surrogate Court, the duty was described as follows:

> Might not a careful and experienced solicitor consider what he might at some later time be called upon in court or otherwise to relate the circumstances surrounding the drawing and execution of the Will. What better way to refresh his memory than from notes he made at the time interview. The duty he owed to his client was to properly support, at a later date if necessary, the Will - once he was sure it expressed the sane and intended wishes of his client. I therefore find a specific duty on the part of the solicitor to ask questions in order to satisfy himself that his client had testamentary capacity and a duty to reduce to some permanent form his impressions.

Litman and Robertson reminds us that when suspicious circumstances are present (meaning any circumstances surrounding the execution and the preparation of a Will which alone or together cast doubt upon the testator's capacity to make a Will and his knowledge and approval of the Will's contents.

Examples of suspicious circumstances include:

g. physical or mental disability or deterioration of the testator,

h. secrecy in the preparation of the Will,

i. "unnaturalness" of dispositions,

j. preparation or execution where a beneficiary is involved,

k. lack of control of personal affairs by the testator,

l. drastic changes in the personal affairs of the testator,

m. isolation from friends and family,

n. drastic change in the testamentary plan,

o. physical, psychological or even financial dependancy by the testator on beneficiaries.

Where suspicious circumstances are present, the onus remains with the person propounding the Will, but knowledge and approval of the contents of the Will is not sufficient; **affirmative evidence** of capacity is required.

Litman and Robertson refer to several cases which state that "there is a heavy burden on

the propounder of the Will to prove that the Will was executed by a testator who knew and approved of its contents and who, at the time, had testamentary capacity. The propounder's evidentiary burden varies with and is proportionate to the gravity and degree of suspicion" (page 471).

At page 471 they say "since the solicitor's obligation is to support the Will, one would expect that the solicitor's burden to substantiate capacity grows commensurately with that of the propounder. Indeed, this seems to be the thrust of ***MURPHY*** v. ***LAMPHIER*** (supra.) when Chancellor Boyd said that solicitors' duties vary with the situation and condition of the testator and, further, that the solicitor who is faced with suspicious circumstances must make "searching" enquiries as to his client's capacity.

In the case of ***EADY*** v. ***WARING*** (1974), 43 DLR (3d) 667, the Ontario Court of Appeal said that the law imposes a heavy burden on a solicitor confronted with "suspicious" circumstances and the conduct of the inquiries and responses thereto must be minutely surveyed to divine from the vantage point of hindsight how free and unfettered was the mind of the testator.

VII. Attempts to Extend the Duty

GRAHAM v. ***BONNYCASTLE*** (2004) ABCA 270 is a decision of the Alberta Court of Appeal. This case examined whether there is a duty of care owed to beneficiaries of a prior Will. The court found that there is no need to extend it to them because they can

challenge the new Will and because they do have a remedy, the law does not need to extend a duty of care to them. Madam Justice McFadyen said at page 7 "there are strong public policy reasons why the solicitor's duty should not be extended. The imposition of a duty to beneficiaries under a previous Will would create inevitable conflicts of interest. A solicitor cannot have a duty to follow the instructions of his client to prepare a new Will and, at the same time, have a duty to beneficiaries under previous Wills whose interests are likely to be affected by the new Will. The interests of a beneficiary under a previous Will are inevitably in conflict with the interests of the testator who wishes to change the Will by revoking or reducing a bequest to that beneficiary. ...A solicitor must be free to act in the best interests of her client when discharging her duties to make enquiries regarding the client's testamentary capacity without concerns about the interests of others. The decision as to testamentary capacity, which is a difficult one for the solicitor, should not be made more difficult by the unnecessary extension of duties to others. Concerns about law suits brought by beneficiaries under prior Wills could create the danger that solicitors would decide against the testator's interest in determining capacity, where any doubt arose as to testamentary capacity and previous Wills existed. Solicitors may reluctant to act for elderly testators who wish to change provisions of their Wills, if they may also be liable for damages to beneficiaries under previous Wills. ...There is not justification for imposing a duty on solicitors taking instruction from a testator for a new Will to protect the interests of beneficiaries under a former Will. There is not a sufficient relationship of proximity and there are strong policy reasons for refusing to recognize the existence of a duty. It is not fair, just and reasonable to impose

a duty.

HALJAN v. ***MERCER***, 2004 ABQB 670 (CanLII) This decision followed closely on the heels of ***GRAHAM*** v. ***BONNYCASTLE***. In this case, a disappointed executor and beneficiaries by **designation** were attempting to extend the liability of a negligent solicitor to themselves. The Master of Court of Queen's Bench said "What is clear from the cases is that a court may grant a remedy to a disappointed beneficiary where the interests of the testator and the disappointed beneficiary are in harmony and there is no possibility of conflict. It would be a drastic change to require solicitors to canvass the possibility that previously designated beneficiaries or executors might not be in agreement with the proposed changes in the new Will. To do that would confuse the law of Wills with the law of contracts." The court found that there was no such cause of action and dismissed the claim.

EARL v. ***WILHELM*** (2000), 189 Sask. R 71 (C.A) In this case a lawyer incorporated the testator's farming operation for tax purposes. Subsequently the same lawyer drafted a Will for the testator making several bequests of the farmland which had been transferred to the corporation. Those bequests were void and therefore residual beneficiaries inherited the land. The specific beneficiary successfully sued the solicitor for negligence.

VIII. The Preferred Evidence

Litman and Robertson say at page 472 that "where solicitors have properly grounded

their opinion as to their client's testamentary capacity, courts have accorded their views a very high degree of influence. ...Solicitors differ from other witnesses in that they have a specific appreciation of the legal notion of testamentary capacity. Unlike other witnesses, solicitors are under a legal duty to consider carefully whether capacity exists in a particular testator, and are duty bound to document their opinions. ...If a solicitor does his job conscientiously and properly it seems natural and correct that there should be extremely heavy reliance placed on his opinion. Where suspicious circumstances attend the preparation and execution of a Will, particularly where a testator is seriously ill or debilitated by a terminal illness which is capable of affecting his state of mind, the solicitor's evidence is especially crucial. ...The courts are interested in the testator's state of mind at the precise moment when instructions are given and/the Will is executed. In this situation the history of the testator's mental competence prior to his illness is irrelevant and therefore the observations and insights of persons who have interacted with the testator in his daily life become immaterial. The ill testator in his last days frequently has visitors who have an opportunity to observe his mental state but their impressions are usually general in the sense of not specifically being related to the various elements of testamentary capacity. Moreover, these persons tend to be interested parties whose evidence is not infrequently in conflict. Physicians and nurses will have observed the ill testator but too often their impressions are also general. Medical evidence tends to emphasize the deficiencies and weaknesses rather than the strength and abilities of the testator. In all these circumstances casual observation is simply not good enough. **What is required is a systematic assessment of the testator's capacity. Such an assessment**

should be conducted by the solicitor and if there are any doubts whatever, by a physician or psychologist at the solicitor's request. Moreover, the solicitor should prior to the assessment, convey to the physician or psychologist the content of the legal concept of testamentary capacity. This is all part of the solicitor's burden to ensure that all available means are utilized to ascertain that testamentary capacity exists. 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 suspicious circumstances. Few other circumstances demand of the solicitor greater care and caution."

However, it is not always the evidence of the lawyer, or indeed of the medical people, which carries the day.

Consider again *Leger v. Poirier*, supra, in which the issues of the mental capacity of an elderly, infirm woman to make her final Will and potential undue influence exerted on her by her son which if true would have prevented her from knowing and approving the contents of her Will.

Mr. Justice Rand commented on the behavior of the lawyer who came into the home of whose son had made all of the arrangements and had "pre-instructed" the lawyer about the terms and conditions of his mother's Will.

Mr. Justice Rand rejected the lawyer's evidence, preferring the evidence of the testator's young caregiver, Rose, and said , "Now, we know the intentions of this woman (Rose's evidence) as to the disposition of her property at a time when she was in good health and able to look after her own affairs, and that those intentions, so far as the evidence discloses them, continued up to the day of signing the impeached Will. Although the solicitor knew of her relatives, he made no inquiries of any sort regarding them, or her property, or an existing Will. His opportunity to judge her memory was of the most limited kind.... these facts cast on the whole case such doubt of the competency of the testatrix as... requires us to say that the onus of showing the document to be the will of a free and capable person have not been met".

The judge at first instance also rejected evidence by the medical doctor, Dr. Coffyn.

O'NEIL *v.* **ROYAL TRUST CO**. is an earlier decision of the Supreme Court of Canada[1946] S.C.R. 622. This case is an interesting lesson for husbands and wives to make mutual Wills. Mrs. Brown changed her Will after her husband died and felt so guilty about it for the rest of her life that she was tormented by hallucinations involving her disapproving husband. Her lawyer and her doctors were aware that she had what they called nervous conditions, and she had been declared at one .in capable of managing her affairs.

Mr. Justice Estey said, "That Mrs. Brown possessed certain hallucinations and delusions

of the type and character described by her (her doctor) must be conceded. The possession of such does not invalidate a Will unless they have brought about the will or constituted "an actual and impelling influence" in the making thereof. Her (doctor and her lawyers) were definitely of the opinion that Mrs. Brown was competent to make a Will. A perusal of the (the doctor's) evidence as a whole, including his admission, indicates that he believed she was competent to make the will. The credibility of all these witnesses is admitted. (The lawyer) had known Mrs. Brown over long years and had been consulted professionally by her as early as (20 years before) .... it is possible that a person may conduct herself in a very rational manner, even making a rational Will, and still be motivated and governed by insane delusions. That is the reason the authorities require that in such cases this all we have to **go below the surface** and determine if in fact the Will be or been not the result of a free and capable testator... in the determination on this fact, the contents of the Will and all the surrounding circumstances must be considered by the jury for the court called upon to arrive at the decision. If satisfied at the relevant time the testator was not impelled or directed by hallucinations or delusions and in possession of testamentary capacity, the will is valid".

IX. The Successful Beneficiary

Referring to the common errors and the cases which review these errors, most of the cases in which the Will was invalidated on the ground of incapacity, the court worded its conclusion in terms of failure to establish capacity. Litman and Robertson point out that "Even when the court makes an affirmative finding of incapacity this does not necessarily

mean that, if the solicitor had provided better evidence of capacity, the court's decision would still have been the same.

In order to establish causation, the beneficiary must prove, on a balance of probabilities, that had the solicitor discharged his duty properly the court would have concluded that the testator had capacity. In practice, however, it will be impossible for the beneficiary discharge the onus of proof. The evidence which he requires is unavailable because of the solicitor's negligence. He will be unable to prove what, if any, evidence of capacity the solicitor would have been able to aduce had he discharged his duty properly.

Because this evidence remains unknown, the beneficiary will be unable to prove whether the testator did in fact have capacity. Since the onus of proof of causation, according to traditional principles, rests with the plaintiff, the beneficiary's action seems doomed to failure."

X. The Ethical Issues

Litman and Robertson close their remarkable paper by saying "in view of the catalogue of errors committed by solicitors in recent cases, and of the potential liability arising therefrom, solicitors would be well advised to review the way in which they presently discharge their duty to substantiate testamentary capacity.

It is of very great discredit to the legal profession that the failure of a lawyer to

substantiate testamentary capacity could cause an otherwise valid Will to fail because of lack of evidence. The cost and human consequences of litigation can be enormous.

Mary L. MacGregor

April 2010