TAB 16

Part 6: How Vulnerable to Attack is a Power of Attorney and Will?

Capacity Assessments by the Drafting Lawyer

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16

Special Lectures 2010

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

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING LEGAL EDUCATION

CAPACITY ASSESSMENTS BY THE DRAFTING LAWYER*

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CAPACITY ASSESSMENTS BY THE DRAFTING LAWYER*

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Although superficially simple, problems involved in litigation concerning the establishment of a deceased person's will against attacks of lack of testamentary capacity, fraud and undue influence, are ... second to none in difficulty. While the Chief Justice of Canada has recently said in an appeal involving these questions that "the law is well established and well known",[1] the fact remains that judgments dealing with litigation of this kind abound in language that's hazy, obscure, and extremely difficult to reconcile.

-- Dr. Cecil A. Wright in "Wills – Testamentary Capacity – 'Suspicious Circumstances' – Burden of Proof", 1938, and quoted with approval by Justice Sopinka in *Vout v. Hay* [2]

1. INTRODUCTION

Dr. Wright's remarks underscore the difficulties facing judges in cases involving the determination of testamentary capacity. These difficulties derive from the fact that while it may be fairly simple and straightforward to set out principles of law defining testamentary capacity, it is often difficult to apply such principles to a given set of facts. Nevertheless, this task is expected to be accomplished every time a solicitor is asked to prepare a will for his or her client, especially in situations where the facts are not clear or the circumstances are less than ideal. The purpose of this paper is to consider which

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[1] *Riach v. Ferris* [1935] 1 D.L.R. 118 at pp. 118-19, [1934] S.C.R. 725.

[2] Dr. Cecil A. Wright, "Wills – Testamentary Capacity – 'Suspicious Circumstances' – Burden of Proof", *Canadian Bar Review* (Vol. XVI, 1938) at p. 405; *Vout v. Hay* (1995), 125 D.L.R. (4th).

steps should be taken by a solicitor to *minimize* the likelihood that the will he or she prepares will be litigated and *increase* the likelihood that the testator's wishes will be carried out. I propose to focus on the following:

(i) the test for testamentary capacity;

(ii) the role of medical experts' and lay persons' evidence;

(iii) how to satisfy the duty to substantiate testamentary capacity; and

(iv) consequences of breach of the duty to substantiate testamentary capacity.

2. Legal Requirements of Testamentary Capacity

A solicitor who prepares a will for his or her client has the duty to support the client's will.[3] A fundamental aspect of that duty is to ensure that the client has the requisite testamentary capacity to provide instructions for the preparation of the will.[4] This requires not only that the solicitor know the legal requirements for testamentary capacity but also that he satisfy him or herself that these requirements have been met. As pointed out by Jarman in his classic treatise on wills:[5]

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[3] *Peters Estate v. Ewert*, [2002] B.C.J. No. 2513 [hereinafter referred to as *Peters Estate v. Ewert*], at para. 83, quoting "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", (1984), 62 Can. Bar Rev. 457 [hereinafter referred to as "Solicitor's Liability for Failure to Substantiate Testamentary Capacity"], at p. 469.

[4] The solicitor preparing the will for a client must also ensure that during such preparation, the testator is not the subject of undue influence by a third party. While the concept of undue influence in the context of the validity of wills is certainly an important issue, an analysis of this concept goes beyond the scope of this paper.

[5] *Jarman on Wills*, 8th ed., at pp. 2073-7.

> Few of the duties which devolve upon a solicitor more imperatively call for the exercise of a sound discriminating and well-informed judgment, than that of taking instructions for wills .... it is [the] bounden duty [of the solicitor] to satisfy [himself] thoroughly as to the proposed testator's volition and capacity, or, in other words, that the instrument expresses the real testamentary intentions of a capable testator prior to its being executed *de facto* as a will at all.

(a) *Banks v. Goodfellow*[6]

Though each jurisdiction draws its definition of testamentary capacity from varying sources, they all refer back to the classic statement of what constitutes sufficient testamentary capacity to make a will from the British case of *Banks v. Goodfellow*.[7] In this case, the Court held that in order to make a valid will, a testator must be of "a sound and disposing mind", understand the nature and extent of the property of which he is disposing and be able to comprehend and appreciate the nature of the claims of others who might be expected to participate in his bounty.

Expanding on the statement in *Banks v. Goodfellow*, the Ontario Supreme Court (High Court Division) in *Murphy v. Lamphier*[8] explained which elements were necessary in determining that a person had "a sound and disposing mind" for the purpose of making a will. In this case, the testatrix was 80 years old when she executed her will – a year before she died and a time when she was frail and progressively impaired. There were a number of suspicious circumstances surrounding the execution of the will. The will was drafted: (a) during a temporary absence from her husband; (b) without reference to or communication with people whom the testatrix obviously trusted; (c) while she was in

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[6] (1870), L.R. 5 Q.B. 549 [hereinafter referred to as *Banks v. Goodfellow*].

[7] *Ibid.*

[8] (1914), 31 O.L.R. 287 (Ont. H.C.), affirmed (1914), 32 O.L.R. 19 (Ont. C.A.) [hereinafter referred to as *Murphy v. Lamphier*].

the hands and under the care of two married daughters who were dissatisfied with a former will and had recently sought to have it altered; (d) by an elderly person of nearly 80 years old; (e) by a solicitor who could not be regarded as an independent adviser and who was not chosen by the testatrix; and (f) made on the spur of the moment, where the method of testamentary disposition, developed since a previous will nine years earlier and consistent with every subsequent will since, was replaced by a method of distribution desired by the two daughters and other dissidents in the family. After examining all of the evidence, the Court concluded that the testatrix did not have the requisite testamentary capacity to make a will.

The decision in *Murphy v. Lamphier* provided useful guidance to subsequent courts for identifying the necessary elements that constitute "a sound and disposing mind":[9]

> 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 extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in that property.

Subsequent cases have clarified and built upon the necessary components to determine testamentary capacity. Cumulatively, they have held that in order to satisfy the test of testamentary capacity, an individual must possess the following elements:

- the ability to comprehend and recollect the nature and extent of one's property in general terms,[10]

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[9] *Murphy v. Lamphier*, *supra.* note 8, at p. 318 (Ont. H.C.).

[10] *Banks v. Goodfellow*, *supra.* note 6, at 556, referred to in *Duschl (Attorney of) v. Duschl Estate* [2008] O.J. No. 1422 at para. 78 [hereinafter referred to as *Duschl (Attorney of) v. Duschl Estate*]; *Re Culbert Estate*, [2006] S.J. No. 648 [hereinafter referred to as *Re Culbert Estate*], at paras. 123-4; *Palahnuk v.*

- the ability to understand the nature and effect of a will, on one's own initiative,[11]
- the knowledge of who might ordinarily expect to benefit from one's will,[12]
- the knowledge of the property that is being given to each beneficiary,[13] and
- the comprehension and appreciation of the nature of the claims of persons who are being excluded from the will.

No insane delusion may influence the testator's 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.[14] British and American courts have also specified that the mere fact that the testator was eccentric or was subject to delusions does not necessarily lead to a determination of testamentary incapacity. It must be shown that the delusion had, or was calculated to have, an influence on testamentary

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Kowaleski, 2006 CarswellOnt 8526 (Ont. S.C.J.) [hereinafter referred to as *Palahnuk v. Kowaleski*], at para. 64; *Re Fowler*, [1937] O.W.N. 417 (C.A.) [hereinafter referred to as *Re Fowler*]; *Scott v. Cousins*, (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.) [hereinafter referred to as *Scott v. Cousins*]. Testators who have little or no understanding of their assets because of medical ailment or disease will not have the requisite capacity to execute a will. (*Re Collicutt Estate* (1994), 128 N.S.R. (2d) 81 (N.S. Prob. Ct.) [hereinafter referred to as *Re Collicutt Estate*], referred to in *Re Culbert Estate*, *ibid.*, at para. 129.) However, they need not know the exact value of particular assets or their entire estate. (*Piasta v. St John's Cathedral Boys School* (1989), 62 Man.R. (2d) 50 (C.A.), referred to in *Re Culbert Estate*, *ibid.*, at para. 129; *Palahnuk v. Kowaleski*, *ibid.*, at para. 82.) The Court requires that a testator have an understanding that he or she holds certain types of property, and that a disposition in a will would provide a beneficiary with a valuable gift. A testator need not know the exact value of his residual estate. It is sufficient if he realizes that it may have substantial value. (*Pike v. Stone* (1999), 179 Nfld. & P.E.I.R. 218 (N.S.T.D.) at para. 39 and *Re Coughlan Estate*, 2003 PESCTD 64; (2003), 227 Nfld. & P.E.I.R. 193, referred to in *Re Culbert Estate*, *ibid.*, at para. 129.)

[11] *Banks v. Goodfellow*, *supra.* note 6; Re *Culbert Estate*, *ibid.*, at paras. 123-4 and 132; *Palahnuk v. Kowaleski*, *ibid.*, at para. 64.

[12] *Banks v. Goodfellow*, *supra.* note 6; *Re Culbert Estate*, *op. cit.*, at paras. 123-4; *Palahnuk v. Kowaleski*, *op. cit.*, at para. 64; *Re Fowler*, *op. cit.*.

[13] *Banks v. Goodfellow*, *supra.* note 6; *Re Culbert Estate*, *supra.* note 10, at paras. 123-4; *Palahnuk v. Kowaleski*, *supra.* note 10, at para. 64.

[14] *Banks v. Goodfellow*, *supra.* note 6; *Re Culbert Estate*, *supra.* note 10, at paras. 123-4; *Palahnuk v. Kowaleski*, *supra.* note 10, at para. 6.

dispositions.[15] British courts in particular have also noted that what may be mere eccentricity or foolishness in one person may be shown to amount to incapacity in another. Accordingly, eccentricity and foolishness may have to be judged on a review of the whole life of the testator,[16] and are disregarded by the courts unless accompanied by evidence of general conduct amounting to insanity.[17]

Furthermore, Canadian courts have specified that an individual may be able to make a will even if his or her mental capacity is impaired. That is, "perfection of mind" is not required to make a valid will.[18] Capacity may even be diminished almost to the point of non-existence, and yet still be sufficient to sustain the preparation of a will, especially where the alternative is intestacy.[19] Similarly, American courts have agreed that a testator's knowledge and understanding need not be perfect. For instance, in *Williams v. Vollman*,[20] the contested will was upheld even though the testator did not know that his wife and daughter had died. Also, in *Re Estate of Jenks*,[21] the Court declared a will to be valid even though the testatrix was unclear about the full amount of her estate.

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[15] *Banks v. Goodfellow*, *supra.* note 6; *Murfelt v. Smith* (1887) 12 PD 116; *Boughton v. Knight* (1873) LR 3 P & D 64 [hereinafter referred to as *Boughton v. Knight*]; *Smee v. Smee* (1879) 5 PD 84; Roger W. Andersen, *Understanding Trusts and Estates*, 3rd ed., (LexisNexis Group, Danvers, Mass.:2003) at pp. 33-34.

[16] *Austen v. Graham* (1854) 8 Moo PCC 493; *Mudway v. Croft* (1843) 3 Curt 671 [hereinafter referred to as *Mudway v. Croft*].

[17] *Wellesley v. Vere* (1841) 2 Curt 917; *Mudway v. Croft*, *ibid.*; *Frere v. Peacocke* (1846) 1 Rob Eccl 442; *Pilkington v. Gray* [1899] AC 401.

[18] *Banks v. Goodfellow*, *supra.* note 6.

[19] *Murphy v. Lamphier*, *supra.* note 8, at 126.

[20] 738 S.W. 3d 849 (Ky. Ct. App. 1987).

[21] 189 N.W. 2d 695 (Minn. 1971).

- where the testator is elderly or suffering from mental or physical disability or deterioration, it becomes a question as to whether the testator's mental faculties have so diminished as to result in a lack of testamentary capacity. In *Leger v. Poirier*,[22] it was pointed out that the mere ability to make rational responses or repeat a tutored formula of simple terms was not enough to prove testamentary capacity. Testamentary incapacity could be 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".[23]

This standard for proving testamentary capacity is, apparently, in the view of one judge, even higher than that required to commit crimes, enter into contracts or into the holy state of matrimony.[24] The standard is, however, not so high as to exclude eccentric wills. As pointed out by Justice Boyd in the case of *Murphy v. Lamphier*,[25]

> Once it is found that a man is of sound and disposing mind, it does not concern the court that the will is apparently just or unjust in its provisions. It may be whimsical or eccentric or inofficious; nevertheless, if the testator is competent, he may do what he will with his own; but if he is lacking in testable capacity and the surroundings of the will-making breed suspicions, then anything unusual or unnatural or revolutionary as compared with earlier wills may well be taken into account in testing the worth of the document claimed to be the last will.

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[22] [1944] S.C.R. 152 (S.C.C.), [1944] 3 D.L.R. 1.

[23] *Ibid.*, at pp. 11 - 12.

[24] *Boughton v. Knight*, *supra.* note 15; and see Feeney, *The Canadian Law of Wills*, 3rd ed., vol. 1, (Toronto: Butterworths, 1987) [hereinafter referred to as *The Canadian Law of Wills*] at p. 32.

[25] *Supra.* note 8; affirmed in *Re Culbert Estate*, *supra.* note 10, at para. 174.

Additionally, it is interesting to note that while the American legislatures and courts generally agree that the above components are necessary considerations in determining testamentary capacity, they have also added the requirement that the larger and more complex the testator's estate, the greater the capacity required.[26] I have not yet come across a similar requirement in Canadian and British statutory or common laws.

(i) Suspicious Circumstances

For over a century, British courts have consistently taken into account the presence of suspicious circumstances surrounding the preparation of a will in determining testamentary capacity,[27] though it is only over the past few decades have Canadian courts placed an emphasis on the existence of suspicious circumstances during will preparation. Such circumstances may individually or cumulatively cast doubt on the testator's ability to make a will or know and approve of its contents.[28] Examples of circumstances which the courts have found to be suspicious include clandestine preparation of a will, unnaturalness of the dispositions, dispositions which differ substantially from those of prior testamentary documents, preparation of a will by a person who benefits from the will or on instructions received from a beneficiary, the

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[26] Roger W. Anderson, *Understanding Trusts and Estates*, 3rd ed. (LexisNexis Group: Danvers, Mass.: 2003) at p.33.

[27] *Tyrrell v. Painton* [1894] P. 151 at 159; *Wintle v. Nye* [1959] 1 W.L.R. 284; *In the Estate of Fuld (No. 3)* [1968] P. 675 at 712; *Re Stott* [1980] 1 W.L.R. 246 (R.S.C., Ord. 76, r. 9(3); *Barry v. Butlin* (1838) 2 Moo.P.C. 480; *Paske v. Ollat* (1815) 2 Phillim. 323; *Greville v. Tylee* (1851) 7 Moo.P.C. 320; *Hagerty v. King* (1880) 5 L.R.Ir. 249, 7 L.R.Ir. 18; *Finney v. Govett* (1909) 25 T.L.R. 186; *Re a Solicitor* [1975] Q.B. 475.

[28] "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *supra.* note 3, at p.470; referred to in *Hall v. Bennett Estate*, [2003] O.J. No. 1827 (Ont. C.A.) [hereinafter referred to as *Hall v. Bennett Estate*], at para. 24.

presence of a beneficiary at the time instructions are received, isolation of a testator from family and friends and the testator's physical, psychological or financial dependence on a beneficiary.[29]

In determining whether suspicious circumstances are present, the Court looks at several factors, including:[30]

- whether the testator is elderly. On this topic, the Ontario Court of Appeal in *Hall v. Bennett Estate* affirmed the following statement by M.M. Litman & G.B. Robertson in their article "Solicitor's Liability for Failure to Substantiate Testamentary Capacity"[31]:

  > 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;

- whether the testator is experiencing physical or mental disability or deterioration;

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[29] Margaret Ramsey, "Testamentary Capacity and Undue Influence; A Solicitor's Standard of Conduct in Preparing Wills"; *Proceedings, Canadian Bar Association*, Jan. 1984 386 where Ms. Ramsey cites 64 different circumstances which the court found suspicious; and "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *supra.* note 3, at p. 470 and *The Canadian Law of Wills*, *supra.* note 24, pp. 44 – 53.

[30] Brian A. Schnurr, *Estate Litigation*, 2nd ed., vol. 1, looseleaf (Toronto: Thomson Carswell, 1994, updated 2002-Rel. 2) at 2-5, , referred to in *Re Culbert Estate*, *supra.* note 10, at para. 135; "Solicitors Liability For Failure to Substantiate Testamentary Capacity": "For an extensive list of suspicious circumstances see Margaret Ramsay's paper entitled "Testamentary Capacity and Undue Influence: A Solicitor's Standard of Conduct in Preparing Wills", published in Proceedings, Alberta Branch, Canadian Bar Association, mid-winter meeting, January 1984, p. 396. In this article the author lists sixty-four different circumstances which courts have found to be suspicious."; Lisbeth Hollaman, "Preparation of a Will – Duty Re Testamentary Capacity", 9th Annual Estates and Trusts Summit, The Law Society of Upper Canada Continuing Legal Education (November 2, 2006), at p.8, Ian M. Hull and Suzana Popovic-Montag, "The Standard of Care and Will Drafting – The Nature of the Retainer and its Impact on the Duty of Care in Estate Matters" at 3.

[31] *Supra.* note 3, at p. 474.

- whether there have been drastic changes in the personal affairs of the testator;

- whether the testator has experienced isolation from family and friends;

- whether the testator has suffered significant ill health;

- whether the testator is unwilling to provide the solicitor with full information relating to the assets, liabilities, or family condition circumstances;

- whether the will in question constituted a significant change from the former will(s). For instance, the will in question in *Murphy v. Lamphier* followed four other wills of the testatrix, one of which had been drawn 11 months prior to the will in question. The Ontario Supreme Court (High Court Division) remarked that the will was considerably different from all that preceded it. Because there were such remarkable changes from the four previous wills, the Court called for clear proof of capacity "equal not merely to some testamentary act, but to this important revocation of former dispositions and to a new direction given to the property";[32]

- whether the will in question generally seems to make testamentary sense;

- whether there is physical, psychological or financial dependency by the testator on any of the beneficiaries;

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[32] *Murphy v. Lamphier*, *supra.* note 8, at para. 24; referred to in *Petrowski v. Petrowski Estate*, [2009] A.J. No. 353 (A.B. Q.B.) [hereinafter referred to as *Petrowski v. Petrowski Estate*], at para. 84.

- whether a beneficiary was instrumental in the preparation of the will;[33]

- the extent of physical and mental impairment of the testator around the time instructions were given for the preparation of the will and during its execution; and

- the factual circumstances surrounding the execution of the will.

In cases where suspicious circumstances exist, in fulfilling his duty to support the will he has prepared, the solicitor must take extra precautions to satisfy not only himself, but ultimately the court, that the client has the requisite capacity to make the will. The breadth and depth of the inquiry required will increase in proportion to the existence of the suspicious circumstances. In the case of *Eady v. Waring*,[34] the Court of Appeal quoted the following passage from the trial judge's reasons for judgment:

> The Law imposes a heavy burden on a solicitor confronted with [suspicious circumstances] and the conduct of his 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.

(ii) Relevant Time for Testing Testamentary Capacity

In determining whether testamentary capacity exists, the question has arisen as to when in the will-making process the test should be applied. Put in other terms, if a person has capacity to give instructions to prepare a will, does his or her subsequent incapacity at the time the will is executed invalidate the document? This issue has

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[33] Note that, according to A.B. Moen, J. of the Alberta Court of Queen's Bench in *Petrowski v. Petrowski Estate*, *ibid.*, there is nothing in the law to suggest that a will cannot be executed in the presence of a beneficiary if the beneficiary is not a witness to the will (para. 98).

[34] (1974), 2 O.R. (2d) 627, 43 D.L.R. (3d) 667 (C.A.) at pp. 675.

arisen in situations where there is a rapid and major deterioration in the mental faculties of a testator after instructions have been given. The deterioration may be the result of the age of the testator or the malady from which he or she is suffering.

There are at least two critical times for gauging testamentary capacity–when the testator gave instructions regarding the contents of the will and when the will was executed. To determine the relative weight given to each of these times, reference should be had to the classic statement on this issue, found in the British case of *Parker v. Felgate*[35] where Hannen, J. stated,

> If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, 'I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.'

His Lordship went on to describe three possible states of mind which, if present at the time of execution of a will, would be sufficient to establish the validity of the will in circumstances where the testator had capacity to give instructions but lacked capacity at the time of execution. They are as follows:

(A) did the testator, at the time of execution, know and recollect all that he had done at the prior meeting with the solicitor where instructions were given?

(B) even if there was not recollection of every detail of what had transpired at the meeting, could it be said that if the clauses in the will were put before

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[35] (1883), 8 P.D. 171, at pp.173-4 [hereinafter referred to as *Parker v. Felgate*].

the testator, he could respond intelligently in the affirmative? (*i.e.*, did the testator know and approve of the contents of the will?); and

(C) even if the testator no longer had capacity to recall the whole transaction, would it be possible to say that the testator had sufficient capacity to say, in effect, that he had completed his business with the solicitor, trusted the solicitor to have embodied his instructions in proper words and accepted the paper as so embodying those instructions?

In His Lordship's view, even the minimal state of mind set out in the third instance would be sufficient to render a will valid in the circumstances outlined above. Similarly, British courts have held that if a will is shown to have been drawn in accordance with instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to execute as his will a document drawn in pursuance of those instructions though he is unable to follow all of its provisions.[36] This is true even if the testator is unable to remember the instructions he previously delivered and his signature was affixed by another person on his behalf.[37]

In an annotation to the case of *Re Seabrook*[38], Professor Litman reviews the Canadian law in this area. His article is excellent and I recommend it if you are faced with the difficult situation of a client whose health is deteriorating rapidly. In his article, Professor Litman suggests that the rule in *Parker v. Felgate* may be invoked to rescue

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[36] *Perera v. Perera* [1901] AC 354; *Kenny v. Wilson* (1911) 11 SRNSW 460; *Wilkie v. Wilkie* (1915) 17 WALR 156; *Thomas v. Jones* [1928] P 162; *Battan Singh v. Amirchand* [1948] AC 161, [1948] 1 All ER 152.

[37] *Parker v. Felgate*, *supra.* note 35; *Re Flynn, Flynn v. Flynn* [1982] 1 All ER 882, [1982] 1 WLR 310, per Slade J at 890, 891 and *Re Rodziszewski's Estate* (1982) 29 SASR 256.

[38] (1978), 4 E.T.R. 135, [1978] 1 A.C.W.S. 384 (Ont. Surr. Ct.).

wills or even parts of wills even in cases where the testator, at the time he signed his will, is not capable of knowing and approving of its contents. In his concluding remarks, he suggests that when faced with such situations, solicitors should consider having the instructions executed by the testator:[39]

> ...as a precautionary measure solicitors taking instructions for wills should have the instructions executed pursuant to the formalities required by the various Wills Acts. This may require some alteration of the form in which instructions are ordinarily taken but the slight inconvenience involved in adapting one's practice to this suggestion, particularly in cases where a client's health is rapidly deteriorating or there is an unusually high risk of sudden death is clearly outweighed by the fact that effect will be given to the client's intentions. The case law is unequivocal that properly executed instructions, so long as they contain a fixed or deliberate and final expression of intention, may be given effect as a will... . So long as an executant, with a disposing mind, knows and approves of the contents of his instructions, and such knowledge and approval entails understanding or appreciating the meaning of those instructions, the rule in *Parker v. Felgate* may be invoked to save in whole or in part a will executed by an incapacitated testator.

(b) Lawyer's Standard of Care and Duties with Respect to a Client's Testamentary Capacity

(i) Rules of Professional Conduct and a Lawyer's Standard of Care

All lawyers practicing law in Ontario are required to adhere to a standard of care dictated by the Law Society of Upper Canada. In particular, rule 2.01(2) of the Society's *Rules of Professional Conduct*[40] holds that "a lawyer shall perform any legal services on a client's behalf to the standard of a competent lawyer." The rule does not require a

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[39] M. M. Litman, "Giving effect to wills executed by testators lacking in capacity where capacity is present at the time of giving instructions: The Scope of the Rule in *Parker v. Felgate*", 4 E.T.R. 136, at pp. 141-2.

[40] These rules came into effect on November 1, 2000, and were last amended on June 25, 2009.

standard of perfection. That is, an error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. Nevertheless, incompetent professional practice may give rise to disciplinary action under this rule.

In addition to this rule, the *Law Society Act*[41] provides that the Society may conduct a review of a lawyer's practice to determine if the lawyer is meeting standards of professional competence. A review will be conducted in circumstances defined in the by-laws under the *Law Society Act.* The Act provides that a lawyer fails to meet standards of professional competence if there are deficiencies in (a) the lawyer's knowledge, skill, or judgment, (b) the lawyer's attention to the interests of clients, (c) the records, systems, or procedures of the lawyer's professional business, or (d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected. A lawyer may also be subject to a hearing by the Society at which it will be determined whether the lawyer is failing or has failed to meet standards of professional competence.[42]

(ii) Tort Law and a Lawyer's Duty of Care

However, it is important to note that while the *Rules of Professional Conduct* may inform a court's decision on the questions of duty and standard of care, they do not, in and of themselves, create legal duties that found a basis for civil liability. The question

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[41] R.S.O. 1990, c. L.8.

[42] Commentary to rule 2.01(2) of the Rules of Professional Conduct.

of whether a duty of care arises in a negligence action is one that must be determined according to general principles of tort law.[43]

The principles of tort law dictate that, in the context of a solicitor retained to prepare a will for a client, the solicitor must meet a professional standard of care expected of a reasonably competent and prudent solicitor in preparing the will.[44] This standard of care entails executing the basic tasks necessary to effect a valid will. Adducing and documenting evidence of testamentary capacity is one such task.[45]

It follows that the law requires a solicitor who undertakes to prepare a will to inquire into and substantiate his or her client's testamentary capacity when taking instructions from the client to prepare his or her will.[46] For instance, in *Scott v. Cousins*,[47] the niece, nephew, and children of two deceased nieces of the testatrix contested the validity of her final will dated October 23, 1997, in which she left the majority of her assets to her husband absolutely. The testatrix had been very close with her nieces, nephews and their children, and in her three wills executed previous to the contested one, she left them residual interests in her estate. The three wills were executed in 1983 and 1995.

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[43] *Hall v. Bennett Estate*, *supra.* note 28, at para. 62.

[44] *Kournossoff Estate v. Chapman*, [2000] B.C.J. No. 1627, at para. 14; *Hall v. Bennett Estate*, *supra.* note 28, at para. 47.

[45] *Peters Estate v. Ewert*, *supra.* note 3, at para. 83, quoting M.M. Litman and G.B. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *supra.* note 3, at 469.

[46] CCH Canadian Limited 2010: ¶ 8162: Assessing Mental Capacity. Website: <file://H:\Reference\Elana Hoffman\cch-F65B4.htm> Accessed on February 19, 2010; *Hall v. Bennett Estate*, *supra.* note 28, at para. 22; *Murphy v. Lamphier*, *supra.* note 8, at pp. 320-321 (Ont. H.C.); *Maw v. Dickey* (1974), 52 D.L.R. (3d) 178, at pp. 190-191, 6 O.R. (2d) 146, at pp. 158-159 (Ont. Surr. Ct.), referred to in "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *supra.* note 3, at 470; *Parker v. Felgate*, *supra.* note 35; *Bradshaw Estate (Re)* (1988), 30 E.T.R. 276, 90 N.B.R. (2d) 194, 15 A.C.W.S. (3d) 361 (Prob. Ct.), referred to in John E. S. Poyser, "The Preparation and Execution of Wills: Everyday Issues and Changing Industry Standards", HeinOnline – 25 Est. Tr. & Pensions J 31 2005-2006, at p. 52.

[47] *Supra.* note 10.

On July 10, 1997, the testatrix suffered a stroke-like occurrence, and was seriously confused while in hospital for eight weeks and in September and October of that year. Regarding her mental capacity, the Court considered the following critical evidence:

- In September and October of 1997, the testatrix's solicitor and personal physician expressed concern about her competence, cognitive skills, memory with respect to her assets, and capacity to make a will and handle her financial affairs. In April and November of 1998, two psychiatrists examined the testatrix and concluded that she lacked capacity to manage her property independently.

- Two experts in geriatric psychiatry gave evidence at trial. Neither of them had met the testatrix. One concluded that she probably had testamentary capacity on October 23, 1997, and concluded that she likely did not.

Regarding her husband's conduct leading to the execution of the disputed will on October 23, 1997, the Court considered the following crucial facts:

- In early September, 1997, a solicitor ("B") met with the husband, who expressed concern about the testatrix's capacity to execute powers of attorney.

- In October, 1997, the husband met with B to aid in the transfer of the testatrix's condominium to be held jointly by her and her husband. On October 2, 1997, B met with the testatrix for the first time to deliver her documentation regarding the transfer and to direct her to another solicitor to receive independent legal advice.

- Prior to October 23, 1997, the testatrix and her husband met with B, and gave him instructions for (i) the preparation of new powers of attorney for the testatrix

that would replace the previous attorney with her husband, and (ii) a new will for the testatrix. The new will replaced the residuary gifts to the applicants in her three previous wills with an absolute gift to her husband. If he predeceased her, the residue of her estate would be divided among his children. Delivery of instructions and execution of the will were made in the presence of the husband.

While B was aware of the testatrix's hospitalisation and that her husband had doubts about her mental competency, during the preparation or execution of her will, B did not make even the most perfunctory attempt to question or initiate discussions with the testatrix on matters that would enable B to form a professional judgment with respect to the testatrix's capacity to make a will. In response, and speaking for the Ontario Superior Court of Justice, Justice Cullity described the solicitor's "duty to substantiate testamentary capacity":[48]

> At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and, if there is any possible doubt – or other reason to suspect that the will may be challenged – a memorandum, or note, of the solicitor's observations and conclusions should be retained in the file... .

The Court ultimately held that the will was not valid.

In *Re Collicutt Estate*[49], the Nova Scotia Probate Court further elaborated on this duty to substantiate testamentary capacity. In this case, the Court assessed a testatrix's competency to make her last will, prepared in 1988. The testatrix was 85 years old and residing in a nursing home when she gave instructions for and executed the 1988 will.

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[48] *Scott v. Cousins*, *supra.* note 10, at para. 70.

[49] *Supra.* note 10.

She had made two prior wills: one in 1982 and the other in 1985, leaving dispositions to her friends and relatives including K, with the residue to certain charities. The will that was prepared in 1988 made K the sole beneficiary and executrix. In coming to its decision that the will was valid, the Court weighed evidence from a number of sources – the solicitor who prepared the will in question, doctors who treated her, as well as lay persons who knew her for varied lengths of time and purposes. In coming to its conclusion on the testatrix's testamentary capacity at the time of making her 1988 will, the Court affirmed the duty of a lawyer to determine testamentary capacity of his or her client, as follows:[50]

> The law reports of England and Canada are replete with lengthy decisions setting forth the principles to be applied when testamentary capacity has been challenged, and describing the standards expected of a solicitor who has drafted a challenged will. Banks v. Goodfellow (1870), L.R. 5 Q.B. 549; Tyrell v. Painton, [1894] P. 151 (C.A.); Menzies v. White (1892), 9 Gr. 574; Murphy v. Lamphier (1914), 31 O.L.R. 287 (affirmed 32 O.L.R. 19); Leger v. Poirier, [1944] S.C.R. 152 [1944] 3 D.L.R. 1 (S.C.C.), and Slater v. Chitrenky (Alta. Surr. Ct.) affirmed [1982] 3 W.W.R. 421, 10 E.T.R. 191, 28 A.R. 54 (sub nom. Re Campbell; Slater v. Chitrenky (Alta. Surr. Ct.) affirmed [1982] 3 W.W.R. 575, 11 E.T.R. 171 (C.A.)], are only a few. Rather than review or quote extensively from those cases, I will enumerate what I regard to be the basic rules to be garnered therefrom, as they apply to this case.
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> 1. Proving testamentary capacity rests upon he who propounds the will or seeks to take advantage therefrom.
>
> 2. For a testator to be of sound and disposing mind, he must understand the extent of the property of which he is disposing; he must be able to comprehend and appreciate the nature of the claims of others who might be expected to participate in his bounty.
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> 3. Whenever a will is prepared and executed in circumstances which arouse the suspicion of the Court, it will not be admitted to probate unless the person propounding it produces evidence which is sufficient to remove the suspicion and to satisfy the Court that the testator both knew

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[50] *Re Collicutt Estate*, *supra.* note 10, at para. 67; *Friesen et al v. Friesen Estate* (1985) 32 Man. R. (2d) 98.

and approved the contents of the will.

4. The weight of the onus will be proportionate to the gravity of the suspicion raised in any particular case.

5. Neither the superficial appearance of lucidity nor the ability to answer simple questions in an apparently rational way are sufficient evidence of capacity.

6. The duty upon a solicitor taking instructions for a will is always a heavy one. When the client is weak and ill, and particularly when the solicitor knows that he is revoking an existing will, the responsibility will be particularly onerous.

7. A solicitor cannot discharge his duty by asking perfunctory questions, getting apparently rational answers, and then simply recording in legal form the words expressed by the client. He must first satisfy himself by a personal inquiry that true testamentary capacity exists, that the instructions are freely given, and that the effect of the will is understood.

The Court in *Re Collicutt Estate* applied many of the above principles to the facts of the case when it emphasized the solicitor's lack of information regarding the testatrix's testamentary capacity:

> I have also great concerns about the lack of instructions taken by [the solicitor] when he was preparing a will for an inhouse 85-year old lady at a nursing home. His only contacts with her were for the Power of Attorney in January, 1988, and back in 1970 when he acted on an estate of her brother. ...
>
> [The solicitor] did not conduct any inquiry about [the testatrix's] mental competence, did not inquire about the provision of a former will or address the startling change, did not inquire whether she was on medication or consult her doctor or the administrator of the home about her condition nor did he take any notes. From his evidence he was there a very, very short period of time. Had all turned out well that may have been sufficient but on a hearing of Proof of Solemn Form it leaves the court with little or nothing as to the mental competence of the testatrix on September 9, 1988, the date the instructions were taken. It may have been on that day she was bright, alert and mentally competent and if that showed on [the solicitor]'s notes had he made them it may have meant the burden on the proponent would be met. A further concern is [the solicitor] did not attend to the execution but gave a will to the sole beneficiary to have executed by an 85-year old lady. If there was even a

> time for a lawyer to be present, this was the time. He told the court this was not his practice. Why it was done on this occasion does give cause for concern.

The lack of information by the solicitor regarding the testatrix's testamentary capacity led the Court to determine that the testatrix was not mentally competent to give instructions for the will in question, and the probate of the will in question was ordered to be revoked.

(iii) Assessments to Substantiate Testamentary Capacity

There are a number of circumstances where a solicitor may consider performing a formal assessment to substantiate a client's testamentary capacity. Where a lawyer has had a long-term relationship with a client, with numerous and lengthy visits over several years, the obligation to perform a detailed assessment of the client's testamentary capacity is less likely to arise than in a situation where the lawyer meets an elderly client for the first time to prepare his or her will,[51] or there are suspicious circumstances.

In the latter case, the solicitor should perform an assessment of mental capacity to ensure that the client has the legal capacity to dispose of his or her assets upon death.[52]

The solicitor may also want to enlist a further assessment performed by a medical expert or licensed assessor. In such a case, the instructing solicitor should give the

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[51] *Palahnuk v. Kowaleski*, *supra.* note 10, at para. 303; *Petrowski v. Petrowski*, *supra.* note 32, at para. 303.

[52] R. Hull, Q.C., "Obtaining Instructions for the Preparation of the Will", 6 E. & T. Q. 11 (1982-84), cited with approval in *Peters Estate v. Ewert*, *supra.* note 3, at para. 85.

expert detailed information about the client's circumstances, articulate the particular test which must be met, and provide guidelines for determining testamentary capacity, such as those listed below. Generally speaking, the assessor's final report should demonstrate how the clinical information of the client meets the legal standard for testamentary capacity.

(A) Suggested Guidelines for Medical Experts and Licensed Assessors in the Determination of an Individual's Testamentary Capacity

If the solicitor decides to obtain a mental capacity assessment from a medical expert or licensed assessor, the solicitor should choose those professionals who have expertise in such assessments and provide them with suggested guidelines in order to ensure that each assessment report is as useful as possible to the solicitor and potentially, a court in the event of a will challenge. The guidelines should, at the very least, suggest that the professional include the following in the assessment report:[53]

- **An outline of his or her expertise in the field of mental capacity.**
- **A statement that the professional has a clear understanding of the test for testamentary capacity, and a description of the sources lending to such an understanding.** If the professional is not familiar with this

[53] This is not an exhaustive list of elements to include in an assessment report, but inclusion of these elements could be useful in helping to support the professional's determination of the testator's testamentary capacity.

test, the guidelines should include an outline of the test and references to further material describing the test.

- **A statement that the professional is aware of the potential use of the assessment report and what such uses may be** – *i.e.*, use by a solicitor who is preparing a will for the testator, by a court in the determination of testamentary capacity of the testator, or for other specified purposes.

- **Knowledge of background information about the testator** – *i.e.*, age; appearance; demeanour; habits and eccentricities; contact information (mailing address, telephone number, etc.); family history and dynamics; close relationships; medical history and the impact of any illness(es) on mental capacity; medications used and the impact of the medications on the testator's mental capacity, etc..

- **The amount and nature of contact between the professional and:**

    - the testator over the course of the testator's life;
    - physicians who have treated the testator over the course of the testator's life;
    - individuals who have been in close contact with the testator over the course of the testator's life.

- **A statement that the professional has received and considered information contained in the following documents** – *i.e.*, medical files from all health professionals who have treated the testator; all court documents, if the assessment is being requested for use in court proceedings; copies of all wills of the testator; financial / asset statements, etc..

- **A step-by-step analysis of how the testator meets the test for testamentary capacity.** Several examples satisfying each step should be included in the report. The professional should include quotes by the testator as much as possible, if they support the professional's assessment.

- **Results from any formal cognitive screening**, such as the Mini Mental State Examination (MMSE), conducted by the professional or anyone else on the testator.

- **Any other information supporting the professional's assessment of the testator.**

- **Concluding statements**, indicating whether the professional finds the testator fully capable to make independent decisions regarding the disposition of assets upon his or her death.

(iv) What to do When a Solicitor Determines that a Client Lacks Testamentary Capacity

What are a solicitor's obligations if he or she determines that a particular client *lacks* the requisite testamentary capacity to execute a will? There is no clear answer to this question, but the following statements should give solicitors attempting to answer this question some guidance.

In *Scott v. Cousins*, Justice addressed this question in the following statement:

> Some of the authorities ... state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel 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.

The complicated nature of this issue was further revealed in the trial and appeal court decisions of *Hall v. Bennett Estate*.[54] In this case, the defendant solicitor attended at a hospital to prepare a will for a patient who was terminally ill. During the solicitor's 65-minute interview, the patient drifted in and out of consciousness, though lucid while awake. The patient instructed the lawyer that he did not want his daughter and grandchildren to receive his estate, leaving them with only token bequests, and to bequest the bulk of his estate to the plaintiff. The solicitor decided not to continue with the interview and did not draw up the will. The patient died later that day. At trial, the plaintiff brought a successful action against the solicitor for negligence for failing to

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[54] *Hall v. Bennett*, *supra.* note 28, at paras. 58 - 61.

prepare the will. The Court found that the client had the requisite testamentary capacity on the day of the interview, and in failing to prepare the will, the solicitor had breached his duty of care to the plaintiff. The trial judge also found that the solicitor had sufficient information to prepare the will and that he should have prepared the will and left the question of testamentary capacity to the Court, if necessary. However, the Ontario Court of Appeal disagreed. It held that the relevant question regarding testamentary capacity was not whether the patient was capable of executing a will, but whether a prudent and reasonable solicitor in the defendant's position could have concluded that the patient did not have capacity. The solicitor's first obligation was to inquire into the patient's testamentary capacity before preparing the will, and according the Court of Appeal, there was overwhelming evidence supporting the solicitor's opinion that the patient lacked testamentary capacity–apparent lucidity should not be equated with testamentary capacity. The Court concluded that it was the solicitor's duty to decline the retainer—he had fulfilled any obligation he owed to the patient and, in the absence of a retainer to prepare the will, owed no duty of care to the plaintiff.

Thus, where a solicitor undertakes to interview a person with a view to obtaining instructions to prepare a will, does not obtain sufficient instructions to do so and is presented with significant evidence that the person lacked testamentary capacity at the time of giving instructions, the solicitor may be entitled to decline the retainer. Under these circumstances, the solicitor is not under any legal obligation to accept the retainer to prepare the will.

(v) Breaching the Duty to Substantiate Testamentary Capacity

Breaching the duty to substantiate testamentary capacity can have significant consequences – it can cause a will to be declared invalid on grounds of incapacity, even in instances where the testator was actually competent (though insufficient proof of that fact was available to the court).[55] Where the will fails as a result of the breach, the solicitor will be presumed to have caused the loss, and the onus will be on the solicitor to rebut this presumption. This will be a very difficult onus to discharge. If the solicitor is unable to do so, he may be personally liable for the loss suffered by one or more disappointed third party beneficiaries named in the proposed will.[56]

3. MEDICAL EXPERTS AND LAY PERSONS' EVIDENCE

How do medical and lay evidence contribute to a court's determination of an individual's testamentary capacity?

The classic statement of what constitutes testamentary capacity in *Banks v. Goodfellow*, mentioned above, was recently affirmed in *Re Culbert Estate*.[57] However, the Court in *Re Culbert Estate* expanded on this statement by considering the role of

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[55] "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *supra.* note 3, at 458, Lisbeth Hollaman, "Preparation of a Will – Duty Re Testamentary Capacity", 9th Annual Estates and Trusts Summit, The Law Society of Upper Canada Continuing Legal Education (November 2, 2006), at p.2.

[56] *Harrison v.* Fallis, [2006] O.J. No. 2336, at paras. 14-15. Note that a solicitor owes no duty to advance the cause of a particular beneficiary, and any duty owed to third party beneficiaries flows from the duty of care to the testator client. Also, if a testator maintains the intention to make a particular bequest and has been advised that that bequest may be void or voidable, a solicitor is not negligent in including that particular bequest in a will. That is, it is acceptable for a solicitor to include a bequest in a will that may be void if the testator has been made aware of the potential invalidity and decides that the bequest should be included regardless. In such an instance, the solicitor owes no duty to the third party beneficiary to ensure that the intended bequest can be given full effect. (*Wakeford v. Arnold*, [2001] A.J. No. 1372 (A.B. Q.B.), at para. 31. Any further discussion on the duty of care owed to third party beneficiaries goes beyond the scope of this paper.

[57] *Supra.* note 10.

medical evidence in the determination of a person's testamentary capacity. *Re Culbert Estate* is a case about a testatrix who was estranged from her five adult children for much of her later life. During the last years of her life, she made two wills – one in 1997 and the other in 1999. One of her children contended that the 1999 will was invalid, and the 1997 will should be admitted to probate, while two of her other children wanted the Court to declare the opposite. The case was partly decided on the basis of the testatrix's testamentary capacity around the times when each will was prepared. The Saskatchewan Court of Queen's Bench introduced the issue of testamentary capacity by citing the following passage with approval from its judgment in *Dieno Estate v. Dieno Estate*[58],

> The law is fairly settled respecting what constitutes testamentary capacity and how it is proven. Thomas G. Feeney in *The Canadian Law of Wills*, 3d edition, Volume 1, p. 31 (Toronto: Butterworths) summarizes the law as follows:
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> > ... To use the time-honoured phrase, a person must be "of sound mind, memory and understanding" in order to be able to make a will. When a will is contested on the ground of mental incapacity, the executors must prove that the testator had a sound and disposing mind. This means that they must show that the testator was not only able to understand what he was doing, but that he was able to comprehend and recollect what property he had and remember the persons that he might be expected to benefit. He must understand, too, the extent of what he is giving to each beneficiary and the nature of the claims of others whom he is excluding.
>
> At p. 33 he goes on to state:
>
> > Whether the testator's mind was sound is a practical question that does not depend on scientific or medical definition. Medical evidence is not required nor necessarily conclusive when given.

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[58] [1996] 10 W.W.R. 375; (1996), 147 Sask.R. 14 (Sask. Q.B.) [hereinafter referred to as *Dieno v. Dieno Estate*], at para. 36.

Nevertheless, evidence and opinions of medical experts and lay persons can significantly impact a court's determination of a person's testamentary capacity.

(a) Weight Given to Solicitor's Evidence vs. Medical and Lay Evidence

The role of the solicitor in cases involving challenges to the validity of a will on the grounds of lack of testamentary capacity has been the subject of careful scrutiny and lengthy, and all too often, negative comment by the courts. Especially in cases involving suspicious circumstances, the evidence of the careful solicitor, whose opinion is based on a properly conducted interview and which is supported by thorough documentation, has been accorded great weight by the courts and in many cases, has determined the outcome. While the testimony of other witnesses and, in particular, other professionals such as doctors, nurses or psychologists is also significant, often their observations are general in the sense that they do not relate to the various components of testamentary capacity. Solicitors taking instructions are often in a better position to assess the mental status of a testator at the very time instructions are given and are also most aware of the legal test which must be met.

The rationale for according such weight to the testimony of the solicitor was articulated in *Murphy v. Lamphier*:[59]

> A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease, and particularly in the case of one labouring under both disabilities, the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of

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[59] *Murphy v. Lamphier*, *supra.* note 8, at para. 120; referred to in *Petrowski v. Petrowski Estate*, *supra.* note 32, at para. 78.

> 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 substance and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty. The Court reprobates the conduct of a solicitor who needlessly draws a Will without getting personal instructions from the testator, and, for one reason, that the business of the solicitor is to see that the will represents the intelligent act of a free and competent person.

Where testamentary capacity is being challenged, and the solicitor who drafted the will has taken the necessary steps to allow him or her to form an opinion regarding his or her client's capacity, the courts have accorded the solicitor's opinion significant weight, compared to weight attached to medical or lay evidence. There are several reasons why the courts place such reliance on the evidence of solicitors. First, unlike other witnesses, solicitors have a specific understanding of the legal notion of testamentary capacity. Second, they are under a legal duty to carefully consider whether such capacity exists in a particular testator, and are obliged to document their opinions.[60] Third, the solicitor is usually the only person who was present at both critical testamentary junctures–when the testator gave instructions regarding the contents of the will and when the will was executed.[61] Therefore, in cases where a solicitor is best positioned to make an assessment regarding a client's testamentary capacity, the assessment may begin and end with the solicitor.[62]

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[60] "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *supra.* note 3, at 472.

[61] Brian A. Schnurr and Felice C. Kirsh, "2005-2006 In Review: Significant Developments in Estate Litigation", 9th Annual Estates and Trusts Summit, The Law Society of Upper Canada, Continuing Legal Education, November 2, 2006.

[62] Solicitors may delegate his or her assessment of a client's testamentary capacity to medical experts or licensed assessors only where the solicitor is not best positioned to make such a decision. (*Palahnuk v. Kowaleski*, *supra.* note 10, at para. 71.)

The importance of the solicitor's testimony in cases involving challenges to a will on the basis of lack of testamentary capacity was analyzed in an article published in the December, 1984 issue of the *Canadian Bar Review*.[63] In this article, the authors analyze 32 Canadian cases in which the issue of testamentary capacity was litigated. Solicitors were involved in the preparation and execution of 26 of these cases. In about 90% of those 26 cases, suspicious circumstances were present and in about 63% of those 26 cases, the court adopted the opinion of the solicitor that testamentary capacity was present. The analysis also indicates that in most of the cases where the wills failed, the solicitors did not discharge their duty properly and the court rejected the solicitor's opinion that testamentary capacity was present.

In reviewing the nature of the failure of solicitors in the performance of their duty in the cases analyzed, the authors cite the following criticisms revealed by the courts.

(A) Failure to obtain mental status examinations where the circumstances warranted.

(B) Failure to interview clients in sufficient depth. The criticisms of the courts ranged from criticism for making insufficient inquiries or no inquiries as to why the testator was making no provision for close relatives who would be the more natural objects of the testator's bounty, to criticism for making overly general inquiries as to the nature and extent of the property of the testator.

(C) Failure to properly record or maintain notes. In one case cited, the notes were too sketchy; in another, no notes were taken and, as a result, the solicitor's

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[63] "Solicitor's Liability to Failure to Substantiate Testamentary Capacity", *supra.* note 3, at p. 457.

memory of crucial facts was too weak to be relied on. In a third case, where the testatrix's condition fluctuated from day to day, notes were taken but were undated and the judge concluded that he could not rely on the solicitor's "guesstimate" that the date of execution of the will was one of the better days of the testatrix.

(D) Failure to ascertain the existence of suspicious circumstances. In one case, the solicitor was criticized for failing to determine that the will he was asked to prepare departed substantially from prior testamentary expressions.

(E) Failure to react properly to the existence of suspicious circumstances. The authors cite the case of *Re Schwartz*[64] where the testator, a father of four children, disinherited a son who he perceived to be responsible for certain disruptions in family relationships. For some years before the testator changed his will to that effect, the testator had had a series of strokes and heart attacks. At the time of changing his will, he was living with his daughter, who forbade the disinherited son from visiting the testator after the disruptions occurred. In requesting that probate of the will be refused by the Court, counsel for that son argued that the testator lacked testamentary capacity when executing the contested will. This request was not granted by the Trial or Appeal Courts. In his dissenting decision at the Court of Appeal, Laskin, J.A. commented that, although the testator was 78 years of age, seriously ill and exhibiting signs of mental dysfunction when the solicitor took his instructions, the solicitor

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[64] [1970] 2 O.R. 61, 10 D.L.R. (3d) 15 (C.A.), aff'd [1972] S.C.R. 150, 20 D.L.R. (3d) 313.

"appeared to treat the matter as if he were acting for a man in good health and in full command of all faculties".

(F) Failure to provide proper interview conditions – the presence of an interested party. The authors discuss the case of *Eady v. Waring*[65] where the solicitor took instructions from an elderly, ill testator in the presence of the testator's nephew who was the son of the major beneficiary under the will. The testator did not divulge to the solicitor the extent of his assets and the court was influenced by the fact that the rectitude of the testator could have resulted from the inhibiting presence of the nephew. As a result, the will was not admitted to probate.

(G) Improper relationship between solicitor and client – preparing a will for a relative. In the one case cited by the authors under this heading, *Re Fergusson*,[66] the solicitor was a nephew of the testator, and received instructions from a brother of the testator. The solicitor prepared a draft will, attended at the hospital and discussed very generally the terms of the will with the testator. Justice O'Hearn, commenting on the impropriety of a solicitor preparing a will for a close relative, points out that a solicitor's duty to his client to provide disinterested advice may not be met because of a reluctance on the part of the solicitor-relative to discuss financial affairs and obtain proper and sufficient medical information in respect of close relatives. Ultimately, the Nova Scotia Probate Court decided that the proponents of the will failed to establish that the

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[65] (1974), 2 O.R. (2d) 627, 43 D.L.R. (3d) 667 (C.A.) at pp. 675.

[66] (1980), 40 N.S.R. (2d) 223, 73 A.P.R. 223 (Prob. Ct.), aff'd (1981), 43 N.S.R. (2d) 89, 81 A.P.R. 89 (C.A.).

testator possessed the requisite testamentary capacity to execute this last will and probate of the will was refused.

(H) Failing to take steps to test for capacity. Although in the cases reviewed by the authors, no express criticism was levelled by the courts, the authors point out that such criticism is justified in situations where, for instance, instructions are received from a third party who is a major beneficiary of the estate and the solicitor failed to meet personally with the testator who is dying in hospital, or where the professional who prepares the will on the instructions of the family members may subsequently meet with the testator but not be able to communicate properly with him.

Re Griffin's Estate[67] is an example of the first type of situation. In this case, the testator was suffering from congestive heart failure (and later it was discovered cirrhosis of the liver) in hospital when he purportedly gave instructions for the preparation of his will to his wife and in the presence of her son. The will was drawn by a one solicitor who never proceeded to personally meet with the testator, and executed without having been read over to the testator or by him. Since there was no evidence that the testator knew and approved of the contents of the will, it was refused probate.

Karstonas v. Karstonas[68] is an example of the second type of situation. In this case, the testator was sick in the hospital when his wife and brother attended the

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[67] (1979), 21 Nfld. & P.E.I.R. 21, 56 A.P.R. 21 (P.E.I. C.A.), leave to S.C.C. appeal ref. [1979] 2 S.C.R. viii, 24 Nfld. & P.E.I.R. 90n.

[68] (1979), 12 B.C.L.R. 45 (S.C.).

office of a notary public and instructed him to draw a will for the testator. That day, the notary public attended the hospital with the wife and brother, whereupon the solicitor prepared the will and the testator with the help of the wife signed the will. The testator was described by the notary public as being "unable to move any part of his body" and only able to speak in what the notary public thought to be Greek. The testator died the next day and the wife in her capacity as executrix sought to prove the will in solemn form. Probate of the will was not granted by the Court because the proponents of the will failed to take steps to test for testamentary capacity.

The importance and weight attached to a solicitor's capacity assessment is underscored in the case of *Palahnuk v. Kowaleski*.[69] In that case, the Ontario Superior Court was influenced by prudent and thorough conduct of the solicitor who was asked to prepare a will for a testatrix who suffered from an intermittent confusional state which would clear completely after she received medical treatment. In 1996, her psychiatrist had issued a certificate declaring the testatrix incapable of managing her property. This certificate was never formally reversed and remained operative until the testatrix's death. In assessing the evidence, the Court held that it does not necessarily follow that a person found to be incapable of managing his or her property lacks testamentary capacity for all time thereafter. However, the existence of a finding of incapacity will increase the onus upon the propounder of the will to prove testamentary capacity.

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[69] *Supra.* note 10.

The solicitor in *Palahnuk v. Kowaleski* satisfied the onus. His long-term and significant contact with the testatrix helped substantiate his position. The solicitor had taken instructions for, prepared and attended on the execution of the testatrix's will in 1989. He visited her in 1996 at a time and in circumstances where her psychiatrist had declared her incapable of managing her property. He had a baseline for comparing his personal observations of the testatrix's condition, made several visits to her home, and conducted extensive and probing conversations. He received written instructions from the testatrix, and verbal confirmation of such instructions, regarding possible dispositions she might want to make in her will. Thus, in this case, the Court held that the solicitor who prepared the testatrix's will was best positioned and bore the obligation to make and record his personal assessment of the testatrix's capacity. This derived from evidence of the solicitor being an impressive witness, articulate, open and reliable:[70]

> During his testimony, he demonstrated good character, firm knowledge of the law, sensitivity and discernment. He has no personal interest in the estate and is not a party to these proceedings. Over the course of more than 25 years of general practice and extensive experience in taking instructions for a will, [the solicitor] had never met with a testator as frequently or for longer periods of time as he did with [the testatrix]. He was vigorously but fairly cross-examined at trial. My confidence in [the solicitor's] testimony, his judgment, and the adequacy of his inquiry remains unshaken. His testimony forms the core of my conclusions that [the testatrix] had the capacity required to give instructions for a will on January 16, 2001 and the capacity required to make and execute a valid will on January 23, 2001.

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[70] *Palahnuk v. Kowaleski*, *supra.* note 10, at para. 72.

The Court concluded,[71]

> While the opinion of the other professionals may have been useful in informing [the solicitor's] decision-making process and in establishing a more extensive record, the duty to make the capacity assessment here ultimately lay with [the solicitor] and was not, in practical terms, delegable.

In *Palahnuk v. Kowaleski*, the court also held that while solicitors are not obligated to consult with other professionals for their opinion regarding a person's testamentary capacity, certain circumstances make such consultation extremely persuasive. Especially in situations where a solicitor finds reason to doubt whether the client has testamentary capacity,[72] it is prudent to obtain one or more assessments from medical experts or licensed assessors. The solicitor in *Palahnuk v. Kowaleski* did just that, which only strengthened his evidence.

> Upon receiving the reports from [the testatrix's personal physician] and [the testatrix's psychiatrist] in November 2000, [the solicitor] realized that a full geriatric assessment had not been completed. He elected to proceed, in stages, along a path that included multiple visits with [the testatrix] which, individually and cumulatively, led to his taking her instructions for a will and ultimately to attending her on its execution. Her basic mental capacity and current mental functioning in October and November 2000 had been attested by two medical professionals, one of whom was the family physician of [the testatrix], the other her psychiatrist. Both medical professionals were familiar with [the testatrix]. Both had been previously involved in her treatment. In [the Court's] opinion, it was reasonable for [the solicitor] to have proceeded as he did.
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> Thus, while such assessments are not legally determinative, they may act as strong supporting evidence of the client's testamentary capacity, and help confirm the solicitor's own opinion.

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[71] *Palahnuk v. Kowaleski*, *supra.* note 10, at para. 71.

[72] *i.e.*, where the client is not well-known to the solicitor or suspicious circumstances exist

Where solicitors do not discharge their duty to substantiate a client's testamentary capacity when preparing the client's will, the court will look to the evidence of medical experts and lay persons. Evidence of medical experts and lay persons will be persuasive if they prove that they had, for instance:

- significant contact with the testator prior to and around the time the will was made;
- relevant medical records, where appropriate, from the testator's regular physicians;
- communicated with the testator's regular physicians and lay persons close to the testator with regard to the his or her mental capacity prior to and around the time the will was made;
- other evidence supporting the argument that the testator had testamentary capacity when the will was made;
- an awareness of the testator's health, and if the testator was ill, how the illness or any medications taken by the testator, may have affected his or her mental capacity around the time the will was prepared; and
- expertise in the field of mental capacity.

(b) Weight Given to Medical Evidence vs. Lay Evidence

Do courts afford different weight to evidence from medical experts and lay persons? Not necessarily. Courts may accord the pathological findings of medical professionals

and the observations of lay persons equal weight.[73] This was affirmed by the Saskatchewan Court of Queen's Bench in *Re Culbert Estate*,[74]

> The Ontario Court of Appeal has said that the question of a sound and disposing mind "so far as evidence based on observation and experience is concerned may be answered as well by laymen of good sense as by doctors." [Emphasis added]

In fact, there may be cases where a lay person's testimony outweighs a medical expert's opinion. In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*[75], the authors state:

> **s. 12.23** In civil cases a lay witness may express an opinion on the issue of a person's testamentary capacity. Indeed, if the lay person has had an opportunity to observe the testator over long periods of time and association, such evidence may be given greater weight than expert testimony. ... [Emphasis added]

In other words, expert evidence may not always outweigh the testimony of lay eyewitnesses who observed and knew the testator.[76] This may be especially true in cases where a medical expert does not form his or her opinion on any formal assessment of the testator's mental capacity or consult any third party to verify the testator's responses. For instance, in *Re Culbert Estate*, Justice Ball, speaking on behalf of the Saskatchewan Court of Queen's Bench, held at paragraph 163,

> As was the case with Dr. Jachak, I am satisfied that Dr. Graham-Rowe's qualifications as a general medical practitioner did not enable him to offer a professional opinion with respect to [the testatrix's] testamentary

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[73] *Re Davis*, [1963] 2 O.R. 666.

[74] *Dieno v. Dieno Estate*, *supra.* note 58, at para. 36. From *The Canadian Law of Wills*, *supra.* note 24, p. 33.

[75] 2nd ed. (Toronto: Butterworths Canada Ltd., 1999) at p. 615.

[76] Ian M. Hull, *Challenging the Validity of Wills* (Carswell, 1996) at 24.

> capacity. I accept his evidence on the basis that he made observations in the same manner as any lay person. He did not conduct any specialized examination and he did not verify the accuracy of her responses by asking a knowledgeable third party.

The case of *Petrowski v. Petrowski Estate*[77] is another example of a decision where a court practically dismissed the evidence of medical experts. In this case, the Alberta Court of Queen's Bench described the situation of a testator who died leaving one adult dependent child, and another adult child who looked after the testator and his business for nearly 30 years before his death. Pursuant to the terms of his will, the testator left all of his property to the second child, whom he also made executrix of his estate. Upon the testator's death, the first child challenged the validity of the will on several grounds, including the testator's testamentary capacity when he executed the will. Upon analyzing evidence presented by both sides of the case, the Alberta Court of Queen's Bench dismissed the evidence of medical experts involved in the case. The Court's reasons are as follows.[78]

> First, at trial [the family doctor] derogated from this opinion changing his views from those expressed in his written opinion in a number of respects. Second, some of his underlying assumptions were not held out to be true during his evidence at trial. Finally, he conceded several times that his opinion should give way to the opinion of an expert in internal medicine. Later, I will review the opinions of an internal medicine specialist who disagrees with [the family doctor's] opinion. ...
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> [The family doctor] maintained his opinion that [the testator] was suffering from a mental incapacity amounting to testamentary incapacity when he made his Will in August, 2000. However, [the family doctor] could point to no objective evidence that substantiated his opinion. His opinion amounted to a belief that [the testator] suffered from some kind of chronic lung problem that deprived his brain of oxygen sufficient to make him cognitively impaired more than two months before he was admitted to

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[77] *Supra.* note 32.

[78] *Petrowski v. Petrowski Estate*, *supra.* note 32, at paras. 180, 216 and 217.

> Viking hospital. This opinion was given in spite of the evidence of lay witnesses which gave absolutely no evidence of cognitive impairment. I reject [the family doctor's] opinion.

The Court also did not accept the expert evidence of two other doctors giving expert evidence. The second doctor's testimony was rejected for inconsistency and the third doctor's evidence was dismissed because the Court did not find that the facts upon which he relied in his written opinion were proved at trial.

However, the Court did accept the medical evidence presented by a fourth doctor, a specialist in internal medicine who provided opinion evidence with respect to the testator's medical condition around the time when the testator was giving instructions for and executing his will. Since this fourth doctor was a qualified expert whose opinions were supported by evidence, the Court accepted these opinions in support of the fact that the testator had testamentary capacity at the crucial times. The Court ultimately held that the testator had the requisite testamentary capacity when he gave instructions for and executed his will.

(c) Necessity of Formal Mental Capacity Assessments

Does a medical expert need to perform formal capacity assessment for his or her opinion to be valued by a court? Put simply, if a medical expert has observed the testator over long periods of time, the expert need not have performed such assessments to deliver persuasive evidence of the testator's testamentary capacity to a court.

For instance, in *Irwin v. Cupolo*[79], the Ontario Superior Court of Justice ruled on the testamentary capacity of a testatrix who executed her will in 1994. At trial, the Court heard evidence from the testatrix's family physician and another physician who was an expert in geriatric medicine and capacity assessments. The two medical opinions conflicted. The family physician, who had seen the testatrix weekly for short periods of time, performed an in-person assessment of testamentary capacity on the day which the testatrix executed the will. While the assessment was not an objective neuropsychological test with scores, it was specifically directed towards determining the testatrix's testamentary capacity. His conclusion that the testatrix had the requisite capacity to give instructions for and execute a will, was reinforced by nursing home records, and testimony by four lay persons. In contrast, the expert witness gave evidence with respect to the testatrix's capacity to make the will and her susceptibility to undue influence. He did so without having met, interviewed or assessed the testatrix in person; nor did he interview the testatrix's family physician, or her solicitor. He proceeded entirely on information supplied to him by the plaintiff's solicitor. This included the family physician's clinical notes and records, the daily records of nurses at the nursing home where the testatrix lived, and records from three hospitals where the testatrix was treated. While he conceded that the best way to form an opinion was to do an actual assessment of testamentary capacity and agreed that reviewing nursing home and hospital records was not the best basis for formulating an opinion, he nevertheless gave the opinion that the testatrix had displayed the classic features of middle phases of dementia and suffered from cognitive impairment during the time

[79] [1999] O.J. No. 2682 (Ont. S.C.J.).

when she executed her 1994 will. The Court ultimately accepted the family physician's evidence, rejected the expert opinion of the second doctor, and held that the testatrix had the requisite testamentary capacity at the time of preparing and executing her will.

In *Duschl (Attorney of) v. Duschl Estate*,[80] the Superior Court of Justice also concluded that a medical expert's contact with a person over several years trumps formal assessments of mental capacity without such contact. In this case, an experienced wills and estates lawyer was asked to go to a hospital to meet the testatrix for the first time and draw up her will. The solicitor testified that he had no concerns regarding the testatrix's testamentary capacity. This opinion was formulated after engaging her in small talk for about half an hour—a discussion which centered on her relationships with likely beneficiaries of her estate, her main assets and her decisions regarding the disposition of such assets.

The solicitor's opinion was consistent with both lay and medical evidence. The strongest lay evidence was delivered by the testatrix's niece, who knew the testatrix her whole life. Further evidence supporting the solicitor's opinion was delivered by the testatrix's oncologist for the last three years of her life, and the testatrix's personal physician for over 20 years until her death. While neither doctor performed formal assessments of her testamentary capacity, they were in close contact with the testatrix when she gave instructions for and executed the will in question. They were also able to confidently testify that the testatrix did not exhibit any signs of mental impairment at those times.

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[80] *Supra* note 10.

In contrast, the plaintiffs presented an expert in geriatric medicine and capacity assessments. The expert had no direct contact with the testatrix.[81] To aid in formulating his opinion, the expert was given only the memos and documentation prepared by the solicitor who drew the will, other legal documents of the testatrix, and relevant medical records from her personal physician. The expert questioned the other doctors' opinions, since there was no objective measurement in the testatrix's medical chart to indicate whether she was competent or not. He then concluded that since the testatrix was 80 years old and in frail health, her "ability to carry on what would appear to be normal social conversation would be insufficient to warrant a conclusion that she was mentally competent. Her condition required a process that was thorough and well documented so that conclusions respecting her mental capacity were supportable."[82]

The Court rejected the expert's opinion, and stated that while a mental capacity assessment of the testatrix at the crucial times may have spared her family strife and expense of litigation over the validity of the will, the lack of such an assessment did not cause the will to fail, nor did it relieve the court from determining testamentary capacity or undue influence. The Court also held that is not the law that everyone suffering from ill health must have a formal mental capacity assessment before his or her will can be admitted to probate.

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[81] The Saskatchewan Court of Queen's Bench in *Re Culbert Estate*, *supra.* note 10, also emphasized the fact that a witness's direct contact with the testator significantly strengthens the witness's testimony. (para. 163)

[82] *Duschl (Attorney of) v. Duschl Estate*, *supra.* note 10, at para. 84.

4. HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

It is clear from the foregoing analysis that the unfortunate results that have occurred in contested will situations are largely attributable to the lack of care exercised by the solicitor at various stages of the will-making process – from taking instructions, to preparing the will and having it executed. What, then, are the types of inquiries a solicitor should make and what precautions should be taken to ensure that he or she has met the standard of care required of him or her to discharge his or her duty to the testator and those on whom he wishes to confer a benefit and, if not eliminate, at least reduce the risk of challenges to the will he or she has prepared?

The following is a list of steps to be taken in cases where suspicious circumstances are or may be present or where the health of the client indicates the need for a more in-depth inquiry by the solicitor. This list does not pretend to be exhaustive and I am sure that you will all be able to add to it based on your own experiences.[83]

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[83] M. Elena Hoffstein, "Protecting the Will from Challenge and Attack", 1988 Institute of Continuing Legal Education, Canadian Bar Association (February 4, 1988) at pp. 16-20; Brian A. Schnurr and Felice C. Kirsh, "2005-2006 In Review: Significant Developments in Estate Litigation", 9th Annual Estates and Trusts Summit, The Law Society of Upper Canada, Continuing Legal Education, November 2, 2006; Kenneth I. Shulman, "Psychiatric Issues in Challenges of Testamentary Capacity", Sixth Annual Estates and Trusts Forum, The Law Society of Upper Canada Continuing Legal Education (November 19, 2003) at p. 23. Howard S. Black, "Assessing Testamentary Capacity: Is There a New Definition of Solicitor's Negligence?" *Advocates' Quarterly*, Vol. 27, No. 4 (December 2003) at p. 356; *Earl v. Wilhelm*, (1997), 18 E.T.R. (2d) 191, at para. 81, Paul D. Milne, "Solicitor's Obligations – Suggestions for an Estates Practice" (2000), 20 E.T.P.J. 230 at p. 250, both referred to in John E. S. Poyser, "The Preparation and Execution of Wills: Everyday Issues and Changing Industry Standards", HeinOnline – 25 Est. Tr. & Pensions J 31 2005-2006, at pp. 32 and 45 respectively; Lisbeth Hollman, "Preparation of a Will – Duty Re Testamentary Capacity", 9th Annual Estates and Trusts Summit, The Law Society of Upper Canada Continuing Legal Education (November 2, 2006), at pp. 2,6. Please note that this is not an exhaustive list of requirements for fulfilling the duty to substantiate testamentary capacity.

(a) Setting the Conditions of the Interview

- The solicitor should meet with the client alone to receive instructions and ensure that proper interview conditions exist.

- The solicitor should ensure that persons who may be interested in the client's estate or whose presence might in any way intimidate or inhibit the testator are not be directly involved in the interview process.

- If language barriers exist, the solicitor should consider the advisability or necessity of having an interpreter who is a disinterested third party present.

- If the client is under medication, the solicitor should try to meet with the testator when his or her medication is least likely to affect his or her mental faculties.

(b) Information Gathering

- If the client is not known to the solicitor, he or she should make inquiries as to prior solicitors and why they have not been retained to prepare the will.

- The solicitor should obtain the following information from the client: his or her marital status, educational background, employment

history, the members of his or her family, and details of other persons to whom he or she may feel obliged.

- The solicitor should obtain from the client full information concerning the nature and extent of his or her assets including the location of such assets and the manner in which they are held (joint tenancy, tenancy in common) and beneficiaries of insurance proceeds, RRSP's, pension plans, etc..

- The solicitor should review the client's prior wills and other pertinent documents (separation agreements, *inter vivos* settlements, etc.). If the instructions differ substantially from the provisions made in prior wills, or *inter vivos* arrangements, the solicitor should obtain an explanation from the client as to the reasons for the changes.

- The solicitor should inquire as to any special reasons or circumstances to explain why the testator would prefer one beneficiary over another or why a person, who might otherwise be a beneficiary of the client's estate, is being excluded.

- In the case of a client who is elderly or ill, the solicitor should avoid asking leading questions, or questions that could each be answered by a single word.

- The solicitor should prepare a draft will that is sent to the client for review and consideration; engage in further discussion or a meeting with the client regarding the draft will; and meet with the client for the purpose of summarizing the provisions of the final will and executing the will.

(c) Testing for Testamentary Capacity[84]

- The solicitor should fully explore the nature and extent of any medical problems of the client, inquire as to the type of medication being taken by the client, and consider whether it is affecting his or her ability to give proper instructions. The client's behaviour and idiosyncrasies should also be noted.

- If considered necessary or advisable, the solicitor should obtain the written evaluation of the client's family doctor, mental health professional and/or licensed assessor as to the testamentary capacity of the client.

- If suspicious circumstances surface, the solicitor must analyze the nature, effect and results of such circumstances, and take consults when appropriate. At minimum, the solicitor who faces suspicious

[84] The interested reader should also refer to the following resource: Ian M. Hull and Suzana Popovic-Montag, "The Standard of Care and Will Drafting – The Nature of the Retainer and its Impact on the Duty of Care in Estate Matters" at 12 to 17.

circumstances must make "searching"[85] inquiries as to his or her client's capacity.

- The solicitor should conduct thorough tests, such as the MMSE to satisfy him or herself as to the client's testamentary capacity both at the time instructions are given and at the time of execution of the will. A client's memory should be tested of recent and remote events, his or her ability to be influenced, awareness of the surroundings, comprehension that he or she is providing instructions for the preparation of a will, awareness of the effect of the will and the persons who ought to be the natural beneficiaries of his or her estate, and whether the testator can read, or at least understand, the wording or content of the will.

(d) Instructions Received from Third Parties

- If, given the exigencies of the particular case, the solicitor obtains instructions to prepare a will from someone other than the client, the solicitor must ensure that he or she meets with the client before the will is executed to satisfy the solicitor of the following: the will reflects the client's true intentions, the client is competent to so advise the solicitor, the client knows and approves of its contents, and the client is aware of the nature and effect of the document he

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[85] *Murphy v. Lamphier*, *supra.* note 8, at pp. 320-321 (Ont. H.C.), quoting with approval from Blake V.-C.'s judgment in *Wilson v. Wilson* (1875-6), 22 Gr. 39, at p. 74, aff'd (1876), 24 Gr. 377; referred to in "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", *supra.* note 3, at 471.

or she is signing. This meeting should be conducted in the absence of the person giving the instructions or any party who may benefit from the will. The solicitor should not give the will for execution to the person from whom the solicitor obtained instructions or any person who may be interested in the estate. The solicitor should meet personally with the client and supervise the execution of the will.

(e) Documentation

- The solicitor should have a record of the instructions that were given to him or her for preparation of the will and all information the solicitor received concerning the client's family situation and assets. If the solicitor takes instructions from a client whose illness is such that there are rapid changes in his or her physical and/or mental condition, the solicitor should record the instructions at a time when the client is most lucid, and have those instructions dated and signed by the client at the end of the interview and in the presence of two witnesses.

- The solicitor could consider using audiotape or videotape to record the involvement of and interaction with the client. There may be several advantages to using such recording methods in the preparation of a will. For instance, an audiotape or videotape may provide inexpensive, convenient, and reliable evidence that:

- **is highly accurate.** Witnesses' memories or impressions may fade with the passage of time – audiotape or videotape would compensate for such losses;

- **is non-verbal**, such as demeanour, voice tone and inflection, facial expressions, and gestures;

- **the testator understood the contents and all the implications of his or her will.** The testator could list the contents and state the implications in his or her own words, and the reasons for the particular disposition of his or her estate;

- **the testator was of sound mind** during the making of his or her will;

- **the testator was not the type of person who is weak willed** enough to be susceptible to undue influence;

- **a visually-impaired testator** knew and approved of the contents of his or her will. In this situation, the will could be read to the testator in front of impartial, and preferably non-familial, witnesses;

- **an illiterate testator** knew and approved of the contents of his or her will. In this situation, the will could be read to the

testator in front of impartial, and preferably non-familial, witnesses;

- **a hearing-impaired testator** knew and approved of the contents of his or her will. Where the testator communicates via sign-language, an interpreter could relay the contents of the will using sign language. Preferably, the interpreter would be a disinterested party to the testator's estate and not be related to the testator;

- **a testator who is not fluent in English** knew and approved of the contents of his or her will. A skilled interpreter could relay the contents of the will from the solicitor to the testator, and communicate back to the lawyer the testator's questions, comments and concerns. Preferably, the interpreter would be a disinterested party to the testator's estate and not be related to the testator; and

- **all formalities for the proper execution of the will were met.**

Support for use of an audiotape is found in *Re Eastland Estate*,[86] where a testator who suffered three heart attacks and two heart operations in the span of just over a year, executed three wills

[86] (1977), 9 A.R. 504 (Alta. Surr. Ct.).

around that time. The Alberta Supreme Court (Trial Division) determined his testamentary capacity in respect of all three wills and codicils thereto. Justice Moore, speaking on behalf of the majority of the Court, held at paragraphs 20 and 30,

> After the third will was executed, [the testator and his two solicitors] then discussed at length the corporate affairs and the estate of [the testator]. This conversation was taped at the suggestion of [one of the solicitors]. [He] felt that it would be a good idea to have a tape available to assist in any future tax discussions with the Department of National Revenue. The tapes were played in open Court and everyone had an opportunity to listen to the conversation... . [The testator's] answers to [one of the solicitor's] questions on tape certainly sounded as though [the testator] was well informed and had good recollection and good capacity to answer a myriad of complicated and technical questions about his property and his possible tax problems. His voice seemed weak and tired and faded at times according to [one of the solicitors] but nevertheless his mind was alert and he was able to respond to every question. The conversation according to [that solicitor] took place over a period of at least an hour of intensive questioning involving [the testator's] land acquisitions, land operations, cattle operations, and generally his entire business affairs, and business background in recent years. ...
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> Therefore, on reviewing the whole of the evidence, it is abundantly clear that at the time of the execution of all three wills and codicils that [the testator] had testamentary capacity. Each will was properly executed in the presence of two witnesses both being present at the same time. Not only does the evidence of the various witnesses substantiate this finding but one can very easily come to the same conclusion by listening to the taped conversation...

Furthermore, in the case of *Re Wright*,[87] the Saskatchewan Surrogate Court was asked to determine whether the 99-year-old

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[87] (1981), 13 Sask. R. 297 (Sask. Surr. Ct.).

testatrix had testamentary capacity upon executing a codicil to her last will in October 1975. The will itself was executed in April 1975 (the "April 1975 will"). When a certain solicitor was retained to prepare the will in April and determined that the testatrix had made a number of prior wills, he decided to tape his interview with the testatrix. During the interview, the testatrix discussed the disposition of her property upon her death. Justice McIntyre, speaking on behalf of the Court, held at paragraphs 23, 27 and 48, respectively,

> [the solicitor] ... decided that it would be wise, and I commend him for it, to tape the complete interview with [the testatrix] and a transcript of the tapes of the interview ... was filed by consent of the solicitors for all the parties. ...
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> Although [the testatrix] was 99 years of age when she completed her [April 1975 will], and although her eyesight was bad due to a cataract problem and she was somewhat frail at this stage of her life, there is no doubt whatever in my mind that she was very alert mentally and that she understood her business affairs. If there was any doubt as to her capacity in April, 1975 one only has to look at the ... transcript of the tapes taken on the interview at [the solicitor's] office....
>
> The statements of [the testatrix] to [the solicitor] during his interview on the [date of execution of the April 1975 will] and a letter prepared by [the solicitor] at the direction of [the testatrix] ... satisfied me that the [immediately prior] will of [the testatrix] ... did not truly represent her wishes or desires but came about as a result of pressure on her ... to leave the bulk of her estate to her eastern relatives.

Ultimately, the taped interview helped the Court determine that the testatrix had the requisite testamentary capacity when she gave

instructions to the solicitor for the preparation of the codicil to her last will in October 1975.

However, parties involved in the preparation of a will should be aware that the use of audiotape or videotape does not always support the validity of a will. In fact, it may cause several problems, such as the following:

- **a court could conclude that the testator did not possess the requisite testamentary capacity, or was unduly influenced,** when hearing an audiotape of the testator speaking or viewing an accurate picture of the testator;

- **bias against the testator may exist** because of his or her outward appearance or potentially annoying traits; and

- **there is the possibility that the audiotape or videotape may be accidentally or intentionally altered,** leading to significant and negative consequences.

For instance, *Tucker v. Tucker Estate*,[88] is a case in which the testatrix executed several wills, each one leaving different portions of her estate to her three sons upon her death. The validity of her last will, written in one of her son's handwriting, was being questioned in this case. To show that the formal requirements for

[88] (2009) CanLII 1664 (Ont. S.C.J.).

due execution of the will were met, including the testatrix's capacity to make the will, the son had the execution of the will recorded on videotape. It was submitted as evidence to the Ontario Superior Court of Justice. However, the videotape did not help support the son's position. In fact, the Court found the making of the videotape was itself suspicious:[89]

> I find if all were above board and there were no concerns about health, capacity, or influence, a video would not have been contemplated. It is clear that every effort was made to ensure that the will was deemed to be valid and that evidence existed of knowledge and capacity. To watch the videotape is almost to watch a play.
>
> The will was all in [the son's] handwriting. Although he explained this as being due to his mother being arthritic, it is apparent that she was able to sign her own name clearly and, as perceived on the videotape, in a fairly quick fashion. It would lead the court to believe that if, in fact, these were her true wishes and her free will, she could have created this less than 10-paragraph will herself in her own handwriting.

Ultimately, the Court held that the son did not show that the testatrix had the requisite testamentary capacity, and the will was not valid.

If the solicitor decides to use audiotape or videotape to record the making of a will, he or she should follow a number of precautions to ensure that the recording supports the testator's will, such as the following:

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[89] *Ibid.*, at para. 39.

- ensure solid technical quality of the recording. Audio (and lighting, if video recording is used) tests should be conducted before recording the event. There should be enough light to see the testator's face and that he or she is speaking clearly without distortion. A microphone that records sound clearly should be used. The recording device should be secured in place, using a tripod or other such device. There should be enough room on the tape to ensure that the entire length of the session is recorded, and that the recording is not interrupted. If not, the end of each section or tape should be announced, and the beginning of each following tape should also be announced. Any technical data necessary to play back the tape, such as the record speed and format, should be stored with the tape;

- everyone witnessing the event (including interpreters) should identify him or herself by name, relationship to the testator, and contact information (mailing address, phone numbers, e-mail addresses, etc.). Preferably, the witnesses should be impartial and not family members;

- the testator should identify him or herself by name, contact information (mailing address, phone numbers, e-mail addresses, etc.), declare that he or she is of sound mind,

specify the nature of the event that is being recorded, his or her approval of the event taking place, and whether the recording is meant to accompany a hard copy of a will. He or she should also mention the date, time and place of recording; list all of the assets of his or her estate; describe how he or she wishes the assets to be transferred, the names of the beneficiaries, what they are to receive and why, and the potential implications of such dispositions on the overall estate and the family relations;

- if the testator is visually-impaired, the recording should include the will being read to the testator in front of the other witnesses;

- if the testator is illiterate, the recording should include the will being read to the testator in front of the other witnesses;

- if the testator is hearing-impaired and communicates *via* sign-language, the recording should include an interpreter relaying the contents of the will to the testator using sign language. If the testator is not comfortable using sign-language, but is able to write, all communication could be conducted in writing and recorded;

- if the testator is not fluent in English, the recording should include a skilled interpreter relaying the contents of the will to the testator, and communicating to the audience the testator's questions, comments and concerns. Preferably, the interpreter would be a disinterested party to the testator's estate and not be related to the testator; and

- during the recording, the witnesses should be alert to any contradictory or inappropriate statements made by the testator or any of the witnesses, and aim to clarify such statements during the recording;

- if the will is read to the testator, the witnesses should follow along as the will is read, hear the testator agree to the contents of the will, and then watch the testator sign the will;

- have the witnesses sign a notarized transcript of the event, including a statement of the testator's:

    - agreement to what was read,

    - acknowledgment of any communication deficiencies (*i.e.*, visual, hearing, illiteracy, etc.), and

    - having the entire will execution preserved on audiotape or videotape, as the case may be;

- at the end of the tape, there should be a recording of the hours and minutes of the recording;

- there should be a provision in the hard-copy of the will indicating the existence of the recording, how many copies of the recording were made, and the storage location(s).

- The solicitor should ensure that proper docket entries are made of all meetings with the client.

- The solicitor should prepare a complete and thorough memorandum documenting:

  - the client's history; a list of the client's assets as they are known to him or her;

  - the client's family members and people to whom the client might normally be expected to leave bequests;

  - reasons for why a likely beneficiary is being left out of the will;

  - in complex and conflictual family situations, evidence showing an appreciation of the implications and consequences of a particular asset distribution;

  - the solicitor's involvement, observations, potential concerns and the basis upon which the solicitor was able to resolve

those concerns, especially when instructions are being given regarding preparation of the will and during its execution;

- dates of the interviews and description of where the interviews were conducted;

- instructions given by the client, though they need not be verbatim records of instructions;[90]

- questions asked at the interview and responses thereto to test for testamentary capacity and the steps taken to determine whether suspicious circumstances existed. If there is any doubt as to the testator's capacity, a memorandum or note of the lawyer's observations and conclusions should be kept in the file;[91]

- general observations and impressions of the client, including his or her demeanour, alertness, cognitive abilities, idiosyncrasies displayed during each meeting and any notable changes in behaviour from one meeting to the next;

- the length of time spent during each interview;

- the length of time between giving instructions and execution of the will;

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[90] *Petrowski v. Petrowski Estate*, *supra.* note 32, at para. 96.

[91] *Scott v. Cousins*, *supra.* note 10.

- who accompanied the client to the office and who was present at each meeting;

- the reasons given by the client to explain changes to prior wills and reasons for his or her attitude toward beneficiaries or other persons interested in the will;

- the nature of the meeting when the will is executed, including the steps taken to ensure that the client had the requisite capacity at the time of execution and whether the will was read to the client, or alternatively, how the contents of the will were described to the client, the client's reactions and the manner in which the will was executed.

If a solicitor fulfills his or her duty to substantiate testamentary capacity, but a court ultimately holds that the solicitor's conclusion regarding the client's testamentary capacity is inaccurate, the solicitor should not be found to have fallen below the acceptable level of professional conduct. Failing to meet the acceptable level of professional conduct may result in the solicitor being held liable for negligence in failing to substantiate testamentary capacity. Thus a solicitor should approach the will-making process on the basis that at some later date, the will may be challenged and the steps taken by him or her surrounding the making and execution of the will may be put under the microscope of judicial scrutiny. It is hoped that common sense will dictate the nature and extent of the procedures which should be taken by the solicitor to protect the validity of the will he or she has prepared, not only because that is his duty his client,

but also to avoid embarrassment at the very least, and more pertinently, finding of liability. The case of *Re Worrell*[92] stands as a negative object lesson for us all as to the embarassment that can be visited on a lawyer who has not taken the necessary steps to satisfy himself with respect to testamentary capacity. In that case, the court felt compelled to make the following comment about the solicitor:[93]

> I consider it necessary in this action to comment on the conduct of the solicitor who drew the will that is at issue. The solicitor impressed me as an honest, conscientious person, and yet on his own evidence he acted as set out hereunder:
>
> (a) he prepared a will for a testator for whom he had never acted and whom he never saw and knew the testator concerned was 82 years of age and confined to a home for the aged,
>
> (b) he drew the will without any knowledge of the size of the testator's estate or the nature of its assets,
>
> (c) he drew the will leaving a substantial portion of the estate to the person who consulted him,
>
> (d) he drew the will with changes from the original letter of instructions signed by the testator without any consultation with the testator,
>
> (e) he handed the will to the beneficiary who had consulted him, to take out and have executed,
>
> (f) he kept no docket entries or other records dealing with the matters in issue.
>
> It seems incredible that a competent solicitor, the head of a respected law firm, would act in this manner. It seems even more incredible that he gave no indication in the witness-box which would indicate that he realized he had acted improperly.

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[92] [1970] 1 O.R. 184, 8 D.L.R. (3d) 36 (Surr. Ct.).

[93] *Ibid.*, at paras. 16,17.

In the result, the Ontario Simcoe County Surrogate Court held that testamentary capacity was not proven, the document propounded was not the will of the testator and that the deceased died intestate.

5. CONCLUSION

Clients often view the will-making process as a necessary evil – something to be endured but not enjoyed. After all, the contemplation of one's own mortality is not considered to be one of life's greater pleasures. As a result, clients are often inclined to try to spend as little time and money as possible completing the transaction. However, we do not serve our clients well if we do not take the time required to ensure that the instructions we receive are based on an appreciation of all relevant issues – be they tax laws or constraint on testamentary freedom or other considerations, and satisfy ourselves that the instructions we receive have been given by a testator who understands and appreciates what he or she is doing. We must also take all necessary precautions to ensure that the document we prepare will produce the desired results.

We have all, I am sure, heard comments about the increasing costs of preparing wills and the lament that wills are "loss-leaders". To a large extent, we have only ourselves to blame for this state of affairs. It is up to us to educate our clients and the public as to the importance of the will-making process and to point out that the costs of preparing a proper will may, in the long run, be less than the costs involved if the will is later revoked.

Capacity Assessments by the Drafting Lawyer

M. Elena Hoffstein

The Law Society of Upper Canada Special Lectures 2010:
A Medical-Legal Approach to Estate Planning,
Decision-Making, and Estate Dispute Resolution
for the Older Client

"Although superficially simple, problems involved in litigation concerning the establishment of a deceased person's will against attacks of lack of testamentary capacity, fraud and undue influence, are ... second to none in difficulty. While the Chief Justice of Canada has recently said in an appeal involving these questions that "the law is well established and well known",the fact remains that judgments dealing with litigation of this kind abound in language that's hazy, obscure, and extremely difficult to reconcile."

[Emphasis added]

-- Dr. Cecil A. Wright in "Wills – Testamentary Capacity – 'Suspicious Circumstances' – Burden of Proof", 1938, and quoted with approval by Sopinka, J. in *Vout v. Hay* (1995)

OUTLINE

- Legal Requirements of Testamentary Capacity
- Lawyers' Standard of Care
- Assessments to Substantiate Testamentary Capacity
- Solicitor's Evidence
- Medical Experts and Lay Persons' Evidence
- How to Satisfy the Duty to Substantiate Testamentary Capacity

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

Solicitor's Duty to Support the Client's Will

- Know the legal requirements for testamentary capacity
- Satisfy him/herself that the requirements have been met

"Few of the duties which devolve upon a solicitor more imperatively call for the exercise of a sound discriminating and well-informed judgment, than that of taking instructions for wills .... It is [the] bounden duty [of the solicitor] to satisfy [himself] thoroughly as to the proposed testator's volition and capacity, or, in other words, that the instrument expresses the real testamentary intentions of a capable testator prior to its being executed de facto as a will at all."

– Jarman on Wills, 8th ed.

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

What constitutes sufficient testamentary capacity to make a will?

- Ability to comprehend and recollect the nature and extent of one's property in general terms;
- Ability to understand the nature and effect of a will, on one's own initiative;
- Knowledge of who might ordinarily expect to benefit from one's will;
- Knowledge of the property that is being given to each beneficiary; and
- Comprehension and appreciation of the nature of the claims of persons being excluded from the will.
- Where the testator is elderly or suffering from mental or physical disability or deterioration, his/her mental faculties have not diminished so much so that the testator lacks testamentary capacity

Cases:

- *Banks v. Goodfellow* (British, 1870)
- *Murphy v. Lamphier* (Ont. H.C., aff'd Ont. C.A., 1914)

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

Suspicious Circumstances

- Circumstances that may cast doubt on the testator's ability to make a valid will

  - Clandestine preparation of a will
  - Preparation of a will by a beneficiary named in the will or on instructions received from the beneficiary
  - Testator's physical, psychological or financial dependence on a beneficiary
  - Advanced age of the testator
  - Physical or mental illness, disability or deterioration of the testator
  - Testator's isolation from family and friends
  - Will is significantly different from previous wills
  - Beneficiary was instrumental in the preparation of the will
  - Testator is unwilling to provide the solicitor with full disclosure of assets, liabilities or family circumstances
  - Drastic changes in the testator's personal affairs

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

Suspicious Circumstances

- Where they exist, the solicitor must take extra precautions to satisfy himself, and potentially the court, that the client has the requisite testamentary capacity to make the will
- The breadth and depth of the inquiry required will increase in proportion to the existence of the suspicious circumstances

***Eady v. Waring* (Ont. C.A., 1974):**

"The Law imposes a heavy burden on a solicitor confronted with [suspicious circumstances] and the conduct of his 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."

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

When in the Will-Making Process Should the Test for Testamentary Capacity be Applied?

At least 2 critical times:

- When the testator gives instructions regarding contents of the will
- When the will is being executed

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

When in the Will-Making Process Should the Test for Testamentary Capacity be Applied? (cont')

Parker v. Felgate **(British, 1883)**

To determine the relative weight given to each of these times, refer to the following classic statement on this issue:

> *"If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, 'I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.' "*

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

When in the Will-Making Process Should the Test for Testamentary Capacity be Applied? (cont')

Parker v. Felgate (British, 1883)

- **3 possible states of mind:**

(A) Did the testator, at the time of execution, know and recollect all that he had done at the prior meeting with the solicitor where instructions were given?

(B) Even if there was not recollection of every detail of what had transpired at the meeting, could it be said that if the clauses in the will were put before the testator, he could respond intelligently in the affirmative? (*i.e.*, did the testator know and approve of the contents of the will?)

(C) Even if the testator no longer had capacity to recall the whole transaction, would it be possible to say that the testator had sufficient capacity to say, in effect, that he had completed his business with the solicitor, trusted the solicitor to have embodied his instructions in proper words and accepted the paper as so embodying those instructions?

LEGAL REQUIREMENTS OF TESTAMENTARY CAPACITY

Assessments to Substantiate Testamentary Capacity:

- **Purpose** To ensure that the client has the legal capacity to give instructions with respect to the disposition of assets upon death
- **Experts** Consider enlisting a further assessment by a medical expert/licensed assessor
- **Guidelines** Solicitor should give the medical expert/licensed assessor guidelines for determining the client's testamentary capacity

LAWYERS' STANDARD OF CARE

- Solicitor preparing a will for a client must meet a professional standard of care expected of a reasonably competent and prudent solicitor in preparing the will

- Standard of care entails executing the basic tasks necessary to effect a valid will, such as adducing and documenting evidence of testamentary capacity

- Lawyer who undertakes to prepare a will should inquire into and substantiate the client's testamentary capacity

ASSESSMENTS TO SUBSTANTIATE TESTAMENTARY CAPACITY

What should a solicitor do if he/she is in doubt about a client's testamentary capacity?

Scott v. Cousins (Ont. S.C.J., 2001):

> *"Some of the authorities … state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel 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."*

ASSESSMENTS TO SUBSTANTIATE TESTAMENTARY CAPACITY

Hall v. Bennett Estate (Ont. C.A., 2003):

Where a solicitor undertakes to interview a person with a view to obtaining instructions to prepare a will, does not obtain sufficient instructions to do so and is presented with significant evidence that the person lacked testamentary capacity at the time of giving instructions, the solicitor is not under any obligation to accept the retainer to prepare the will.

SOLICITOR'S EVIDENCE

- **Evidence of the careful solicitor has been accorded great weight by the courts and often determines the outcome**

- **Why have the courts placed such reliance on the evidence of solicitors?**

  - Unlike other witnesses, solicitors have a specific understanding of the legal concept of testamentary capacity
  - Solicitors are under a legal duty to carefully consider whether such capacity exists in a particular testator, and are obliged to document their opinions
  - The solicitor is usually the only person who is present at both critical testamentary junctures
    1. When instructions were given regarding preparation of the will
    2. When the will was executed

- **Where a solicitor is best positioned to determine a client's testamentary capacity, the assessment may begin and end with the solicitor**

SOLICITOR'S EVIDENCE

Article published in the *Canadian Bar Review* (Dec., 1984):

- Authors analyzed 32 Canadian cases in which testamentary capacity was litigated
- Authors cite courts' criticisms of solicitors in the performance of their duty to inquire into and substantiate their clients' testamentary capacity:

  (A) Failure to obtain mental status examinations where circumstances warranted
  (B) Failure to interview clients in sufficient depth
  (C) Failure to properly record or maintain notes
  (D) Failure to ascertain the existence of suspicious circumstances
  (E) Failure to react properly to the existence of suspicious circumstances
  (F) Failure to provide proper interview conditions – presence of interested party
  (G) Improper relationship between solicitor and client – preparing a will for a relative
  (H) Failing to take steps to test for capacity

MEDICAL EXPERTS & LAY PERSONS' EVIDENCE

How do medical and lay evidence contribute to a court's determination of an individual's testamentary capacity?

***Re Culbert Estate* (S.K.Q.B., 2006)**

- Considered role of medical evidence in the determination of a person's testamentary capacity
- Court cited the following passage with approval from its judgment in *Dieno Estate v. Dieno Estate* (S.K.Q.B., 1996):

> *"The law is fairly settled respecting what constitutes testamentary capacity and how it is proven. … Whether the testator's mind was sound is a practical question that does not depend on scientific or medical definition. Medical evidence is not required nor necessarily conclusive when given."*

- Nevertheless, evidence and opinions of medical experts and lay persons can significantly impact a court's determination of a person's testamentary capacity

MEDICAL EXPERTS & LAY PERSONS' EVIDENCE

What elements make medical experts and lay persons' evidence persuasive?

- Significant contact with the testator prior to and around the time the will was made
- Relevant medical records, where appropriate, from the testator's regular physicians
- Communicated with the testator's regular physicians and lay persons close to the testator with regard to his or her mental capacity prior to and around the time the will was made
- Other evidence supporting the argument that the testator had or did not have testamentary capacity when the will was made
- An awareness of the testator's health, and if the testator was ill, how the illness or any medications taken by the testator, may have affected his or her mental capacity around the time the will was prepared
- Expertise in the field of mental capacity

MEDICAL EXPERTS & LAY PERSONS' EVIDENCE

Do Courts Afford Different Weight to Evidence from Medical and Lay Persons?

Not necessarily.

Courts may accord the pathological findings of medical professionals and the observations of lay persons equal weight.

Re Culbert Estate (S.K.Q.B., 2006)

> *"The Ontario Court of Appeal has said that the question of a sound and disposing mind "so far as evidence based on observation and experience is concerned may be answered as well by laymen of good sense as by doctors."* [Emphasis added]

MEDICAL EXPERTS & LAY PERSONS' EVIDENCE

Do Courts Afford Different Weight to Evidence from Medical and Lay Persons?

There may be cases where a lay person's testimony outweighs a medical expert's opinion.

Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2nd ed., 1999)

> *"In civil cases a lay witness may express an opinion on the issue of a person's testamentary capacity. Indeed, if the lay person has had an opportunity to observe the testator over long periods of time and association, such evidence may be given greater weight than expert testimony."* [Emphasis added]

In other words, expert evidence may not always outweigh the testimony of lay eyewitnesses who observed and knew the testator.

MEDICAL EXPERTS & LAY PERSONS' EVIDENCE

Does a Medical Expert Need to Perform a Formal Capacity Assessment for his or her Opinion to be Valued by a Court?

- If a medical expert has observed the testator over long periods of time, the expert need not perform a formal capacity assessment to deliver persuasive evidence of the testator's testamentary capacity to a court

MEDICAL EXPERTS & LAY PERSONS' EVIDENCE

Suggested Guidelines for Experts/Assessors

Report should include:

- Outline of his/her expertise in the field of mental capacity
- Statement that he/she has a clear understanding of the test for testamentary capacity, and a description of the sources lending to such an understanding
- Statement that he/she is aware of the potential use of the assessment report and what such uses may be
- Knowledge of background information about the testator
- Amount and nature of contact between the professional and:
  - Testator
  - Testator's physicians
  - Testator's close friends and relatives

MEDICAL EXPERTS & LAY PERSONS' EVIDENCE

Suggested Guidelines for Experts/Assessors

Report should include: (cont')

- Statement that the professional has received and considered information contained in the relevant medical, court, testamentary and financial documents
- Step-by-step analysis of how the testator meets the test for testamentary capacity
- Results from any cognitive screening (ex: MMSE)
- Any other information supporting the his/her assessment of the testator
- Concluding statements (*i.e.*, testator is/is not fully capable to make independent decisions regarding the disposition of assets upon death)

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take:

(a) Setting the Conditions of the Interview

- Solicitor should meet with the client alone to receive instructions and ensure that proper interview conditions exist
- Solicitor should ensure that persons who may be interested in the client's estate or whose presence might in any way intimidate or inhibit the testator are not directly involved in the interview process
- If language barriers exist, the solicitor should consider the advisability or necessity of having an interpreter who is a disinterested third party present
- If the client is taking medication, the solicitor should try to meet with the testator when his/her medication is least likely to affect his or her mental faculties

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(b) Information Gathering

- If the client is not known to the solicitor, he/she should make inquiries as to prior solicitors and why they have not been retained to prepare the will
- Solicitor should obtain the following information from the client: his/her marital status, educational background, employment history, family members, and details of other persons to whom he/she may feel obliged
- Solicitor should obtain from the client full information concerning the nature and extent of his/her assets, including the location of such assets and the manner in which they are held (joint tenancy, tenancy in common, etc.), and beneficiaries of insurance proceeds, RRSPs, pension plans, etc.
- Solicitor should review the client's prior wills and other pertinent documents (separation agreements, *inter vivos* settlements, etc.). If the instructions differ substantially from the provisions made in prior wills, or *inter vivos* arrangements, the solicitor should obtain an explanation from the client as to the reasons for the changes

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(b) Information Gathering (cont')

- Solicitor should inquire as to any special reasons or circumstances to explain why the testator would prefer one beneficiary over another or why a person, who might otherwise be a beneficiary of the client's estate, is being excluded
- In the case of a client who is elderly or ill, the solicitor should avoid asking leading questions, or questions that could each be answered by a single word
- Solicitor should prepare a draft will that is sent to the client for review and consideration; engage in further discussion or a meeting with the client regarding the draft will; and meet with the client for the purpose of summarizing the provisions of the final will and executing the will

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(c) Testing for Testamentary Capacity

- Solicitor should fully explore the nature and extent of any medical problems of the client, inquire as to the type of medication being taken by the client, and consider whether it is affecting his/her ability to give proper instructions The client's behaviour and idiosyncrasies should also be noted

- If considered necessary or advisable, solicitor should obtain the written evaluation of the client's family doctor, mental health professional and/or licensed assessor as to the testator's testamentary capacity

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(c) Testing for Testamentary Capacity (cont')

- If suspicious circumstances surface, the solicitor must analyze the nature, effect and results of such circumstances, and take consults when appropriate. At minimum, solicitor who faces suspicious circumstances must make "searching" inquiries as to his/her client's capacity

- Solicitor should conduct thorough tests, such as the MMSE, to satisfy him/herself as to the client's testamentary capacity both at the time instructions are taken and at the time of execution of the will. A client's memory should be tested of recent and remote events, his/her ability to be influenced, awareness of the surroundings, comprehension that he/she is providing instructions for the preparation of a will, awareness of the effect of the will and the persons who ought to be natural beneficiaries of his/her estate, and whether the testator can read, or at least understand, the wording or content of the will.

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation

- Solicitor should have a record of instructions that were given to him/her for preparation of the will and all information the solicitor received concerning the client's family situation and assets. If the solicitor takes instructions from a client whose illness is such that there are rapid changes in his/her physical and/or mental condition, the solicitor should record the instructions at a time when the client is most lucid, and have those instructions dated and signed by the client at the end of the interview and in the presence of two witnesses

- Solicitor should ensure that proper docket entries are made of all meetings with the client

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation (cont')

- Solicitor should prepare a complete and thorough memorandum documenting:
  - Client's history; list of his/her assets, as they are known to him/her
  - Client's family members and people to whom the client might normally be expected to leave bequests
  - Reasons for why a likely beneficiary is being left out of the will
  - In complex and conflictual family situations, evidence showing an appreciation of the implications and consequences of a particular asset distribution
  - Solicitor's involvement, observations, potential concerns and the basis upon which the solicitor was able to resolve those concerns
  - Dates and locations of the interviews
  - Client's instructions

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation (cont')

- Solicitor should prepare a complete and thorough memorandum documenting: (cont')
  - Questions asked at the interviews and responses thereto to test for testamentary capacity and the steps taken to determine whether suspicious circumstances existed. If there is any doubt as to the testator's capacity, a memorandum or note of the lawyer's observations and conclusions
  - General observations and impressions of the client (demeanour, alertness, idiosyncrasies, etc.)
  - Duration of each interview
  - Length of time between giving instructions and execution of the will
  - Who accompanied the client to the interviews, and who was present during each interview
  - Client's explanations for changes made to prior wills, and reasons for his/her attitude toward beneficiaries or other persons interested in the will
  - Nature of the meeting when the will was executed (*e.g.*, will read to client, etc.)

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation (cont') – Audiotape / Videotape

- Solicitor should consider using **audiotape / videotape** to record the involvement of and interaction with the client. There may be several advantages to using such recording methods in preparation of a will.

  For instance, an audiotape / videotape may provide inexpensive, convenient, reliable and highly accurate evidence, and proof of the following:

  - testator understood the contents and all the implications of his/her will
  - testator was of sound mind during the making of his/her will
  - testator was not the type of person who is weak willed enough to be susceptible to undue influence
  - visually-impaired / illiterate / hearing-impaired testator knew and approved of the contents of his/her will
  - testator who is not fluent in English knew and approved of the contents of his/her will
  - all formalities for the proper execution of the will were met

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation (cont') – Audiotape / Videotape

Use of audiotape / videotape does not always support the validity of the will.

It may cause several problems, such as:

- A court could conclude that the testator did not possess the requisite testamentary capacity, or was unduly influenced
- Bias against the testator may exist
- Possibility that the audiotape / videotape may be accidentally or intentionally altered

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation (cont') – Audiotape / Videotape

If the solicitor decides to use audiotape / videotape to record the making of a will, he/she should follow a number of precautions to ensure that the recording supports the testator's will, such as:

- Ensure technical quality of the recording
- Everyone witnessing the event (including interpreters) should identify him/herself
- Testator should identify him/herself
- If the testator is visually-impaired and/or illiterate, the recording should include the will being read to the testator in front of the other witnesses
- If the testator is hearing-impaired and communicates *via* sign-language, the recording should include an interpreter relaying the contents of the will to the testator using sign-language. If the testator is not comfortable using sign-language, but can write, all communication could be conducted in writing and recorded

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation (cont') – Audiotape / Videotape

(cont')

- If the testator is not fluent in English, the recording should include a skilled interpreter relaying the contents of the will to the testator, and communicating to the audience the testator's questions, comments and concerns
- During the recording, witnesses should be alert to any contradictory or inappropriate statements made by the testator or any of the witnesses, and aim to clarify such statements during the recording
- If the will is read to the testator, witnesses should follow along as the will is read, hear the testator agree to the contents of the will, and watch the testator sign the will

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

Non-Exhaustive List of Inquiries that a Solicitor should make and Precautions that a Solicitor should take: (cont')

(d) Documentation (cont') – Audiotape / Videotape

(cont')

- Have witnesses sign a notarized transcript of the event, including a statement of the testator's:
  - Agreement to what was read
  - Acknowledgment of any communication deficiencies
  - Agreement to having the entire will execution preserved on audiotape / videotape
- At the end of the tape, record the hours and minutes of the recording
- There should be provision in the hard-copy of the will indicating that the recording exists, how many copies of the recording were made, and the storage location(s)

HOW TO SATISFY THE DUTY TO SUBSTANTIATE TESTAMENTARY CAPACITY

- If a solicitor fulfills his/her duty to substantiate a client's testamentary capacity, but a court ultimately holds that the solicitor's conclusion regarding the client's testamentary capacity is inaccurate, the solicitor should not be found to have fallen below the acceptable level of professional conduct

- Failing to meet the acceptable level of professional conduct may result in the solicitor being held liable for negligence in failing to substantiate testamentary capacity

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