

Assessing Testamentary Capacity in Light of Mental Illness

By Suzana Popovic-Montag

One of the unfortunate side effects of COVID-19 is an increase in reported mental illness. Over the last two years, cases of psychosis - people experiencing hallucinations and delusional thinking - has risen in England by 29%.ⁱ In light of this concerning statistic, now may be a good time to review how to assess testamentary capacity for clients coping with mental illness.

Caselaw confirms that a testator with any of the following conditions may be able to make a valid will:

- Bipolar disorder;ⁱⁱ
- Schizophrenia;ⁱⁱⁱ and
- A personality and/or thought disorder.^{iv}

A person may even maintain testamentary capacity while suffering from delusions, “provided those delusions do not affect the testator’s decisions as to the bequest.”^v

When assessing the capacity of a mentally ill client, we recommend taking extra precautions for two reasons:

- First, if the client’s will is challenged, any presumption that the will is valid could be displaced due to the client’s mental health, in which case a high test for capacity may apply.^{vi}
- Second, a high onus applies to the solicitor who assists a “weak and ill” client. In *Wiseman v Perrey*,^{vii} the court held that “[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[.]”^{viii}

Since both capacity and mental illness are time and task specific,^{ix} a lawyer who assists a mentally ill client ought to inquire into:

1. The current state of the client’s mental illness; and
2. The type of tasks the client can perform.

Mental Health Inquiries

When assessing the capacity of a mentally ill client, it is prudent to ask:

- Whether the client has been hospitalized as a result of the condition and, if so, when the hospitalization occurred;^x and
- Whether treatment has been prescribed (such as medication or therapy) and, if so, whether the client is utilizing that treatment.

It warrants noting that a client who is not being treated may still have capacity. In *The Vegetarian Society v Scott*, for example, the testator’s final will was admitted to probate even though he had untreated schizophrenia and a logical thought disorder.^{xi} An individualized approach is essential when assessing capacity, since the symptoms of any illness will “vary from individual to individual and from time to time.”^{xii}

A lawyer may request an opinion regarding capacity from the client’s family doctor ^{xiii} or a specialist, particularly if the client has recently been treated by a specialist. ^{xiv} Alternatively, if the client is hospitalized, an opinion regarding capacity could be obtained from the client’s treating physician. ^{xv} However, the ultimate duty to assess capacity lies with the lawyer. The opinion of other professionals may be useful, but the obligation to assess capacity is not delegable.^{xvi}


Task-Related Inquiries

When examining tasks that the client can perform, the focus ought to be on whether the client is capable of logical thought, making rational decisions, and completing a “goal directed activity”.^{xvii}

Whether the client is capable of handling his or her financial affairs may also be pertinent, but this factor is not determinative of capacity. As noted by the court in *Palahnuk v Palahnuk Estate*, “[i]t does not necessarily follow that a person found to be incapable of managing her property is incapable for all time thereafter of possessing the ability to have disposing capacity in relation to her assets for the purposes of a will.”^{xviii} If the client is unable to handle his or her finances, this simply indicates that a more thorough examination of capacity ought to be undertaken.

Observing the Client

Ideally, it is also advisable to visit the client multiple times, and at least once at the client’s home. Observations of the client’s home environment, the level of care the client receives (if any), and the client’s personal appearance and behaviour, may all be of interest if the client’s will is challenged.^{xix}

Lastly, we want to be mindful that, if the client presents as “irrational, delusional, incoherent, or abnormal,”^{xx} a testamentary instrument should not be executed until a later time. 



Hull & Hull LLP

Editor: Suzana Popovic-Montag
spopovic@hullandhull.com

141 Adelaide St. W., Suite 1700
Toronto, Ontario M5H 3L5

Tel: 416.369.1140 | Fax: 416.369.1517

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ⁱ Helen Pidd, “Psychosis cases rise in England as pandemic hits mental health”, *The Guardian* (18 Oct 2021), online: <theguardian.com>.

ⁱⁱ See *Leonard v Zychowicz*, 2020 ONSC 662 [*Leonard*].

ⁱⁱⁱ See *Hoffman v Heinrichs*, 2012 MBQB 133, affirmed 2013 MBCA 63 [*Hoffman*].

^{iv} See *Palahnuk v Palahnuk Estate*, 2006 CanLII 44262 (ON SC) [*Palahnuk*]; *The Vegetarian Society v Scott* ([2013] EWCH 4097 (Ch) [*Scott*].

^v *Fawson Estate (Re)*, 2012 NSSC 55 at para 195, citing *Re Marsh Estate* (1990), 99 NSR (2d) 221 (Pr Ct), aff’d (1991), 104 NSR (2d) 266 (CA)).

^{vi} *Palahnuk*, *supra* note 4 at paras 64, 66.

^{vii} *Wiseman v Perrey*, 2012 BCSC 1681.

^{viii} *Ibid* at para 112.

^{ix} See *Scott*, *supra* note 4 at paras 26, 32, 60.

^x Prior hospitalizations were considered in both *Leonard*, *supra* note 2 and *Palahnuk*, *supra* note 4.

^{xi} *Scott*, *supra* note 4.

^{xii} *Hoffman (QB)*, *supra* note 3 at para 17.

^{xiii} See *Leonard*, *supra* note 2 at paras 10, 24; *Palahnuk*, *supra* note 4 at paras 36-37, 67-69.

^{xiv} *Palahnuk*, *ibid* at paras 41-43, 67-69.

^{xv} See *Brydon v Malamas*, 2008 BCSC 749 at paras 121(d), 150, 186, 187.

^{xvi} *Palahnuk*, *supra* note 4 at para 71.

^{xvii} See *Scott*, *supra* note 4 at paras 21, 34-35, 59, 102.

^{xviii} *Palahnuk*, *supra* note 4 at para 75.

^{xix} See *Palahnuk*, *ibid* at para 69. To learn more about the lawyer’s home visits with the testatrix in this case, see paras 50-63.

^{xx} This language was used by the Ontario Court of Appeal in *McGrath v Joy*, 2022 ONCA 119 at para 78 in the context of assessing the impact of drugs and alcohol on testamentary capacity.