Taking Care in taking Instructions

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THE IMPORTANCE OF TESTAMENTARY CAPACITY

It is a fundamental tenet of law that, in order for a Will to be valid, the testator must have been mentally capable of making the Will. The classic test for testamentary capacity was set out in *Banks v. Goodfellow*, where the court held that a testator must be capable of understanding (1) the nature and effect of making a Will; (2) the extent of the property and assets involved; and (3) the claims of persons whom the testator would normally be expected to benefit.[1] Testamentary capacity is assessed at the time of giving instructions and, if it exists, the Will is valid provided that if, when the Will is executed, the testator understands what document he is signing and the document he is signing has been drawn in accordance with his instructions.

Given that the testator must understand what he is doing when he makes his Will, and the solicitor must ensure the Will he is drawing reflects the testator's wishes, the issue arises as to how far the solicitor's duty to ensure capacity extends. To be sure, most lawyers do not have the expertise to make a medical diagnosis with respect to their client's mental health. However, given that the lawyer has a responsibility to ensure that the Will being executed reflects the testator's true intentions, it would also seem apparent that the lawyer must take steps to satisfy herself that the testator has the capacity necessary to make a Will.

In their article, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity",[2] Litman and Robertson list six major deficiencies that often arise in cases where the lawyer fails to adequately inquire into the testator's capacity:

1. The failure to take steps to test for capacity;

2. The failure to make an adequate inquiry into whether suspicious circumstances exist;

[1] *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 at 565
[2] M.M. Litman & G.B. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", Canadian Bar Review (Volume 62), December 1984, 457 at 493

3. The failure to obtain a medical examination in cases where it appears the testator might be incapable;

4. The failure to interview the testator in a sufficiently thorough manner;

5. The failure to maintain adequate records of the interview with the testator; and

6. The failure to ensure that the setting in which the interview takes place is such that the solicitor can receive reliable information from the testator.

In cases where a lawyer fails to take adequate steps to satisfy himself of the capacity of the testator and the Will is later successfully challenged, the lawyer may find himself being sued in negligence by the disappointed beneficiaries. In order to reduce the chances of being held liable down the road, it is important that lawyers understand the extent of their duty to inquire into a client's testamentary capacity and the implications of the failure to discharge that duty.

THE OBLIGATION TO INQUIRE INTO TESTAMENTARY CAPACITY

In matters relating to estate planning, the case law imposes an obligation on a lawyer to satisfy herself of certain factors, such as the testator's capacity, that the testator has knowledge and approval of the contents of documents being signed, and that there is no apparent undue influence or fraud. When a lawyer draws a Will, she has an obligation to promote its effectiveness by documenting evidence of testamentary capacity or, if there is none, to decline the retainer to prepare a Will that could not be effected.[3] This duty a lawyer has becomes particularly important in cases where the prospective testator is elderly, infirm, or appears to be suffering from lack of capacity. Furthermore, if the instructions differ substantially from a previous Will, counsel must be very alert to the issue of capacity.

[3] *Harrison v. Fallis*, Unreported Judgment of Eberhard J., Court File No. 05-0403, Released June 12, 2006

The standard of care that a lawyer must exercise was discussed in *Ristimaki v. Cooper*.[4] This family law case involved a situation where the court had to decide whether a solicitor had provided inadequate advice to his client concerning whether she should enter into an agreement respecting the amount of money her husband would be required to post as security prior to trial. As it happened, her lawyer had failed to tell her key information, including the fact she would be giving up any further claim for security prior to judgment at trial.

At trial, the judge reviewed the evidence by dividing the defendant's retainer into three periods. Then, using the standard of "egregious error" rather than "reasonableness", he considered each period separately when determining whether the lawyer's behaviour fell below the requisite standard of care. He ultimately dismissed the plaintiff's action, concluding that most of the solicitor's behaviour did not constitute an "egregious error". On the occasions his behaviour did fall below the required standard of care, the judge ruled that his conduct did not cause her any loss.

On appeal, the plaintiff argued that, amongst other things, the trial judge had erred in applying too low a standard of care to the solicitor. In considering the standard of care that applies to lawyers, the Court of Appeal said that when performing a professional service, the lawyer must exercise reasonable care, skill and knowledge. In cases where the lawyer holds herself out as being an expert in a particular area of the law, a higher standard of care applies. A lawyer who is not diligent in protecting her client's interests will be found negligent.

In rejecting the trial judge's finding that in order to establish negligence against the lawyer for the advice he provided concerning the settlement of a case, an egregious error had to have occurred, the court said that there was no justification for holding lawyers to a different or lower standard than other professionals. The court also said that, in determining whether certain conduct falls below the requisite standard of care,

[4] (2006), 79 O.R. (3d) at 648

the conduct as a whole should be considered, rather than merely breaking the relevant time frame into discrete periods, deciding whether the lawyer breached his standard of care in each period, and leaving it at that.

The effect of the decision in *Ristimaki v. Cooper* is that in order to breach the standard of care, a lawyer's error does not have to be egregious, as some previous case law has suggested. It is sufficient that the lawyer's conduct was unreasonable. Further, when examining whether a lawyer has been negligent, while the court may look at the conduct in discrete segments of time, the court is also required to step back and look at whether the conduct as a whole amounts to negligence.

Materials dealing specifically with lawyers who practice in the area of estates law describe the standard of care expected of a lawyer as follows:

> At the outset, estate practitioners should recognize that by accepting employment to render legal advice or other such services, they impliedly agree to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks they undertake. If they fail to meet the standards of fellow practitioners in the same area of law, they may be held liable.[5]

In the decision of *Murphy v. Lampier,*[6] Chancellor Boyd stated:

> The solicitor is a skilled professional man... [He] 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 business of the solicitor is to see that a will represents the intelligent act of a free and competent person.

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[5] Bonnie Leigh Rawlins, "Liability of a Lawyer for Negligence in the Drafting and Execution of a Will" (1983), 6 E.T.Q. 117; see also M.M. Litman and G.B. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", [1984] 62 C.B.R. 457; *Ross* v. *Caunters*, [1980] Ch. 297, [1979] 3 All. E.R. 580; *White* v. *Jones*, [1995] 1 All E.R. 691; see also Rodney Hull "A Current File with an Unsigned Will: A loose Cannon in the Solicitor's Office" 17 E.T.P.J. 31

[6] 287, at p. 320-321 (Ont. H.C.), aff'd (1914), 20 D.L.R. 960, 32 O.L.R. 19 (C.A.)

If the solicitor does her job conscientiously and in a proper manner, as she is expected to do, then clearly heavy reliance will be placed on her opinion. Because of this it is essential that the solicitor remains alert to the issue of capacity and carefully and precisely documents any observations she makes.[7]

In the decision of *Danchuk v. Calderwood*,[8] the court stated that the solicitor does not discharge his or her duty by simply taking down and giving expression to the words of the client with the inquiry into capacity being limited to asking the client if he understands the words.

The extent to which a duty of care is owed was widened in *White v. Jones*,[9] to include acts of omission. With respect to the nature of the duty of care that a solicitor owes to the testator and the intended beneficiaries, the court stated that:

> ... the duty requires a solicitor to make the enquiries necessary to satisfy himself that the wishes of the testator will be honoured and given proper legal expression through the provisions of the will. Unusual circumstances, if presented, must be inquired into to ensure that the will that is ultimately prepared meets the wishes of the client. It is not a sufficient discharge of a solicitor's duty in circumstances to simply enquire of the client what he wishes and then to record and thereafter prepare the documents.

IDENTIFYING SUSPICIOUS CIRCUMSTANCES

Counsel's duty to substantiate capacity is particularly important in cases where suspicious circumstances exist. Suspicious circumstances are any circumstances surrounding the execution or preparation of a Will, which individually or cumulatively cast doubt upon either the testator's capacity to make a Will or his knowledge and approval of the Will's contents.[10]

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[7] Litman &Robertson, *supra* note 2
[8] (1996), 15 E.T.R. (2d) 193 (B.C. S.C.)
[9] [1995] 1 All E.R. 691 (H.L.)
[10] Litman & Robertson, *supra* note 2 at 470

The law is very clear in that a lawyer has the obligation to fully document the steps taken to test testamentary capacity in these circumstances, and particularly where capacity is likely to be an issue.

In the decision of *Re Carvell*,[11] the solicitor was criticized by the court for not taking reasonable steps to ascertain the existence of suspicious circumstances. This case involved a situation where the testator had executed a Power of Attorney in favour of the nursing home operator who was the sole beneficiary under his Will. The court was critical of the solicitor in the circumstances where the testator was clearly dependent and vulnerable. In describing the solicitor's conduct, the court stated:

> What reasons are given to explain why ... [the testator] would completely change his intention which was expressed repeatedly and was embodied in a document affecting his property? Why would ... [the testator] make such a drastic change in his intentions and leave all of his estate to an individual he had known for such a short time? The answers to these questions, if they had been asked of ... [the testator], would have thrown considerable light on the question of testamentary capacity. However, [the solicitor] never inquired if ... [the testator] had any previous intentions or apparently if he had any previous wills. [The solicitor] testified that he was interested only in the present intentions and therefore asked no questions regarding prior intentions.
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> The expressed reasons of the testator for such changes provide the evidence in which testamentary capacity can be assessed by the court. Since the reasons for this change have not been ascertained, I am left in doubt as to testamentary capacity.[12]

When drafting testamentary documents, there are recurring circumstances relating to testators that must raise the attention of the solicitor and require that measures be taken to ensure, to the extent practicable, that the testator's true wishes are being expressed and that these wishes will be protected and upheld upon the testator's death. Such circumstances include:

[11] (1977), 37 A.P.R. 642, at p. 646, 21 M.V.R. (2d) 643, at p. 646, M.V. Prob. Ct.
[12] *Ibid.* at p. 660 (A.P.R.)

- an elderly testator;
- a testator who has suffered significant ill health;
- a testator who is unwilling to provide the solicitor with full information relating to the assets, liabilities, or family condition circumstances;
- a testator who disposes of the estate in a way that would generally be viewed as being unusual in the context of the objective circumstances of the testator;
- a beneficiary of the Will who has been particularly involved in assisting the testator with the preparation of the Will; and
- a testator who is attempting to dispose of assets in a way that represents a drastic departure from the terms of the former Will.

The existence of any one or more of these factors does not necessarily mean that the testator lacks capacity or that the testamentary document is invalid. However, since the presence of any of these factors could reasonably provide a route by which someone could attack the Will, the draftsperson must consider what steps can be taken to ensure that the true intention of the testator is being communicated.

THE LAWYER'S DUTY IN THE FACE OF SUSPICIOUS CIRCUMSTANCES

In the decision of *Eady v. Waring*,[13] the Ontario Court of Appeal approved the lower court's comments on the issue of what to do in the face of suspicious circumstances, and noted that, "[A] heavy burden is imposed on the solicitor confronted with [suspicious circumstances] [in respect] of his inquiries and responses thereto."

More recently, in *Hall v. Bennett*,[14] the Ontario Court of Appeal reviewed the issue of what a solicitor should do when her suspicions are aroused. The court stated that, "the

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[13] (1974), 43 D.L.R. (3rd) 667, at page 665, 2 O.R. (627), at page 635 (Ont. C.A.)
[14] [2003] O.J. No. 1827

law is ... clear that a solicitor who undertakes to prepare a will has a duty to inquire into his or her client's testamentary capacity."

In *Hall v. Bennett*, the court referred to the Supreme Court of Canada's decision in *Murphy v. Lamphier*,[15] where the nature of the duty of care was described as follows:

> A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a 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 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.[16]

In *Hall v. Bennett*, the Court of Appeal also quoted the Honourable Mr. Justice Cullity's decision in *Scott v. Cousins*:[17]

> The obligations of solicitors when taking instructions for wills have been repeatedly emphasized in cases of this nature. At the very least, the solicitor must make a serious attempt to 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: see, for example, *Maw v. Dickey* (1974), 6 O.R. (2d) 146 (Surr. Ct.), at pages 158-9; *Eady v. Waring*, above, at page 635; *Murphy v. Lamphier* (1914), 31 O.L.R. 287 (H.C.), at pages 318-21. Some of the authorities go further and 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

[15] (1914), 31 O.L.R. 287 (Div. Ct.), aff'd (1914), 32 O.L.R. 19 (Sup. Ct. (A.D.))
[16] *Ibid.* at 318-9
[17] (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J)

> will while taking, and retaining, comprehensive notes of their observations on the question.

In *Scott v. Cousins,* the lawyer knew and acted for the Deceased on several occasions. However, of concern was the extent of the lawyer's notes made regarding the deceased's mental and physical health. One of the important duties of the solicitor is to take and retain comprehensive notes of observations. Recent case law seems to suggest that if the solicitor's evidence is not confirmed in writing, it will not be easily accepted.[18] Thus, there is some concern that the extent of a lawyer's notes may open him or her up to criticism and, potentially, liability. In order to help minimize this risk, it would be prudent for any solicitor making a Will to take sufficiently detailed and thorough notes, so that if the capacity of the testator is later brought into question, the solicitor will have the documentation necessary to establish their understanding of the testator's capacity at the time the Will was made.

Having said that, even if there is doubt in the lawyer's mind as to the capacity of the deceased, in view of the decision of Mr. Justice Cullity in *Scott v. Cousins*, as adopted by the Ontario Court of Appeal in *Hall v. Bennett*, providing the lawyer made the necessary inquiries regarding capacity, it might still be proper to draw the Will. It would seem that the key is that the solicitor makes reasonable efforts to satisfy herself that it is the true intention of the testator which is being carried out in their Will, and records the findings of those efforts in a clear and cogent manner. If the Will is later challenged, then those notes will become important evidence in establishing the testator's state of mind when the Will was drawn.

CONSEQUENCES OF FAILING TO DISCHARGE THE DUTY OF CARE

Courts have become increasingly willing to hold lawyers liable when a Will is challenged because it was negligently prepared or executed. Not only can lawyers be held liable for preparing the Will of a testator who is incompetent, but they can also attract liability if

[18] *Turi v. Swanick*, [2002] O.J. No. 3595

they fail to keep notes that are adequate to provide evidence of the testator's capacity at the time instructions were given or the Will was executed. Depending on the size of the estate which is the subject of the Will, the losses suffered by the disappointed beneficiaries might be significant. Increasingly, courts are being called upon to determine who qualifies as a "disappointed beneficiary".

At this point, it appears that if a lawyer is exposed to the claims of disappointed beneficiaries, it will only be from those who lost out as the result of the challenged Will. In its decision in *Harrison v. Fallis*,[19] the court considered a situation where there had previously been a successful Will challenge and the costs of the action had been ordered against the unsuccessful propounder. The defendant solicitor had drafted a Will which was executed by the testator in 2003. That Will was challenged on the basis of lack of testamentary capacity and ultimately failed as a result of "capitulation" by the propounder of the Will, who was also the defendant solicitor's client. When the court assessed costs, it did so against the propounder, rather than against the estate. The litigation had been long and expensive and, as a result, the beneficiaries under the previous Will took their share at a significantly reduced amount. The beneficiaries under that previous Will, who were now entitled to the estate, brought an action against the solicitor who drew the now invalid Will, arguing in part that, as a result of his negligence, the Will challenge occurred, and their share of the deceased's assets was reduced. The premise of the beneficiaries' argument was that the solicitor who had drawn the last Will owed them a duty to care as beneficiaries under a prior Will and, as such, was obliged not to cause them foreseeable damage, injury, or loss.

While the case was struck out for disclosing no cause of action and being an abuse of process, the court commented on the issue whether a solicitor's duty of care extended to beneficiaries under a previous Will. In determining that it did not, the court reasoned that the extent of the solicitor's duty is defined by the testator's intention to confer a benefit to a named individual, whereas the "former beneficiary" group may include a

[19] *Supra* note 3.

large number of people, prior Wills, and long forgotten loyalties.

The Judge's remarks in the *Harrison v. Fallis* decision adopted the reasoning of the Alberta Court of Appeal in *Graham v. Bonnycastle*.[20] In *Graham*, the testator had executed a Will in 1984, naming his two children co-executors and equal beneficiaries of his estate. In 1994, the testator was suffering from, amongst other things, Alzheimer's disease, dementia, and an incurable lung disease. His accountant contacted the defendant solicitor and said that the testator wanted to prepare a new will. The solicitor was concerned about capacity and so arranged for another lawyer to attend the meeting where she was taking instructions. At the meeting, both solicitors concluded that the client had the requisite capacity to execute the Will. Under the new Will, the testator reduced the amount to be received by his children, made bequests to his grandchildren, and bequeathed the residue of the estate to his sister and his new wife. The accountant was named the executor. Just over a month after he executed the new Will, the testator died.

The testator's sister and wife tried to prove the second Will in solemn form (the matter was tried together with an action commenced by his children challenging the validity of the testator's marriage to the wife). The parties eventually settled both actions without resolving the issues relating to capacity to marry or make a Will. The children became the executors of the estate.

After the settlement was reached, the children commenced an action (in their personal capacities, not in their capacity as executors) claiming as damages the difference between what they would have received under the 1984 Will and what they received under the settlement agreement. They also claimed the costs associated with the challenge of the 1994 Will, both those incurred by them personally as well as by the estate (thus reducing the amount of money the beneficiaries could receive). The chambers judge dismissed the action on the basis that not only did a solicitor taking

[20] [2004] A.J. No. 940 (C.A.)

instructions for a new will owe no duty of care to beneficiaries under a previous Will, but that if the duty were to be imposed, it had the potential of placing the solicitor in a conflict of interest. The plaintiffs appealed.

The Alberta Court of Appeal agreed with the decision of the Chambers judge and found that there is no general duty owed to third parties to take care. To the extent that a lawyer may owe a duty to a non-client, it would only occur in situations where the third party beneficiary was identifiable and when both the lawyer and the testator knew of the testator's intention to benefit the beneficiary by the transaction. Liability could only arise in situations were there was no possibility of conflict of interest between the testator and the beneficiary. As a result of this, any duty of care that might be owed is only owed to those beneficiaries who were intended to benefit from the bequest which failed as a result of the solicitor's negligence.

In respect of any losses sustained by the beneficiaries to an earlier Will, the court found that it was unnecessary to extend the duty of care to them because they already had a right to challenge the new Will on the basis of testamentary capacity. In the event the testator had capacity when the Will was drawn, then he was entitled to do with his assets what he wished and it was not open to the beneficiaries to allege negligence on the solicitor's part. In the event the testator did not have capacity and the Will was not admitted to probate, the prior Will takes effect and the beneficiaries are entitled to their bequests under it. With respect to costs, if they were properly incurred as a result of the challenge, then it is appropriate for them to be charged against the estate. If the estate suffers a loss in the process, it has its own remedy against the solicitor.

The court also found that there were strong policy reasons for refusing to extend the duty of care to beneficiaries under prior Wills. When a lawyer draws a Will, she has a duty to ensure that the wishes of the client are reflected in it. However, when making changes to a Will, the interests of at least some of the beneficiaries under a previous will are likely to be adversely affected. If the lawyer owed a duty of care to the past

beneficiaries, a conflict-of-interest would inevitably arise anytime a testator wished to make changes to a Will that negatively affect the rights of the previous beneficiaries to the assets of the estate. As the court found, a solicitor can never owe a third party a duty which is inconsistent with the duty owed to the client; and if a duty of care were owed to beneficiaries under previous Wills, this would inevitably happen.

Courts in other common law jurisdictions have held that a lawyer's duty of care extends only to those who are beneficiaries under the most recent Will. In *Knox v. Till*,[21] for instance, the plaintiffs were beneficiaries under a Will executed by the testator. The defendant solicitors prepared two subsequent Wills for the testator. After the testator's death, the plaintiffs successfully challenged the two subsequent Wills and had them set aside. They then sued the defendants to recover the costs they had spent on the litigation. The Master struck out the plaintiffs' claim and the plaintiffs appealed.

The New Zealand Court of Appeal found that the solicitors owed the plaintiffs no duty of care. The plaintiffs had not been the solicitors' clients, the solicitors' had no responsibility towards them, and the plaintiffs did not rely on the solicitors. If a duty of care were to exist in favour of the plaintiffs, the solicitors would have been put in conflict with their client (i.e. the testator), as well as the beneficiaries under the Wills the solicitors had drawn for him. Further, as the plaintiffs were beneficiaries under a pre-existing Will, they cannot be said to have placed reliance on the solicitors drawing the subsequent Will.

What this case law suggests is that, in cases where a solicitor is negligent in failing to take adequate steps to ascertain capacity when drawing a Will, the population wishing to claim against him as disappointed beneficiaries will be limited to those who were eligible to take under the challenged Will. It is unlikely that the solicitor would be found liable for any loss suffered by beneficiaries of previous Wills.

[21] [2000] Lloyd's Rep PN 49 (N.Z. C.A)

PROTECTING AGAINST FUTURE CLAIMS

In its Wills and Estates Checklist, the Law Society of Upper Canada suggests that lawyers do the following to satisfy themselves of the testator's capacity:

- ensure that a personal meeting with the testator takes place, preferably when instructions are taken. If a personal meeting has not occurred when instructions are given (because, for example, they were given by telephone or through an agent), the lawyer should make sure that he meets with the testator at the time the Will is executed;

- inquire sufficiently into the testator's family situation and the extent of her assets, particularly in terms of their nature, location, and value. This will help to ensure that the testator is aware of the nature and extent of his estate and that he has not omitted any obvious beneficiary when making his bequests;

- in cases where an obvious beneficiary has been disinherited, or where beneficiaries one would have expected to share equally in the estate are treated unequally, be satisfied that the omission or the unequal treatment is not the result of mental incapacity; and

- review any previous Wills and establish whether the testator is making any significant deviations in his new Will. If this appears to be the case, the lawyer should make the appropriate inquiries.

While even the most prudent lawyer might find herself subject to claims by disappointed beneficiaries, by taking adequate steps to ascertain capacity, and by keeping complete and detailed notes on the steps that were taken and the observations the lawyer made, hopefully if or when a claims occurs, she will be able to produce the evidence necessary to support the efforts she made when drawing the Will.