



HULL & HULL LLP
Barristers and Solicitors

The Use of Capacity Assessments in Estate Planning

When assisting a client who appears to suffer from one or more health conditions that may cause fluctuating or diminished mental capacity, it may be a good idea to suggest that he or she submits for a capacity assessment.

Mental capacity is both time and task-specific. The level of capacity required when it comes to the requisite capacity to provide instructions for and to execute a valid Last Will and Testament (testamentary capacity) is relatively high.

Courts frequently defer to the following test for testamentary capacity, as outlined within the English decision of *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549:

- the testator must understand the nature of the act and its effect;
- the testator must understand the extent of his or her property;
- the testator must be able to understand and appreciate the claims that may be made in respect of his or her property; and
- there must be no "disorder of the mind" that prevents the exercise of his or her natural faculties.

If it is anticipated that a Will may be challenged on the basis of lack of testamentary capacity, a capacity report can be strong evidence in support of the validity of the Will. In some circumstances, an expert report obtained after death can feature a retrospective capacity assessment that may also be helpful evidence in propounding a Will. However, evidence contemporaneous to the execution of the Will may be more difficult to challenge by way of a responding expert report and may also be more effective in preventing litigation in the first place.