

20th Annual Estates and Trusts Summit

PRIMER ON STANDARDIZED COGNITIVE FUNCTIONING TESTING

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Introduction

Although there are numerous areas of concern for the practitioner in Will challenge proceedings, one major concern is testamentary capacity. The underlying principle of testamentary capacity is that the testator's mind must go with his or her testamentary act, whether making or revoking a will.¹ The difficult question is always, at what point is it clear that the testator was of unsound mind?

The point at which a mind may be considered unsound at law can be a difficult legal determination. One must look at all the facts and circumstances to reach a conclusion. One factor that a court will often consider is the capacity assessment of a medical expert. However, a variety of methods exist; two medical experts may rely on different methods or tools in conducting their analyses. The use of different tools and methods by medical experts can create difficulties for a court when comparing conflicting expert opinions.

The use of a standardized assessment² tool could assist the courts by ensuring that the same criteria are employed by medical experts. Such a standardized assessment would provide greater clarity to the court in comparing competing medical opinions. This paper discusses the legal issues surrounding testamentary capacity and the potential benefits of a standardized assessment tool, including the points at which such a tool could be helpful to potentially deter estate litigation.

Testamentary Capacity

No specific legislation provides a bright line test for testamentary capacity. In Ontario, the *Succession Law Reform Act*³ discusses the proper execution of a Will, but it deals with technical aspects as opposed to the testator's mental capacity at the time of execution.

The general requirements of capacity were laid out in the English case of *Banks v Goodfellow*⁴,

¹ Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (London: Stevens & Sons, 1993) at 158.

² See Schedules A & B for details on The Cambridge Brain Sciences Approach, see also LawPRO Magazine Feb. 2017 V.16.1 for a further review of issue related to neuro science and decision making.

³ RSO1990, c S. 26.

⁴ [1870], LR 5QB 549 (Eng. QB) [*"Banks v Goodfellow"*].

which requires a testator to understand the nature of the acts and its effects; to understand the extent of the property of which they are disposing; and be able to comprehend and appreciate the claims to which they ought to give effect. Further, no disorder of the mind shall poison their affectations, pervert their sense of right or prevent the exercise of their natural faculties. No insane delusion shall influence their will in disposing of their property and bring about a disposal of it which, if the mind had been sound, would not be made.⁵

While *Banks v Goodfellow* sets out these important requirements, it does not provide guidance as to how to decipher whether the requirements have been met. When the capacity of the testator is in question, the propounder of the Will bears the onus of proving testamentary capacity. The standard of proof that the propounder of the Will must meet is on a balance of probabilities.⁶ Further, *Royal Trust v Ford* held the propounder need prove that the testator was competent in every respect.⁷

Because there is no such thing as a perfect mind, the challenge of testamentary capacity is finding a point at which a "deviation" from the "theoretical norm" amounts to unsoundness of mind in a legal sense. A testator's eccentricity, capriciousness or unfairness is not sufficient for a court to determine the testator's mind unsound. The issue of testamentary capacity can be conceptualized along a spectrum, with a theoretical normal mind residing at one end and the unsound mind at the other. Eccentricity, capriciousness, and unfairness occupy some of the grey, middle areas.

Although predominantly occupied by case law, some legislation, such as Ontario's *Mental Health Act*⁸, can provide insight and guidance that may assist practitioners and courts in the realm of capacity assessment. The MHA defines "mental disorder" as "any disease or disability of the mind".⁹ The MHA also outlines that if a physician determines a patient is not capable of managing property, he or she is to issue a certificate of incapacity in the approved form, which is then transferred to the Public Guardian and Trustee

In England and Wales, there is a standard that when an old and infirm testator makes a Will, it

⁵ *Ibid.*

⁶ *Scott v Cousins* [2001] OJ No 19, 37 ETR (2d) 113 [*"Scott v Cousins"*].

⁷ [1971] SCR 831 (SCC).

⁸ RSO 1990, c M-7 [*"MHA"*].

⁹ *Ibid* at s 1.

should be witnessed and approved by a medical practitioner who satisfies themselves as to capacity and understanding. The medical practitioner is also to make a record of said examination and resulting findings.¹⁰ In Canada, physicians are not required to witness Will signings, however, solicitors have a responsibility to assess whether their clients have capacity.

A standardized assessment tool could assist both a drafting solicitor and an attending physician in providing a contemporaneous determination of the testator's capacity. While the presence of an attending physician may help protect an estate plan in the event of litigation, a standardized tool employed by a competent professional would likely further protect an estate plan. In addition, in the event of litigation, while a court will base its ultimate decision on all the facts and circumstances, a standardized assessment tool that harmonizes the approach employed by medical experts in assessing capacity could bring greater clarity to courts in weighing medical evidence in conjunction with all the circumstances. Such a tool could include some of the factors set out in *Banks v Goodfellow* and in subsequent case law. For example, an assessment tool could probe whether the testator is capable of evaluating the claims of those who might expect to benefit from the testator's estate and whether the testator can communicate a clear, consistent rationale for the distribution.

Undue Influence and Suspicious Circumstances

Even when a testator is fully capable, a Will can be set aside because it was executed at the behest of undue influence by another party. Of course, deterioration in mental condition or lifelong mental health problems may render a testator susceptible to undue influence. However, undue influence requires "coercion". In essence, coercion is the process of making somebody do something they either do not want to do or making a person sign a document they do not understand or wish to sign.¹¹

Undue Influence Involves Coercion

Mere arm-twisting tactics are not sufficient to establish undue influence. There must be evidence of actual coercion. What amounts to coercion will vary depending on the circumstances, as the unique mind of the testator may render them susceptible to certain kinds

¹⁰ *Sharp & Anor v Adam & Ors* [2006] EWCA Civ 449 at para 27.

¹¹ Ian M. Hull, *Challenging the Validity of Wills* (Toronto: Thomson Canada Limited, 1996).

of pressure. For example, the mere fact that a person who drafted a Will is named as a beneficiary does not, in itself, give rise to a reasonable inference that a testator lacked knowledge and approval of the contents of the Will.

For a Will to be set aside on the basis of undue influence, it must be shown on a balance of probabilities that the "influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased".¹² This does not mean that one must dislocate the testator's shoulder to obtain the document. It often happens that a testator's intellect has diminished to the extent that they simply cannot resist the urgings being imposed upon them and, for the sake of peace, the testator simply signs the document without any real intention to do so or to understand its contents.

Persuasion is not Undue Influence

One must always remember, however, that the influence must be undue influence and not simply legitimate persuasion or legitimate reasoning or discussion between the testator and the beneficiary.¹³

While those parameters are almost impossible to define comprehensively, an example of what is and what is not undue influence may be helpful. If a dutiful child is discussing his or her parent's testamentary dispositions and the parent suggests that a family member is less deserving than that dutiful child, especially for the reason that the other child will simply squander the funds, then a suggestion by the dutiful child that he or she should inherit more than the other child would seem to be legitimate persuasion.

In those circumstances undue influence would be the situation where the dutiful child advised the parent that since the parent was intending to make an equal division of his or her estate with the other family member, the dutiful child would cease to care for and live with the testator and would put the testator in a nursing home unless an unequal division were made.

One is legitimate persuasion; the other is undue influence or coercion.

¹² *Banton v Banton*, 1998 OJ No 3528 at para 58.

¹³ See *Vout v Hay*, [1995] 2 SCR 876 (SCC) at 228.

Both in considering testamentary capacity and undue influence, it is essential that the court be satisfied that the testator knew and approved of the terms and conditions of the Will. The onus is on those who oppose the Will to show that the transaction is inofficious or the Will constitutes a distinct departure from previous Wills, especially if the evidence of progressive mental impairment exists.

In *Scott v Cousins*, the testatrix suffered from a form of dementia, and it was ultimately held that she lacked testamentary capacity, even though, at times, she had capacity to converse and appeared alert and aware. The court found that the testatrix had been unduly influenced by a family member in her revocation of certain gifts previously made. This case is important as it distinguished between varying degrees of mental capacity. The reality of varying degrees of mental capacity can add a layer of complexity to a case in which capacity is at issue, but it is an important consideration.

Scott v Cousins also set out other relevant factors in considering a claim of undue influence, including the willingness or disposition of the person to have exercised undue influence; whether an opportunity existed; the vulnerability of the testator; the degree of pressure that would be required; the absence of moral claims of the beneficiaries; and whether the Will departs radically from the dispositive pattern of earlier Wills.

The relevant issue in a retrospective analysis of undue influence is the following: Did the testator suffer mental illness that rendered him or her particularly susceptible to undue influence at or before the time the challenged testamentary document was signed? and were the personality features and social and environmental factors, during the same time period, more or less conducive to the exertion of undue influence or coercion?

As with testamentary capacity, it is the court's practice to examine all circumstances surrounding the execution of a Will to determine whether the evidence presented is sufficient to ground a claim of undue influence. A standardized assessment tool could assist in this regard. Such a tool could include some of the factors noted in the paragraph above. This would likely involve an inverse relationship between social and environmental pressures in the testator's life and the mental capacity of the testator. As the testator is exposed to greater social and

environmental pressures in their life (like certain family conflict), the higher the level of mental capacity they would need to demonstrate in order to possess testamentary capacity.¹⁴

Suspicious Circumstances is not an Independent Cause of Action

As to suspicious circumstances, these usually involve suspicious circumstances with respect to the issue of undue influence in obtaining a Will or in the knowledge, approval or consent of a testator as to the contents of the Will. Suspicious circumstances automatically arise when, for example, a fiduciary, such as the solicitor for the testator, obtains a benefit under the Will. In those cases, the doctrine of *Barry v Butlin*¹⁵ applies, and the onus is on those who take under the Will to dispel this presumption.

While suspicious circumstances are not an independent cause of action, it will be a factor weighed in determining the requisite capacity needed to execute a valid Will. In reviewing *Vout v Hay*, the following comments are helpful :

There would appear to be a two-step process:

- (1) The court must determine if there is sufficient evidence relating to the circumstances surrounding the execution of the Will as to constitute “suspicious circumstances”;
- (2) If suspicious circumstances are found to be present, those propounding the Will must prove to the satisfaction of the court and to a level commensurate with the level of suspicion, that the testator had knowledge of and approved of the contents of the Will.¹⁶

Thus, suspicious circumstances are relevant with regard to testamentary capacity.

The issue of undue influence should be included in the order for directions if raising suspicious circumstances is wished either on discovery or at trial. If it is held that the inclusion of undue influence as an issue was not justified, those alleging it may be penalized in costs.

If, after examination for discovery, it is decided that suspicious circumstances did not exist or should not have been alleged, then the issue of undue influence can be abandoned and it is unlikely in that event that an award of costs against those alleging undue influence will be made

¹⁴ Kenneth I. Shulman et al, “Assessment of testamentary capacity and vulnerability to undue influence” (2007) 164:5 Am J Psychiatry 722.

¹⁵ (1838), 2 Moore’s PCC 480, 12 ER 1089. See also *Vout v Hay*, *supra* note 12 at p 227 (ETR).

¹⁶ Brian A. Schnurr, *Estate Litigation*, 2nd ed (Toronto: Carswell, 1994).

by the court, so long as it was reasonable to raise it in the first instance.

A standardized assessment tool would be helpful in this regard as well, particularly insofar as it examines not only the medical evidence of capacity but also examines the social and environmental pressures that may alert a court of suspicious circumstances and the potential for undue influence.

Conclusion

Getting older and adjusting to life as one ages can be a difficult task in its own right. With advanced age come medical issues. However, as discussed in this paper, medical issues can become legal issues, particularly with regard to mental capacity and estate planning. A standardized assessment tool could be of assistance in navigating these challenges during the testator's life, and in the event of estate litigation, such a tool could assist courts in weighing a capacity assessment against other evidence in determining a Will challenge.

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