Wills & Estates
Winter Term 2014

Lecture Notes – No. 4

Limits on the Power of Testation

Re Millar
[1938] SCR 1; cb., p.180

Charles Millar was a Toronto lawyer who was a great practical joker – Google him, it's worth the effort. The rule: public policy can invalidate a gift but usually for illegality or some really good reason and not capriciousness.

The Minimum Age Requirement

Age is not strictly a mental capacity issue, but is related to the question of testamentary capacity conceptually as it relates to legal capacity to make a will. Section 8 of the Succession Law Reform Act can be traced to the Wills Act 1837 (UK), which originally set out a minimum age requirement of 21 years with exceptions for those in actual military service.

The SLRA now provides:

> Wills by minors
> 8(1) **A will made by a person who is under the age of eighteen years is not valid unless at the time of making the will the person**,
> (a) is or has been married;
> (b) is contemplating marriage and the will states that it is made in contemplation of marriage to a named person except that such a will is not valid unless and until the marriage to the named person takes place;
> (c) is a member of a component of the Canadian Forces,
> (i) that is referred to in the National Defence Act (Canada) as a regular force, or
> (ii) while placed on active service under the National Defence Act (Canada); or
> (d) is a sailor and at sea or in the course of a voyage.

Testamentary Capacity

- **Testamentary capacity is not age-dependant.** Here the law looks to the circumstances and evidence to prove that the deceased was capable of the rational thought required to make a Will.

- **The Will itself need not reflect rational decision-making**. The testator or testatrix can act whimsically aside from restrictions of testamentary freedom either agreed-to *inter vivos* (e.g. provision of a gift to a former spouse as agreed-

to in a separation agreement and chargeable against the estate if not honoured) or that arise by statute (dependants' relief claims) – but must do so where he or she was mentally competent.

- **Testamentary capacity is a question of fact, which is presumed upon a duly-executed Will being proven.** Where the testator made a Will that meets formalities requirements, it is presumed that the testator knew and approved of the contents, and, had the necessary testamentary capacity to make the Will. **Where there is evidence that the Will was made in 'suspicious circumstances' (in respect of the preparation of the Will, or the testator's mental capacity, or the presence of coercion or fraud), the presumption is spent and the party propounding the Will must prove testamentary capacity and knowledge of the contents of the will on the normal civil standard**; *Vout v Hay* [1995] 2 SCR 876, para. 27; cb, p. 210.

- **Testamentary capacity means that the testator or testatrix is of 'sound mind, memory and understanding' when the Will was made in the sense that he or she: (1) understands the nature and effect of a Will l; (2) recollects the nature and extent of his or her property; (3) understands the extent of what he or she is giving under the Will; (4) remembers the people he or she might be expected to benefit under his or her Will; and, (5) understands the nature of the claims that may be made by persons he or she is excluding under the Will**; see *Re Martin*, [1965] S.C.R. 757.

- **Many of the principles set out in the older cases were developed at a time when psychiatric science was unknown or immature. Now expert evidence of the deceased's capacity are the best evidence and the Court will resist reliance on broad presumptions respecting incapacity developed in the older cases**. Thus, for example, the totality of the evidence might establish that the deceased was 'a cranky, garrulous, crotchety, somewhat eccentric old man... suffering from mild cognitive impairment and a slight deterioration in mental acuity... [but] He was not mentally ill..." sufficient to make him incapable of making a Will; see *Royal Trust Corp. of Canada v. Saunders* [2006] O.J. No. 2291 (Sup. Ct.), para. 87. One might wish to obtain a mental status assessment by a certified capacity assessor under the Substitute Decisions Act 2002. The Capacity Assessment Office within the Ministry of the Attorney General makes available current guidelines, forms, and lists of approved assessors.

- **It is mandatory that the solicitor drawing the Will inquire into testamentary capacity to ensure validity of the Will and as a matter of professional competence.** In *Hall v. Bennett Estate* (2003), 64 O.R. (3d) 191 (C.A.), Charron JA held:

> 24 For a useful review of cases that have considered the solicitor's duty to ascertain and substantiate testamentary capacity, see the article written by M.M. Litman & G.B. Robertson on "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" (1984), 62 Can. Bar Rev. 457. The authors note how courts have stressed the particular importance of the solicitor's duty in cases of suspicious circumstances. They state the following, at p. 470:

> The solicitor's duty to substantiate capacity is particularly important in cases of suspicious circumstances. By suspicious circumstances is meant any circumstances surrounding the execution or preparation of a will which individually or cumulatively cast doubt upon the testator's capacity to make a will or his knowledge and approval of the will's contents. Suspicious circumstances are innumerable in form and cannot be listed comprehensively.
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> 25 The authors conclude their review of cases of suspicious circumstances by saying, at p. 474:
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> ‘In the context of testamentary capacity cases, serous 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.’
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> 26 The authors then identify solicitors' common errors that have been either the subject of criticism by the courts or the basis of liability for professional negligence in the preparation of a will. These include:
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> **• the failure to obtain a mental status examination,**
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> **• the failure to interview the client in sufficient depth,**
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> **• the failure to properly record or maintain notes,**
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> **• the failure to ascertain the existence of suspicious circumstances,**
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> **• the failure to react properly to the existence of suspicious circumstances,**
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> **• the failure to provide proper interview conditions (e.g., the failure to exclude the presence of an interested party),**
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> **• the existence of an improper relationship between the solicitor and the client (e.g., preparing a will for a relative), and**
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> **• failing to take steps to test for capacity.**

The Will must be the product of a person having the capacity to understand the nature of the act of making a will and its effects, and, have knowledge of the contents of the will and approve those contents. Failure to have knowledge of, and give approval to, the will or its individual provisions will render the will ineffective in whole or in part.

The classic statement in respect of testamentary capacity is set out in *Harrison v. Rowan* 11 Fed. Cas. 658, 663 (C.C.D.N.J. 1820) in a jury charge on the point by Washington Circ J:

> As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be

> capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.

This statement was cited with approval in **Banks v. Goodfellow [1870] 5 Q.B. 549; cb, p.190** (which is usually cited for the passage set out above). Here the testator was subject to delusions (and had been hospitalised due to his mental illness). There was evidence that the testator was somewhat lucid at times and could do some of his own business, but the evidence was quite consistent with insanity. The *Banks* case is striking for its support of a broad vision of testamentary freedom, which must be exercised by a rational will unaffected by 'general insanity' or 'insane delusions' in respect of the ability to comprehend the nature of the act of making the will and its effects. **The test of a sound and disposing mind and memory is certainly good law in Ontario; e.g. *Re Schwartz* [1970] 2 O.R. 61, 78 (C.A.).**

(a) 'general insanity'

Leger v Poirier
[1944] SCR 152; cb, p.182

The testatrix was kept isolated by her son, who influenced her decision-making. Evidence was lead at trial in respect of the testatrix's memory and possible senile dementia at the time that the Will was made; she suffered experienced a rapid deterioration in her health, memory and mental functioning less than two months prior to the will being made. Rand J held in respect of the test:

> Now, in the majority judgment below, it is clear that both Baxter C.J. and Grimmer J. were powerfully influenced by the view that a pronouncement against the will necessarily involved a reflection upon the integrity of Robichaud, which was repelled by both his standing as a solicitor and the finding of the trial judge. But there is no doubt whatever that we may have testamentary incapacity 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; this has been recognized in many cases:

Marsh v. Tyrrell and Harding (1828) 2 Hagg. Ecc. R. 84, at 122:

> It is a great but not an uncommon error to suppose that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.

Quoting from the *Marquess of Winchester's Case* 6 Coke's Rep. 23, Sir John Nicholl adds:

> By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

Murphy v. Lamphier (1914) 31 Ont. L.R. 287, at 308:

> Again the words of Sir John Nicholl are apposite: "To support a paper thus revoking and altering this will and substituting a disposition quite different from and the very opposite to it, would require the clearest and most indisputable evidence": *Dodge v. Meach* (1828) 1 Hagg. Ecc. 612, 617.

Menzies v. White [(1862) 9 Gr. 574:

> Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

(b) 'insane delusions'

A delusion is a belief in a state of facts which no rational person would believe. The testatrix may be mentally ill causing her to hear voices from her deceased spouse's grave, and might even have been held incapable of managing his or her affairs by such a disease. This itself does not mean that he or she was incapable of making a Will; **O'Neil v Royal Trust Co. [1946] SCR 622; cb, p. 204**. In this case, the testatrix had changed her will when hospitalized and suffering from delusions and was declared incompetent in respect of her financial affairs.

‘Suspicious Circumstances’ and the Onus of Proof

Barry v Butlin
(1838), 12 ER 1089 (Ch); cb, pp.215, 224

Baron Parke held that the rules for admitting a Will to probate are two:

> . . . the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party wrote or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

In **Wintle v Nye [1959] 1 WLR 284, 291 (HL); cb, p.229, fn 10**, Viscount Simonds added:

> It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed.

Vout v Hay
[1995] 2 SCR 876; cb, p. 217

The Will was made by the testator, age 81, in favour of a friend (defendant), age 29. The Will was drawn by a secretary in the office of the defendant’s parents’ lawyer. There was conflicting evidence as to how much involvement the defendant had in the preparation of the Will, and to what extent she influenced the testator. The trial judge found that there was no undue influence and in favour of the defendant; the Court of Appeal reversed, holding that the trial judge ought to have inquired further into matters that were disputed. The SCC restored the verdict as the trial judge was satisfied that the testator was competent and exercising an independent will. Per Sopinka J:

> 23 Any discussion of the role of suspicious circumstances must start with the statement of Baron Parke in *Barry v. Butlin*, supra, at p.1090:
>
> [F]irst ... the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.
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> [S]econd ... if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to

pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.

24 At least two problems are raised by this statement:

(1) whether suspicious circumstances impose a standard of proof that is higher than the ordinary civil standard; and

(2) whether the reference to a free and capable testator requires the propounder of the will to disprove undue influence.

25 With respect to the first problem, in accordance with the general rule applicable in civil cases, it has now been established that the civil standard of proof on a balance of probabilities applies. The evidence must, however, be scrutinized in accordance with the gravity of the suspicion. As stated by Ritchie J. in *Re Martin; MacGregor v. Ryan*, [1965] S.C.R. 757, at p. 766:

The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case.

26 With respect to the second problem, although *Barry v. Butlin* and numerous other cases dealt with circumstances in which the procurer of the will obtained a benefit, it has been determined that the dictum in *Barry v. Butlin* extends to any "well-grounded suspicion" (per Davey L.J. in *Tyrrell v. Painton* (1893), [1894] P. 151 (C.A.), at pp. 159-160). This was reaffirmed in this court by Ritchie J. in *Re Martin*, supra. The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, supra, and Rodney Hull, Q.C., *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.

27 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

28 Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving

knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

29 It might have been simpler to apply the same principles to the issue of fraud and undue influence so as to cast the legal burden onto the propounder in the presence of suspicious circumstances as to that issue. See Wright, supra, and Hull, *Macdonell, Sheard and Hull on Probate Practice*, supra, at p. 33. Indeed the reference in *Barry v. Butlin* to the will of a "free and capable" testator would have supported that view. Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will. They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will. See *Craig v. Lamoureux*, [1920] A.C. 349; *Riach v. Ferris*, [1934] S.C.R. 725; *Re Martin*, supra.

Relevant Date of Capacity

The usual date that capacity is required is the date of the execution of the will. Thus, lucidity at the time of execution notwithstanding mental illness, delusions, etc. will allow the will to be regarded as valid.

There is an exception. A will is also valid if the testator is competent when he or she instructs the solicitor drawing the will, and, is capable of knowing that the will that is being executed is a will and is made in accordance with earlier instructions and gives assent to the making of the will.

Re Bradshaw Estate
(1988), 30 ETR 276 (NBPC); cb, p.231

The testator signed a codicil but was so ill that he signed with a few strokes of his pen rather than signing the will; he died that same day. The solicitor who drew the will had been instructed two weeks prior by the testator, to the effect that the codicil to the will was necessary to set out gifts to two friends. The testator was 96 years old at his death. Jones J held:

> Testamentary capacity has been referred to as "a disposing mind and memory". In the case of *Leger v. Poirier* [1944] 3 D.L.R. 1 at pp. 11-12 Rand, J. stated as follows:
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> 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: this has been recognized in many cases.
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> On the evidence before me I am satisfied that certainly at the time Mr. Bradshaw gave instructions with respect to the final codicil that he had a disposing mind and memory sufficient to take in the necessary elements referred to above. In fact while it is clear that Mr. Bradshaw was very frail on April 15, 1988 the evidence given indicates that his mind was alert and that he had testamentary capacity at that time. He certainly understood what he was doing. There is authority to the effect that the capacity of a person at the time of execution of a will need only go to the extent of his understanding of what he is doing and that he is completing that which he has previously instructed... *Feeney The Canadian Law of Wills*, third edition, Volume 1, page 39:
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> The relevant time for having capacity to make a will is when instructions are given. If a person has capacity then, he may make a good will later, so long as he knows that he is executing a will for which he has previously given instructions and is physically capable of showing his assent thereto.
> See also *Parker v. Felgate* (1883), 8 P.D. 171.
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> I am satisfied that the testator had the requisite testamentary capacity both at the time that he gave Mr. O'Connell the original instructions with respect to the codicil of April 1988 and at the time it was presented to him for signature.