

FOLEY'S | LIST

ESTATES AND SUCCESSION PLANNING – CAPACITY ISSUES

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Date: 8 November, 2013

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ESTATES AND SUCCESSION PLANNING CAPACITY ISSUES

Obtaining Instructions When Capacity Is In Doubt

A practical issue that often faces solicitors is obtaining instructions from clients for Wills when their capacity is in doubt.

I cover two situations. First, the testator is at death's door and wishes to make a Will, and second the testator is usually in the twilight years and may well seem competent on the face of it, but in reality has a tenuous grip on their capacity.

As Dixon J said in *Re Erdogan's Application Erdogan v Ekici* (2012) VSC 256 at 54:

54. Taking an overview of the many different situations in which courts have been called on to consider questions of capacity – the validity and fairness of transactions, fitness to plead, testamentary capacity, litigation guardians, guardianship and administration statutes, and consent to medical treatment are examples - demonstrates the test of capacity is specific to the issues for which capacity is required.^[27] It is hardly surprising, given the complexity of human cognitive and intellectual function, that capacity is related to the nature and complexity of the transaction or decision or the ongoing continuum of transactions that are in issue. A clear illustration of this distinction can be seen in a comparison of the requirements for capacity to institute, conduct, and compromise litigation and the capacity then to manage the award subsequently received.

The list of cases – which I don't propose to refer to that illustrates that point are set out.

^[27] Compare, for example *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423, 437-438; *In the Estate of Park (Dec'd)*; *Park v Park* [1954] P 89; *Martin v Azzopardi* (1973) 20 FLR 345, 358; *PY v RJS* [1982] 2 NSWLR 700, 702; *Secretary, Department of Health and Community Services v JWB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218, 237-238; *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511; *Murphy v Doman (as representative of the estate of the late Min Simpson) & Anor* [2003] NSWCA 249; (2003) 58 NSWLR 51 [35]; *Sheffield City Council v E* [2004] EWHC 2808 (Fam); *Edwards v Edwards* (2009) 25 VR 40 [56]; *Farr v State of Queensland* [2009]

[NSWSC 906](#) [15]; *Guthrie & Anor v Spence* [2009] NSWCA 369; *PJB v Melbourne Health and State Trustees Limited* [2011] VSC 327.

I will come back to this issue after the test for capacity.

The Test For Capacity and How It Applies To Will Drafters

In *Re The Will of Dimitra Giofches* (2011) VSC 533, Habersberger J said at paragraph 22:

22. The Law

The relevant principles can be summarised as follows.^[5]

- (a) When there are circumstances which give rise to suspicion about the testatrix's **testamentary capacity**, the propounder of the will assumes the burden of affirmatively proving, to the satisfaction of the Court, that she had the requisite capacity to make the will,^[6] that is, that she was of sound mind, memory and understanding when she executed it or, if instructions for the will preceded its execution, when the instructions were given.^[7]
- (b) The standard of proof is upon the balance of probabilities "but the Court is not to reach such a conclusion unless it has exercised the caution appropriate to the issue in the particular circumstances by a vigilant examination of the whole of the relevant evidence".^[8]
- (c) To prove that the testatrix was of sound mind, memory and understanding at the relevant time, the propounder must satisfy the Court that the testatrix:
 - (i) understood the nature and effect of making a will;
 - (ii) was aware of the general nature and value of her estate;
 - (iii) was aware of those who would have a legitimate claim to the estate; and
 - (iv) was able to evaluate and discriminate between such claims.^[9]
- (d) Although it needs to be shown that the testatrix understood that she was executing a will and the practical effect of the central clauses in the instrument, including the dispositions of property made, it is not necessary to establish that she was capable of understanding every clause of the will.^[10]

- [5] See generally *Kantor v Vosahlo* [2004] VSCA 235; *Nicholson v Knaggs* [2009] VSC 64.
- [6] *Kantor v Vosahlo* [2004] VSCA 235, [3] (Ormiston JA); *Nicholson v Knaggs* [2009] VSC 64, [87].
- [7] *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179, 180 (Williams, Fullagar and Kitto JJ).
- [8] *Kantor v Vosahlo* [2004] VSCA 235, [22] (Ormiston JA).
- [9] *Banks v Goodfellow* (1870) LR 5 QB 549, 565; *Bailey v Bailey* [1924] HCA 21; (1924) 34 CLR 558, 566-567 (Knox CJ and Starke J); *Timbury v Coffee* [1941] HCA 22; (1941) 66 CLR 277, 283 (Dixon J); *Nicholson v Knaggs* [2009] VSC 64, [100] (Vickery J).
- [10] *Nicholson v Knaggs* [2009] VSC 64, [97] (Vickery J).

As you can see, the testator must show:

- that they understood the nature and effect of making a will;
- was aware of the general nature and value of his/her estate;
- was aware of those who have a legitimate claim to the estate; and
- was able to evaluate and discriminate between such claims;

Understood the nature and effect of making a Will

Practically for a drafter to understand the nature and effect of making a Will, probably needs some general discussion between the Will drafter and the Testator before they start. It may be that a solicitor has a long history with the client and well knows the client and well knows the circumstances of the client. In that case one must be especially vigilant against making an assumption and there should be a discussion as to why it is the testator is making the Will. Is it a new Will, an updated Will or even a Codicil?

General nature and value of the testator's estate

Many solicitors often draw Wills without realising what is in the estate. Is there a house, shares, money in the bank, superannuation and the like? If so, it is wise to obtain instructions as to what is in the estate, because if there is no evidence that those issues were discussed a Court would more readily come to the conclusion that the testator was not aware of their estate. Similarly so with those who would have a legitimate claim to the estate. The testator must be questioned about their children, siblings or friends to whom they intend to leave money and be advised of the effect of leaving a child or dependent out of the estate.

Was aware of the general nature and value of estate

If a child is to be left out of the estate then you have to consider whether or not any mention is made of it in the Will. In my experience I have often found the excuse for leaving a child out of the estate when proceedings are commenced for further provision from the estate are inadequate or can be argued with. There is no magic form of words. Some say it is best to say nothing. Sometimes the best approach is to say words to the effect of:

“I have been advised of the provisions of the Administration and Probate Act 1958 in relation to claims for provision from my estate and have determined that I make no provision for.....

Or

I make no provision for..... and have been advised of the provisions of the Administration and Probate Act.”

Was able to evaluate and discriminate between such claims

This is important, as, again, quite often there are no notes to say if the testator knew the way in which the Will was framed. Sometimes it is terribly easy, other times it is

difficult if children are not being left like with like and it is intended to treat each child fairly.

I cannot emphasise the importance of note keeping in those circumstances.

If there is a concern about whether or not the testator has sufficient capacity to make the Will, you should seek a report from the treating general practitioner, you could have as a witness to the Will a medical practitioner, or in a more extreme case, get the advice of a practitioner specializing in geriatric medicine. (But be careful the question that you ask of the doctor as there are different tests for capacity depending on the circumstances).

Remember that capacity is judged at the time at which the Will instructions were given, not at the time at which the Will was signed. But the testator should understand the Will she signed disposed of the property in accordance with the instructions given.

In *Re the Will of Dimitria Giofches* Justice Habersberger asserted that although it needed to be shown the testatrix understood that she was executing a Will it was not necessary to establish she was capable of understanding every clause of the Will. Adopting what was said by Vickery J in *Nicholson v Knaggs* (2009) VSC 64 at [97].

Le Bon

In the very recent case of *Le Bon & Others v Lili and Anor* (2013) VSC 431 Macaulay J applied the rule in *Felgate* (1883) 8 PD 171. His Honour found that:

24 In my view, I should follow and apply the principles of *Norris v Tuppen and Parker v Felgate*. Adapting those principles to the present case, in order to find the Will proved I need to be satisfied that:

- first, on 12 September 2008, Mrs Lane was aware of and appreciated the significance of giving instructions for the preparation of her Will; was aware, in general terms of the character, extent and value of her estate; was also aware of those with a claim on her bounty and the basis and nature of those claims; and, finally, had the ability to evaluate and discriminate between the respective strengths of those claims;
- second, that the will presented to Mrs Lane on 3 November 2008 faithfully reflected the instructions given to Mr Kraus on 12 September 2008; and
- third, on 3 November 2008, she was able to understand, and believed, that she was signing a will that had been prepared by Mr Kraus to make disposition of her property in accordance with instructions given by her on an earlier occasion.

In short, Will drafters should keep good notes about instructions given to them. Second, consider obtaining a medical opinion if capacity be in doubt. Even consider having the treating general practitioner witness the Will.

Brock

Practically speaking it never hurts to have a draft of a Will signed. If a signed draft Will is obtained, it would overcome the problems that were identified by the Court in *Brock, Estate of Peter Geoffrey Brock Chambers v Dowker and Another v Chambers and Others* (2007) VSC 415 in which the deceased left behind a number of documents which were said to contain his testamentary wishes, a validly executed Will dated 24 July 1984, an informal Will prepared about 2003, a further informal Will prepared on 6 July 2006 shortly before his death.

The informal Will was prepared in circumstances where Mr Brock gave his employee a Will kit and had a Will written up with what he wanted to take place. She wrote it up and he sat next to her looking over her shoulder telling her what he wanted, but he was distracted and never signed it.

His 2003 Will was executed in circumstances where he brought a do it yourself Will kit, completing his personal details, setting out who his executors would be and gave his funeral directions.

Mr Brock then left that Will kit blank which were the parts which disposed of his property. He told his wife that as he trusted her completely so she could complete the remaining sections of the Will and that she should then sign and date it. He validly executed the Will as testator in the presence of his wife and another witness. However she didn't fill out the part which was operative, that is the disposition of the property.

His previous Will in 1984 was validly executed and was a valid Will.

So, which Will did Her Honour admit to probate? The 2003 Will which merely revoked the 1984 Will. Her Honour refused to admit the 2006 Will to probate which meant that all that had happened was the first Will was revoked, executors were appointed and there was otherwise an intestacy.

Thus, the importance of having the Will executed even if it is only in draft, is paramount.

It an extreme case, where you have someone in hospital who knows they have not much longer to live, there will always be a question of capacity because as a person is dying it will be argued that being so close to death it is likely that their mental processes are impaired. Even so, if there is a rush to get the Will executed before the deceased dies, I suggest that the Will be handwritten at the bedside by the solicitor and signed by the testator.

Recent Cases on Capacity

In *Re the Will of Dimitra Gofches* (2011) VSC 553 Justice Habersberger admitted a Will to probate in circumstances where there was a requisition from the Registrar of Probates about the testamentary capacity of the deceased and required medical evidence that there was capacity of the testator. His Honour heard evidence about the deceased's state in which the general practitioner had diagnosed the defendant with dementia and auditory hallucinations. She was then admitted to the Werribee Mercy Hospital in March 2008 where there was no evidence of delirium.

In April 2008 a medical practitioner determined that she had capacity to make an EPA and shortly afterwards a Doctor completed a medical report which stated that she had been showing signs of dementia with auditory hallucinations.

An investigator with the OPA determined that she did have capacity and there was no need for her to have an administrator appointed by VCAT. She was assessed by another medical practitioner, who agreed.

Although in July 2008 she was said to have mild dementia, an affidavit was sworn by her solicitor saying that he discussed with her at some length her wishes and she made it clear she wished to provide for the entirety of her estate to be left to her son. She was advised in relation to various matters pertaining to Part IV claims and challenges of the estate. It was very clear in her express wishes that her estate be left for the benefit of her son.

His Honour was critical of the evidence about the giving of instructions to the Will which could have been more detailed. That so, His Honour found there was testamentary capacity (paragraph 35).

In *Le Bon v Lili* His Honour dealt first with the medical evidence which His Honour was of the view is of usually central importance (paragraph 26) and neither Doctor provided a positive support from the conclusion that the testatrix had testamentary capacity. The solicitor provided an affidavit with detailed discussions which, because of the ambivalence of medical evidence, His Honour dealt with in detail.

After the last Will the solicitor sent a letter to the testatrix enclosing a draft Will and saying if there is any doubt as to your capacity to execute the documentation, or if you envisage any dispute, we recommend that you obtain a medical report or certificate from your treating Doctor evidencing such capacity (paragraph 47). At the time the Will was ultimately executed the solicitor noted on his file "I am not sure if she understands what (or why) she is signing but happy to sign. However "on the basis that she probably did [understand] (paragraph 58) he then went looking for

two persons who could witness her signature. He found one nurse who was willing to, the other he found was unwilling as she said that the executrix has dementia. He did not sign the Will himself as it was not his practice to do so.

The solicitor was then told by a Doctor that the testatrix had dementia. Although with hesitation His Honour found that the testatrix had the testamentary capacity on 12 September 2008 to give instructions, and as well on 3 November 2008. His Honour had to deal with the issue as to whether or not on 3 November 2008 she understood and believed that she was signing a Will that had been prepared by the solicitor in accordance with her instructions.

The solicitor agreed that he thought the executrix was confused, vague and forgetful and he could not find a second willing nurse to witness the Will and she did not recognise her solicitor. It was explained to her at which point that she appeared to recognise him. There was a difficult and irrational conversation with her. His Honour found that although he only had to find whether or not the testatrix understood and believed she was signing a Will prepared by her instructions, he was unable to reach that level of satisfaction because there was an absence of affirmative evidence to suggest that she did have the requisite understanding.

Whilst this is no criticism of the solicitor, it illustrates the dangers of delay in having a Will finalised. His Honour found that the solicitor was a truthful witness – which he was – but it raises a number of practical issues. Should he have been an executor? Should he have asked the testatrix to seek medical advice about her capacity? Should he not have got the Will signed, at least, in draft when instructions were first given?

Two other cases worth noting are *Saunders v Pedemont (No 2)* (2012) VSC 601 in which an application for a statutory Will was unsuccessful and then costs followed the event; and in *Steele v Ifrah (No 2)* (2013) VSC 167 Dixon J ordered that an unsuccessful Defendant pay the Plaintiff's costs because it was not a case where departure from the general rule of costs was warranted, and it was not a case in which it could be said that the Will was executed in circumstances which required the Court to investigate.

So, although it is a common technique to press a testamentary capacity claim than try and settle it on the basis of it being a Part IV claim, it runs a great risk.

Finally, *Abel v State Trustees Ltd* [2013] VSC 20. Here Almond J refused to strike out a claim that alleged that an administrator settled a represented persons' claim too light despite being advised her claim for a farm was worth a much higher amount than the administrator thought it was, and not getting a valuation before settling the claim. A beneficiary of the represented persons' estate sued the administrator for negligence in that it should have settled for full value. If successful, the claim will be one step beyond *Hill v Van Erp (1997) 188 CLR 159*

Law Reform Commission and Developing Areas of Law

In the recent Law Reform Commission recommendation was made at chapter 2:

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Recommendations

Chapter 2

Witnessing wills and undue influence

Prevention of undue influence through other changes to the will-making process

1. The Law Institute of Victoria should prepare best practice guidelines for legal practitioners on the detection and prevention of undue influence when preparing a will. The guidelines should cover such matters as:
 - (a) the importance of taking detailed instructions from the will-maker alone;
 - (b) common risk factors associated with undue influence;
 - (c) the need to keep detailed file notes and make inquiries regarding previous wills.

Doctrine of undue influence

2. Four years after the legislation comes into effect, the Attorney-General should cause a report to be prepared on:
 - (a) the operation of new legislation in British Columbia that imports the equitable doctrine of undue influence into the probate context, and
 - (b) whether a similar provision should be adopted in Victoria.

Some Practical Advice

I think the practical advice can be gleaned from what I have said today but it is fairly simple. First, you must take detailed instructions and you must satisfy yourself that the testator is capable of giving instructions.

You must determine what it is the testator has to leave and who it is has a claim upon the testator's bounty. Once satisfied of that you must ensure that you advise the testator the rights of a person who has been left out of the Will. If you have any doubts about capacity, there is no point searching around for a nurse at the hospital to witness the Will. You should go to the treating general practitioner of the testator or seek a report from a specialist in geriatric medicine, asking the right question. Not just "does the client have capacity to make a Will?"

Although it is easy enough to say you are following the client's instructions, it will ultimately be you, the solicitor, who has to defend your actions if the Will is to be proven. There is nothing a court likes more than a straight forward witness who said yes I did have some concerns about the client's ability to give instruction, so I asked the client's treating general practitioner.

As I always say to people what advice they should give about Wills, I say that you should look at your Will every five years and review it, and if you intend to leave somebody out of the Will, you should have that discussion beforehand, because people will accept that, rather than finding out later that they have been left out.

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8 November 2013