

Hull on Estates Podcast #2

Testamentary Capacity

Posted on April 3, 2006

Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by estate solicitors, Ian Hull and Suzana Popovic-Montag, the podcast will touch on some key considerations when planning estates and Wills. Now, here are Ian and Suzana.

Ian Hull: Good morning and welcome to Hull on Estates, a regular podcast hosted by Ian Hull, myself and my partner, Suzana Popovic-Montag. The purpose of the podcast is designed to work through legal issues and legal concepts for the estate and trusts practitioner. Our podcast today is going to focus on some of the legal issues in an overview sort of way because we wanted to work through some of the concepts that are outlined in detail in our article that Suzana and I wrote, *Will Drafting Tips*, it's found on our web page at www.hullandhull.com. You can get a copy of the article and get any of the specific cases that we may refer to from that article itself. Good morning Suzana.

Suzana Popovic-Montag: Good morning Ian.

Ian Hull: Well, today let's roll our sleeves up and try to work through an issue that is fundamental to any estate plan and any estate litigation ultimately at the end of the day, and that is, the concept of what we all know as testamentary capacity. And you know, while it's unlikely that any solicitor is going to draw a Will for the client who clearly lacks testamentary capacity, there is the gray area and that gray area is something that is difficult for us as practitioners on the front lines, to deal with sometimes. And the courts have looked at it from time to time in a very detailed way, but there is a decision, a famous case in Ontario that Justice Cullity rendered, *Scott v. Cousins* where he implores that the lawyer should not feel that he or she has to play God, but has to carefully assess the concept of testamentary capacity when taking instructions. So as we know, a court is the ultimate arbitrator on the question of testamentary capacity itself, and that's why in our last podcast, we talk so much about note-taking and the importance of inquiring into the extent of testamentary capacity and making sure, of course, that there is no undue influence. So as far as capacity is concerned, Suzana, what would be a good rule to follow?

Suzana Popovic-Montag: Ian, I think that a sensible rule, particularly given Justice Cullity's commentary in the case that you mentioned, would be that a solicitor shouldn't deprive a client of the benefit of a professional aid or benefit of having a lawyer draft a Will simply because the lawyer may have some doubts about the matter of capacity. Because the fear is that if you do that, then you might deprive the prospective beneficiaries of their right to have a Will ultimately confirmed by a court.

Ian Hull: I like that point that a court confirms it. Certainly in the commonwealth jurisdictions, the court, with respect to the issue of testamentary capacity, has a real

obligation and role to ensure that Wills are upheld. And they have sort of what we describe as a right to inquire into and be more likely an inquisitorial approach that is found in some jurisdictions such as the German courts, where in Germany the judges are expected to make direct and express inquiry. Well in the concept of testamentary capacity and certainly in my experience, a court will get in and roll their sleeves up to determine whether or not they feel capacity was present at the relevant time. And that is, of course, the time when the Will was drawn. Let's ask a basic question then, Suzana, give me a definition of testamentary capacity.

Suzana Popovic-Montag: There really is no easy definition that everyone can sort of rely on when determining whether or not a will maker has testamentary capacity, but we do know though that the onus, of course, is on those trying to uphold the Will to prove testamentary capacity. I can refer you, Ian, to the leading case, which for more than a century continues to be that leading case, and that is that of *Banks v. Goodfellow*. In that case, the court set out a summary of some of the considerations to consider when determining whether or not a person has testamentary capacity.

Ian Hull: Alright, that's a good starting point and the *Banks v. Goodfellow*, of course, is authority that is used throughout the United States, Canada and the commonwealth as the leading case in this area. And I'm going to come to the quote in a moment, not forgetting that we can even go back to sort of the basic definitions where Black's Law Dictionary defines "testamentary capacity" as the ability to know and understand the business in which the client is engaged, the effect of making a Will and capacity to know the object of the client's bounty and the potential claims upon the client. And of course the general nature and extent of the client's property. But let's talk about the *Banks v. Goodfellow*, some of the concepts that came out of that. Suzana, maybe you can talk about that at this point.

Suzana Popovic-Montag: Sure Ian. The court there said that a testator needs to understand the nature of the act and its effects. He or she has to understand the extent of their property that they're trying to dispose of, they need to be able to understand the claims to which they need to give effect. That is, claims by potential beneficiaries at the end of the day on that person's bounty. And they want to make sure that there's no disorder of the mind, which would affect the way that the testator or testatrix is disposing of their estate or maybe affect their sense of what is right, or what needs to be done with an estate plan. You also want to make sure that there is no insane delusion as the courts call it, which would influence a testator or a testatrix in disposing of their property or bring about some disposal which, if their mind had been sound, they would not have otherwise made.

Ian Hull: I think the decision in *Legere v. Peoria* is a helpful one as well, where the Supreme Court of Canada, Justice Rand, defined a disposing mind and memory as one where one is able to comprehend of its own initiative and volition, the essential elements of will making, property, objects and the just claims and considerations. You have to also have the ability to understand revocation of any existing dispositions, i.e the prior Will is no longer going to be in force and effect. And the standards expected of the

solicitor who drafted a challenged Will are also touched upon in that case. Can we just take a minute now and just talk about when they have been reviewed by the courts and just maybe, Suzana, you can provide us with an overview of that.

Suzana Popovic-Montag: Sure Ian. The courts sort of expect that someone who takes instructions for a Will will ensure that testamentary capacity has been proven, or certainly explored. And then it's the people who are questioning capacity who actually have to prove it, they have to propound the Will, so to speak. And a Will won't be admitted to probate if it's been prepared and executed in circumstances that arouse suspicion, unless the person who is propounding it can lead evidence to remove that suspicion, and show basically that the will maker knew and approved of the contents of the Will. The courts seem to say that the more serious a suspicion, the heavier the onus to prove that there was no undue influence. The will maker should also appear to be lucid and able to answer simple questions about his or her estate. We want to make sure that we meet, as solicitors, our responsibility to do a careful inquiry that we'll document in our file and make sure that we can protect the client as best as we can. This is especially the case where the client is ill or elderly or appears to be weak. And in trying to take our instructions and speaking to our clients, we want to be careful that we're not asking leading questions, so that we're putting words, so to speak, in our client's mouth, but that we're inviting them to tell us what it is that they want to do with their estate.

Ian Hull: Well that's very helpful and an excellent, I think, overview of what the courts have said. On our next podcast, we're going to talk about some of the specific expectations of the court and deal with a few of the recent decisions and some of the historic basis upon which the courts have judged the lawyer in circumstances when testamentary capacity is being considered. So we'll save that for our next podcast and again, I'd like to remind our listeners that Hull on Estates is a regular podcast that is provided as an information service. It's a summary of current legal issues and concepts of concern to estate law practitioners. The comments though, and the articles that we refer to, are not meant as legal opinions and the listeners are cautioned not to act on information provided without seeking specific advice with respect to the particular situation they find themselves in.

Suzana Popovic-Montag: Thanks Ian, and I'd also like to just invite our listeners to feel free to drop us a line if they have any comments or any questions on what we've discussed today, or even in earlier podcasts. They can feel free to write to me at spopovic@hullandhull.com.

Ian Hull: Terrific. Well thanks very much Suzana, and thanks to the listeners, we look forward to our next podcast.

This has been Hull on Estates with Ian Hull and Suzana Popovic-Montag. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.

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