

## **Hull on Estates Podcast #6**

### Testamentary Capacity

**Posted on May 2, 2006**

Suzana Popovic-Montag: Hi and welcome to Hull on Estates. You're listening to Episode #6 of our podcast on Tuesday, May 2<sup>nd</sup>, 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: O.k. Today I'd like to start to really work through the issue of testamentary capacity, a fundamental sort of core aspect of any estate matter and one which has been debated over the years in many courts in many jurisdictions, Suzana. So why don't we start off with the aspect of age and how that might be an influence in this issue.

Suzana Popovic-Montag: As a general rule, Ian, a testator must have attained at least the age of 18 years before he or she has the capacity to make a valid Will. There are, though, four exceptional cases in which the general rule does not apply.

Ian Hull: So the first of which being a person who is or who has been married, is capable of making a Will irrespective of his age at the time of the Will when it is executed, I know that is number one. What's the second one?

Suzana Popovic-Montag: The second one is when a Will is made by a minor before marriage, that Will will become valid if and when the marriage actually takes place if it states that it's made in contemplation of the marriage to the other spouse, Ian.

Ian Hull: O.k. And then the third exception to the general rule with respect to age reflects the policy which permits a relaxation of the requirements of validity in the case of privileged Wills. There are no age requirements, for example, for a testator who is a member of a component of the Canadian Forces that's referred to in the *National Defences Act*, just as an example. What about the fourth?

Suzana Popovic-Montag: The final exception, then Ian, also reflects the policy behind the formal requirements for privileged Wills. And it provides that there is no age restriction for testators who are mariners or seamen at sea or in the course of a voyage.

Ian Hull: O.k. So let's now turn to mental capacity itself. And, you know, as from time immemorial it has been the law of common-wealth jurisdictions, Canada, England, the U.S., that no person of unsound mind is capable of making a Will, but let's talk a little bit about what is a perfectly normal mind, and what are we looking for in the context of capacity Suzana?

Suzana Popovic-Montag: Well, Ian, there is an often-quoted passage that provides that there is no difficulty in the case of a raving madman or of a driveling idiot in saying that he's not a person capable of disposing of property. But between such an extreme case and that of a man of a perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. And there is no possibility of misstating midnight for noon, but at which precise moment twilight becomes darkness is hard to determine.

Ian Hull: Now that's a great quote and a classic case of how years ago, and it's a case in 1857, the *Boyse* decision that was a British case, and I love the way they describe it. But it really does highlight the difficulties in that there is in this area, a constant battle of what you do with the issue of mental capacity when you are into the gray area itself. And you know how the authorities deal with that debate. What's the sort of seminal case that has been used for many, many years in the area of capacity?

Suzana Popovic-Montag: That's the case, Ian, of *Banks v. Goodfellow* and that case was decided way back in 1870, even before medical investigations in the field had many progress and before there was any even lingo to describe these particular mental conditions.

Ian Hull: Well that's right and again, you know, if you look at the cases even today, if the analysis of the question of testamentary capacity is undertaken, almost every court will go back to the *Banks v. Goodfellow* approach and the analysis. And it really talks about how important it is that the exercise of a power and the question of capacity is that the testator, the will maker must understand the nature of the act and its effects. What else does *Banks v. Goodfellow* help us sort of guide us when we are looking at how to analyze testamentary capacity?

Suzana Popovic-Montag: The will maker also has to understand the extent of the property of which he or she is disposing and he or she has to be able to comprehend and appreciate the claims to which he or she has to give effect.

Ian Hull: So with a view, though, as well, that in terms of who should be beneficiaries of your estate, the *Banks* case helps us, you know, to highlight the fact that there should be no disorder as they call it, disorder of the mind to what they call poison affections and sort of make it so that a person is unable to understand their sense of right and wrong and who should take and the like. So then what about, you know, looking at the *Banks v. Goodfellow* decision now, let's take it and dissect it a little bit because it talked about the concept of delusions and it takes us into what is a whole other wing of testamentary capacity. But tell me what is meant by delusions?

Suzana Popovic-Montag: Ian, delusions is meant to be something more than just a mistaken belief in the state of facts which don't exist or which a reasonable man or woman would not believe to be true. A delusion has to actually involve a belief in something that no man or woman in his or her sense could believe.

Ian Hull: So there is lots of authority on this area of delusions, but it's really been flushed out where the courts say they want to find a mistaken belief as to a factual circumstance or a logical conclusion that might be come to by the individual. They look for not necessarily insane delusions but a belief or a prejudice or a mistaken understanding that is really beyond what would be acceptable and rational in the circumstances. But what kind of dangers do you get into with this analysis on delusion?

Suzana Popovic-Montag: That's a good question Ian, and you know, the danger is that every situation is very fact-specific and you want to be very careful that, you know, you don't simply rely on the extreme cases where it's clear that, you know, someone is clearly being delusional in terms of the gift that they're trying to make and that it doesn't make any sense in the circumstances. But it's as you said in those gray zones that we have to be really careful that the proper inquiries are being made by, you know, the person who is drafting the Will for the testator or the testatrix.

Ian Hull: Yeah, because with delusion, I mean the question isn't that could the delusions possibly have an influence upon the disposition to make the Will. That's sort of almost the wrong question, but the question is, did the delusion influence or affect the disposition actually made. And so it's really a tough, again it's sort of counter-intuitive when you are looking at this question and your first senses of it. Alright, let's talk a little bit about some decisions since *Banks v. Goodfellow* and some of the analysis that has sort of flown from that. One case about delusions and how far the courts may go in certain circumstances to uphold the Will of someone who is admittedly insane, is described in the case, sort of a reasonably famous case called *Re Walker*, it's a British case. Tell me a little bit about that and how they dealt with delusions in that one, because the *Re Walker* decision has stemmed from *Banks v. Goodfellow* and has also been followed in many commonwealth jurisdictions.

Suzana Popovic-Montag: The case, Ian, was decided way back in 1912 and it really is like an extreme example of, you know, the extent to which a court will go to actually uphold a Will, notwithstanding the concerns that they might actually have, the testator or the testatrix might actually have a delusion that could have affected the bequests that are made. In this case in particular, the testatrix was illegitimate and so if the court was ultimately to find that her Will was invalid, her whole property, and at the time, was quite a significant estate, it would have passed to the Crown as *bona vacantia* and so her relatives, who themselves were in real need of what they would have been entitled to under the woman's estate, would have otherwise received nothing. And in this case, then, the court did go to, you know, quite a length in order to actually uphold the Will notwithstanding that there was some strong medical evidence that she was indeed suffering from an obsessional insanity of an extreme and even violent type, said the court, but nonetheless, it said that the Will was valid in the circumstances.

Ian Hull: I think, you know, and although that's just one case and it's an older case, it really does serve as an important illustration of how the courts, and my experience and I think we've both seen it in cases since *Re Walker* is that there is such a tremendous bias toward upholding a Will and an expectation of almost an assumption that the person was

capable and one that you have to knock down and that sandcastle you have to knock down. Although that's not the way the courts would describe it, certainly from a practical standpoint, I think that's the way they approach it. Alright, so one other aspect of this question of capacity is that it's important to note that it's not only the terms of the Will itself that the testator must be capable of appreciating but it's also the facts of the general situation in which the Will is made, and the circumstances surrounding it. And I know that there has been lots of case law sort of discussing this sort of nuance to the question of capacity, but I think the case was *Baton v. Singh*. It's an older British case in 1948 but there is a good quote from it, I think you were referring to in a paper recently.

Suzana Popovic-Montag: Yes Ian, that quote actually provided that a testator may have a clear apprehension of the meaning of a draft Will that's submitted to him and may approve of it, and yet if he has at the time, through infirmity or disease, so deficient a memory that he was oblivious of the nature and the claims of his relations. And if that forgetfulness was an inducing case and cause of his choosing strangers to be his legatees, the Will will be invalid.

Ian Hull: Well that's interesting and it really helps us sort of take it and branch out the question of capacity. Alright, well for the purposes of this podcast, I think we've sort of worked through some of the starting point issues. On the next podcast, I want to deal with a little bit more on the question of testamentary capacity and some of the classic Supreme Court of Canada decisions on this and some comment on it, talk a little bit about not just the questions of delusion and mental infirmity but circumstances arousing suspicion, what has been called by the courts as suspicious circumstances. And ultimately we are going to talk a little bit about the undue influence issues and how they get played out in this area. So I think that was very helpful and I appreciate your help on this Suzana, and we'll look forward to our next podcast.

Suzana Popovic-Montag: Thanks very much Ian.

*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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