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Wills, Trusts & Estates

The importance of keeping good notes

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(January 29, 2021, 8:27 AM EST) -- The recent Ontario Superior Court trial decision of Justice Arthur Gans in *Kates Estate v. Fatica* 2020 ONSC 7046 demonstrates once again the value that the court places on the evidence of drafting solicitors in will challenge matters, particularly when they keep good notes.

Ellen Kates was 79 years of age and in the midst of a guardianship fight with her brother, Colin, in August 2011, when she signed codicils to her will which had the effect of removing him as executor of her estate and disinheriting him.

Ellen had been diagnosed with Alzheimer's disease in February 2011 and her geriatric psychiatrist was of the opinion that she was no longer able to manage her finances. Her power of attorney was invoked as a result, leading to the events which prompted the changes to her will.

Colin was one of his sister's three attorneys, but he quickly fell into disagreement with the other powers of attorney and in June 2011 brought a Guardianship Application seeking to displace the appointed powers of attorney and to impose a third party as guardian over his sister's affairs.

The actions of her brother enraged Ellen and in meetings with her long-time solicitor, Barry Smith, she told him she wanted to remove her brother as executor and disinherit him from her will. After numerous meetings with Smith to discuss the Guardianship Application and to give instructions with respect to a codicil to her will, new codicils were signed in August 2011 which had the effect of removing her brother from any entitlement to her estate.

The question for the court in 2020, nine years later, was whether Ellen had testamentary capacity to make the codicils she did in August 2011.

The test for testamentary capacity has been clearly set out in the case law since 1870. A testator must understand the nature and effect of the testamentary document, must have an understanding of the nature and extent of their property, must remember the persons who might be expected to benefit under her will and, where applicable, understand the nature of the claims that may be made by persons excluded.

While there is a presumption of testamentary capacity, in circumstances where there is evidence of cognitive decline or a significant change to a testamentary plan, the onus shifts, and the propounder of a will is required to prove on a balance of probabilities that testamentary capacity existed.

The question for estate litigators is always how to prove testamentary capacity years after the signing of a will when memories have faded and many of the potential witnesses have passed away or cannot be found.

Solicitors preparing wills or codicils for elderly clients where there may be a question of testamentary capacity will frequently have a capacity assessment performed by a qualified professional so that evidence may be available in any subsequent court challenge. Smith had done that in August 2011.

Justice Gans noted, however, that he was not impressed by the medical professional who had performed the assessment. The judge held that the evidence of the drafting solicitor who had met with and spoken with the testator concerning her intentions should be preferred over all else, even the medical professionals.

Justice Gans described Ellen's solicitor, Smith, as an “old school” solicitor who made copious notes to file which Justice Gans found to be unassailable in terms of providing him with the details of the events that took place in 2011.

Each time he met with Ellen, Smith took contemporaneous notes and frequently summarized them with a dictated memo to file. These notes permitted Justice Gans to be confident in the testimony of Smith nine years later. The judge noted that the written material generated by Smith in 2011 supported and buttressed his oral evidence which he found to be credible and reliable.

Justice Gans was particularly swayed by the notes taken on the day that the codicil was signed in August 2011 as Smith had carefully recorded the comments made by Ellen as she was reviewing and then signing the codicils. The notes clearly indicated that she understood the nature of the document, understood the extent of her assets and understood the people in her life whom she wanted to benefit.

The evidence of the capacity assessor was found to be of “marginal assistance.” Although Ellen had been assessed on the very day she signed her codicil by a respected independent geriatric psychiatrist, nine years later the doctor had no independent recollection of his meetings with her.

Similarly, Justice Gans commented that the evidence of two further respected geriatric psychiatrists who had prepared retrospective capacity assessments following their review of the medical records was also of little assistance. Their reports could not be given much weight as they had not met with the testator and they were forming their opinions based on reports of others which may or may not have been complete or accurate.

Justice Gans was far more confident in the testimony of Smith, the drafting solicitor, given his clear and copious notes which assisted and reinforced his testimony.

In the result, the judge found that Ellen did have testamentary capacity and the wishes she expressed in her codicil in August 2011 will be fulfilled.

A lesson for all drafting solicitors can be found in this decision. While it may take some extra time to carefully record and note your observations of a client and your discussions with them, that time can be invaluable to you and your client years later.

Richard Worsfold is a partner and Reshma Kishnani is an associate at Mills & Mills LLP*, a full-service law firm, which practises in estates litigation. They acted for one of the defendants in this case. The authors represented 20 charities who benefited from the codicils in question.*

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