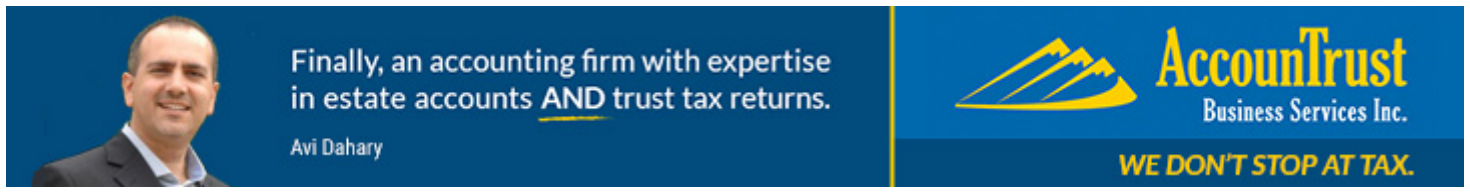

Estates & Wills & Trusts

Make sure Mom knows when you visit

By Charles Ticker

A recent case from British Columbia, *Moore v. Drummond*, may have some lawyers scratching their heads as to what evidence they need to adduce in a will challenge case to prove that a person does not have the requisite testamentary capacity. Read Moore v. Drummond

Dorothy "Dee" Drummond died on Jan. 27, 2011 at the age of 98. She had one son named Bruce. The year before her death, Dee made a new will naming her neighbours Kenneth (Casey) and Clara Moore as her executors and sole beneficiaries and left her son out of the will. The estate was a modest one, maybe worth $175,000. Not surprisingly, her son Bruce decided to challenge the will.

The will was drafted by an experienced solicitor, John Perry. He did not know the testator personally but his father had prepared her earlier will in 1994 in which Bruce was named as sole executor and presumably, her sole beneficiary. (The earlier will did not have a residual clause. However, as Bruce was the only child he would have been entitled to her entire estate in any event as her closest next-of-kin).

Unbeknownst to the solicitor, one week before he met with his client, the Public Guardian and Trustee had referred Dee to a doctor because of concerns they had. The doctor wrote to the Public Guardian and Trustee that Dee had dementia and was incapable of managing her affairs. One would have thought that a diagnosis of dementia and a medical opinion that Dee was incapable of managing her affairs would go some way in having the will set aside.

The impugned will provided as follows:

"7. My reasons for providing for my neighbours, CASEY MOORE and CLARA MOORE are because they have been a lot of help to me and have become my good friends over many years.
8. I have not given any part of my estate to my son, Bruce Drummond, because he does not visit me and he does not need anything from me. Bruce is retired and I believe he made good money as a logger."

At trial, the solicitor testified that he took instructions for the will at a meeting at Dee's home that lasted between half an hour and an hour. He had been contacted by the neighbour who was present to introduce him but did not stay for the meeting. Perry was an experienced solicitor with more than 30 years in practice and he had prepared "hundreds and hundreds of wills."

Perry was aware of the circumstances including the significant change to an existing will and the disinheritance of the son. This, of course, triggered "alarm bells" and he took careful notes when taking the instructions. His testimony at trial was that based on his experience he had no concerns about Dee's capacity to make a will.

Perry stated that he was satisfied that Dee had reasons for disinheriting her son. He didn't visit very often (his notes recorded that Dee had told him Bruce had not visited her for 50 years) and she was very close with her neighbours

who had helped her over a period of 40 years.

The trial judge referred to the well-known test of testamentary capacity set out in *Banks v. Goodfellow* (1870), 5 QB 549 at 567:

"… [The testator] 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."

However, the judge did not quote the usually-quoted passage from *Banks v. Goodfellow* which reads:

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, ***that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made*** *(emphasis added)."*

The trial judge also quoted from a more recent formulation of the test found in *Schwartz v. Schwartz*, a decision of the Ontario Court of Appeal which was affirmed by the Supreme Court of Canada where Justice Bora Laskin summarized the elements of testamentary capacity. Read Schwartz v. Schwartz

"… The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property..."

The trial judge held that this did not mean that the testator must have perfect mental capacity for all purposes or be able to remember all the details. At paragraph 36 of the judgement, he wrote:

"Diminished capacity does not equate to lack of capacity and a person who has been deemed incapable of managing his or her own affairs may still be able to make a valid will." Royal Trust Co v. Rampone, [1974] 4 WWR 735 at 743 (BCSC)

The judge further held that medical opinions are not necessary determinative of testamentary capacity.

In the Supreme Court of Canada decision in *Vout v. Hay*, the court held that there is a presumption that a will is valid where it has been duly executed with the requisite formalities after having been read by or to the testator who appeared to understand it. However, that presumption can be rebutted where there are suspicious circumstances. Read Vout v. Hay

In this case, the trial judge found that there were suspicious circumstances that being the opinion of a doctor a week before the will was executed that held that Dee had dementia and was unable to manage her affairs. Notwithstanding the medical evidence, the trial judge found that the executors had satisfied him that the testator had testamentary capacity. He held that that Dee's mental condition was deteriorating but she was able to accurately tell the lawyer that her property consisted of her house and two bank accounts including one which she said had $25,000. However, in the same sentence the trial judge stated that Dee did not accurately recall the current balance in those accounts. According to the bank records, she actually had in excess of $48,000 in the bank.

The trial judge found that Dee was also able to articulate reasons for disinheriting Bruce although he found that she was inaccurate in that she apparently did not remember instances of his coming to visit. Dee had told her lawyer that her son had not visited her for over 50 years and only phoned once in a while. In fact the evidence showed that he did visit her from time to time, maybe once or twice a year through 2009, the year before she made her will. Telephone records also indicated that Bruce or his spouse called her at least once or twice a month although the phone calls were not very lengthy.

One would have thought that Dee's advice to her lawyer that she had not seen her son for over 50 years was a delusion that would have negated testamentary capacity, particularly when she set that out in the will as a reason for disinheriting her son .

The judge held that this was not a case of an elderly and infirm testator suddenly making a will in favour of someone he or she has known for only a short time. However, the claim against the will was not made based on undue influence. Rather, the issue was testamentary capacity.

The trial judge did not give much weight to the physician's opinion because the physician was not asked to address the issue of testamentary capacity. It is not clear why the physician was not asked to make a retrospective opinion on testamentary capacity based on her observations. According to the reported decision, it appears that evidence was not presented.

The judge acknowledged that while the successful party typically has the costs paid by the losing party, in this case, because of the legitimate questions that arose from medical opinion it would not be fair or appropriate to burden Bruce with the costs of the trial. However, instead of awarding costs out of the estate to all parties, the judge held that the parties should bear their own costs.

With respect, I find the result of the case somewhat puzzling. One would have thought that there was considerable evidence to support a finding of lack of testamentary capacity: there was evidence of dementia, mistakes as to value of assets and a shocking misapprehension as to when the son last visited.

This case emphasizes what I always tell my clients: you never know what a trial judge is going to do and there is no such thing as a sure winner. On the other hand, the judge placed great weight on the evidence of an experienced lawyer who took the time to take careful notes. In my view, had the lawyer not done so, Bruce would probably have won his case.

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