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## Capacity to Make and Revoke an Enduring Power of Attorney

**By:** Jonnette Watson Hamilton

**Case Commented On:** *Pirie v Pirie*, [2017 ABQB 104 \(CanLII\)](#)

The issue in this case was whether the applicant had the mental capacity in July 2016 to revoke his 2008 Enduring Power of Attorney and to create a new Enduring Power of Attorney. His 2008 Enduring Power of Attorney appointed his three children and his wife jointly as his attorneys and became effective if and when he became mentally incapable of understanding the nature and effect of that instrument. His 2016 Enduring Power of Attorney appointed his brother, and in the alternative, his long-term assistant, and in the further alternative, his sister-in-law, immediately upon its execution.

In some ways, this was an easy decision for Justice Robert Hall. If the applicant lacked the mental capacity to revoke the 2008 instrument, then three children who owed the applicant money and his now-estranged wife would be his attorneys. If the applicant had the mental capacity to revoke the 2008 instrument and create the 2016 instrument, then his businessman brother would be looking out for his financial interests, no doubt under the watchful eye of the three children and the now-estranged wife. Nevertheless, the case is noteworthy because it involved a challenge to the widely-accepted test for assessing mental capacity to create and revoke a power of attorney. That challenge argued for the inclusion of an evaluation of the rationality and reasonableness of the applicant's reasons for making the changes. Although Justice Hall stated he did not accept the challenge to the existing test, he did assess the applicant's reasons and found that the applicant had ample reason to make the changes. By doing so, he might have introduced some uncertainty into this area of the law.

### Facts

A number of the applicant's decisions and actions in 2015 and 2016 were out of character for the 88-year-old, and his children became concerned about his mental abilities. At their request, the applicant agreed to be assessed by a clinical psychologist. That assessment indicated that the applicant suffered medium level dementia with significant neurocognitive dysfunction. Nevertheless, the psychologist noted that the applicant possessed an adequate understanding and appreciation of the nature and purpose of an enduring power of attorney.

The applicant was unhappy with the psychologist's assessment and arranged to see a neurologist. The neurologist reported that the applicant suffered from only mild cognitive impairment and that people with such an impairment generally retained the capacity to engage in decision making about their financial affairs. The neurologist denied the applicant suffered from dementia.

The applicant's 2008 enduring power of attorney was a "springing" or "contingent" type, meaning that the written declaration of the attorneys and of the applicant's attending physician would be conclusive proof that the mental incapacity that triggered the enduring power of attorney had occurred and brought the enduring power of attorney into effect. The applicant's new doctor signed a declaration that the applicant was not competent to make decisions regarding matters to his estate on May 5, 2016. On May 6, 2016, all of the named attorneys signed a similar declaration and the 2008 Enduring Power of Attorney therefore came into effect. The parties agreed that the applicant's three children and his now estranged wife of more than 53 years owed the applicant not less than \$7,000,000. (We are not told why they were indebted, but presumably the debt had to do with the four attorneys taking control of the applicant's financial affairs once they triggered the 2008 Enduring Power of Attorney.)

However, with the favourable written opinion of the neurologist in hand, the applicant retained a lawyer, and on July 22, 2016 executed a revocation of his 2008 Enduring Power of Attorney and a replacement enduring power of attorney that appointed his brother, Glen, as his attorney and, in the alternative, his longtime assistant, and, in the further alternative, his brother's wife. The 2016 power of attorney was not a springing one, but rather a "continuing" one. It took effect immediately on its execution and it continued in effect even if the applicant subsequently became mentally incapacitated.

## Law

The governing law is in the *Powers of Attorney Act*, [RSA 2000, c P-20](#). It specifically provides for an Enduring Power of Attorney in section 2 as a power of attorney which either continues "notwithstanding any mental incapacity or infirmity of the donor" after its execution or takes effect "on the mental incapacity or infirmity of the donor" — "donor" being the name in the *Act* for the person who gives a power of attorney (section 1(d)). The terms "mental incapacity" and "infirmity" are not defined in the *Act*.

The *Act* contains two provisions which are relevant to the dispute. The first is section 3 which specifies the consequences of incapacity at the time of execution:

3. An enduring power of attorney is *void* if, at the date of its execution, the donor is *mentally incapable of understanding the nature and effect* of the enduring power of attorney. (emphasis added)

The second is section 13(1) which provides for the termination of an enduring power of attorney:

13. (1) Except in the case of an irrevocable power of attorney, and notwithstanding any agreement or waiver to the contrary, an enduring power of attorney terminates
  - (a) . . . if it is *revoked in writing* by the donor at a time *when the donor is mentally capable of understanding the nature and effect of the revocation*; . . . (emphasis added)

## Issue

Based on sections 3 and 13(1), the issue was whether, in July 2016, when the 2008 Enduring Power of Attorney was revoked and the new Enduring Power of Attorney was executed, the applicant was mentally capable of understanding the nature and effect of the revocation and the new power of attorney.

## Statutory Interpretation

For the articulation of the test about whether a donor has the capacity to execute a power of attorney, Justice Hall relied upon (at paras 26-27) the leading decision in Alberta, *Midtdal v Pohl*, [2014 ABQB 64 6 \(CanLII\)](#). For its statement of the appropriate test, *Midtdal* at para 92 relied upon the Ontario District Court decision in *Godellie v Ontario (Public Trustee)*, [1990] OJ No 1207, 39 ETR 40 (WL) at para 33, which in turn relied upon an English decision by Lord Hoffman in *Re K; Re F*, [1988] Ch 310; [1988] 1 All ER 358 (Ch D) at 363.

*Re K; Re F* stated the test for the validity of a power of attorney was whether, at the time of execution, the donor understood *the nature and effect of the power*, and not whether the donor would have been able to perform all of the acts which the power authorized (at 363). It is therefore the same as the tests under Alberta's *Powers of Attorney Act*. Lord Hoffman also specified the criteria by which that determination was to be made:

Capacity to execute the power of attorney would be established if the donor understood that

- (a) the attorney would be able to assume complete authority over the donor's affairs;
- (b) the attorney could do anything with the donor's property that the donor could have done;
- (c) that the authority would continue if the donor became mentally incapable; and
- (d) would in that event become irrevocable without confirmation by the court. (at 363)

The test from *Re K; Re F* has also been recommended by various Canadian law reform agencies. See, for example, Law Reform Commission of Nova Scotia, [Enduring Powers of Attorney in Nova Scotia](#), Discussion Paper (June 1998) at 7; Law Reform Commission of Saskatchewan, [Consultation Paper on Enduring Powers of Attorney](#) (January 2001) at 20.

However, the British Columbia Court of Appeal, in *Egli (Committee of) v Egli*, [2005 BCCA 627 \(CanLII\)](#), sounded a cautionary note about the use of *Re K; Re F*. In *Pirie*, Justice Hall mentions that the *Midtdal* case noted that the British Columbia Court of Appeal had “referred to” the *Re K; Re F* principles in *Egli* (at para 28). However, “referred to” is not an appropriate characterization of *Egli*'s treatment of *Re K; Re F*. Although the British Columbia Court of Appeal upheld the trial judge's decision which applied the *Re K; Re F* test, it did not fully endorse that test. Instead, the Court of Appeal emphasized the differences between the English legislative framework and British Columbia's legislation. The Court of Appeal noted that the English legislation contained more safeguards than did the British Columbia legislation, and suggested that it “would be appropriate to be cautious in considering English precedents” (at para 32). The Court of Appeal wanted to add to the *Re K; Re F* test for capacity:

It seems to me that while, as the judge found, it may not be necessary to treat the test for testamentary capacity as being the standard required for valid execution of a power of attorney, yet the donor must *have a general appreciation of the enabling power* he or she is bestowing upon the donee of the power. (at para 33, emphasis added)

Counsel for the respondents in *Pirie* argued that the test in *Re K; Re F* was not the proper test because its basis was under attack and it was a test developed by the common law rather than through interpretation of the legislation. In addition, counsel argued that the *Re K; Re F* test provides what is required to revoke one power of attorney and replace it with another, but the test does not address why the change is being made and whether the change is a rational and reasonable one or an irrational one due to mental illness (at para 31). Two of the three medical experts called by the applicant favoured a consideration of the reasons behind the revocation and the new appointment when applying the test for capacity (at paras 32-34).

Justice Hall indicated he was not persuaded to depart from the *Re K; Re F* test adopted by the Alberta Court of Queen’s Bench in *Midtdal*. The Alberta statute, after all, merely requires that the donor be “mentally capable of understanding the nature and effect” of both the new enduring power of attorney and the revocation (at para 35). He thought the test was appropriate even if the donor was not capable of looking after his own financial affairs. He reaffirmed this in his conclusion:

In the result, I find that the July 2016 revocation of the 2008 power of attorney and the execution of a new enduring power of attorney in July 2016 are valid as they were both competently executed and *meet the test set out in Midtdal*. (at para 42, emphasis added)

### **Application of the test**

Justice Hall indicated that, if the test from *Re K; Re F* was the proper test to apply, then there was no doubt that the 2016 revocation and enduring power of attorney were both valid (at para 30). The applicant’s evidence indicated that he fully understood the four elements of the *Re K; Re F* test. Even the psychologist who had stated that the applicant suffered medium level dementia with significant neurocognitive dysfunction confirmed that the applicant met the *Re K; Re F* test.

Justice Hall also stated that the court would start down a “slippery slope” if it tried to assess whether and to what extent the decision to revoke an old power of attorney and execute a new one was irrational or appropriate (at para 35). The basic logic of a causal type of slippery slope argument is that the first step is not itself bad or wrong. However, it is seen as the first step down a slippery slope, at the bottom of which is something very bad or wrong. The basic claim is that, once you take the first step, you will unavoidably slide to the bottom and therefore the unobjectionable first step should not be taken. See, for example, Eugene Volokh, “[The Mechanisms of the Slippery Slope](#)” (2003) 116:4 Harvard Law Review 1026-1137 for a thorough review of this type of argument in law.

Despite his apparent qualms about the “slippery slope” nature of the evaluation requested by the respondents, and his endorsement of the *Re K; Re F* test adopted in *Midtdal*, Justice Hall did consider the legitimacy of the applicant’s expressed reasons for making the change: he felt his children were treating him like a child, he felt he should be entitled to his own money, he felt

decisions about his finances should not be controlled by his estranged wife or his children who were his major debtors, and he felt his brother was loyal to him and a businessman whom he trusted (at para 36). Justice Hall went further and stated that, in his opinion, the applicant had expressed ample reasons for his decision to change his attorney from his estranged wife and their children to his brother or the two alternates (at para 41).

## Comments

It is not clear that Justice Hall simply applied the test from *Re K; Re F*. First, while it is true that he concludes “it was clear from the evidence given by [the applicant] that he fully understood the four elements of the test” and that conclusion was confirmed by the medical evidence (at para 30), Justice Hall does not discuss the application of the test from *Re K; Re F* to the applicant’s testimony — he merely concludes. Second, although Justice Hall *says* that assessing the reasons for revoking or creating a power of attorney is a bad idea — i.e., would start the court down a “slippery slope” (at para 35) — he *does* consider the applicant’s reasons and assesses them as “ample” (at paras 36, 41). Third, Justice Hall significantly downplayed the British Columbia Court of Appeal’s concerns with the test in *Re K; Re F*.

It would seem that *Pirie v Pirie* muddies what was in Alberta a clear line of authority stretching from *Re K; Re F* through *Godelie* to *Midtdal*. Is the test still the easily met test enunciated in *Re K; Re F*? Or does the test also include a consideration of the donor’s reasons for creating and/or revoking a power of attorney?

British Columbia and Ontario are two of the Canadian jurisdictions who have codified very specific tests for capacity to create an enduring power of attorney, unlike the general test used in Alberta. The test in *Re K; Re F* for the capacity to create a power of attorney is far less onerous than the statutory tests in those two jurisdictions. For example, in British Columbia, under the *Power of Attorney Act*, [RSBC 1996, c 370](#), section 12(1), the standard is almost identical to that in Alberta: the proposed donor must be capable of understanding the “nature and consequences” of the proposed enduring power of attorney in British Columbia as opposed to understanding its “nature and effect” in Alberta. The British Columbia statute goes on to state in section 12(2) how to determine whether the donor has mental capacity:

12(2) An adult is incapable of understanding the nature and consequences of the proposed enduring power of attorney if the adult cannot understand *all* of the following:

- (a) the property the adult has and its approximate value;
- (b) the obligations the adult owes to his or her dependants;
- (c) that the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney;
- (d) that, unless the attorney manages the adult's business and property prudently, their value may decline;
- (e) that the attorney might misuse the attorney's authority;
- (f) that the adult may, if capable, revoke the enduring power of attorney;
- (g) any other prescribed matter. (emphasis added)

The Ontario statute sets out a very similar test for capacity in the *Substitute Decisions Act, 1992*, [SO 1992, c 30](#), at section 8(1), adding that the proposed donor must also know that the attorney

must account for his or her dealings with the donor's property. Note that neither province's test includes an evaluation of who the proposed donor wants to appoint as their attorney or an assessment of the donor's reasons for granting the power of attorney. The concerns that arose in *Pirie* are not specifically addressed by even these more specific, certain and onerous tests. Perhaps those concerns are too intrusive on the donor's autonomy.

The determination of mental capacity has been described as “a societal judgment about the appropriate balance between respecting the patient's autonomy and protecting the patient from consequences of a bad decision”: P. S. Applebaum, “Clinical practice: Assessment of patients' competence to consent to treatment” (2007) 357 *New England Journal of Medicine* 1834. Should *Re K; Re F* be the test in Alberta? Does it set the proper balance?

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