



## Challenging suspicious wills

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### 1. SUSPICIOUS WILLS

There are a number of classic features common to probate claims where the validity of a Will is challenged. A testator typically executes a new Will in favour of one or more family members (often to the exclusion of others) or in favour of others, such as friends, neighbours or carers. The new Will represents a significant departure from the terms of previous Wills, which may have divided the estate equally between the testator's children or nearest relatives. The terms of the Will are, therefore, surprising or suspicious, at least to the parties who wish to challenge its validity.

The testator may have been elderly and/or in failing health, perhaps in the early stages of dementia, or suffering from the result of a recent bereavement. The golden rule may not have been observed if a doctor did not certify the testator's capacity before the Will was executed.

The testator is typically vulnerable and susceptible to influence. The primary beneficiary under the Will may have been in the position to influence the testator, by virtue of their dominating personality or position of trust and/or may have been involved in the preparation or execution of the Will.

There may, however, be little or no direct evidence that the beneficiary had sought to coerce the testator to execute the Will, or that the Will has been procured by a fraudulent statement. However, that is the strong suspicion of the beneficiaries under the testator's previous Will. In any event, there is a suspicion that the testator was not actually aware, or did not approve, of the contents of the Will as representing his or her wishes. A solicitor may not have been involved; or, if a solicitor was involved, there may be grounds for alleging that the solicitor failed to take proper precautions to ensure that the contents of

the Will were brought home to the testator.

Lastly, there may be a lack of positive evidence, or unsatisfactory evidence, from the witnesses or others, as to whether the proper formalities were observed in the execution of the Will in accordance with s. 9 of the Wills Act 1837.

### 1.1. Grounds of invalidity

The claimants must, of course, bring their claim within a recognized legal ground of invalidity such as:

- (a) undue influence;
- (b) fraudulent calumny;
- (c) want of knowledge and approval;
- (d) testamentary incapacity; or
- (e) lack of due execution.

There are, however, problems which typically face a claimant wishing to rely on any of these heads of claim. Indeed, the initial task for the legal advisers of a potential claimant will often be to determine which head or heads of claim best fits the facts.

The purpose of this paper is to explore the elements of each possible head of claim, and how they differ from one another. Reference is made to the case law as a way of illustrating the requirements of each head of claim.

### 1.2. Suspicion not sufficient

*“Even though the disappointed beneficiaries may be convinced in their own minds that the challenged Will could not have represented the testator’s genuine wishes, it does not necessarily follow that they will succeed in mounting a successful legal challenge to the validity of the Will.”*

Even though the disappointed beneficiaries may be convinced in their own minds that the challenged Will could not have represented the testator’s genuine wishes, it does not necessarily follow that they will succeed in mounting a successful legal challenge to the validity of the Will. As Lord Neuberger said in *Gill v Woodall* [2010] Ch 380 at para. [16]:

*Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.*

In *Inchbald v Inchbald* [2016] EWHC 3215 (Ch) the Judge commented that the party challenging the Will had lost all sense of perspective about the case. His evidence consisted of nothing more than inferences. He appeared to have persuaded himself that there was a policy, amounting in effect to a conspiracy, masterminded by the testator’s former wife, to surround the testator with servants and advisers who would impose on the testator their own views, or those of his former wife, about how

his life and relationships should be conducted and how his estate should be disposed of. He was a prime example of the relative with feelings of disappointment or worse who had set out to find evidence, or had persuaded himself that evidence existed, which showed that the Will did not, could not, or was unlikely to, represent the intention of the testator.

In *Barnaby v Johnson* [2019] EWHC 3344 (Ch) the claimant threw in everything but the kitchen sink: undue influence, testamentary incapacity, forgery and want of knowledge and approval. It was to no avail; all the claims were dismissed. The claimant came nowhere near establishing the basis for any proper challenge; there was no documentary evidence nor evidence from independent third parties to support the claim, and the claimant's own evidence was found to be contradictory, self-serving and misleading.

### 1.3. Evidence

It follows that a Will can only be set aside on the basis of admissible evidence (which may not be the same thing as objective truth). As Proudman J said in *Nesbitt v Nicholson (Re Boyes)* [2013] EWHC 4027 (Ch), at para. 137:

*The problem in this case, as in so many, is that the parties seem to think that a judge can look into the hearts of the witnesses and somehow divine the truth. That is not how the system works. A judge can only find facts on the evidence, properly adduced. Indeed sometimes where the facts cannot be determinatively ascertained on such principles a case may have to stand or fall by default on the burden of proof. I cannot tell what actually happened. I can only, as I have said, find facts on the evidence.*

These observations were echoed by Judge Paul Matthews in *Ball v Ball* [2017] EWHC 1750 (Ch), para. 20, where he made the point that the decision of the court is not necessarily the objective truth of the matters in issue. Instead, it is what is most likely to have happened, based on the material which the parties had chosen to place before the Court.

### 1.4. Freedom of testation

The principle of freedom of testation means that people can make a valid Will, even if they are old or infirm, or in receipt of help from those whom they wish to benefit, and even if the terms of the Will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed (*Hawes v Burgess* [2013] EWCA Civ 74, at [14]). The testator may be moved by capricious, frivolous, mean or even bad motives. In *St Clair v King* [2018] EWHC 682 (Ch) it was said, at [79], that that "an intentional, unjust and unfair will must be upheld if the testator has the capacity to make a rational, just and fair one; but it cannot be upheld if he did not".

In *Gill v Woodall* [2010] Ch 380 Lord Neuberger said, at para. [26]:

*Subject to statutes such as the Inheritance (Provision for Family*

*"The testator may be moved by capricious, frivolous, mean or even bad motives."*

*and Dependants) Act 1975, the law in this country permits people to leave their assets as they see fit, and experience of human nature generally, and of wills in particular, demonstrates that people's wishes can be unexpected, inexplicable, unfair, and even improper. As I have mentioned, a court should be very slow to find that a will does not represent the genuine wishes of the testatrix simply because its terms are surprising, inconsistent with what she said during her lifetime, unfair, or even vindictive or perverse.*

In *Vegetarian Society v Scott* [2013] EWHC 4097 (Ch) the testator (who was schizophrenic) left the majority of his £1 million estate to the Vegetarian Society, rather than to his own relatives. The Will was upheld on the basis that the testator did not feel the bond of natural love and affection with his blood family that usually exists. He consciously, and with capacity, and notwithstanding his schizophrenia, decided to leave his estate elsewhere. That was a decision which the law should respect and uphold.

## **2. UNDUE INFLUENCE**

### **2.1. Undue influence means coercion**

It is notoriously difficult to establish undue influence in the context of a Will, in large part because undue influence in relation to testamentary dispositions means actual coercion, i.e. the improper exertion of influence over a person to execute a Will contrary to their wishes. There must be positive proof of coercion overpowering the volition of the testator.

"Victimisation", "domination" and "coercion" are the words used in the authorities (*Hubbard v Scott* [2011] EWHC 2750 (Ch), at para. [45]).

Nonetheless, coercion does not simply cover physical violence; it extends to verbal bullying or simply talking to a weak or ill person in such a way that that person may be induced, for quietness' sake, to do anything. A "drip drip" approach may be highly effective in sapping the will (*Edwards v Edwards* [2007] WTLR 1387, at para. 47 vi)).

### **2.2. Mere persuasion**

Coercion must be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate (*Edwards v Edwards* [2007] WTLR 1387, para. 47 v)). As Norris J said in *Wharton v Bancroft* [2011] EWHC 3250 (Ch), at para. 30(c):

*Where the line between "persuasion" and "coercion" is to be drawn will in each case depend in part upon the physical and mental strength of the testator at the time when the instructions for the Will are given. Was the testator then free and able to express his own wishes? Or was the testator then in such a condition that he felt compelled to express the wishes of another?*

In *Hubbard v Scott* [2011] EWHC 2750 (Ch) the testator

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executed a Will leaving his entire estate to his young, female, cleaner, whom he had only known for a short time. He seems to have found her attractive. A claim of undue influence failed. The only hard evidence was that the testator was happy and jovial when he gave instructions for, and when he executed, the Will. *Hubbard v Scott* illustrates that influence is not necessarily undue. It is not undue influence where a man succumbs to the fascination of a younger woman, making a Will in her favour and cutting out his relatives. The cleaner may have influenced the testator by her charms and/or been motivated by money. But the testator was happy to succumb to her influence: he was led, not driven.

In *Edkins v Hopkins* [2016] EWHC 2750 (Ch) the testator left the majority of his estate to a friend and colleague, rather than to his family from whom he had separated. The friend had a striking level of control over the testator, running his business and taking control of his financial affairs. However, the Judge found that such control had to be assessed in the context that the testator had placed a great deal of trust in his friend. A significant level of that control was given by the testator, not taken by the beneficiary. The testator had acted as a free agent. It was likely that he acted with the encouragement or even persuasion of his friend. However, the Judge was satisfied that such persuasion did not cross the line so as to rob the testator of his judgement.

A person may, therefore, seek to persuade or encourage a testator to make a Will for their benefit. However, if the testator voluntarily submits to such persuasion, that does not amount to undue influence.

### 2.3. Proof of coercion

Another potential obstacle relates to the burden of proof. Execution of a Will as a result of undue influence is a fact that must be proved by those who assert it. There is no presumption of undue influence in the case of Wills.

In many cases positive evidence of the actual exercise of coercion will be lacking or insufficient. The person, who is alleged to have exercised coercion, will not usually have committed evidence of their coercion to paper, or uttered incriminating words in front of a third party. The testator is, of course, dead and cannot give evidence.

As Norris J observed in *Wharton v Bancroft* [2011] EWHC 3250 (Ch), at para. 30(d), in many cases the fact of undue influence cannot be proved by the direct evidence of witnesses, but is an inference to be drawn from other proven facts. However, it may be an uphill task to establish undue influence where reliance is placed on circumstantial evidence.

It has sometimes been said that an inference of undue influence should not be drawn unless the facts are inconsistent with any other hypothesis (*Nutt v Nutt* [2018] EWHC 851 (Ch) at para. 65). However, the danger of that formulation is that it may cause one to lose sight of the relevant standard of proof. The better approach is that, as the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the court that the explanation for what has occurred is

*“There is no presumption of undue influence in the case of Wills.”*

that the testator's will has been overborne by coercion rather than there being some other explanation (*Cowderoy v Cranfield* [2011] WTLR 1699, at para. 141; *Wharton v Bancroft* [2011] EWHC 3250 (Ch), para. 30).

*Wharton v Bancroft* is a good example of a case where the provision made by the testator could be explained by a narrative not involving undue influence. The testator made a deathbed Will leaving the entirety of his estate of £4 million to his partner of 32 years, in contemplation of his intended marriage to her, which took place immediately thereafter. The testator's daughters challenged the Will alleging undue influence (and want of knowledge and approval). As Norris J pointed out a deathbed marriage, a deathbed Will, a large estate and the absence of any provision for the testator's family were all matters likely to provoke indignation and a sense of unfairness. However, there was no direct evidence of coercion. It was not surprising that Mr Wharton should have wanted to execute a Will in favour of his "wife" of 32 years whom he had just chosen to marry. He was also concerned that the taxman should get nothing on his death (which would be the case if he left his estate to his wife).

#### **2.4. Elements to be proved**

The claimant must establish (by proof or inference): (a) the opportunity to exercise influence; (b) the actual exercise of influence; (c) the actual exercise of influence in relation to the Will; (d) that the influence was "undue" (i.e. went beyond persuasion); and (e) that the Will before the court was brought about by these means (*Wharton v Bancroft* [2011] EWHC 3250 (Ch), para. 30).

It is, therefore, necessary to establish that the alleged undue influence caused the execution of the Will. In *Vaughan v Vaughan* [2005] WTLR 417 the testatrix had come under pressure from members of her family to change her Will, and in the end made a Will substantially in favour of one of her sons. Even though the court found that the behaviour of her family, including her son, had been "little short of disgraceful", it did not consider that the Will had been procured by undue influence. The testatrix had seen other members of her family regularly, but had made no complaint that she was being subjected to undue influence.

#### **2.5. Successful claims**

In relatively rare cases, a claim in undue influence will succeed. In *Schrader v Schrader* [2013] EWHC 466 (Ch) Mrs Schrader was a widow of 98. In 2006 she made a Will leaving her house (the main asset of her estate) to one of her two sons (Nick) and her residuary estate to her two sons equally. Under her previous Will she had left the whole of her estate to her two sons equally. The court inferred that the testatrix's execution of the Will must have been procured by undue influence because:

- (a) Mrs Schrader was vulnerable and dependent on Nick;
- (b) Nick had a forceful personality, and was convinced that he had been treated unfairly by his parents;

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- (c) Nick had been involved in the preparation of the 2006 Will, and attempted to cover this up in his evidence; and
- (d) there was no other identified reason why the testatrix would have changed her Will.

In *Schomberg v Taylor* [2013] EWHC 2269 (Ch) a claim of undue influence claim succeeded. The testatrix was in a very fragile mental and physical state after the death of her husband; there was cogent evidence that she was subjected to unwanted pressure from the father of her nephews and nieces, which wore her down to the extent that she was prepared to do what he suggested for a quiet life; and there was no obvious reason why her step-sons should have been virtually excluded from her Will when under earlier Wills they benefited from her residuary estate equally.

In *Chin v Chin* [2019] EWHC 523 (Ch) the court upheld challenges on the grounds of want of knowledge and approval and undue influence. With regard to the latter, it was permissible for a husband to express freely his views as to how his wife should leave property in a way which accorded with their cultural traditions, and to use persuasion to that end. However, a line had been crossed in that the pressure and the persuasion exerted by the husband was such that the testatrix succumbed to it for the sake of a quiet life and to avoid family squabbles. She was worn down by such pressure to the extent that the Will represented her husband's wishes, and not her own.

### 3. FRAUDULENT CALUMNY

#### 3.1. Elements of fraudulent calumny

In *Edwards v Edwards* [2007] WTLR 1387 Lewison J confirmed that a testamentary disposition could be avoided on the ground of fraud, i.e. "fraudulent calumny" which he regarded as being a form of undue influence. If, he said, A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the Will is liable to be set aside. The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false.

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In *Kunicki v Kunicki* [2017] 4 WLR 32 the following elements were identified: (a) a false representation; (b) to the testator; (c) about the character of an existing or potential beneficiary; (d) for the purpose of inducing the testator to alter his testamentary dispositions; (e) knowledge that the representation is untrue, or recklessness as to its truth; and (f) causation: the disputed Will is only made because of the fraudulent calumny. It seems that (d) is a necessary element of the claim in that the representation must be made for the specific purpose of inducing the testator to alter his testamentary dispositions (see *Christodoulides v Marcou* [2017] EWHC 2632 (Ch)).

#### 3.2. Burden of proof

Just as it is difficult to prove coercion, it will often be difficult also

*“Just as it is difficult to prove coercion, it will often be difficult also to prove fraud.”*

to prove fraud. Although the standard of proof is the civil standard on the balance of probabilities, the cogency and strength of the evidence required to prove fraud is heightened by the nature and seriousness of the allegation (*Nesbitt v Nicholson (Re Boyes)* [2013] EWHC 4027 (Ch) at para. 113). There will usually not be any direct evidence of fraud; it will be necessary to rely on circumstantial evidence.

Furthermore, it is not enough to establish that an objectively false representation was made. Dishonesty and causation have to be proved. In *Nesbitt v Nicholson* the claim failed as the representor believed that she was telling the truth; and, in any event, the testator exercised his own independent judgement. In *Kunicki v Hayward* [2017] 4 WLR 32 it was not proved that the alleged representation was false, that it was made with knowledge that it was untrue or with a reckless disregard as to its truth, or that the representation was a factor in the testator making the disputed Will. In *Rea v Rea* [2019] EWHC (Ch) there was no evidence that the claimant poisoned the testatrix’s mind by casting a dishonest aspersion on the defendant’s character. The case was based on an unjustified inference and supposition as to the claimant’s alleged bad character. The testatrix had acted of her own volition on the basis of her own free decision that she wanted to benefit the claimant, who had looked after her for years, in contrast to the defendants who had not.

If the testatrix has been interviewed on her own and advised by an independent solicitor, it will not automatically mean that there cannot have been any effective calumny or undue influence. However, it would obviously be relevant in considering whether fraudulent calumny (if any existed) could have caused a new Will to have been made in the terms that it was. The interposition of an independent solicitor may negate or take away the causative effect of any fraudulent calumny (*Todd v Parsons* [2019] EWHC 3366 (Ch), at 159).

### **3.3. Successful claims**

The courts have upheld fraudulent calumny claims on the basis of circumstantial evidence. In *Edwards v Edwards* [2007] WTLR 1387 the testatrix (T) made a Will in favour of one of her sons (S), excluding her other son, with whom she had a good relationship. Under her previous Will T had left her residuary estate equally between her two sons. T was frail and vulnerable. She was afraid of S, who was a heavy drinker. T made the Will at home, where she had been taken by S against medical advice. S prevented the other son from visiting. S, therefore, had the opportunity to influence his mother. He also had a motive: he was fearful of being evicted from the house where he lived with T. T had also made a number of surprising and false accusations against her other son. The only plausible explanation was that S had exercised undue influence over T by poisoning her mind against the other son. All other possible explanations were implausible. It was to be inferred that S had made deliberately untruthful accusations against his brother which had the effect that T’s judgment was overborne.

A claim based on fraudulent calumny also succeeded in *Marcou v Christodoulides* [2017] 2 WLUK 274 where there was clear and cogent evidence that one of the testatrix’s daughters had made



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false representations to the testatrix about her sister, which induced the testatrix to change her Will so as to exclude the sister.

#### **4. WANT OF KNOWLEDGE AND APPROVAL**

##### **4.1. Knowledge and approval**

It is a pre-requisite to the validity of a Will that the testator knew of and approved its contents. A Will executed in ignorance, or without acceptance, of its contents is invalid. The question is whether the contents truly represented the testator’s testamentary intentions (*Fuller v Strum* [2002] WLR 1097, at para. [65]). There is a risk of reading too much into the words “knowledge and approval”. It merely covers the proposition both that the testator knows what is in the Will, and that he approves it, in the sense of accepting it as setting out the testamentary intentions to which he wishes to give effect by execution (*Gill v Woodall* [2010] Ch 380, para. 71).

##### **4.2. Burden of proof**

Knowledge and approval must be proved in every case. However, where the circumstances are such as to arouse the suspicion of the court, the burden falls on the propounder to prove knowledge and approval affirmatively. In *Fuller v Strum* [2002] 1 WLR 1097, Peter Gibson L.J. said, at para. 33:

*Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But in the case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. All the relevant circumstances will be scrutinised by the court which will be “vigilant and jealous” in examining the evidence in support of the will.*

##### **4.3. Standard of proof**

The standard of proof is the civil standard, i.e. on the balance of probability – that is to say that the court must be satisfied, on the balance of probability, that the contents of the Will do truly represent the testator’s intentions. However, built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation (*Fuller v Strum* [2002] WLR 1097, para. 70). There is, however, no basis for an approach that requires, in all cases, that the person propounding a Will which he has prepared, and under which he takes a benefit, must satisfy the court by evidence which excludes all doubt, or by evidence which excludes all reasonable doubt, that the testator knew of and approved the contents of the Will (*Fuller v Strum*, para. 72).

It is not, therefore, essential to prove that the Will originated

with the testator; and, therefore, proof of instructions may be dispensed with, provided that it is proved that the testator completely understood, adopted and sanctioned the disposition proposed to him and that the instrument itself embodied that disposition (*Sharp v Hutchings* [2015] EWHC 1240 (Ch), para. 9.7).

#### 4.3. One or two stage test

The traditional approach is to apply a two-stage test of asking (*Hawes v Burgess* [2013] EWCA Civ 94, para. 12):

- (i) do the circumstances of the Will arouse the suspicions of the court as to whether its contents represent the wishes and intentions of the testator as known and approved by him or her? and
- (ii) has scrutiny of those circumstances by the court dispelled those suspicions?

However, where the court has heard detailed evidence as to the character and state of mind and likely desires of the testator, and as to the circumstances in which the Will was drafted and executed, and other relevant matters, the value of such a two-stage approach to deciding the issue of the testatrix's knowledge and approval may be questionable (per Lord Neuberger, *Gill v Woodall* [2010] Ch 380, para. 22). It may then be more appropriate to proceed directly to answer the ultimate question, which is whether the testator knew of and approved the contents of the Will, that is, whether the testator understood what he was doing and its effects (*Cowderoy v Cranfield* [2011] WTLR 1737, at [139]). Indeed, this more holistic approach is likely to be preferable (*Ashman v Thomas* [2017] EWHC 3136 (Ch), para. 34).

In *Sharp v Hutchings* [2015] EWHC 1240 (Ch) the Judge was satisfied, in the light of the authorities, that the correct approach in the first instance is to apply the single-stage test. The two-stage test can usefully be deployed as a cross-check to the conclusions reached using the single-stage test. The answer should be the same.

#### 4.4. Suspicious circumstances

Even if a single-stage test is adopted, it may still be relevant to ask whether there are "suspicious circumstances". The relevant suspicion is simply that the testator may not have known or approved of the contents of the Will.

Suspicious circumstances might arise where:

- (a) a party writes or prepares a Will under which he or she takes a benefit, or is instrumental in obtaining such a Will;
- (b) the testator was deaf, dumb or blind;
- (c) the testator had impaired capacity and/or was vulnerable to undue influence;
- (d) the witnesses to the Will are unable to confirm that the testator knew that he or she was signing a Will;
- (e) the testator had communication and/or

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- comprehension difficulties, or English was not their first language;
- (f) the testator made comments, after the execution of the Will, indicating a belief that a Will had been made in different terms; and/or
- (g) neither a solicitor, nor a doctor, supervised the execution of the Will.

The suspicion should, it seems, bear upon the process of preparation and execution of the Will, rather than being merely an indication that the testator might have been expected either not to make a Will at all, or to make a Will in different terms (*Re R decd* [1951] P 10, at 17; *Ark v Kaur* [2010] EWHC 2314 (Ch), at paras. 43 and 45).

In *Gill v Woodall* [2010] Ch 380, para. 46 Lord Neuberger M.R. accepted that the mere fact that the terms of the Will are surprising or worse should not, without more, raise a presumption that the testator did not know or approve of the Will. In that case, however, not only were the terms of the Will surprising, but the testatrix was also suffering from agoraphobia which may well have affected her ability to concentrate when the Will was read to her by a solicitor.

The involvement of a beneficiary in writing, preparing or bringing about the execution of a Will is a classic circumstance which may excite the suspicion of the court. However, not every such case will be suspicious in itself, otherwise the numerous everyday situation in which people help elderly relatives with their financial affairs including sorting out a Will and then, unsurprisingly, are the recipients of a legacy when the relative dies, would be regarded as suspicious (*Bates v Wheildon* [2008] WTLR 1705). Alternatively, the suspicion may be removed by the person propounding the Will (*Wintle v Nye* [1959] 1 WLR 284, at 291).

#### 4.5. Rebuttal of suspicion

A plea of want of knowledge and approval is of particular use where there is a suspicion, but no proof, of undue influence or testamentary capacity. There may be some evidence of failing capacity and/or evidence of the involvement of a beneficiary in the Will-making process. However, the alleged want of knowledge and approval need not be linked to undue influence or lack of capacity. The suspicion may simply be that the testator was mistaken as to the contents of the Will, or that a provision has been inadvertently included.

The proof required to rebut the suspicion of want of knowledge and approval is not that the testator actually had full testamentary capacity, or that he was not unduly influenced, only that the Will does in fact express the real intentions of the testator (*Perrins v Holland* [2010] EWCA Civ 840). There is, therefore, no requirement to prove “the righteousness of the transaction” if this is taken to impose a greater burden than proving knowledge and approval (*Fuller v Strum* [2002] WLR 1097, at paras. [33] and [78]; *Griffin v Wood* [2008] WTLR 73, at para. [35]). There is no overriding requirement of morality (*Fuller v Strum*, para. 65). Indeed, if it is established that the testator did know and approve of the Will, it does not matter that it is irrational, and cannot be explained (*Hung v Chiu* [2007] 10

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ITELR 707).

#### 4.6. Degree of suspicion

The greater the suspicion the higher the degree of proof of knowledge and approval that is required (*Wintle v Nye* [1959] 1 WLR 284, at 291). In some cases the suspicion will be so great that it cannot be removed.

In *Turner v Pythian* [2013] EWHC 499 (Ch) the Will had been drawn up by an individual (P) who, with his wife, were the exclusive beneficiaries. That was the clearest possible example of a situation where the court should be vigilant and jealous in examining the evidence in support of the instrument. Even though P was found not to have been a dishonest person, he and his wife failed to adduce cogent evidence that the testatrix understood what she was doing when she signed the Will that he had drawn up. There was no evidence, other than from P, that the testatrix had ever read the Will, or that it was read to her. In *Cushway v Harris* [2012] EWHC 2273 (Ch) the gravest suspicions of the court were raised where a solicitor had drafted Wills, of which he was a substantial beneficiary, for his aunts, who were elderly, in poor health and unable to read due to poor eyesight. The solicitor had not appeared and had not led any evidence that could begin to discharge the burden of proving knowledge and approval.

In other cases, the degree of suspicion will be low and can be removed relatively easily (see, for instance, *Boudh v Bodh* [2008] WTLR 411).

#### 4.7. Grave suspicions rebutted

Even grave suspicions may be rebutted by evidence that the testator probably knew and approved of the contents of the Will. In *Hart v Dabbs* [2001] WTLR 527 the circumstances could hardly have been more suspicious, and there was a strong suggestion of impropriety. Nonetheless, on a review of all the evidence, it was probable that the deceased had known and approved of the contents of the Will. The propounder of the Will (H), or someone on his behalf, had prepared on his computer a Will, under which H and his wife took substantial benefits. H arranged the execution of the Will by the deceased and the witnesses. H was alleged to have killed the deceased unlawfully. There was no professional involvement of any kind in the Will-making process, no evidence that the testator prepared the Will himself or gave instructions for its preparation, no evidence that the testator read the Will or had it read to him before or after it had been made, or that he retained a copy. Nor (apart from one inaccurate statement of the deceased) was there any evidence that the deceased knew about its terms. Nonetheless, the Will was upheld.

There was credible evidence from the attesting witnesses that the Will had been duly executed, and that reference had been made during the signing ceremony to the fact that the purpose of the attendance of the witnesses was to witness the deceased's signature of his Will. The deceased was not, therefore, deceived as to the nature of the document he was signing. The provisions

*“Even grave suspicions may be rebutted by evidence that the testator probably knew and approved of the contents of the Will.”*

of the Will were neither complex, nor difficult to grasp. So long as the deceased read the document, he would have had no difficulty in taking in its provisions, even if someone else had prepared the Will. The evidence showed that the deceased was alert and not likely to have allowed himself to be persuaded to do what he did not want to do.

#### **4.8. Reading of Will**

*“The classic way of rebutting a claim of want of knowledge and approval is to establish that the testator read the Will.”*

The classic way of rebutting a claim of want of knowledge and approval is to establish that the testator read the Will, preferably but not necessarily in the presence of a solicitor, or that the Will was read to the testator by a solicitor or some other person who explained its terms and effect. It is not, however, essential, to adduce positive evidence that the Will had been read or explained to the testator by a solicitor, or even that it had been read by the testator. Instructions for, or reading over of the instrument, form, no doubt, the most satisfactory, but not the only satisfactory, proof by which the cognizance of the contents of the Will may be brought home to the deceased (*Barry v Butlin* 2 Moo PC 480, at 486). The court must, however, review the whole of the evidence and determine, on the balance of probability, whether the testator knew of and approved the contents of the Will (*Fuller v Strum* [2002] WLR 1097; *Reynolds v Reynolds* [2005] EWHC (Ch) 6).

#### **4.9. No positive evidence that Will read**

The court may find knowledge and approval even in the absence of any evidence that the Will was read by the testator, let alone that it was read or explained by a solicitor to the testator.

In *Sherrington v Sherrington* [2005] WTLR 587 the testator made a Will leaving everything to his second wife, and nothing to his children. The Will was prepared by the legally unqualified daughter of the second wife. There was no positive evidence that the testator had read it before signing. The court considered the whole of the evidence and concluded that the testator must have known and approved of the contents of the Will. The testator was an experienced and successful solicitor and businessman. He had ample opportunity to read the Will, the substantive provisions of which comprised three pages and which contained only two short and simple dispositive provisions. He signed three of the pages of the Will. It would have been astonishing if he had signed without looking at the Will first, especially since it had been prepared by someone with no legal qualifications.

In *Hoff v Atherton* [2005] WTLR 99 there was no specific finding by the Judge that the testatrix had read the draft Will sent to her by her solicitor. There was no reason to suppose that the testatrix, having written to the solicitor to ask him to prepare a new Will for her, would not have opened and read the solicitor's letter explaining the terms of the Will, and also read the enclosed Will. There was also the testatrix had laid out the Will before the witnesses arrived to attest her signature.

#### **4.10. Explanation sufficient**

In *McCabe v McCabe* [2015] EWHC 1591 (Ch) the Will was

prepared by a solicitor, but he did not read it over to the testatrix. In fact, there was no evidence that she had read it. However, the absence of reading over was held not to be fatal and was not a touchstone of validity. It was sufficient that the contents had been brought home to the testatrix. The solicitor gave clear evidence that the testatrix had given instructions for the simple Will that she had made, and that he had explained its terms without going through it clause by clause. There was also evidence from a doctor that the testatrix was able to explain to him the Will that she had made and its consequences, and that she had not been passively going along with a draft that had been proffered to her.

#### **4.11. No professional involvement**

A Will may be upheld even though there was no professional involvement.

In *Sharp v Hutchings* [2015] EWHC 1240 (Ch) the Judge found that a simple homemade Will had first been read by the testator, and then handed to the sole beneficiary with a request that he should read it, which he did. There was no professional involvement. However, the Judge was entirely satisfied that the testator understood what was in the Will and what its effect would be, having regard to all the evidence, looked at holistically, including that of credible witnesses that there was nothing suspicious about the circumstances in which the Will was executed.

In *Simon v Byford* [2014] WTLR 1097 the testatrix was suffering from dementia, but was not medically examined. During the course of a party to celebrate her 88th birthday, with no solicitor present, but in the presence of those who would benefit, she made a Will which revoked an earlier professionally drawn Will which had favoured one of her sons (who was not present). Even though these facts gave rise to an initial suspicion of want of knowledge and approval, the court held that the suspicion had been dispelled. In particular, the Judge accepted the evidence of a former legal secretary that she had read the Will to the testatrix who had appeared to understand it. Given that the Will was relatively simple, and that the Judge had found that the testatrix had testamentary capacity, his finding of knowledge and approval was unassailable.

#### **4.12. Evidence of attesting witnesses**

In *Hart v Dabbs* [2001] WTLR 73 the Will was upheld largely due to the evidence from the attesting witnesses, which was sufficient to lead to the conclusion that the deceased knew that he was signing a Will.

#### **4.13. Reading through by solicitor**

If the Will has been read by a solicitor and its terms explained, it may be difficult to establish want of knowledge and approval. As Lord Neuberger said in *Gill v Woodall* [2010] Ch 380, para. 14:

*As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor*

*“If the Will has been read by a solicitor and its terms explained, it may be difficult to establish want of knowledge and approval.”*

*and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will.*

*Re Burns* [2016] WTLR 755 is a good example. There were suspicious circumstances in that the testatrix demonstrated some traits of mental impairment, and the primary beneficiary accompanied the testator to the appointment for the execution of the Will. However, any suspicion was rebutted as the testator had been seen alone by a solicitor who, although not searching in his enquiries, read the simple Will over to her. He was an experienced solicitor in this type of business and clearly reached the view that the testator understood and approved the contents.

#### **4.14. Exceptional case**

The Court of Appeal in *Gill v Woodall* [2010] Ch 380 found that the testatrix had not known and approved of the contents of the disputed Will, even though the Will had been read to her by a solicitor and she had indicated her approval. The testatrix was suffering from an extreme form of agoraphobia (of which the solicitor was unaware) which inhibited her ability to concentrate and absorb information, and the solicitor had not read out the Will in manageable chunks.

However, the facts in *Gill v Woodall* were quite exceptional and should not generally be relied upon by claimants seeking to allege want of knowledge and approval where a solicitor has been involved. The Court of Appeal in *Gill v Woodall* (para. 65) were keen to emphasise that fact, and that their decision should not be taken as something of a green light to disappointed beneficiaries, and in particular to close relatives of a testatrix who have not benefited from her Will, to challenge the Will even where it has been read over to the testatrix or to appeal a full and careful first instance decision upholding a Will's validity.

#### **4.15. Reading through by solicitor not conclusive**

A challenge based on want of knowledge and approval may succeed even if the Will has been read to the testator by a solicitor or third party, as was the case in *Gill v Woodall* [2010] Ch 380. It may also succeed where the reading through of the Will was something of a performance not designed to ensure that the testatrix understood what she was signing (*Franks v Sinclair* [2007] WTLR 439) or where there was a lack of positive input on the part of the testator due to illness or limited capacity (*Buckenham v Dickinson* [2000] WTLR 1083) or where the Will was not read out in full (*Catling v Catling* [2014] EWHC 180 (Ch)).

#### **4.16. Knowledge and approval of part**

It is possible for the court to conclude that a provision in a Will has been introduced without the testator's knowledge and approval, in which case the provision may be rejected and the offending words omitted from probate, if this can be done without altering the sense of the remainder of the Will (*In the Goods of Boehm* [1891] P 247, at 250). It may be appropriate to

*“The facts in Gill v Woodall were quite exceptional and should not generally be relied upon by claimants seeking to allege want of knowledge and approval where a solicitor has been involved.”*

omit a self-contained clause or sub-clause, but not to rewrite the Will so that it complies with the intention of the testator (*Marley v Rawlings* [2015] AC 129, paras. 46 to 48).

A testator may, therefore, approve a Will, but not a particular clause which has been included deliberately or inadvertently without the testator's assent. However, the circumstances in which it will be proper to find such a curate's egg of a Will are likely to be rare (*Fuller v Strum* [2002] 2 All ER 87 at para. [36]).

The doctrine of partial knowledge and approval does not apply where a provision which the testator intended to include has been omitted (see *Paynter v Hinch* [2013] EWHC 13 (Ch), para. 80). There is no power to add words intended by the testator, otherwise than by way of rectification under s. 20 of the Administration of Justice Act 1982, and only then if there has been a clerical error or failure to understand instructions.

#### 4.17. Understanding of effect

*“In some cases, the testator must not only know and approve of the contents of the Will, but also of the effect of the Will.”*

In some cases, the testator must not only know and approve of the contents of the Will, but also of the effect of the Will (*Hoff v Atherton* [2005] WTLR 99, para. 64) e.g. that a particular beneficiary will receive a very generous disposition (see *Carapeto v Good* [2002] WTLR 801 where it was held to be necessary for the propounders to show that the testatrix understood the “effect” of her Will, i.e. that the gift of her residuary estate included not only her house but also some £450,000 after the incidence of IHT). Indeed, it is “axiomatic” that, in an appropriate case, a failure to appreciate the financial consequences of a testamentary gift will amount to a failure to understand the contents of the Will containing such a gift (*Kunicki v Hayward* [2016] 4 WLR 32).

In *Costa v Germain* [2019] EWHC 3324 (Ch) it was said (para. 62) that a mistake as to whether an asset (the testator's house) was comprised in the testator's estate would not be a mistake as to the effect of the Will invalidating the Will. The testator knew that he was giving the whole of his net estate to his daughter, and that is what he did.

Nor does a testator need not have a full understanding as to how a gift is to be effected. In *Fitzgerald v Henerty* [2016] EWHC Civ 701 the testator included a provision in his Will granting an option to a company in which he held shares to buy those shares at probate value. There was no evidence that the testator turned his mind either to the manner in which that might be achieved, e.g. by an option or right of pre-emption, or to the price which it would be appropriate to require the company to pay for the shares. It was submitted that the testator could not have understood that the effect of the option was that the estate would be forced to sell their shares at what might be a vastly reduced price. The Court of Appeal held that it was of no consequence whether the testator misunderstood the implications of the right to buy since it was not necessary that he should understand what he might have done, merely what he did. His intention was simply that the company should have the right to buy the shares at an ascertainable price, and this was achieved. It was overwhelmingly likely that the testator was



indifferent as to whether this was pursuant to an option or a right of pre-emption. In any event, he assented to the terms of the option when they were read to him.

#### 4.18. Understanding of other matters

There may be a failure to understand the effect of a Will where the effect of any changes from previous testamentary dispositions has not been brought home to the testator. In *Poole v Everall* [2016] WTLR 1621 a vulnerable and suggestible testator executed a Will, prepared by his carer, under which the carer would receive 95% of the estate. The court was not satisfied that the carer had drawn to the testator's attention the extent of the actual gift in his favour, or that the Will removed gifts in favour of family and charities under a previous Will, or that a gift in favour of the testator's partner had been reduced from 10% to 5%. The Will was, therefore, invalid.

This is consistent with *Hoff v Atherton* [2005] WTLR 99 where it was accepted that in some cases the court might rightly insist on evidence that the testatrix had earlier testamentary dispositions in mind in order to test whether she truly intended to make the dispositions that she had done under her last Will. Indeed, if there is some evidence of a failing mind, coupled with the fact that the beneficiary has been concerned with the instructions for the Will, the court may require evidence that the effect of the Will was explained to the testator, that the testator did know the extent of his property, and that he did comprehend and appreciate the claims of his bounty to which he ought to give effect (*Hoff v Atherton*, at para. [64]).

It may only be in extreme cases that knowledge of previous testamentary dispositions, or of other potential dispositions, is required. In a normal case, all that counts is knowledge and approval of the actual Will, rather than other potential dispositions (*Simon v Byford* [2014] [2014] WTLR 1097).

#### 4.19. Understanding of legal wording

There is an important distinction between a failure to understand the character of the disposition that the testator is making, and "the language of art in which it is couched" (*Wintle v Nye* [1959] 1 WLR 284, at 292). A testator need not have a full understanding of the legal terminology used to give effect to his wishes. In particular, where a testator employs a solicitor to draft a Will in such a way as to give effect to the testator's intentions, the testator will be taken to have known and approved of the words used, even if he did not understand their technical meaning, and even if the draftsman was mistaken as to the legal effect (*In the Estate of Beech* [1923] P 46, 53). Indeed, a testator cannot be understood to be saying that he approves the words he uses if, but only if, they have the meaning he desires. This prevents a Will being held to be invalid, or words being omitted from probate, simply because the testator did not have a lawyer's grasp of the technical language used in the Will. Few testators have such understanding. The testator has to accept the phraseology selected by the draftsman without himself really understanding its esoteric meaning, and in such a case he adopts it, and knowledge and approval is imputed to him (*Greaves v Stolkin* [2013] EWHC 1140 (Ch), para. 73).

*"A testator need not have a full understanding of the legal terminology used to give effect to his wishes."*

*“A mistake in drafting will not necessarily be sufficient to invalidate the Will on the grounds of want of knowledge and approval.”*

#### 4.20. Mistakes in drafting

A mistake in drafting will not necessarily be sufficient to invalidate the Will on the grounds of want of knowledge and approval. In *Kunicki v Hayward* [2016] 4 WLR 32 at 114 the Judge said (cited in part with approval in *Gupta v Gupta* [2018] EWHC 1353 (Ch), para. 58):

*In my view, it is not a requirement of the plea, in all cases, that it must be established that the testator must have appreciated the legal effect of the words used in the document in issue. Suppose that a solicitor drafts a will believing it accords with her client's instructions but, through a drafting error which may be rectified by the court, the legal effect of the words is to divert a gift from its intended recipient to a third party. Suppose too that the solicitor advises or otherwise leads her client to believe that the effect of her drafting is that the intended recipient of the gift will receive it. Suppose too that the client fully and freely considers that advice or information and then approves the words used. I am of the view that it cannot be said, in these circumstances, that, solely because of the drafting error and its legal effect, the testator did not know and approve the contents of his will.*

It may seem surprising that a mistaken belief that a gift is to X, whereas on the wording it is to Y, is consistent with knowledge and approval of the contents of the Will, or at least of that provision. In such a case the testator's lack of understanding goes to the heart of what he intends. There is not merely a failure to understand the legal technicalities by which effect is to be given to the testator's intention. The testator's intention has been frustrated.

Rectification may not be available if the draftsman has deliberately chosen the words used, but was mistaken as to their legal effect, as such a mistake does not amount to a “clerical error” or failure to understand instructions for the purposes of s. 20 of the Administration of Justice Act 1982 (*Kell v Jones* [2013] WTLR 507).

#### 4.21. Free assent

Knowledge and approval must be free and independent. It may, therefore, be necessary to establish that the testator has applied his or her own decision-making powers in determining what testamentary provision to make, rather than simply accepting the suggestion of a third party.

In *Key v Key* [2010] EWHC 408 (Ch) due to the effects of his recent bereavement, the testator had not applied his own mind and decision-making powers in apparently agreeing to his daughter's assertion that his existing Will was unfair and that he should change it so as to leave his remaining property to his daughters. Knowledge and approval was, therefore, lacking. The Judge accepted medical evidence to the effect that distress caused by bereavement may make the sufferer suggestible, and may make him say anything to put an end to emotional pressure.

In *Gupta v Gupta* [2019] WTLR 575 a wife from a traditional Indian family was accustomed to go along with the wishes of her husband (who did not brook disagreement) on financial matters. The Judge did not accept that such acquiescence was suspicious. On the contrary, he regarded it as providing an explanation for the terms of the wife's Will, which created a disparity in the benefits enjoyed by their children. The Will was upheld.

It may, therefore, be difficult to establish that a testatrix did not know and approve of a Will where the testatrix is accustomed, for cultural or other reasons, to go along with the wishes of their spouse.

## **5. TESTAMENTARY INCAPACITY**

### **5.1. The test**

The classic test of testamentary capacity is that set out in *Banks v Goodfellow* (1870) LR 5 QB 549, at 565. The testator must be capable of:

- (a) understanding the nature of his act, i.e. executing the Will, and its effects;
- (b) understanding the extent of the property of which he is disposing; and
- (c) comprehending and appreciating the claims to which he might give effect; and
- (d) not be subject to any disorder of the mind as shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties and 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.

The degree of capacity required in order for a testator to be capable of understanding the extent of the property on which she is disposing, and of appreciating the claims to which he ought to consider giving effect, will vary depending on the nature and complexity of the estate and of the claims to which she ought to consider giving effect (*Costa v Germain* [2019] EWHC 3324 (Ch), para. 53).

### **5.2. Capacity to understand**

The test in *Banks v Goodfellow* is not a statutory provision. It is not to be read literally as requiring that a testator must have actual understanding of the matters referred to in it in order that he or she should be capable of making a Will. In its context and on the question of whether the common law test for capacity is satisfied, what is required is that the testator or testatrix should have the capacity or mental potential to understand the various things mentioned (*Costa v Germain* [2019] EWHC 3324 (Ch), para. 38).

As to the relationship between knowledge and approval and testamentary capacity, see para. 8.1. below.

### **5.3. Mental Capacity Act 2005**

In some cases it has been suggested that the test of capacity in

*“The test in Banks v Goodfellow is not a statutory provision.”*

the Mental Capacity Act 2005 (applied by the Court of Protection after 1 October 2007 in determining whether a person lacks capacity in relation to a matter) has superseded the *Banks v Goodfellow* criteria. However, the better view is that the correct and only test for testamentary capacity, where the validity of a Will executed by the deceased is retrospectively in issue, is that in *Banks v Goodfellow* (*Walker v Badmin* [2014] EWHC 71 (Ch); *James v James* [2018] EWHC 43 (Ch); *Costa v Germain* [2019] EWHC 3324 (Ch), para. 37). The Mental Capacity Act 2005 applies to the prospective task of the Court of Protection in deciding whether living persons have capacity in relation to a particular matter, such as a statutory Will, and in the manner of making decisions on behalf of such living persons. It does not apply to determine the validity of the Will of a deceased person after their death.

#### 5.4. Mental disorder

A testator will only lack capacity if he or she suffers from a mental disorder (defined by the Mental Health Act 1983, s. 1(2) as any disorder or disability of the mind). However, the precise diagnosis is of secondary importance. The criteria in *Banks v Goodfellow* are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgement on the basis of the whole of the evidence. Nonetheless, an understanding of the causes of mental illness may be helpful in determining whether and to what extent testamentary capacity is impaired.

*“It is not necessary to establish a disorder of mind or mental impairment which results from a condition or disease recognized and identified by medical science in order for a putative testator not to have capacity.”*

It is not necessary to establish a disorder of mind or mental impairment which results from a condition or disease recognized and identified by medical science in order for a putative testator not to have capacity. The fact that a doctor or psychiatrist is unable to identify or put a name to a particular disorder or mental impairment or its cause does not of itself prevent the disorder or impairment from being sufficient to result in a lack of capacity (*Costas v Germain* [2019] EWHC 3324 (Ch), para. 40; see also para.5.17.5 below).

The lack of capacity to understand may derive from a variety of causes such as dementia, delirium, abuse of alcohol or drugs, physical illness, schizophrenia, depression or bereavement. Some of these causes may be recognised physical or mental illnesses, others may not. Whichever they are, if they give rise to a sufficient lack of capacity, they should invalidate the Will (*Costa v Germain*, para. 41). Bereavement, for instance, is not in itself a disease or disorder. However, it may cause an effective disorder in that its symptomatic effect is capable of being almost identical to that associated with depression (see para. 5.21. below).

On the other hand, the fact that an alleged mental impairment does not arise from a known and identifiable medical cause may frequently make it less likely as a matter of fact that the alleged medical impairment did in fact cause a lack of capacity (*Costa v Germain*, para. 48).

It does not necessarily follow from the fact that the testator suffers from a condition affecting capacity, such as dementia, that the testator will be found to have lacked testamentary

capacity.

*“The court does not require a perfectly balanced mind.”*

### 5.5. Imperfect capacity

There is a formidable obstacle facing claims to set aside a Will on the grounds of testamentary incapacity: the court does not require a perfectly balanced mind. In the case of *Den v Vancleve* (quoted with approval in *Banks v Goodfellow*) the law was stated as follows:

*By the terms ‘a sound and disposing mind and memory’ it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory.*

There are many cases where testamentary capacity has been found, notwithstanding that the testator’s capacity was impaired, e.g. by mild to moderate dementia and/or by physical ailments.

In *Carr v Beaven* [2008] EWHC 2582 (Civ) the testator had had a stroke and was suffering from mild to moderate dementia when he made his disputed Will. Two medical experts produced reports. Both concluded that the testator had testamentary capacity when he executed the contested Will, albeit one was of the view that the testator had lacked capacity when executing a Will only a few months before the disputed Will. The court upheld the Will, noting that a diagnosis of mild to moderate dementia is not of itself an obstacle to satisfying the requirements of testamentary capacity, and that a testator may lack testamentary capacity on a particular day, but may possess it many months later. It was also not relevant to contrast the state of the testator with that before his stroke and dementia. Despite his decline, he retained sufficient testamentary capacity on the date he made the disputed Will.

### 5.6. Modern developments

The test in *Banks v Goodfellow* is to be applied, if anything, with greater indulgence to testators with imperfect capacity than was the case when the test was first formulated. As Lewison J pointed out in *Perrins v Holland* [2009] EWHC 1945 (Ch), para. 40, contemporary attitudes toward adults with impaired capacity are more respectful of adult autonomy, in part because our general understanding of impaired mental capacity of adults has increased enormously since 1870. It is now recognised that an adult with impaired mental capacity is capable of making some decisions for himself, given help. It is also recognized that the test of mental capacity is not monolithic, but is tailored to the

task in hand: *Hoff v Atherton* [2005] WTLR 99, at 109. A lower degree of capacity will be required in the case of a simple, rather than a complex, Will.

### 5.7. Burden of proof

An important consequence of the common law, rather than the statutory, test applying to assess testamentary capacity relates to the burden of proving capacity or incapacity. At common law the legal burden is on the propounder to prove capacity, and also the evidential burden if a real doubt is raised as to capacity. The relevant principles were summarised by Briggs J in *Key v Key* [2010] EWHC 405 (Ch) at para.97:

- i. While the burden starts with the propounder of a Will to establish capacity, where the Will is duly executed and appears rational on its face, then the court will presume capacity.
- ii. In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.
- iii. If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.

In contrast, section 1(1) of the Mental Capacity Act 2005 provides that a person must be assumed to have capacity unless it is established that he lacks capacity. This presumption does not apply where the validity of a Will is challenged on the grounds of testamentary incapacity. In that respect, it may be easier to establish testamentary incapacity at common law than if the Mental Capacity Act 2005 applied.

### 5.8. Shifting of burden

*“The burden of proving or disproving capacity can shift.”*

The burden of proving or disproving capacity can shift. *Ledger v Wootton* [2007] EWHC 2599 (Ch) illustrates the operation of the common law rules relating to the shifting of the burden of proof. The testatrix made a Will benefiting only two of her five children. The Will was held to be rational on its face. The fact that the testatrix had only benefited two of her five children was not, in itself, irrational. However, there was evidence that the testatrix had a long history of mental illness and suffered from paranoia. The presumption of capacity was, therefore, rebutted. The positive burden of adducing evidence of capacity, therefore, fell upon the persons seeking to uphold the Will. However, they adduced no positive evidence of capacity. The solicitor who drafted the Will, and the witnesses, had no direct recollection of the circumstances surrounding execution. The court was, therefore, compelled to hold that the testatrix lacked capacity.

In *Ashman v Thomas* [2017] EWHC 3136 (Ch) the fact that the testator suffered from a degree of confusion, and possibly the onset of dementia, was not sufficient to raise a real doubt as to capacity, nor to shift the burden onto the person alleging incapacity. It was material that a social worker had formed the view that the testator had sufficient capacity at or about the times of the disputed Wills. In *Todd v Parsons* [2019] EWHC

3366 (Ch) great age, even when coupled with an arterial disease of the brain, was not sufficient to return the evidential burden to the propounder of the will. Being in a nursing home, cared for by professionals, and away from the influence of children, seemed to point in the opposite direction to incapacity.

### 5.9. Effect of burden

The imposition of an evidential burden to establish capacity, where such capacity is in doubt, may be decisive. In *Vaughan v Vaughan* [2005] WTLR 401 the Judge stated that he was left in a position that he did not know if the testatrix had testamentary capacity. The burden of proving testamentary capacity, and of removing any suspicions as to the lack of capacity, was not discharged. In *Westendrop v Westendrop* [2006] EWHC 915 (Ch) the medical evidence was either to the effect that the testatrix probably lacked testamentary capacity, or that it was not safe to assume that she had such capacity. The court concluded that it was not satisfied, on the balance of probabilities, that the testatrix had testamentary capacity. In *Hanson v Barker-Benfield* [2006] WTLR 1141 it was impossible to prove that the testator did have capacity, and such impossibility made it probable that he did not have capacity.

In contrast, in *White v Philips* [2017] EWHC 386 (Ch) the claimant's expert considered that it was 50:50 that the testator lacked capacity, and repeatedly suggested that there was doubt as to testamentary capacity. The Judge made the point (para. 65) that he did not have to be sure beyond doubt that there was testamentary capacity - only that testamentary capacity when the testator executed the Will was more likely than not. The Judge found that the testator had sufficient capacity even though, at times, he had suffered from drug toxicity to a greater or lesser extent.

Cases are, in any event, only decided on the burden of proof if, exceptionally, the court is unable to reach an evaluative decision on the evidence taken as a whole (*Sharp v Adam* [2006] EWCA Civ 449, para. 74).

### 5.10. Understanding of relevant information

In one important respect, the common law takes a more lenient approach to testamentary capacity than under the Mental Capacity Act 2005. Section 3(1)(a) and (b) of the 2005 Act provides that a person is unable to make a decision for himself if he is unable to understand and retain the information relevant to the decision.

However, the common law does not require in all cases that the testator is able to remember and understand all information relevant to the making of the Will. In particular, it is not necessary that the testator should have a precise knowledge or perfect recollection of the extent of their assets, or of the names of their relations. The law upholds the right of elderly people to leave their property as they choose, even if their mental faculties have declined considerably. This must include many cases in which they can no longer remember all the circumstances

*“The common law does not require in all cases that the testator is able to remember and understand all information relevant to the making of the Will.”*

relevant to the division of their property between the people they wish to benefit (*Simon v Byford* [2013] WTLR 1567, at [156]).

#### 5.11. Knowledge of extent of assets

*“The test is whether the testator is capable of having a broad appreciation of what their assets are, and an approximate, but not necessarily exact, idea of their value.”*

The test is whether the testator is capable of having a broad appreciation of what their assets are, and an approximate, but not necessarily exact, idea of their value. A lack of evidence that the testator was actually aware of the value of their estate or of specific assets, or even evidence that they did not have any precise understanding of their value, is not, therefore, necessarily inconsistent with capacity. The issue is whether it can be inferred, on all the evidence, that the testator would have been capable of understanding the extent of their estate, if told. Indeed, the testator does not need actual knowledge of any of her estate; what is needed is mental capacity to understand it (*Todd v Parsons* [2019] EWHC 3366 (Ch), at 142).

In *Abbott v Richardson* [2006] WTLR 1567 the testatrix was aware that she had shares of substantial value, but no more: she did not even know their approximate value. However, she was found to have been capable of understanding the value of her shares, if she had been told what it was. Where the estate is being divided proportionately between beneficiaries, it is sufficient to know that the shares are of substantial value (as was the case). If, on the other hand, the testatrix was contemplating a series of pecuniary legacies, the amount of which would depend upon the value of the assets available, it might be necessary for the testatrix to know the approximate value of her assets and liabilities.

A similar approach was taken in *Parsonage v Parsonage* [2019] EWHC 2362 (Ch). The testatrix had been unaware of a potentially valuable contingent asset that she owned. However, that did not affect the Will's validity given that her testamentary intention was that, whatever her estate might be, it should all fall into residue and be divided equally between her four children. Her inability to remember all the circumstances relevant to the division of her estate between the people she wished to benefit was not a vitiating factor. It did not matter that the testatrix did not have in mind a contingent asset, which could add some 50% to, or more than double, the size of her estate because her overarching objective was still achieved.

In *Scammell v Farmer* [2008] EWHC 1100 (Ch) it was sufficient that the testatrix could only give a general indication of the value of her estate (which consisted principally of a house the value of which would be difficult to state with precision in a thriving property market). In *Blackman v Man* [2008] WTLR 389 there was no evidence as to what value the testatrix thought was attributable to her property portfolio. However, there was independent evidence that she understood that she had, through companies, a substantial property portfolio. That was sufficient. In *Hubbard v Scott* [2011] EWHC 1750 (Ch) the testator gave to the solicitor executing the Will information relating to his property which was broadly correct, albeit with some inaccuracies. The Will was upheld.

In *Schrader v Schrader* [2013] EWHC 466 (Ch) there was no Challenging suspicious wills – Article by Charles Holbech



evidence that the testatrix was aware of the then value of her farmhouse. However, Mann J (para. 81) said:

*I agree that she may not have known the value of her house, but that is likely to be the case with large numbers of testators (and non-testators). It is not, of itself, a requirement of capacity that a testator has to know the value of his or her home. It is highly likely that she knew that it was her most valuable asset by a long way, and that is good enough on the question of capacity. When Banks v Goodfellow talks of knowing the extent of one's property, it does not mean that one has to know its value with a high degree of precision.*

## 5.12. Memory of terms of previous Wills

*“Capacity is not to be equated with a test of memory.”*

Capacity is not to be equated with a test of memory. In *Simon v Byford* [2013] EWHC 1490 (Ch) the testatrix had forgotten not only the terms of her previous Will which benefited her son, Robert, at the expense of her other children, but also the reasons for making a Will in those terms. The trial Judge had found that the testatrix was capable of understanding the provisions of her previous Will (which had left her shares in a family company to Robert so as to give him a controlling shareholding). Indeed, she had been reminded of her previous, unequal, Will and could have asked to see it to remind herself of its provisions. The Judge considered that she was capable of accessing the information in her previous Will, which she would have understood, but that she chose not to do so. He also found that she did actually understand that her previous Will benefited Robert in some way, but that she now wished to treat her four children equally under her new Will.

On appeal ([2014] WTLR 1097) the Court of Appeal upheld her last Will, dividing her estate equally between her children, stressing that capacity depends on the potential to understand, and is not to be equated with a test of memory. Lewison L.J. said, at para. 41:

*In my judgment, when the judge said that Mrs Simon was not "capable" of remembering why her earlier will had benefited Robert, he meant no more than that she had forgotten. Once I knew the dates of all the Kings and Queens of England, and the formula for Hooke's law; and was "capable" of remembering them. Now I would have to look them up. The judge's important finding was not that Mrs Simon had forgotten the terms of and reasons for her earlier will. It was that she was capable of accessing and understanding the information; but chose not to.*

Lewison L.J. also regarded the fact that the testator had to be prompted to remember to include a legacy as tending to support the proposition that, once reminded of claims on her bounty, she was able to make decisions about them.

In *Goss-Custard v Templeman* [2020] EWHC 632 (Ch) the testator, Lord Templeman, suffered from difficulties with his episodic (short-term recall) memory, attributable to incipient Alzheimer's disease, but otherwise suffered no significant impairment. It was alleged that, when he executed his last will in 2008, he had forgotten the terms of his previous will in 2001 and

a codicil thereto in 2004 (which had made different provision in respect of his home). The Judge held that Lord Templeman had in 2008 been aware of the terms of his 2004 codicil and had had the capacity to consider afresh to whom he wished to leave the assets in his estate.

In any event, at para. 136, the Judge rejected the notion that a will cannot be valid unless the testator is aware of the terms of his existing or previous wills, or has to mind the reasons underlying the gifts in them. A testator does not have to be able to justify to himself a difference between a previous will, even if there were particular reasons for the terms of the previous will.

### 5.13. Comprehension and appreciation of claims

*“It must be shown that no cognitive impairment prevented the testator from having in mind all the other claims and considerations which he should properly have in mind.”*

The common law requires that the testator be able to recollect the persons whom he might reasonably wish to benefit, understand their respective claims upon his regard and bounty, and deliberately form an intelligent purpose of including or excluding them in or from any share of his property (*Harwood v Baker* (1840) 3 Moore 282, at 291; *Abbott v Richardson* [2006] WTLR 1567, paras. 186 and 194). It is not enough to show that the testator wished to benefit the person who in fact benefited. It must be shown that no cognitive impairment prevented the testator from having in mind all the other claims and considerations which he should properly have in mind (*Markou v Goodwin* [2013] EWHC 4570 (Ch), para. 53).

In *Abbott v Richardson* [2006] WTLR 1567 this test was not satisfied. The testatrix could not remember the identity of individual members of her family whom she would be likely, if reminded, to wish to benefit so as to arrive at a rational decision as to which of them she wished to benefit and in what way. The limited range of beneficiaries in her last Will, when compared to the range of beneficiaries in her previous Will, was striking and due to the fact that she was incapable of concentrating on more than a very limited range of objects at one time.

In *Markou v Goodwin* [2013] EWHC 4570 (Ch) there were a number of oddities in the Will of a testatrix who had become forgetful as a result of underlying dementia. The testatrix considered giving a beneficiary only £10, raising real doubts as to her awareness of money; she had not noticed that the address given for another beneficiary was one that he had left years earlier; a reference to her late brother’s family was incorrect as he had no children; her statements in a side letter that she was not giving anything to other family members because they were not close to her was at odds with the facts. The testatrix had a considerable degree of understanding, but set against the various oddities, it was not established that the testatrix had been able to comprehend and appreciate the claims to which she might give effect and was not subject to a disorder of the mind.

However, in *Todd v Parsons* [2019] EWHC 3366 (Ch) the Master was of the view that, even if the testatrix had temporarily overlooked or forgotten an alleged promise to leave her house to her daughter, that would not mean that she did not have capacity to appreciate moral claims on her estate. It would just

mean that she had made a mistake of fact.

In *Goss-Custard v Templeman* [2020] EWHC 632 (Ch) it was alleged that the testator, Lord Templeman, could not sufficiently comprehend and appreciate the nature and extent of the claims on his estate because he could not appreciate that his stepdaughters did not have a legitimate and substantial claim (because they had been substantially provided for by their mother and they had no need for further substantial provision) whereas own family did have a good claim.

However, the Judge found that the test of testamentary capacity does not depend on a testator's ability to judge to a nicety the relative merits of the rival claims, or judge correctly to what extent their needs have already been met from some other source. It depends on having capacity to appreciate those persons who have a claim and to decide fairly between competing beneficiaries, making provision for some and not for others. Comprehension and appreciation of the calls on a testator's bounty does not, therefore, require actual knowledge of other gifts that have been made to, or the financial circumstances of, a potential object. A testator does not have to have all the facts with which to make a correct or justifiable decision; he has to have the capacity to decide for himself between competing claims. That means that he must have the ability to inform himself about those claims, to the extent that he wishes to do so, but not that he must remember the relevant facts about each of the potential objects or have correctly understood their financial circumstances. It was, therefore, sufficient that Lord Templeman wished to leave to his stepdaughters the matrimonial home, which he had shared with his late wife, as he felt emotionally that it belonged with his wife's family and because he was very attached to his stepdaughters.

#### 5.14. Understanding of consequences

Section 3(4) of the Mental Capacity Act 2005 stipulates that the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision. This has some overlap with the common law requirement that the testator should be capable of comprehending and appreciating the claims to which he might give effect. However, the statutory test goes a great deal further than the common law.

*“There is no requirement to understand and remember the extent of anyone else's property, or the significance of the testator's assets to other people.”*

In *Simon v Byford* [2013] WTLR 1567 Lewison L.J. drew a distinction between understanding direct or immediate consequences (what assets are at the testator's disposal and the persons who have claims on those assets) and collateral consequences of disposing them in one way or another. The testatrix's shares were of particular significance to the testatrix's son, Robert, in that a legacy of her shares, combined with Robert's existing shareholding in a family company, would have given him effective control of the company, thereby preventing a deadlock. Indeed, for this reason, the testatrix had made a previous Will leaving her shares to Robert. It was submitted that the testatrix's failure to understand the significance of the shares to Robert, and her failure to remember the reasons for her

previous Will, was more than simply a failure of recollection, but amounted to an inability to replicate the thought processes that had led to her earlier Will. This submission was rejected. There is no requirement to understand and remember the extent of anyone else's property, or the significance of the testator's assets to other people.

If this is correct, it does represent a significant limitation. The condition that the testator be able to comprehend the claims of potential beneficiaries would not require the testator to recall or understand the impact on any particular beneficiary of leaving an asset to that beneficiary, or of not doing so, even where the significance of the asset to the beneficiary has previously been acknowledged by the testator, but forgotten. It seems that the testator must know who has a claim to assets, but not necessarily why that person has a claim, or what weight should be attached to their claim. That does seem to impose an unduly low standard.

#### **5.15. Capacity to understand legal effect**

There is no requirement that a testator should be capable of understanding the legal effect of a testamentary disposition. In *Brennan v Prior* [2013] EWHC 2867 (Ch) the testator gave an apartment in Cannes to his sister. However, the gift was ineffective as a matter of French law, being a gift of immoveable property away from an heir. The testator's daughter sought to have the Will set aside. She submitted that her father was familiar with French law, and that his attempt to leave the Cannes apartment to his sister was evidence of incapacity. There was, however, no evidence of the extent of his knowledge of French law. In any event, there is no requirement for knowledge of the comparative law of succession.

#### **5.16. Assistance in understanding**

Section 1 of the Mental Capacity Act 2005 provides that a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success. It is, therefore, good practice for a solicitor to seek to assist the testator in understanding relevant matters, e.g. by asking the testator about previous Wills. Indeed, such questioning may identify a failure of capacity.

In some cases, capacity can only be established if the testator is provided with necessary explanations. In particular, there will be cases in which a testator's capacity to understand the effect of what he is doing is limited by defects in memory or comprehension so that — absent some proper assistance by way of reminder or explanation — it cannot be said that the testator had the necessary capacity (*Hoff v Atherton* [2005] WTLR 99, paras. 35 and 58). In *Abbott v Richardson* [2006] WTLR 1567 the court held that the testatrix's capacity might have been sufficient if the changes to the terms of her previous Will had been considered with, and explained to, her. However, that had not occurred and she was, therefore, held to have lacked testamentary capacity.

However, there is, at common law, no presumption of testamentary capacity where no, or insufficient, assistance has

been given to the testator to understand relevant matters. It is open to a Judge to find, on the evidence as a whole, that a testator is capable of understanding relevant matters, even in the absence of explanation. In *Hoff v Atherton* the Court of Appeal upheld the Judge's finding to that effect.

Judge David Cooke took a more radical approach in *Poole v Everall* [2016] WTLR 1621 where he expressed the view that if the testator was capable of understanding relevant matters, even if he could only do so if they were suitably explained to him at the time, he should be treated as having had testamentary capacity. Whether in the circumstances of the case he in fact understood the nature and effect of what he was doing in the absence of an explanation appropriate to the level of his ability and the complexity of his affairs was a separate and logically subsequent enquiry, under the heading of knowledge and approval rather than incapacity.

The Judge was not satisfied that the testator understood that he was by his Will removing or substantially reducing the entitlement of his family and charities who had benefited under his earlier Will, in large part because this was not drawn to his attention. He was, however, capable of understanding these matters, if they had been explained to him. The Will was set aside on the grounds of want of knowledge and approval, rather than incapacity.

## 5.17. Delusions

Under the fourth limb in *Banks v Goodfellow* it is a requirement that no insane delusion shall influence the testator's will in disposing of his property and bring about a disposal of it which, if the mind had not been sound, would not have been made. The following address to a jury in *Boughton v Knight* (1873) L.R. 3 P&D 64 gives some idea of what is meant by a delusion:

*Can I understand how any man in possession of his senses could have believed such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say the man is not sane.*

*“There is a delusion where no person in possession of their senses could have believed what the testator believed, such that the belief must have been the product of insanity.”*

In other words, there is a delusion where no person in possession of their senses could have believed what the testator believed, such that the belief must have been the product of insanity (*Ball v Ball* [2017] EWHC 1750 (Ch) at para. 44).

Some beliefs are clearly so irrational as to be delusional. In *Kostic v Chaplin* [2007] EWHC 2298 (Ch), for instance, the testator believed that there was an international conspiracy of dark forces against him in which he believed his son was implicated.

However, in other cases, the extent to which a belief is delusional will have to be tested as against the facts as known to the testator. In *Walter v Smee* [2008] EWHC 2029 (Ch) the testatrix (who was suffering from the onset of dementia) reached a number of false conclusions relating to the conduct of her carers, e.g. that they were abusing her physically and mentally, threatening to turn her out of her property into a nursing home,

stealing her money and jewellery, and bringing prostitutes to her house. The Judge was satisfied that no person of full capacity, knowing what the testatrix knew, could have reached the conclusions that she did about her carers' conduct.

Of course, if the belief held was justified by what happened, it is not a delusion or confabulation (*McCabe v McCabe* [2015] EWHC 1591 (Ch), para. 50).

#### 5.17.1. Extreme dislike

*“It may be difficult to distinguish between an extreme and unfair dislike for, say, a child of the testator, and a delusional belief about the child’s behaviour.”*

It may be difficult to distinguish between an extreme and unfair dislike for, say, a child of the testator, and a delusional belief about the child's behaviour. As Sir John Hannen said in *Boughton v Knight* (1873) L.R. 3 P. & D. 64 a testator may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite. He went on to say (at 69):

*It is unfortunately not a thing unknown that parents – and in justice to women I am bound to say it is more frequently the case with fathers than mothers - that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. ... there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind.*

In *Ritchie v Ritchie* [2009] EWHC 709 (Ch) the testatrix believed that her daughters did not come near or visit her and did nothing to help her, and that her sons had behaved violently towards her and stolen her money. The Judge found not only that these beliefs were not true, but also that there was no rational reason for her to cut out all her children. Plainly therefore her affections to her children were poisoned. The Judge rejected the submission that the testatrix's statements about her children's conduct were exaggerations or lies rather than delusions. They were so far from the truth that they could not be described as mere exaggerations: she had even told her doctor that her son had got her by the throat. The Judge also found that the testatrix was not lying when she made the allegations about her children. She believed that those allegations were true. If she had not, then she would not have been suffering from delusions, and would have been acting out of spite.

#### 5.17.2. Causation

There has to be a causal connection between the delusion and the disposition effected by the Will in order for the delusion to invalidate the Will (*Ledger v Wootton* [2007] EWHC 2599 (Ch), para. 5). However, this may be difficult to establish. As was said in *Banks v Goodfellow* (1870) LR 5 QB 549, page 570:

*Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in a*

*particular disposal of his property.*

Indeed, in *Ledger v Wootton* [2007] EWHC 2599 (Ch) the testatrix suffered from paranoid ideas or delusions of persecution. However, the evidence did not establish that a particular delusion directly influenced the actual terms of the Will. In *Lloyd v Jones* [2016] EWHC 1308 (Ch), the Judge found that the testatrix suffered from dementia, heard voices and suffered delusions. It was accepted by both Counsel that delusions are only relevant if they affect the dispositions made. The Judge noted that, however bizarre the delusions were, it was not suggested that they could have had any such effect.

### 5.17.3. Burden of proof

The task of challenging a Will on the basis of delusions is, however, made easier in one important respect. The ultimate legal burden of establishing capacity is on the person seeking to propound the Will, as is the evidential burden if a real doubt is raised as to capacity. If, therefore, it is established that the testator was suffering from delusions, the evidential burden will fall on the propounder of the Will to prove that they had no influence on the dispositions made by the Will.

In *Kostic v Chaplin* [2007] EWHC 2298 (Ch) it was submitted that the propounder should also be required to prove that the delusions were not likely to influence the dispositions in the Will, whether or not they actually did so. The testator believed that there was an international conspiracy of dark forces against him in which he believed his son was implicated, and made a Will leaving his estate to the Conservative Party, excluding his son. It would have been a tall order for the Conservative Party to prove that the testator's belief that his son was involved in a conspiracy against the testator was not likely to have influenced his decision to exclude his son from benefit under his Will.

In any event, the Judge declared himself to be fully satisfied on the basis of all the evidence that the testator's decision to disinherit his son was heavily influenced by his delusions, and in particular by his belief that the son was implicated in the global conspiracy he saw around him. The Judge made clear that his decision did not turn on the burden of proof.

The better view is that the burden is on the propounder to prove that the Will was not in fact influenced by the testator's delusions, rather than that it was not likely to have influenced the testator.

### 5.17.4. General incapacity

It is possible to conceive of cases where a testator, suffering from a condition, such as dementia, impacting on their cognitive powers, expresses unreasonable beliefs, suspicions or fears, without the testator crossing the boundary of reaching conclusions which no reasonable person could have reached. The testator's statements may be evidence of incapacity, even if they are not delusions. Ultimately the question that has to be asked is: was the mental impairment such as significantly to undermine the deceased's proper appreciation of the calls upon his or her

*“The testator's statements may be evidence of incapacity, even if they are not delusions.”*

bounty? (*Walter v Smea* [2008] EWHC 2029 (Ch), at para. 123). If so, the Will will be set aside, even if the belief is not delusional in the sense of being one which no person in possession of their senses could believe.

Similarly, the testator may have expressed beliefs which are delusional, but which cannot be said to have caused any particular testamentary disposition to be made. In *Ledger v Wootton* [2007] EWHC 2599 (Ch) the evidence did not establish that a particular delusion directly influenced the actual terms of the Will. However, it did raise the possibility that a defect in mind interfered with a consideration of the matters which should be weighed and taken into account on the making of a Will; and it seemed to show that the mind of the testatrix was generally, about the time of its execution, incompetent to the exertion required, in that she suffered a potentially disabling condition that could not simply be put down to fickleness of affection or a manipulative character. The burden of proving capacity was not discharged.

#### **5.17.5. Evidence of underlying medical condition and delusions**

In *Ritchie v Ritchie* [2009] EWHC 709 (Ch) both experts considered that the testatrix was paranoid. One of them took the view that her paranoia was part of her personality or authentic self and, therefore, was not a disease of the mind or a delusion. The other expert considered that the testatrix's paranoia was a disease of the mind which gave rise to irrational and delusional beliefs about her children (and others). The latter view was accepted by the Judge.

This might suggest that, absent medical evidence that the testator was suffering from a disease of the mind (such as paranoia) a Will cannot be set aside as having been caused by a delusion. However, in *Ritchie* it was conceded by Counsel (properly in the view of the Judge) that if the testatrix was delusional, that was as a result of a disease of the mind.

In *Walter v Smea* [2008] EWHC 2029 (Ch), para.123, HHJ Purle Q.C. expressed the view that the test for a delusion (that no man in possession of his senses could believe what the testator believed) is applicable when there is no supporting medical evidence explaining how the cognitive faculties of the testator were impaired in consequence of a recognized medical condition. In the case of a delusion, the court will infer that the testator's beliefs must have been the product of insanity (*Ball v Ball* [2017] EWHC 1750 (Ch), para. 44).

Thus, a Will executed in consequence of a wholly irrational or delusional belief can be set aside, even if there is no expert evidence of a physical or mental disorder affecting capacity. In such a case, it would be inferred that there must have been some underlying condition of insanity or disease of the mind caused by the delusion.

#### **5.18. Mistake**

It is not possible to set aside a Will simply on the grounds that

*“It is not possible to set aside a Will simply on the grounds that the testator was mistaken as to some material fact.”*



the testator was mistaken as to some material fact. In *Ball v Ball* [2017] EWHC 1750 (Ch) the testatrix made a Will excluding three of her children who had claimed to have been sexually abused by their father. Those children claimed that the testatrix was labouring under such a serious mistake (in the form of her belief in her husband's innocence) as to deprive her of testamentary capacity. It was accepted that the testatrix was not suffering from any mental or physical illness which would have affected her testamentary capacity. On the claimants' case, she had merely made a mistake.

The Judge upheld the Will on the basis that mistake does not by itself operate to invalidate a Will (and, in any event, the testatrix was not mistaken). What it can do, however, is to provide a basis upon which to say in an appropriate case that the testator either is suffering from an insane delusion, or does not possess a sufficiently sound memory for the purposes of making a Will. But a mere mistake without more is not enough (see also *Costas v Germain* [2019] EWHC 3324 (Ch), para. 70).

Furthermore, the Judge in *Ball v Ball* commented that mistake on its own is not a severe affective disorder. Nor does the mere fact of making a mistake whilst suffering from stress cause a loss of testamentary capacity. Either the stress is such as to cause such a loss, or it does not. The mistake is or may be a symptom of the pre-existing condition. It is not itself the cause of loss of capacity.

The Judge relied upon the case of *Re Belliss* (1929) 141 LT 245 in which a 93-year old testatrix made a Will stating that she had some years ago given to one of her two daughters more financial assistance than to the other and that she now wished to put provision for her two daughters on an equal footing. However, she was mistaken in her belief as to what she had done in the past. Lord Merivale P stated that a mere mistake of fact as to persons or property would not stand in the way of probate. However, he found that the memory of the testatrix had so failed that she could no longer call to mind the facts of her past actions towards her daughters so as to displace illusionary notions and beliefs.

In *Goss-Custard v Templeman* [2020] EWHC 632 (Ch) it was alleged that the testator, Lord Templeman, was subject to a delusion, or illusory belief, that a wrong had been done to his stepdaughters, which he needed to put right by leaving them the home which he had shared with their mother. In fact, there was no wrong that needed to be put right in favour of his stepdaughters, as his ex-wife had left the home to him absolutely. The Judge rejected the submission that *Re Belliss* was authority for the proposition that a mere mistaken belief, which is the product of forgetfulness, is inimical to testamentary capacity. A simple mistake, which is attributable to poor memory, is to be contrasted with a delusion or fixed belief from which the testator cannot be shaken, or which he has not the capacity to sort out in his mind. A delusion only exists where the testator will not accept the truth when it is explained to him. Lord Templeman did not suffer from such a delusion, even assuming that he was mistaken as to the reasons for his previous testamentary dispositions relating to the home he had shared with his late wife.

A mistake may, of course, be brought about by undue influence or fraudulent calumny, in which case there may be a claim under those heads.

#### **5.19. Perversion of sense of right**

Under the fourth limb of the test in *Banks v Goodfellow* no disorder of the mind shall poison the testator's affections, pervert his sense of right, or prevent the exercise of his natural affections.

In *Sharp v Adam* [2006] EWCA Civ 449 the testator made a Will disinheriting his two daughters, who had been the principal beneficiaries of his estate under a previous Will. He left the bulk of his estate to two persons who had run his stud farm under his direction for many years. The testator suffered from progressive multiple sclerosis. When he made the Will he was paralysed from the head down. He could only communicate with the help of a carer asking direct questions which could be answered with a nod. His solicitor, doctor and carers were nonetheless of the opinion that he retained testamentary capacity. The Will was signed by the testator in the presence of two solicitors and his GP.

Before the Will was signed the testator was reminded that he was not leaving anything to his daughters, and that his estate consisted not only of his business and his house but also personal possessions which his daughters might expect to inherit. This was repeated many times, but on each occasion that he was asked to agree to leave his daughters anything, he made it clear by shaking his head that he did not wish to do so. He indicated that he approved the terms of the Will.

The court found that the testator lacked testamentary capacity. There was no good reason why the testator should wish to leave nothing to his daughters. It was significant that there was contradictory medical evidence at trial as to capacity: one expert concluded that the testator had lacked capacity, the other that he retained capacity. Both doctors focused on the issue of cognitive impairment. However, the Court of Appeal stated that the question of capacity does not relate exclusively to cognitive powers. The fourth element in *Banks v Goodfellow* was concerned as much with mood as with cognition. The court was, therefore, entitled to infer, in part from the irrationality of the Will itself, that there had been some temporary poisoning of the testator's natural affection for his daughters, or a perversion of his sense of right, the nature of which nobody could satisfactorily explain. This was a point that one of the experts had not considered, and the other had only mentioned in passing as a "lay observer". Nonetheless, it was sufficient to justify the decision of the first instance judge that the testator had lacked testamentary capacity.

*"The question of capacity does not relate exclusively to cognitive powers."*

#### **5.20. Terms of Will surprising**

*Sharp v Adam* [2006] EWCA Civ 449 shows that the irrationality of the provision made by a Will may support a claim of incapacity. The decisive consideration was that the Will was in

part irrational. Leaving the residuary estate as the testator did was entirely understandable. However, leaving nothing at all to his daughters was not, in the light of evidence that there was enduring mutual affection and no significant family rift.

In *Abbott v Richardson* (2006) WTLR 1567, at 1627, it was held that the testator must have the mental capacity to make decisions which take into account the relevant property, persons and circumstances and arrive at a “rational fair and just” testament.

Nonetheless, the question is not whether or not the Will is a fair one in all the circumstances of the case, because a valid Will can be unfair, vindictive or perverse; but if the terms of a Will are surprising, that may be material to the court's assessment of the testator's capacity (or indeed to knowledge and approval of the terms of the will): *Cowderoy v Cranfield* [2011] EWHC 1616 (Ch), para. 133; *Re Ashkettle* [2013] EWHC 2125 (Ch), para. 42).

In *Re Ashkettle* the terms of the Will were surprising. There was no proper support or explanation for the expressed reasons for excluding the testatrix's two sons from benefit under her Will. The reasons given were irrational and inexplicable in the context of the testatrix's family life and history. They were not even explicable as the product of caprice or vindictiveness on the testatrix's part. The Will was set aside on the grounds of incapacity and want of knowledge and approval.

The court may, however, conclude that the terms of the Will are not irrational, or such as to throw doubt on the testator's capacity. In *White v Phillips* [2017] EWHC 386 (Ch) the Judge made the point that fairness, rationality and justice have a number of permutations. He did not see it as irrational, unfair or unjust to provide that one's estate shall pass to one's children from a previous marriage (or indeed one of them) in circumstances where the Will also provided that the current spouse should have the use and benefit of the majority of the estate including the house for the foreseeable future.

## 5.21. Bereavement

*“The testator's bereavement amounted to a severe affective disorder which on its own, or together with the mild dementia from which the testator was suffering, deprived him of testamentary capacity.”*

In *Key v Key* [2010] EWHC 408 (Ch) the testator, an 89 year old farmer, made a Will, 10 days after the unexpected death of his wife of 65 years, providing for the bulk of his estate to be divided between his two daughters. The court accepted medical evidence to the effect that the testator was devastated, rather than merely upset, by the recent death of his wife when he made his Will. The testator's bereavement amounted to a severe affective disorder which on its own, or together with the mild dementia from which the testator was suffering, deprived him of testamentary capacity. He was incompetent to the exertion required for the purpose of making an important decision as to the disposition of his property upon his death.

Medical evidence was accepted that the symptomatic effect of bereavement is capable of being almost identical to that associated with severe depression. Indeed, depression could itself cause cognitive impairment with symptoms similar to dementia, a condition that used to be called depressive pseudo

dementia from which, unlike true dementia, the patient might recover once the factors causing the depression had passed.

The *Banks v Goodfellow* test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the 19th century. The test which has emerged is primarily about the mental capacity to understand or comprehend. However, an affective disorder such as depression, including that caused by bereavement, is more likely to affect powers of decision-making than comprehension. A person in that condition may have the capacity to understand what his property is, and even who his relatives and dependants are, without having the mental energy to make any decisions of his own about whom to benefit.

In *Turner v Pythian* [2013] EWHC 499 (Ch) the testatrix was found to be suffering from an affective disorder brought about by the death of her brother which, combined with her fragile mental state arising from her advanced age, her physical frailty and her grief for her late husband, deprived her of testamentary capacity. The features consistent with a severe affective disorder included marked weight loss, cognitive impairment (such as failure to recognise relatives at her brother's funeral), social isolation and deterioration in self-care.

#### 5.21.1. Bereavement: unsuccessful claims

A claim to set aside a Will on the grounds of bereavement failed in *Dharamshi v Velji* [2013] EWHC 3917 (Ch). The testator made a Will a month after the death of his wife. He was seriously distressed by her death. It was accepted that, whilst bereavement might cause an affective disorder sufficient to deprive a patient of the power of rational decision-making, it does not necessarily result in a disorder of the mind. The issue was whether, the testator's powers of decision-making had been significantly impaired such that he lacked testamentary capacity. On the evidence, the testator had himself taken the decision to go to a solicitor, and his instructions to the solicitor were given of his own volition and reflected his true intentions and wishes. He had known what he was doing and what he wanted to achieve; his thinking was not muddled or disjointed, and he appeared to be fully in charge of his mental faculties. It was, accordingly, appropriate to pronounce in favour of the Will.

The testator's mental energy may be so deficient, as a result of physical ailments or an affective disorder, that he or she lacks the capacity to make testamentary decisions. However, in *Parker v Litchfield* [2014] EWHC 1799 (Ch) the court found that the testatrix retained the mental energy for decision-making even though she was 90 years old, her eyesight had deteriorated, and she suffered from blackouts. She had lived on her own and had written in rational terms to her solicitor.

#### 5.22. Involvement of solicitor

If the testator has been guided by an experienced solicitor, it may be difficult to establish testamentary incapacity.

*“Whilst bereavement might cause an affective disorder sufficient to deprive a patient of the power of rational decision-making, it does not necessarily result in a disorder of the mind.”*

In *Hawes v Burgess* [2013] EWCA Civ 74 the testatrix was 77 and was suffering from dementia of modest severity. She made a Will leaving her estate to her two daughters, excluding her son, Peter, with whom she was on good terms. The Will was challenged on grounds including incapacity. The incapacity claim was upheld at first instance, in large part on the basis of expert evidence that the testatrix was suffering from dementia.

However, the Court of Appeal cast considerable doubt on the decision, despite the failure of the solicitor to observe the golden rule (see para. 5.23 below). In the event, they decided the case on the grounds of the testatrix's want of knowledge and approval. As the Court of Appeal emphasised, it is a very strong thing for a court to find that a testator lacked testamentary capacity when:

- (a) the Will was prepared by an experienced and independent solicitor following a meeting with the testator;
- (b) the Will was executed by her after the solicitor had read and explained it;
- (c) the solicitor considered that the testator was capable of understanding the Will; and
- (d) the terms of the Will were not, on their face, inexplicable or irrational.

A Will, executed in these circumstances, should only be set aside "on the clearest evidence of lack of capacity" (*Hawes v Burgess*, para. 60). Although talk of presumptions and their rebuttal is not regarded as especially helpful nowadays, the courts realistically recognise that, for example, if a properly executed Will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the Will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in the case where those prudent procedures have not been followed (*Hawes v Burgess*, para. 13).

The Court of Appeal expressed doubt as to whether evidence of lack of capacity from a medical expert who had never actually met or examined the testatrix would be sufficient to trump evidence of capacity from the solicitor who had prepared the Will.

### **5.22.1. Solicitor's involvement persuasive factor**

The assessment of an experienced solicitor that the testator had testamentary capacity may be determinative of capacity. In *Elliott v Simmonds* [2016] EWHC 732 (Ch) the testator made a Will leaving his whole estate to a woman with whom he had been in a relationship. He left nothing to his wife or their children. The Will was prepared by a solicitor, who had known the testator for many years and was his brother-in-law. Briggs J accepted that a friend or professional person such as a solicitor might fail to detect defects in mental capacity which will be or become apparent to a trained and experienced medical examiner. However, the fact that the solicitor in the instant case knew the testator so well meant that he would have been in a better position than most to judge whether there were signs of deterioration in the testator's mental acuity. The solicitor was a long-standing friend and family member who also happened to

*"The assessment of an experienced solicitor that the testator had testamentary capacity may be determinative of capacity."*

be a solicitor. It was clear from his evidence that he was alive to the need to be sure that the testator understood what he was doing and as to its consequences. The court, therefore, found in favour of capacity.

In *Todd v Parsons* [2019] EWHC 3366 (Ch) the Judge accepted the evidence of a solicitor who was an experienced will-maker and aware of the relevant law. He saw the testatrix alone to take instructions, when he engaged her in detailed conversation. She was sensible and rational in the answers that she gave, and was able to give an approximate valuation of her assets.

### 5.22.2. Unsatisfactory evidence of solicitor

*“Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information, or it is worthless.”*

In *Re Ashkettle* [2013] EWHC 2125 (Ch), para. 43, the Judge, whilst accepting the wisdom of the Court of Appeal's comments in *Hawes v Burgess* on the value of a solicitor's evidence of capacity, observed that they do not go so far as to suggest that, in every case, the evidence of an experienced and independent solicitor will, without more, be conclusive. Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information, or it is worthless; and the terms of the Will may themselves suggest that the solicitor's assessment was not soundly based.

In *Re Ashkettle* the Will file (if there was one) had not survived. It was impossible to see how, when, and in what precise terms, the testatrix (or anyone on her behalf) could be said to have given appropriate instructions. The solicitor had little recollection of relevant matters, and his contact with the testatrix had been brief. The testatrix was suffering from dementia, and the evidential burden of proving capacity was not satisfied. Perhaps above all, the terms of the Will made no sense.

### 5.23. The golden rule

The so-called "golden rule" is that in the case of an aged testator, or one who has suffered a serious illness, the making of the Will "ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves this examination and finding" (*Re Simpson* (1977) 127 New LJ 487).

If a solicitor has concerns as to capacity, he must either refuse the instructions and make the position clear to the client, or take steps to satisfy himself as to the client's mental capacity promptly (*Feltham v Freer Bouskell* [2013] WTLR 1363). If the solicitor has instructed a doctor to produce a report, he should chase up the doctor within 10 days and, if necessary, obtain verbal confirmation which would be sufficient for him then to visit the testatrix.

The value of a medical opinion is that a friend, or a non-medical professional adviser, such as a solicitor, may fail to detect defects in mental capacity which would become apparent to a trained and experienced medical examiner who understands the test for testamentary capacity (*Cowderoy v Cranfield* [2011]

EWHC 616 (Ch), at para. 137). If a medical opinion is obtained certifying, or not certifying, capacity, this may go a long way to avoid a subsequent probate claim based upon lack of capacity.

### 5.23.1. Rule not determinative

The golden rule is not a rule of law such that (i) if it is not followed, the Will is not valid, but (ii) if it is followed then the Will is valid. Instead, it is a rule of practice, the following of which generally has a prophylactic effect, in that it is then much less likely that there will be a (long and expensive) dispute as to testamentary capacity (*James v James* [2018] EWHC 43 (Ch)).

As Sonia Proudman Q.C. said in *Allen v Emery* [2005] EWHC (Ch) 2389, at para. 24:

*It is undoubtedly a desirable precaution, and one which can save a great deal of trouble in the future, for a solicitor to observe the golden rule where there is the possibility of dispute as to testamentary capacity. Failure to do so, however, is not in my judgment determinative; the rule is no more than prudent guidance for a solicitor ... Ultimately capacity is a question of fact like any other which the Court must decide on the evidence as a whole.*

Therefore, where evidence has been called on both sides as to the testator's mental capacity, reference to the golden rule is rather like crying over spilled milk (*Carr v Beaven* [2008] EWHC 2582 (Ch), at para. [12]). The golden rule is not itself a touchstone of validity and is not a substitute for the established tests of capacity (*Cattermole v Prisk* [2008] WTLR 1261, at 1287; *Todd v Parsons* [2019] EWHC 3366 (Ch), at 136). The court must apply the standard tests of capacity in *Banks v Goodfellow* to the evidence as a whole.

### 5.23.2. Golden rule observed

Even if the golden rule is scrupulously observed, and a doctor certifies capacity, it does not necessarily follow that the court will find that the testator had capacity. In *Sharp v Adam* [2006] EWCA Civ 449 a GP certified the testator's capacity. The Court of Appeal nonetheless set aside the Will for lack of capacity, in large part because there was no sound reason for the testator to have wholly excluded his daughters from benefit under the Will. May L.J. had this to say on the golden rule, at para. [27]:

*Counsel...came quite close to submitting that such meticulous compliance with the golden rule should in principle be determinative. In our view this would go too far. The opinion of a general practitioner, unimpeachable in itself and supported by that of one or more solicitors, may nevertheless very occasionally be shown by other evidence to be wrong. The golden rule is a rule of solicitor's good practice, not a rule of law giving conclusive status to the evidence obtained in compliance with the rule. Nevertheless, where a testator's apparent mental state is observed and recorded at the time when he actually executes the will in complete compliance with the rule and with the care with which it was in the present case; and where the professional people concerned reached a proper and informed conclusion that*

*“Even if the golden rule is scrupulously observed, and a doctor certifies capacity, it does not necessarily follow that the court will find that the testator had capacity.”*

*the testator does have testamentary capacity, it will require very persuasive evidence to enable the court to dislodge that conclusion.*

### **5.23.3. Failure to follow the golden rule**

A failure to follow the golden rule may not be determinative of a lack of capacity, but nonetheless it may well provide ammunition to those who seek to challenge testamentary capacity or knowledge and approval. Indeed, the failure to consult a doctor may, along with other factors, cast real doubt on the testator's capacity, throwing the evidential burden on those who seek to propound the Will to prove capacity (*Re Kaur*, Lawtel, 12 Sept 2017). In *Catling v Catling* [2014] EWHC 180 (Ch) the expert evidence indicated that the testator lacked capacity. That conclusion was reinforced by a failure to comply with the golden rule.

In *Hawes v Burgess* [2012] W.T.L.R. 423 the solicitor taking instructions did not observe the golden rule. The Judge at first instance found that the solicitor had relied upon his own judgment that the testatrix appeared to be capable. However, he had not met her before he took her Will instructions. He did not, therefore, have anything to judge her capacity against, and it was more difficult to assess her capacity as her daughter was present at the same time. The solicitor noted that the testatrix was "compos mentis". However, this comment was added to the Attendance Note after the event. At first instance, the Will was set aside for lack of capacity (albeit that the Court of Appeal doubted this conclusion on appeal having regard to the evidence of the solicitor). Nonetheless, the failure to carry out a formal, contemporaneous, assessment was a factor which influenced the Judge at first instance to conclude that the testatrix lacked capacity.

### **5.23.4. Disregard of golden rule justified**

The failure of a solicitor to follow the golden rule may, in the circumstances, be reasonable. In *Wharton v Bancroft* [2011] EWHC 3250 (Ch), the solicitor did not follow the golden rule. Norris J had this to say, at para. [110]:

*"His job was to take the will of a dying man. A solicitor so placed cannot simply conjure up a medical attendant."*

*I consider the criticism of Mr Bancroft for a failure to follow "the golden rule" to be misplaced. His job was to take the will of a dying man. A solicitor so placed cannot simply conjure up a medical attendant. He must obtain his client's consent to the attendance of and examination by a doctor. He must procure the attendance of a doctor (preferably the testator's own) who is willing to accept the instruction. He must make arrangements for any relevant payment (securing his client's agreement). I do not think Mr Bancroft is to be criticised for deciding to make his own assessment (accepted as correct) and to get on with the job of drawing a will in contemplation of marriage so that Mr Wharton could marry. I certainly do not think that "the golden rule" has in the present case anything to do with the ease with which I may infer coercion. The simple fact is that Mr Wharton was a terminally ill but capable testator.*

Although the claim was of undue influence, and not of lack of testamentary capacity, Norris J's comments are of application to



incapacity claims. A solicitor's failure to follow the golden rule, in reliance upon his own assessment of capacity, may not have anything to do with the ease with which the court may find that the testator lacked capacity, if there were reasonable grounds for failing to follow the rule.

## 5.24. Time for assessing capacity

The relevant time for assessing the capacity of the testator is, generally, at the date when the Will is executed. However, there is an exception where the testator had full capacity when he gave instructions for a Will, but no longer has testamentary capacity at the date of execution. The so-called rule in *Parker v Felgate* was applied at first instance in *Perrins v Holland* [2009] EWHC 1945 (Ch) and confirmed as a correct statement of the law on appeal in that case ([2011] Ch 370).

A Will will be valid where (see *Perrins v Holland* [2009] EWHC 1945 (Ch), paras. 43, 49 and 52; [2011] Ch 370, at para. 55):

- (a) the testator had testamentary capacity at the time when he gave instructions for his Will;
- (b) at the date of execution of the Will, the testator knew that he is making a Will and understood that that it was the Will for which he had previously given instructions;
- (c) the instructions continued to reflect his intentions as at the date of execution of the Will; and
- (d) the Will as drawn up did in fact give effect to his instructions.

In *Perrins v Holland* the Will in question was held to be valid even though the testator was found not to have had testamentary capacity when he executed his Will in September 2001. The testator had testamentary capacity when he gave instructions for the Will in April 2000. He understood when he executed the Will that he was executing a Will which accurately embodied his instructions.

On appeal, the rule in *Parker v Felgate* was confirmed as representing good law, and the judgment of Lewison J at first instance upheld. The rule does not displace the requirement for full testamentary capacity; it merely displaces the ordinary requirement that the deceased should have had such capacity at the time he executed the Will.

### 5.24.1. Different ways of satisfying the rule

It is sufficient (taking elements from passages in *Parker v Felgate* (1883) 8 PD 171, at 173 and *Perrins v Holland* [2011] Ch 370, at para. 55) if the testator:

- (a) can remember giving instructions for a certain disposition to his solicitor, has no doubt that the solicitor has given effect to that intention, and accepts the Will put before him as carrying out that intention;
- (b) cannot remember the details of the instructions he gave, but would have had capacity to understand

- each clause of the Will if summarised to him, and to indicate his assent to it; or
- (c) does not at the date of execution have capacity to go over the whole transaction, but can remember that he gave instructions for his Will, and believes that the document correctly reflects his settled intentions (as it does) and decides to execute it on that understanding.

In all these cases, there is testamentary capacity at the date of the decision, and an intention to give effect to the decision at the date of execution. In *Parker v Felgate* the third test as set out at (c) above was satisfied, but not the first two. The jury found that the testatrix was capable of understanding, and did understand, that she was executing the Will for which she had given instructions to her solicitor, when she was roused from a coma and confirmed that she wished to execute the Will that was put in front of her. However, she did not remember and understand her previous instructions, nor would she have understood each clause if those clauses had been put to her.

*“It is, therefore, sufficient if the testator is capable of understanding and does understand that he is executing the Will for which he had given instructions.”*

It is, therefore, sufficient if the testator is capable of understanding and does understand that he is executing the Will for which he had given instructions (as was the case in *Re Burns* [2016] EWCA Civ 37). However, in *Markou v Goodwin* [2013] EWHC 4570 (Ch) the test was not satisfied. The evidence amounted to no more than that the testatrix signed a piece of paper. The evidence did not establish, on the balance of probabilities, even that the testatrix really knew that what she was signing was a Will. In any event, it was not established that she recollected that she had given instructions previously and knew that she was giving effect to those instructions.

#### 5.24.2. Knowledge and approval

It is not, therefore, necessary that the Will is put to the testator clause by clause, or that its general purport be explained. Indeed, it is not even necessary that the testator would have understood the Will if it had been put to him clause by clause (per Lewison J, *Perrins v Holland* [2009] EWHC 1945 (Ch), para. 43). It is sufficient if the testator remembers that he had given instructions (whatever they were) and understands correctly that the Will reflects those instructions.

In *Perrins v Holland* the testator knew and approved of the contents of the Will on the date when he executed it. The contents of the Will were summarised to the testator by a solicitor, and the testator understood the summary, and gave his assent thereto. Indeed, Lewison J found that if each and every clause of the Will had been put to the testator and he had been asked “do you wish to do this?”, he would have been able to answer intelligently “yes”. However, he acknowledged that such actual knowledge and approval was not necessary to satisfy the rule.

It may be, therefore, that the testator satisfies the test of capacity in *Parker v Felgate*, but does not know and approve of the contents of the Will on the date when he executes the Will. In such a case, the Will will not be invalid on the grounds of want of knowledge and approval, so long as such knowledge and

approval was present when the instructions were given (*Markou v Godwin* [2013] EWHC 4570 (Ch), at para. 55). In effect, where the rule applies, both testamentary capacity and knowledge and approval are to be assessed at the date of the instructions (*Baker v Baker* [2008] WTLR 565, para. [12]).

### 5.24.3. Settled instructions

The testator's instructions must be "settled" when given. In *Perrins v Holland* [2009] EWHC 1945 (Ch) it was submitted on appeal that it was necessary for the testator to have given settled instructions in relation to his property at the time when he had testamentary capacity, and that the testator had not done so in that case. Otherwise, tentative or provisional instructions may become final after testamentary capacity is lost. The Court of Appeal rejected this ground of appeal. Lewison J had appreciated that, because of the long gap between the preparation of the first draft of the Will and its execution, he had to be satisfied that the testator's instructions given in April 2000 remained his testamentary wishes in September 2001. Whilst Lewison J might not have described the instructions as "settled" when given, he was satisfied that the testator's wishes had not changed in the period of time between giving the instructions and executing the Will.

Indeed, the Court of Appeal confirmed that it did not matter whether or not the instructions which the testator had given some 15 months earlier could be described as "settled" despite the lapse of time and the obvious opportunity for a change of mind. Provided the deceased was capable, at the time of execution, of understanding that he had given instructions and intended to implement them, changes of mind in the meantime did not matter.

In short, the instructions, when given, do not have to be settled, in the sense of irreversible (although they must not be provisional). Nor would it matter if the testator had expressed a possible change of mind before losing capacity, provided that the testator intends to implement the original instructions when executing the Will.

### 5.24.4. Instructions through an intermediary

The rule in *Parker v Felgate* should be applied only with the greatest caution when the testator did not himself give instructions to the solicitor who drew up the Will, but instead gave them to a lay intermediary, who in turn repeated them to the solicitor. The opportunities for errors in transmission, misunderstanding, and even deception in such a method of delivering instructions are obvious. The court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor (*Battan Singh v Armichand* [1948] AC 161).

This is not, however, an absolute rule. It might be sufficient, for instance, if the testator's instructions, albeit addressed to an intermediary, were in writing.

*"The rule in Parker v Felgate should be applied only with the greatest caution when the testator did not himself give instructions to the solicitor who drew up the Will, but instead gave them to a lay intermediary."*

#### 5.24.5. Partial validity

It is theoretically possible for a Will to be partially valid, e.g. if testator had, when retaining capacity, given settled instructions in respect of all of its provisions, bar one, and subsequently, after losing full capacity, understands that he is executing a Will giving effect to such settled instructions (see *Thomas v Jones* [1928] P 162). In principle, the Will could be admitted to probate, deleting the provision in respect of which there were no settled instructions.

#### 5.25. Lucid intervals

A person who lacked capacity at some point or points prior to, and after, executing their Will may nonetheless have had sufficient capacity to make a valid Will during a "lucid interval". The burden will then be on those seeking to propound the Will to establish, by convincing proof, testamentary capacity during such a lucid interval, and execution during that interval (or the giving of instructions during a lucid interval and sufficient capacity at the date of execution for the purposes of the rule in *Parker v Felgate*).

The evidence ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act (*A-G v Parnter* (1792) 3 Bro CC 441).

#### 5.26. Medical evidence

The evidence of a medical witness who has attended the testator is, of course admissible, at least as to the existence of facts which the expert has himself observed. However, in many cases, contemporaneous evidence from a doctor qualified to assess capacity may not be available.

Non-contemporaneous expert evidence from a psychiatrist is commonplace, even essential, in a contested probate claim. Indeed, if no formal evidence of capacity is adduced, it may be impossible to satisfy the evidential burden of establishing capacity where the evidence raises a real doubt as to capacity. GP and hospital records are, of course, relevant.

Often there will be two medical experts, one who asserts testamentary capacity, and one who does not, in which case part of the task facing the court is to evaluate their evidence (as in *Vegetarian Society v Scott* [2013] EWHC 4097 (Ch) where the evidence of one expert was preferred to that of the other as being more focused and nuanced on the issue of whether the testator's thoughts were so disordered and his schizophrenia such that he was prevented from comprehending the claims to which he should give effect).

#### 5.26.1. Role of expert

The issue of testamentary capacity is ultimately one for the court to decide; it is not one to be delegated to experts, albeit that

*"The issue of testamentary capacity is ultimately one for the court to decide."*

their knowledge skill and experience may be an invaluable tool in the analysis of that issue (*White v Philips* [2017] EWHC 386 (Ch), para. 7). Indeed, it may be appropriate for an expert to concede that the issue of capacity will depend upon the court's determination of oral, factual (i.e. non-medical) evidence (*Re Ashkettle* [2013] EWHC 2125 (Ch), para. 4).

*Cowderoy v Cranfield* [2011] WTLR 1699 contains some pertinent observations on expert medical evidence in cases where testamentary capacity is in issue. Two psychiatrists gave expert evidence as to the testatrix's capacity. Neither of them had ever seen the testatrix. Morgan J made the valid point that psychiatric evidence could assist a court by referring to such medical evidence as is available as to an individual's physical condition, and in explaining the likely impact of that physical condition on the mind of the testator. Similarly, expert evidence could refer to medication being taken by an individual and comment on the likely effect on the mind of such medication.

Morgan J was prepared to take into account expert evidence that the testatrix's capacity would have fluctuated from time to time depending upon her level of alcohol consumption in conjunction with her medication; and that her inability to form words clearly, by reason of her vascular disease, was not inconsistent with her understanding of language remaining intact. These were appropriate matters for expert evidence. Indeed, he found that the testatrix did have testamentary capacity on the day when she made her Will, even if her condition did fluctuate as a result of her medication and consumption of alcohol.

However, Morgan J criticised one of the experts for expressing an opinion that the testatrix's decision-making capacity was probably influenced by a beneficiary. That was not an opinion on a psychiatric or medical matter. It was a factual question which was ultimately a question for the court to decide. Generally, he did not place any great reliance upon the views expressed by the psychiatrists as to whether the testatrix had testamentary capacity from time to time. Their views depended very much on what they understood the facts of the case to be. Each psychiatrist was given a version of facts which was probably not complete.

### **5.26.2. Non-contemporaneous medical evidence**

In *Blackman v Man* [2008] WTLR 389 the Judge stated that the court must be wary of placing too much reliance on the theoretical conclusions of medical witnesses, however eminent, who have not seen the testatrix, but base their views on inferences from other evidence - inferences as to which ultimately it is for the court and not an expert witness to decide whether they should be drawn.

In *Hawes v Burgess* [2013] EWCA Civ 94 Mummery L.J. said, at para. 60:

*The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix*

*“The court must be wary of placing too much reliance on the theoretical conclusions of medical witnesses, however eminent, who have not seen the testatrix.”*

*understood that she was making a will and also understood the extent of her property.*

### 5.26.3. Lay evidence preferred to medical evidence

As the Court of Appeal of New South Wales pointed out in *Zorbas v Sidiropoulos* (No 2) [2009] NSWCA 197 (cited with approval by the Court of Appeal in *Simon v Byford* [2014] [2014] WTLR 1097, at para. 17):

*Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation.*

This approach is well illustrated by the case of *Re Wilkes* [2006] WTLR 1097 where the Will of the testatrix was challenged on a number of grounds including incapacity. The claim was supported by a consultant physician, who had never met the testatrix, but whose evidence was given by reference to her medical records. The expert warned against the acceptance at face value of statements indicating that the testatrix was mentally well, in the absence of some form of objective diagnostic analysis of her mental ability (which had never taken place). The court, nonetheless, concluded that there was sufficient evidence of capacity from independent witnesses, relating to her ability to recall the birthdays of all her children and grandchildren, her capacity to engage in meaningful conversations, to read newspapers, to enter into a newspaper bingo game, and to make a joke at the solicitor's office.

### 5.26.4. Medical evidence preferred to lay evidence

Expert medical evidence may, however, carry greater weight than evidence from lay witnesses. In *Baker v Baker* [2008] WTLR 565 the medical evidence was preferred to the anecdotal evidence of non-experts. The testator had executed a Will 5 days before his death, whilst he was in a hospital intensive care unit suffering from changes in his brain functions brought about as a result of liver disease. A consultant had advised that he did not believe the testator had testamentary capacity due to his medical condition. The Will was nonetheless executed in the absence of a solicitor or doctor. Not surprisingly, the court concluded that the testator lacked testamentary capacity, despite the (rather tenuous) evidence of a number of lay witnesses to the effect that the testator exhibited a rational desire to execute the Will.

The value of evidence from lay witnesses in support of capacity will carry even less weight if the Will is in part irrational (*Edkins v Hopkins* [2016] EWHC 2542 (Ch) at [41]).

*“Expert medical evidence may carry greater weight than evidence from lay witnesses.”*

#### 5.26.5. Solicitor's evidence

A solicitor's evidence as to capacity may be persuasive. In *Hawes v Burgess* [2013] EWCA Civ 94, para. 59, Mummery L.J. commented that it was a strong thing for the Judge to have acted on medical evidence not based on any meeting with or any medical examination of the testatrix at or about the time of the execution of the Will, or at any time, when a solicitor had met her twice at that time, and formed the view that she was entirely *compos mentis*. He, therefore, entertained doubts, in the light of the solicitor's evidence, as to whether the Judge's conclusion of lack of capacity, based to a significant extent on acceptance of the medical evidence, was justified. The appeal was determined on the alternative ground of want of knowledge and approval.

#### 5.26.6. No hierarchy of witnesses

The correct approach, it is submitted, is that taken by McBride J in the Northern Irish case of *Guy v McGregor* [2019] NICH 17, at paras. 14 and 15. In determining whether a testator has capacity, the court must consider the evidence of all the witnesses including the medical experts, the drafting solicitor and the other lay witnesses. The weight to be given to each type of evidence will depend upon a number of factors, including the witness' expertise, knowledge, experience and independence. In some cases the assessment of a medical expert may be limited by the fact that he has never met nor examined the testator and there are limited medical notes and records available to him. In such cases the weight to be attached to the medical evidence may be significantly less than that attached to the evidence of an experienced solicitor who knew the testator well or who carried out a specific assessment of capacity at the date of execution of the will.

In other cases the nature of the medical evidence may be such that it outweighs the evidence of even an experienced solicitor. In general the weight to be attached to the view expressed by a solicitor as to capacity will depend on that solicitor's experience, his knowledge of the testator, and the nature of any assessment carried out by him in respect of capacity.

The weight to be attached to the evidence of lay witnesses will generally depend on their independence, experience and knowledge of the testator. In cases where there is a divergence in the views of the expert medical witnesses or where there is a paucity of medical notes and records, the evidence of lay witnesses who can give detailed evidence of the testator's behaviour, demeanour and activities around the time of the execution of the will, by reference to conversations they had with the testator or in respect of activities conducted by the testator at the relevant date, will be of much assistance and will be given great weight.

Accordingly, there is no hierarchy of witnesses. Each case will be fact specific. In some cases the medical evidence will be the weightiest factor. In other cases the evidence of the solicitor will be of magnetic importance and in yet other cases the evidence of the lay witnesses will be decisive.

## 6. DUE EXECUTION

In order to be valid a Will must comply with the formal requirements in s. 9 of the Wills Act 1837. In particular, the Will must be signed or acknowledged by the testator in the presence of two or more witnesses present at the same time, and the witnesses must attest and sign the Will in the presence of the testator (but not necessarily in the presence of any other witness). The signature of the testator must, of course, be his or her signature, and not a forgery.

### 6.1. Presumption of due execution

There is a presumption that a Will which, on its face appears to be duly executed, has indeed been duly executed. As Lord Penzance in *Wright v Rogers* (1869) LR 1 PD 678 at p. 682 said:

*“There is a presumption that a Will which, on its face appears to be duly executed, has indeed been duly executed.”*

*The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed.*

There is both a practical and a principled reason why the court should be slow, on the basis of extraneous evidence, to hold that a Will, which on its face was duly executed and which represents the apparent wishes of the testator, was not properly executed (*Channon v Perkins* [2006] WTLR 427, paras. 7 to 11). The practical reason is that oral testimony as to the way in which a document was executed many years ago is not likely to be inherently particularly reliable on most occasions. Often, indeed normally, the witnesses have no interest in the document which would not have been of any particular significance to them. The principled reason is that the court will be declining to implement the apparent wishes of the testator. There has, therefore, to be cogent and clear evidence that the Will was not duly executed.

### 6.2. Strongest evidence

The strongest evidence is required to rebut the presumption of due execution. What constitutes the strongest evidence in any particular case will depend on the totality of the relevant facts of the case in the court’s evaluation of the probabilities. The more probable it is, from the circumstances relevant to attestation, that the Will was properly attested, the greater will be the burden on those seeking to displace the presumption as to due execution. However, if the evidence of due attestation is weak, the burden of displacing the presumption may be more easily discharged (*Channon v Perkins*, paras. 45 to 47).

### 6.3. Evidence as to due execution questionable

Due to the strength of the presumption of due execution, the



court may uphold a will, applying the presumption of due execution, even where the evidence of the attesting witnesses casts doubt on whether there has been due execution.

In *Sherrington v Sherrington* [2005] WTLR 587 an issue arose as to whether the witnesses attested and signed the Will in the presence of the testator in accordance with s. 9(d)(i) of the Wills Act 1837. As a matter of law it is necessary that the witnesses should intend by their signatures to attest that the testator signed or acknowledged his signature in their presence. There was some (weak and inconsistent) evidence that one, or perhaps both, of the witnesses had not intended to attest the testator's signature. However, in the absence of the strongest evidence, the intention of the witness to attest is inferred from the presence of the testator's signature on the Will (particularly where there is a duly executed attestation clause). On the facts of the case, the evidence was far from being the strongest evidence necessary to rebut the presumption of due execution. The Will was upheld.

In *Channon v Perkins* [2006] WTLR 427 a Will was upheld despite evidence from the witnesses that they could not remember signing the Will as witnesses. The Will had a regular attestation clause and appeared on its face to have been duly signed by the testator and the witnesses. The presumption of due execution applied and was not rebutted by the strongest evidence. 7 years had passed by the time that the witnesses gave evidence, with the result that they may simply have forgotten.

In *Kentfield v Wright* [2010] EWHC 1607 (Ch) the Will was regular on its face and contained an attestation clause stating that it was signed in the presence of both witnesses. The strongest evidence was, therefore, necessary to rebut the presumption of due execution. One of the witnesses gave evidence that the other witness was not present when the deceased signed the Will. The other witness did not recall the details, but insisted that she would not have signed unless the deceased had signed in the presence of both witnesses. This evidence was not sufficiently strong to rebut the presumption of due execution. The court found, on the basis of all the evidence, that both witnesses were present when the deceased wrote and signed the Will, and both signed the Will at the same time in the deceased's presence.

The above cases were ones in which the witnesses to the Will, at trial, to a greater or lesser extent cast doubt as to whether it had been executed as stated in the attestation clause. Nevertheless, it was held that the court could not accept that evidence as reliable in the face of their contemporaneous declarations set out in the attestation clause.

#### **6.4. Prior inconsistent statements by witnesses**

The court may uphold a Will even where one or more of the attesting witnesses have made positive statements as to facts which are inconsistent with due execution, but they subsequently give evidence that there was due execution.

In *Poole v Everall* [2016] WTLR 1621 both attesting witnesses had originally stated in correspondence that one of them had not

been present when the testator signed the Will (although they both subsequently gave evidence that the Will had been duly attested). The court held that the presumption in favour of an apparently duly executed Will is very strong. It was right for the claimant to submit that the witnesses' explanations did not make sense. However, all the positive evidence supported the position that both had been present on the relevant date, and in those circumstances, whatever doubts there were about their credibility, it could not be said that there was "the strongest" evidence against due execution. The court was bound to find that the Will was duly executed.

#### **6.5. Evidence at court from witnesses that defective execution**

*“In some cases, one or more of the witnesses have given evidence to the court that the Will was not duly executed, but the Will has nonetheless been upheld.”*

In some cases, one or more of the witnesses have given positive evidence at court that the Will was not duly executed, but the Will has nonetheless been upheld.

In *McCabe v McCabe* [2015] EWHC 1591 (Ch) there was evidence from one of the witnesses that he had not signed in the presence of the testatrix. However, the Judge was satisfied to a high degree of probability, even without applying the presumption of due execution, that the Will was properly executed and witnessed by both witnesses as the attestation clause suggested, and as was confirmed by the beneficiary of the Will and by the other witness, a consultant physician. The witness in question must have been "very seriously mistaken in his professed recollection". In any event, the evidence was wholly inadequate to displace the strong presumption in favour of due execution.

In *Briscoe v Green* [2006] EWHC 2116 (Ch) the court accepted the evidence of the executor and beneficiary of a Will that the witnesses were together with the testator when he signed the Will, and that the witnesses signed the Will in the testator's presence. That finding was made even though the attesting witnesses had given evidence that they were not both present when the Will was executed. The court accepted the evidence of the executor/beneficiary, finding that the witnesses must have been mistaken.

#### **6.6. Presumption of due execution rebutted**

The presumption of due execution may be rebutted by all the evidence. In *Singh v Ahluwalia* [2011] EWHC 2907 (Ch) (confirmed on appeal: [2012] EWCA Civ 1635) it was accepted that the strongest evidence was required to rebut the presumption of due execution arising from a Will containing an attestation clause and the signatures of the attesting witnesses. However, the presumption was rebutted. One of the witnesses gave evidence, which was accepted, that he had not signed the document for the deceased in the presence of any other person, that he had not seen the attestation clause on the document before he signed it, and that the deceased had folded over the two-page document just enough to sign it and in such a way as to obscure the attestation clause.

In *Royal National Institute for Deaf People v Turner (Re Whelen)* [2015] EWHC 3301 (Ch) the Judge accepted the evidence of both

witnesses that the testatrix had not signed the Will in the presence of them both, and that she had not been present when they attested her Will. Indeed, the witnesses' evidence was that they had never seen the testatrix, and thought that they had witnessed the beneficiary's own Will. The strength of the presumption of due execution was at the lower end of the scale. The Will was home-made, and the witnesses were ignorant of the necessary formalities. Despite forgetting the finer details, the witnesses had not forgotten the circumstances of execution altogether and had remembered the important parts. Their recollection constituted sufficiently strong evidence to rebut the presumption of due execution.

The presumption may be rebutted by the evidence from the surrounding circumstances, especially if the evidence of the attesting witnesses is unavailable (*Mason v Robinson* [2019] EWHC 4055).

## 6.7. No presumption if irregularities

The presumption of due execution may not arise if there are irregularities relating to execution. In *Lim v Thompson* [2009] EWHC 3341 (Ch) the evidence of the witnesses to the purported Will indicated, at best, that the witnesses had attested a copy of a Will. The Judge pointed out that the burden was upon the party who wished to assert that a Will had been duly executed. He said (at para. 26):

*The circumstances in this case are of such suspicion that no presumption of due execution arises and I am not prepared to infer that everything was regular in this highly irregular chain of events ... One is left with the very clear impression that Mrs Lim has concocted these documents to serve her own purposes. It is not strictly necessary for me to go that far because the burden is upon her to prove due execution and she has manifestly failed to do so.*

## 6.8. Forgery

The reported cases display a reluctance to find that the testator's signature has been forged, mainly because of the seriousness of an allegation of forgery and the difficulty of proof.

In *Fuller v Strum* [2002] 1 WLR 1097 a joint handwriting expert found that there was very strong positive evidence of forgery. However, the trial Judge declined to make a finding of forgery, since that would have involved a conclusion that the persons present when the Will was allegedly signed had been guilty of fraud. There was no appeal from this aspect of the judgment.

In *Wyniczenko v Plucinska-Surowka* [2005] EWHC 2794 one expert concluded that there was very strong evidence that the testatrix's signature had been forged; the findings of the other expert were inconclusive. The Judge stated that there was a real possibility of forgery, but that he was not satisfied on the balance of probabilities that the Will was forged by the sole beneficiary. The burden of proof of forgery lay on the person seeking to claim forgery, and the civil standard of proof, on the balance of probabilities, was capable of accommodating the instinctive

*“The reported cases display a reluctance to find that the testator’s signature has been forged, mainly because of the seriousness of an allegation of forgery and the difficulty of proof.”*

feeling that a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

In *Barrett v Davies* [2007] All ER (D) 267 a Will was challenged on the grounds of the alleged forgery of the testator's signature. The claimants relied upon the evidence of a registered forensic practitioner. The court upheld the Will. Although proper weight had been given to the expert evidence, the evidence of the defence witnesses of fact had been compelling.

#### **6.8.1. Finding of forgery**

The court may make a finding of forgery where the expert evidence is that the testator's signature was likely to have been forged, and there is other evidence to support that conclusion. That was the case in *Vacciana v Herod* [2006] WTLR 367 where neither the defendant executor nor the attesting witnesses attended at trial.

In *Bhagal v Kaur*, Lawtel, 15 Feb. 2014, the handwriting expert opined that there was "moderate evidence" that someone other than the testator had signed the Will. The evidential burden was on the person applying to set aside the Will to assert that the testator's signature was a forgery. There was an absence of any evidence from the attesting witnesses. The party upholding the Will had failed to explain the absence of the attesting witnesses, even though one was traceable. There was other evidence which made it inherently unlikely that the testator had executed the Will. In effect, the court found that the testator's signature had been forged.

#### **6.8.2. Expert evidence**

The above cases illustrate that the evidence of handwriting experts in forgery claims is not necessarily conclusive. Such expert evidence does not take into account circumstantial evidence as to the likelihood that the testator would have executed the Will. It may be difficult to assemble a sufficiently large number of undisputed original, comparable, signatures. Ill health may affect the signatures. Handwriting experts use a 7 or even a 9-point scale to represent their findings, ranging from conclusive or strong evidence that the signature is genuine, through moderate, to weak. The expert's conclusions are also seldom expressed to be conclusive. The experts can disagree fundamentally.

Furthermore, the evidence of lay witnesses is primary, and expert evidence secondary. In *Supple v Pender* [2007] WTLR 1461 the handwriting evidence was to the effect that there was strong positive evidence that the testator's signature was not genuine. The Will had been witnessed by two witnesses, only one of whom (T) gave evidence at trial. It was held that the proper approach was to consider first the evidence of T, in conjunction with the evidence of other witnesses of fact. If that evidence was accepted, then the Judge stated that he would be minded, irrespective of the expert handwriting opinion, to pronounce in favour of the Will. The Judge concluded that he could not place reliance on T's evidence, much of which was untrue. The handwriting evidence fortified the conclusion that the signature

*"The evidence of handwriting experts in forgery claims is not necessarily conclusive."*

of the testator was a forgery.

#### **6.9. CPR 57.7(5)**

A person wishing to question whether a Will was duly executed may give notice of their intention to cross-examine the attesting witnesses on the issue of execution (or, indeed, knowledge and approval) if there are reasonable grounds for opposing the Will.

CPR 57.7(5) applies in probate claims where the validity of a Will is called into question. That rule provides that:

- (a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will.
- (b) If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will.

However, such costs protection is of limited application as it will not apply if:

- (a) the defendant makes a positive case;
- (b) the defendant cross-examines any witness other than the attesting witnesses;
- (c) the defendant calls his own witnesses; or
- (d) there are no reasonable grounds for opposing the Will.

Given these limitations, it may be impossible to overcome the presumption of due execution (see *Breslin v Bromley*, reported on the issue of costs at [2015] EWHC 3760 (Ch)) or the presumptions of testamentary capacity and/or knowledge and approval (see *Elliott v Simmonds* [2016] EWHC 732 (Ch)).

In *Breslin v Bromley* the 1st defendant made a positive case that the Will had not been duly executed. The 2nd defendant relied upon CPR 57.7(5), with the result that she was unable to raise a positive case. Her Counsel only went so far as to make observations on the evidence. He did not cross-examine a non-attesting witness. The Will was upheld.

The 2nd defendant obtained a measure of costs' protection. She had not made a positive case, and it was not unreasonable for her to have opposed the Will as one of the witnesses had given a statement (subsequently retracted) to a retired police officer that neither the testatrix, nor the other witness, was present when he attested the testatrix's signature. The 2nd defendant was not ordered to pay the claimant's costs. However, this might be regarded as small comfort as the Will was upheld, and the 2nd defendant was liable for her own costs.

#### **7. KNOWLEDGE AND APPROVAL AND UNDUE INFLUENCE**

### 7.1. Differences

Undue influence typically arises where a testator makes a Will knowing and appreciating what they are doing, but does so not as a free agent but instead as a result of improper pressure from a third party (*Ashman v Thomas* [2017] EWHC 3136 (Ch), at para. 44). Approval does not, therefore, necessarily connote free consent in its fullest form, merely an understanding that the Will sets out the testamentary intentions to which the testator intends to give effect by execution. Conversely, a testator may not know and appreciate what is in the Will, but that may be the result of a mistake rather than undue influence. The claims are, therefore, conceptually distinct.

### 7.2. Overlap

There is some overlap between want of knowledge and approval and undue influence. The suspicion requiring evidence of the testator's knowledge and approval is often that the testator may have been coerced into executing the Will. A finding of lack of knowledge and approval may mean that such a suspicion has not been removed. Indeed, there is no objection to a party alleging want of knowledge and approval pleading facts and matters which might support a claim of undue influence and also to cross-examine on such matters (*In the Estate of Fuld, decd.* (No. 3) [1968] P 675, 722C-F; *Re Stott* [1980] 1 WLR 246).

However, there is authority to the effect that, if it is intended to allege undue influence, such an allegation should be pleaded in plain and unambiguous terms. Allegations of a homosexual relationship between the testator and beneficiary were struck out in *R (Deceased), Re* [1951] P 10 on the basis that they did not raise a suspicion relating to the preparation and execution of the Will; it was accepted that they could be relevant to a plea of undue influence, but no such claim was made.

A claim of coercion should not, therefore, be dressed up as one of want of knowledge and approval. That would reverse the burden of proof. There is no onus on those seeking to propound a Will to prove that the Will was not procured by undue influence (*Walters v Smea* [2008] EWHC 2029 (Ch), para. 130).

### 7.3. Independent approval

There is also a link between the two claims in that the testator must not be the cipher of another but must exercise his or her own judgment. In *Key v Key* [2010] EWHC 408 (Ch) the testator was, by reason of his bereavement, suggestible in apparently agreeing to his daughter's assertion that his existing Will was unfair and that it should be changed in favour of his daughters. Accordingly, he did not know and approve of the Will. There was no claim of undue influence, no doubt because susceptibility to another's suggestions does not amount to submission to coercion.

However, a party suspecting undue influence should not in all cases be able to fall back on a claim of want of knowledge and approval, where undue influence cannot be proved. Arguably,

*“There is some overlap between want of knowledge and approval and undue influence.”*

*Key v Key* the Will was wrongly decided on the issue of knowledge and approval. The Will was set aside on the grounds of testamentary capacity in any event, as the testator was suffering from a condition which impacted on his capacity to make an independent judgement. Arguably, the Will should not also have been invalidated on the alternative ground of want of knowledge and approval due to the testator's suggestibility, where there was no evidence of the actual exertion of undue influence.

#### 7.4. Combined claims

Often claims of undue influence and want of knowledge and approval will be combined in one action. As they cover common ground, both claims may succeed, or both fail. The claim of want of knowledge and approval should, logically, be considered first (*Gill v Woodall* [2010] Ch 380, para. 13).

In *Ashman v Thomas* [2017] EWHC 3136 (Ch), para. 44, the Master commented that the case on undue influence did not sit easily with the case on want of knowledge and approval. There was evidence of bullying and mistreatment of the testator by the main beneficiary. The Master found against the Will on the grounds of want of knowledge and approval, and commented that, as a result, the issue of undue influence did not come into play and there was no need to set aside the Will on that ground too. If, however, the deceased had known and approved of the contents of the Will, the Will would have been set aside on the grounds of undue influence. In short, a Will is not likely to be set aside on the grounds of both want of knowledge and approval and undue influence, but one or the other.

#### 7.5. Undue influence the better claim

It should not be assumed that want of knowledge and approval is necessarily easier to prove than undue influence. If the Will has been read by a solicitor and its terms explained, there is a very strong presumption that its terms represent the testator's intentions (*Gill v Woodall* [2010] Ch 380, para. 14). There may also be evidence from the attesting witnesses which confirms the testator's knowledge and approval (as in *Hart v Dabbs* [2001] WTLR 527). However, the Will may nonetheless have been procured by undue influence.

In *Schrader v Schrader* [2013] EWHC 466 (Ch) a claim of undue influence succeeded on the basis of cogent evidence of coercion; but that of want of knowledge and approval was rejected as instructions had been given to a solicitor which were accurately recorded, and the Will had been read over properly before execution. In *Schomberg v Taylor* [2013] EWHC 2269 (Ch) a claim of undue influence succeeded. No claim of want of knowledge and approval was made, presumably because the Will was prepared by a solicitor on the testatrix's instructions.

#### 7.6. Want of knowledge and approval the better claim

Want of knowledge and approval may be the easier claim, e.g. if a solicitor or other independent witness is not involved in the preparation of the Will.

*“It should not be assumed that want of knowledge and approval is necessarily easier to prove than undue influence.”*

In *Fuller v Strum* [2002] WLR 1097 one of the beneficiaries (the claimant) had played a major role in the preparation and execution of the Will which, he claimed, was dictated to him by the testator. No solicitor was involved. The Will diverted a significant part of the estate to the claimant away from the testator's next of kin. The testator left the residue of the estate to his adopted son stating in the Will expressly (and uncharacteristically in the view of the Judge) that he did so "very grudgingly" and that "I hate him like poison, that Irish bastard".

A claim was advanced by the adopted son on the grounds of suspicious circumstances, thereby throwing the burden onto the claimant to prove knowledge and approval. The want of knowledge and approval claim was ultimately unsuccessful on appeal. However, there was no claim of undue influence (even though this may have been the true complaint) presumably because this would have been more difficult to establish.

#### 7.7. **Gill v Woodall**

*Gill v Woodall* [2010] Ch 380 illustrates the difficulty of choosing between want of knowledge and approval and undue influence in a case where the evidence does not quite fit either head of claim.

Mr and Mrs Gill made Wills in matching terms leaving their property to the survivor and, in default of survivorship, to the RSPCA. The Wills contained a declaration that no provision was being made for their daughter (their only child) because she had been well provided for over a long period of time. Mr Gill died first. On Mrs Gill's death her residuary estate (worth £1m) passed under her Will to the RSPCA. The main asset of the estate was a farm of which Mr and Mrs Gill had been joint tenants.

The terms of the Will were surprising since Mrs Gill got on well with her daughter, who had not only given her considerable personal support, but had, together with her husband, done significant work on her parents' farm, unpaid, for which Mrs Gill had expressed her gratitude.

Mrs Gill had also made disparaging remarks about the RSPCA whom she had described as "a waste of time" and "a bunch of townies". The idea of benefiting the RSPCA at the expense of the daughter clearly came from Mr Gill, who for some mysterious reason had taken against his daughter. He was a domineering and bombastic character.

Mrs Gill suffered from an extreme form of agoraphobia which made her anxious and fearful when leaving home. She had executed the Will at the offices of the solicitor who had prepared the Will. The solicitor had read the Will to Mrs Gill, who had indicated her approval. The solicitor did not know that Mrs Gill suffered from agoraphobia. After Mr and Mrs Gill had executed their Wills, Mrs Gill had told her daughter that she and Mr Gill had left each other the farm, but said nothing about the gift of her estate to the RSPCA.



*“It seemed most unlikely that Mrs Gill would have wanted to disinherit her daughter in favour of the RSPCA.”*

The daughter challenged Mrs Gill’s Will on a number of grounds, including want of knowledge and approval and undue influence. The main asset of Mrs Gill’s estate was a farm, of which Mr and Mrs Gill had been joint tenants.

### **7.7.1. The dilemma**

It seemed most unlikely that Mrs Gill would have wanted to disinherit her daughter in favour of the RSPCA. It was, therefore, likely that either:

- (a) she had known what was in the Will, but had been unduly influenced by Mr Gill to leave nothing to her daughter against her wishes; or
- (b) she had not understood that she was leaving her estate to the RSPCA, and not to her daughter, if she survived Mr Gill.

The difficulty facing a want of knowledge and approval claim was that the Will had been read to and explained to Mrs Gill by a competent solicitor, and that Mrs Gill had indicated that she agreed its contents. The difficulty facing an undue influence claim was that there was little or no direct evidence that Mr Gill had actually coerced Mrs Gill into making a Will against her wishes.

### **7.7.2. First instance decision**

The trial Judge decided the claim in favour of the daughter on the basis of undue influence, rejecting the want of knowledge and approval claim. He found that Mr Gill had directed his domineering and bombastic personality to Mrs Gill, utilising her anxiety and fear of his explosive character, and of the possibility of her losing his financial support upon which she was so dependent, to coerce her into making the Will which she did. These fears, combined with her timid and shy personality, her traditional deferment to him, and the severe anxiety consequent upon the agoraphobia from which she suffered, unduly influenced her to make the Will that she did. However, the Judge’s finding of undue influence appears to have been an inference as to what must have happened. There was no direct evidence that Mr Gill had actually exercised coercion.

The Judge rejected the want of knowledge and approval claim. He accepted that there were suspicious circumstances, but found that the suspicions were rebutted, largely on the basis that the Will had been read to Mrs Gill by the solicitor, and she had stated that she approved its terms.

### **7.7.3. Court of Appeal**

The Court of Appeal decided the case in favour of the daughter on the basis of want of knowledge and approval, not undue influence (on which they expressed no view).

Mrs Gill suffered from a severe anxiety disorder, agoraphobia (of which the solicitor was unaware) which rendered her fearful when she left home, and when in contact with strangers, and which was likely to have inhibited her ability to concentrate and absorb information. The Judge had accepted expert evidence that

Mrs Gill would have experienced severe anxiety (at least 8 on a scale of 0 to 10) which would have impacted on her ability to concentrate, take in and commit to memory what was said to her by the solicitor. She would have done whatever she could to bring the meeting with the solicitor to a conclusion so that she could return home.

The solicitor had not read out the Will in manageable chunks. He had read it out in one go. Mrs Gill may, therefore, have understood that she was giving her estate to Mr Gill, if he survived her (the first bit), but not that she was giving her estate to the RSPCA, if she was not survived by Mr Gill (the second bit).

This does rather look like a case where the real complaint is undue influence, but proof is lacking. Due to the difficulty of proving undue influence, resort is had to want of knowledge and approval, even though there is evidence pointing to knowledge and approval. Alternatively, the proper claim might have been one based on the testatrix's incapacity to understand the Will by reason of her agoraphobia.

## **8. KNOWLEDGE AND APPROVAL AND CAPACITY**

### **8.1. Relationship**

There is an obvious overlap between knowledge and approval or actual understanding, on the one hand, and testamentary capacity or capacity to understand, on the other. The former relates to actual understanding, the latter to capacity to understand. For that reason, both claims are often pleaded together. Indeed, both claims may be upheld (as in *Williams v Mugadza* [2015] EWHC 4285 (Ch)) or both rejected (see *Edkins v Hopkins* [2016] EWHC 2542 (Ch)).

It might seem to be a truism that incapacity to understand will always mean that actual understanding is lacking. Indeed, it has been said that testamentary capacity is a prerequisite to knowledge and approval because if the former is not shown, there is no need to look for the latter (*Perrins v Holland* [2011] Ch 270, para. 31). Lack of a capacity to understand will usually mean that there is no actual understanding (as in *Re Ashkettle* [2013] EWHC 2125 (Ch) where the testatrix had been suffering from a progressive form of dementia and was unable to communicate in any meaningful way). As Briggs J said in *Key v Key* [2010] EWHC 408 (Ch) at para. 16 a conclusion that a testator lacks capacity necessarily compels a conclusion that he did not know and approve the contents of his Will.

However, there are cases where a testator lacks full testamentary capacity, but nonetheless knows and approves of the contents of the Will (see para. 8.2 below).

Evidence of lack of actual understanding does not necessarily equate to incapacity to understand. The testator may be capable of understanding if an appropriate explanation is given (see para. 5.16 above). However, evidence of lack of understanding may: (1) be some evidence of a lack of capacity to understand the relevant facts or concepts and/or (2) evidence that the person concerned did not know and approve the contents of the Will (*Costa v Germain* [2019] EWHC 3324 (Ch), para. 38).

*“Testamentary capacity is a prerequisite to knowledge and approval because if the former is not shown, there is no need to look for the latter.”*

## 8.2. Knowledge and approval but no capacity

It has been accepted that, in some cases, a testator may have knowledge and approval, even in a case where he or she lacks capacity (*Markou v Goodwin* [2013] EWHC 4570 (Ch), at para. 55). Modern authorities recognise that a clear distinction is to be drawn between testamentary capacity and knowledge and approval. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made (*Perrins v Holland* [2011] Ch 270, at para. 64). Knowledge and approval of a Will simply connotes acceptance of its contents, which does not require full capacity (*Perrins v Holland* at para. 28).

Indeed, in *Battan Singh v Armichand* [1948] AC 161, at 170, the Privy Council expressly recognised that a testator may have a clear apprehension of the meaning of a draft Will submitted to him and may approve it, and yet if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations, and if that forgetfulness is an inducing cause of his choosing strangers to be his legatees, the Will is invalid.

*Markou v Goodwin* illustrates this very point. The testatrix made a Will giving half of her property to a neighbour. The Judge accepted that the testatrix wished to make the gift out of gratitude to her neighbour for care that she had received and that, accordingly, she knew of and approved the gift. However, for a Will to be upheld, it is not enough to say that the testator wished to benefit the person who was in fact benefited. It must also be shown that no mental disorder or, in modern language, cognitive impairment, prevented her from having in mind all the other claims and considerations which she should properly have in mind. This did not just mean recalling who else might be potential beneficiaries, but also a capacity to understand the nature of their claims. The Judge was not persuaded, on the balance of probabilities, that this was the case.

## 8.3. Capacity but no knowledge and approval

It is possible that the testator had testamentary capacity, but nonetheless did not know and approve of the contents of their Will, e.g. if the testator retained only borderline capacity, and there is insufficient evidence of actual knowledge and approval.

In *Catling v Catling* [2014] EWHC 180 (Ch) the court held that the testatrix lacked testamentary capacity. Given that conclusion, the issue of knowledge and approval did not arise. However, the court noted a number of findings of facts which would have been sufficient to set aside the Will on the grounds of want of knowledge and approval even if it had found that she had testamentary capacity. The solicitor's Will file contained no instructions for the Will, and the Will was not read out in full.

A similar conclusion was reached in *Williams v Mugadza* [2015] EWHC 4285 (Ch). The testatrix was held to have lacked capacity

due to dementia and considerable memory loss. However, if that was wrong, and given the doubts as to the testatrix capacity, the court's suspicion was aroused by the fact that the sole beneficiary made the appointment to make the Will; there was no solicitor's attendance note on the date of execution; and the witnesses to the Will had not given any evidence. The court concluded that the testatrix did not know and approve of the terms of her Will.

#### 8.4. Hawes v Burgess

*Hawes v Burgess* [2013] EWCA Civ 74 illustrates the difficulty which may sometimes arise in determining whether the better claim is that the testatrix lacked capacity, or that she had capacity, but did not know and approve of the contents of the Will.

Mrs Burgess was 77 and was suffering from dementia of modest severity. She suffered from high blood pressure, was diabetic, and had probably suffered a stroke. She made a Will leaving her estate to her two daughters, excluding her son, Peter, with whom she was on good terms. There were alternative claims of lack of capacity and want of knowledge and approval.

The difficulty facing the incapacity claim was that the Will was prepared by an experienced solicitor who was satisfied as to the testatrix's capacity. The difficulty facing a want of knowledge and approval claim was that a solicitor read the draft Will to Mrs Burgess and explained its meaning.

The incapacity claim was upheld at first instance, in large part on the basis of expert evidence that Mrs Burgess was suffering from dementia. The Judge also upheld the want of knowledge and approval claim (if she was wrong on the incapacity claim).

However, the Court of Appeal expressed considerable doubt as to whether evidence of lack of capacity from a medical expert who had never actually met or examined the testatrix would be sufficient to trump evidence of capacity from the solicitor who had prepared the Will. It did not express a concluded view on incapacity. Instead, it preferred to decide the case on the basis of want of knowledge and approval. The solicitor had not taken some essential precautions which were appropriate in the case of an elderly testatrix of diminished mental capacity who might be susceptible to undue influence. He had not sent a draft of the Will to the testatrix to read it in advance. One of the daughters was the controlling or driving force in giving instructions to the solicitor, and was present when instructions were given and when the Will was explained to Mrs Burgess. That daughter had fallen out with Peter, and felt that he did not need, or deserve, part of his mother's inheritance. The daughter had also given false information to the solicitor.

Thus, a testator may suffer from diminished capacity, not necessarily amounting to full testamentary incapacity; but there may be grounds for suspecting that the Will did not genuinely represent the testatrix's independent wishes, rather than the wishes of a beneficiary. If a solicitor fails to take proper steps to bring home the contents to the testator and/or to ascertain the testator's independent wishes, the Will may be set aside on the

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grounds of want of knowledge and approval.

#### **9. UNDUE INFLUENCE AND INCAPACITY**

There is nothing inconsistent in claiming lack of testamentary capacity and undue influence (and, indeed, want of knowledge and approval). However, if the testator is found to have lacked capacity, there is no need to consider undue influence (which assumes capacity).

If the testator suffered from mental or physical frailty, that may support a claim of undue influence. There may be evidence that the testator had diminished capacity, and was the victim of coercion in an attempt to take advantage of such diminished capacity. Indeed, there may be expert, medical evidence that, by virtue of such frailty, the testatrix was particularly susceptible to being influenced (as in *Wilkes v Wilkes* [2006] WTLR 1097).

#### **10. DUE EXECUTION AND OTHER CLAIMS**

In some cases, there may be a suspicion of forgery, or that the Will was not duly executed. However, the strongest claim may be want of knowledge and approval, or even incapacity.

In *Murrin v Matthews* [2006] EWHC 3419 there was no satisfactory evidence as to the circumstances in which the Will was executed. The witnesses could not be identified. It was probable that the Will had been prepared by the sole beneficiary. However, the signature of the testatrix appeared to be genuine. The Will was set aside on the grounds that there was no evidence that the testatrix's signature had been duly witnessed. No doubt, a claim of want of knowledge and approval would also have succeeded, if it had been made. The claims are natural bedfellows. Indeed, there are "plainly related" considerations with regard to both heads of claim (see *Mason v Robinson, Re Relton* [2019] EWHC 4055 (Ch) where a Will was set aside on the grounds of lack of due execution, alternatively want of knowledge and approval).

In *Re Christou* [2014] EWHC 79 (Ch) an unsuccessful claim was made to invalidate the Will on the grounds of either forgery or want of knowledge and approval. In *Sherrington v Sherrington* [2005] WTLR 587 both claims were made. The trial Judge found against the Will on both grounds; the Court of Appeal rejected both claims.

In *Couwenbergh v Valkowa* [2008] EWHC 2451 (Ch) the presumption of due execution was not rebutted, despite evidence from the witnesses which cast doubt on whether the Wills in question had been duly executed. The court instead set aside the Wills on the grounds of incapacity.

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