# LITIGATING THROUGH THE GREY ZONE: THE LAW OF TESTAMENTARY CAPACITY

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> *We must not render it impossible for old people to make wills of their little worldly goods. The eye may grow dim, the ear may lose its acute sense, and even the tongue may falter at names and objects it attempts to describe, yet the testamentary capacity be ample.*
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> *To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.*[1]
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> Justice Idington in *Laramée v. Ferron* (1909) (SCC)

## INTRODUCTION

It is estimated that approximately 44 million people around the world suffer with some form of dementia. By 2050, that number is estimated to increase to 135 million.[2] The problem of dementia is so prevalent that in December 2013, dementia was a topic for a G8 summit hosted by the United Kingdom. At that time, G8 leaders committed to finding a cure or an effective treatment of the disease by 2025. Until such time, as litigators, we can expect to see an increase in will challenges based on claims of testamentary incapacity.

We titled this paper "Litigating through the Grey Zone" to refer to this particular area of law which is said to be misunderstood[3] and in which the application of the legal principles is not predictable (because the best evidence, that from the testator, is unavailable). We hope this paper expounds the critical components of the

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1 (1909), 41 SCR 391 at paras 55, 56 [*Laramée v. Ferron*].

2 "Dementia Summit Goals" (December 11, 2013) online: CBC <http://www.cbc.ca/player/News/TV+Shows/The+National/Health/ID/2423840215/>.

3 The principles in this area of law have been thought to be confusing but in our view have been clarified over time.

law in Canada, illustrates the challenges and issues in this area, as well as explores the possibility for improvement.

In Part I of this paper, we discuss the history of and current case law regarding the common law test for testamentary capacity, including: (1) the overarching principle of the law; (2) when capacity is to be measured; (3) the test to challenge the validity of a will; (4) the elements of the test for testamentary capacity; (5) related issues of knowledge and approval, suspicious circumstances and undue influence; (6) the types of evidence used to demonstrate testamentary capacity, or lack thereof, in court proceedings; and (7) how the test for testamentary capacity compares with other capacity tests. We hope that this review will not only guide the reader in litigation but also illustrate that this area of law should evolve as the life expectancy of individuals increases and medical developments become more advanced. As such, there is room for change and improvement in this area of law.

In Part II of this paper, we consider a mechanism by which a testator can ensure, during his[4] lifetime, that his testamentary autonomy and intentions will be respected. In doing so, we have introduced the concept of obtaining a "testamentary declaration" and we examine the US experience that permits *ante mortem* (Latin meaning "before death") probate. We advocate that a testator should be allowed to have his testamentary capacity and will validated by the court prior to his death[5] and argue that this procedure should be adopted in Canada.

## I. TESTAMENTARY CAPACITY AT COMMON LAW

### 1. Overarching Principle to Consider in the Law of Testamentary Capacity

In 1909 the Supreme Court of Canada declared that the testator's autonomy and testamentary freedom in deciding who will take his possessions once he has died is an important right, which the courts should be slow to take away.[6] In *Tataryn Estate*, almost 100 years later, the Supreme Court stated the principle as follows:

> In the absence of other evidence, a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for

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4 Use of the pronoun "his" is intended generically to include "her".

5 We recognize that a will does not become the "Last Will and Testament" until death. However, we use the term "will" to describe a document which reflects at the time "the deliberate or fixed and final expression of intention to dispose of property on death." See *Lindblom Estate v. Worthington*, 1999 ABQB 196 (Alta Surr Ct) (regarding the definition of a testamentary document). In addition, the term "testator" is also used to describe a will-maker. Notably, the *Wills, Estates and Succession Act*, SBC 2009, c 13 [*BC Wills, Estates and Succession Act*] which came into force on March 31, 2014 uses the term "will-maker" to describe a person who makes a will.

6 *Laramée v. Ferron*, *supra* note 2; *Calvert (Litigation Guardian of) v. Calvert*, 1997 Carswell 581 (Gen Div) at paras 52, 57 [*Calvert v. Calvert*]; aff'd (1998), 37 OR (3d) 221, 106 OAC 299 (Ont CA); leave to appeal to SCC ref'd [1998] SCCA No. 161.

> an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is not to be interfered with lightly but only in so far as statute requires.[7]

The right of the testator is limited by statute such that the testator must provide support to his spouse and dependants.[8] In Ontario, for example, unless there are dependants, a capable parent (acting voluntarily) can do whatever he or she likes with his or her own possessions, no matter how unfair, mean or selfish.[9] Because the court gives deference to testator autonomy after review of any competing interests such as dependants' relief, a majority of cases involving testamentary dispositions hinge on the testamentary capacity or undue influence of the testator.

The courts endeavour to determine whether the last will and testament was the free act of the testator such that the will was made at a time when the testator was free of undue influence and in possession of a disposing mind and memory.[10] This principle permeates all aspects of this law, including the legal test for testamentary capacity, the evidence examined, the applicable presumptions and the applicable burden of proof.

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7 *Tataryn v. Tataryn Estate*, [1994] 2 SCR 807 at 824 refusing reconsideration or rehearing [1994] 9 WWR Ixxiii [*Tataryn Estate*]; see also *Marquis v. Weston* (1993), 134 NBR (2d) 17 (NB CA) at para 25, leave to appeal to SCC refused, [1993] 3 SCR x. ("the presumption of testamentary capacity is grounded in the doctrine that testators must be free to dispose of their property as they wish. Accordingly courts will not lightly frustrate those wishes — provided, of course, that wish was truly expressed.").

8 *Tataryn Estate*, *supra* note 8.

9 See e.g. *Banton v. Banton* (1998), OJ No 3528 at para 9 (Ont Gen Div) [*Banton v. Banton*]. See also the discussion below regarding eccentric dispositions. Counsel have argued that *Tataryn Estate*, *supra* note 8 and *Cumming v. Cumming* (2004), 69 OR (3d) 398 stand for the proposition that a testator has a moral obligation to provide for his adult, independent children. However, *Tataryn Estate* was based on a 1920 BC Statute, which interpretation included claims of non-dependent adult children. *Cumming v. Cumming* addressed the question of whether a deceased person made adequate support for his dependants. See the discussion in *Verch v. Weckwerth* (2013), 89 ETR (3d) 109 (SCJ) at paras 43-44, aff'd 2014 ONCA 338, leave to appeal to SCC requested June 30, 2014, that dismissed these arguments and concluded that adult independent children do not have a moral claim to assets in an estate. An adult child actually having a "moral claim" is different than a testator remembering who would be expected to benefit under the will and the reasons for such an exclusion. See further discussion below regarding a testator's requirement to understand the nature of claims that may be made by persons he is excluding from the will. See *Wills and Succession Act*, SA 2010, C W-12.2, s 88 [*Alberta Wills and Succession Act*]. The *BC Wills, Estates and Succession Act*, *supra* note 6, provides that adequate provisions must be given to a spouse or children and a court can make such an order it thinks is "adequate, just and equitable in the circumstances". See *Tataryn v. Tataryn Estate*, *supra* note 8 regarding the interpretation of such phrase and the moral claims of adult children.

10 *Spence v. Price*, [1946] OWN 80 at 81-2 [*Spence v. Price*], [1946] 2 DLR 592 at 595 cited in *Re Schwartz*, [1970] 2 OR 61-84 (CA); aff'd [1972] SCR 150 [*Re Schwartz*].

On the other hand, consideration must also be given to protecting the interests of testators who have become vulnerable to delusions, undue influence or fraud which may interfere with their true testamentary intentions.[11] Finally, the courts have recognized the interests of those closest to the testator, particularly his or her immediate family, as the "natural objects" of a testator's bounty.[12]

## 2. Capacity is Time and Task Specific[13]

### (a) Capacity is time specific

A person's level of capacity can fluctuate from time to time.[14] This principle was recognized in *Banks v. Goodfellow*.[15] In that case, Lord Cockburn stated:

> . . . every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of

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11 Testamentary intentions are not musings, questions or wondering. As stated in *George v. Daily* (1997), 115 Man R (2d) 27 (Man CA) at paras 61 and 64: "[61] Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his or her testamentary intention. The law reports are filled with cases in which probate of holographic instruments has been refused because they do not show a present intention to dispose of property on death *Re Gray Estate*, [1958] SCR 392 was such a case . . . [64] The term "testament intention" means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death: *Re Gray*; *Molinary v. Winfrey*, [1961] SCR 91; and *Canada Permanent Trust Co. v. Bowman*, [1962] S.C.R. 711."

12 See Milton D. Green, "Public Policies Underlying the Law of Mental Incompetency" (1940) 38 Mich L Rev 1189 at 1212 ("freedom of testation, like freedom of contract, is restricted by the operation of policies looking toward the protection of the family as a social institution").

13 See *Rishi v. Kakaoutis*, 2011 ONSC 7184, 76 ETR (3d) 39, (Justice P. O'Marra states that capacity is time specific); *Bahry v. Zytaruk*, 2002 ABQB 716, 47 ETR (2d) 1 at para 67, additional reasons relating to costs, 2002 ABQB 858, 2003 ABQB 408 (describes capacity as situation specific); *Petrowski v. Petrowski Estate*, 2009 ABQB 196, 47 ETR (3d) 161, additional reasons, 2009 ABQB 753 [*Petrowski v. Petrowski*] (refers to a book by Dr. Malloy for assessing decision-specific capacity); Kimberley Whaley and Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity", (May 2013) 32:3 Estates and Pensions Journal 214 [Whaley and Sultan].

14 *Palahnuk v. Palahnuk Estate*, 2006 CarswellOnt 2639 (SCJ) at para 4 citing *Knox v. Burton* (2004), 6 ETR (3d) 285 (Ont SCJ); aff'd (2005), 14 ETR (3d) 27 (Ont CA).

15 (1870), LR 5 QB, 549 (Eng QB) [*Banks v. Goodfellow*].

> mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; — that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life.[16]

Subsequent commentators on the case commented that "Lunacy, it is at once apparent, is not regarded under English law as a fixed condition."[17] Over a century later, Canadian jurisprudence is still consistent on this point. For example, in *Palahnuk v. Palahnuk Estate*, the Court commented that "it does not necessarily follow that a person found to be incapable of managing her property is incapable for all time thereafter of possessing the ability to have disposing capacity in relation to her assets for the purposes of a will."[18] Therefore, those suffering from cognitive deficiencies can have "good days" and "bad days" and one's capacity may change from one day to the next.[19] More recently, this legal principle has been under examination and medical evidence suggests that fluctuations in capacity are extremely short in duration (such that the fluctuations are insufficient to allow a testator to regain capacity to execute a will).[20]

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16 *Ibid* at 560.

17 Wilson, Rankine, "*Lunacy in Relation to Contract Tort and Crime"*, (1902) 18:1 Law Quarterly Review 21 at 21–39.

18 *Palahnuk v. Palahnuk Estate*, [2006] OJ No 5304 (SCJ) at para 75 [*Palahnuk v. Palahnuk*].

19 This was referred to as "partial unsoundness, not affecting the general faculties". Where such unsoundness does not operate on the mind of a testator in regard to testamentary disposition, it is not sufficient to render a person incapable of making a will. See *Jenkins v. Morris* (1880), 14 Ch D 674 [*Jenkins v. Morris*] and in the *Estate of Bohrmann*, [1938] 1 All ER 271. Also see Ian Hull and Dr. Nathan Herrman, "Testamentary Capacity and Lucid Intervals: Good Days and Bad Days" (Paper presented at the Law Society of Upper Canada 16th Annual Estates and Trusts Summit, November 11, 2013) [*Hull and Herrman on Good Days and Bad Days*] at 3–6 regarding lucid intervals of a testator where the writers express that the notion of good and bad days has been stretched further — where one can have lucidity of a matter of minutes.

20 *Hull and Herrman on Good Days and Bad Days*, *supra* note 20 at 3–9, 3–10 where the authors state that the concept of 'good and bad days' may have no place in the law of testamentary capacity. The authors further state that good and bad days ". . . is a faulty concept which has been used to imply that the deviation between days can be so severe as to elevate a testator to a level of requisite lucidity to execute a will; when in fact, the change in capacity is much more subtle. . . .'Good and bad days' are simply a reflection of heightened attention and alertness; not of higher level functioning required to validly execute a will."

Generally speaking, there are two relevant time periods during which testamentary capacity is required in will challenges: (1) at the time the will is reviewed and executed;[21] and (2) at the time instructions for the will are given. A court will review the facts before and after the execution of a will. Proven incapacity at a later date does not prove incapacity at the time of execution.[22] Similarly, where testamentary capacity is found to be lacking at the date of execution, a will can still be valid, provided that: (a) the testator had capacity at the time he gave instructions for making the will; (b) the will was prepared in accordance with those instructions; and (c) at the time of execution the testator had capacity to understand and did understand that the will he was signing was a will prepared in accordance with his previous instructions.[23]

If a testator is proven to lack capacity at a later date, the significance of this evidence will depend on how long after the relevant time (the time of instructing or executing the will) the incapacity is shown to exist, and its relationship to matters that have gone on before, or arose at or near the time of the execution of the will.[24]

(b) Capacity is task specific

Capacity is also task specific. This means, for example, that a person can be capable to enter into a marriage but not capable to make a will.[25] One of the earliest indications of the courts' view on capacity being task specific is found in 1828 in the English Ecclesiastical Court. The Court stated:

> [Mental capacity] . . . is a matter of degree, and the degree of weakness differs in the same individual under different circumstances, and according to the different habits existing and the different situations in which he is placed, at one time or another of his life . . .[26]

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21 *Palahnuk v. Palahnuk*, *supra* note 15 at para 67 and *Smith v. Rotstein*, [2010] OJ No. 1527 at para 118 [2011] OJ No. 3075 (CA) (appeal allowed in part regarding costs); aff'd [2011] SCCA No. 411 [*Smith v. Rotstein*].

22 *Eady v. Waring* (1974), 43 DLR (3d) 667 at 678 (CA) [*Eady v. Waring*] citing *Pocock v. Pocock et al.*, [1950] OR 734 at 736 [*Pocock v. Pocock*]; *Smith v. Rotstein*, *supra* note 22 at para 118; *Hoffman v. Heinrichs*, [2012] MJ No. 167 (QB) at para 54; aff'd (2013), 87 ETR (3d) 198 (CA) (where the testator was hospitalized earlier in her life but not near the time of executing her will) [*Hoffman v. Heinrichs*].

23 *Parker v. Felgate* (1883), 8 PD 171 (Eng Prob Div); *Re Davis Estate*, [1932] SCR 407; *Laszlo v. Lawton*, [2013] BCJ No. 337 (BCSC) at para 189 [*Laszlo v. Lawton*].

24 *Eady v. Waring*, *supra* note 23 at 639 cited by *Smith v. Rotstein*, *supra* note 22 at para 118. In *Smith v. Rotstein*, Justice Brown commented that proven incapacity after the will is executed may be a relevant fact where its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself. See also *Hoffman v. Heinrichs*, *supra* note 23 (the Court placed little weight on the evidence of the testator's behavior several years before or several years after the date of the will execution).

25 See the discussion below regarding the different capacity tests.

26 *Countess of Portsmouth v. Earl of Portsmouth* (1828), 1 Hagg Ecc 355 at 362-3.

This principle remains true today. If a person has diminished capacity, this does not necessarily equate to a lack of capacity to make a will,[27] nor does occasional confusion or memory lapses.[28] Consequently, a person who has been diagnosed with dementia may have testamentary capacity.[29]

(c) Delusions[30]

The judicial principle that one can suffer from delusions but still be capable to make a valid will is consistent with the principle that capacity is time and task specific. A delusion has been defined as "a belief which has no basis in reason and cannot be dispelled by argument."[31] For a person who experiences delusions to still have testamentary capacity, the delusion must concern matters unrelated to the elements of testamentary capacity. This principle was discussed in *O'Neil v. Brown Estate*.[32] In that case, the Supreme Court of Canada had to determine the validity of a will where the testator had suffered delusions and hallucinations. She imaged that she heard voices from the grave, that she was smelling gas or dusting powder in her room and that she was tasting poison in her food. The testator resided in an institution. In that case and others, the Court stated that the mere presence of delusions will not invalidate a will unless they constitute "an actual and impelling influence" on it. Conversely, even if a testator has the capacity to manage his affairs in all other respects, a delusion affecting the subject matter of the will, thereby interfering with his ability to satisfy the elements of the test, may lead to a determination that the deceased lacked testamentary capacity. However, "[i]t is not enough to vitiate a will if the testator is delusional. The authorities are clear that only delu-

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27 *Royal Trust Co. v. Rampone*, [1974] 4 WWR 735 at 743 (BCSC) [*Royal Trust Co. v. Rampone*]; *Girard v. Cloutier*, 1991 CarswellQue 54, 43 ETR 97 (suicide on the day a will was made does not reverse the presumption that the testator was capable).

28 *Minkofsky v. Dost Estate*, [2012] OJ No 5011 (SCJ) (Master) at para 63; aff'd 2014 ONSC 1904 (CanLII) (Div Ct) [*Minksofsky v. Dost Estate*]. Similarly, alcoholism of a sufficient extent and duration to cause brain damage may affect testamentary capacity but even a habitual drinker while not under the influence of liquor is capable of making a will: *Lata v. Rush*, [2012] OJ No. 3725 (SCJ) [*Lata v. Rush*].

29 See *Re Ferguson* (1962), 48 MPR 154 (PEISC). Although testamentary capacity is task and time specific, it cannot partially exist. A court cannot find that a person had capacity to dispose of property in one instance, but not in another. We are making a distinction to the situation where the testator did not know and approve of part of the dispositions in the will. We are also making a distinction between partial probate, where a will challenge exists involving multiple testamentary instruments. See *Smith v. Rotstein*, *supra* note 22 at paras 60-61.

30 Entire papers are written on the topic of delusions. For our purpose, we have mentioned delusions only to note how a delusion affects testamentary capacity.

31 *Re Watts*, [1933] 2 DLR 800 at 800 (NBCA); *Banton v. Banton*, *supra* note 10 at para 33.

32 *O'Neil v. The Royal Trust Co and McClure* (1946), SCR 622. See also *Banton v. Banton*, *supra* note 10 at para 63; *Yen Estate v. Yen-Zimmerman*, [2012] BCJ No 2251 (SC); aff'd [2013] BCJ No 2157 (CA) (considers insane delusions).

sions that bear directly on and influence the testator's deliberations may bottom an attack on testamentary capacity."[33]

### 3. The Test to Challenge the Validity of a Will

In a will challenge, the propounder of a will has the burden to prove three things: (1) that the formalities of making the will were complied with;[34] (2) that the testator had testamentary capacity; and (3) that the testator knew and approved the contents of the will.[35] Whether a person has testamentary capacity is a question of fact to be determined by the trial judge.[36]

The propounder of the will is aided in satisfying the burden of proof by the following presumption:

> Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.[37]

Thus, the burden of proving the testator lacked the requisite capacity and/or knowledge and approval of the contents of the will rests with those attacking the validity of the will on such grounds. Although related, "testamentary capacity" and "knowledge and approval" are distinct concepts. While a testator who lacks capacity necessarily fails to know and approve the contents of the will, a testator *with* capacity may still not know or approve the contents of a will where the testator did

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33 *Re Davis* (1910), CarswellNB 68 (NBSC) at para 113 [*Re Davis*] citing *Tufnell v. Constable* (1836), 3 Knapp 122 and *Smee v. Smee* (1879), 49 LJP 8; See also *Fuller Estate v. Fuller*, 2002 BCSC 1571 at para 32; aff'd 2004 BCCA 218 (CanLII). See the further discussion below under the heading "Delusions".

34 There is a body of case law regarding the substantial compliance of formalities. See *Zerbinati v. Zerbinati*, 2013 ONSC 7630 on the Ontario courts' more recent views regarding substantial compliance. For the requisite formalities of a will see also *BC Wills, Estates and Succession Act*, *supra* note 6, ss 37-38; *Alberta Wills and Succession Act*, *supra* note 10, ss 14-15; Saskatchewan–*The Wills Act*, SS 1996, c W-14.1, s 7; Manitoba–*The Wills Act*, SM c W-150, ss 3,4; Ontario–*Succession Law Reform Act*, RSO 1990, c S-26, s 4 [*Succession Law Reform Act*]; New Brunswick–*Wills Act*, RSNB 1973, c W-9, ss 3,4; Nova Scotia–*Wills Act*, RSNS 1989, c 505, s 6; Prince Edward Island–*Probate Act*, R.S.P.E.I. 1988, c P-21, s 60; Newfoundland and Labrador–*Wills Act*, RSNL 1990, c W-10, s 2; Yukon–*Wills Act*, RSY 2002, c 30, s 5; Northwest Territories–*Wills Act*, RSNWT 1988, c W-5, s 5; and Nunavut–*Wills Act*, RSNWT (Nu) 1988, c W-5, s 5.

35 *Hastilow v. Stobie* (1865), LR 1 P & D 64, 35 LJP & M 18; *Baptist v. Baptist* (1894), 23 SCR 37 [*Baptist v. Baptist*].

36 *Smith v. Rotstein*, *supra* note 22 at para 117.

37 *Vout v. Hay*, [1995] 2 SCR 876 at para 26 [*Vout v. Hay*]. A mere allegation of lack of capacity is not sufficient to defeat the presumption of knowledge and approval of the contents of the will. See *Ostrander v. Black*, [1996] OJ No 1372 cited in *Lata v. Rush*, *supra* note 29 at para 33.

not read the will, did not appreciate the nature of his assets or where the will was obtained by fraud or undue influence.[38]

## 4. The Test for Testamentary Capacity

### (a) *Banks v. Goodfellow*

*Banks v. Goodfellow* is the starting point in any discussion of testamentary capacity in Canada and England.[39] In that seminal case, Lord Cockburn enunciated the test for testamentary capacity as follows:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[40]

There was no question on the evidence that John Banks had, for many years, suffered from fixed delusions that he was pursued and assaulted by a particular person (who had long since died) and by devils and evil spirits.[41] Indeed, he had spent many years in a psychiatric institution, and the delusions continued thereafter. Nonetheless, the evidence also demonstrated that Banks was able to transact business and manage his own financial affairs. Banks executed a will which left all of his property to a niece. The question was whether Banks had the requisite testamentary capacity to execute the will.[42]

Lord Cockburn summarized what to look for in assessing testamentary capacity, quoting from the U.S. case of *Harrison v. Rowan*:

> As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be ca-

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38 A testator who clearly understands what he was doing, even if a will was signed in unusual circumstances, will be held to have knowledge and approval of the will. See *Re Prong Estate* (2001), 65 ETR (3d) 48 (SCJ).

39 *Banks v. Goodfellow*, *supra* note 16. The case is cited in testamentary capacity cases today in England, Canada, Australia and New Zealand. See for example, *Jones and others v. Firkin-Flood and another*, [2008] EWHC 2417 (Ch), [2008] All ER (D) 175 (Oct).

40 *Banks v. Goodfellow*, *supra* note 16 at 565. Adopted by Wilson JA in *Re Rogers* (1963), 39 DLR (2d) 141 (CA) at 148-49 [*Re Rogers*].

41 *Ibid* at 551.

42 *Ibid* at 551-552. The Court upheld the jury's finding that Banks' will was valid.

> pable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them.[43]

In 1920, in "Wills of Lunatics", W.G.H. Cook recognized that the expression "sound mind" does not mean a perfectly balanced mind, because "if this were so, no one would be competent to make a will."[44]

Subsequently, in 1944, the Supreme Court of Canada considered the meaning of "disposing mind and memory" in *Leger v. Poirier*. At issue in that case was the validity of a will made where less than two months prior the testator had experienced a rapid failure in her health and a weakening of her mind and memory. "Disposing mind and memory" was described as:

> one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like . . .
>
> Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole . . ..[45]

In 2003, the Ontario Court of Appeal in *Hall v. Bennett Estate* summarized Justice Rand's requirements in *Leger v. Poirier* for a sound disposing mind as follows:

> In order to have a sound disposing mind, a testator:
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> i. must understand the nature and effect of a will;
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> ii. must recollect the nature and extent of his or her property;
>
> iii. must understand the extent of what he or she is giving under the will;
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> iv. must remember the persons that he or she might be expected to benefit under his or her will; and
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> *v.* where applicable, must understand the nature of the claims that may be made by persons he or she is excluding from the will.[46]

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43 *Ibid* at 567 citing *Harrison v. Rowan* (1820), 3 Washington C.C. 580 at 585 (Cir Ct, D. NJ).

44 Cook, W.G. H. "Wills of Lunatics", (1920) 317 Journal of Comparative Legis. & Int'l L. 3d at 318.

45 *Leger v. Poirier*, [1944] SCR 152 at 161 [*Leger v. Poirier*]. Also see *Murphy v. Lamphier* (1914), 31 OLR 287 (Ont HC); aff'd (1914), 32 OLR 19 (Ont CA) at 318 [*Murphy v. Lamphier*].

46 *Re Schwartz*, *supra* note 11 (Laskin dissenting on other grounds); *Hall v. Bennett Estate*, 2003 OJ No 1827, 64 OR (3d) 191 (Ont CA) at para 14 [*Hall v. Bennett*]; *Royal Trust Corp. of Canada v. Saunders*, [2006] OJ No 2291 at para 58; also see *Carlson v. Lazicki*, [2012] SJ No 410 (QB) at para 39 [*Carlson v. Lazicki*].

We briefly consider the case law regarding each of these five elements below.

***(i) The nature and effect of the will***

The testator must understand that he is making a testamentary disposition. A person does not need to understand the will as a lawyer would understand it.[47] However, he needs to know "of his own initiative and volition, the essential elements of will-making . . ."[48] such that the disposition of the estate is made with understanding and reason.[49]

***(ii) The testator must understand the nature and extent of his property***

As early as 1840, the principle that the testator must be able to understand the nature and extent of his property[50] was considered a requirement for a sound mind. This was affirmed by the Supreme Court of Canada in *Baptist v. Baptist*[51] where the testator was found to be in "utter ignorance" of the real amount of her fortune, being under the delusion that her sons had used it and her daughters divided the estate upon their father's death. On the same day she made the will, the testator declared that she did not know what she was doing and similar declarations were made afterwards to various witnesses. The will was declared invalid.

A general appreciation of the nature and approximate value of the estate assets will usually suffice.[52] It has been suggested that the larger and more complex an estate, the greater the appreciation of the nature and extent of the assets required.[53]

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47 *Minkofsky v. Dost Estate*, *supra* note 29 at para 63 (Master).

48 *Leger v. Poirier*, *supra* note 46 at 12.

49 *Ibid* citing *Marquess of Winchester's Case*, 6 Coke's Rep 23.

50 *Harwood v. Baker* (1840), 3 Moo PC 282 [*Harwood v. Baker*].

51 *Baptist v. Baptist*, *supra* note 36.

52 *Laszlo v. Lawton*, *supra* note 24 at para 249. A testator that has limited assets (such as a bank account) has very little to understand: *Machander v. Drader*, [2012] BCJ No. 2087 (SC) at para 56 [*Machander v. Drader*]. In *Moore v. Drummond*, 2012 BCSC 1702 [*Moore v. Drummond*], the testator knew her property consisted of her house and two bank accounts but was unable to accurately recall the current balances of those accounts. She thought she had $25,000 in an account when in fact she had $3,500 in one account and $45,000 in another. Her less than exact understanding was considered adequate. In *Coleman v. Coleman*, 2008 NSSC 396 [*Coleman v. Coleman*], the testator told a doctor that she bought her house for $2,900 sixty years earlier and she would be willing to sell it for $10,000. The house was worth $180,000. The Court concluded that she lacked capacity because it was directly relevant to whether she had a basic understanding of the extent of her assets.

53 For example, if a testator has a private company worth $20 million, it would be insufficient to say that the company is worth $5 million and not explain what makes up such values. However, the testator would not have to have a lawyer's knowledge of the complex share structure. This is distinguished from the situation in *Orfus Estate*, 2011 ONSC 3043 (CanLII) at para 183; aff'd 2013 ONCA 225 (CanLII) [*Orfus Estate*] where the aggrieved beneficiary argued that the testator was passive in her acceptance

Testators are not required to know the exact make-up of their estate nor are they required to have an accountant's[54] or lawyer's knowledge of their estate. They do, however, need to understand that they hold certain types of property and that a disposition in a will would provide a beneficiary with a valuable gift.[55] In *Palahnuk Estate*, the Court articulated the requirement of the testator as follows:

> . . . it is unnecessary for a competent testator to know the precise make up of his entire estate to the last detail. That degree of particularity of knowledge should not be engrafted as additional gloss on the requirement that one recollect the nature and extent of one's property. . . . Testators are not required to be accountants nor to have an accountant's knowledge and understanding of their estate. If such a meticulously demanding standard were required . . . many testators would be unable to meet it.[56]

That said, a person who has little to no understanding of their assets will not have the required capacity to execute a will. However, forgetfulness of a testator to recollect some property will not necessarily suffice to invalidate a will, unless the forgetfulness establishes incapacity to remember sufficient facts to displace illusory notions and beliefs.[57]

***(iii) The testator must remember the persons who might be expected to benefit under his will***

Another part of the "sound mind" test is that the testator must remember the persons who might be expected to benefit under his will. This means that the testator understands the persons who are the "natural objects" of his estate, meaning those whom the community would normally regard as having a claim to the estate. Usually, this refers to family members and individuals who share a close personal relationship with the testator — those who are "the object of his affection and regard", as stated in *Banks*.[58] If a testator meets the sound mind test in all other aspects, his will may still be invalid:

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of the figures provided to her in a complex estate and that her attestation to the figures did not reflect her "true understanding". This was rejected by the Court and was said not to correspond to the evidence of the lawyers who retained accountants and presented the figures to the testator who agreed with such figures and the explained company structure.

54 *Minkofsky v. Dost Estate*, *supra* note 29 at para 63 (Master).

55 *Re Culbert Estate*, [2006] SJ No 648 (QB) [*Re Culbert Estate*] citing *Pike v. Stone* (1999), 179 Nfld & PEIR 218 (NSTD).

56 *Palahnuk v. Palahnuk*, *supra* note 15 at para 82.

57 Such as in *Baptist v. Baptist*, *supra* note 36, Halbury's *Laws of England*, v. 102 (2010) 5th ed. para 49.

58 Also see *Machander v. Drader*, *supra* 53 where the testator lived in a marriage like relationship with Ms. Drader for a year and a half and had openly spoken about intending her to benefit from his will.

> A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of 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 was an inducing cause of his choosing strangers to be his legatees, the will is invalid.[59]

Thus, although it might be unfair, a testator can prevent those expecting to take under the will from doing so as long as he remembers who would expect to take.[60] This is different from a situation where a delusion affects the testator's ability to appreciate the moral claims.

Where a "natural object" of a testator's estate is not included in the will, the courts are interested in the reason for such an exclusion. In *Moore*, a testator disinherited her son in favour of a couple who were her neighbours for 40 years. The testator expressed reasons such as the son only called her once in a while and would visit infrequently.[61] This evidence was consistent with the testator's hostile attitude towards her son. The Court also noted that after the will was made, the testator spoke of the will and its exclusion of her son, showing her memory of his exclusion.

Similarly, in *Orfus Estate*, the testator provided a nominal gift to her daughter because, among other things, she did not visit her despite the fact the daughter lived next door to her mother and the daughter sued her in the wind-up of the family business.[62] The reasons for a testator's exclusion illustrates that not only did the testator remember the family member who expects to inherit, but also reasoned that such an expectation is not deserving because of the manner in which the family member treated the testator in his lifetime.

#### *(iv) The testator must understand the nature of the claims that may be made by persons he is excluding from the will*

A testator must understand the nature of the claims of others whom by his will he is excluding from benefiting from his property.[63] In *Banton v. Banton*[64], this prong of the test was carefully examined because the testator understood the nature

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59 *Battan Singh v. Amirchand*, [1948] AC 161 (PC) at p 170.

60 *Coleman v. Coleman*, *supra* 53 paras 115–117 where there was no evidence that the testator was aware of the legal or moral claims of her family members. The testator must also understand the nature of the claim.

61 In fact, the lawyer's notes showed the testator said that her son did not visit her once in 50 years. Although this was not accurate, the neighbour testified that she had known the testator for 15 to 20 years before she became aware that she had a son. *Moore v. Drummond supra* note 53 at paras 28–32.

62 *Orfus Estate*, *supra* note 54.

63 *Harwood v. Baker*, *supra* note 51. In *Laszlo v. Lawton*, *supra* note 24 at para 260, the Court declared a will to be invalid, in part, because the testator was unable to appreciate at the time the ramifications of the exclusion of the natural objects of her estate.

64 *Banton v. Banton*, *supra* note 10.

and effect of his will and the extent of his property. However, the testator married a 31 year old waitress at the retirement home where he lived and he changed his will to give his entire estate to his young wife with a gift over to a charity. In determining if the testator was subject to undue influence and had testamentary capacity to make a will, the Court considered whether Mr. Banton had the *ability to assess and appreciate* the moral claims of his children. The evidence of the children was that they had their father's best interests at heart and the evidence of the young wife was that the testator complained about his children's treatment of him. The Court concluded that the allegations against the children were not true and they amounted to delusions. The analysis of the insane delusion directly related to the issue of whether Mr. Banton appreciated the moral claims of his children and whether his delusions regarding his children affected his testamentary disposition at the time of the making of his will.

## 5. Suspicious Circumstances and Undue Influence

(a) What are suspicious circumstances?

Suspicious circumstances arise where:

> . . . a person writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and [thus] calls upon [the Court] to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.[65]

In *Vout v. Hay*,[66] Justice Sopinka set out three types of situations which give rise to suspicious circumstances:

> (1) circumstances surrounding the preparation of the will;
>
> (2) circumstances tending to call into question the capacity of the testator; or
>
> (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[67]

Although this categorization has been described as non-exhaustive,[68] notably the categories relate to knowledge and approval, testamentary capacity and undue

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65 *Barry v. Butlin*, [1838] 2 Moo PC 480 at 483.

66 *Vout v. Hay*, *supra* note 38.

67 *Ibid* at para 25. Also, cited in *Re Willis Estate*, 2009, NSSC 231 at para 10. These three circumstances have been transposed to trials of issues. See *Carlson v. Lazicki*, *supra* note 47 at para 54.

68 *Re Quandt Estate*, [2011] SJ No 603 (QB) at para 43 [*Re Quandt Estate*].

influence. Within those three categories of suspicion mentioned, courts consider the following factors to determine if suspicious circumstances are present, including:

> (1) whether the testator is elderly and/or has a serious illness or is experiencing physical or mental disability or deterioration;[69]
>
> (2) whether there have been drastic changes in the personal affairs or behaviours of the testator;[70]
>
> (3) whether the testator has been isolated from family or friends;[71]
>
> (4) whether the testator is unwilling to provide full information to the solicitor relating to the assets, liabilities or family circumstances;
>
> (5) whether the will in question constituted a significant change from former wills;[72]
>
> (6) the factual circumstances surrounding the execution of the will;[73]
>
> (7) the extent to which the testator is dependent on any of the beneficiaries;
>
> (8) whether a beneficiary was heavily involved in the preparation of the will;[74] and
>
> (9) whether the will seems to make testamentary sense.[75]

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69 *Hall v. Bennett Estate*, *supra* note 47 at para 25.

70 *Eady v. Waring*, *supra* note 23.

71 *Kissendal v. Kissendal*, 2013 Carswell Alta 2676 at paras 25–27; *McCullough v. McCullough*, 1997 Carswell Alta 49 (QB) at paras 103-104.

72 *Murphy v. Lamphier*, *supra* note 46 at para 24; *Re Culbert Estate*, *supra* note 56 at para 135 citing Brian Schnurr, Estate Litigation, 2nd ed., vol. 1 Looseleaf (Toronto: Thomson Carswell, 1994, updated 2014) at 2-5; *Re Davis Estate*, [1963] 2 OR 666 (CA) (where the testator lacked capacity where she bequeathed her entire estate to a cancer charity and nothing to her two sisters and the will was a marked departure from two previous wills which had been executed only weeks before the challenged will.)

73 *Re Culbert Estate*, *supra* note 56 at para 135 and *Barr v. Barr* (2012), 78 ETR (3d) 135 (SCJ) at para 18 [*Barr v. Barr*] citing Brian Schnurr, *Estate Litigation*, 2nd ed., vol. 1 Looseleaf (Toronto: Thomson Carswell, 1994, updated 2014) at 2-5. Also see *Carlson v. Lazicki*, *supra* note 47 at para 49.

74 *Re Culbert Estate*, *supra* note 56 at para 135. Also see M. Elena Hoffstein, "How Vulnerable to Attack is a Power of Attorney and Will? Capacity Assessments by the Drafting Lawyer", Law Society of Upper Canada, Special Lectures 2010 at 16-9 to 16-11 [*Hoffstein*].

75 *Re Culbert Estate*, *supra* note 56 at para 135 citing Brian Schnurr, Estate Litigation, 2nd ed., vol. 1 Looseleaf (Toronto: Thomson Carswell, 1994, updated 2014) at 2-5.

Although courts examine each of these factors in order to determine if suspicious circumstances are present,[76] there only needs to be *some* evidence of suspicious circumstances.[77]

(b) The effect of suspicious circumstances on the burden of proof

As described above, the propounder of a will is aided by a presumption that if the requisite formalities are carried out in executing the will, and the will is read by or to the testator, who appears to understand it, the testator is presumed to have known and approved of the contents of the will and also to have had the requisite testamentary capacity.[78] However, this presumption is rebuttable if satisfactory evidence is led by the attacker of the will.[79] In order to satisfy the evidentiary burden, the attacker of the will can show the presence of suspicious circumstances. This rebuts or "spends" the presumption and the propounder of the will must independently establish knowledge and approval and/or testamentary capacity.[80]

Although there has been some confusion in the case law, the existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will.[81] Like all civil litigation matters, the standard of proof to show testamentary capacity is that of a balance of probabilities and the existence of suspicious circumstances does not alter the standard of proof.[82] However, the extent of

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76 *Barr v. Barr*, *supra* note 74.

77 *Re Fawson Estate*, [2012] NSJ No. 61 (SC) at para 198 [*Re Fawson Estate*]. The adducing of "some evidence" was discussed in *Machander v. Drader*, *supra* note 53 where the Court discussed the important aspect that adducing or pointing to some evidence, which if accepted, would tend to *negative testamentary capacity or knowledge and approval*, as the case may be. Therefore, as cited in *Vout v. Hay*, *supra* note 38 at para 25, the question to ask is "suspicion of what?".

78 *MacGregor v. Martin Estate*, [1965] SCR 757 [*MacGregor v. Martin Estate*]; *Vout v. Hay*, *supra* note 38 at para 26. *Dieno Estate v. Dieno Estate* (1996), SJ No 494, 147 Sask R 14 (QB) at para 35 [*Dieno Estate v. Dieno Estate*] cited in *Quandt Estate (Re)*, *supra* note 69; *Scott v. Cousins* (2011), 37 ETR (2d) 113 (SCJ) at para 39 [*Scott v. Cousins*]; *Columbos v. Columbos*, 2014 CarswellOnt 2708 (SCJ) at paras 25-26.

79 *Scott v. Cousins*, *supra* note 79 at para 39 as cited in *Smith v. Rotstein*, *supra* note 22 at para 180. Also see *Leger v. Poirier*, *supra* note 46.

80 *Barr v. Barr*, *supra* note 74 at para 17; *Banton v. Banton*, *supra* note 10 at para 52 (where the Court stated that the presumption is "spent" and not as much "rebutted" as discarded with no further role to play).

81 Counsel often are confused by commentary that states the extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case. See *MacGregor v. Martin Estate*, *supra* note 79 at 766 as cited in *Vout v. Hay*, *supra* note 38 at para 24 and *Scott v. Cousins*, *supra* note 79 at para 47. More recently in *FH v. McDougall*, 2008 SCC 53, the Supreme Court held that there is only one standard of proof in civil cases, that being the balance of probabilities. There are no degrees of probability within that civil standard: cited in *Hoffman v. Heinrichs*, *supra* note 23 at para 34 (QB).

82 *Sorkos v. Cowderoy*, 2006 CanLII 31722 (Ont CA) at para 19; see also *Smith v. Rotstein*, *supra* note 22 at para 180.

the proof or the amount of proof required is proportionate to the gravity of the suspicion. This means that depending on the level of suspicion, the weight of evidence required to satisfy the legal burden of knowledge and approval or capacity may be affected.[83] In other words, the quality and cogency of evidence necessary to satisfy the standard is proportionate to the gravity and degree of suspicion raised by the circumstances.[84] Altogether, the court must be satisfied that the will was the free act of a testator who, at the time, had "a disposing mind and memory."[85]

(c) Undue influence

Undue influence is a species of fraud.[86] Undue influence has been described as a "subtle thing, almost always exercised in secret and usually provable only by circumstantial evidence."[87] It has also been described as something much more than influence but something amounting to coercion. It is when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do.[88] In Williams and Mortimer, *Executors, Administrators and Probate* it is described as follows:

> Thus undue influence is not bad influence but coercion. Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded. Appeals to the affections or

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83 *Scott v. Cousins*, *supra* note 79 at para 47. It has also been articulated as "the burden on the propounder is commensurate with the level or degree of the suspicion". See *Barr v. Barr*, *supra* note 74 at para. 17.

84 Gerald Robertson, *Mental Disability and The Law in Canada*, 2nd ed. (Carswell: Thomson Canada Limited, 1994) at 218-219 [*Robertson*] citing various cases including *Sherman Estate v. Sherman* (1989), 31 ETR 254 (Sask QB); aff'd (1989), 81 Sask R 252 (CA); *Hrycan Estate v. Hrycan* (1986), 49 Sask R 277 (QB).

85 *MacGregor v. Martin Estate*, *supra* note 79.

86 *Boutzios v. Boutzios*, 2004 CanLII 14219 (Ont SC) at para 25. Although undue influence is a species of fraud, in estate matters, allegations of undue influence attract ordinary costs consequences. *Cornwall v. Cornwall* (1908), CarswellOnt 468 (Div Ct) (where the Court dismissed the appeal where the lower court found in favour of the plaintiff that a will was valid although allegations of lack of testamentary capacity and undue influence were made); *Blanchard v. Bober*, 2013 CarswellOnt 10979 (SCJ) (the Applicant's conduct of case where undue influence was alleged did not warrant elevated costs); *Re Orfus Estate*, *supra* note 54 (where allegations of undue influence were made but the Court did not award costs); *Tate v. Gueguegirre*, 2013 CarswellOnt 2309 (SCJ) (where costs were payable from the estate where will was made under suspicious circumstances (and allegations of undue influence were made) and the beneficiary's behavior invited further inquiry); *St. Onge Estate v. Breau* (2009), 38 ETR (3d) 162 at 55 citing *Mitchell v. Gard* (1863), 164 ER 1280 (Eng Prob Ct).

87 Thomas E. Atkinson, *The Handbook of the Laws of Wills and Other Principles of Succession Including Intestacy and Administration of Decedents' Estates*, 2nd ed (St. Paul: West Publishing, 1953) at para 638.

88 *Wingrove v. Wingrove* (1885), 11 PD 81 (Eng Prob Ct) at 82 cited in *Carlson v. Lazicki*, *supra* note 47.

> ties of kindred, to the sentiment of gratitude for past services, or pity for future destitution or the like may fairly be pressed on the testator. The testator may be led but not driven and his will must be the offspring of his own volition, not the record of someone else's. There is no undue influence unless the testator if he could speak his wishes would say "this is not my wish but I must do it."[89]

Therefore, domination of the will of the testator is sufficient; he or she does not need to be threatened or terrorized.[90] The power to coerce the testator is not sufficient. Rather, there must be evidence to show that the overbearing power was actually exercised and because of the exercise of such power, the testamentary document was made.[91] In sum, the alleged influence must be so overpowering that the will of the influencer is reflected in the testamentary documents, and not that of the testator. As is evident from these cases, the threshold for undue influence is high.[92] It must be proved on a balance of probabilities.

The case law discusses undue influence in two situations: (1) undue influence giving rise to suspicious circumstances; and (2) undue influence as a ground for defeating a will. We have addressed these situations below.

***(i) The interrelationship between suspicious circumstances and undue influence***

As set out above in the section entitled "the effects of suspicious circumstances", suspicion of undue influence only discharges or rebuts the presumption in favour of the propounder of the will. Therefore, the propounder of the will is required to prove knowledge and approval and testamentary capacity.[93]

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89 Williams and Mortimer, Executors, Administrators and Probate (17th edition, 1993) at 184 cited in *Scott v. Cousins*, *supra* note 79 at para 113.

90 *Crompton v. Williams*, [1938] OR 543 (Ont HC) as cited in *Scott v. Cousins supra* note 79 at para 114. Also see *Carlson v. Lazicki*, *supra* note 47.

91 *Orfus Estate*, *supra* note 54 SCJ at para 264 citing *Scott v. Cousins*, *supra* note 79 at para 81 and *Pocock v. Pocock*, *supra* note 23 at para 42.

92 *Orfus Estate*, *supra* note 54 SCJ at para 254. Undue influence is a serious allegation and demonstrating the existence of persuasion or even "bad influence" is insufficient.

93 In the *BC Wills, Estates and Succession Act*, *supra* note 6, s 52, the legislation states: "In a proceeding, if a person claims that a will or any provision of it resulted from another person (a) being in a position where the potential for dependence or domination of the will-maker was present, and (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged, and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged."

***(ii) Undue influence as a ground to challenge the validity of a will***[94]

Undue influence as a separate ground to attack a will was recognized in *Craig v. Lamoureaux*:

> Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.[95]

A testator may have testamentary capacity and yet be the victim of undue influence.[96] The burden for establishing undue influence is upon the person attacking the validity of the will.[97] The test of undue influence is as described in the definition of undue influence above.[98] The challenger must adduce evidence which, if accepted, would satisfy the court on a balance of probabilities that there has been undue influence.

Conversely, from the perspective of the propounder of the will, while proof of knowledge and approval will go a long way in disproving undue influence, there is still a distinction: a person may still know and appreciate what he or she is doing but may be doing it as a result of coercion or fraud.[99]

Motive and opportunity is not sufficient to set aside a will based on allegations of undue influence. The court has considered cases where children assisted their parents or grandparents with daily living. The "opportunity" presented, which may or may not give rise to dependency, is insufficient evidence to show coercion. Rather, the law does not discourage the care of the elderly by their children. Where an elderly person has a child who assists them with the incidence of daily living, that assistance is not evidence of undue influence by that child.[100]

We have canvassed the cases that allege undue influence as a ground to challenge the validity of a will. The vast majority of cases alleging undue influence do

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94 Although this paper is focused on testamentary capacity, we have outlined undue influence as a separate ground in order to clarify the two circumstances in which undue influence can be raised.

95 *Craig v. Lamoureux*, [1920] AC 349 at 357 by Viscount Haldane.

96 It has been unsuccessfully argued that the issue of undue influence must be determined prior to the issue of testamentary capacity. It has also been unsuccessfully argued that once testamentary capacity has been proved, a person may not attack a will on the basis of undue influence: see *Quinlan v. Caron*, [2011] OJ No 911 (SCJ) at para 8.

97 *Vout v. Hay*, *supra* note 38 at para 28 citing *Riach v. Ferris*, [1934] SCR 725; *Re Culbert Estate*, *supra* note 56 at para 136. In *Lata v. Rush*, *supra* note 29 the plaintiff argued that the defendants had to disprove undue influence. This was not accepted by the Court.

98 *Carlson v. Lazicki*, *supra* note 47 at para 42.

99 *Vout v. Hay*, *supra* note 38 at para 29.

100 *Orfus Estate supra* note 54 at para 259 citing *Smith v. Rotstein*, *supra* note 22 at para 300 (SCJ); aff'd 2011 ONCA 491.

so when coupled with a challenge of testamentary capacity. Where undue influence has been the sole basis to challenge the validity of a will, there have been very few cases where the challenge has been successful.[101]

(d) Delusions

There is case law that suggests that the existence of a delusion can be sufficient to rebut the presumption of testamentary capacity following due execution. In the 2013 case of *Laszlo*, Justice Ballance revisited the relevance of delusions to the test for testamentary capacity, even where she found those delusions did not directly influence the testator in making his or her will:

> The thrust of the defendant's position is that once there is evidence showing that a testatrix experienced delusions around the time of making a will, those delusions are only relevant to the issue of testamentary capacity if they are shown to have actually influenced the dispositive provisions of her will. I do not share that narrow view.
>
> . . .
>
> [D]elusions may be symptomatic of an impairing degenerative disease of the mind, such as Alzheimer's disease, and their presence may speak to the depth of the mental impairment experienced by a testator in consequence of that affliction.
>
> . . .
>
> It follows that the existence of delusions, while not themselves sufficient to defeat testamentary capacity, ought not to be excluded from consideration under the rubric of suspicious circumstances or the ultimate assessment of whether a testator possessed testamentary capacity at the material time. Non-vitiating delusions may reflect the ravages upon the testator's mental functioning at large exacted by dementia or other brain disease, which cannot reasonably be ignored in the overall assessment of testamentary capacity.[102]

In that case, the Court considered the delusions of the testator, together with other circumstances (although the Court said the fact that the testator was in the

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101 We have found one such case: *Re Marsh Estate*; *Fryer v. Harris* (1991), 41 ETR 225 (NSCA) (where the testator had capacity but the codicil was set aside based on undue influence). Also see undue influence raised in the context of a will challenge but where the issue centers on *inter vivos* gifts: *Turner v. Turner*, 2010 BCSC 49 and *Modonese v. Delac Estate*, 2011 BCSC 82; aff'd 2011 BCCA 501. These cases were resolved on the basis of the presence of a resulting trust. See also *Sawchuk Estate v. Evans*, 2012 MBQB 82 (where monies were held in a joint account and there was a presumption of undue influence that was not rebutted. Again, the case was resolved on the basis of a resulting trust).

102 *Lazlo v. Lawton*, 2013 BCSC 305 (Sup BC) at paras 225–227. See also *Re Marsh Estate* (1990), 99 NSR (2d) 221 (Probate Court); upheld on appeal (1991), 104 NSR (2d) 266 (CA) at paras 14 and 15 where the Court stated that the burden of proving that the delusions affected the disposition under the will is on those supporting the will.

early stages of Alzheimer's and had non-psychotic symptoms of cognitive deficit at the material time was itself enough to constitute a suspicious circumstance), as sufficiently "suspicious" to cause the propounders of the will to lose the benefit of the presumption of capacity.[103] There is a similar line of cases that look at the delusions of a testator in a broad nature to suggest that a delusion coupled with a progressive disease such as Alzheimer's raises suspicious circumstances.[104, 105]

### 6. Irrational Decisions Do Not Maketh the Testator Insane

It is not the law that anyone who entertains wrong-headed notions, capricious whims, or absurd idiosyncrasies, cannot make a will.[106] Rather, a person can have testamentary capacity and still be an irrational decision maker. Testamentary capacity can mean that bad decisions are made by the testator.[107] Similarly, a court "cannot override the freely expressed wishes of the testator because it considers those wishes to have been eccentric or "unfair"."[108]

The freedom of the testator to make unfair and eccentric dispositions is a long developed proposition. In *Austen v. Graham*, a case of the Privy Council in 1864, the testator, of English origin, who lived in the East and professed his belief in Islam, died in England. His will gave the residue of his estate to the poor of Constantinople and toward erecting a cenotaph in that city, inscribed with his name, with a light to perpetually burn. In those days, such a gift was deemed to be unsound and in fact, the Prerogative Court did declare the testator to be of unsound mind when he made the will. However, the Privy Council said that the courts need to examine the life, habits and opinions of the testator and once those were examined, the gift was not absurd. The will was admitted to probate.[109]

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103 *Ibid* at para 238-239.

104 See also the English line of cases of *Waring v. Waring* (1848), 6 Moo PCC 341; *Jenkins v. Morris*, *supra* note 20; *Ledger v. Wootton*, [2007] EWJC 90 (Ch); [2007] All ER (D) 99 (Oct) cited in Halbury's *Laws of England*, vol 102 5th ed (London, UK: Lexis-Nexis, 2010) at 52.

105 In *Banton v. Banton*, *supra* note 10 which was a reiteration of the principles in other cases, the test for delusions was said to be two pronged: (1) to be a delusion the belief held must be one that no one could reasonably believe; and (2) the decision by the testator to disinherit a person must be rooted in the delusion. We also make a distinct between the facts of *Hall v. Bennett*, *supra* note 47 where a lawyer was called to a hospital to prepare a will for a terminally ill patient. The testator continually drifted in and out of consciousness. This condition of the testator attracts the doctrine of suspicious circumstances.

106 *Skinner v. Farquharson* (1901), 32 SCR 58 at 59 per Taschereau J.

107 *Bird v. Luckie* (1850), 8 Hare 301.

108 *Re Culbert Estate*, *supra* note 56 at para 174; *Tate v. Gueguegirre*, [2012] OJ No 6231 (SCJ) (where the testator left his estate to his son with very little to five daughters. Although the will was unfair, the testator had testamentary capacity).

109 *Austen v. Graham* (1854), 8 Moo PCC 493, 14 ER 188 (PC).

Gifts that are considered foolish by some do not maketh the testator of unsound mind. Similarly, eccentric dispositions are also not invalid,[110] nor are wills of a testator made by bad motives. More recently, testators are leaving significant sums of money in trust for the care of their pets.[111] Such dispositions have been and are viewed by some as controversial and eccentric but that does not make them invalid.

### 7. Evidence Used to Demonstrate Testamentary Capacity or Lack Thereof

The question of whether a testator has the requisite level of capacity to make a will is a legal determination based on the facts in the particular circumstances.[112] The best evidence — that of the testator — will no longer be available given that will challenges based on lack of capacity only occur after the testator's death. In testamentary capacity cases, the courts have commented on the scope of the evidentiary examination as follows:

> This being a case involving the consideration of the sanity or insanity of the party deceased, and consequent legal validity or invalidity of her will, the Court was bound to examine very carefully and minutely into the whole of the circumstances adduced in evidence on the one side and on the other, in order to satisfy itself whether this is or not the will of a capable testatrix . . . every case has some distinguishing features; each case must be governed by its own peculiar circumstances . . . in all such cases it is absolutely and essentially necessary to look to the peculiar circumstances of each individual case, and to judge from the whole character of the person whose mental

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110 It might be difficult to distinguish between a delusion and a misjudgment or eccentric character. See Theobald on Wills (16th ed), London, Sweet & Maxwell, 2001) as cited in *Re Fawson Estate*, *supra* note 78 (where this difficulty was highlighted when a testator's assessment of the character of possible beneficiary was made. In that case, the delusion ultimately affected the dispositions in the will. In addition, there were suspicions in that case surrounding the making of the will that had not been removed.) *Penno v. Penno*, [2012] AJ No 1262 (CA) allowing appeal from *Penno v. Penno*, [2012] AJ No 322 (QB) (where the testator wanted to leave his estate to someone who could carry on his non-existent holistic healing business (to help people live a more healthy lifestyle)). The Appeal Court determined that the will had to be proved in solemn form.

111 For example, in the United States, heiress Gail Posner left a $3 million trust fund and an $8.4 million Miami mansion to her three dogs. Ms. Posner's only child received $1 million. See Rebecca Dube, "How to give Fido the mansion after you die" (August 23, 2012) online: The Globe and Mail at: <http://www.theglobeandmail.com/life/relationships/how-to-give-fido-the-mansion-after-you-die/article4261008/> (accessed on Jan 22, 2014). See also *Zinn v. Bergren*, 2012 SKQB 214 (CanLII).

112 *Laszlo v. Lawton*, *supra* note 24 at para 197; *Knox v. Trudeau* (2001), 38 ETR (2d) 67 (Ont SCJ).

> capacity is the subject of inquiry what was the state and condition of the mind of that individual . . .[113]

This section considers the various evidence the court will look to in determining whether the testator had capacity, including: (a) evidence of the solicitor with respect to the testator's apparent capacity at the time the will instructions were given and the will was executed; (b) medical evidence, including capacity assessments conducted at or around the time of the will's drafting or execution; and (c) evidence of family members and other lay witnesses familiar with the testator. It is important to note that no one type of evidence is conclusive as to testamentary capacity, but rather the court will look at all the circumstances in each particular case.[114]

(a) Drafting solicitor's evidence

The significant role of the solicitor has been expressed as follows:

> When you employ a lawyer either to draw a will or a deed which requires skill you rely on his skill and, of course, you rely on his integrity, and when he tells you, "I have drawn this will according to your instructions," and he puts it before you to sign, do not you adopt his words as expressing your wish? I do not desire, as far as this is a question of fact, to take it out of your hands, but, speaking for myself, it appears to me the man does approve of the words which his solicitor puts in for him.[115]

The drafting solicitor has an obligation to assess the testator's capacity before drawing up the will and having it executed, as well as an obligation to document the evidence. In *Murphy v. Lamphier*, the Court discussed at length the duty of a drafting solicitor:

> A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease, and particularly in the case of one labouring under both disabilities, the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists

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113 *Mudway v. Croft* (1843), 3 Curt 671, 163 ER 863 cited in *Re Davis*, [1963] 2 OR 666–683 (CA). See *Re Quandt Estate*, *supra* note 69 at para 70 (because the testator is no longer around to tell us what she knew and intended, the Court can only be instructed by the totality of the evidence).

114 This section does not examine the procedure the court directs to hear the evidence. See *Ferguson v. Martin*, 2014 CarswellOnt 4366 (SCJ) (Justice Brown ordered to limit prehearing discovery and directed a short hybrid trial in a will challenge where the only estate asset was a house). See also *Re Estate of Ireni Traitses*, 2014 ONSC 2102.

115 *Re Davis* (1910), CarswellNB 68 (NBSC) at para 37 citing *Harter v. Harter*, LR 3 P & D 11, 20 and *Rhodes v. Rhodes*, 7 App Cas 192, 199.

> and is being freely and intelligently exercised in the disposition of the property. The solicitor is brought in for the very purpose of ascertaining the mind and will of the testator touching his worldly substance and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty. The Court reprobates the conduct of a solicitor who needlessly draws a will without getting personal instructions from the testator, and, for one reason, that the business of the solicitor is to see that the will represents the intelligent act of a free and competent person.[116]

It is because of these duties on solicitors that the evidence of solicitors is so valuable in testamentary capacity will challenge cases.

Courts often accord great weight to the solicitor's well-documented opinion.[117] This has been said to be for several reasons, including: solicitors have a specific understanding of the legal requirements for testamentary capacity; they are under a legal duty to carefully consider and document capacity;[118] and they are usually the only one who is present at both critical testamentary moments — time of instructions and time of execution.[119]

However, while such evidence is important and solicitors must take diligent notes relating to the testator's capacity at the time of giving instructions and executing the will, a finding of testamentary capacity "does not hang solely on what a solicitor did or did not do when instructions were taken to prepare well and thereafter on its executions . . . A solicitor's intervention is not the *sine qua non* to determine the validity of a will . . .".[120]

There are a number of helpful resources to assist drafting solicitors to ensure that they meet their obligations in assessing and documenting a testator's capacity prior to execution of the will. However, in the litigation of will challenges, the

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116 *Murphy v. Lamphier*, *supra* note 46 at para 120 (HC Div).

117 *Hall v. Bennett Estate*, *supra* note 47 (where the Court concluded that a solicitor lacked sufficient instructions to prepare a will and that the deceased lacked testamentary capacity. The lawyer declined the retainer. The deceased was in and out of lucidity, which did not amount to testamentary capacity).

118 Solicitors have an onerous duty. In *Leger v. Poirier*, *supra* note 46 at 161-62 the Court stated that "there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. . . . Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole. . . .". Similarly, in *Scott v. Cousins*, *supra* note 79 at paras 71–73, Cullity J comments: "The profession has also been warned on numerous occasions that the fact that an elderly person suffers from a form of dementia, and has lost capacity, may not be immediately apparent to those who are not closely associated with her . . .".

119 *Hoffstein*, *supra* note 75 at 16-30.

120 *Stiles Estate v. Stiles*, 2003 ABQB 317 at para 110; see also *Re Davies*, [1963] 2 OR 666, 40 DLR (2d) 801 at 808: "The failures of the solicitor do not prove, or tend to prove the capacity or incapacity of the testatrix."

lawyers take the evidence as they find it. If you are representing the opponents of the will's validity, some grounds upon which to attack a solicitor's evidence include, among others: (a) failure to obtain mental status examinations where the situation warranted; (b) failure to properly interview clients (including failure to ask enough or the right questions, failure to interview personally,[121] and failure to conduct the interview with the testator outside the presence of interested beneficiaries); (c) failure to properly record or maintain notes; and (d) failure to ascertain or react properly to existence of suspicious circumstances.[122]

(b) Capacity assessments by medical practitioners and other medical evidence

A drafting solicitor may suggest that her client undergo a capacity assessment to confirm testamentary capacity shortly before executing the will. While this practice has been increasingly recommended, some commentators suggest that capacity assessments are "over-used by lawyers who wish to defer responsibility for decision making onto others", including in the wills context.[123] Others suggest that obtaining a capacity assessment indicates that the drafting solicitor was worried about the capacity of the will-maker. Conversely, a capacity assessment could only mean that the will-maker wants to ensure that his will is valid upon a will challenge. Such an assessment will reduce the risk that the will is disputed based on testamentary incapacity.

As the Court in *Palahnuk v. Kowaleski* noted, where a solicitor is in the best position to make a decision regarding testamentary capacity, the decision is not delegable to others (e.g. medical experts). Still, in situations where the solicitor may have doubts whether the client has testamentary capacity, it may be appropriate for the solicitor to confirm his opinion with a capacity assessment.[124] In any event, as stated by the Court in *Duschl*: "to expect everyone who is suffering from ill health to have a full blown mental capacity assessment before his or her will can be admitted to probate is not the law . . .".[125]

Even where the drafting solicitor does not arrange an assessment prior to execution of the will, there may be reason to have an assessment conducted shortly thereafter if family members or others learn of the new will/codicil and raise con-

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121 *Re Griffin's Estate* (1979), 21 Nfld & PEIR 21.

122 *Re Schwarz*, *supra* note 11; see Hoffstein, *supra* note 75 at 16-31 to 16-34.

123 Arthur Fish & Alissa K. Gabel, "*What is a Capacity Assessment and How to Seek One"*, (Paper delivered at the Law Society of Upper Canada Six-Minute Estate Lawyer, April 8, 2008) at 11-9.

124 *Palahnuk v. Kowaleski*, 2006 CarswellOnt 8526 (SCJ) at paras 70-71; see also *Covello v. Sturino* at para 22.

125 *Duschl v. Duschl Estate*, [2008] OJ No 1422 at para 93. Although a capacity assessment should not be required, it does help fight frivolous claims. See *Bell v. Bell Estate*, [2011] OJ No. 2951 (SCJ) where an MMSE score of 29/30 resulted in a diagnosis of anxiety and depression, but not a loss of mental capacity. This evidence was used by the court in deciding that the evidence did not support an inference of lack of testamentary capacity.

cerns about the testator's capacity. Family members may also directly seek to have the testator assessed.

Whether or not the assessment was "appropriate" at the time it was conducted, any assessments conducted during the relevant time period will likely be considered in any subsequent will challenges based on grounds of testamentary incapacity. However, the weight given to such assessments by the court may vary. In *Laszlo v. Lawton*, Justice Balance recently confirmed:

> Testamentary capacity is not a medical concept or diagnosis; it is a legal construct. Accordingly, scientific or medical evidence — while important and relevant — is neither essential nor conclusive in determining its presence or absence. Indeed, the evidence of lay witnesses often figures prominently in the analysis. Where both categories of evidence are adduced, it is open to the court to accord greater weight to the lay evidence than to the medical evidence, or reject the medical evidence altogether.[126]

Therefore, the existence of testamentary capacity does not depend on scientific or medical definitions and medical opinions are not necessarily determinative.[127] Circumstances in which the assessment may be given lesser or little weight may include: (a) where the capacity assessment was conducted for some other purpose or where the instructions provided to the assessor were not adequately tailored to the issue of testamentary capacity (or where the assessor did not fully appreciate the legal criteria for testamentary capacity); (b) where the assessment was completed too far before or after the date of execution which may reduce its reliability as an indicator of the testator's capacity at the time of the execution[128] (particularly since, as discussed above, capacity can fluctuate from day to day); (c) where the assessor lacks the expertise to make an accurate assessment (e.g. opinions of treating general practitioner — though this evidence can still count as reliable lay testimony based on a longstanding relationship with the testator);[129] (d) where the assessment was not based on a personal interview of the testator by the assessor but

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126 *Laszlo v. Lawton*, *supra* note 24 at para 198; see also *Re Cuthbert*, [2006] SJ No 648; *Dieno Estate v Dieno Estate*, [1996] 10 WWR 375 (Sask. QB) at para 36; *Re Davis Estate*, 1963 CarswellOnt 217 (CA) at para 16.

127 *Moore v. Drummond*, [2012] BCJ No. 2392 at para 38 citing *Field v. James*, 2001 BCCA 267 at para 77 and *Baker Estate v. Myhre* (1995), 168 AR 248 at para 39.

128 See e.g. *Mesesnel (Attorney of) v. Kumer* at para 10(9). Schulman et al, "Contemporary Assessment of Testamentary Capacity" (2009), 21 International Psychogeriatrics 433 at 436: "Ideally, the assessment of testamentary capacity should take place in close temporal proximity to the giving of instructions for the will by the testator." But see *Covello v. Sturino*, 2007 CarswellOnt 3726; *Abrams v. Abrams*, 2008 CanLII 67884 (ONSC), where capacity assessments carried out a year or more after the event were accepted by the court.

129 *Re Culbert*, *supra* note 56 at para 163; see also *Petrowski* where court rejected the evidence of the family doctor but accepted the evidence of the specialist in internal medicine based in part on his expert qualifications; but see *Irwin v. Cupolo*, [1999] OJ No 2682 (SCJ) (where the Court accepted evidence of the family doctor and rejected contrary evidence of the expert where the expert had not met or assessed the testator in

rather on an analysis of evidence provided by others;[130] and/or (e) where the assessor failed to specify the background information, materials, and legal principles he/she considered in forming his/her conclusion.[131]

Notably, counsel have been putting before the courts expert retrospective opinions regarding capacity.[132] In the authors' view, these retrospective opinions are not compelling and should be afforded little weight. Typically, the expert did not meet the testator and is evaluating the evidence only in a retrospective way, as a judge would. In *Gironda*, Justice Penny rightly commented that retrospective opinions provide an opinion on a set of *concerns*, the evidence does not elevate these concerns to proof on a balance of probabilities.[133] The courts ought to be cautious that retrospective opinions not assume the role of a judge.[134]

(c) Evidence of family members and other lay witnesses

As set out above, the soundness of the testator's mind does not require specific medical or scientific evidence. In fact, medical evidence does not determine the issue. In *Re Davis Estate*, the Court commented that:

> Whether a person has testamentary capacity, i.e., whether he has a sound and disposing mind, raises a practical question which, so far at least as evidence based on observation and experience is concerned, as contrasted with

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person and the family doctor's evidence was supported by the evidence of multiple lay witnesses).

130 *Duschl (Attorney of) v. Duschl Estate*, [2008] OJ No 1422 at para 78.

131 See e.g. *Forgione v. Forgione*, [2007] OJ No 2006 (SCJ) at para 3; see other "red flags" in assessments in L. Sheard, "Taking Instructions — Red Flags Relating to Capacity and Undue Influence" (Law Society of Upper Canada, Special Lectures 2010) at 10-24 to 10-25.

132 *Gironda v. Gironda*, [2013] OJ No 2949 (SCJ) at para 46, revised supplementary reasons 2013 ONSC 6474 (note as of the date this paper was written, this case is currently under appeal) [*Gironda v. Gironda*]; also in *Orfus Estate*, *supra* note 54 at para 136–138, 211–218 (SCJ), counsel put forward an expert opinion that critiqued the capacity assessment that was done at the time the testator was alive. The opinion set out a set of concerns with the assessment or deficiencies regarding information provided by counsel at the time. This is not the same as a retrospective opinion regarding capacity. In that case, Justice Penny found that the expert opinion was not in conflict with the capacity assessment done at the time the testator executed her will and further said that the expert was not in a position to comment on the testator's capacity at all. Also see Brian Schnurr, Felice Kirsh and Elizabeth Bozek, "Revisiting Testamentary Capacity" 14th Annual Estates and Trusts Summit (Law Society of Upper Canada: November 9, 2011) at 11-10 and 11-11 for a discussion on retroactive capacity assessments.

133 *Gironda v. Gironda*, *supra* note 133 at para 92.

134 In the authors' view, it is correct that testamentary capacity is not a medical question. A court is able to evaluate and weigh all of the evidence and circumstances, while the medical practitioner is not in a position to do so.

> evidence based on pathological findings, may be answered by laymen of good sense as by doctors.[135]

Lay witnesses may express an opinion on the issue of a person's testamentary capacity. This is particularly important where the witness saw the testator over periods of time.[136] In *Re Orfus Estate*[137] Justice Penny relied on, among others, the evidence of the testator's investment advisor who said he believed that the testator was capable. In the witness' words, on re-examination, he stated: "This woman is competent at this moment. There is no question in my mind."[138] Evidence of lay witnesses may be accorded equal weight to that given to the evidence of medical professionals.[139] Indeed, where the lay person has had significant contact with and the opportunity to observe the testator over long periods of time, this evidence may be given greater weight than the expert testimony.[140] Similarly, where there is a conflict between the evidence of medical witnesses and that of lay witnesses, the testimony of the experts does not outweigh the testimony of lay witnesses who had opportunities for observation and knowledge of the testator and that the will was the last will of the testator.[141] The weight of the evidence given to the lay witness depends in part on the extent of observations made by the witness.[142]

(d) Corroboration requirement in estates litigation

While the "general rule" in civil litigation is that "the testimony of a single witness, if believed to the requisite degree of certainty, is sufficient to found a con-

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135 *Re Davis Estate*, [1963] 2 OR 666 (CA) at para 16.

136 Sopinka, Lederman and Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009) at 784 [*Sopinka on Evidence*].

137 *Re Orfus Estate*, *supra* note 54.

138 *Ibid* at para 172.

139 *Re Davis*, [1963] 2 OR 666.

140 *Sopinka on Evidence*, *supra* note 137 at 784; Ian Hull, *Challenging the Validity of Wills* (Toronto: Carswell, 1996) at 24; See also *Petrowski v. Petrowski Estate*, *supra* note 14 at paras 180, 216, 217.

141 *O'Neil et al. v. Royal Trust Co. & McLure*, [1946] 4 DRL 545, [1946] SCR 622.

142 *Spence v. Price*, *supra* note 11 at 81-2, [1946] 2 DLR 592 at 595 cited in *Re Schwartz*, *supra* note 11. See also *Calderaro v. Meyer*, [2011] OJ No. 6140 (SCJ) at para 46 where the evidence of the wife in and around the time the testator's will was made was accepted. *Wright v. Wright*, [2013] NSJ No. 478 (SC) where a long time neighbor testified that the deceased was "in and out" mentally on the day the will was presented to her. Also note that where contradictory evidence is adduced, especially where findings of credibility will have to be made, the only realistic option for the Chambers judge is to direct a trial: *Smith v. Smith Estate*, [2011] MJ No. 81 (QB) at para 51 citing *Dieno (Inez) v. Dieno (Jacob) Estate*, [1996] 10 WWR 375 (QB) at p. 21.

viction or civil judgment",[143] the majority of Canadian provinces require corroboration in certain types of estates litigation.[144]

In Ontario, for example, this corroboration requirement is found in section 13 of the *Evidence Act*:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.[145]

Will challenges on grounds of incapacity will necessarily require corroboration because they involve the circumstances surrounding the making of the will (i.e. a matter occurring before the death of the testator). The requirement is said to address the obvious disadvantage that the dead "cannot tell their side of the story or respond to the livings' version of events".[146]

Only the evidence of opposite and interested parties must be corroborated. The evidence of an interested person who is not a party to the proceeding need not be corroborated.[147] Parties aligned in interest cannot corroborate each other's evidence — the corroboration must be found outside their evidence.[148]

While the degree and extent of corroboration required is not specifically set out in the statute, the evidence must be "material", meaning that the corroborating evidence "appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to".[149] In *Orfus Estate*, Justice Penny explained that while not every particular of the party's evidence need be corroborated, the

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143 *Sopinka on Evidence*, *supra* note 137 at 1179.

144 These requirements are contained in the evidence acts of Ontario, Alberta (*Alberta Evidence Act*, RSA 2000, C A.18, s.11), Newfoundland (*Evidence Act*, RSN 1990, c.E-16, s.16), Nova Scotia (*Evidence Act*, RSNS 1989 c.154, s.45), Prince Edward Island (*Evidence Act*, RSPEI 1988, c. E-11, s.11), the Yukon (*Evidence Act*, RSY 2002, c.78, s.15) and the Northwest Territories (*Evidence Act*, RSNWT 1988, c E-8, s.17). [See Howard Black and Amy Cull, "S.13 of the *Evidence Act* of Ontario: Does it Really Matter?" (paper delivered at the Law Society of Upper Canada 15th Annual Estates and Trusts Summit, November 14, 2012) at 7-31 [*Black and Cull*]. The provinces of B.C., Saskatchewan, Manitoba and New Brunswick contain corroboration requirements in their rules of practice; however, where a party's evidence is deemed to be credible, it can stand without corroboration. *Black and Cull* at 33-34 citing *Adamson v. Vachon* (1914), CarswellSask 154 (SCC).

145 *Evidence Act*, RSO 1990, c E. 23, s. 13. See also Black and Cull, *supra* note 145.

146 *Re Orfus Estate*, *supra* note 54 at para 15 (SCJ) citing *Burns Estate v. Mellon* (2000), 2000 CanLII 5739 (ONCA); 48 OR (3d) 641 (CA).

147 Jenkins and Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* at 21-3; *Miller Estate (Re)*, 1949 CarswellOnt 266 (Surr Ct) [*Re Miller Estate*].

148 *Re Miller Estate*, *supra* note 148 at para 14.

149 Black and Cull, *supra* note 145 at 9; *Smallman v. Moore*, 1948 CarswellOnt 110 at para. 19; *Orfus Estate supra* note 54 at paras. 4-5.

evidence must "materially enhance the probability of the truth of the adverse party's statement".[150]

The corroborating evidence can be direct or circumstantial and introduced by *viva voce* or documentary evidence.[151] Still, the evidence must be admissible in accordance with the normal rules of evidence. Historically, this would exclude the use of hearsay evidence unless a specific exception applied.[152] However, with the introduction of the "principled approach" to hearsay by the Supreme Court of Canada in *R. v. Khan*,[153] courts have accepted the hearsay evidence of the deceased in estates litigation.

Briefly, under the "principled approach", hearsay evidence will be admissible where it is deemed to be "necessary" and "reliable".[154] The hearsay evidence will be deemed "necessary" where the witness is dead; thus necessity is demonstrated in all will challenges. Reliability is more difficult to demonstrate. However, given the necessity of the evidence, courts may decide to admit the evidence and instead acknowledge any doubts with respect to reliability in reducing the weight given to the evidence.[155]

In *Brisco Estate*, the Ontario Court of Appeal recently confirmed the role of section 13 in estates litigation (albeit in the insurance context, not a will challenge). Justice Rosenberg wrote:

> Given its anomalous place in the modern law of evidence, especially in a case such as this, I see no reason to give s. 13 a broad interpretation when considering its application nor a narrow interpretation when considering the scope of evidence capable of corroborating the evidence of the interested party.[156]

The Court accepted, under the "principled approach" to hearsay, evidence of statements previously made by the deceased to three of his adult children that corroborated their position in the litigation. Moreover, the Court accepted the corroborating evidence of each of the children as indicia of reliability in determining that the deceased's statements were admissible.

Although some courts have applied a low standard for meeting the requirement under section 13,[157] recent case law demonstrates that corroboration is still an

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150 *Orfus Estate supra* note 54 at para. 16; see also *Sands Estate v. Sonnwald*, 1986 CarswellOnt 599.

151 Black and Cull, *supra* note 145 at 12; see e.g. *Brisco Estate v. Canadian Premier Life Insurance Company*, 2012 ONCA 854 (CanLII) [*Brisco Estate*] (Ontario Court of Appeal considering several items of circumstantial evidence together as sufficient to corroborate evidence under s. 13).

152 Black and Cull, *supra* note 145 at 16.

153 *R v. Khan*, [1990] 2 SCR 531.

154 *Ibid.*

155 Black and Cull, *supra* note 145 at 27-28, citing Morton, "Hearsay: Is the Principled Approach Unprincipled?" 2003 Archibald — AnnRevCiv (2003) at 12.

156 *Brisco Estate*, *supra* note 152 para 62.

157 See e.g. *Burns Estate v. Mellon*, 2000 CanLII 5739 (ONCA).

important component in estate matters.[158] It should be noted that, where corroboration is statutorily required, a judgment rendered based on the uncorroborated evidence of a party may be overturned on appeal as an error in law.[159]

## 8. Testamentary Capacity Compared to Other Capacity Tests

Capacity is decision- and time-specific. The level of capacity required to make a particular decision varies by the decision. It has often been said that the level of capacity required to make a valid will is the highest level of capacity.[160] However, some courts and commentators have suggested that it is not a higher standard, just a different one.[161] In this section, we briefly compare the test for testamentary capacity as described above with the level of capacity required in other situations. Specifically, we focus on the common law tests for capacity to contract, capacity to make a gift, capacity to instruct counsel, the capacity to marry and the statutory test of capacity to manage property. We then highlight any nuances found within these tests, and finally, we compare each test to the established test for testamentary capacity.

### (a) Capacity to contract

The common law test for capacity to contract is set out in *Bank of Nova Scotia v. Kelly*.[162] For the contract to be valid, both parties must have: (a) the ability to understand the nature of the contract; and (b) the ability to understand the contract's specific effect in the set of circumstances to which it pertains.[163] The question is not whether the contracting party whose capacity is in question failed to

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158 Black and Cull, *supra* note 145 at 39; see e.g. *Orfus Estate*, *supra* note 54, *Lagani v. Lagani Estate*, 2012 CarswellOnt 5516 (SCJ), aff'd 2013 ONCA 159; *Cowderoy v. Sorkos Estate*, 2012 CarswellOnt 6857 (SCJ) reversed on other grounds, 2014 ONCA 618.

159 Black and Cull, *supra* note 145 at 7, citing *Sopinka on Evidence*, *supra* note 137 at 1180.

160 *Boughton v. Knight* (1873), LR 3 P & D 64; *Calvert v. Calvert*, *supra* note 7; *Park v. Park*, [1953] 2 All ER 1411 at 1434; *Hall v Bennett Estate*, *supra* note 47.

161 See e.g. *Covello v. Sturino*, 2007 CarswellOnt 3726 (SCJ) at para 21, Justice Boyko quoting Meisner J. in *Godelie v. Ontario (Public Trustee)*, 1990 CarswellOnt 497 (Dist. Ct.) who held, in addressing the different degrees of capacity required to execute a Power of Attorney and that necessary for testamentary capacity: "It can never be a question of one level being less than another. If it is a question at all, it must be whether one level is different than the other. I have of course, made it clear that in my view the levels must be different."

162 (1973), 41 DLR (3d) 279 at para 10, 5 Nfld and PEIR (PEITD).

163 Whaley and Sultan, *supra* note 14 at 228; *Bank of Nova Scotia v. Kelly*, 1973 CarswellPEI 31, 41 DLR (3d) 273.

understand the nature and effect of the transaction; rather, the question is whether the person was *capable* of understanding it.[164]

The key principle underlying this test is that parties enter contracts with free and full consent.[165] "Consent is an act of reason accompanied by deliberation." Where there is "a want of rational and deliberate consent . . . conveyances and contracts of persons of unsound mind are generally deemed to be invalid".[166]

It should also be noted that in an effort to guard against situations where a contracting party duplicitously argues that a contract should be deemed voidable due to their lack of requisite mental capacity, the courts have recognized an additional element to the test outlined above. This addition requires that for a contract to be voided at the request of an incapable party, the capable party must have possessed either actual or constructive knowledge of the incapable party's mental incapacity to enter into the contract at the time the contract was made. If the incapable party is able to show on a balance of probabilities that they neither understood the nature of the contract nor its consequences, and knowledge of their incapacity on the part of the capable party, the contract may be deemed voidable by a court at the request of the incapable party.[167]

Additional questions have been raised with respect to the "fairness" of the contract. Specifically, even when the stronger party is not aware of the incompetence, a contract will only be enforceable if it is fair and reasonable.[168]

The level of capacity required to enter a contract was contrasted with the level of capacity required to make a will by Justice Sheppard of the British Columbia Court of Appeal in *Re Rogers*:

> [T]he contractor is required to be capable of appreciating his own interest whereas the testator is required to be capable of appreciating the interests of other persons, those interests consisting of their claims to his bounty.[169]

For this reason, some consider the capacity required to enter into a valid contract lower than the capacity required to create a valid will.[170]

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164 *Royal Trust Co. v. Diamant*, 1953 CarswellBC 204 (BCSC); 3 DLR 102 at para 37 [*Royal Trust v. Diamant*].

165 G. Robertson, *supra* note 85 at 191-192.

166 *Royal Trust Co. v. Diamant*, *supra* note 165 at para 36.

167 See *Re Sullivan* (2000), 2000 PESCTD 8 at para 19, 2000 CarswellPEI 134 (PEITD); aff'd (2000), 102 ACWS (3d) 1030, 193 Nfld & PEIR (PEIAD); *Campbell v. Hill* (1874), 23 UCCP 473 at para 73, 1874 CarswellOnt 88 (Ont CA).

168 S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) at 495; Robertson, *supra* note 85 at 198–201.

169 *Re Rogers*, *supra* note 41 at para 27.

170 *Ibid* at para 30. But see *Re Rogers* where Justice Sheppard commented: Having concluded that the testamentary test is the right one to apply, I cannot see that, so far as degree of understanding or capacity is concerned, there is any real difference. I do not think that a man requires any higher or lower degree of capacity to consider his own interest than he needs to consider the interests of other persons. Nor do I think that the degree of capacity required differs in respect to any disposition by gift or otherwise.

(b) Capacity to make a gift[171]

The test for capacity to make a valid *inter vivos* gift is generally considered to be quite similar to the test required to make a valid contract. Just as a contracting party must have the ability to comprehend the nature and effect of a contract in order for it to be considered valid, a party bestowing a gift to another person or organization (a "donor"), must have the ability to comprehend both the nature and the effect of the gift they are choosing to make.[172]

However, the more significant the gift is in value in relation to the donor's estate, the more rigorous the test for capacity becomes. The leading case cited for this proposition is the English case of *Re Beaney*.[173] In that case, an elderly woman gifted her house, her only asset of value, to one of her three children, shortly after being admitted to hospital with dementia. In determining whether the donor understood the nature and effect of her gift, the judge reasoned:

> The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.[174]

A high degree of comprehension of both the nature and effect of the donor's gift – to a point that approaches the elevated level of comprehension required by a testator to make a valid will – is required, due to the effect the disposition of the gift will have on the donor's property and financial interests.[175]

*Re Beaney* has been cited with approval in several Canadian cases where the test for testamentary capacity has been applied to determine the validity of substantial gifts.[176] In the recent case of *Gironda v. Gironda*, Justice Penney of the Ontario

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171 For a more detailed discussion on *inter vivos* gifts see Laura West, Testamentary Capacity and Capacity to Make *Inter Vivos* Gifts (Paper presented at Ontario Bar Association Institute, February 2012).

172 See *Royal Trust Co. v. Diamant*, *supra* note 165; *Bunio v. Alberta (Public Trustee)*, 2005 ABQB 137 at para 4, 14 E.T.R. (3d) 81; *St. Onge Estate v. Breau*, *supra* note 87 at para 29.

173 *Re Beaney* (1977), [1978] 1 WLR 770, [1978] 2 All ER 596 (ChD).

174 *Ibid* at 774.

175 *Ibid*.

176 See *Lynch Estate v. Lynch Estate* (1993), 8 Alta LR (3d) 291 at para 108, 138 AR 41 (Alta QB); *Canada Trust Co. v. Ringrose*, 2009 BCSC 1723 at para 100, [2010]

Superior Court of Justice referenced *Re Beaney* in determining that the applicable test for capacity to transfer a home that was not the donor's only asset, but "by a significant margin, her largest single asset", was essentially equivalent to that of testamentary capacity.[177]

However, the central question is how significant a gift needs to be in order to increase the standard from the capacity required to make a contract to the capacity required to make a testamentary disposition. One commentator has suggested that "Canadian law imposes the standard of testamentary capacity for gifts that comprise less than the majority of the estate" as long as the gift is "significant, relative to the donor's estate".[178]

Prior to *Re Beaney*, the Supreme Court of Canada applied the test for testamentary capacity to the gift of real property even where it was not the donor's sole asset of value in *Mathieu v. Saint-Michel*.[179] Citing *Mathieu*, an Alberta court recently stated that the "mental capacity required to give effect to an *inter vivos* transfer is the same as that for the execution of a will" and that the "standard for capacity applied to an *inter vivos* transfer is no less stringent than that for testamentary dispositions", with no apparent qualification with respect to the value of the asset transferred.[180] However, in that case the transfer appeared to be of a significant portion of the donor's estate and, in any event, the same person benefitted from the transfer and the will, which was also challenged.

(c) Capacity to instruct counsel

Like many of the tests for capacity, the test for capacity to instruct counsel requires the comprehension of both the nature of the decision to be made and the effect or consequences of doing so. In practical terms, to meet the test for capacity to instruct legal counsel, an individual must: (a) understand what they have asked the lawyer to do for them and why; (b) be able to understand and process the information, advice and options the lawyer presents; and (c) appreciate the advantages and drawbacks and the potential consequences associated with the options they are presented with.[181]

The Law Society of Upper Canada's (LSUC's) Rules (the "Rules") of Professional Conduct[182] address the test for capacity to instruct counsel from counsel's point-of-view. The commentary in Rule 3.2-9 begins by discussing the presumption that exists of capacity to instruct counsel, by stating "a lawyer and client relation-

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BCWLD 3102; *MacGotty v. Anderson* (1995), 9 ETR (2d) 179 at para 20, 1995 CarswellBC 825 (BC SC).

177 *Gironda v. Gironda*, *supra* note 133 at paras 99-100.

178 Whaley and Sultan, *supra* note 14 at 11-18.

179 *Mathieu v. Saint-Michel*, [1956] SCR 477 at 487.

180 *Petrowski v. Petrowski Estate*, *supra* note 14 at para 392.

181 Ed Montigny, "Notes on Capacity to Instruct Counsel" (Paper presented at the Continuing Legal Education Program "A Disability Law Primer"), November 27 2003) at 2-3.

182 LSUC, *Rules of Professional Conduct*, amended by convocation October 24, 2013, amendments effective October 1, 2014.

ship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions."[183] The Rules also reinforce the importance placed on maintaining a client's personal autonomy. Rule 3.2-9 states that "where a client's ability to make decisions is impaired . . . the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.[184]

Recent case law[185] has looked to *Calvert (Litigation Guardian of) v. Calvert*[186] for the basic test that must be met for an individual to instruct counsel, as well as this test's position as compared to testamentary capacity. In *Calvert v. Calvert*, Justice Benotto reasoned that, as on a spectrum where testamentary capacity is the highest level of capacity required, "financial matters require a higher level of understanding, and as the capacity to instruct counsel requires the ability to comprehend both financial and legal issues, that this puts the test for capacity to instruct legal counsel significantly higher on the competency hierarchy."[187]

(d) Capacity to marry

While there is currently no statutory test for capacity for parties to marry, a guide to answering the question of whether an individual possesses the requisite capacity to marry has developed over time by the Canadian common law.[188]

While the historic point-of-view has been that entering into marriage is a simple contract, more recent case law has focused on the notion that marriage typically has a significant impact on an individual's legal, property and financial interests. This recent case law has found that as a result of the serious implications of marriage, the test for capacity to marry has become a more stringent one, while at the same time, also attempting to balance the importance placed in Canadian society of individual autonomy to make decisions about one's personal life.

For a marriage to be deemed valid, one must be considered capable of entering into a contract for marriage. The starting point for understanding the test for capacity to marry is the viewpoint that a marriage contract is similar to entering into any other type of contract. Like the test for entering into any type of valid contract, to enter into a valid marriage contract, both contracting parties must possess the capacity to understand the nature and effect of the contract which they are entering.

Recent case law has found that in addition to comprehending the nature and effect of the contract, more precisely, an individual must comprehend the responsibilities of the relationship (including the commitment of the spouses to be exclu-

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183 *Ibid*, commentary to Rule 3.2-9.

184 *Ibid* at Rule 3.2-9.

185 See *Wolfman-Stotland v. Stotland*, 2011 BCCA 175 at para 26, 333 DLR (4th) 106; *Ross-Scott v. Groves Estate*, 2014 BCSC 435 at para. 49, 2014 CarswellBC 684; *Fuhr (Litigation Guardian of) v. Tingey*, 2013 BCSC 711 at para 32, 227 ACWS (3d) 365.

186 *Calvert v. Calvert*, *supra* note 7.

187 *Ibid* at 56.

188 For a comprehensive review of the developing law of capacity to marry, see Kimberly A. Whaley et al., *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010).

sive, that the relationship is terminated only upon death, and that the marriage is to be founded on mutual support and cohabitation), understand the state of any previous marriages, and appreciate the effect of the marriage on one's children.[189]

A finding of a lack of testamentary capacity does not necessarily determine whether an individual has the mental capacity to marry; nor is testamentary capacity at the time of marriage required before the marriage will revoke a will.[190] Like making a will, a marriage may have significant financial repercussions. Entering into a valid marriage will also have testamentary repercussions, as marriage revokes any prior will created before the marriage and marriage creates a financial responsibility between spouses. While both the requisite capacity to enter into a valid marriage and to create a valid will require the individual to understand the nature and effect of their actions, as well as the effect or implications on others, i.e. their family members, the capacity required to enter into marriage still falls below that required for testamentary capacity.

(e) Capacity to manage property

To have capacity to manage personal property, a person must have the ability to both: (a) understand the information that is relevant in making a decision in the management of one's property; and (b) appreciate the reasonably foreseeable consequences of a decision or lack of a decision.[191]

Although the test for capacity to manage property is straight-forward, a finding of incapacity to manage property is not easily made.[192] In Ontario for example, a finding of incapacity is only made after a person is formally assessed by a physician following his admittance to a psychiatric facility under the *Mental Health Act*[193] or after a person is assessed by a qualified and certified capacity assessor, and deemed to be incapable of managing their property.

While clear and convincing evidence of incapacity is required where such a fundamental personal right regarding important matters of life such as the management of property is made, the capacity required to manage one's property does not reach the level required to be considered to have the capacity to make a valid will.[194]

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189 See *Banton v. Banton*, *supra* note 10 at para 111, 66 OTC 161 (Ont Ct J (Gen Div)); *Barrett Estate v. Dexter*, 2000 ABQB 530 at para 72, 34 ETR (2d) 1.

190 *Banton v. Banton*, *supra* note 10 at 110.

191 See for example *Substitute Decisions Act*, RSO 1992, c 30, s 6; *Adult Guardianship and Trustee Act*, RSA 2009, c A-4.2, s 46(6); *The Vulnerable Persons Living with a Disability Act*, CCSM c. V90, s 81. The test to manage property varies by province. We have focused this section on the test in Ontario.

192 Whaley and Sultan, *supra* note 14 at 7.

193 *Mental Health Act*, RSO 1990, c M-7.

194 See *Banton v. Banton*, *supra* note 10 at 6; *Canada Permanent Toronto General Trust Co. v. Whitton* (1965), 51 WWR 484 at para 32, 1965 CarswellBC 31 (B.C. S.C.); *Royal Trust Co. v. Rampone*, *supra* note 28 at paras 30–34.

As evidenced by the different capacity tests above, these legal tests are driven by the importance of autonomy with the most onerous test being that for testamentary capacity. The difficulties of having different capacity tests for different tasks in today's modern society became quite clear in the case of *Banton v. Banton*. In fact, Justice Cullity highlights the dilemma he faced in the case:

> While there is no reason to doubt the appropriateness of having different tests for different capacities, the task of reaching conclusions — even on the balance of probabilities — on the basis of rather fine distinctions when the issues relate to the deteriorating mental state at a particular time of an elderly person now deceased, is not easy. The difficulty is exacerbated where, as here, there are significant discrepancies between the testimony of the applicant and the respondents.[195]

Whether it is necessary and appropriate to have different capacity tests is a discussion for another paper. What is apparent is that these issues are not straightforward and can become quite complex when trying to ascertain facts about a deceased person or someone who no longer has capacity, especially in a case involving the evaluation of facts related to different tasks at a particular time.

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As illustrated by the foregoing overview on testamentary capacity litigation, the principles in this area of law have developed through centuries of case law. However, society has changed significantly since the cases were first considered and legal principles born. In particular, same-sex marriages, multiple marriages, marriage breakdown, common law relationships and blended families are now more than ever testing those principles. In addition, modern science has allowed people to live longer such that, long before their bodies give out, their minds begin to fade.[196] With the rise of dementia and the changes in our society, which necessarily affect the frequency in which our courts will see this type of litigation, we need to give true regard to the principle we say is most important — testator autonomy. To do so, we need to give our courts the proper tools to effect solutions.

The next section of this paper explains one direction the law can take to catch up with societal changes. We advocate that a testamentary declaration, which is explained below, will allow the court to give final effect to a person's wishes.[197]

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195 *Banton v. Banton*, *supra* note 10 at para 7.

196 1 in 11 Canadians over the age of 65 has Alzheimer's disease or related dementia. Within a generation, the number of Canadians with Alzheimer's disease or a related dementia will more than double, ranging between 1 million and 1.3 million people. See www.alzheimertoronto.org/ad_Statistics.htm (accessed on April 28, 2014).

197 We recognize there are other methods a testator could use to help ensure his wishes are carried out, such as setting up an alter ego trust if the testator is over 65 years old.

## II. ENSURING TESTAMENTARY AUTONOMY AND CERTAINTY THROUGH THE USE OF TESTAMENTARY DECLARATIONS BEFORE DEATH

> No matter how sane, competent, and lucid a testator may be or how strong his desire that his estate be administered by trusted persons, our current system of post-mortem probate cannot guarantee a testator that his intentions and instructions will be carried out in spite of all the expense and caution exerted.[198]

In Part I of this paper we focused on the case law and principles involved in determining testamentary capacity during a will challenge brought after the death of the testator. In Part II, we consider one method by which testators can ensure during their lifetimes that their testamentary intentions will be carried out after death: obtaining a testamentary declaration from the court.

Other jurisdictions and several Canadian provinces have begun implementing a number of statutory alternatives for allowing individuals at varying levels of diminished capacity (from early stages of dementia to a complete inability to manage their property or person) or those close to them to try to address or remedy instances where the individuals' testamentary intention would otherwise be frustrated and/or an injustice would result.[199] In this Part II, we examine in detail the practice

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198 Aloysius A. Leopold and Gerry W. Beyer, "Ante-Mortem Probate: A Viable Alternative"(1990) 43 Ark L Rev 131 at 137 [Leopold & Beyer].

199 For example, the United Kingdom, Australia, New Zealand, and even New Brunswick have enacted "statutory wills" legislation pursuant to which a court, upon application, may make, revoke or alter a will on behalf of a living testator who lacks the capacity to make or change a will himself in order to avoid a result that is contrary to the perceived intentions of the testator or otherwise would be unjust. The British Columbia Law Institute has recently recommended that British Columbia enact statutory will legislation, calling it a "useful remedy that could help people with diminished capacity and their families avoid hardships". British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (September 2013) at 66 [BCLI Capacity Report]. Another recent statutory change in British Columbia and Alberta is the abolition of the automatic revocation of a will by marriage. *Wills, Estates and Succession Act*, SBC 2009, c 13; *Wills and Succession Act*, SA 2010, c W-12.2, s 23(2). One reason for the change was the recognition that individuals may unwittingly frustrate their testamentary intentions by getting married late in life — while they may have the requisite level of capacity to marry, thereby revoking their will, they may lack the higher level of capacity required to make a new one, with the result that their estate will be devised by intestacy. British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (June 2009) at 34. The Law Commission of Ontario has recently identified the revocation of wills upon marriage as an example of a law which affects older adults differently: "Older adults are more likely than the general population to be affected by conditions like dementia that affect their testamentary capacity but may not affect their capacity to marry. They are also more likely to have complex family arrangements, including children from previous marriages, and thus complex obligations and wills as well as complex family dynamics. . . . The automatic revocation of wills has also been identified as particularly problematic in the context of 'predatory marriages', in which

known as "ante-mortem probate" in the United States as a basis for recommending the adoption of a similar testamentary declaration procedure in Canada.[200]

### 1. Introduction to Testamentary Declarations

In contrast to traditional will challenges brought after the death of the testator, the procedure known as "ante-mortem probate" in the United States allows a will-maker to apply for a declaration by the court that his will is valid,[201] and invite those he expects would want to challenge the will to do so while he is alive and can speak to the issue. If declared valid, the will cannot later be challenged after death and will be probated in accordance with its terms. Although we examine procedures in other jurisdictions which may have a similar effect of limiting post-mortem will challenges (for example, the use of special notaries in civil law jurisdictions), ante-mortem probate appears to be unique to the United States in modern times.

Although the procedure may not be for everybody — indeed, many will-makers may wish to put off any possible contention over their estate plans during their lifetimes — the option to obtain a declaration that one's will is valid would provide will-makers with an important tool in ensuring that their testamentary intentions will be respected and their estates not whittled away by spurious litigation after death. Such a procedure carries several key advantages over traditional post-mortem will challenges, which will be explored below. However, we emphasize from the beginning that this tool should be considered optional and only supplemental to traditional probate practice, rather than as an alternative to it. That is, the testator *may* (but is not required to) seek a declaration that will pre-empt a will challenge after death during the usual probate proceedings. However, failure to apply for a testamentary declaration before death should not later carry any adverse inference with respect to the validity of the will when challenged after death.

While the statutory procedure referred to as "ante-mortem probate" has been extensively discussed by academics and policy-makers across the United States, only a handful of states have enacted statutes specifically allowing the procedure. Moreover, absent a statutory authorization, courts in other U.S. jurisdictions have been reluctant to make a declaration regarding the validity of a will while the testa-

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a younger individual allegedly marries an older one in order to receive a share of the individual's estate after death." Law Commission of Ontario, *Final Report: A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (April 2012) at 139. However, as of the date of this article, Ontario law still provides for the automatic revocation of a will by marriage under Ontario's *Succession Law Reform Act*, *supra* note 35, s 16.

200 We are excluding Québec from this discussion.

201 We recognize that a will does not become the "Last Will and Testament" until death, and has been considered nothing but "a piece of waste paper" until that time (see *infra* footnote 300). Any will declared valid in accordance with the testamentary declaration procedure advanced herein would still only become the testator's Last Will and Testament upon death (assuming it had not been revoked or superseded prior to death). Similarly, we refer to "will-maker" as the "testator" (see *supra* footnote 6).

tor is alive. Although we understand the problematic issues underlying this reluctance, courts should nonetheless be permitted to make a testamentary declaration. Below, we recommend not only that a similar statutory mechanism allowing for the declaration of the validity of a living person's will be adopted in Canada, but also that Canadian courts could and should make such declarations under existing common law. Because we recommend the ability to obtain a declaration of a will's validity under both statutory and common law frameworks, we will refer to the procedure proposed for Canada in broader terms, as obtaining a "testamentary declaration". We will continue to refer to the existing American statutory practice as "ante-mortem probate".

## 2. Historical Origin of "Ante-Mortem Probate"

Some commentators have suggested that ante-mortem probate finds its roots as far back as Biblical times.[202] However, there are only limited historical references to the practice before its emergence in various legislation and academic literature in the United States, as described below.

There is some evidence that the early Ecclesiastical Courts of England allowed a testator to petition to prove his will during his lifetime, whereupon it would be recorded and registered with the Court, but would have no effect until after the testator's death. Despite its registration, the will could still be revoked or altered by the testator, and it is unclear the extent to which registration of the will during the testator's lifetime prevented disgruntled heirs from challenging the will after death.[203]

As the law developed, the Ecclesiastical Courts determined that they did not have jurisdiction over a testator's will during his lifetime. For example, in the 1789 decision of *Allen v. Dundas*, the Court stated:

> The case of a probate of a supposed will during the life of the party may be distinguished from the present; because during his life the Ecclesiastical Court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction.
>
> Then this case was compared to a probate of a supposed will of a living person; but in such a case the Ecclesiastical Court have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all

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202 Leopold & Beyer refer to the Old Testament stories of Isaac and Ruth as examples where inheritance was decided during the lifetime of the testator. Isaac passed his inheritance by way of irrevocable blessing to his eldest son near the end of his life (except in this case, his younger son Jacob tricked him into passing the inheritance to Jacob instead of the elder son, Esau). For Ruth, Boaz contracted to receive all rights to inherit and marry Ruth from the kinsman who was by custom entitled to this "estate". Leopold & Beyer, *supra* note 199 at 148-149; *Ruth* 1–4; *Genesis* 27:1–4.

203 Leopold & Beyer, *supra* note 199 at 149-150.

> other places: but where they have no jurisdiction, their whole proceedings are a nullity.[204]

It does not appear that modern English courts have since changed their position from that articulated above. Similarly, we have been unable to find any reference to ante-mortem probate or any testamentary declaration practice in other common law jurisdictions such as Australia or New Zealand.

Indeed, outside of the U.S., the only other jurisdiction that explicitly authorizes a testator to validate his will with the court during his lifetime is the Philippines. Rule 76 of their Rules of Court sets out the procedure for probating (or "allowing") a will. Section 1 of Rule 76 provides:

> Section 1. *Who may petition for the allowance of will.* — Any executor, devisee, or legatee named in a will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will allowed, whether the same be in his possession or not, or is lost or destroyed.
>
> *The testator himself may, during his lifetime, petition the court for the allowance of his will.*[205] [emphasis added]

The procedure for both ante-mortem and post-mortem will challenges appears to be the same, as set out in the subsequent sections of Rule 76.

The Philippines is a mixed common law/civil law jurisdiction. Although its civil law tradition is based in its Spanish roots, there are significant common law influences which have been said to trace back to the period of American rule during the first half of the twentieth century.[206]

### 3. The Civil Law Solution to Will Challenges: The Authentication of Wills

European civil law jurisdictions limit post-mortem will challenges through the use of a different will validation process — the "authentication" of wills by quasi-judicial notaries.

In France, for example, a will-maker seeking to avoid a post-mortem challenge can have a *notaire* draw up and "authenticate" the will. The French notarial profession can be traced back to medieval times and the current role of notaires is codified in the Law of 25 Ventose an XI (1803).[207] Notaires are unlike notaries in the United States or Canada. They are lawyers with a specialized education who are

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204 *Allen v. Dundas*, 3 TR 125 at 129-130 (1789).

205 Rules of Court of The Philippines, Rule 76, available at: http://www.lawphil.net/courts/rules/spro.html (accessed March 23, 2014).

206 See e.g. Soliman M. Santos, Jr. "Common Law Elements in the Philippine Mixed Legal System" (2000) 2(1) Asian Law 34, available online at http://digital.federationpress.com.au/8gujl/ (accessed: April 4, 2014).

207 Nicole M. Reina, "Protecting Testamentary Freedom in the United States by Introducing into Law the Concept of the French Notaire" (2003) 46 NYL Sch L Rev797 at 806-807 [Reina].

appointed by the Minister of Justice and vested with prerogatives of official authority, although they are not state employees. Notaires are for the most part self-governed within their profession.[208]

The fact that an instrument is drawn up by a notaire is a guarantee of its legality and authenticity and makes it practically immune to post-mortem challenges on grounds of incapacity or undue influence.[209] This is because notaires have a strict duty to satisfy themselves of the will-maker's capacity and absence of undue influence before authenticating the will. Where the testator's capacity is in question, the notaire will require a medical certification from the family doctor attesting to capacity around the time the will is executed.[210] The notaire must not draw up the will where the testator's capacity remains in doubt.[211]

A will executed before a notaire is considered fully proved until impeached. The impeachment procedure is tedious and costly, and certain challenges may even subject an unsuccessful challenger to civil damages or criminal liability (for example, challenging the notaire on grounds of fraud).[212] Accordingly, there are few challenges of authenticated wills in France.

Some have suggested that ante-mortem probate in the United States has been influenced by the civil law practice of will authentication.[213]

### 4. Ante-Mortem Probate in the United States

#### (a) History

The first ante-mortem probate statute was adopted by Michigan in 1883.[214] However, that statute was overturned by the Michigan Supreme Court in 1885 on constitutionality grounds for two reasons: (1) it "enabled the testator to avoid the rights of a spouse and child"; and (2) "it failed to provide for finality of judgment".[215] The first ground was primarily concerned with the testator's failure to provide adequate notice of the proceedings to his wife and child (whom he had purposefully excluded from his will), and the second was because the testator could

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208 Reina, *supra* note 208 at 808; John H. Langbein "Living Probate: The Conservatorship Model" (1978-1979) 77 Michigan Law Review 63 at 70 [Langbein].

209 Langbein, *supra* note 209 at 66, 71; Margaret Ryznar and Angelique Devaux, "*Au Revoir* Will Contests: Comparative Lessons for Preventing Will Contests" (March 8, 2013) 14 Nevada Law Journal 1 at 19, available at http://ssrn.com/abstract=2230248 (accessed: April 4, 2014) [Ryznar & Devaux].

210 Langbein, *supra* note 209 at 65; Ryznar & Devaux, *supra* note 210 at 22;

211 Ryznar & Devaux, *supra* note 210 at 22.

212 Ryznar & Devaux, *supra* note 210 at 20.

213 See e.g. Langbein, *supra* note 209 at 66.

214 1883 Mich Pub Acts 17.

215 *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N.W. 28 (1885) [*Lloyd*]; Leopold & Beyer, *supra* note 199 at 153.

later make a new will revoking the one that had been declared valid.[216] This second reason was in part a sign of the times, as U.S. courts did not generally allow for declaratory judgments until the mid-1930s.[217]

Various state legislatures, courts, law commissions, and academics continued to consider ante-mortem probate throughout the twentieth century.[218] Legislation was considered in New York, Massachusetts and other states in the early 1900s.[219] In the 1930s, a special committee of the National Conference of Commissioners on Uniform State Laws began drafting a uniform ante-mortem probate act, although the project was ultimately abandoned.[220] Ante-mortem probate was later considered in early drafts of the *Modern Probate Code* in the early 1940s and the *Uniform Probate Code* in the 1960s, but did not make it into further drafts.[221]

A number of state courts considered the issue of adjudicating the validity of a will prior to the testator's death, but declined to do so in the absence of express statutory authority. For example, in *Cowan v. Cowan*, Mrs. Cowan's children brought a suit for a declaration that her will was invalid on grounds of incapacity and undue influence.[222] Mrs. Cowan, though still alive, was alleged to be incompetent with no reasonable possibility of ever regaining her mental faculties. Nonetheless, the Civil Court of Appeals of Texas determined that this was not a justiciable issue as the children had no legal interest given the principle that a living person has no heirs. Quoting from *American Jurisprudence*, the Court wrote:

> It seems clear that in the absence of statute expressly conferring such jurisdiction, a court does not have the power to entertain a suit for the establishment or annulment of the will of a living testator. The ambulatory nature of a will, and the absence of parties in interest, which results from the rule that a living person has neither heirs nor legatees, render impossible the assumption that a court has inherent power to determine the validity of a will prior to the death of the maker. While there is much to commend in the practice in civil-law countries which permits a testator to prevent a contest of his will by disappointed heirs after his death, particularly a contest on the ground of testamentary incapacity, by acknowledging his will before reputable officers, public policy condemns an attempt to compel a testator to enter upon a contest of his will with persons who can have no interest in his estate until after his death.[223]

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216 *Lloyd*, *ibid.* at 239, 243; Leopold & Beyer, *supra* note 199 at 153-154.

217 *Ibid* at 156.

218 See David F. Cavers, "Ante Mortem Probate: An Essay in Preventive Law" (1934) 1 U. Chicago L. R. 440, often considered the seminal academic article on the subject.

219 15 Law Notes Edward Thompson Co. 1, 1911-1912 (available at Heinonline).

220 Leopold & Beyer, *supra* note 199 at 162.

221 Leopold & Beyer, *supra* note 199 at 164-165.

222 *Cowan v. Cowan*, 254 S.W.2d 862 at 863 (Ct. Civ. App. Texas 1952).

223 *Ibid* at 864, quoting from 57 Am. Jur. at 523; see also *Pond v. Faust*, 90 Wash. 117, 155 P. 776 (1916) (a court does not have jurisdiction to adjudicate the validity of a will prior to the testator's death); *In re Guardianship of Irene Sinclair*, 2000 WL 122696 (Wash. App. Div. 1); *Wynns v. Cummings*, 2001 WL 1683757 at *7 (Tenn. Ct. App.) ("The capacity to make a will must be adjudged following the offer of probate of the

Below we argue that although Canadian law also recognizes the principle that a living person has no heirs, this should not preclude the courts in Canada from making testamentary declarations upon application by the testator.

(b) Current ante-mortem probate statutes

Despite the continued interest in ante-mortem probate, no new legislation was adopted in any of the states until the 1970s, when North Dakota (1977),[224] Ohio (1978)[225] and Arkansas (1979)[226] enacted ante-mortem probate statutes. Although other states have contemplated adopting ante-mortem probate legislation since then,[227] the only state to actually do so was Alaska (in 2010).[228]

The four existing ante-mortem probate statutes in the United States each contemplate an adversarial proceeding in which the will-maker seeks a declaratory judgment from the court. Those with a prospective interest in the will (the statutes provide that all named beneficiaries and intestate successors must be named as parties to the proceeding) have the opportunity to participate in and challenge the proceedings.[229] Similar to the presumptions in traditional post-mortem will challenges, the burden of proof in these proceedings, at least as articulated under the Alaska statute, is that the testator has the burden of proving the execution of the will, and

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will"; thus, there is no justiciable issue where the will-maker is not deceased. "The declaratory judgment act does not give the courts jurisdiction to render advisory opinions to assist the parties or to allay their fears as to what may occur in the future.") [*Wynns*]; *Estate of Rogers v. Battista*, 125 S.W.3d 334 (Missouri Ct. App. 2004) (court does not have jurisdiction to determine the validity of the will outside the statutory probate procedure — which could only be instituted after the testator's death); and *Burcham v. Burcham*, 1 P.3d 756 (Col. Ct. App.) (living testator could not obtain declaratory judgment with respect to validity of his will, as the action stated no actual controversy, since the testator could potentially execute a new will thereby rendering the judgment merely advisory) [*Burcham v. Burcham*].

224 1977 N.D. Laws ch. 296, *codified at* N.D. Cent. Code §§30.1-08.1-01 to -04 (2010).

225 1978 Ohio Laws H. 505, *codified at* Ohio Rev. Code Ann. §§2107.081 to 2107.085 (2007).

226 1979 Ark. Acts 194, *codified at* Ark. Code Ann. §§28-40-201 to -203 (2004).

227 In 1994, the Texas Real Estate, Probate & Trust Law Council considered proposing an ante-mortem probate statute, but did not move forward because of "more pressing concerns"; in 2009, the New York Bar Committee considered whether to promote the adoption of ante-mortem probate, but this was subsequently rejected; and in 2011, ante-mortem probate legislation was introduced but failed to pass in Nevada. See Gerry W. Beyer, "Will Contests — Prediction and Prevention", 4 Est. Plan & Community Prop. L.J. 1 at 49, 51; Forrest J. Heyman, "A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in light of Alaska's Recent Ante-Mortem Legislation" (2012) 19 Elder L J 385 at 390 [Heyman].

228 2010 Alaska Sess. Laws 64, *codified at* Alaska Code Ann. §§13.12.530 to -580 (2010). The Alaska statute also allows for the declaration of the validity of a trust.

229 N.D. Cent. Code §30.1-08.1-02 (2010); Ohio Rev. Code Ann. §2107.081; Ark. Code Ann. §28-40-202 (1979); Alaska Code Ann. §13.12.565 (2010).

any person who opposes the petition has the burden of establishing lack of testamentary intent, capacity, or the presence of undue influence, fraud, duress, mistake or revocation.[230] A declaration of validity by the court is determinative upon probate after death.[231]

There are some key differences between the state statutes, including the following:

> 1. Only the testator can bring the proceedings in Ohio, North Dakota and Arkansas. In Alaska, the testator, a representative, or an interested party who has obtained the testator's consent can bring the proceedings.[232]
>
> 2. The declaration obtained in Ohio, Arkansas and Alaska is that the entire will is valid. In North Dakota, the court will instead make declarations as to the various elements of the will, i.e. whether: (1) the requisite formalities were observed; (2) the will-maker had testamentary capacity; and (3) there was no undue influence.[233]
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> 3. Once a will is declared valid under the North Dakota statute, the testator can only modify or revoke the will by instituting new proceedings. By contrast, in Arkansas, Ohio and Alaska, the testator can change his will by any method allowed by law.[234]

The ante-mortem probate statutes do not appear to be widely used. Indeed, there are no reported cases in Arkansas applying the legislation, and only one case in North Dakota which references its ante-mortem probate statute.[235] However, when ante-mortem probate is used, the proceedings are said to progress smoothly, which could account for the dearth of reported cases.[236] Given that Alaska's statute is still new, it is difficult to predict to what extent it will be used. There do not appear to be any reported cases in Alaska on the subject.

Ohio's statute has been used more often, though still infrequently. For example, in the first eight years of the statute's availability, only eight ante-mortem pro-

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230 Alaska Code Ann. §13.12.570 (2010). The other statutes do not specifically address the burden of proof.

231 N.D. Cent. Code §30.1-08.1-03 (2010); Ohio Rev. Code Ann. §2107.084; Ark. Code Ann. §28-40-203 (1979); Alaska Code Ann. §§13.12.555-560 (2010).

232 Ohio Rev. Code Ann. §2107.083; Ark. Code Ann. §28-40-203 (1979); Alaska Code Ann. §13.12.535 (2010).

233 N.D. Cent. Code §30.1-08.1-01 (1977).

234 Ark. Code Ann. §28-40-203 (1979); Ohio Rev. Code Ann. §2107.084 (2011); Alaska Code Ann. §13.12.575 (2010).

235 *Bartusch v. Hager*, 623 NW 2d 720 (N.D. 2001) [*Bartusch v. Hager*]. In this case, the testator had executed a will while under a guardianship. After the testator's death, a disgruntled heir sought to set aside the will because, among other reasons, it had not been declared valid in accordance with the ante-mortem probate procedure. The court summarily dismissed this argument, confirming that the ante-mortem probate procedure is not a requirement. *Ibid.* at para 28.

236 Leopold & Beyer, *supra* note 199 at 171.

bate cases were filed in one of Ohio's largest counties.[237] However, the constitutionality of the statute was challenged and upheld in 1983,[238] and the statute is said to thereafter have been repeatedly applied by the state courts. The procedure appears to be used most commonly where a lawyer has prepared a will for an elderly person or one under a guardianship, having been satisfied of the will-maker's capacity and absence of undue influence, but wanting to ensure the will's validity. Because the clients are in effect pre-screened for competence, the ante-mortem probate applications are rarely denied.[239]

The following cases from Ohio highlight the potential benefit to testators in ensuring against post-mortem will challenges through ante-mortem probate:

- In *Fischer v. Swartz*, the Ohio Court of Appeals upheld an ante-mortem declaration of will validity despite the fact that the testator had been declared incompetent and a guardian had been appointed prior to the testator having executed the will in question.[240] The Court recognized that "[w]hile a guardianship based upon mental disability is some evidence of testamentary capacity, it is not conclusive of the issue".[241] Although the guardianship "undoubtedly weighed heavily" in the determination, the Court of Appeals confirmed that the trial court had "substantial credible evidence" from which it could find that the testator had testamentary capacity on the date the will was executed, including, *inter alia*, the evidence of the drafting lawyer, the two witnesses to the will's execution and the friend who had driven the testator to the lawyer's office that day.[242]
- In *Horst v. First National Bank in Massillon*, an 87-year-old testator was declared to have the requisite capacity and his will was upheld on an ante-mortem probate petition, despite various testimony by him at the hearing that might have indicated some confusion as to the extent of his assets, among other inconsistencies, but when considered as a whole by the court, did not amount to delusion or incapacity. This decision was upheld on appeal, with the Ohio Court of Appeals noting several benefits of the ante-mortem statute, including the "luxury" of hearing from the testator personally and the comparative freshness of the evidence given the "acceleration of [the will's] contestation".[243]
- In *Hayes Memorial United Methodist Church v. Artz*, the church brought a post-mortem challenge to a will on grounds of incapacity, undue influence and fraud despite the fact that the will had previously been declared

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237 *Ibid*. at 173-174.

238 See *Cooper v. Woodard*, 1983 Ohio App. LEXIS 13477 (Ohio Ct App July 28, 1983).

239 Leopold & Beyer, *supra* note 199 at 174.

240 1983 Ohio App. LEXIS 12724.

241 *Ibid* at *3.

242 *Ibid* at *3–5.

243 1990 WL 94654 (Ohio App 5 Dist). The benefits of a testamentary declaration procedure are discussed in more detail below.

valid by an ante-mortem probate application.[244] The church argued that it was not bound by the declaration because it had not been served with proper notice of the application. Finding that the church was not entitled to notice, the court upheld the ante-mortem declaration of validity and dismissed the church's suit.

(c) Academic models of ante-mortem probate

Since the 1970s a variety of academic models of ante-mortem probate have been proposed in an effort to address criticisms of the procedure. The four models briefly described below are the: (i) contest model; (ii) conservatorship model; (iii) administrative model; and (iv) mediation model.

All of the existing ante-mortem probate statutes in the United States are based on the contest model. For the reasons discussed below, we agree that the contest model is the most viable and could be used as a basis for a testamentary declaration procedure in Canada.

***(i) Contest model***

The contest model envisions an adversarial proceeding similar in form to regular post-mortem will challenges, except that the testator is still alive.[245] After a will is executed, the will-maker files the will with the court and seeks a declaratory judgment that the will is valid. Notice and standing to challenge the will's validity are given to all beneficiaries named in the will and all those who would be heirs by intestate succession. In addition, a *guardian ad litem* (a litigation guardian in Canada) is appointed to represent unborn or unascertained potential heirs. The hearing is a public proceeding. A declaration of the will's validity is binding against any future challenges to the will. Under the original model, the testator would have to repeat the process in order to change or revoke the will.[246]

***(ii) Conservatorship model***

The conservatorship model is like the contest model, except that it seeks to limit interfamilial discord by suggesting a "conservator" (e.g. a litigation guardian) represent the interests of *all* prospective heirs and beneficiaries.[247] This would al-

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244 2011 WL 3368497 (Ohio App 6 Dist).

245 Howard Fink, *Ante-Mortem Probate Revisited: Can An Idea Have a Life After Death?* (1976) 37 Ohio St. L.J. 264 [Fink].

246 *Ibid* at 276. In a 2012 article a "collage contest model" was advanced. Although touted as a separate model, it is really an affirmation of the superiority of the contest model after revisiting the four models proposed since the 1970s. The author then considers the variations of the contest model as put into practice in the four existing state statutes and proposes a model act combining the best aspects of each statute. See Heyman, *supra* note 228.

247 Langbein, *supra* note 209.

low those wishing to challenge the will's validity to anonymously communicate relevant information or suspicions to the litigation guardian without having to take actions overtly hostile to the testator.[248] Where a significant conflict of interest existed between prospective heirs/beneficiaries, more than one litigation guardian could be appointed or any party could directly participate in the suit. The extent to which anonymity could be maintained in practice has been questioned as the testator would likely at least suspect which facts had been provided by which prospective heir or beneficiary.[249]

Under the conservatorship model, the declared will could be changed or revoked according to normal rules — the testator need not bring it before the court again.[250]

***(iii) Administrative model***

In order to avoid the adversarial and public nature of the contest and conservatorship models, the administrative model proposes that the court appoint a "litigation guardian" to act as an agent of the court to investigate the will's validity by questioning the testator, his family members and potential heirs or beneficiaries and report back to the court.[251] The court would then determine the validity of the will. The proceeding is done in camera and *ex parte* — with no formal notice being provided to others besides the litigation guardian. (Of course, anyone questioned by the litigation guardian about the testator's capacity or undue influence could deduce that such a proceeding is underway.) Because there is no opportunity to formally receive notice or challenge the will, the authors note that states adopting this model may wish to exempt members of the will-maker's "nuclear family" from being bound by the procedure — i.e. they would be given the right to contest the will at post-mortem proceedings.[252] The authors recommend against such a statutory exception,[253] but the reasons behind it may lead courts to grant such an exception in practice anyway given the reduced notice requirements.[254] This practice, in our view, defeats the purpose of obtaining ante-mortem probate.

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248 *Ibid* at 78.

249 Mary Louise Fellows, "The Case Against Living Probate" (1980) 78 Mich L Rev1066 at 1075 [Fellows].

250 Langbein, *supra* note 209 at 81.

251 Gregory S. Alexander & Albert M. Pearson, "Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession" (1979) 78 Mich L Rev 89 [Alexander & Pearson].

252 *Ibid* at 119-120.

253 *Ibid* at 120-121.

254 See e.g. Heyman, *supra* note 228 at 395.

***(iv) Mediation model***

More recently, a "mediation model" has been proposed as an alternative to the three main models discussed above.[255] Specifically, it is suggested that the benefits of mediation over the other three models would include privacy, confidentiality, "therapeutic effects for the participants", the "preservation of the family" and reduced costs.[256]

Under this model, upon petition to the court for a declaration of validity, the court would order the necessary and interested parties into mediation. The cost of the mediation would be shared by all parties. Although any settlement reached in the mediation would not be binding on all future interested parties, it is expected that after having the opportunity to express their frustrations, potential heirs would not feel the need for further litigation. It is also suggested that "the fact that the court is closely tied to the process should give the mediation result great weight in subsequent litigation".[257]

With respect, whereas mediation can be a useful way to maintain confidentiality and settle an action to avoid litigating away the assets of an estate *post-mortem*, it is difficult to conceive how or why a will-maker would seek during his lifetime to determine the validity of his will through court-ordered mediation. The questions to be decided in determining will validity — i.e. that the requisite formalities have been observed, and that the testator had capacity and was not unduly influenced, are "yes" or "no" questions where compromise is inappropriate. Any settlement resulting from such a mediation would necessarily involve the testator agreeing to do something different than what he had intended and had every right to do in his will, assuming he had capacity and was providing for his dependants. The purpose of ante-mortem probate is to allow the testator to confirm this right to do what he wants with his estate during his lifetime. Anyone who wishes to negotiate the terms of his own estate plan with his family should seek to do so privately before drafting his will. Alternatively, if the testator does not have capacity, it would be equally inappropriate for him to mediate the terms of his will.

## 5. Testamentary Declarations Should be Available in Canada

### (a) Advantages of testamentary declarations

Obtaining a testamentary declaration could successfully address key limitations of the traditional post-mortem probate system in Canada. These limitations include the increased likelihood of spurious will challenges, evidentiary difficulties, and the inability to rectify technical deficiencies in the will — all of which lead

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255 Dara Greene, "Antemortem Probate: A Mediation Model" (1999) 14 Ohio St J Disp Resol 663 at 679.

256 *Ibid* at 679-680.

257 *Ibid* at 684–685.

ultimately to a frustration of the testator's intent. The ways in which testamentary declarations could address these limitations are discussed in turn below.

***(i) Testamentary declarations provide autonomy and certainty to the testator***

The ability to obtain a testamentary declaration provides a key measure of autonomy to will-makers to determine how to dispose of their estate, and certainty that these intentions will be carried out upon their death.

Although measures can be taken by sophisticated and/or well-advised will-makers to increase the likelihood that their will will be upheld after death (for example, by obtaining a capacity assessment immediately prior to execution), there is no guarantee. As discussed in Part I, whether a testator had capacity to make a will is a legal question: even where a capacity assessor has found the testator capable, a court may disagree based on other evidence. In the end, the only way to guarantee a will's validity is to have a court declare it valid.

Courts will sometimes look to the terms of the will itself as evidence of the testator's capacity, or lack thereof, at the time of execution. The law of testamentary capacity generally expects that testators will make provisions for the natural objects of their bounty. In a post-mortem challenge, the exclusion of an adult child from the will, or the disposition of an entire estate to a distant charity, for example, may be put forth as evidence that the testator lacked the requisite capacity. Because of this, the ability to obtain a testamentary declaration could be particularly useful to testators, especially those with significant estates, who have made eccentric dispositions in their will (as discussed in Part I) and can foresee a will challenge:

> The looting of dead men's estates has now become an established industry . . .. A will bequeathing any substantial sum of money to charities, or to any person or object outside the testator's family and near relatives, is always liable to be contested . . .. The chances are, at the best, that a substantial part of the estate may be wasted in defending the will or buying off claimants, and if the estate is large and the testator had any sign of eccentricity about him, or any peculiarity of temperament or conduct that can be tortured by easy consciences into evidence of insanity, there is always a chance if not a probability that his will must give way to a new and radically different disposition of his estate, arranged by or between claimants, lawyers, judges and jurors according to their own interests or ideas of propriety.[258]

During the hearing of the application for a testamentary declaration, the testator could directly explain to the court his reasons for making the disposition he did. This in turn makes it easier for the court not to substitute its judgment for that of the testator's, which sometimes occurs in post-mortem challenges where the court must rely on imperfect and indirect evidence about the testator.

In addition, will-makers in the early stages of dementia may foresee, while they still hold testamentary capacity, that their condition will make their will ripe for a challenge after death. As the law has recognized, even those under a guardian-

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258 Hon. Albert E. Pillsbury, in an address to the Massachusetts legislative committee, as reported in *Law Notes*, April 1911 at 6.

ship because of a general lack of capacity to manage their affairs, may still have the capacity on a given day at a given time to make their will.[259] Bringing a testamentary declaration application shortly after executing the will, before the testator's condition further declines, may be an important way for those under a guardianship to still make a valid will that survives challenge.[260] (Consider how the fact that a person who was under a guardianship would be considered strong evidence of testamentary incapacity in post-mortem litigation.)

Opponents have noted that, despite the increased autonomy and certainty, obtaining a testamentary declaration has its downsides for the testator. For example, critics suggest that the procedure disrupts family harmony at a time when the testator needs family the most.[261] However, will challenges cause family disruption whether brought pre- or post-mortem. In bringing an application for a testamentary declaration, the testator effectively states: "If anyone is going to challenge my will, challenge it while I am alive so that I may defend it, notwithstanding any family disruption."[262]

Others submit that the procedure will not be used often in any event because testators are reluctant to publicize their estate plans and invite family members to "air the family laundry" in a public proceeding.[263] Also, the procedure can be quite costly for a testator during the end of his life.[264] These are valid concerns. However, these concerns do not justify refusing to make this *option* available to willmakers who weigh these potential downsides in their particular situation against the advantage of ensuring their testamentary intentions are upheld.

Again, we wish to emphasize that any testator who does not wish to avail himself of this procedure need not do so. There is and should be no adverse inference to be made against testators who do not apply for a testamentary declaration.[265] This practice is simply meant as an optional supplement to adhere to the principle of testator autonomy and to add certainty when the will is later probated under the traditional post-mortem system.

In addition to these potential downsides for the testator, critics of ante-mortem probate suggest that it is unfair to potential beneficiaries. Besides criticisms relating to insufficient notice to interested parties and whether the judgment can be held binding on certain potentially interested persons (e.g. minors, the unborn), critics say it presents family members with concerns about the will's validity with only unattractive alternatives: they can either remain silent, allowing the will to be vali-

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259 See e.g. *Royal Trust Co. v. Rampone*, *supra* note 28; *Laszlo v. Lawton*, *supra* note 24 at para. 192.

260 As in *Fischer*, *supra* note 241 and accompanying text.

261 Fellows, *supra* note 250 at 1094; Tracy Costello-Norris "Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?" Connecticut Probate Law Journal 9:2 (1995) at 333 and 349 [Costello-Norris].

262 Heyman, *supra* note 228 at 406; Fellows, *supra* note 250 at 1094; Costello-Norris, *supra* note 262 at 331, 336.

263 See e.g. Fellows, *supra* note 250 at 1094.

264 *Ibid* at 1095.

265 See e.g. *Bartusch v. Hager*, *supra* note 236.

dated, or challenge the will, disrupting family harmony and incurring litigation costs, with no assurance that the testator will not later change his will anyway.[266]

Although the protection of family members is one goal of current testamentary law, it cannot outweigh the primary goal of providing a testator with autonomy in determining how to dispose of his property. Thus, a testator should not be prevented from deterring family members from challenging his will in this way.

In any event, we are now seeing more and more family members litigating around wills during the testator's lifetime in guardianship and power of attorney proceedings. For example, one sibling finds out another took their parent (for whom the sibling happens to act as attorney for property), who is beginning to exhibit signs of dementia, to have a will drawn up. The first sibling objects and tries to have the second removed as attorney for the parent. These types of proceedings significantly overlap with questions regarding the will's validity. To be clear, we do not suggest that others besides the testator should be allowed to also challenge the validity of the will during these proceedings. However, the testator, if still capable and participating in those proceedings, should have the right to seek to validate his will at the same time (for example, by cross-application). Because many families are litigating issues relating to the testator's capacity and estate plans in the courts anyway, "family disharmony" is not a good reason to withhold from testators the opportunity to apply for a testamentary declaration.

***(ii) Testamentary declarations discourage spurious will challenges***

Our post-mortem probate system provides an attractive environment for disgruntled heirs to challenge a will. After a testator's death, previous comments made by him can be taken out of context, and the terms of his will themselves can be used by challengers to question his sanity and invalidate the will. Challengers can do so with impunity because the testator is no longer able to speak to the truth of the matter. For example, it is much easier to bring a claim that one's mother did not have capacity or that she intended something other than what is in her will when the mother is not available to directly contradict such evidence.

In post-mortem probate litigation, there is little downside to bringing a frivolous challenge as the high costs of litigation may encourage the estate to agree to a settlement even where the claims are unfounded. The estate and the rightful beneficiaries may recognize the settlement goes against the testator's intentions, but feel forced to settle to avoid further depleting the bulk of the estate. In recent years, the courts have tried to alleviate this concern by shifting the default costs rules in estates litigation from the traditional practice that the estate pays the costs of all parties to a default "loser pays" principle.[267] However, the estate may still be required to pay all costs where one of several public policy considerations applies, including "where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate".[268] Because of these exceptions,

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266 Fellows, *supra* note 250 at 1095.

267 *McDougald Estate v. Gooderham* (2005), 255 DLR 4th 435 at paras 78–80 (CA).

268 *Ibid* at para 78.

the risk that the estate will ultimately bear the costs of the litigation is a real concern in many will challenges and may lead the estate trustee to settle with spurious challengers in order to prevent total depletion of the estate. Alternatively, will challengers with few financial resources may be judgment proof and therefore have nothing to lose in trying to grab a few extra bucks from the estate.

Because the application for a testamentary declaration is brought by the willmaker, most likely in situations where a lawyer has advised him to do so after having already been pre-screened for concerns about capacity and undue influence, there is a greater chance that any challenge that might have been brought post-mortem would have been spurious. Where capacity is really a concern, the drafting solicitor is not likely to recommend the application. Thus, the procedure tends to weed out only spurious challenges before death.

Some commentators have suggested that obtaining a declaration of will validity is unnecessary because there are other procedures a testator can use to deter post-mortem will challenges, including the use of *in terrorem* will clauses or placing assets in joint ownership with rights of survivorship. However, these options provide only limited security and/or come with their own problems. An *in terrorem* clause provides a particular bequest on the condition that the beneficiary not contest the will. While this may deter some challengers, these clauses may be held unenforceable in certain circumstances.[269] Moreover, the clause does not establish the technical validity of the will as ante-mortem probate would, as discussed below. Recent case law has also made clear that assets of significant value which are transferred into joint-ownership often get drawn into post-mortem will challenges anyway.[270]

***(iii) Testamentary declaration applications provide the court with more reliable evidence***

In traditional post-mortem litigation, the court must rely on indirect evidence of the testator's intent, capacity and susceptibility to influence by considering the testator's past conduct and circumstances as relayed or analysed by third parties. Litigating these issues prior to the testator's death as part of an application for a testamentary declaration would overcome this challenge by allowing the court to observe the testator personally and receive his or her submissions regarding these issues directly.

Wills are often probated many years after their execution, during which time evidence relating to the testator's intentions or capacity may be lost or forgotten. By contrast, an application to obtain a testamentary declaration would in the usual course occur shortly after the will's execution, which is the relevant time period for assessing capacity. In observing the testator shortly after the will's execution, the court is in a better position to consider for itself the testator's capacity rather than having to rely on years-old doctor's reports or retrospective capacity assessments prepared by experts who had never met the testator.[271] In addition, other important

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269 See e.g. *Kent v. McKay*, 1982 CarswellBC 187 (BCSC).

270 See e.g. *Pecore v. Pecore*, [2007] 1 SCR 795.

271 As mentioned above, the appropriateness of such retrospective capacity reports in will challenges is questionable.

witnesses such as family members and friends are more likely to be available and to have a fresh recollection of relevant facts than in post-mortem challenges.

Critics of ante-mortem probate in the U.S. have posited that it actually "sacrifices considerable evidence in order to obtain the testator's testimony".[272] This claim is based on an assumption that would-be challengers to the will would be deterred from doing so in order to avoid upsetting the testator.[273] However, this criticism cannot stand. The fear that would-be challengers would be deterred from bringing a challenge is one of the very things that makes this procedure attractive to testators. Recall that the testator is the one bringing the issue to the forefront — those testators wishing to avoid confrontation regarding their testamentary intentions need not apply. Along similar lines, opponents suggest that would-be challengers will be deterred from applying for fear that if they oppose the testator while he is still alive, he could then further change his will and disinherit them altogether.[274] Yet those who have this fear are often the types of spurious will challengers the testator and society would *wish* to discourage from coming forward. Loved ones with a genuine concern about the testator's capacity or subjection to undue influence are more likely to set aside fears of upsetting the testator or of retribution in order to do what they think is right. We see loved ones doing this all the time in power of attorney and guardianship proceedings, for example. The only difference here is that the testator forces the issue earlier by applying for a testamentary declaration while he or she is still able to participate in such proceedings.

One commentator goes further to suggest that even a successful challenge to a will on grounds of fraud or undue influence would "achieve little" because "the testator can always re-execute the will and force the presumptive takers to find further wrongful conduct to invalidate the will again".[275] On its face this argument appears persuasive; however, this scenario is likely rare in practice. First, as the U.S. practice has demonstrated, most applications for ante-mortem probate are granted because those who bring such applications have already been in effect prescreened for capacity and undue influence by the lawyer who recommended the procedure. Of the few successful challenges, some will be for incapacity, in which case the testator may not be able to re-execute his will. Of the remaining few successful challenges grounded in fraud or undue influence, these will likely also have some link to diminished capacity given the overlap between the concepts, and therefore also poses challenges to the testator re-executing his will. Even where the will-maker can and does execute a new will, it is highly unlikely that he, having just undergone the time and expense of an application only to have his will invalidated by the court, would then bring the new will before the court again during his lifetime. Accordingly, the worst that could happen in these few cases is that chal-

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272 Fellows, *supra* note 250 at 1080; see also Costello-Norris, *supra* note 262 at 350.

273 Fellows, *supra* note 250 at 1080.

274 Costello-Norris, *supra* note 262 at 350.

275 Fellows, *supra* note 250 at 1080-1081.

lengers would fight the battle twice. The second time, they would have evidence of the last will's invalidation on their side.[276]

***(iv) Testamentary declaration applications provide an opportunity to correct technical errors in the will***

A court will invalidate a will if the required formalities have not been observed, including, for example, inadequacies in the way the will execution was witnessed or attested to by the witnesses.[277] Under traditional post-mortem probate practice where the testator is no longer available, these deficiencies cannot be remedied. As several commentators have noted: "testing the validity of the instrument after the testator's death is the most illogical and impractical time for such scrutiny because even the simplest of errors have the unavoidable effect of destroying the validity of a will and upsetting the testator's intentions".[278] Although these formalities are meant to ensure that the testator's true intentions are carried out, when they are not observed properly due to inadvertent error, they can result in just the opposite — the thwarting of the testator's intent by invalidating the will.

Although a testator is unlikely to bring an application for a testamentary declaration for the sole purpose of confirming all formalities have been properly observed, an incidental benefit to allowing such applications would be the identification and rectification of any perceived technical errors while the testator is still able to do so. Critics have downplayed this benefit by pointing out that because the few ante-mortem applications which are brought tend to be by those who have had a competent lawyer draft and witness the execution of the will, one would expect few errors to be revealed during the application. Even if this is the case, it is still worth noting as a secondary benefit of testamentary declarations.

(b) Canadian provinces should enact legislation authorizing testamentary declarations[279]

To date, no Canadian jurisdiction has enacted legislation allowing a person to obtain a testamentary declaration from the court.[280] However, given the increase in litigation involving elderly persons' estates (many involving capacity issues) during

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276 See discussion *infra* regarding the admissibility and binding nature of findings of fact made in the declaration proceedings on subsequent proceedings involving the validity of a will.

277 For the requisite formalities of a will see *supra* note 35.

278 Leopold & Beyer, *supra* note 199 at 136.

279 Again, we have excluded Québec from this discussion.

280 Recently, the B.C. Law Institute considered recommending the procedure for adoption in British Columbia. Although the Institute noted the advantages of such legislation, it ultimately decided not to pursue it, primarily because of the time and expense involved in developing the procedure and a perceived lack of public will for such a measure. BCLI Capacity Report, *supra* note 200 at 90-91. We think the BCLI should reconsider its recommendation in light of the benefits of testamentary declarations described herein.

their lifetimes, which has all signs of continuing to increase, Canadian provinces should adopt testamentary declaration legislation as an option for people who may wish to avail themselves of this procedure.

Specifically, Canadian provinces should adopt legislation similar to that in the United States which is based upon the contest model. Shortly after executing a will, the testator could bring an application in the relevant provincial court for a declaration of the will's validity. Alternatively, the statutes could authorize the courts to make a declaration as to one or more of the elements of a will's validity — i.e. that the formalities were properly observed, that the testator had the requisite capacity at the time of execution and/or that the testator was free from undue influence at the time of execution. All potential beneficiaries/heirs should be named as Respondents in the application. The Public Guardian and Trustee or the Children's Lawyer should also be added to all applications to represent the interests of minors, the unborn and unascertained heirs/beneficiaries. The court would consider the validity of the will (or, the particular element(s) to be determined) based on the common law principles usually applied in post-mortem will challenges.

As in the Arkansas, Ohio and Alaska statutes, after obtaining a testamentary declaration, the testator should still be permitted to change his will by any method allowed by law. Some might criticize this feature as diminishing the finality of a testamentary declaration. However, in obtaining a pre-death declaration of a will's validity,[281] the testator should not be seen as giving up his autonomy to make a new will. The procedure is an optional added step to the normal probate rules. It does not take the testator outside of the normal rules; it merely forces an anticipated challenge of the will to an earlier point in time. In any event, in practice it is unlikely that a testator would change his will after going through the time and expense of having it declared valid. "Most testators who are at once sufficiently prudent and well-counselled to have used living probate procedure and sufficiently aged or decrepit to have needed it will not lightly venture out of the safe harbor that they will have achieved. The testator who uses living probate procedure will almost always be making his true 'last will'."[282]

As with the U.S. statutes, the testamentary declaration should be binding and the validated will cannot later be challenged during probate after the testator's death — the issue would be *res judicata*. The provincial legislatures should also consider a provision such as that in the North Dakota statute, which specifically provides that the facts found in the ante-mortem probate proceeding "shall not be admissible in evidence in any proceeding other than one brought in North Dakota to determine the validity of the will".[283] This provision would prevent the use of any evidence of (in)capacity, for example, to be used against the testator in other proceedings not relating to his will. On the flip side, it should be admissible in subsequent proceedings involving the validity of another will or codicil. For example, in the rare cases where the testator made a new will or codicil after the declared will but did not apply for a testamentary declaration as to the new will/codicil, and that new will/codicil is later challenged on probate, the earlier declared will could

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281 See discussion at footnote 6 regarding the usage of the term "will".

282 Langbein, *supra* note 209 at 81.

283 N.D. Cent. Code § 30.1-08.1-04.

serve as determinative evidence that the testator had the requisite capacity at least as of the date of execution of the declared will.

As previously mentioned, issues relating to wills often arise in the context of power of attorney or guardianship proceedings. In *Banton v. Banton*, Justice Cullity appeared to open the door for the consideration of capacity to make a will during the testator's lifetime by extending jurisdiction under the Ontario *Substitute Decisions Act*:

> At the beginning of these reasons I referred to the difficulty in making the findings of fact, and drawing the distinctions, required for each of the different tests of capacity that are applicable for specific purposes. Much of the relevant evidence was circumstantial and there was a great deal of conflicting testimony. Although the difficulty has, in the past, confronted courts exercising probate jurisdiction as far as testamentary capacity and, occasionally, capacity to marry are concerned, it seems inevitable that enhanced longevity will lead to an increase in the frequency of disputes of this kind in the future. This is evidenced by the number of cases now coming before the Court under the *Substitute Decisions Act*. In such cases the Court invariably hears expert evidence addressed to the specific questions that are in issue after the particular individual has been examined for that purpose by the expert if not by the Court. Findings of credibility are less likely to be required under the Act than in probate proceedings. The relative efficiency of the fact-finding process suggests that the possibility of extending the jurisdiction under the Act may, at least, merit discussion even though the primary legal significance of the questions may not arise in the individual's lifetime. In many cases such an extension would permit all, and not merely some, of the issues that concern members of an individual's immediate family to be addressed directly and openly in the same proceedings.[284]

While we hesitate to suggest that potential beneficiaries/heirs be allowed to challenge an individual's will during power of attorney or guardianship proceedings, there is no reason why that individual at the centre of these proceedings, if he is participating, could not bring an application (e.g. a cross-application) to determine the validity of his will while all of the same evidence is already before the court.

(c) Canadian courts should grant testamentary declarations under the common law

Even without a statute, Canadian courts should consider granting testamentary declarations under the common law.

Admittedly, this suggestion raises questions about the courts' jurisdiction to grant testamentary declarations. In Ontario, section 97 of the *Courts of Justice Act* authorizes the Ontario Superior Court of Justice to "make binding declarations of

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284 *Banton v. Banton*, *supra* note 10 at para 163, cited by BCLI Capacity Report, *supra* note 200 at n. 294.

right, whether or not any consequential relief is or could be claimed".[285] Accordingly, Canadian courts may make a declaration as to any existing legal or equitable right.[286] There must be an actual live dispute regarding the legal right in question — courts will not "deal with unripe claims" or "entertain proceedings with the sole purpose of remedying only possible conflicts".[287]

As previously mentioned, the courts in the United States have been reluctant, absent statutory authority, to grant declaratory judgments as to a will's validity while the testator is alive. They hold that this issue is not yet justiciable based on the maxim that a living person has no heirs or legatees, and therefore there are no existing interests to determine until after the testator's death.[288] The validity of a will in this context is considered a "future controversy" and to seek a declaratory judgment on this point is considered seeking merely an "advisory opinion".[289]

The principle that the possibility of inheriting from a living person is not an interest recognized at law is also generally accepted in Canada.[290] Moreover, in *The Law of Declaratory Judgments*, Professor Lazar Sarna also questions the testator's rights in seeking a determination regarding his will:

> It is difficult to see how a testator during his lifetime would have sufficient interest or grounds to request a determination of rights in relation to the will he has drafted, or even with respect to the succession duties to be attached to the transmission of certain rights after death, seeing that a will is an act by means of which the testator makes a free disposal of his property to take

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285 *Courts of Justice Act*, RSO 1990, c C 43, s 97. See various provincial statutes for the authorization to make binding declarations of right. See British Columbia — *Supreme Court Civil Rules*, BC Reg 168/2009, Parts 10–20, s 20-4(1).; Alberta — *Judicature Act*, RSA 2000, c J-2, s 11; Saskatchewan — *The Queen's Bench Act*, SS 1998, c Q-1.01, s 11; Manitoba — *The Court of Queen's Bench Act*, SM c C-280, s 34; Prince Edward Island — *Judicature Act*, RSPEI 1988, c J-2.1, s 40; Newfoundland and Labrador — *Rules of the Supreme Court*, SNL 1986, c 42, Sched. D. Rule 7, s 7.16; Yukon — *Judicature Act*, RSY 2002, c 128, s 32; Northwest Territories — *Judicature Act*, RSNWT 1988, c J-1, s 48; and Nunavut — *Judicature Act*, SNWT (Nu) 1998, c 34, s 45.

286 See e.g. *Nickerson v. Nickerson*, 1991 CarswellOnt 302 at paras 20, 21 (OCJ).

287 *Operation Dismantle Inc. v. Canada*, [1985] 1 SCR 441 at para 31, quoting from Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Thomson Canada Limited, 2007) at 179.

288 See *supra* note 223-224 and accompanying text. Indeed, two of the U.S. ante-mortem probate statutes specifically address this concern by explicitly providing that the beneficiaries entitled to notice under the statute are deemed to possess inchoate property rights for purposes of the proceeding. ND Cent Code §30.1-08.1-02; Ark. Code Ann. § 28-4-202.

289 See e.g. *Wynns*, *supra* note 224 at *7.

290 See e.g. *Middleton's Will Trusts, Re* (1967), [1969] 1 Ch 600 at 607-608 (Eng Ch Div) (a gift to the heir of a living person confers no interest in that property; it is merely an expectancy, or a *spes successionis*). *Middleton's Will Trusts* has been cited in several Ontario cases for this proposition, including *Weinstein*, *infra* note 293 at para 11 and in *Sutherland v. Hudson's Bay Co.*, 2005 CarswellOnt 2564 at para 35 (SCJ).

> effect only after his death with the power of revocation at all times before then.[291]

Nonetheless, this principle should not prevent the making of testamentary declarations by Canadian courts for the following reasons.

***(i) The courts are increasingly receptive to determining the validity of wills of living testators***

The idea that a court could not declare a will's validity during the life of the testator focuses on the fact that the question is only a potential, future controversy — not a current, existing one. It is also suggested to be a waste of time, because the testator maintains the power of revocation until death. However, this principle rests on the assumption that the testator does actually have the power of revocation at all times before death. As we know, for people with diminished capacity, this is not in fact the case. Many testators, due to dementia or other cognitive deficiencies, become incapable to make or change a will during their lifetimes. From that point, any existing will is effectively frozen in time until death. Several recent cases have recognized that such a situation crystallizes the rights of the testator and beneficiaries vis-a-vis the will, thereby allowing the court to determine the validity of the will even though the testator is still alive.

In *Weinstein v. Weinstein (Litigation Guardian of)*, Justice Sheard held that despite the usual principle that potential heirs have no interest in bequeathed property until after the will takes effect upon death, where the testator no longer has the mental competence to change her will, the potential heirs' entitlement is no longer just the "mere hope of succession". Rather, the heirs in practical terms hold what amounts to a vested interest in the property.[292] The Court further pointed to the obligation of a guardian for property to determine whether the incapable person has a will and if so, what the provisions of the will are, as "indicative of the importance legislators attach, appropriately, to the will of an incapable person, in view of the permanent character of the will if the incapable person does not regain capacity".[293]

Later, the Court in *Nystrom v. Nystrom* relied on Justice Sheard's reasoning in *Weinstein* in granting Ms Nystrom's daughter standing to bring an action "to protect her vested interest under the permanent will of an incapable person," including for a declaration that Ms Nystrom was without capacity and/or had been subjected to undue influence when she conducted certain transactions.[294] The Court disagreed that the action should be delayed until after Ms Nystrom's death because of the possibility that the applicant could predecease Ms Nystrom. The Court con-

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291 Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Thomson Canada Limited, 2007) at 251 [*Sarna*].

292 *Weinstein v. Weinstein (Litigation Guardian of)*, 1997 CarswellOnt 3231 at paras. 11-12 (Gen Div) [*Weinstein*].

293 *Ibid* at paras 17-18.

294 *Nystrom v. Nystrom*, 2006 CarswellOnt 4310 at paras 17-18 (SCJ) [*Nystrom v. Nystrom*].

firmed the present vested — not contingent — interest of the applicant, which could be pursued presently.[295]

In 2005, Justice Veit of the Alberta Court of Queen's Bench considered whether a will can be litigated prior to death in *A. (S.) (Trustee of) v. S. (M.)*.[296] In that case, the Court granted an application to strike portions of a Statement of Claim that sought to adjudicate a dependant adult's will (the exact details are not provided), on the grounds that an individual's will may not be adjudicated upon while that individual is alive.[297] The Court quoted from Lord Chancellor Hardwicke in the 1750 English case of *Lord Godolphin* regarding the status of a will during a testator's lifetime:

> . . . the will is not complete until the death of the testator . . . and the law says that a testamentary act is only inchoate during the life of the testator from whose death only it receives perfection, *being until then ambulatory and mutable, vesting nothing, like a piece of waste paper* . . .[298]

The court noted that neither party in the action was able to find Canadian case law on the specific point in issue, and continued:

> . . . the reason why virtually no cases can be found of the type that would help to elucidate the issue before this court is that, for nearly 500 years, the English common law has held that, during the life of the testator, a will is no more than a piece of waste paper. It then becomes obvious why courts will not make [*sic*] entertain costs about waste paper — whether the answer is framed in mootness or in excessive expense relative to the potential benefit, to litigate over a piece of waste paper is a poor use of personal and state resources.[299]

However, Justice Veit went on to add the following caveat:

> Despite the clarity of the law on the status of a will during a testator's lifetime, if there were evidence before a court that the dependent adult who executed a will would absolutely never be able to validly execute another will, and if there were a risk that those who had a contingent duty to prove the will would lose available evidence, a court might be persuaded to have a hearing into the validity of a piece of paper that might escape the designation "waste paper".[300]

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295 *Ibid* at para 19.

296 *A. (S.) (Trustee of) v. S. (M.)*, 2005 ABQB 549, 2005 CarswellAlta 1003 (QB) [*A. (S.) v. S. (M.)*].

297 *Ibid* at para 1.

298 *Ibid* at para 25, quoting from *Duke of Marlborough v. Lord Godolphin*, [1750] 28 All ER 41 (UK HL) (emphasis in *A. (S.) v. S. (M.)*).

299 *A. (S.) v. S. (M.)*, *supra* note 297 at para 28.

300 *Ibid* at para 29.

The court concluded, however, that this "type of call upon the court's jurisdiction in equity" could not be made in that case because the remaining portions of the statement of claim that would be litigated would raise the same issues as would be raised in litigation over the will.[301]

More recently, the case of *Gironda v. Gironda* has been touted as one of the top cases in estates law in 2013 for its confirmation of the tests for testamentary capacity, undue influence and the place that these issues have in determining the validity of a will, among others.[302] After careful consideration of these tests and the medical and other evidence in this case, Justice Penney determined that Caterina Gironda had testamentary capacity, knew and approved the contents of her will, and that she had not been unduly influenced in making her will. Accordingly, the court determined that Caterina's will was valid. At the time of judgment, Caterina was still alive, although suffering from severe Alzheimer's disease, and was no longer capable. As justification for determining the validity of Caterina's will, Justice Penney in a footnote explained that: "[t]he issue is not moot because . . . Caterina does not and is unlikely ever to have current capacity to make or change a will".[303]

These cases signal an increased receptiveness by the courts to address the validity of a will prior to a testator's death where the testator's capacity poses a challenge to his ability to later change or revoke his will. If the courts accept that they can make declarations regarding the validity of a will to determine the rights of potential beneficiaries based on an acknowledgment that the testator is no longer capable of changing the will, then the courts should also acknowledge the testator's right to ensure that his testamentary intentions will be carried out by bringing his will to the court for a determination of validity before he gets to the point where he can no longer change his will.

***(ii) The testator has a right to have his will declared valid even if potential beneficiaries do not***

The U.S. cases declining to take jurisdiction to determine a will where the testator is still alive, and even the Canadian cases described above, were all brought by others besides the testator and/or focused on the rights of the potential beneficiaries rather than the rights of the testator.[304] Their rights to take, and to what extent, under the will may be contingent and therefore only involve a future controversy, but the testator has an existing right at stake — the right to make a will.[305] In

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301 *Ibid.*

302 *Gironda v. Gironda*, *supra* note 133. Again, as of the date of writing this paper, this case was under appeal.

303 *Ibid* at note 2.

304 In *Burcham v. Burcham*, *supra* note 224, the testator brought the action himself, but in addition to the validity of his will, he sought a declaration limiting the rights of his adult children from a previous marriage to take under the will.

305 See e.g. *Corron v. Corron*, 531 NE2d 708 at 711 (Ohio Sup Ct 1988) (the court confirming that the ante-mortem probate statute permits only the testator himself to have a judgment rendered as to the validity of his will, and continuing: "Because such a will

Ontario, section 2 of the *Succession Law Reform Act* provides a statutory right to dispose of one's property by a will: "A person may by will devise, bequeath or dispose of all property (whether acquired before or after making his or her will) to which at the time of his or her death he or she is entitled either at law or in equity . . .".[306] Arguably, this right lacks any teeth if there is no way for the testator to ensure that his property will actually be devised in accordance with the will.

Moreover, on an application for a testamentary declaration, the court is not being asked to *interpret* a will or determine anyone's rights to particular property under the will. Accordingly, the maxim that the potential beneficiaries of a living testator have no property rights is irrelevant for the purposes of a testamentary declaration. Those rights are yet to crystallize on the death of the testator (or, at the earliest, upon his becoming permanently incapable), and will be determined and distributed upon probate under the usual system. In an application for a testamentary declaration, the court is only being asked to declare the elements required for a will's validity, including that: (i) the will was properly executed; (ii) the testator had the requisite testamentary capacity; and (iii) the testator was free from undue influence. There is no reason why these questions should not be considered prior to death in the same way they would be considered after death in the current probate system. The courts already grant capacity determinations, for example, in guardianship proceedings. There is no difference in asking the court to declare testamentary capacity on an application by the testator, even if stopping short of declaring the entire will valid. That declaration alone could prevent a spurious post-mortem will challenge or, at the very least, would provide determinative evidence on a key element of the will's validity during a post-mortem challenge.

***(iii) The will of a testator facing an inevitable loss of capacity is not "waste paper"***

Alternatively, even if the courts consider an application for a testamentary declaration to fall under the category of addressing a "future controversy", there are good reasons why the courts should still entertain such an application — i.e. that the will would escape the designation of "waste paper". Professor Sarna notes that "the court has the discretion to grant a declaration as to the future where the order serves a definite purpose and does not embarrass the interests of any of the parties concerned".[307] Given the emotional and financial costs of bringing an application

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would not yet have been admitted to probate, persons who are potential beneficiaries or heirs at law have no actionable interest in the document.")

306 The right to dispose of one's property is set out in the various provincial statutes. See e.g. British Columbia — *Wills, Estates and Succession Act*, *supra* note 6, s 41; Alberta — *Wills and Succession Act*, *supra* note 10, s 9; Saskatchewan — *The Wills Act*, *supra* note 35, s 21; Manitoba — *The Wills Act*, *supra* note 35, s 2; Ontario — *Succession Law Reform Act*, *supra* note 35, s 2; New Brunswick — *Wills Act*, *supra* note 35, s 2; Nova Scotia — *Wills Act*, *supra* note 34, s 3; Prince Edward Island — *Probate Act*, *supra* note 34, s. 58; Newfoundland and Labrador — *Wills Act*, *supra* note 35, s 16; Yukon — *Wills Act*, *supra* note 35, s 3; Northwest Territories — *Wills Act*, *supra* note 35, s 3; and Nunavut — *Wills Act*, *supra* note 35, s 3.

307 Sarna, *supra* note 292 at 31.

for a testamentary declaration, such applications would likely only be brought in circumstances where the testator has good reason to believe that his will may not survive a post-mortem challenge, likely on capacity-related grounds, and particularly where there is a significant estate at issue. Thus, granting a testamentary declaration (or even, in the alternative, a declaration of capacity), would serve a definite purpose in ensuring that the testator's impending deterioration will not be used against him to invalidate his will after his death.

As described throughout this article, the testator's autonomy in deciding how he wishes to dispose of his property, and ensuring that these intentions are in fact carried out, are at the heart of the probate system in Canada. Yet, when a testator learns that he will likely lose his testamentary capacity and that this may later make his will ripe for challenge after his death, we can offer only few, limited measures (e.g. capacity assessments) to try to build up the record in anticipation of such challenges. Under the current post-mortem probate system, the testator can do nothing but wait for death and *hope* that his testamentary intentions will be carried out thereafter. At most, the testator may try to explain his wishes to family members and friends and try to convince them not to later challenge his will — all during a time when the testator is growing more anxious and confused because of his illness.

The case law underlying the post-mortem probate system — and the idea that a will is nothing but "waste paper" before death — originated many years ago and needs to be revisited in light of current realities. Due to advances in medical technologies, individuals' bodies may continue in good health for many years after the mind has begun to fade. As a result, there is a real possibility that a will executed by someone with questionable capacity will not be challenged on that basis until many years later, when evidence has faded or been lost, and/or has been skewed by the long period of the testator's subsequent decline. The ability to seek a testamentary declaration would instead allow a testator the opportunity to "take the bull by the horns" and address a potential will challenge head-on shortly after the will's execution.