STANDARDIZING THE ASSESSMENT OF TESTAMENTARY CAPACITY

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INTRODUCTION

Challenges to wills involving medical and legal issues of capacity are expected to increase in the coming decades due, in part, to societal and demographic changes. Numerous factors, such as an increase in the complexity of the family unit together with what is anticipated to be an unprecedented transfer of intergenerational wealth, serve to exacerbate these issues. With a statistical rise in the choice of more complex relationships and family arrangements, including blended and fractured families, multiple marital or common law unions, later-life partnerships, children of multiple relationships (including step-children, adopted children and genetically procured children), the list of potential claimants to a dispute is growing. Moreover, families are not the same tight-knit unit they once were, in that they are no longer in the same community, town, city or even country, as facilitated by advancements in communications and technology.[1] These relatively recent developments will inevitably produce more complicated distributions of estate assets and transfers of wealth.[2] Demographic shifts have become relevant in the assessment of what is known as requisite testamentary capacity ("TC").

Amid the nuances and complicated factors inherent in modern family dynamics, assessments of TC have remained inconsistent, both in terms of procedure and interpretation. That it is further confused by the interplay of medicine and the law is trite. This monograph seeks to establish the utility of a uniform cognitive standard for assessing TC.

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1. Kimberly A. Whaley, "The Intersection of Family Law and Estates Law: Post-Mortem Claims Made by Modern Day 'Spouses'" (2012), 40 Adv. Q. 1.
2. Kimberly A. Whaley and A. Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" (2013), 32 E.T.P.J. 215.

LEGAL BACKGROUND

Overview of Requisite Decisional Capacity

There is no single legal definition of capacity (though we often refer colloquially to various "tests" for capacity). Rather, according to the *Substitute Decisions Act, 1992*[3] ("*SDA*"), capacity is equated with being "mentally capable". The law presumes that every person is capable unless and until this presumption is rebutted,[4] by looking to both law and fact, and applying the available evidence to the criteria for determining requisite decisional capacity in a particular context.[5] The presence of a mental disorder is not determinative in considering whether a person can be said to lack requisite decisional capacity. Rather, only clear evidence can rebut the presumption of capacity.[6] Capacity entails possession of the "cognitive ability to process, retain and understand the relevant information" as well as an appreciation of the risks and consequences of a decision,[7] and a person with capacity in a certain respect should "be able to apply the relevant information to his/her circumstances, and to be able to weigh and appreciate the foreseeable risks and benefits of a decision or lack thereof".[8] The crucial inquiry is whether the individual possesses the mental capacity to render the decision at hand, rather than wisdom. As delineated in *Re Koch*,[9] "[t]he right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected".[10]

Importantly, capacity is time-, situation-, and task-specific.[11] For this reason, it is incorrect to conclude that one type of decision falls higher or lower along a threshold than another in terms of the

3. R.S.O. 1992, c. 30.
4. *Palahnuk v. Kowaleski* (2006), 154 A.C.W.S. (3d) 996, 2006 CarswellOnt 8526, [2006] O.J. No. 5304 (Ont. S.C.J.) [*Palahnuk*]; *Brillinger v. Brillinger-Cain*, 2007 CarswellOnt 4011, [2007] O.J. No. 2451 (Ont. S.C.J.) [*Brillinger*]; *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216, 2004 CarswellOnt 1228 (Ont. S.C.J.), affirmed (2005), 14 E.T.R. (3d) 27, 137 A.C.W.S. (3d) 1076, 2005 CarswellOnt 877 (Ont. C.A.) [*Knox*].
5. *Starson v. Swayze*, 2003 SCC 32, [2003] 1 S.C.R. 722, 225 D.L.R. (4th) 385 (S.C.C.).
6. *Ibid.*, at para. 77.
7. *Ibid.*, at para. 78.
8. *Ibid.*
9. (1997), 33 O.R. (3d) 485, 70 A.C.W.S. (3d) 712, 27 O.T.C. 161 (Ont. Gen. Div.), additional reasons (1997), 35 O.R. (3d) 71, 72 A.C.W.S. (3d) 230, 28 O.T.C. 22.
10. *Ibid.*, at para. 89.
11. K.A. Whaley and A. Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" (2013), 32 E.T.P.J. 215.

requisite criteria to be satisfied.[12] Rather, every decision is unique, and the presence or absence of requisite decisional capacity in one decision does not necessarily imply its presence or absence in another decision.[13] Moreover, courts have consistently endorsed the notion that capacity can fluctuate over time.[14] This complexity and specificity has broader implications for legal and medical professionals practising in areas that touch on capacity issues. In the course of assessing an individual's capacity, a delicate balance must be struck between promoting an individual's decisional autonomy and protecting vulnerable individuals from exploitation and loss. This impetus can create numerous and significant potential minefields for professionals, who are required to act diligently for clients without putting them in harm's way.

Rules of professional conduct for lawyers provide some guidance to legal professionals when it comes to working on matters involving capacity issues. For example, the Law Society of Upper Canada's *Rules of Professional Conduct* (the "Rules")[15] stipulate that the lawyer and client relationship presupposes that a client has the requisite mental capacity to make decisions about his/her legal affairs, and to provide instructions to lawyers. These Rules also indicate that a client's ability to make decisions may change over time or in the presence of differing factors such as age, intelligence, experience, mental/physical health and on the advice, guidance and support of others. In the event that a client does not possess the legal capacity to manage his or her legal affairs, a lawyer may need to take the necessary steps to have a lawfully authorized representative appointed or to obtain other assistance in order to protect the client's interests.[16]

Due to the complexity of assessing capacity and working with individuals whose capacity might be at issue, as well as an increase in the possible precursors for capacity issues such as dementia, many legal professionals have been faced with difficult decisions as to how to best serve their clients, as well as concerns over potential liability for handling such situations incorrectly. For this reason, professionals working with individuals whose capacity may be at issue often refer to "red flags" for decisional capacity issues. For

12. Kimberly A. Whaley, Kenneth I. Shulman and Kerri L. Crawford, "The Myth of A Hierarchy of Decisional Capacity: A Medico-Legal Perspective" (2016), 45 Adv. Q. 395.
13. *Ibid.*
14. *Palahnuk*, *Brillinger*, and *Knox*, *supra*, footnote 4.
15. The Law Society of Upper Canada, *Rules of Professional Conduct* (Law Society of Upper Canada, 2000).
16. Rule 3.2-9 and related Commentary.

example, the most significant cause of mental disability among older adults is Alzheimer's Disease and related dementias, which affect approximately 500,000 Canadians.[17] This unprecedented rate of dementia amongst older adults over the age of 80 renders very advanced age itself as a possible red flag for the presence of factors that might impact requisite decisional capacity. A legal or medical professional working with a person who is of very advanced age, then, will require a high degree of sensitivity with regard to avoiding ageism, while simultaneously ensuring that professional obligations and duties to the client are adequately adhered to. A high degree of professionalism is required. Thus, red flags can constitute a means of ensuring that circumstances that may be cause for concern from a decisional standpoint are thoroughly canvassed. Ultimately, it may be that red flags signal a need for a more fulsome assessment of a client's capacity with respect to a particular decision. For example, a significant departure from previously expressed wishes should trigger probing for a clear and consistent rationale for those changes.

Types of Decisional Capacity

At law, certain types of decisions and their corroborating requirements are enunciated by statute, such as the *SDA*, which seeks to protect vulnerable individuals under disability while also respecting and promoting autonomy. In Ontario, these types of decisional capacity include:

1. the capacity to manage property;[18]
2. the capacity to manage personal care;[19]
3. the capacity to grant a power of attorney for property or a continuing power of attorney for property;[20] and
4. the capacity to grant a power of attorney for personal care.[21]

While the above decisions are governed by statute, other types of decisional capacity have been developed at common law. TC and the capacity to marry are types of decisional capacity established at common law.

17. The Alzheimer's Society, "Rising Tide: The Impact of Dementia on Canadian Society" (2010), online at www.alzheimer.ca/~/media/Files/national/Advocacy/ASC_Rising_Tide_Full_Report_e.pdf at 8.
18. *SDA*, s. 6.
19. *SDA*, s. 45.
20. *SDA*, s. 8.
21. *SDA*, s. 47.

Testamentary Capacity

TC is a legal term used to describe the decisional understanding required to make a valid will. At law, in summary, TC includes:

1. the ability to understand the nature and effect of making a will;
2. the ability to understand the extent of the property in question; and
3. the ability to understand the claims of persons who would normally expect to benefit under a will of the testator.

In the court's words:

> The testator does not require a thorough understanding of the above criteria but must have a "disposing mind and memory", meaning a mind that is "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".[22]

Importantly, TC is essential at the time at which instructions are given, not necessarily when the testamentary document is executed. In *Parker v. Felgate*,[23] the court established that, even if the testator lacked the requisite TC at the time the will was executed, the will is still valid if:

1. the testator had TC at the time he or she gave the lawyer instructions for the will;
2. the will was prepared in compliance with those instructions; and
3. when the testator executed the will, he or she was capable of understanding that he or she was signing a will that reflected his/her own previous instructions.[24]

Even disordered thinking does not necessarily lead to a conclusion that a testator lacks TC. In *Laszlo v. Lawton*,[25] for example, the Supreme Court of British Columbia examined the effect of delusions on TC. The individual whose capacity was in question believed that she could communicate telepathically with objects and that unidentified individuals had conspired to steal funds from her. These delusions, however, were not clearly connected to her decision

22. *Leger v. Poirier*, [1944] S.C.R. 152 at 153, [1944] 3 D.L.R. 1, 1944 Carswell-NB 11 (S.C.C.).
23. (1883), L.R. 8 P.D. 171 (Eng. P.D.A.).
24. *Ibid.*
25. 2013 BCSC 305, [2013] 8 W.W.R. 747, 45 B.C.L.R. (5th) 125 (B.C. S.C.) [*Laszlo*].

to disinherit her husband's family, who were previously named as beneficiaries in her will. The individual's cognitive faculties were intact at the time she made her will, in spite of the presence of delusional thinking. Though the court ultimately found that this person lacked TC, this finding was due to the fact that she did not understand the nature and quantum of her estate.

One of the most influential decisions pertaining to TC is *Banks v. Goodfellow*,[26] in which the English High Court found the presence of delusions on the part of a testator did not preclude the presence of requisite criteria for possessing TC. The decision was a turning point in the assessment of TC as it represented a shift away from the perspective that a diagnosis of a mental disorder equates to incapacity to make a valid and subsisting will. Instead, it determined that no assumption about capacity can be made from a diagnosis alone – capacity is state dependent, not trait dependent. The court laid out four broad criteria to determine whether a testator has the capacity to make a valid will. In particular, Chief Justice Cockburn, as he then was, stipulated that:

> 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.[27]

Recently, Shulman et al. propose an updated and modern interpretation of the *Banks* criteria, based largely on clinical experience.[28] The updated proposal requires that the testator be:

1. capable of understanding the act of making a will and its effects;
2. capable of understanding the nature and extent of their property relevant to the disposition;
3. capable of evaluating the claims of those who might be expected to benefit from the estate, and able to demon-

26. (1870), [1861-73] All E.R. Rep. 47, 39 L.J.Q.B. 237, [1871] L.R. 11 Eq. 472 (Eng. Q.B.) [*Banks*].
27. *Ibid.*, at p. 56.
28. K.I. Shulman, S. Himel, I.M. Hull, C. Peisah, S. Amodeo and C. Barnes, "*Banks v. Goodfellow* 1870: Time to Update the Test for Testamentary Capacity" (2017), Can. Bar Rev. (in press).

strate an appreciation of the nature of any significant conflict and or complexity in the context of the testator's life situation;
4. capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure from previously expressed wishes or prior wills; and
5. free of a mental disorder, including delusions, that influences the distribution of the estate.

Overview of Cognitive Screening Tests

While cognitive screening tests are of great utility in elucidating requisite decisional capacity, they represent only one component of a capacity assessment, and do not serve as diagnosis or, for that matter a final determination, as to whether a particular individual possesses requisite decisional capacity in some respect. As the court noted in *Laszlo* with regard to TC, this type of capacity:

> . . . is not a medical concept or a 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.[29]

In regard to weighing the evidence of lay or medical witnesses, it is important for the court to be aware of the potential pitfall of misinterpreting the preservation of social graces for evidence of intact cognition. It is a known clinical phenomenon that significant cognitive impairment can be missed unless it is directly probed.

Cognitive Screening Tests and TC

Ultimately, TC is a legal determination rendered by the courts. However, it is often informed by clinical opinion, sometimes with input from more than one expert, as well as evidence from lay witnesses and the influence of precedent, statute and/or other equitable principles. Indeed, the complicated, medico-legal nature of judicial opinion regarding TC calls for a collaborative approach between medical and legal professionals.[30] As the prevalence of dementia and elder abuse continue to increase in our society, it is

29. *Laszlo*, *supra*, footnote 25, at para. 199.
30. K.I. Shulman, C.A. Cohen, F.C. Kirsch, I.M. Hull and P.R. Champine,

inevitable that medical professionals will be increasingly called upon to inform judicial opinion as to TC. A standardized approach to the assessment of TC may help both medical and legal professionals to assist the court in rendering such determinations in a more consistent fashion.[31]

TC can be assessed contemporaneously (for example, at the time instructions are provided for drafting a will) or retrospectively (including following the death of the testator).

PROPOSED STANDARDIZED ASSESSMENT OF TC: THE CASE FOR A CONTEMPORANEOUS ASSESSMENT INSTRUMENT

Megan Brenkel et al. have proposed a standardized assessment of TC, referred to as a Contemporaneous Assessment Instrument ("CAI").[32] A CAI is a combination of a legal test and a validated cognitive screening tool of sorts that tests executive functioning and working memory. It is a semi-structured interview that provides specific and direct answers to clinical and legal questions.[33] Using a model developed by Appelbaum and Grisso,[34] widely hailed as the gold standard for the development of a CAI, the authors concluded that a capacity assessment should address the following hierarchical standards for capacity:

1. the ability to communicate a choice;
2. the ability to understand relevant information;
3. the ability to appreciate his or her situation and its likely consequences; and
4. the ability to manipulate information rationally (*i.e.* reasoning).

"Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007), 164 Am. J. Psychiatry 722.

31. K. Purser, "Assessing Testamentary Capacity in the 21st Century: Is *Banks v. Goodfellow* Still Relevant?" (2015), 38 U.N.S.W. L.J. 854.
32. M. Brenkel, K. Whaley, N. Herrmann, K. Crawford, E. Hazan, A. Owen, K. Shulman (submitted, publication pending): "A case for the standardized assessment of testamentary capacity".
33. L.B. Sousa, M.R. Simoes, H. Firmino and C. Peisah, "Financial and Testamentary Capacity Evaluations: Procedures and Assessment Instruments Underneath a Functional Approach" (2014), 26 Int. Psychogeriatr. 217.
34. P.S. Appelbaum and T. Grisso, "The MacArthur Treatment Competence Study. I: Mental Illness and Competence to Consent to Treatment" (1995), 19:2 Law Hum. Behav. 105.

The latter component is particularly important, as it is the decision-making process that is important to the clinician, rather than the decision ultimately rendered.

In the event that professionals working in the field of wills and estates anticipate a will contest in a particular case, a contemporaneous assessment may be recommended as a precautionary step. In so doing, a subsequent, post-mortem inquiry into requisite TC may be avoided, including the potential negative impact of such a series of events on friends and family members.

Notably, courts appear to accord more importance to contemporaneous assessments of TC than retrospective ones.[35] By way of example, in the recent *Orfus Estate* decision,[36] where a contemporaneous assessment was conducted on the date on which the will in question was executed, the court articulated a preference for contemporaneous rather than retrospective assessments of TC. In that case, although a retrospective assessment had been completed which demonstrated that there had been flaws in the contemporaneous assessment, including a lack of attention to many of the relevant criteria for requisite TC as well as the assessment having been completed in the presence of the testatrix's daughter, the court was of the opinion that the contemporaneous assessment was more persuasive or probative. Cases such as this demonstrate how effective contemporaneous assessments can be when weighed against other types of evidence.

The methodological advantages of contemporaneous assessments are clear. When conducting such an assessment, an assessor is able to directly examine particular questions pertaining to a subject's TC as well as the legal criteria relevant to cognitive abilities implicated in TC.[37] Consequently, a simple, valid CAI that addresses an updated legal test for TC may encourage individuals to seek this type of assessment, thus helping to prevent the anticipated dramatic rise in will contests in the coming years. However, a CAI that includes only legal criteria, without the inclusion of a cognitive screening component, is a potentially misguided approach that will leave a testator's capacity open to potential scrutiny. Indeed, researchers have noted that a CAI without a cognitive screening component may not be capable of withstanding legal challenge.[38] It has been asserted in the

35. K.M. Kennedy, "Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will" (2012), 19 J. Forensic Leg. Med. 191-5.
36. 2013 ONCA 225, 86 E.T.R. (3d) 6, 304 O.A.C. 349 (Ont. C.A.), additional reasons 2013 ONCA 314, 86 E.T.R. (3d) 34, 228 A.C.W.S. (3d) 59.
37. K. Purser, E.S. Magner, J. Madison, "A therapeutic approach to assessing legal capacity in Australia" (2015), 38 Int. J. Law Psychiatry 18-28.

medical jurisprudence that a neuropsychological assessment component is an integral accompaniment to a CAI encompassing legal criteria in pursuit of a meticulous investigation of TC.[39]

Importantly, any test developed for the assessment of TC must be interpreted through the lens of a given testator's unique circumstances, since cognitive impairment may affect TC in some contexts but not others. The neuropsychological component of a CAI must be validated in a representative sample of older adults to ensure that it is practical, acceptable and accurately reflects the relevant cognitive functions necessary for complex decisional capacities such as TC. This should include working memory, language and frontal-executive functions such as judgment, planning and reasoning.[40] If developed and validated, such a CAI may be a benefit to all concerned if it can prevent emotionally and financially stressful litigation.

38. See, for example, D.C. Marson, R.C. Martin, V. Wadley, H.R. Griffith, S. Syder, P.S. Goode, F.C. Kinney, A.P. Nicholas, T. Steele, B. Anderson, E. Zamrini, R. Raman, A. Bartolucci, L.E. Harrell, "Clinical interview assessment of financial capacity in older adults with mild cognitive impairment and Alzheimer's Disease" (2009), 57 J. Am. Geriatr. Soc. 806-814.
39. See, for example, K.M. Kennedy, "Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will" (2012), 19 J. Forensic Leg. Med. 191-5.
40. J. Moye, "Theoretical frameworks for competency in cognitively impaired elderly adults" (1996), 10 J. Aging Stud. 27-42.