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The Doctrine of Righteousness

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demand proof that the revocation clause in the will was included as the specific result of an express wish would make no sense and lend itself to potential mischief.

11 Predators – The Doctrine of Righteousness

(a) *Doctrine of Righteousness in General*

Many disputes follow a common pattern. A person is old, or confused, or inattentive, or simply isolated from any friends and family. A second person senses an opportunity, and is fueled by greed. He or she convinces the target to put a new will in place. Predictably, that new will makes a significant gift to the person who has identified the opportunity to profit. Usually, it is a gift of the whole of the residue. Rather than simply making a passive suggestion that a new will be drafted, the predator takes steps to make it happen. He or she might arrange for the lawyer, or dictate the terms to be put in the will, or have them prepared in the form of a letter. The predator might drive the will-maker to the appointment, and volunteer to sit in. He or she might dispense with the use of the lawyer entirely and write up the will for signature, or dictate it as the target writes the will out as a holograph. A principle developed in the English courts of probate in the 1800s is specifically geared to respond to that scenario. It amounts, in practice, to a judicial tool to protect the will-maker and his or her heirs from that type of predatory behavior. The leading case on point is *Barry v. Butlin*,¹⁴² but the principle was developed and finds voice in other leading cases in England such as *Fulton v. Andrews*,¹⁴³ *Tyrell v. Painton*,¹⁴⁴ *Wintle v. Nye*,¹⁴⁵ and *Fuller v. Strum*.¹⁴⁶ In Canada, the principle was applied and endorsed by the Supreme Court of Canada in *Adams v. McBeath*,¹⁴⁷ *British & Foreign Bible Society v. Tupper*,¹⁴⁸ *Connell v. Connell*,¹⁴⁹ and *Riach v. Ferris*,¹⁵⁰ and finds voice in cases such as *Re Timlick Estate*,¹⁵¹ *Russell v. Fraser*,¹⁵² *Sloven v. Ball*,¹⁵³ and *Johnson v. Pelkey*.¹⁵⁴

The principle is this: whenever a person is instrumental in the generation of a will under which he or she benefits, or the circumstances are otherwise of a character

¹⁴² *Barry v. Butlin* (1838), 163 E.R. 223, 12 E.R. 1089, 2 Moo. P.C. 480 (England P.C.) at pp. 482-483.

¹⁴³ *Fulton v. Andrews* (1875), L.R. 7 H.L. 448 (U.K. H.L.).

¹⁴⁴ *Tyrell v. Painton (No.1)* (1893), [1894] P. 151, 1893 WL 9231 (Eng. C.A.).

¹⁴⁵ *Wintle v. Nye* (1958), [1959] 1 All E.R. 552, [1959] 1 W.L.R. 284 (U.K. H.L.).

¹⁴⁶ *Fuller v. Strum* (2001), [2002] 1 W.L.R. 1097, [2002] 2 All E.R. 87 (Eng. C.A.) at p. 1107 [W.L.R.]

¹⁴⁷ *Adams v. McBeath*, 1897 CarswellBC 16, 27 S.C.R. 13 (S.C.C.).

¹⁴⁸ *British & Foreign Bible Society v. Tupper*, 1905 CarswellNS 105, 37 S.C.R. 100 (S.C.C.).

¹⁴⁹ *Connell v. Connell*, 1906 CarswellOnt 745, 37 S.C.R. 404 (S.C.C.).

¹⁵⁰ *Riach v. Ferris* (1934), 1934 CarswellOnt 136, [1934] S.C.R. 725, [1935] 1 D.L.R. 118 (S.C.C.).

¹⁵¹ *Timlick v. Crawford*, 1965 CarswellBC 86, 53 W.W.R. 87 (B.C. S.C.).

¹⁵² *Russell v. Fraser*, 1980 CarswellBC 533, 118 D.L.R. (3d) 733, 8 E.T.R. 245 (B.C. C.A.).

¹⁵³ *Sloven v. Ball*, 1996 CarswellOnt 2153, 14 E.T.R. (2d) 309, 4 O.T.C. 257 (Ont. Gen. Div.), affirmed 1997 CarswellOnt 4128 (Ont. Div. Ct.).

¹⁵⁴ *Johnson v. Pelkey*, 1997 CarswellBC 1450, 36 B.C.L.R. (3d) 40, 17 E.T.R. (2d) 242, [1997] B.C.J. No. 1290 (B.C. S.C.), additional reasons 1998 CarswellBC 1105 (B.C. S.C.), affirmed 1999 CarswellBC 1247 (B.C. C.A.), additional reasons 2000 CarswellBC 1089 (B.C. S.C.).

that causes the court to be concerned over whether the will-maker truly understood the will and its effect, the court can refuse to put the will to probate unless given affirmative proof that the will-maker had actual knowledge of its contents and operative effect. That principle was historically referred to as “the doctrine of righteousness,” a label that appears to be falling from judicial vogue due to the implied focus on moral considerations. It would be better referred to as “the rule from *Barry v. Butlin*,” or the “procurer principle,” or perhaps, most descriptively, could be referred to as “the requirement for true and informed approval.” It has sometimes been described as the “suspicious circumstances principle,” a label that is also misdescriptive. A will is never invalid for suspicious circumstances, and suspicious circumstances fall into different categories, extending beyond knowledge and approval into other areas. The traditional label has the advantage of being well known, even if slightly misleading.

The principle under consideration here should not be confused with undue influence, a point made by W.H.D. Winder in a 1939 paper out of England, “Undue Influence and Coercion.”¹⁵⁵ The author carefully distinguished between testamentary undue influence and the doctrine of righteousness, stating the view that both principles originated in the courts of probate, but were separate and distinct. In dealing with the doctrine of righteousness, Winder refers to the doctrine as a “rule” and refers to the cases, but never gives it a name or label:¹⁵⁶

There is another rule concerning wills which must not be confused with undue influence in any of its senses. If a person who prepares a will or who is responsible for its preparation benefits thereunder, it is treated as a suspicious circumstance and the court will refuse probate if not convinced that the testator understood what he was doing. The rule is an independent one of ancient origin.

The doctrine of righteousness is an expression of the requirement for knowledge and approval that, in practice but not in substance, operates as a policy tool.¹⁵⁷ It resembles an obsolete principle of equity used to attack gifts and other *inter vivos* wealth transfers on the grounds that they were unconscionably procured.¹⁵⁸ That equitable principle renders a transaction as voidable where it is not fair, just, and reasonable. Unlike the doctrine of righteousness, it can be properly characterized as a policy tool. The equitable principle does not apply to wills.

The requirement for true and informed approval fills an important gap in the collection of judicial responses necessary to protect will-makers and their heirs from predators. A person attacking a will can also plead undue influence, want of capacity, and often fraud. Typically, none of those tools fit the job. Testamentary undue influence, properly defined in the context of the leading cases, is narrow and only available where a form of actual and overbearing coercion can be proven.¹⁵⁹ The presumption of undue influence is part of an equitable doctrine that has historically

¹⁵⁵ W.H.D. Winder, “Undue Influence and Coercion” (1939) 3 M.L.R. 97 at pp. 107-108.

¹⁵⁶ W.H.D. Winder, “Undue Influence and Coercion” (1939) 3 M.L.R. 97 at p. 107.

¹⁵⁷ See 4-11(e), “Proper Characterization of the Rule.”

¹⁵⁸ See 9-3, “Unconscionable Procurement.”

¹⁵⁹ See 5-3(a), “Conduct Must Amount to Coercion.”

been limited to claims of *inter vivos* undue influence, and excluded from play when testamentary undue influence is in play.¹⁶⁰ The courts have also taken the position that persuasion is perfectly permitted when a will is concerned.¹⁶¹ A person hoping to be an heir is allowed to argue his or her case with a potential benefactor, and to press and be persistent in doing so. The will-maker has to leave their estate to someone – friends and family are entitled to jockey for position. When it comes time to argue capacity, it is not a policy tool. The threshold for capacity does not increase or decrease with the proximity of a predator. While a predator might fool a will-maker, a predator cannot reduce the will-maker’s powers of mind. The courts have also been consistent in taking the position, as a matter of policy, that the elderly and infirm ought to be allowed their last testamentary hurrah, notwithstanding diminishing capacity, and the power to make a will should not be lightly stripped from them.¹⁶² Efforts to use capacity to bar a gift to a predator often involve the attempt to bend capacity into a shape it does not normally enjoy in the case law. When it comes time to argue fraud, it applies in a narrow band of fact situations and resounds in costs if the party alleging it fails to make it out. Given those policy objectives and restrictions, the doctrine of righteousness fills an important gap. The doctrine of righteousness forces a procurer to prove that the will-maker not only knew what they were signing, but knew what they were doing. It is a powerful tool.

(b) History and Development of the Requirement for True and Informed Approval

The requirement for true and informed approval, or the doctrine of righteousness as it has historically been called, developed slowly but steadily in England over the 1800s. It took firm root in Canada, and developed with vigour in decisions of the Supreme Court of Canada and Privy Council in the late 1800s and early 1900s. It then appeared to drop largely from view in Canada, with the exception of British Columbia, and has seen only sporadic use since. Because of that judicial summer fallow, the effort is made in the material that follows to trace the chronological development and use of the principle under discussion in great detail across both Canada and the United Kingdom.

¹⁶⁰ See 5-5(a), “Presumption of Undue Influence Not Applying to Wills.”

¹⁶¹ See 5-3(b), “Persuasion Permitted for Wills.”

¹⁶² See 1-9(c), “Underlying Judicial Policy.” A nice statement of that policy is found in *Laramée v. Ferron*, 1909 CarswellQue 20, 41 S.C.R. 391 (S.C.C.) at paras. 55 and 56: “We must not ... so 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. ... 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...”

Knowledge and Approval

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In *Re Morris*¹¹² a woman sent a very clear letter to her lawyer asking for a codicil to be put in place changing one, and only one, gift in her will. If the instructions were properly followed, the change would have been fairly minor. In the process of following her instructions, the lawyer made a clerical error. He should have used language revoking clause “7(iv)” but mistakenly used language revoking clause “7.” The error went to the heart of the estate plan, changing the collection of people who would inherit the whole of her wealth. The court found that the will-maker had performed the physical act of reading over the codicil “in the sense of casting her eye over it” before she signed it. The trial judge also found that if she had understood what she had read, she never would have approved and signed it. She assumed her lawyer had got it right. The court took the position that knowledge and approval involved understanding. The facts of the case established that there had been no understanding, and therefore no knowledge and approval. What she had been approving in her mind was not what had been set down on paper.

This is similar to, but distinct from, an application for equitable rectification in a bid to correct a will that contains mistaken content.¹¹³ It is an exercise of the probate function of the court, not its jurisdiction as a court of construction.

7 Barriers of Language and Literacy

A person who does not speak English can still have knowledge and approval of a will written in English. Similarly, illiteracy or blindness are not bars to knowledge and approval. Each of those, however, may be sufficient to displace the presumption of knowledge and approval. The jurat employed for a blind or illiterate will-maker is intended to circumvent that and restore the presumption, allowing probate in common form.

In *Re Sopel*¹¹⁴ the will-maker could neither read nor write. A local lawyer prepared a will and had her sign it. The will gave the residue of her estate to the lawyer’s wife, rather than the will-maker’s family in the old country. The will also appointed him as executor. When the lawyer tried to put the will to probate, he was unable to satisfy the trial judge that the will had been read or explained to her, or that she was otherwise aware of its contents or knew its terms and effect. The lawyer claimed in testimony that he had explained it to her, but his testimony was not believed. The onus being on the propounder, the will was refused to probate. The decision at trial was confirmed at appeal.

The will-maker in *Johnson v. Pelkey*¹¹⁵ suffered from some visual impairments, significant hearing impairment, and could not lip-read. The lawyer helping with the

¹¹² *Morris, Re* (1969), [1971] P. 62, [1970] 2 W.L.R. 865 (Eng. P.D.A.). *Re Morris* is dealt with in greater detail later in this chapter.

¹¹³ A topic canvassed at 4-12(c), “Severance Compared to Equitable Rectification.”

¹¹⁴ *McGavin v. Ulrich*, (sub nom. *Re Sopel*) 1951 CarswellMan 39, [1951] 4 D.L.R. 820, 3 W.W.R. (N.S.) 451 (Man. C.A.).

¹¹⁵ *Johnson v. Pelkey*, 1997 CarswellBC 1450, 36 B.C.L.R. (3d) 40, 17 E.T.R. (2d) 242, [1997] B.C.J. No. 1290 (B.C. S.C.), additional reasons 1998 CarswellBC 1105 (B.C. S.C.), affirmed 1999 CarswellBC 1247 (B.C. C.A.), additional reasons 2000 CarswellBC 1089 (B.C. S.C.).

will was unaware of the will-maker's limitations and took instructions from a family member who stood to benefit from the will. He explained the will to the will-maker, who repeatedly said "Um-hmm" during the process. The will was attacked on the basis of capacity, undue influence, and lack of knowledge and approval. Each attack succeeded and the will failed on all three grounds. It was both a procurer case and a case where the physical limitations of the will-maker interfered with his ability to know and understand the terms of the will without special help. The court applied *Russell v. Fraser*¹¹⁶ and *Riach v. Ferris*,¹¹⁷ as standing for the proposition that where a person is instrumental in procuring a will, and takes an interest under the terms of the will in circumstances that excite the suspicion of the court, then that person must affirmatively prove that the will-maker actually understood what the will-maker was doing by signing the will.¹¹⁸

English was a second language for the will-maker In *Dhaliwal v. Dhaliwal*.¹¹⁹ The will was in English and explained to her in English. There was no question as to due execution or capacity. The persons attacking the will pointed to her difficulties with English, and provided evidence that she was later surprised when the content of her will was explained to her post-execution. Affidavits to that effect were sufficient to excite the suspicions of the court as to knowledge and approval and have the court direct proof in solemn form.

8 No Requirement that Will be Read

A will-maker does not necessarily have to read over a will, or have it read to him or her, in order to establish knowledge and approval. That point is clear from remarks of Baron Parke to that effect in 1838 in *Barry v. Butlin* (emphasis added):¹²⁰

Nor can it be necessary, that *in all such cases*, even if the Testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the Will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof, by which the cognizance of the contents of the Will, may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a Will without it, but it has no right in every case to require it.

That conclusion is also clear in *Parker v. Felgate*¹²¹ and the line of cases in England and Canada following its lead,¹²² where wills that have never been read by the maker are nevertheless found to be valid (provided, in each case, that the will

¹¹⁶ *Russell v. Fraser*, 1980 CarswellBC 533, 118 D.L.R. (3d) 733, 8 E.T.R. 245 (B.C. C.A.).

¹¹⁷ *Riach v. Ferris* (1934), 1934 CarswellOnt 136, [1934] S.C.R. 725, [1935] 1 D.L.R. 118 (S.C.C.).

¹¹⁸ This principle has traditionally been referred to as the "doctrine of righteousness," discussed at greater length later in this text at 4-11, "Predators – The Doctrine of Righteousness."

¹¹⁹ *Dhaliwal v. Dhaliwal*, 2011 ABQB 279, 2011 CarswellAlta 680 (Alta. Q.B.).

¹²⁰ *Barry v. Butlin* (1838), 163 E.R. 223, 12 E.R. 1089, 2 Moo. P.C. 480 (England P.C.) at pp. 485-486.

¹²¹ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.).

¹²² A larger discussion of the case law on point can be found earlier in section 1-12, "Standard for Capacity at Execution of Will" dealing with the capacity aspect of this issue.

was signed by the maker on the understanding that the will reflects instructions given earlier). *Parker v. Felgate* was an 1883 decision of Sir James Hannen, discussed earlier in this text while dealing with capacity. It also deals with knowledge and approval. The will-maker was a young woman and a widow of some means. Her father and brother tottered on the edge of bankruptcy and she made gifts to them while she was alive to keep their creditors at bay. She gave instructions to a lawyer, before she fell ill, that would see her father receive a bequest of £500 and her brother a bequest of £250 before seeing the residue go to charity. The residue amounted to just under £3,000. The lawyer took those instructions, and had another lawyer draft the will. The lawyer doing the drafting added in a pair of clauses, one to account for the possibility that her father and brother might become bankrupts, and another to make a gift over if the charity was unable to accept the residue. There was evidence that those clauses, before they were added, were discussed in principle with the will-maker. At some stage during the preparation of the will, and before it could be signed, the will-maker fell ill. Her illness induced a coma-like state in which she could be roused by pain or discomfort. When roused, she was conscious briefly and could answer simple questions, largely by making signs in response, before lapsing again into unconsciousness. It was decided that an effort be made to have her execute her will and the document was brought to her bedside. Two doctors were present as well as a nurse, and other individuals including at least two women. One of the doctors supervised the execution of the will. He roused the will-maker. She smiled and put out her hand. He rustled the will in front of her face and said, "This is your will. Do you wish this lady [gesturing to a woman to was to sign the will on her behalf] to sign it?"¹²³ The doctor testified that will-maker said "yes." That was corroborated by some witnesses at the bed-side, but other witnesses did not hear it, or heard some other utterance indicating assent. The will was not read to her, or explained clause-by-clause. There was no evidence that she had looked over a draft on some earlier occasion. The will-maker very clearly signed the document without reading it. The will was challenged on the grounds that the will-maker lacked capacity, but also on the grounds that the will-maker did not have the requisite knowledge and approval at the time of execution.¹²⁴ Sir James Hannen made the following remarks relating to the add-in clauses in giving his charge to the jury in the case:¹²⁵

There remains the further question as to the contents of the will. If [the lawyer who drafted the will] only inserted these clauses because he believed the testatrix would approve of them that would not be sufficient. To make the clauses good there must be either instructions previously given or the will as drawn must be afterwards acknowledged or approved. If you believe that there were such instructions, then the will only expresses her intention and carries out her instructions, and the clauses cannot be rejected.

¹²³ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.) at p. 173.

¹²⁴ One of the parties opposing the probate of the will was described as the trustee in bankruptcy of the father and brother – to the extent that the will-maker had been concerned about the financial plight of her father and brother, those concerns were well justified.

¹²⁵ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.) at p. 174.

The jury found that the two add-in clauses had in fact been discussed with the will-maker and approved before she became ill, and that the will in its totality reflected instructions previously given.

Parker v. Felgate supports the proposition that knowledge and approval can be present without reading when the will does no more than include the specific instructions of the will-maker. The case is not suggesting that knowledge and approval is not required, but that in some circumstances knowledge and approval can be found where the will-maker has not read the will or had the will explained clause-by-clause. While that might be counter-intuitive, it makes plain and clear common sense in some situations. Consider a situation where a will-maker in a hospital bed dictates the terms of a will to another person, in a chair beside the bed, who simply takes dictation and transcribes the words of the will-maker. The will is then signed by the will-maker who does not read it, is then witnessed by the scribe, and finally is signed by a second witness, all present in the hospital room throughout this process. Provided the scribe accurately took down the words of the will-maker, there is clear knowledge and approval on the part of the will-maker. The will-maker would know exactly what he or she was signing. If the scribe violated the trust of the will-maker and wrote different terms, then the issue of knowledge and approval would remain a live one, and the provisions added through the fraud on the will-maker could not stand. There is an element of faith at work, but that element of faith is accepted as part of the law that pertains to knowledge and approval. Every will-maker who turns his or her back, momentarily, in the minutes just prior to signing a will in a lawyer's office is also engaging in an act of faith, trusting that the will on the desk has not been squirreled away though a trick of sleight-of-hand and replaced with a substitute will.

9 Knowledge and Approval as a Precursor Issue

There will be situations where knowledge and approval needs to be dealt with as a precursor issue and be disposed of before the court can logically turn its attention to the issue of capacity. This relates to severance, an issue dealt with later in greater detail.¹²⁶

When knowledge and approval is at issue, it is possible to ask the court to sever clauses from a will or codicil that are invalid for that reason and allow the balance of the document to be put to probate. Where that may be possible, it may become important for the court to make a conscious decision to deal with the issue of knowledge and approval as a separate issue before dealing with the capacity of the will-maker to validly make the will or codicil. That amounts to asking what the will-maker intended to do, and then asking if the will-maker had the capacity to do it. The first question is arguably the precursor to the second. That point is nicely

¹²⁶ See 4-12(b), "Severance Where Knowledge and Approval Absent."

illustrated by the Ontario Court of Appeal in the 1937 decision *Re Souch*.¹²⁷ The will-maker made a will and a series of codicils to it over the years leading up to her death. The validity of the last of the codicils was in question. She suffered a series of strokes before signing it, and lost the ability to speak and write. Her original will had made nineteen bequests to friends and family totaling \$91,000, and then divided the residue of her estate equally among her siblings. Her total estate was in the order of \$200,000 when she eventually died. She adjusted those gifts in subsequent codicils, reducing and increasing amounts, and removing or adding people to the list of those to receive bequests. She made her fourth and final codicil after she had suffered the strokes and her capacity had come into question. The codicil was prepared on behalf of the will-maker by an insurance and financial advisor, named Mrs. Scobell. That final codicil had three effects. First, it increased some of the bequests. One bequest, in favour of her sister, increased from \$10,000 to \$30,000. Second, it introduced a gift of the contents of a specific account in favour of the advisor, Mrs. Scobell. Third, the residue of the estate was directed into a trust, giving Mrs. Scobell income for life, and then re-directing the remainder away from the will-maker's siblings to nieces and nephews through one of the siblings. There was no independent advice. Mrs. Scobell had no good explanation why she should have been favoured with the testamentary largess of the will-maker. The will-maker died four years later, and the validity of the codicil was questioned on the dual grounds of capacity and of knowledge and approval. Because Mrs. Scobell had been instrumental in procuring the will and took an advantage under it, the gifts in her favour could not stand unless she satisfied the court that the will-maker truly knew what she was doing when she made the gifts.¹²⁸ The will was upheld at trial, and the case went to appeal. The Ontario Court of Appeal arrived at a divided result. The learned appellate judges in the majority dealt with knowledge and approval first and capacity second. The dissenting judge reversed that order.

The majority reasons were penned by Middleton J.A. Dealing with the issue of knowledge and approval first, the nefarious Mrs. Scobell could not satisfy the court that the deceased truly knew what she was doing and intended to benefit her. That invalidated the gifts to her on the grounds of knowledge and approval. Both the gift of the account to Mrs. Scobell and the residuary clause were held to be invalid. The majority severed the offending clauses and then considered the remaining clauses in the codicil as standing on their own. The clauses that remained were simple. Did the will-maker enjoy the capacity to increase the bequests? Middleton J.A. concluded that she did, stating:¹²⁹

¹²⁷ *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.). The decision in *Re Souch* was also discussed earlier in the context of codicils. Some of the description here will be repetitive. See 3-1(b), "Applicable Capacity Test for Codicils."

¹²⁸ Where a person is instrumental in procuring a will or codicil and takes an advantage under it, the court can demand that the person prove that the chain of events in making the will was proper and righteous and remove the stain of suspicion and, failing to satisfy the court, will not be able to receive the benefit of the gift. For a larger discussion dealing with the doctrine of righteousness see 4-11 "Predators – The Doctrine of Righteousness."

¹²⁹ *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.) at para. 11.

Dr. Storey describes faithfully and well the mental condition of the old lady. Put shortly, it is that she had sufficient mentality to realize a simple proposition. She could understand the nature and effect of a gift. She knew the meaning of the words used. She had not enough capacity to grasp the situation as a whole. She would forget the first part of a list of gifts before she reached its conclusion. I agree with the learned trial Judge that she had testamentary capacity.

The dissenting judgment was by Fisher J.A. Unlike the majority that dealt with knowledge and approval first, the dissent dealt with the issue of testamentary capacity first. The dissenting reasons cited the *Banks v. Goodfellow* test,¹³⁰ and then reviewed the evidence at length. The dissenting judge then drew elements from the medical evidence relating to capacity.¹³¹ The codicil-maker had suffered three strokes, could not read or write, and her powers of speech were seriously affected. She could only make decisions on little or separate items. If a simple clause in her codicil were read to her, then her mental capacity would allow her to give a decision on it. Yet, in the words of the court, “If several details of fact about her estate were mentioned to her at one time she would be able to grasp one, but if more she would forget the first one by the time she was asked to consider a third or fourth detail and if several details about her estate were mentioned to her she would throw up her hands and not be bothered by them.”¹³² The codicil was actually a complex document.¹³³ It cross-referenced the original will by paragraph number over and over. Read by itself, it would carry little meaning. More telling, it adjusted gifts, imposed a trust and redirected the residue to different heirs. It had as much complexity as the will it amended, and arguably more. The will was simple by comparison. Taking all of that together, the dissenting judge concluded that the codicil-maker lacked the capacity to make the codicil, and the whole of the document was invalid. The focus appears to have been largely, if not entirely, on capacity.

The order in which the issues were addressed in *Re Souch* appears to have influenced, if not determined, the result. The majority considered knowledge and approval first and found the gifts to the procurer, Mrs. Scobell, were invalid. The invalid clauses were severed from the balance of the codicil. The majority then considered whether the codicil-maker had the capacity necessary for the relatively simple provisions that remained in the stripped down codicil – simply adjusting the amount of certain bequests. Capacity was found. The dissenting reasons for decision deal with testamentary capacity first and found that the deceased codicil-maker lacked capacity to make the codicil as a whole. That finding of incapacity seems inescapable given the medical evidence and the severe impairment that was described. By considering capacity first, the dissenting appellate judge was left con-

¹³⁰ *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.) at para. 69.

¹³¹ *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.) at paras. 20 to 31.

¹³² *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.) at para. 31.

¹³³ *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.) at para. 35.

sidering the capacity of the deceased to make a complex instrument. In contrast, by considering knowledge and approval and severance first, the majority of the appellate court was left considering the capacity of the deceased to make a simple instrument. The two sets of reasons end up dealing with what amounts to different cases. Both sets read well. They are internally defensible and consistent with the weight of prior authority. The fulcrum that tips between them is the order chosen to address the issues. That raises the question: which order is correct? Should capacity be considered before knowledge and approval, or vice versa? It can be argued that knowledge and approval should be considered first where the court might sever clauses from the will or codicil on that basis. Consider a situation where a will-maker is asked to sign a will, but an unsolicited and unwanted clause has been hidden from them by some artifice, folding over a page or the like. The will-maker reads over the balance of the document and approves it as consistent with their instructions, and signs the will. Capacity is said to be transaction specific. Does it make sense to test the capacity of the will-maker by asking if he or she would have had the capacity to make a provision that he or she was unaware of, unintended, and authored by some other person for their purposes? Surely, it would be argued that capacity should be assessed against the complexity and character imposed by the will or codicil the will-maker intends to sign, not the one he or she signed without knowledge. If that argument makes sense, then there will be cases where it makes sense to deal with knowledge and approval first when capacity is in concurrent dispute.

The discussion here is limited to the logical priority of the two issues when a final determination is made. To the extent that severance might be possible in dealing with knowledge and approval, then a final determination should be made on that issue first. A different discussion presents when the interplay of the two presumptions is considered. Where capacity is put at issue, and the presumption of capacity is no longer in play, then the presumption of knowledge and approval is also knocked from play. That interaction was dealt with earlier.¹³⁴

10 Boiler-Plate and Other Add-in Clauses

Knowledge and approval is focused on the dispositive provisions of a will, directing the destinations of wealth, not on boiler-plate provisions, adding efficiency to the operation of the will. The best view relating to those latter type of provisions is that a will-maker gives the instruction to include them by necessary implication in the act of directing the lawyer to prepare a will.

Wills prepared by lawyers today typically contain several pages of boiler-plate provisions. Even a simple will stretches very easily to ten pages. The instructions from the client provide the two page framework, and the boiler-plate provides the

¹³⁴ See 4-3(d), "Relationship Between the Two Presumptions."

Overarching Capacity Test

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(Carswell: Toronto, 2014) pages 617-621
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10

OVERARCHING CAPACITY PRINCIPLES

- 1 An Across-the-Board Test for Capacity
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1 An Across-the-Board Test for Capacity

A single, overarching test for capacity cuts across *inter vivos* gifts, wills and all other juridical acts. It is the basic test expressed in 1829 in the Irish decision *Ball v. Mannin*.¹ The test is whether the person making the wealth transfer would have been “capable of understanding what he did by executing the deed in question when its general purport was fully explained to him.”² Later cases added the phrase “nature and effect” to the test. A person has the mental capacity to validly perform a juridical act if that person enjoys the powers of mind necessary to understand the nature and effect of the juridical act if given a proper explanation of its basic terms. Some expressions of the test substitute the word “quality” for the word “effect” but without any apparent shift in nuance.

Many discussions of capacity begin by citing *MacNaughten’s Case*, an 1843 decision of the House of Lords dealing with the capacity to commit a criminal act (emphasis added):³

...every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and

¹ *Ball v. Mannin* (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer).

² *Ball v. Mannin* (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer) at p. 21.

³ *R. v. McNaughten* (1843), 8 E.R. 718, 10 Cl. & F. 200, 1843 WL 5869 (U.K. H.L.) at p. 723 [E.R.].

that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Sir James Hannen quoted that passage years later and made the following general remarks relating to capacity in his 1873 charge to the jury in a wills case, *Boughton and Marston v. Knight* (quoted at length):⁴

Gentlemen, I think I can give you some assistance in determining the question before you by referring to what has been said on the subject in another department of the law. Some years ago the question of what amount of mental capacity was required to make a man responsible for crime was considered in *McNaughten's Case*. No doubt the question is treated somewhat differently in a criminal suit to what it is here (the difference I will explain presently); but there is, as you will easily see, an analogy between the cases which will be of use to us in considering the points before us. Lord Chief Justice Tindal, in expressing the opinion of all the judges, said – “In all cases every man is to be presumed to be sane until the contrary is proved, and it must be clearly proved, that at the time of committing or executing the act the party was labouring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.” That, in my opinion, affords as nearly as possible a general formula which is applicable in all cases in which the question arises, not exactly, perhaps, in the terms I have read, but to the extent I will explain to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now a very small degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act, and whether he is doing right or wrong, when he kills another man; accordingly he is responsible for the crime committed if he possesses that amount of intelligence. And so in reference to all other concerns of life, – was the man at the time the act was done of sufficient capacity to understand the nature of the act? Take the question of marriage. It is always left in precisely the same terms as I have to suggest in this case. If the validity of a marriage be disputed on the ground that one or other of the parties was of unsound mind, the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into. The same will occur in regard to contracts of selling and buying. Again, take the case suggested by counsel, of a man, who, being confined in a lunatic asylum, is called upon to give evidence. First, the judge will have to consider, was he capable of understanding the nature and character of the act that he was called upon to do, when he was sworn to speak the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If so, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things, – responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, – I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition.

⁴ *Boughton and Marston v. Knight* (1872-75), L.R. 3 P. & D. 64 (Eng. Q.B.) at pp. 71-72.

And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention...

Hannen J. went to great pains later to step back from the statement relating to the ascendant position of wills in any notional hierarchy of capacity, taking the position that the threshold for capacity is dependent on the specific act, not the category of action.⁵

Hoffmann J. struck the same overarching test in *K (Enduring Powers of Attorney), Re*:⁶

It is well established that capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and effect of that particular transaction...

That statement of law was later noted with approval by the Court of Appeal in *W (Enduring Power of Attorney), Re*.⁷

The general principle of legal capacity was discussed in Australia in *Gibbons v. Wright*:⁸

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.

Ball v. Mannin was cited as authority, as was *Boughton v. Knight*. That principle was then restated by the court in *Gibbons* as follows:⁹

The principle ... appears to us to be that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.

More recently, Chadwick L.J. made the following remarks in the 2003 English Court of Appeal decision in *Masterman-Lister v. Brutton & Co (No 1)* (emphasis added):¹⁰

English law requires that a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself...

⁵ A point discussed later in this section at 10-4, "The Concept of a Capacity Hierarchy."

⁶ *K (Enduring Powers of Attorney), Re*, [1988] Ch 310 at p. 313.

⁷ *W (Enduring Power of Attorney), Re* (2000), [2001] Ch. 609 at p. 613.

⁸ *Gibbons v. Wright* (1954), 91 C.L.R. 423, [1954] A.L.R. 383 (Australia H.C.) at p. 437 [C.L.R.].

⁹ *Gibbons v. Wright* (1954), 91 C.L.R. 423, [1954] A.L.R. 383 (Australia H.C.) at p. 438.

¹⁰ *Masterman-Lister v. Brutton & Co (No 1)*, [2003] 1 WLR 1511 (Eng. C.A.) at paras. 57 and 58.

The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained.

The test was then restated by the English Court of Appeal in *Hoff v. Atherton*:¹¹

It is a general requirement of the law that for a juristic act to be valid, the person performing it should have the mental capacity (with the assistance of such explanation as he may have been given) to understand the nature and effect of that particular act...

A nice summary of the law on point was provided in *Sheffield City Council v. E*:¹²

The general rule of English law, whatever the context, is that the test of capacity is the ability (whether or not one chooses to exercise it) to understand the nature and quality of the transaction. The classic statement of principle goes back to the advice of the judges to the House of Lords in *M'Naghten's Case* (1843) 10 Cl. & F. 200. That, of course, was a criminal case. ... But on this very general level of abstraction – that capacity is dependent upon the ability to understand the nature and quality of the transaction – the same basic principle applies whether the question is as to capacity to enter into a contract, to execute a deed, to marry, to make a will, to conduct litigation, to consent to a decree of divorce, or to consent to medical treatment...

The British Columbia Court of Appeal devoted a brief review to the capacity necessary for both wills and for gifts in *York v. York* and stated: “To summarize, the question to be decided in each case is *whether the donor was capable of understanding the nature and effect of the transaction...*”¹³

While a universal and unifying test has been expressed in the case law, it has been largely ignored when it comes to wills. Why? The vast majority of wills amount to exactly the same act for the maker: giving away everything they own, and doing so at death. The homogeneity of the situation allows for the development and application of a stock test on the terms formulated in *Banks v. Goodfellow*. It is only when minor codicils are discussed, or testamentary beneficiary designations, does that stock test admit different formulations. But it does admit for those different formulations. This point was discussed at length earlier.¹⁴ Gifts do not feature that same homogeneity. They arise in different situations and take different shapes. A gift of a pocket watch to a nephew on his birthday is different than a gift of a person's entire fortune on his or her deathbed. A gift of a person's entire fortune on his or her

¹¹ *Hoff v. Atherton* (2004), [2004] EWCA Civ 1554, [2005] W.T.L.R. 99, 2004 WL 2582631 (Eng. C.A.).

¹² *Sheffield City Council v. E* (2004), [2004] EWHC 2808 (Fam), [2005] 2 W.L.R. 953 at para. 19. The *Sheffield* decision deals with the capacity to marry.

¹³ *York v. York*, 2011 CarswellBC 1789, 20 B.C.L.R. (5th) 217, 335 D.L.R. (4th) 292, (sub nom. *York Estate v. York*) 308 B.C.A.C. 197 (B.C. C.A.), additional reasons 2012 CarswellBC 2458 (B.C. C.A.) at para. 39 (emphasis repeated from the original).

¹⁴ See 1-15, “Relaxing the Test from *Banks v. Goodfellow*.”

deathbed is different than the same gift made during a person's prime with a long life stretching before them. A transfer into joint tenancy, or into an alter ego trust, or a reversionary trust of some kind, is different than an outright gift. No specific test for capacity can be formulated to fit the myriad of differing situations. This makes the capacity test for gifts one that is general, allowing it to be amorphous and shifting. The generality of the test from *Ball v. Mannin*, standing beside specific test from *Banks v. Goodfellow* for wills, might tempt the conclusion that two different tests are in play. That is not the modern view. The various passages quoted above purport to express a unitary and overarching test applicable to all. That test involves a single principle to be applied in determining capacity, whether it be testamentary, *inter vivos*, or a compound transaction combining both. No case of any authority appears to have expressed or defended the existence of two separate tests as a competing view.

A competing view can be defended, however. On that view, the general test would be the one expressed in *Ball v. Mannin*, gradually demanding greater and greater powers of mind as the transaction increases in its intrinsic complexity. A second and arguably different test would come into play when the court is being asked to regulate the intergenerational passage of wealth. That second test would demand powers of mind not only to consider intrinsic complexity, but also extrinsic factors, such as overall wealth and natural objects of bounty, that need to be in view to ensure that the wealth transfer can be made in ways that are socially appropriate.¹⁵ Modern courts say they are applying a single overarching capacity test. They may, in practice, be applying two different tests and not analyzing it that way in *obiter* comments.

2 An Across-the-Board Approach to Onus

Once we have a unitary, overarching test for capacity, it makes for a short leap to a single and overarching approach to onus. The onus to prove capacity in the case of a will or other testamentary wealth transfer is clearly on the propounder who alleges that a valid juridical act occurred.¹⁶ The onus to prove capacity in the case of a gift or other *inter vivos* wealth transfer is also on the party who alleges that a valid juridical act occurred.¹⁷ The law on point as it relates to *inter vivos* transfers is less clear than the law as it relates to testamentary ones, but the conclusions stated here emerge as the best and proper view when the case law of England and Canada is canvassed as a whole and first principles are taken into consideration.¹⁸

*Re W (Enduring Power of Attorney)*¹⁹ was a 2000 decision of the English Court of Appeal dealing with the capacity to validly enter into a power of attorney, but

¹⁵ A concept taken up later at 10-3, "Theoretical Considerations Relating to Capacity."

¹⁶ See 1-2(a), "Onus of Proof for Testamentary Capacity."

¹⁷ See 6-2, "Onus and Standard of Proof."

¹⁸ See 6-2(b), "Case Law Review Relating to Onus of Proof in Gift Cases," and 6-2(c), "Conclusions Relating to Onus."

¹⁹ *W (Enduring Power of Attorney), Re* (2000), [2001] Ch. 60, [2001] 2 W.L.R. 957, [2001] 4 All E.R. 88, 2000 WL 1881284 (Eng. C.A. [Civ. Div.]).

Relaxing Test from *Banks v Goodfellow*

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15 Relaxing the Test from *Banks v. Goodfellow*

The test from *Banks v. Goodfellow* is not rigid. It can be adjusted or relaxed in the right case. It can be viewed as an outgrowth of the larger test for capacity applicable to wealth transfers in general that was expressed in *Ball v. Mannin*.⁴⁰⁷ That general test requires the capacity to understand the nature and effect of the instrument at hand if it were properly explained. The glory of the test from *Banks v. Goodfellow*, however, is in its detail. It is specific and easy to apply. The test clearly points to the questions that might be asked of a will-maker to apply it, such as “what do you own?” The making of a will lends itself to the application of a standard form test for capacity. Wills are made in a homogeneous context. What is being given away? Everything the will-maker owns. When? At death. To whom? To the persons most dear and deserving in the mind of the will-maker. Rich or poor, the transaction has the same substantive importance to the will-maker. All wills are, in very real ways, manifestations of the same basic act, and that allows for the application of the same standardized test for capacity. It still remains important to view the *Banks v. Goodfellow* test in the context of the larger more universal test it voices. To do so allows the test to be relaxed in some cases, or reformulated to a higher level of demand in others. These cases will be the exceptions, not the rule. They will involve testamentary instruments falling outside of the standard pattern.

Consider circumstances that suggest a test that is less than the full and stringent test from *Banks v. Goodfellow*. This might be a possibility for a codicil that simply effects a change in the appointment of personal representatives, for example (“I appoint A to serve as my executor in place and stead of B, and in all other respects confirm my said Will”). That action seems administrative, not dispositive. Demanding the full test from *Banks v. Goodfellow* in that situation seems conceptually awkward.

Another example might be a codicil that simply adds a small gift of little consequence to a person’s will, as might be the case of a codicil making a gift of a pocket watch of trifling value to a favourite nephew. That provision is dispositive. It is akin to making an *inter vivos* gift to the nephew on the nephew’s birthday. The test for capacity for the *inter vivos* gift is, under *Ball v. Mannin*, a relaxed and modest one, with the gift-maker needing the powers of mind to be able to understand the basic nature and effect of the gift transaction (“The watch will be belong to my nephew to do as he wishes, and I will not be able to get it back”).⁴⁰⁸ It would seem odd to require the full *Banks v. Goodfellow* test for a testamentary gift of a pocket watch in those circumstances. There is appeal to the idea that the test for the testamentary gift should be the same relaxed test that applies to the *inter vivos* gift. Imagine a wealthy will-maker calling her two favourite nieces to her bedside. Handing one a pocket watch she says “I want you to have this – it is a gift to remember me by.” To the other she says, “I have a second watch identical to the first, and while

⁴⁰⁷ *Ball v. Mannin* (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer).

⁴⁰⁸ *Beaney (Deceased), Re* (1977), [1978] 1 W.L.R. 770, [1978] 2 All E.R. 595, 121 S.J. 832. See the larger discussion on point at 6-3, “Test for Capacity Applicable to Gifts.”

I plan to keep it for now, I want you to have it when I die,” while producing a codicil that is ready for execution to that effect and calling a pair of witnesses from the hall. Should the capacity test for the two juridical acts be significantly different or different at all? A gift that depends on death for its vigour might, arguably, be slightly more complex (as its revocability might make it more abstract), but the difference should be little more than a nuance if common sense is to hold sway.

It is true that a codicil has the effect of republishing the earlier will, and a person might be tempted to take the position that the act of republishing requires the same full capacity under *Banks v. Goodfellow* that was required in making the original will at first instance. That argument is easily met, however. The principles from *Parker v. Felgate* can be imported to dispel it.⁴⁰⁹ A person without the capacity to make a will on its execution date can validly make it nonetheless if they understand that they gave instructions for it earlier (when they did have capacity) and that the document they are signing gives effect to those instructions. Thus, signing a codicil to give away a pocket watch does two things. First, it makes the testamentary gift of an item of trifling importance. Second, it republishes a completed will for which instructions were given earlier. The capacity threshold necessary in the circumstances for the act of republishing should be the low threshold set out in *Parker v. Felgate*. If *Parker v. Felgate* is good law, and it is, there is no reason to demand a higher capacity threshold in republishing than was demanded in executing the will in the first place. Instructions for the will were given earlier – it is simply to be resigned with a small change (and a change easily within the will-maker’s current powers of mind).

As yet another hypothetical, consider circumstances where a person is employing a will-substitute to pass the majority of his or her wealth and, after making those arrangements, signs a will that governs the small body of assets that remain. That might be the case where a person has placed the vast majority of his or her assets into joint ownership with rights of survivorship. At death, those assets pass to the intended heirs without falling into the estate where they would be governed by the person’s will. It might be the case with an alter ego trust. A person might place all of their land and investments in a trust of that character, leaving only a few thousand dollars of assets in personal ownership to be disposed of by will. The terms of the *inter vivos* trust would dispose of those assets at the death of the settlor, a decision beyond the settlor’s continuing control by will. In either variant of the hypothetical posed here, whether involving joint ownership or an *inter vivos* trust, a will done a year later would dispose of nothing but a few thousand dollars of personalty. A deed of gift governing a few thousand dollars would require a very low level of capacity.⁴¹⁰ Why in those circumstances should a will require more? The capacity threshold at the time assets were moved into the trust, or into joint ownership in the earlier version of this hypothetical, would be set higher and approximate the test from *Banks v. Goodfellow*, or even surpass it.⁴¹¹

⁴⁰⁹ This argument is given brief treatment here but broader treatment at 3-1(c), “The Impact of Republication.”

⁴¹⁰ Again, see 6-3, “Test for Capacity Applicable to Gifts.”

⁴¹¹ See 6-3(c), “The Application of the Test to Various Kinds of Gifts.”

Finally, consider a hypothetical dealing not with a will or codicil but with a beneficiary designation under a policy of life insurance, an instrument that is, in its standard form, testamentary.⁴¹² A person might have a will leaving all of her substantial wealth to a pair of nieces and, late in life, sign a new beneficiary designation re-directing the proceeds of a \$5,000 life insurance policy away from the estate (where the nieces would receive them) to a different heir, a nephew. The proceeds would comprise a trifling amount to her. She might, that same day, write a cheque for \$5,000 to a friend as a gift. If her capacity for the two acts was challenged, what does common sense dictate? The capacity test for the two acts should, it is submitted, be much similar if not the same. It would seem strange to demand a full *Banks v. Goodfellow* test for one act and a less demanding *Ball v. Mannin* test for the other.

Can it be argued that the law is the law, common sense aside, and the two tests are different because the judiciary has said so? That is not what the courts have said. Looking at the case law in the United Kingdom, Canada, and Australia, the courts have suggested that there is a common and unifying test for capacity that extends to all transactions,⁴¹³ whether testamentary or *inter vivos*. That test simply involves the capacity to understand the nature and effect of the juridical act in question given a proper explanation. The *Banks v. Goodfellow* test is a standardized variant of that larger test employed in the relatively homogeneous setting presented by the vast majority of wills. Not all testamentary instruments fit that mould. This section of text deals with the rarer situations that present dealing with testamentary dispositions around and outside of the edges of that homogeneous setting. To be clear, the courts have not said that the *Banks v. Goodfellow* test must be applied in full and standardized form to each and every testamentary act. Similarly, the courts have not said that there is something inherently special in a testamentary disposition so as to demand a substantively different test for capacity when dealing with it.

Leaving aside the hypotheticals outlined above, there is at least one case in Canada of high appellate authority that can be used to argue that a relaxed standard is applicable to a testamentary gift of a relatively small value. It is *Re Souch*,⁴¹⁴ a decision by the Ontario Court of Appeal in 1937 dealing with a codicil. Most of the provisions contained in the codicil were struck down by the majority of the Court for want of knowledge and approval. The remaining terms of the codicil (after it was

⁴¹² For a specific discussion of the capacity requirements for a beneficiary designation, see 3-3, “Beneficiary Designations.”

⁴¹³ *McNaughten’s Case, Re* (1843), 8 E.R. 718, 10 Cl. & F. 200, 1843 WL 5869 (U.K. H.L.); *Boughton and Marston v. Knight* (1872-75), L.R. 3 P. & D. 64 (Eng. Prob. and Div.) at pp. 68-69; *K (Enduring Powers of Attorney), Re*, [1988] Ch 310 at p. 313; *W (Enduring Power of Attorney), Re* (2000), [2001] Ch. 609 at p. 613; *Gibbons v. Wright* (1954), 91 C.L.R. 423 (Australia H.C.); *Masterman-Lister v. Jewell*, [2003] 1 W.L.R. 1511, [2003] 3 All E.R. 162 (Eng. C.A.) at para. 57; *Hoff v. Atherton* (2004), [2004] EWCA Civ 1554, [2005] W.T.L.R. 99 (Eng. C.A.); *Sheffield City Council v. E* (2004), [2004] EWHC 2808 (Fam), [2005] 2 W.L.R. 953; *York v. York*, 2011 CarswellBC 1789, 20 B.C.L.R. (5th) 217, 335 D.L.R. (4th) 292, (sub nom. *York Estate v. York*) 308 B.C.A.C. 197 (B.C. C.A.) at para. 39, additional reasons 2012 CarswellBC 2458 (B.C. C.A.). For a review of those cases and a larger discussion of the idea at hand here, see 10-1, “An Across-the-Board Test for Capacity.”

⁴¹⁴ *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.). The facts in *Re Souch* are discussed at length in material later in this text dealing with codicils. See 3-1(b), “Applicable Capacity Test for Codicils.”

stripped down using the tool of severance⁴¹⁵) were simple, leaving the Court of Appeal considering the capacity necessary to validly make increases to small bequests. One was an increase from \$10,000 to \$30,000 in favour of a sister. The change in dollar amount ultimately represented a shift of about ten percent of the value of the codicil-maker's estate. Did the will-maker enjoy the capacity to increase the bequest? Middleton J.A. concluded that she did, stating:⁴¹⁶

Dr. Storey describes faithfully and well the mental condition of the old lady. Put shortly, it is that she had sufficient mentality to realize a simple proposition. She could understand the nature and effect of a gift. She knew the meaning of the words used. She had not enough capacity to grasp the situation as a whole. She would forget the first part of a list of gifts before she reached its conclusion. I agree with the learned trial Judge that she had testamentary capacity.

The case is notable for how low the majority in the Court of Appeal was willing to set the bar. The codicil-maker was of severely downgraded capacity, but still found to enjoy the capacity to redirect \$20,000 to a different heir in the context of an estate ultimately totaling in the neighbourhood of \$200,000. The minority of the Court, in separate reasons for decision, made it clear that the codicil-maker did not have the capacity necessary to make the codicil as a whole (without stripping it down, and considering terms that affected the larger transfer of wealth). The majority might have been stricter on the issue of capacity if the codicil had involved adding a new beneficiary rather than jiggling the amounts due between existing ones.

As an adjunct to all of this is the idea, discussed earlier, that an exceedingly complex will can require an elevated threshold of capacity.⁴¹⁷ That point holds with equal force. The standard is already high for a normal will, however. It gives away everything a will-maker owns, caring for the people the will-maker loves best. Thus it requires a full appreciation of the extent of assets, the natural objects of bounty, and the effect of the instrument. That standard demands significant powers of mind in the case of a normal will in the normal course. It is hard to elevate it further by complicating the terms of the will instrument. Thus, the basic test from *Banks v. Goodfellow* might be adjusted slightly upwards but still holds steady at the end of the spectrum where the wills are very complex. The complex will still deals with the same key set of elements. That conclusion is buttressed by the proposition that the will-maker needs to understand the basic dispositive scheme, not the boiler-plate or technical operation of the will.⁴¹⁸ It is at the other end of the spectrum, where the testamentary instrument deals with items of small or otherwise trifling import, that the test from *Banks v. Goodfellow* becomes flexible and submits to substantial adjustment.

⁴¹⁵ For the use of severance to strip away bad clauses for want of knowledge and approval see 4-12(b), "Severance Where Knowledge and Approval Absent."

⁴¹⁶ *Souch Estate, Re* (1937), 1937 CarswellOnt 68, [1938] O.R. 48, [1938] 1 D.L.R. 563 (Ont. C.A.) at para. 11.

⁴¹⁷ See 1-7(c), "Nature and Effect of Will."

⁴¹⁸ See the discussion earlier at 1-8, "Technical Provisions and Tax Structuring."

Equitable Fraud and Policy Violation

Excerpt from John E. S. Poyser, ***Capacity and Undue Influence***
(Carswell: Toronto, 2014) pages 608-613
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to a solicitor with a view to seeing what steps she could take; and that he refused to do anything for her without money.

The court was willing to allow the action to proceed. The delay did not protect the neighbours who had taken rights to the land away from the woman. The transaction was clearly unconscionable, and the inequity of the delay brought little weight to countervail against the improvidence of the transaction.

4 Transactions Amounting to Equitable Fraud

Equitable fraud was dealt with at length by Viscount Haldane LC in *Nocton v. Lord Ashburton*.²⁴⁴ He distinguished between fraud as it had developed in the common law courts, on the one hand, and equitable fraud, on the other. Common law fraud involved the use of falsehood with an intent to deceive and profit by it. Equitable fraud was broader, involving any breach of equitable duty, and could be found without a finding of falsehood or a finding of intention to deceive. The point was made as follows:²⁴⁵

My Lords, I have dealt thus fully with this distinction because I think that confusion has arisen from overlooking it. It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression “constructive fraud” came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

Where a relationship exists between the parties that creates equitable duties then breach of that equitable duty amounts to “fraud” and gives rise to remedies *in personam*. That will include court orders that the person acting in breach of the duty be required to re-convey property, make restitution, or pay compensation to make the victimized party whole again. Outside of that relationship, there is no fraud

²⁴⁴ *Nocton v. Lord Ashburton* (1914), [1914] A.C. 932, [1914-15] All E.R. Rep. 45 (U.K. H.L.).

²⁴⁵ *Nocton v. Lord Ashburton* (1914), [1914] A.C. 932, [1914-15] All E.R. Rep. 45 (U.K. H.L.) at pp. 953-954 [A.C.].

without satisfying the requirements for deceit as set out by the House of Lords in *Derry v. Peek*.²⁴⁶

The English Court of Appeal had occasion to repeat that same basic point in 2011 in *Pitt v. Holt*.²⁴⁷

The jurisdiction of equity to protect parties against fraud, undue influence, unconscionable bargains and related conduct including abuse of confidence is long established and well known. Equity does not limit fraud, in this context, to actual dishonesty such as would give rise to an action in deceit at common law. Equitable fraud takes account of any breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience ...

Sheridan devoted a small chapter in the textbook *Fraud in Equity* to breach of fiduciary duty as a form of equitable fraud.²⁴⁸ Fraud of this type was broken into categories. Equitable fraud included the situation where a fiduciary makes a secret profit out of the position, or a fiduciary makes negligent misrepresentations to the person to whom the fiduciary duty is owed.²⁴⁹ Equitable fraud, as a source of jurisdiction to grant relief, reached its apogee long before the Sheridan textbook was published in 1957. The jurisdiction is still there.

The term “fraud” has proven elastic and, as a result, is difficult to use with clarity. It is often used in the sense of outright deceit, the common law usage. It is sometimes used in the broader sense employed here, as any breach of equitable duty. It is sometimes used more broadly still to encompass and include equitable undue influence (both actual and presumed) as well as unconscionable bargains and transactions violating the policy of the law (a topic dealt with in a section that follows).²⁵⁰ Where the word is used in a decision, the reader has to carefully consider the context before attaching the intended definition, sometimes broader and sometimes narrower. The use of the word “fraud” in connection with a will or other testamentary wealth transfer is always, in the common law sense, importing falsehood and deceit.

No effort is made here to comprehensively deal with equitable fraud in any of its senses. A brief discussion of it is necessary, however, to provide context for the discussion of undue influence by relationship. Relationships of trust or confidence

²⁴⁶ *Derry v. Peek* (1889), 14 App. Cas. 337, 5 T.L.R. 625 (Eng. H.L.).

²⁴⁷ *Pitt v. Holt*, [2011] EWCA Civ 197, [2011] 2 All E.R. 450, [2011] Pens. L.R. 175, 2011 WL 674966 (Eng. C.A. (Civ. Div.)) at para. 165. The case went to appeal in the Supreme Court of the United Kingdom in *Pitt v. Holt*, [2013] UKSC 26, [2013] 2 A.C. 108 (U.K. S.C.), but the remarks quoted here remain persuasive law.

²⁴⁸ L. A. Sheridan, *Fraud in Equity, A Study in English and Irish Law* (London: Pittman & Sons, 1957), at pages 107 to 125.

²⁴⁹ L. A. Sheridan, *Fraud in Equity, A Study in English and Irish Law* (London: Pittman & Sons, 1957), at pages 107 to 125. Also see pages 169 to 172 for a list itemizing and categorizing the various types of fraud known to equity. It was tendered as an improvement and update on the classic catalogue of equitable frauds set out by Lord Hardwick in *Earl of Chesterfield and Others Executors of John Spencer v. Sir Abraham Janssen* (1751), 28 E.R. 82, 2 Ves. Sen. 125 (Eng. Ch. App.) at pp. 100-101 [E.R.], described by Sheridan as being out of date and misleading.

²⁵⁰ Used in that broadest sense by Sheridan. The topic is covered in chapter 8 of *Snell's Equity*, where the broadest definition is recognized but a middle ground and narrowed usage is adopted.

make the mildest of pressure cross the line from permissible persuasion to undue influence. The presence of the same relationship creates equitable duties, and those duties are breached by omission as easily as commission. From a conceptual perspective, the conduct amounting to undue influence can be construed so broadly as to include both conduct by omission and commission. In the alternative, equitable undue influence can be conceptualized as always including an overt act of commission, even if that act amounts to merely creating an environment pregnant with the expectation of gift. In that approach, pure acts of omission would have to be caught by the doctrine of equitable fraud discussed here if they are to be declared voidable. The distinction will mean little to litigants, but may be of use in providing clarity to the court in dealing with the “illusiv[e]” nature of undue influence by relationship.

5 Transactions Violating the Policy of the Law

Equity also provided relief against transactions characterized as contrary to the policy of the law under a separate doctrine falling under the umbrella of unconscionable transactions. The doctrine is described on the following terms in *Snell's Equity* (footnotes omitted):²⁵¹

Courts of equity also set aside as “unconscionable” not only transactions where one of the parties needed protection but also transactions which were described as a “fraud” on third parties or upon the public generally. In this category fall marriage-brokerage contracts, payments to a parent to consent to the marriage of his child, loans to a woman to swell her dowry and thus deceive her husband, rewards for influencing a testator, and contracts in restraint of trade...

Those amount to a hodgepodge of cases where courts of equity were willing to interfere. The common thread appears to be a willingness to set aside transactions that undercut core societal building blocks, like marriage, trade, and testamentary freedom.

Into this category, perhaps, finds the dissenting reasons for decision by Lord Denning in *Estate of Brocklehurst (Deceased), Re*.²⁵² The facts are interesting, and described here at length. The case deals with a gift of hunting rights by a baronet to a local garage-keeper. The gift-maker, Lord Brocklehurst, was described by Lord Denning as follows:²⁵³

He was born on March 7, 1887, with a silver spoon in his mouth. He was the heir to the title and to the great estate of Swythamley Hall. He had a conventional upbringing at

²⁵¹ John McGhee, ed., *Snell's Equity*, 32nd ed., (London: Thomson Reuters, 2010), at pages 285-286, paragraph 8-043. A variety of cases were cited in support of each of the categories. *Debenham v. Ox* (1749), 1 Ves. Sen. 276 was cited as an example of a reward for influencing a testator.

²⁵² *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387].

²⁵³ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at p. 23 [Ch.].

Eton and Trinity Hall, but he was the most unconventional of men. He got his blue at Cambridge for boxing. He went with Ernest Shackleton to the Antarctic where he lost his toes with frost-bite. In the first world war he served with the 1st Life Guards and rose to command them. In the second world war he was with the Arab Legion in the desert, commanding a mechanised brigade. Then in his late fifties, he returned to Swythamley Hall, where he did all the things which befit the country gentleman. He was chairman of the Macclesfield bench. He had his horses, his shooting, and his fast motor cars. He was strong minded, too, used to getting his own way, and brooking no interference. An autocrat, if ever there was one.

He became a lonely autocrat late in life. His daughters had moved away. His second wife left him. His batman of forty years died. He was left alone in a vast house on vast grounds, changing his will and becoming more and more eccentric:²⁵⁴

All the time his mind was much on the estate. He had no one to follow him. He had no son. This was a big disappointment. He had two daughters by his first marriage, but they had no children. He had two sisters. One of them, Lady Ley, had a grandson, but the old man did not think him very suitable. Yet here was the great estate of Swythamley. He had succeeded to it in 1904 when his father died. It was left to him in tail, but he had barred the entail. The mansion house was Georgian with Victorian additions. It was surrounded by parkland and farms and open moorlands. There were 4,000 acres in all with some of the finest shooting in the country. It included a grouse moor called The Roaches of 1,400 acres. Besides grouse, there were 200 red deer there. There was also a smaller moor called Gun Moor of 200 acres. He had shot over it all until he was nearly 80. But he had had to give up shooting. He had let The Roaches to Lord Derby for five years. He had allowed friends to shoot over Gun Moor. The value of the estate was enhanced greatly by the shooting rights. What was to happen to it all when he died? Here he was at 85 with only a year or two to go.

He burnt down buildings. He failed to adequately insure others against risk of loss. At one stage he led a male relative to believe that the relative stood to inherit everything, and then changed his will to exclude him:²⁵⁵

He never told Mr. Fane Murray anything about it. He led him to believe that he was still his heir, and accepted all the attention usual from expectant heirs. Mr. Fane Murray believed he was the heir all the time right until after the old man's death. Sir Philip told no one of the change except his solicitor and Mrs. Knight. He told her to keep it secret and tell no one. When she said "That is not fair. You ought to tell him," the old man just laughed. He said: "When the time comes, I shall be like a fox. I shall have gone to ground."

Throughout all this he had the acquaintance of a local garage-keeper:²⁵⁶

²⁵⁴ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at p. 24 [Ch.].

²⁵⁵ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at p. 25 [Ch.].

²⁵⁶ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at pp. 26-27 [Ch.].

This brings me to tell of the garage proprietor. His name is John Roberts. At one time a long-distance lorry driver, now he owns a garage 10 miles away from Swythamley. He comes on to the scene because 10 years ago he answered an advertisement in the "Exchange and Mart." Sir Philip had a tracked motor vehicle for sale. Driving round in it, John Roberts told Sir Philip of a good osteopath. He also told him that he liked shooting. Sir Philip said he could shoot rabbits on Gun Moor if he liked. Soon he brought a friend with him. It became a regular thing. After each day's shoot, they went, as befitted them, to the back door of the Hall to thank Sir Philip for his kindness. They left any game for his larder but took the rabbits away with them. They were not asked into the house. At any rate, not when Lady Brocklehurst was there. They did not go to the Roaches Moor, because that was let to Lord Derby. In June 1972, they wanted to rent Gun Moor, but Sir Philip decided to keep it in his own hands. In June 1972, however, after Lady Brocklehurst left, he did let John Roberts have the shooting on Gun Moor at no rent but paying the rates of £20 a year. A change came after October 1972 when the old batman died and Sir Philip was left alone in the house. John Roberts came over two or three times a week and kept the old man company. He had a key of the back door and would let himself in. He often made tea for Sir Philip. He was "slightly subservient to Sir Philip but in the nicest possible way." In the last year or two of his life the old man relied on John Roberts to get things done. Such as a handrail on the back stairs, and the repair of the garage door. He helped feed the dogs. Sir Philip too had had an operation for opening the colon and occasionally needed help with the equipment. The old batman used to do it, but after he died, John Roberts did it. No doubt Sir Philip was very appreciative of all the attention and kindness shown to him by John Roberts. Especially as John Roberts did everything that Sir Philip asked. In his own words, he was a "Yes-man," never contradicting or crossing the old man in any way. He did not wish to offend him in the slightest. The judge said that this was:

"based on kindness, I am sure; but also on gratitude for past and present favours, especially of course the shooting; and I have no doubt partly on the hope that this would continue."

The hunting rights were assigned during the last eight months of the gift-maker's life. Lord Denning described the transaction and the motives behind it as follows:²⁵⁷

He told no one about it. Not his sister. Not his solicitor nor his agent. No one at all except Mrs. Knight, and then only part of it: he swore her to secrecy. It was never discovered until after he died. It was a transaction by which he severed the shooting rights from the estate and gave them to a garage proprietor for 99 years. He gave him the whole of the shooting rights. Not only over The Roaches and the Gun Moor, but also over the park land and farms, and even the gardens and lawns of the hall right up to the windows. He gave them to the garage proprietor with full right to assign or sublet those rights at whatever profit he could make. No such transaction has ever been known before. It was a disastrous transaction for any one who was to inherit the estate. The shooting rights were an integral part of it. The value would be reduced by £90,000. It might make the house virtually unsaleable.

²⁵⁷ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at p. 26 [Ch.].

Why did Sir Philip do it? He must have known its effect on the estate. Yet he did it. The judge, who tried the case for ten days and heard all the evidence, could find no adequate motive. It was not to be accounted for, he said, by the ordinary motives of ordinary men. He put it down to the age and eccentricity of Sir Philip.

As I have said, he did mention it to Mrs. Knight. She said to him: “There is going to be a frightful rumpus about this one day, you know.” He laughed and laughed. He said: “And when the time comes, I shall be like a fox. I shall have gone to ground.” There is the key. Lady Ley had been so keen that the estate should be left to her grandson that she had turned Sir Philip against him. Mrs. Knight said so. She said that Lady Ley alienated her grandson from his great-uncle. Perhaps this was the old man’s way of getting his own back. He would give the estate to her grandson but with a millstone hung about his neck.

Lord Denning wrote a dissenting judgment and would have supported the trial judge in setting aside the gift, denying the garage-keeper the hunting rights. He did not set aside the gift on the grounds of undue influence.²⁵⁸ He adopted different grounds. He canvassed and employed unconscionable bargain.²⁵⁹

Lord Denning then went on to deal with public policy at the conclusion of his reasons:²⁶⁰

One last word. This is essentially a case where the experience and skill of a Chancery judge are most valuable – where equity steps in to set aside transactions which are unconscionable. This gift was unconscionable. All the witnesses said that Sir Philip was of sound mind. No doubt he was in one sense. But not in another sense. His mind had become addled by age. His memory had failed. He had become irresponsible. He acted irrationally, doing things which no reasonable man would do. He changed his mind constantly. The judge found all this. He said that the 99-year lease was not to be accounted for by the ordinary motives of ordinary men. If I may suggest a motive, it appears to me that he was deliberately setting out to sever the estate and make it unsaleable so as to reduce the inheritance of his sister’s grandson: and he used the gift to Mr. Roberts as the tool for this purpose. He laughed and laughed about it, saying that when the gift was discovered, “I shall be like a fox. I shall have gone to ground.” Forgive him, if you please: because he was so old and so eccentric: and without any independent adviser. But do not let the transaction stand – so as to work the destruction of an estate of which he was morally, though not in law, only a life tenant. It was his duty to preserve the estate in the interests of his family, the neighbourhood and the country at large. To my mind he had no right in equity whatever to do what he did. I would dismiss the appeal.

That latter passage suggests that a second ground might have been in play in Lord Denning’s mind, setting aside the gift as a transaction violating the policy of the law.

²⁵⁸ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at p. 31 [Ch.].

²⁵⁹ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at p. 31 [Ch.].

²⁶⁰ *Estate of Brocklehurst (Deceased), Re* (1977), [1978] Ch. 14, [1977] 3 W.L.R. 696, [1975 H. No. 387] at p. 32 [Ch.].

Timing of Capacity

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the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation.

Not only is the test for capacity viewed as a practical determination, it is also viewed by the courts as a factual determination. That conclusion has implications if the determination by a court on the capacity of a will-maker goes to appellate review. This was addressed by Viscount Dunedin in *Robins v. National Trust Co.*³⁰¹

This raises in a quite distinct way the question of whether their Lordships will examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact. Whether a man at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact.

To the extent that appellate courts are loath to interfere with a finding of fact made by a lower court, it will make a finding of capacity or incapacity difficult to appeal.

12 Standard for Capacity at Execution of a Will

(a) *Timing of Testamentary Capacity in General*

As a general rule, a person making a will must have the requisite testamentary capacity on the date the will is signed. An exception is available and the general rule does not apply where the will is prepared and signed as part of a two-stage process, with the will-maker giving instructions to a lawyer for the preparation of a will on one day and then, at a later date or time, signing a will prepared to accurately give effect to those instructions. Where that occurs, the test for capacity is relaxed on the date of execution, and the will-maker does not have to possess full testamentary capacity at that time. Instead, the will-maker need only to have the capacity to understand that he or she is signing a will, and that the will being signed gives effect to the instructions communicated earlier. Provided that vestigial thread of capacity remains, and full testamentary capacity had been present earlier, it will not defeat the will even though the will-maker's capacity has diminished to the point where he or she can no longer understand the terms of the will, or no longer has the powers of mind to understand the instructions he or she gave earlier, or has lost the capacity to reformulate those instructions. The authorities support the conclusion that the loss of capacity can be fairly profound, and includes examples of will-makers who have successfully executed wills while clearly lacking testamentary capacity and barely

³⁰¹ *Robins v. National Trust Co.*, 1927 CarswellOnt 41, [1927] 2 D.L.R. 97, [1927] 1 W.W.R. 692, [1927] A.C. 515, [1927] All E.R. Rep. 73 (Ontario P.C.) at p. 517.

able to keep conscious. This exception generally comes into play when a lawyer is involved but is not limited to that scenario. What is required is a crystallized statement of the will-maker's final testamentary intent when the will-maker has testamentary capacity followed by an accurate reproduction of that intent in the form of a will signed later. All of these points are discussed in the sections that follow.

The exception outlined above is commonly ascribed and cited to *Parker v. Felgate*,³⁰² but has been a consistent component of the laws of England for more than 250 years. It remains good law in England. It has been cited with approval and consistently applied in Canada. It appears to enjoy continuing approval and application in New Zealand as well.³⁰³

(b) Historical Review of Parker v. Felgate and the English Case Law

*Parker v. Felgate*³⁰⁴ was an 1883 decision of Sir James Hannen. The will-maker was a young woman, but a widow and one of some means. She gave instructions to a lawyer before she fell ill that would see her estate given to her father, a brother and a charity. The charity was to take the lion's share. She clearly had capacity at the time she gave instructions. Shortly thereafter, and before the will could be signed, she fell ill. Her illness induced a coma-like state in which she could be roused by pain or discomfort. When roused, she was conscious briefly and could answer basic questions, by making simple signs and utterances in response, before lapsing again into unconsciousness. While she was able to answer questions, one of her attending doctors stated "I could hardly say that she was perfectly rational."³⁰⁵ She was roused, and asked if she wanted to have the will executed, and she said "yes."³⁰⁶ Based on that, the will was signed. After her death, the will was challenged on two grounds. First, that she lacked the necessary mental capacity to validly enter the will on the date that she was roused to sign it. Second, the will was challenged on the ground, dealt with later in this text, that she did not know and approve of the contents of the will. If the normal standard of testamentary capacity were applied on the date of execution, she lacked the powers of mind to satisfy the test and the will would fail. It was clear, however, that she had been sound of mind when she gave instructions to the lawyer at the outset, before her illness took her. The laws of England allowed for a reduced standard of capacity at execution if the will-maker had capacity at the time instructions were given, and the will accurately reflected those instructions. The case report takes the form of Sir James Hannen's charge to the jury. He described three separate frames of mind, each in the alternative, and each sufficient to allow the valid execution of a will by a will-maker who had lost testamentary capacity after giving instructions for the will:³⁰⁷

³⁰² *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.).

³⁰³ *Brown v. Pourau*, [1995] 1 NZLR 352 (High Ct.) at p. 362.

³⁰⁴ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.).

³⁰⁵ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.) at p. 172.

³⁰⁶ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.) at p. 173.

³⁰⁷ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.) at pp. 173-174.

If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out." Now, I have only put into language that which flashes across the mind without being expressed in words. Do you believe that she was so far capable of understanding what was going on? Did she at that time know and recollect all that she had done with Mr. Parker? That would be one state of mind. But if you should come to the conclusion that she did not at that time recollect in every detail all that had passed between them, do you think that she was in a condition, if each clause of this will had been put to her, and she had been asked, "Do you wish to leave So-and-So so much," or do you wish to do this (as the case might be), she would have been able to answer intelligently "Yes" to each question? That would be another condition of mind. It would not be so strong as the first, viz., that in which she recollected all that she had done, but it would be sufficient. There is also a third state of mind which, in my judgment, would be sufficient. A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, "I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it;" it is not, of course, necessary that he should use those words, but if he is capable of that train of thought in my judgment that is sufficient.

Later in the same case, the learned judge put three questions to the jury, each corresponding to one of the three states of mind that would be sufficient to allow for a valid execution of the will by a will-maker lacking testamentary capacity on the date of execution.³⁰⁸

SIR JAMES HANNEN. Did the deceased when the will was executed remember and understand the instructions she had given to Mr. Parker?

The Foreman. No.

SIR JAMES HANNEN. Could she, if it had been thought advisable to rouse her, have understood each clause if it had been put to her?

The Foreman. No.

SIR JAMES HANNEN. Was she capable of understanding, and did she understand, that she was engaged in executing the will for which she had given instructions to Mr. Parker?

The Foreman. Yes.

On that basis, the will was accepted to probate. *Parker v. Felgate* has come to stand for the proposition that a will is validly made if the will-maker enjoys testamentary capacity on the date that instructions are given and, having lost that capacity, remains capable at execution of understanding that he or she gave instructions earlier, that he or she is being asked to sign a will, and that the will tendered for execution has been prepared based on those earlier instructions. The will-maker in *Parker v.*

³⁰⁸ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.) at p. 175.

Felgate entered into a valid will. There was no evidence of testamentary capacity on the date of execution.

No earlier authority is cited by the court in *Parker v. Felgate*, but the principles expressed to the jury and applied by the court had been part of the English common law for at least 130 years prior, and had already been given clear voice.³⁰⁹

It is worth noting that Sir James Hannen set out three separate frames or conditions of mind, not one, and took the position that any one of those frames of mind would have been sufficient. The jury happened to find that the third frame of mind was present. It became the *ratio decidendi* drawn from the case. Yet the case sets out a broader collection of principles, as *obiter*, than the one for which it is commonly cited. Later cases have confirmed the broader scope of the principle available to save a will at execution by a will-maker who has lost testamentary capacity, beyond the strict bounds of *Parker v. Felgate*. Those cases are discussed below, along with a restatement of each of the three frames of mind.

The principle from *Parker v. Felgate* is of great practical significance, both for deathbed will executions and for everyday wills practice. It not only calibrates and fixes the minimum bar that a will-maker must be able to clear in the last stages of waning capacity, but it is also generally taken to mean that lawyers only have to interview for capacity once, at the point of instructions, and not twice, with a second interview for capacity at execution.³¹⁰

The law relating to capacity at execution expressed in *Parker v. Felgate* came under consideration again in 1901 by the Privy Council in *Perera v. Perera*,³¹¹ a case originating out of Ceylon. Lord McNaughton, writing for a unanimous court consisting of five Law Lords, stated, “Their Lordships think that the ruling of Sir James Hannen is good law and good sense.”³¹² The court did not embark on a detailed examination of the law on point, or the rationale behind it.

In Canada, *Parker v. Felgate* and *Perera v. Perera* were both cited with approval by the Supreme Court of Canada in *Faulkner v. Faulkner*.³¹³ Five members of the Supreme Court wrote concurring reasons for decision. All of them relied on the

³⁰⁹ The earlier case law on point is cited and canvassed, one case at a time, by the Chancellor of the English Court of Appeal in *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at paras. 14 to 17. *Perrins* is discussed at length elsewhere in this text. The cases reviewed by the Lord Chancellor included *Seeman v. Seeman* (1752), 1 Lee 181; *Moore v. Hackett* (1755), 2 Lee 147; *Sandford v. Vaughan* (1809), 1 Phill Ecc 39; and *Harwood v. Smith* (1840), 3 Moo PC 282 (Eng. C.A.). The Chancellor quoted the following passage from 1752 in *Seeman*: “...the only questions were whether the deceased was in his senses when he gave instructions for his will; and whether the will was reduced to writing before the testator was dead; and the court being satisfied on those two points, pronounced for the will without enquiring whether he remained in his senses during the time the will was writing.” This is a clear exposition of the principle later adopted and applied in *Parker v. Felgate*.

³¹⁰ See below at 1-12, “Standard for Capacity at Execution of a Will.”

³¹¹ *Perera v. Perera*, [1901] A.C. 354 (Ceylon P.C.).

³¹² *Perera v. Perera*, [1901] A.C. 354 (Ceylon P.C.) at p. 362.

³¹³ *Faulkner v. Faulkner*, 1920 CarswellOnt 16, 60 S.C.R. 386, 54 D.L.R. 145, [1920] 2 W.W.R. 307 (S.C.C.).

principle from *Parker v. Felgate*.³¹⁴ The will-maker was dying in hospital while his lawyer attempted to have him sign the will that had been prepared. Mignault J.A. commented as follows:³¹⁵

Mr. Anderson [the lawyer] was called early on Friday, he says, by the superintendent of the hospital, Miss Walkdem, to have the will signed, and it was then that the testator, his hand being aided by Mr. Anderson, for the disease had blinded him, put his mark to the will before three witnesses, including Dr. Forrest, his medical attendant, for whose arrival Mr. Anderson had very prudently waited before proceeding with the execution of the will. The question then was: Could the testator think thus far?

I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.

(per Sir James Hannen in *Parker v. Felgate*, 8 P.D. 171, 52 L.J.P. 95, approved by the Judicial Committee of the Privy Council in *Perera v. Perera*, [1901] A.C. 354, 70 L.J.P.C. 46). In fact this test is more than satisfied...

Anglin J.A. listed the applicable cases in coming to the same conclusion:³¹⁶

While the condition of the testator on the Friday, when the will was executed, is perhaps more questionable, the weight of the evidence, in my opinion, is, that he then had the degree of capacity required under such authorities as *Parker v. Felgate*, 8 P.D. 171, at p. 174, 52 L.J.P. 95; *Perera v. Perera*, [1901] A.C. 354, at p. 361, 70 L.J.P.C. 46, and *Kaulbach v. Archbold*, 31 S.C.R. 387, at p. 391.

The *Faulkner* decision amounts to the endorsement of *Parker v. Felgate* as the law in Canada.

The *Parker v. Felgate* principle came before the Privy Council in 1948 later in a case originating out of Fiji, *Battan Singh v. Amirchand*.³¹⁷ Lord Normand, writing for a unanimous court, paraphrased the principle from *Parker v. Felgate* on the following terms:³¹⁸

That case decided that if a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings, and if the solicitor prepares the will in accordance with these instructions, the will will stand good, though

³¹⁴ *Faulkner v. Faulkner*, 1920 CarswellOnt 16, 60 S.C.R. 386, 54 D.L.R. 145, [1920] 2 W.W.R. 307 (S.C.C.). Davies C.J. at paras. 5 and 6, Idington J.A. at para. 13 (alluding to the principle from those cases), Anglin J.A. at para. 17, and Mignault J.A. at paras. 21 and 22, Brodeur J.A. concurring.

³¹⁵ *Faulkner v. Faulkner*, 1920 CarswellOnt 16, 60 S.C.R. 386, 54 D.L.R. 145, [1920] 2 W.W.R. 307 (S.C.C.) at paras. 21 and 22.

³¹⁶ *Faulkner v. Faulkner*, 1920 CarswellOnt 16, 60 S.C.R. 386, 54 D.L.R. 145, [1920] 2 W.W.R. 307 (S.C.C.) at para. 17.

³¹⁷ *Battan Singh v. Amirchand*, [1948] A.C. 161, [1948] 1 All E.R. 152, [1948] L.J.R. 827(Fiji P.C.) (“*Battan*” in the discussion that follows) (cited to AC).

³¹⁸ *Battan Singh v. Amirchand*, [1948] A.C. 161, [1948] 1 All E.R. 152, [1948] L.J.R. 827(Fiji P.C.) (cited to AC) at p. 168.

at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them.

That language underscores the minimal nature of the residual capacity required to execute a will. A will-maker may no longer be capable of understanding the instructions he or she gave, but still be capable of executing the will based on those instructions. More, a will-maker may no longer be able to understand the terms of the will itself, but still be capable of executing it. Before the principle from *Parker v. Felgate* will apply, the court must be able to find a clear chain between the giving of instructions by a will-maker when capable, and the content of the will drawn on those instructions. In *Battan*, the will-maker was seriously ill and died one day after he signed his will. The will excluded his family, with whom he had enjoyed close relations in the past, and left his estate to a pair of acquaintances, who happened to owe him money. One of those acquaintances was involved in causing the will to be prepared. The instructions to prepare a will on behalf of the will-maker were ferried to the lawyer by a young man who acted as an intermediary. As the intermediary went back and forth between the ill will-maker and the lawyer, he was accompanied by the acquaintance of the will-maker who was involved in the preparation of the will document. The will-maker did not meet the lawyer until execution. The will-maker was very ill, could not sign his name and could only make a mark with assistance.

The Privy Council in *Battan* found that the principle from *Parker v. Felgate* did not apply to the will as there was no good evidence to suggest that the instructions ferried to the lawyer were in fact the true wishes of the deceased will-maker. The principle from *Parker v. Felgate* was dependent on a clear and accurate statement of instructions from the will-maker at a time when the will-maker had capacity. Lord Normand sounded the following cautionary note in that regard when writing the reasons for decision in *Battan*:³¹⁹

Their Lordships are further of opinion that the principle enunciated in *Parker v. Felgate* should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.

If the court cannot be satisfied that the content of the will reflects instructions actually given, then the will-maker must demonstrate testamentary capacity as well as knowledge and approval on the date the will is executed. It is possible for instructions to be transmitted to a lawyer by intermediary, or by letter, or for the initial interview to be conducted by one lawyer and the execution by another, so

³¹⁹ *Battan Singh v. Amirchand*, [1948] A.C. 161, [1948] 1 All E.R. 152, [1948] L.J.R. 827(Fiji P.C.) (cited to AC) at p. 169.

long as that chain is established. Thus, in *Parker v. Felgate* itself, instructions were taken by one lawyer at the firm in question and the will was drafted and executed by another lawyer at the same firm relying on detailed file memoranda. Thus, if a will-maker wrote out a letter of instruction, summarizing his or her assets, demonstrating an appreciation of the natural objects of bounty, and giving the lawyer detailed instructions on how the will was to be drawn, the will itself would be valid if the lawyer arrived at the hospital to find the client in a state of severely diminished capacity and had the will executed. That is on the proviso that the court was satisfied that the letter was indeed the product of a sound and disposing mind of a will-maker intending to communicate a finalized statement of testamentary wishes. The chain is most easily established when a lawyer prepares the will, and that one lawyer attends throughout the whole of the process including execution, but the chain can still be made out, although less easily, under other circumstances. The magic of *Parker v. Felgate* is not in the presence of a lawyer, but in the crystallized testamentary intent of a will-maker at a time when he or she has capacity, accurately reduced to the form of a will and then signed after he or she does not.

The principle in *Parker v. Felgate* was given a fresh re-examination by English Court of Appeal in the 2010 decision *Perrins v. Holland*.³²⁰ Counsel in that case suggested that Sir James Hannen had originated the principle in *Parker v. Felgate* “out of the blue” and without past case law to support him, and that *Parker v. Felgate* ought not to be followed as logically inconsistent with the larger law of wills. The English Court of Appeal rejected those arguments. The Chancellor stated, firstly, that there were at least five decisions in the law of England pre-dating *Parker v. Felgate* suggesting that full testamentary capacity does not have to be present at the time a will is signed.³²¹ The Chancellor reviewed the earlier cases before concluding that Hannen J. had ample support in prior case law to conclude that a lesser standard of capacity was sufficient at the execution of a will.³²²

The Chancellor then commented on the textbooks that expressed the law as that stated in *Parker v. Felgate* on point without criticism, and on the string of cases that have followed *Parker v. Felgate* during the years.³²³ The law requiring a lower threshold of capacity at execution is well entrenched. By way of conclusion, the court stated (emphasis added):³²⁴

Counsel ... submits with some force that if the validity of a will depends on both testamentary capacity and due execution logically the former should exist at the time of the latter. The cases to which I have referred demonstrate clearly that that was not and is not the law. What is required is due execution of a will which the court can be satisfied

³²⁰ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.).

³²¹ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 14.

³²² *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 20.

³²³ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 22, citing *Kenny v. Wilson* (1911), 11 State Reporter (NSW) 460; *Thomas v. Jones*, [1928] P. 162 (Eng. Prob. Ct.) at p. 163; *Battan Singh v. Amirchand*, [1948] A.C. 161 (Fiji P.C.); *Wallace, In the Estate of*, [1952] 2 T.L.R. 925; *Flynn, Re* (1981), [1982] 1 W.L.R. 310 (Eng. Ch. Div.); and *Clancy v. Clancy*, [2003] W.T.L.R. 1097 (Eng. Ch. Div.).

³²⁴ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 23.

expressed the wishes of a testator at a time when he did have full testamentary capacity and has not been subsequently revoked. The reasons lie, I believe, in the freedom of testamentary disposition which the law favours, as explained by the court in *Banks v. Goodfellow*, the usual preference of the court, if reasonably possible, to uphold transactions ... and the pragmatic recognition in that context that the testator has no further opportunity to give expression to his wishes. Whatever the reason, the decision of the Privy Council in *Pereira v. Pereira* is strong persuasive authority for upholding the decision in *Parker v. Felgate*. Further the decisions to which I have referred demonstrate a proposition of some antiquity acted on for over 250 years. In those circumstances I do not consider that, even if I thought that *Parker v. Felgate* had been wrongly decided, which I do not, it is open to this court to hold that *Parker v. Felgate* was wrongly decided and should not be followed.

In a separate set of reasons supporting the same result, Lord Justice Moore-Bick went on an extensive review of each of the three frames of mind posited by Sir James Hannen in *Parker v. Felgate*, giving his explanation of each. The following analysis repeats the original description of the state of mind as expressed in *Parker v. Felgate*, along with the question Sir James Hannen used with the jury to test for it, which is then followed by the explanation given some 127 years later by Lord Justice Moore-Bick as additional commentary.

Hannen's first state of mind was:³²⁵

If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out." Now, I have only put into language that which flashes across the mind without being expressed in words. Do you believe that she was so far capable of understanding what was going on? Did she at that time know and recollect all that she had done with Mr. Parker? That would be one state of mind.

The following question was posed to test for that state of mind:³²⁶

Did the deceased when the will was executed remember and understand the instructions she had given to Mr. Parker?

The explanation given later by Lord Justice Moore-Bick states: "In the first example given by Sir James Hannen the testator can remember giving certain instructions to his solicitor, believes that they have been carried out and executes the will in that belief. In such a case there is testamentary capacity at the date of decision and an intention to give effect to those decisions at the date of execution."³²⁷ This

³²⁵ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.). The material at pp. 173-175 sets out all three states of mind and all three questions posited to test for each.

³²⁶ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.). The material at pp. 173-175 sets out all three states of mind and all three questions posited to test for each.

³²⁷ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 70.

would be the case where the will-maker asked the lawyer to make a will appointing “A” as executor, leaving \$10,000 to “B” and then dividing the residue of the estate between the will maker’s two children, “C” and “D.” Then, having lost testamentary capacity afterwards, the will-maker is still able to repeat the same instructions, or at least remember them to be the instructions given earlier, and want to sign the will put on the table on the understanding the will embodies those instructions. That implies the retention of a significant power of mind and memory relating to the instructions, but allows for a woeful loss of power of recollection relating to assets and family tree. The unlikely ability to successfully remember in the first sphere while failing in the second may make this scenario implausible. Perhaps because of that, there are no examples in the case law where this situation has been found to be present.

Hannen’s second state of mind was:³²⁸

But if you should come to the conclusion that she did not at that time recollect in every detail all that had passed between them, do you think that she was in a condition, if each clause of this will had been put to her, and she had been asked, “Do you wish to leave So-and-So so much,” or do you wish to do this (as the case might be), she would have been able to answer intelligently “Yes” to each question? That would be another condition of mind. It would not be so strong as the first, viz., that in which she recollected all that she had done, but it would be sufficient.

The following question was posed to test for that state of mind:³²⁹

Could she, if it had been thought advisable to rouse her, have understood each clause if it had been put to her?

The explanation given later by Lord Justice Moore-Bick states: “In the second example the testator cannot remember the details of the instructions he gave, but has capacity to understand each clause of the will as it is summarized to him and to indicate his assent to it. Again, there is testamentary capacity at the date of decision and an intention to give effect to them at the date of execution.”³³⁰ This would be the case where the will-maker asks the lawyer to make a will appointing “A” as executor, leaving \$10,000 to “B” and then dividing the residue of the estate between the will maker’s two children, “C” and “D.” Then, having lost testamentary capacity afterwards, the will-maker no longer remembers giving those instructions, may no longer remember meeting the lawyer, and stares blankly if asked to repeat what he or she had asked the lawyer to put in the will. The lawyer then goes through the will, explaining it paragraph-by-paragraph, and the will-maker assents to each as he or she heard it, saying “yes, that sounds fine.” The will-maker then signs the will, having just heard each clause repeated. In the scenario described in that manner, the

³²⁸ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.). The material at pp. 173-175 sets out all three states of mind and all three questions posited to test for each.

³²⁹ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.). The material at pp. 173-175 sets out all three states of mind and all three questions posited to test for each.

³³⁰ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 70.

lawyer goes through the exercise of reviewing the will with the will-maker. The actual physical act of review may not be a requirement for the second condition of mind. It would be sufficient instead if the will-maker is found to have retained the capacity to have given clause-by-clause assent if the lawyer had, in fact, conducted that review. It is the powers of mind that is key, not the physical review. The language used by Hannen J., although *obiter*, is very clear on that point. The *Perrins* decision itself involved the second state of mind. The will-maker was dying in the throes of advanced multiple sclerosis. The trial judge made a series of findings.³³¹ The will-maker did not have testamentary capacity on the date he signed the will, but had enjoyed that capacity on the date he gave instructions to his lawyer. The lawyer prepared a will that accurately embodied the instructions. The will-maker's intent did not change after giving the instructions. On the date he signed the will, the will-maker knew he was signing a will, but did not recall the instructions he had given to the lawyer earlier. The lawyer had summarized the will clause-by-clause and the trial judge was satisfied that the will-maker was capable of understanding the summary, and indicated assent to each provision. The appellate reasons given by the Chancellor of the Court of Appeal include the statement that "The judge found not only that the Testator did then have the state of mind described by Sir James Hannen in *Parker v. Felgate* as the second state of mind...but also that the contents of the will were summarized to the Testator on 25th September 2001, that he understood that summary and proceeded to execute his will." Based on those findings of fact, the Court of Appeal in *Perrin* affirmed the trial decision as naturally flowing from *Parker v. Felgate*.

Hannen's third state of mind was:³³²

There is also a third state of mind which, in my judgment, would be sufficient. A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, "I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it;" it is not, of course, necessary that he should use those words, but if he is capable of that train of thought in my judgment that is sufficient.

The following question was posed to test for that state of mind:³³³

Was she capable of understanding, and did she understand, that she was engaged in executing the will for which she had given instructions to Mr. Parker?

The explanation given later by Lord Justice Moore-Bick states: "In the third example the testator can remember only that he gave instructions for his will, believes

³³¹ As summarized by the Chancellor of the Court and by Lord Justice Moore-Bick in *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at paras. 34, 35 and 42.

³³² *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.). The material at pp. 173-175 sets out all three states of mind and all three questions posited to test for each.

³³³ *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng. P.D.A.). The material at pp. 173-175 sets out all three states of mind and all three questions posited to test for each.

that the document correctly reflects them (as it does), and decides to execute it on that understanding. In that case also there is testamentary capacity at the date of decision and an intention to give effect to those earlier decisions at the date of execution.”³³⁴ This would be the case where the will-maker asks the lawyer to make a will appointing “A” as executor, leaving \$10,000 to “B” and then dividing the residue of the estate between the will maker’s two children, “C” and “D.” Then, having lost testamentary capacity afterwards, the will-maker is unable to remember the instructions he or she gave, and might not be able to assent to them clause-by-clause, but is able to recognize that a paper writing is a will and understand that it is intended to give effect to instructions he or she gave earlier. The will-maker then signs the will on the understanding that it gives effect to the prior instructions. Lord Justice Moore-Bick reviewed several examples where this third state of mind was held sufficient to allow the valid execution of a will.³³⁵ One of those examples, *Wallace, In the Estate of*, was described by Lord Justice Moore-Bick on the following terms:³³⁶

In *In the Estate of Wallace* [1952] 2 T.L.R. 925 the deceased shortly before his death wrote and signed a statement called his “Last wish” which provided that certain persons were to have all his property. His instructions were embodied in a will which he executed just before he died. The will was not read over or summarised to him before he executed it and the judge, Devlin J., was not satisfied that the deceased knew and approved its contents at the time he executed it. However, he found that he knew and approved of the contents of the “Last wish” and had executed the will in the understanding that it gave effect to its provisions. Devlin J. pronounced for the will, applying the principle in *Parker v. Felgate*, on the basis that it is sufficient for the court to be satisfied that the deceased executed the will knowing that it had been drawn in accordance with his instructions.

That case is of note as it did not involve a will-maker sitting down and giving instructions to a lawyer. It opens the door to the idea that any modality or method of expressing a settled collection of testamentary wishes can later be reduced to a will and signed if the general principle from cases like *Parker v. Felgate* can be satisfied. Videotapes, memos, notes and verbal instructions, all become fair game if a will in accord with their content is prepared and signed.

The principles from *Parker v. Felgate* came under consideration again in 2011 in *Singellos v. Singellos*,³³⁷ a case notable for finding that the principles applicable in the context of wills are also applicable in the context of *inter vivos* gifts. The case is also notable for a statement confirming that there is no magic in the presence of a

³³⁴ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 70.

³³⁵ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 48 to 52. Those cases included *Perera v. Perera*, [1901] A.C. 354 (Ceylon P.C.), discussed above; *Wallace, In the Estate of*, [1952] 2 T.L.R. 925; *Flynn, Re* (1981), [1982] 1 W.L.R. 310 (Eng. Ch. Div.); and *Clancy v. Clancy*, [2003] W.T.L.R. 1097 (Eng. Ch. Div.).

³³⁶ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 50.

³³⁷ *Singellos v. Singellos* (2010), [2010] EWHC 2353 (Ch), [2011] 2 W.L.R. 1111, [2011] W.T.L.R. 327, Times, December 22, 2010 (Eng. C.A.).

lawyer to take instructions. Any intermediary will do. The court stated (emphasis added):³³⁸

If the approach in *Parker v. Felgate* applies to *inter vivos* dispositions, it cannot, in my judgment, be material that (i) the transaction in question is a composite transaction requiring multiple documents rather than a single document (indeed a will can be regarded as a composite transaction consisting of a series of separate gifts so this would be a distinction without a difference) or (ii) that the recipient of the donor's instructions is an accountant rather than a solicitor.

(c) The Application of Parker v. Felgate in Canada

The Supreme Court of Canada adopted and applied the principles under discussion here in *British & Foreign Bible Society v. Tupper*,³³⁹ a decision from 1905. The will-maker signed a new will three days before his death prepared by a man, Frederick Tupper, who took a substantial benefit under it. Capacity was “doubtful” on the date instructions were given and the will-maker was found to have suffered “entire incapacity at the time when it was executed.”³⁴⁰ The trial judge made those findings but was, on balance, satisfied that capacity had been proven. None of the learned Judges at the Supreme Court disputed that finding and the case moved forward focusing on whether the will-maker knew and approved the residuary clause contained in his will. Davies J. disposed of the capacity issue in passing as follows:³⁴¹

I am more than doubtful whether the testator was at the moment of time of the execution of the instrument of sound mind and memory and capable of understanding the contents of what he was signing. I think there was sufficient evidence, however, to justify the courts in concluding that at the time he gave his instructions to the draftsman or writer, Frederick Tupper, he knew what he was doing and authorized the changes made from the former will outside of the disposition of the residue. As there is reasonable ground for holding the will as drawn (always excepting the residuary devise) did conform to the instructions the dying man gave it can, under the authority of *Perera v. Perera* [(1901) A.C. 354], be upheld as valid.

It was taken as settled law in *British & Foreign Bible Society v. Tupper* that the will-maker does not have to enjoy full testamentary capacity on the date his or her will is signed provided the lesser threshold refined in *Parker v. Felgate* and expressed in *Perera v. Perera* can be met.

³³⁸ *Singellos v. Singellos* (2010), [2011] 2 W.L.R. 1111 (Eng. C.A.) at para. 168.

³³⁹ *British & Foreign Bible Society v. Tupper*, 1905 CarswellNS 105, 37 S.C.R. 100 (S.C.C.).

³⁴⁰ *British & Foreign Bible Society v. Tupper*, 1905 CarswellNS 105, 37 S.C.R. 100 (S.C.C.) at para. 7 per Davies J.A.

³⁴¹ *British & Foreign Bible Society v. Tupper*, 1905 CarswellNS 105, 37 S.C.R. 100 (S.C.C.) at para. 19.

The Supreme Court of Canada also cited both the *Parker* and *Perera* decisions with approval in 1920 in *Faulkner v. Faulkner*.³⁴²

Parker v. Felgate was quoted with approval in the 1999 decision in *Pike v. Stone*.³⁴³ The will-maker in *Pike* was a paranoid schizophrenic who demonstrated bizarre behavior during hours and days before and after dealing with a lawyer for the preparation and execution of a will. The will-maker was held to have the necessary testamentary capacity on both the date he gave instructions and the date he signed the will. On that latter date, the court was of the view that, even if wrong in its finding and the will-maker was not possessed of full testamentary capacity on the date of execution, he certainly would have met the more relaxed test posited in *Parker v. Felgate*.

*Re McPhee*³⁴⁴ dealt with the application of the *Parker v. Felgate* principle to a codicil. The will-maker was gravely ill and signed a codicil in his hospital bed in the presence of two lawyers, who served as witnesses, and a psychiatrist who had been treating the will-maker. The lawyers had misgivings as to the capacity of the will-maker, but had the codicil signed nonetheless to ensure it could be put before the scrutiny of the court to assess its validity.³⁴⁵ The psychiatrist endorsed the face of codicil with a signed note stating: "I was present when this document was signed, and in my opinion Mr. Donald S. McPhee was not of sound enough mind to comprehend the contents and the consequences of this document at the time he signed it."³⁴⁶ Collins J. concluded that the will-maker lacked testamentary capacity on the date the codicil was signed, but went on to discuss the lower level test required on the date of execution in the circumstances:³⁴⁷

However, in view of the decision in *Parker et al. v. Felgate and Tilly* (1883), 8 P.D. 171 approved by the Privy Council in *Battan Singh et al. v. Amirchand et al.*, [1948] A.C. 161, and also in *Perera et al. v. Perera*, [1901] A.C. 354, the latter being followed by the Supreme Court of Canada in *Re Davis, Rogers v. Davis*, [1932] S.C.R. 407, the lack of testamentary capacity at the date of execution of a testamentary instrument is not fatal to its validity provided that the testator had testamentary capacity at the time he gave instructions therefor, provided also that the testamentary instrument was prepared pursuant to and in compliance with those instructions and further provided that at the time of execution the testator had capacity to understand and did understand that the instrument

³⁴² *Faulkner v. Faulkner*, 1920 CarswellOnt 16, 60 S.C.R. 386, 54 D.L.R. 145, [1920] 2 W.W.R. 307 (S.C.C.).

³⁴³ *Pike v. Stone*, 1999 CarswellNfld 191, 179 Nfld. & P.E.I.R. 218, 29 E.T.R. (2d) 292, 546 A.P.R. 218 (Nfld. T.D.).

³⁴⁴ *Canada Permanent Trust Co. v. Stewart* (sub nom. *Re McPhee*) (1965), 1965 CarswellBC 110, 52 D.L.R. (2d) 520 (B.C. S.C.).

³⁴⁵ The court was satisfied that it was a proper course of practice to do so. A similar conclusion was reached by Cullity J. in *Scott v. Cousins*, 2001 CarswellOnt 50, 37 E.T.R. (2d) 113, [2001] O.J. No. 19 (Ont. S.C.J.). For a broader discussion as to the advisability of that practice see 12-8, "Grey Area Execution When Capacity in Doubt."

³⁴⁶ *Canada Permanent Trust Co. v. Stewart* (sub nom. *Re McPhee*) (1965), 1965 CarswellBC 110, 52 D.L.R. (2d) 520 (B.C. S.C.) at p. 523 [D.L.R.].

³⁴⁷ *Canada Permanent Trust Co. v. Stewart* (sub nom. *Re McPhee*) (1965), 1965 CarswellBC 110, 52 D.L.R. (2d) 520 (B.C. S.C.) at p. 525 [D.L.R.].

he signed was a testamentary instrument prepared pursuant to and in compliance with those instructions.

The learned judge then went on to make the findings necessary to invoke those principles and held that the codicil was valid.³⁴⁸

Parker v. Felgate has also been cited with approval by the Trial Division of the Newfoundland Supreme Court in the 1995 decision *Colbourne v. Morey*,³⁴⁹ and in the Ontario Superior Court in the 2001 decision *Scott v. Cousins*,³⁵⁰ by Justice Maurice Cullity, and in the 2011 decision in *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*.³⁵¹

(d) Expanding the Principles From Parker v. Felgate

The principles from *Parker v. Felgate* can be expanded to a wide variety of circumstances. What is required is a crystallized statement of the will-maker's final testamentary intent at a point in time when he or she has testamentary capacity followed by an accurate reproduction of that intent in the form of a will-document that is signed later. That intent can be expressed or recorded by words, or in writing, or by the creation of any other artifact that captures the will-maker's wishes. Provided that those wishes are then accurately reduced into a formal will and presented to the will-maker for signature, the resulting will-document can be expected to pass muster on the grounds of capacity whenever the relatively low threshold described in *Parker v. Felgate* can be met. This might, for example, extend to an effort by a will-maker to record a will using videotape or other voice or image recording. The person might make the recording on a Monday, and lose capacity on Tuesday. The recording might be discovered on Wednesday, and be turned into a formal will and signed on Thursday. Provided the will-maker retained the vestigial threads of capacity de-

³⁴⁸ *Re McPhee* stands as an example of a case demonstrating the defensive wisdom in proceeding forward with a grey area execution. Because the codicil was signed, the true heirs at law were sure to inherit. If the court knocked down the codicil, the heirs under the prior will were the true heirs and would inherit. If the codicil passed muster, and it did, then the heirs under the codicil were the true heirs and would inherit. Compare that to the situation if the codicil had not been signed. There would have been no document to test. The intended heirs under the unsigned codicil would have no document to invoke in demanding the inheritance that was their ultimate due. The only recourse would have been a possible claim against the lawyers under the law of negligence for failing to proceed with the execution. The warning written on the face of the codicil by the doctor is also interesting. It ensured the capacity issue would be brought into focus as a point for consideration by the two camps of potential heirs. For a full discussion relating to grey area executions see 12-8, "Grey Area Execution When Capacity in Doubt."

³⁴⁹ *Colbourne v. Morey*, 1995 CarswellNfld 251, 127 Nfld. & P.E.I.R. 34, 396 A.P.R. 34 (Nfld. T.D.) at para. 28.

³⁵⁰ *Scott v. Cousins*, 2001 CarswellOnt 50, 37 E.T.R. (2d) 113, [2001] O.J. No. 19 (Ont. S.C.J.) at para. 52.

³⁵¹ *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2011 CarswellOnt 10659, 71 E.T.R. (3d) 210 (Ont. S.C.J.) at para. 103 of the trial level decision, affirmed 2013 CarswellOnt 3927, 86 E.T.R. (3d) 6 (Ont. C.A.), additional reasons 2013 CarswellOnt 5533 (Ont. C.A.).

scribed in *Parker v. Felgate* on the date of execution, the will can be found to be valid in those circumstances.

It is interesting to compare the successful outcome that can be secured under *Parker v. Felgate* principles to the outcome that can be secured under remedial provisions in wills legislation available as a tool to bring non-compliant will instruments to probate. Different tools fit different situations. The legislative tool is used after the will-maker is dead, and involves the effort to sanction a document despite its technical noncompliance with the formal requirements imposed by the statute. It allows a will to be saved if it is improperly executed, or might allow a will-like document to go to probate. A written document is required. A typical example might involve a client signing a set of lawyer's notes after endorsing the notes with the banner "I want these notes to form my will if I die before a formal will can be prepared for my signature." Compare that to the tool suggested by *Parker v. Felgate*. That tool is derived from the common law, and is used while the will-maker is still alive to transform a non-will expression of intent into a technically compliant will that is duly executed. The expression of intent need not be embodied in a document. It can also be verbally related to an intermediary or can be recorded by videotape or other means. In the right case that provides an opportunity to use an expression of intent to perfect a will, during life, in circumstances where the document or other artifact expressing that intent may not, after death, support an application invoking the remedial powers of the court.³⁵²

The discussion of the principles from *Parker v. Felgate*, and the related cases in England and Canada that follow in the same line, deals with the idea that capacity can pre-date the actual execution of the will, fracturing due execution and capacity and allowing them to be present on different dates. This raises the question whether capacity might be absent on the date that instructions are given, and absent on the date of formal execution, but present later when the will-maker affirms the will and states the intention to be bound by it? The general law on point would suggest the answer to that to be no. That would be based on all of the necessary formal requirements for a valid will having to come together on or before the date of execution. There is no authority for the idea that a will-maker can verbally ratify a will during a lucid interval. At the same time, the Supreme Court of Canada was willing, at least once, to allow knowledge and approval to be proven as of a later date, long after the will was signed, based on a later process that would affirm the will without any formal document executed to achieve the result.³⁵³ If knowledge and approval can post-date execution, perhaps capacity can as well. That discussion appears elsewhere in this text and at least raises the suggestion, as a possibility, that the law of Canada might allow a will to be ratified, or confirmed, by some later process where the will-

³⁵² That point may be well taken from a planning perspective. If a person is living, and a non-complying will is found among his or her papers, it might be worthwhile to consider having it re-drafted and re-executed, adhering to all of the necessary formal requirements of the applicable wills legislation. After death two options are then concurrently open. The first would be to rely on the duly signed will and the law as expressed in *Parker v. Felgate*. The second would be to apply to court to have the earlier document sanctioned and accepted to probate under the remedial power in the legislation.

³⁵³ *Connell v. Connell*, 1906 CarswellOnt 745, 37 S.C.R. 404 (S.C.C.).

maker considered the will while he or she enjoyed capacity and chose to abide by it.³⁵⁴

(e) Actual Understanding versus Capacity to Understand

Capacity typically focuses on capability, not performance. Where a will-maker is capable of meeting the various heads of the *Banks v. Goodfellow* test then the will stands. It is not necessary to demonstrate that the will-maker actually passed the test by addressing his or her mind to each element of the test at the time of the will. It is sufficient that he or she would have been able to do so if called upon. That focus appears to be blurred in some measure when dealing with the principles expressed in *Parker v. Felgate*.

The first state of mind was expressed, initially, in terms suggesting capability, requiring that the will-maker “should be able to think thus far” and be “capable of understanding what was going on.” Hannen J. went on, however, to express the first state of mind in terms that suggest that actual performance be required, asking “Did she at that time know and recollect all she had done ...” and “Did the deceased when the will was executed remember and understand the instructions she had given ...” That blurs capability with performance. Hannen J. expressed the second state of mind without the same ambiguity, speaking largely if not entirely in terms of capability, asking “Could she, if it had been thought advisable to rouse her, have understood each clause if it had been put to her?” The third state of mind was again blurred, ambiguous as between capability and performance, mentioning both as requirements, asking “Was she capable of understanding [capability], and did she understand [performance], that she was engaged in executing the will for which she had given instructions ...”

The explanation for that ambiguous treatment might be twofold. First, the best measure of capability is performance. A will-maker who successfully demonstrates a particular ability clearly enjoys the competence to do it. Thus, it is natural to talk in terms of demonstrated capability, particularly in a case where evidence is available on point.

The second explanation for the ambiguous treatment might involve the concept of knowledge and approval. Cases where *Parker v. Felgate* comes into play on the issue of capacity are cases where the issue of knowledge and approval is concurrently at issue. The propounder is almost inevitably dealing with both issues. The more demanding of the two is typically the knowledge and approval issue.³⁵⁵ The will-maker has outright failed to read the will in many of the cases. Knowledge and approval, unlike capacity, is all about performance. It must be demonstrated that the will-maker actually knew and approved the content of the will. That might explain why the principles in *Parker v. Felgate* are typically framed in terms of actual

³⁵⁴ See the discussion at 4-12(d), “Possibility of Ratification by Will-Maker.”

³⁵⁵ This is dealt with later, during the larger discussion of knowledge and approval at 4-8, “No Requirement that Will be Read.”

performance. The two issues are conjoined, if not conflated, for the purpose of assessing the validity of the will.

What is the correct approach? The courts have not spoken expressly to this point. Working from first principles, however, the best approach is to view each state of mind expressed by Hannen J. as a capability, and find in favour of capacity, even absent evidence of performance on point, if the court concludes the will-maker could have formed and held the necessary thoughts in mind at execution if called upon to do so. Actual performance would still be relevant and important, but only in addressing the related issue of whether the will-maker happened to display the requisite knowledge and approval.

(f) Impact of Delay

What of delay between the date of instructions or other crystallized testamentary intent and the date the will is signed? The delay in *Parker v. Felgate* between giving instructions and signing the will amounted to between one and two months. Too much delay between those two dates might operate to exclude the *Parker v. Felgate* principle from play. The issue should boil down to the ability to establish a chain between the crystallized intent and the signed will. If a will-maker communicates instructions to a lawyer on Monday for a will leaving everything equally to her spouse, with a gift over to her children, and loses capacity on Tuesday before signing a will on Wednesday, the courts have proven consistently comfortable in accepting a delay of that magnitude and still apply *Parker v. Felgate* to save the will. Compare that to a situation where a will-maker gives instructions months or years earlier.

In *Perrins*, the will-maker had given instructions a full eighteen months prior to signing the will. The trial judge found that the will-maker no longer remembered giving the instructions to the lawyer. The second state of mind from *Parker v. Felgate* was found to be present. The trial judge found that the will-maker had given settled instructions for the will when the will-maker had testamentary capacity, that the will embodied those instructions, that the testamentary wishes of the will-maker had not changed in the mind of the will-maker while he retained capacity, and the will-maker would have been able to assent to each clause were the will read over to him. Further, the trial judge found that the will was in fact summarized and explained clause-by-clause to the will-maker at the time of execution. The will was therefore found to be valid. The reasoning of the trial judge in that regard was endorsed by The Chancellor at the English Court of Appeal.³⁵⁶ These remarks were all made during a discussion of knowledge and approval, and are also of note relating to delay. So long as the trial judge finds that the finalized testamentary intent remained unchanged during the balance of time the will-maker retained testamentary capacity, the intervening period between instructions can be long. Again, it was a full eighteen months in *Perrins*.

³⁵⁶ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 36.

The reasons for decision of the Chancellor in *Perrins v. Holland* include a review of the earlier case law that pre-dated *Parker v. Felgate*.³⁵⁷ Included in that review was reference to an 1809 decision of Sir John Nicholl that included the following statement:³⁵⁸

A person certainly may, in the last moments of his life, so recognize a testamentary paper written twenty years before, as to give it effect and validity, without any formal execution: the length of time during which it had continued unfinished would not of itself be sufficient to induce the rejection of such a paper, although it would create a circumstance of strong presumption against it.

That passage is not tendered here as a definitive statement on point. The use of the word presumption is always ambiguous as presumptions come in different types. The passage itself is not only old but pre-dates modern wills legislation. It deals with a slightly different task, putting an unsigned document to probate. At the same time the passage touches on a related point. More importantly, it is intuitively attractive. Imagine a situation where a will-maker gives instructions and then suffers a stroke a day later. The stroke strips the will-maker of the powers of mind demanded by *Banks v. Goodfellow* but leaves him or her clothed on a steady basis with the vestigial and lower capacity necessary under *Parker v. Felgate*. That state of affairs continues for twenty years that intervene prior to the signing of the will. Intuitively, the passage of time should make no difference. If, however, the will-maker were to spend those twenty years fully capacitated, the chain between the instructions and will-document might be seen to weaken. Circumstances can change significantly over twenty years. Ties to family and friends can weaken or grow. If the stroke takes place at the end of the twenty years, and the will were signed a day later, there is a temptation to ask whether the will still reflects the will-maker's final testamentary wishes. Intuitively, there is less appeal. The better view, however, is that the focus here is more appropriately placed on whether the will-document accurately reflected the will-maker's intent at the time of the instructions, rather than engaging in the speculative exercise of guessing what the final shape of the will-maker's testamentary intent might have been at the close of his or her capacity. That issue comes more tightly into focus when considering a related issue, being change of mind. It can at least be argued that the passage of time is generally irrelevant as the proper focus is not to ensure that the signed will reflects the will-maker's final wishes but, instead, reflects the will-maker's wishes as they crystallized at a particular point in time. The discussion on that point follows.

(g) Change of Mind

Is it a requirement of the principle from *Parker v. Felgate* that there be a finding that there was no change of mind? In other words, if the court were to conclude that

³⁵⁷ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at paras. 14 to 17.

³⁵⁸ At para. 16 of *Perrins*. The cited case is *Sandford v. Vaughan* (1809), 1 Phill Ecc 39.

the will-maker expressed instructions to a lawyer on Monday that included a legacy in favour of a favourite nephew, had a falling out on Tuesday with that nephew before the will could be prepared, then lost testamentary capacity on Thursday due to a stroke, is a will still valid under *Parker v. Felgate* if signed on Friday and still leaves the nephew as a legatee? In that event the will could be seen to accurately reflect the instructions given on the Monday but not to reflect the wishes of the will-maker on the Wednesday immediately before the loss of capacity. One would imagine that the will-maker, on the eve of the stroke, would, if presented with the will, have said, “No – I won’t sign it until you remove the legacy to my undeserving nephew.” What have the courts said on point?

In *Perrins*, the trial judge had concluded as a finding of fact that there had been no change of mind by the will-maker during the nineteen months between giving instructions and signing the will.³⁵⁹

Per Lord Justice Moore-Bick spoke as follows on the topic of change of mind (emphasis added):³⁶⁰

Miss Reed submitted, however, that even if *Parker v. Felgate* is good law, it is necessary for the testator to have given settled instructions in relation to his property at a time when he had testamentary capacity and that Robert had not done so in the present case, as evidenced by the fact that following his receipt of the draft will Anne told his solicitors that there were some matters that were not clear or satisfactory and by his failure to take any further steps in relation to the execution of the will for over a year. Her argument, which was based on the third of the three situations envisaged by Sir James Hannen in *Parker v. Felgate*, was that in the absence of settled instructions one cannot be satisfied that the will as executed reflected the deceased’s intentions.

In my view that overlooks the fact that in order to bring the case within the principles applied in *Parker v. Felgate* it is necessary to show that the will as executed conforms to the instructions given to the draftsman and that the deceased understood that to be the case. In order to be able to invoke the principle, therefore, it must be possible to establish the testator’s original intentions in a form sufficiently certain to be capable of being embodied in a draft and of being compared with the document which is said to carry them into effect. Provided the deceased was capable at the time of execution of understanding that he had given instructions and intended to implement them, changes of mind in the meantime do not matter.

Those comments very clearly suggest that a change of mind, if it occurs, is not germane to the application of the principles from *Parker v. Felgate*, allowing the estranged nephew in the example given earlier to inherit despite a clear change of mind to the contrary while the will-maker retained capacity, and despite the fact that the will-maker would have refused to sign the will on the eve of his incapacity. That is a curious result, and if indeed what was intended by Lord Justice Moore-Bick, seems at first blush to fly in the face of common sense. The remarks on point by Lord Justice Moore Bick are *obiter*, not *ratio*.

³⁵⁹ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at para. 35.

³⁶⁰ *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.) at paras. 69 and 70.

A more detailed hypothetical might illuminate the underlying principles and the dictates of common sense. Imagine the will-maker has no spouse or children but has a dozen nieces and nephews who would inherit on an intestacy. He moves in with one of the nephews, "A", and they live together for a decade. In the midst of that decade he gives instructions for a will leaving everything to nephew A. The unsigned will sits in a drawer in the will-maker's desk – he procrastinates. At the end of the decade he moves out from nephew A, and moves in with nephew "B." The will-maker and nephew B live together for another decade. At the end of that second decade the will-maker becomes ill and loses capacity, but the draft will in favour of nephew A is found, taken out of the drawer, and successfully signed under *Parker v. Felgate* principles. Nephew A demands the residue under the will, stating that the will-maker had capacity when the instructions were given, the will accurately embodied the instructions, and the will-maker was able to satisfy the *Parker v. Felgate* test at execution. The eleven other nieces and nephews resist. They argue that while the will represented the will-maker's crystallized intent at a point in time more than a decade prior, there is no reason to believe the will embodied his final wishes. He was no longer close to nephew A. He lived with B. They allege a falling out with A. They argue that if the will-maker had been asked, just prior to the close of his capacity, he might, if anything, have suggested B as his proper heir. The issue illustrated in that hypothetical boils down to a simple one. Is *Parker v. Felgate* a tool to give effect to a person's final expression of testamentary intent or just to some expression of testamentary intent at a time when it happened to have been crystallized with the hope of reducing it to the form of a will? If the latter, then changes of mind indeed are irrelevant. Nephew A would argue that the will in his favour, even though based on stale instructions, is better than an intestacy. At least the will successfully embodied the will-maker's wishes at some point. The delay? Stale wills are put to probate all of the time. The mere intent to change a signed will is irrelevant. Will-makers procrastinate. *Parker v. Felgate*, it would be argued, is a tool to perfect execution, not a tool to perfect final wishes.

All of that is well and good, and carries some force. If, however, the will-maker had signed the will when it had been produced, he might have taken steps to revoke it after falling out with nephew A. No one thinks to revoke an unsigned will.

Changes of mind remain a sticking point in conceptualizing the principles expressed in *Parker v. Felgate*. It remains for a court to introduce clarity and settle the law on point by deciding a case that turns on the point. Until then, proceeding by first principles, and bearing in mind the *obiter* comments of Lord Justice Moore-Bick on point, the better view appears to be that changes of mind do not matter. That conclusion, if correct, has impact on an issue discussed earlier – the passage of time. The passage of time operates to undermine a *Parker v. Felgate* argument if the will-maker's final intent is a core consideration, but not if the core consideration is determining whether the will-document simply embodies the will-maker's intent at some stage in the past.

The position expressed above needs to be refined in some measure. A change of mind by the will-maker that had been communicated to the lawyer prior to execution would amount to a change in instructions. Clearly a will could not be validly signed unless it embodied the change. An abortive effort, or a failed or stalled

effort to communicate the change might have the same effect. If, for example, the will-maker had announced the intention of contacting the lawyer to delete a bequest but was stopped in his or her tracks by a stroke, it might demand the same result.

The will has to accurately embody the instructions given to the lawyer or otherwise give voice to each artifact that exists at the time of execution that embodies the collective testamentary intent. Where two artifacts exist, one altering the other and both generated while the will-maker had capacity, both artifacts should be accurately built into the form of will that is signed. If one is, and one is not, then the will should not be given full effect under the *Parker v. Felgate* principles on the grounds that it did not accurately embody the will-maker's crystallized testamentary intent. This view still stops short of speculation as to what might have been the will-maker's last wishes if asked at the close of capacity. The issue is not to guess the final intent, but to look for and collect all of the documents or other artifacts that record the will-maker's testamentary wishes prior to the date the will was signed. That might extend to memos, letters, emails, voice-mail messages and video recordings.³⁶¹ The trial judge in *Perrins v. Holland* made a finding that the will embodied the instructions given and, to the point here, that the will-maker's intent had not changed. That finding was treated as pivotal by the trial judge.³⁶² The Court of Appeal was not critical on that point. Change of mind cannot be wholly pushed away as irrelevant. The courts still need to put bounds around its relevance and define its scope. On the view as expressed and refined here, a bitter argument and estrangement with nephew A would be irrelevant, but not a note, found unsent among the will-maker's papers, to contact the lawyer with instructions to remove nephew A from the draft will and substitute nephew B.

13 Relevant and Irrelevant Considerations

The courts have enumerated the body of considerations deemed relevant and irrelevant to a finding of capacity.

(a) *Ability to Carry On Normal Conversation*

The ability to maintain a normal conversation on a social level is not a reliable indicator of capacity. Often quoted is the following passage from the Supreme Court of Canada in *Leger v. Poirier*:³⁶³

³⁶¹ Prior to the *Wills Act* in England the Prerogative Court was clogged with applications to interpret writings as testamentary even though they were unsigned or in abnormal forms. *Sandford v. Vaughan* (1809), 1 Phill Ecc 39 is a good example, involving the effort to stitch together five different documents into one testamentary whole. Part of the intent behind the *Wills Act* was to get away from that and ensure simplicity and clarity. A document either conformed to the requirements of the new legislation or it did not. *Parker v. Felgate* principles may provide an opportunity to relapse into that antique style of analysis for precursor documents leading up to a duly signed will.

³⁶² The reasoning of the trial judge on this point was summarized at the Court of Appeal level at paras. 10 and 35 of *Perrins v. Holland*, [2010] EWCA Civ 840, 2010 WL 2801781 (Eng. C.A.).

³⁶³ *Leger v. Poirier*, 1944 CarswellNB 11, [1944] S.C.R. 152, [1944] 3 D.L.R. 1 (S.C.C.) at para. 17.