

**A Review of Testamentary Capacity in Canada
with Reference to Recent Cases**

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1. Introduction

When you give a review of the current state of the law on testamentary capacity, as I have been asked to do, you must perforce begin with a consideration of the leading case on this law, *Banks v. Goodfellow*.² However you also need to consider related issues, such as knowledge and approval, the onus and standard of proof, suspicious circumstances, and the time when testamentary capacity must be established. I shall address all of them in this paper. I shall not be discussing undue influence, which is a separate topic, but since this issue is often raised together with the issue of testamentary capacity in the cases, I cannot avoid making some comments about undue influence.

The Schedule contains summaries and discussions of recent cases. Most of those cases are also referred to in the body of this paper.

2. The *Banks v. Goodfellow* Criteria

Although *Banks v. Goodfellow* is now almost 150 years old, it has stood the test of time and continues to be cited as *the* authority on testamentary capacity in England, Canada, and the rest of the common law world. The judgment of the court (consisting of a panel of four judges) was written by Sir Alexander Cockburn C.J. The *locus classicus* of the measurement of testamentary capacity is the following passage from the judgment:³

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

For the sake of convenience, courts sometimes divide the criteria into four numbered paragraphs. This is helpful, because it allows a court more readily to

² (1870), L.R. 5 Q.B. 529 (*Banks*).

³ *Ibid.*, p. 565.

consider each criterion *seriatim* and to assess whether the testator has satisfied it. In fact, in a particular case the court may quote only those of the criteria that are relevant to the facts of the case. John Poyser provides the following convenient list in his book, using the actual language of *Banks v. Goodfellow*:⁴

It is essential to the exercise of [the testamentary power] that a testator:

- (1) shall understand the nature of the act and its effects;
- (2) shall understand the extent of the property of which he is disposing;
- (3) shall be able to comprehend and appreciate the claims to which he has to give effect; and
- (4) with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

I believe that the reason the *Banks v. Goodfellow* statement of testamentary capacity has stood the test of time is that it is a flexible tool. It can be applied or adapted to different situations as necessary and the case law has in fact done exactly that over the years.

This does not mean that the statement has not been criticized. For example, it is often pointed out that the limb dealing with knowledge of the extent of the testator's property is rather imprecise. Will the required knowledge be the same for a simple estate as for a complex one? Or is a deeper knowledge required for the latter? As we shall see, the courts are quite able to apply this limb to different situations.

Another complaint is that the test seems to focus principally on mental disorders, such as delusions, and does not address the kinds of mental issues that are commonly found today in older people, namely senile dementia of various kinds.

⁴ John E.S. Poyser, *Capacity and Undue Influence*, 2nd ed. (Toronto: Thomson Reuters/Carswell, 2019), p. 42 (slightly modified) (Poyser). This excellent text should be on the desk of all who practice in estates. I have made grateful use of this text in preparing this paper and acknowledge my indebtedness to it.

But in fact, the Chief Justice does advert to such issues, although they were not relevant on the facts of the case itself. His Lordship went on to state:⁵

It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause – namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.

Thus, there are two kinds of lack of capacity, namely a general lack of capacity and a lack of capacity caused by delusions. It is important, however, to remember that the law does not demand a perfect mind and memory. The courts are loath to deprive a testator of the right to make a will, so they object to an overly strict test, since it will likely mean that many people, especially when they are older will be unable to dispose of their assets as they see fit.⁶

On this point the British Columbia Supreme Court stated the following in *Woodward v. Roberts Estate (Trustee of)*:⁷

Such things as imperfect memory, inability to recollect names and even extreme imbecility, do not necessarily deprive a person of testamentary capacity. The real question is whether the testator’s mind and memory were sufficiently sound to enable him or her to appreciate the nature of the property, the manner of distributing it and the objects of his or her bounty.

Similarly, in *Christensen v. Bootsman*⁸ the court quoted from *Re Weidenberger Estate*⁹ to the effect that the *Banks* test “should not be applied so strictly as to defeat the deceased’s wishes”.

⁵ *Banks*, p. 566.

⁶ See, e.g. *Scramstad v. Stannard*, 1996 CarswellAlta 604 (Q.B.), para. 132. And see *Mah v. Zukas* 2016 ABQB 587, para. 66, quoting from *Laramée v. Ferron* (1909), 41 S.C.R. 391 at 409.

⁷ 2007 BCSC 1192, para. 125.

⁸ 2014 ABQB 94, para. 144.

The *Banks*' criteria are often referred to as the "test" of testamentary capacity. I think it wise to avoid that term. Capacity is measured by criteria that are decision-time- and situation/context-specific.¹⁰ In other words, the criteria must be applied with regard to different circumstances and therefore there is no single "test".

3. A Consideration of Each of the Criteria

It may be helpful at this point briefly to consider each of the criteria in turn.¹¹

The nature of the act and its effects

This criterion does not demand that a testator know in general what is involved in making a will, but whether she understands what making *this* will is all about. This is clear from the use of the definite article. It is *this* act that is relevant, not will-making in general. This follows also from the immediately preceding statement that making a will is decision- or issue-specific.¹²

The extent of the property

This criterion has attracted more judicial comment. The question is how much does the testator need to know about his assets to be able to make a will? The cases have made it clear that he does not need to know the exact value of his estate, so long as he has a general idea of the types of property he owns.¹³ Justice Penny made the following statement on this point in *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*:¹⁴

106. Generally, the more complicated or complex the situation, the higher the level of cognitive function that will be required to meet the test for testamentary capacity. However, where a testatrix understands the general structure of her estate and understands the nature of the changes she is making

⁹ 2002 ABQB 861, para. 33.

¹⁰ On this point see, e.g., *Mah v. Zukas Estate*, footnote 6, *supra*, para. 57.

¹¹ For a fulsome discussion of them see Poyser, footnote 4, *supra*, pp. 48-76.

¹² See *Hoff v. Atherton*, [2004] EWCA Civ 1554, para. 35.

¹³ See, e.g., *Re Culbert Estate*, 2006 SKQB 452, para. 129.

¹⁴ 2011 ONSC 3043, para. 106, affirmed 2013 ONCA 225, at which see para. 60, to the same effect.

to the distribution of that estate, the Court will conclude that the necessary capacity exists irrespective of the complexity of the situation.¹⁵

107. It is unnecessary for a competent testator to know the precise makeup of her entire estate to the last detail. Testators are not required to be accountants or to have an accountant's knowledge and understanding of their estate. Nor is it necessary for the testator to understand the provisions of a will the way a lawyer would.

Similarly, in *Quaggiotto v. Quaggiotto*¹⁶ the Ontario Court of Appeal noted: “the law does not require that a testator have an encyclopedic knowledge of her assets”.

The claims to which the testator ought to give effect

This criterion is also often raised by disappointed heirs and others who had expected to be remembered by the testator. What this criterion means is that the testator must appreciate who has a natural claim to his bounty. And then he must be able with a rational mind to decide to include or exclude members of that group from his will. The testator is not obliged to leave property to anyone and may even act capriciously, frivolously, or spitefully in excluding those closest to him, so long as he is able to know who has a natural claim to his bounty.¹⁷ On the other hand, if he suffers from a mental disorder that caused him to disinherit close relatives, the court will strike down the will.¹⁸

The effect of delusions

Delusions are not a separate criterion. The last of the four paragraphs into which the *Banks* statement is often divided is actually an amplification of the third paragraph. It speaks of “disorders of the mind [that] poison [the testator’s] affections, pervert his sense of right, or prevent the exercise of his natural faculties.” And then it continues with a further elaboration, namely, insane delusions. It follows that disorders of the mind as described in *Banks*’ fourth

¹⁵ Citing *Re Kaptyn Estate* 2008 CarswellOnt 6071 (S.C.J.), para. 122.

¹⁶ 2019 ONCA 107, para. 7, affirming 2018 ONSC 345.

¹⁷ See *Boughton and Marston v. Knight* (1872-75), L.R. 3 P. & D. 64 (Q.B.) at 66, *per* Sir James Hannon.

¹⁸ See *Sharp v. Adam*, [2006], EWCA Civ 449.

paragraph are to be distinguished from insane delusions and are a separate ground on which a will can be attacked.¹⁹

Banks defines an insane delusion as one that causes the testator to dispose of his property in a way that would not have been made if the mind had been sound. In *Boughton and Marston v. Knight*²⁰ Sir James Hannen gave the following succinct definition of an insane delusion, which derived from *Dew v. Clark and Clark*:²¹ “the belief of facts that no rational person would have believed”. In *Skinner v. Farquaharson* the court referred to this definition with approval.²²

Banks itself was a case in which the testator suffered from a delusion. He had a violent aversion to a man named Featherstone Alexander. Alexander had died a number of years earlier, but the testator believed that he still pursued and molested him. He also believed that he was being persecuted and molested by devils and evil spirits and thought them to be physically present. His doctor and minister testified to his general insanity, but he managed his money and affairs competently and lay witnesses testified that he had capacity when he made his will. The will replaced an earlier one that left his estate to his sister. The new will left all to his niece, Margaret Goodfellow. The court held that in the circumstances the testator had capacity and that the will was valid. Although he suffered from delusions, they did not have any influence on the provisions in the will and were incapable of having such influence. Moreover, the will was rational, as it left the property to his niece, who lived with him and was the object of his affections.

The principle that an insane delusion will not invalidate a will unless it is capable of influencing the provisions in the will *and* has in fact influenced them, has been followed in other cases and is generally accepted.²³ Thus, it is surprising that in *Lazlo v. Lawton*²⁴ the British Columbia Supreme Court regarded that approach as a

¹⁹ Ibid.

²⁰ Footnote 17, *supra*.

²¹ (1826), 3 Add. 79, 162 E.R.410.

²² 1902 CarswellNS 54 at para. 24, 32 S.C.R. 58.

²³ See *Skinner v. Farquaharson*, *ibid.*; *O'Neill v. Royal Trust Co.*, [1946] S.C.R. 622, [1946] 4 D.L.R. 545; *Whitford v. Baird*, 2015 NSCA 98.

²⁴ 2013 BCSC 305 at paras. 225-226, 229.

“narrow view” of delusions. It held that “delusions may be symptomatic of an impairing degenerative disease of the mind, such as Alzheimer’s disease, and their presence may speak to the depth of the mental impairment experienced by a testator in consequence of that affliction”. The court went on to hold that in any event there were a sufficient number of suspicious circumstances that required the defendants to reassume their burden to prove capacity and that they failed to do so.

In contrast, in *Whitford v. Baird*²⁵ the court followed the traditional view and found that the alleged delusions did not have any meaningful impact on the will, as the testator did not disinherit the daughters who raised the allegations. In *Stekar v. Wilcox*²⁶ the testator suffered from delusions and there was no medical evidence that the delusions did not affect his mental health. The court held that for this and other reasons the propounder had failed to show that the testator had capacity and therefore it did not admit the will to probate.

There are quite a number of cases in which a will has been struck down for delusions that resulted in a partial or total disinheritance of the testator’s family.²⁷ In my Wills text, I describe two other interesting cases of delusions which, however, did not involve wills.²⁸ The first was the case of a woman who identified herself as the daughter of George IV and his morganatic wife, and her tombstone in

²⁵ 2015 NSCA 98, affirming 2014 NSSC 266.

²⁶ 2017 ONCA 1010, affirming 2016 ONSC 5835.

²⁷ For example: *Smee v. Smee* (1879), 5 P.D. 84 (C.A.), belief that testator was the illegitimate son of George IV; *Re Wilcinsky*; *Schulze v. Ruzas* (1977), 6 A.R. 585 (Surr. Ct.), a belief that a relative was stealing the testator’s property; *Re Barker*; *Corbett v. Wall*, [1939] 2 D.L.R. 201 (N.B.C.A.), a delusion that the testator’s daughter had wired his chair and given him electric shock; *Fuller Estate v. Fuller*, 2004 BCCA 218, delusions that children opposed their father’s connection to a church; *Ouderkirk v. Ouderkirk*, [1936] S.C.R. 619, a delusion about the immoral character of the testator’s wife at age 70 and his groundless suspicion that she was entertaining men for immoral purposes; and *Re Fawson Estate*, 2012 NSSC 55, affirmed 2013 NSCA 54, a delusion that two of the testator’s brothers had alienated the testator from her mother.

²⁸ *Oosterhoff on Wills*, 8th ed. by Albert H. Oosterhoff, C. David Freedman, Mitchell McInnes, and Adam Parachin (Toronto: Thomson Reuters/Carswell, 2016), pp., 209 and 211-12.

London Ontario refers to her as “Lavinia Hermione Gertrude Amanda Guelph, Daughter of George 4th”. Her claim was never proved or disproved, but is unlikely to have been true. The other is a story about Dr. William Chester Minor, as Assistant Surgeon (Ret’d), U.S. Army, who had been retired because of developing insanity. He moved to England to recuperate, but killed someone there. He was found not guilty by reason of insanity and was incarcerated in Broadmoor Criminal Lunatic Asylum “until Her Majesty’s Pleasure be known”. Although he suffered from various delusions, he was a highly intelligent man and while in the Asylum became an enthusiastic and prolific contributor to the development of the Oxford English Dictionary. He and Dr. James Murray, the general editor of the dictionary became friends and Minor’s work was acknowledged in the Appendix to volume 1 of the dictionary.

4. Different Statements of the Criteria

Courts do not always specifically follow *Banks v. Goodfellow*, or even quote from it. Instead they adopt their own criteria. Thus, for example, some cases state that for a will to be valid, the testator must have a “sound disposing mind”.²⁹ However, they then define such a mind in terms remarkably similar to the *Banks v. Goodfellow* criteria.³⁰ A statement of this kind often quoted in the cases is that of Rand J. in *Leger v. Poirier*:³¹

A “disposing mind and memory” is one able to comprehend, of its own initiative and volition, the essentials of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like...

References to a disposing mind and memory appear also in other cases.³² However, as is apparent from the above quotation from Rand J., the term “disposing mind

²⁹ *Harwood v. Baker* (1840), 3 Moo. P.C. 282 at 291, 13 E.R. 117, *per* Lord Erskine.

³⁰ *Ibid.*, *loc. cit.*

³¹ [1944] S.C.R. 152, 1944 CarswellNB 11, para. 17.

³² See, *e.g.*, *Hayward v. Thompson* (1960), 25 D.L.R. (2d) 545 (S.C.C.), p. 557.

and memory” is really no more than a succinct restatement of the *Banks v. Goodfellow* criteria.³³

In *Schwartz v. Schwartz*³⁴ Laskin J.A. in dissent, quoted a portion of the *Banks v. Goodfellow* criteria and rephrased them as follows:

The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.

Some Canadian cases quote this set of criteria, rather than the traditional one. However, it will be apparent that this set still maintains the substance of the *Banks v. Goodfellow* criteria.

5. The Onus and Standard of Proof

Another leading case that is also often quoted in the Canadian cases, particularly when the facts raise suspicious circumstances, is *Vout v. Hay*,³⁵ which builds on the classic statement of the concept of suspicious circumstances of Baron Parke in *Barry v. Butlin*.³⁶

...if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is

³³ Cf. comments by Laskin J.A., in dissent, in *Schwartz v. Schwartz*, 1970 CarswellOnt 243, [1970] 2 O.R. 61 (C.A.), paras. 43, 44 (*Schwartz*). The decision was affirmed 1971 CarswellOnt 163F, [1972] S.C.R. 150.

³⁴ *Ibid.*, para. 44 of the C.A. decision, quoting from *Atkinson on Wills* (1953), 2nd ed., p. 232 and 39 *Halsbury*, 3rd ed., pp. 855-56.

³⁵ 1995 CarswellOnt 186, 1995 CarswellOnt 528, [1995] 2 S.C.R. 876, 7 E.T.R. (2d) 209 (*Vout*).

³⁶ (1838), 2 Moo. P.C. 480 at 482-83.

removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

Despite the wording of that statement, it should be noted that the principle of *Barry v. Butlin* extends not just to cases in which a beneficiary prepares a will, but to all cases in which:

... a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator.³⁷

The great benefit of *Vout v. Hay* is that it clarifies the concept of suspicious circumstances and the onus the propounder of a will bears, as well as the standard of proof he is subject to. It also reaffirms the burden of proof that lies on the person who attacks a will for undue influence. The principles of the case are perhaps best summarized by Justice Maurice Cullity in *Scott v. Cousins*:³⁸

1. The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.
2. A person opposing probate has the legal burden of proving undue influence.
3. The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.
4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.

Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand

³⁷ *Tyrell v. Paynton*, [1894] P. 151 at 159-60 (C.A.), per Davey J.A. And see *Riach v. Ferris*, [1934] S.C.R. 725 at 727; *Re Martin*; *MacGregor v. Ryan*, [1965] S.C.R. 757; *Schwartz v. Schwartz*, 1970 CarswellOnt 243, [1970] 2 O.R. 61 (C.A.), affirmed 1971 CarswellOnt 163F, [1972 S.C.R. 150; *Eady v. Waring* (1974), 43 D.L.R. (3d) 667 (Ont. C.A.); *Clark v. Nash* (1989), 61 D.L.R. (4th) 409, 34 E.T.R. 174 (B.C.C.A.).

³⁸ 2001 CarswellOnt 50, 37 E.T.R. (2d) 113 (Ont. S.C.J.), para. 49 (*Scott v. Cousins*). The references in parentheses are to the pages in the E.T.R report of *Vout*.

it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity. (at page 227)

5. This presumption "simply casts an evidential burden on those attacking the will." (*ibid.*)

6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances – namely, "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder." (*ibid.*)

7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.

8. A well-grounded suspicion of undue influence will not, *per se*, discharge the burden of proving undue influence on those challenging the will:³⁹

It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect and fraud and undue influence remains with those attacking the will. (*ibid.*)

This summary is often quoted in the Canadian cases, as is the similar summary of *Vout* by Baynton J. in *Dieno Estate v. Dieno Estate*.⁴⁰

In passing, it is important to note that while equity raises a presumption of undue influence in the context of *inter vivos* gifts against a person who occupies a position of influence over the donor, probate courts never raised such a presumption in the context of a testamentary gift.⁴¹ This difference was confirmed

³⁹ Although I am not considering undue influence in this paper, it is important to recognize that *Vout* did not change the well-recognized burden on the person attacking a will for undue influence to prove such influence.

⁴⁰ 1996 CarswellSask 500, 13 E.T.R. (2d) 211 (Sask. Q.B.), para. 35 (*Dieno*).

⁴¹ See Albert H. Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" (2017), 46 Adv. Q. 316, at p. 339.

by the Ontario Court of Appeal in *Seguin v. Pearson*.⁴² The courts usually recognize the difference and apply the law correctly.⁴³ However, in *Shannon v. Hrabovsky*⁴⁴ the court, in *dictum*, assumed incorrectly that the presumption applied in a wills context.

It should also be noted, however, that in British Columbia the probate principle that the attacker of a will always has the burden of proving undue influence has been replaced with the principle that once it is shown that a person is in a position where the potential for dependence or domination of the testator exists, the attacker is aided by the presumption of undue influence.⁴⁵

With reference to *Royal Trust Corp. of Canada v. Saunders*,⁴⁶ the Trial Judge in *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*⁴⁷ provided the following helpful “extension” to *Vout v. Hay*, stating that in considering whether there are suspicious circumstances the court may consider:

1) the extent of physical and mental impairment of the testator around the time the will is signed; 2) whether the will in question constitutes a significant change from the former will; 3) whether the will in question generally seems to make testamentary sense; 4) the factual circumstances surrounding the execution of the will; and 5) whether a beneficiary was instrumental in the preparation of the will.

As is clear from *Vout*, the law raises a presumption of testamentary capacity. That is as expected and indeed the law raises a presumption of capacity in other contexts too, such as the capacity to grant a power of attorney.⁴⁸ The presumption

⁴² 2018 ONCA 355.

⁴³ See, e.g., *Olson v. Skarsgard Estate*, 2018 SKCA 64, paras. 33-34; *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, footnote 14, *supra*, at 2011 ONSC 3093, para. 109.

⁴⁴ 2018 ONSC 6593, paras. 53, 112ff. And see *Halliday v. Halliday Estate*, 2019 BCSC 554, in which the court applied this statutory principle.

⁴⁵ See *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 52.

⁴⁶ 2006 CarswellOnt 3478 (S.C.J), para. 58.

⁴⁷ Footnote 14, *supra*, 2011 ONSC 3043, para. 110.

⁴⁸ See, e.g., *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 2.

undergirds applications for common form probate when no one contests the validity of a will.⁴⁹ But it also aids the propounder who is required to prove a will in solemn form. Thus, according to *Vout*, if the will has been executed in accordance with the prescribed formalities, after it was read over to the testator who appeared to understand it, the presumption that the testator had capacity and knew and approved the contents is raised. However, as Poyser points out,⁵⁰ this was *dictum* and other cases suggest that the presumption is triggered simply if the will has been properly executed. Other cases suggest that, perhaps, the will should also appear to be rational on its face.

The presumption is spent if those who oppose the will satisfy the evidentiary burden on them to introduce evidence of suspicious circumstances or other evidence suggesting lack of capacity and knowledge and approval, that, if accepted, would tend to negative capacity and knowledge and approval. In that case the propounder reassumes the legal burden to prove them. What this means is that the burden to prove these two facts (as well as due execution) always remains with the propounder. If the propounder does not prove the two facts, probate will be refused,⁵¹ but if she is able to prove them, probate will be granted. Of course, if the court does not accept the evidence brought by the opponents probate will also be granted.⁵² Indeed, in *Karpinski v. Zookewich Estate*⁵³ the court stated that proof of capacity coupled with due execution is enough to discharge the onus on the propounder, since knowledge and approval will then be presumed. Similarly, in *Perrins v. Holland*⁵⁴ Moore-Bick L.J. stated that if there are no grounds calling knowledge and approval into question, it will be presumed on proof of testamentary capacity and execution. On the other hand, if the propounder fails to

⁴⁹ Poyser, footnote 4, *supra*, pp. 10-11.

⁵⁰ Poyser, *ibid.* pp. 21ff.

⁵¹ See, e.g., *Laszlo v. Lawton*, footnote 24, *supra*, paras. 239, 261.

⁵² See, e.g., *Christensen v. Bootsman*, footnote 8, *supra*.

⁵³ 2018 SKCA 56 para. 37, affirming 2017 SKQB 278.

⁵⁴ [2010] EWCA Civ 840, para 41.

prove capacity, it follows that the testator is also unable to know and approve the contents of her will.⁵⁵

Although *Vout* was concerned particularly with suspicious circumstances, evidence of such circumstances is not the only kind of evidence that, if accepted, will require the propounder to reassume the legal burden. Other evidence suggesting lack of capacity or knowledge and approval will also have that effect.⁵⁶

It is perhaps important to underline that, as *Vout* and other cases make clear, for a will to be valid the propounder must prove not only due execution and testamentary capacity, but also knowledge and approval. In other words, the latter is a distinct category of fact.

It is also interesting that the issue of capacity has also been raised in the context of the applicability of the substantial compliance provision contained in a number of wills statutes. In *Marsden v. Talbot*⁵⁷ the court rightly held that the provision can be applied if the testator has capacity. However, in *Cutts v. Phillips*⁵⁸ the testator lacked capacity and thus the provision could not be applied.

6. As of What Point Must Testamentary Capacity Be Established?

A testator may make his own will, such as a holograph will, in which case capacity must be established as of that point in time. In those circumstances the will is typically executed at the same time.

But when the testator engages a solicitor to prepare a will for her, there will usually be a time gap between the date when she gives instructions to the solicitor and when the solicitor returns to review the will with her and to attend to its execution. In those circumstances the solicitor must satisfy herself that the testator had

⁵⁵ *Laszlo v. Lawton*, footnote 24, *supra*, para. 240.

⁵⁶ See, e.g., *Scott v. Cousins*, footnote 38, *supra*, para. 121, where Cullity J. said “The reference to an evidential burden ... refers to a burden of adducing sufficient evidence to ‘raise an issue’ of knowledge and approval or testamentary capacity”.

⁵⁷ 2018 NBCA 82, affirming *Re Estate of Jean Agnes Marsden*, 2017 NBQB 199.

⁵⁸ 2016 SKQB 126.

capacity at the time she gave instructions and that she still has capacity when the will is executed.⁵⁹

The time of giving instructions is the important time and receives most of the attention in the cases. The emphasis is particularly on the obligation of the solicitor to satisfy herself that the testator has capacity and knows and approves of the contents of the will. Indeed, in a number of recent cases the court was critical of, or commented on what the lawyers did or omitted to do.⁶⁰ This is a matter of concern, for failure to observe these obligations may lead to a negligence claim against the lawyer. I shall explore the obligations of solicitors when taking instructions and attending to the execution of a will in the next section.

The other important time is the time when the will is executed, assuming there is time lapse between that date and the date the testator gave instructions for the will. It may be that the testator had testamentary capacity when she gave instructions for the will, but she was already ailing then and her health deteriorated between that date and the date the lawyer returned to attend to the execution of the will. The law requires that she still have capacity at that point. However, the law does not require as strict proof of capacity as at the time she gave the instructions. The leading case

⁵⁹ See *Stevens v. Crawford*, 2001 ABCA 195, para. 17, leave to appeal refused [2001] S.C.C.A. No. 483 (S.C.C.).

⁶⁰ See, e.g., *Laszlo v. Lawton*, footnote 24, *supra*, para. 254 (notary took a superficial inventory of the testator's assets); *Re Singh Estate*, 2019 BCSC 272, paras. 99-100 (lawyer failed to take notes about his assessment of the testator's capacity); *Devore-Thompson v. Poulain*, 2017 BCSC 1289, para. 279 (lawyer could not recall anything about the execution of the will apart from his notes, which were sparse); *Halliday v. Halliday Estate*, footnote 44, *supra*, paras. 135, 136, 138-39 (lawyer did not perform his duties as he ought); *Walman v. Walman Estate*, 2015 ONSC 185, para. 56 (lawyer should have conducted a "more probing" inquiry into the issue of the testator's estrangement from his sons); *Cutts v. Phillips*, footnote 58, *supra*, para. 18 (lawyer's evidence was problematic because of a medical condition that impacted his short-term memory); and *Graham v. Graham*, 2019 ONSC 3632 (lawyer's evidence unreliable because he accepted the testator's statements at face value about why she benefited only one child and did not press her on the reason she was disinheriting her other children).

on this point is *Parker v. Felgate*,⁶¹ which the English Court of Appeal affirmed in *Perrins v. Holland*.⁶² *Parker v. Felgate* has been consistently followed or cited with approval in Canadian cases.⁶³ The testator in *Parker* had capacity when she gave her instructions to her solicitor, but later was often in a coma, as she was when the solicitor returned. Having been roused from the coma, she was asked: “This is your will. Do you wish this lady ... to sign it?” and she replied, “Yes”.

In the course of summing up for the jury, Sir James Hannen, P., said:⁶⁴

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”.

The jury found that the testator was capable of understanding and did understand that she was executing a will for which she had given instructions to her solicitor, so the will was admitted to probate.

7. Solicitors’ Duties in Determining Whether the Testator Has Capacity

As noted above, solicitors have a very important role in making an assessment about the testator’s capacity. They should be alert to red flags that are raised in different fact situations and ask probing questions to ensure that the testator does indeed have capacity, knows and approves of the contents of the will, and is not

⁶¹ (1883), L.R. 8 P.D. 171.

⁶² [2010] EWCA Civ 840.

⁶³ See, e.g., *Re Bradshaw Estate* (1988), 30 E.T.R. 276 (N.B. Prob. Ct.); *Scott v. Cousins*, footnote 38, *supra*, para. 52; *Laszlo v. Lawton*, footnote 24, *supra*, para. 189; *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, footnote 14, *supra*, at 2011 ONSC 3043, para. 103.

⁶⁴ *Parker v. Felgate*, footnote 61, *supra*, p. 173.

being subjected to undue influence.⁶⁵ Most bar associations and liability insurers provide detailed check lists for this purpose to guide solicitors.

Two particularly helpful comments on a lawyer's obligations are the following statements by Chancellor Boyd in *Murphy v, Lamphier*:⁶⁶

A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease, and particularly in the case of one labouring under both disabilities, the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property. The solicitor is brought in for the very purpose of ascertaining the mind and will of the testator touching his worldly substance and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty. The Court reprobates the conduct of a solicitor who needlessly draws a will without getting personal instructions from the testator, and, for one reason, that the business of the solicitor is to see that the will represents the intelligent act of a free and competent person.⁶⁷

And:

[I]n drawing the will of one of considerably impaired or of doubtful capacity, the solicitor should regard himself as the professional *alter ipse* of his

⁶⁵ See Kimberly A. Whaley and Kate Stephens, "A Lawyer's Duties and Obligations Where Capacity, Undue Influence, and Vulnerability Are in Issue in a Retainer" (2018), 48 Adv. Q. 385. This article is based on a paper with the same title presented at STEP Canada 2018 National Conference, Toronto, May 28-29, 2018. The Appendices to this paper contain checklists for capacity and undue influence and a survey of professional conduct across Canada. See also Ed Esposto, "Ambiguous Testamentary Capacity and the Lawyer's Duty", another paper presented at STEP Canada 2018 National Conference, Toronto, May 28-29, 2018, as supplementary to the Whaley and Stephens paper.

⁶⁶ (1914) 31 O.L.R. 287 (H.C.), affirmed (1914), 20 D.L.R. 906 (Ont. C.A.).

⁶⁷ *Ibid.*, 31 O.L.R. 287 at 318-319.

client, and seek to touch his mind and meaning and memory, to learn of the property to be dealt with and of the usual objects of his regard, as far as may be, by such questioning as shall elicit particulars, and thus to satisfy himself that he has done or tried to do all in his power to find out the real situation. Nor is it a counsel of perfection to suggest that a memorandum of results, apart from the formally expressed will, should be jotted down and preserved. The solicitor may in some perfunctory way go far enough to satisfy himself as to capacity, but it is to be remembered that his duty is to go far enough to satisfy the Court that the steps he took were sufficient to warrant his satisfaction.⁶⁸

These statements are still often quoted in the cases⁶⁹ and lawyers do well to heed them. The following summary of the solicitor's duty by Kroft J. in *Friesen v. Friesen*⁷⁰ is also apt:

5. Neither the superficial appearance of lucidity nor the ability to answer simple questions in an apparently rational way are sufficient evidence of capacity.

6. The duty upon a solicitor taking instructions for a will is always a heavy one. When the client is weak and ill, and particularly when the solicitor knows that he is revoking an existing will, the responsibility will be particularly onerous.

7. A solicitor cannot discharge his duty by asking perfunctory questions, getting apparently rational answers, and then simply recording in legal form the words expressed by the client. He must first satisfy himself by a personal inquiry that true testamentary capacity exists, that the instructions are freely given, and that the effect of the will is understood.

Related to this issue is whether a solicitor can refuse to prepare a will because he determines that the testator lacks capacity. This is a difficult issue, for while the

⁶⁸ *Ibid.*, pp. 320-321.

⁶⁹ See, e.g., *Scott v. Cousins*, footnote 38, *supra*, para. 70; *Mah v. Zukas Estate*, footnote 6, *supra*, paras. 74, 76; *Wasylynuk v. Bouma*, 2018 ABQB 159, para. 127; *Walman v. Walman Estate*, footnote 60, *supra*, para. 20; *Yeas v. Yeas*, 2017 ONSC 7402, para. 296.

⁷⁰ 1985 CarswellMan 84 (Q.B.). para. 77, quoted with approval by Burnyeat J. in *Wiseman v. Perrey*, 2012 BCSC 1681, para. 112, further reasons 2013, BCSC 904.

solicitor has a duty to satisfy himself that the testator has capacity, he is not the one who ultimately make the decision about capacity. That is for the court to decide. It is generally accepted practice that if the solicitor is convinced that the testator lacks capacity she may and should refuse to draft the will. But if she is unsure about his capacity, she should draft the will and attend to its execution. However, she should then also take copious notes about her questions and observations and preserve them for the court's later perusal. In *Scott v. Cousins*⁷¹ Justice Cullity made the following comments about the duty of solicitors in these circumstances.

70. The obligations of solicitors when taking instructions for wills have been repeatedly emphasised in cases of this nature. At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and, if there is any possible doubt - or other reason to suspect that the will may be challenged - a memorandum, or note, of the solicitor's observations and conclusions should be retained in the file: see, for example, *Maw v. Dickey*,⁷² *Eady v. Waring*,⁷³ *Murphy v. Lamphier*.⁷⁴ Some of the authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God — or even judge — and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question.

Hall v. Bennett Estate is instructive on this issue.⁷⁵ A solicitor attended at a hospital to prepare a will for a terminally ill client. The client drifted in and out of consciousness, but while awake he was lucid and communicative. The client instructed the solicitor to make a will containing, *inter alia*, a specific gift of a

⁷¹ Footnote 38, *supra*, para. 70.

⁷² (1974), 6 O.R. (2d) 146 (Surr. Ct.), at pages 158-9.

⁷³ Footnote 37, *supra*, at page 635.

⁷⁴ Footnote 66, *supra*, at (1914), 31 O.L.R. 287 (H.C.), 318-21.

⁷⁵ 2001 CarswellOnt 3783, 40 E.T.R. (2d) 65 (S.C.J.) reversed 2003 CarswellOnt 1730, 64 O.R. (3d) 191 (C.A.).

store to the plaintiff. But the testator told the solicitor to exclude his daughter and grandchildren. The solicitor declined to continue the interview because of the client's condition and his inability to give full and complete instructions. Thus, he did not draft a will. The client died the same day. The plaintiff sued the solicitor for negligence. The trial judge found that the client understood the effect of a will and disclosed the nature of the property he wished to dispose of by will. Thus, the client had capacity and the court held the solicitor liable in negligence for failing to draw the will. However, the Court of Appeal reversed. It held that the solicitor had acted reasonably and prudently, that the evidence in support of his opinion that the testator lacked capacity was overwhelming, and that, in the circumstances it was the solicitor's duty to decline the retainer. The Court of Appeal noted:

48. As stated earlier, it is well settled that a solicitor who undertakes to prepare a will has the duty to use reasonable skill, care and competence in carrying out the testator's intentions. This duty includes the obligation to inquire into and substantiate the testator's capacity to make a will. This first obligation is of fundamental importance. After all, if the testator does not have the requisite testamentary capacity, the preparation of a will in accordance with his expressed wishes at the time may only serve to defeat his true intentions.

In such circumstances the solicitor may wish to have a capacity assessment done – assuming that there is time to do so. But on this point I draw attention to the following comment in an article mentioned above:⁷⁶

A lawyer should be careful to ensure that such an assessment is actually required in order to take on or fulfill a given retainer, as a finding of incapacity represents a significant loss of independence for an individual. There is a delicate balance to consider, and requiring a capacity assessment must be reasonable in the circumstances. As the court held in *Weldon McInnis v. John*

⁷⁶ Kimberly A. Whaley and Kate Stephens, “A Lawyer’s Duties and Obligations Where Capacity, Undue Influence, and Vulnerability Are in Issue in a Retainer”, footnote 65, *supra*, (2018), 48 Adv. Q. 385, pp. 391-92.

Doe,⁷⁷ ... lawyers are allowed a reasonable degree of deference in making such a decision.⁷⁸

8. The Utility and Admissibility of Retrospective Assessments

In many cases one or both of the parties will seek to introduce retrospective assessments of the testator's capacity by neurologists, geriatric psychiatrists, and other specialists. Since the specialists have not typically seen or treated the testator, these are based on an examination of medical records. They are often admitted, but are not necessarily relied on, as the evidence of persons who actually interacted with the testator is often preferred.⁷⁹ In other cases the court will admit the retrospective assessments and rely on them, as well as the evidence of the family doctor.⁸⁰ In *Kay v. Kay Sr.*⁸¹ the court admitted the retrospective assessment, but gave it only modest weight, because it did not really assess the testator. In fact, Justice Maranger stated: "a retrospective assessment (going back 9 years) is, in my view, inherently frail in terms of reliability".⁸² And in *Dujardin v. Dujardin*⁸³ the

⁷⁷ 2014 NSSC 437, 2014 CarswellNS 952, para. 42.

⁷⁸ To the same effect, see *Dutschl v. Dutschl Estate*, 2008 CarwellOnt 2116, para. 93, further reasons 2009 CarwellOnt 309, where Taliano J. stated: "...to expect everyone who is suffering from ill health to have a full blown mental capacity assessment before his or her will can be admitted to probate is not the law and if it were, it would disenfranchise many testators from being able to dispose of their property just before death.

⁷⁹ See, e.g., *Wasylynuk v. Bouma*, footnote 69, *supra* (expert's conclusory opinions regarding a man he had never had an opportunity to observe did not undermine and did not address the evidence of those who came in contact with the testator and who dealt with him at the time of the execution of the will); *Yeas v. Yeas*, footnote 69, *supra* (evidence of personal physician, capacity assessor, and lawyer; preferred; however, the case is unsatisfactory as the court relied, *inter alia*, on assessments to manage property and the person).

⁸⁰ See, e.g., *Birtzu v. McCron*, 2017 ONSC 1420, para. 117. And see *Morris v. Rivard*, 2016 ONSC 4436; *Walman v. Walman Estate*, footnote 60, *supra*, para. 35; *Stekar v. Wilcox*, footnote 26, para. 55.

⁸¹ 2019 ONSC 3166.

⁸² *Ibid.*, para. 21.

Court of Appeal agreed with the conclusion of the judge at first instance that the expert evidence was inadmissible on a cost/benefit analysis.

For this reason the recent ruling on *voir dire* of Sanfilippo J. in *Re Estate of Gertrude Rellinger*⁸⁴ is particularly instructive. The plaintiff called Dr. Kenneth Shulman, a geriatric psychiatrist, to testify at trial and the defendant objected to the admission of the evidence. With the consent of the parties, the proceedings were a blended form of *voir dire*, so that the expert's evidence would be admitted and the judge would then hear submissions on the admissibility of the evidence. If the judge ruled the evidence inadmissible, the entirety of the expert's evidence would be disregarded, but if the judge ruled the evidence admissible, the evidence obtained during the *voir dire* would be incorporated as part of the trial record. The defendant did not dispute Dr. Shulman's expertise. Dr. Shulman intended to provide an opinion of testamentary capacity from a clinician's perspective, not from a legal adjudicative perspective and stated that he could do that based on the medical records. In the process, he would offer a retrospective testamentary capacity assessment.

The court applied the test for admissibility of expert opinion evidence, based on the test in *R. v. Abbey*,⁸⁵ which draws on the test in *R. v. Mohan*⁸⁶ and *White Burgess Langille Inman v. Abbott and Haliburton Co.*⁸⁷ The test consists of a two-stage analysis. In the first stage the expert evidence is admissible only if it meets the threshold requirements of admissibility, as defined in the test.⁸⁸ If the evidence

⁸³ 2016 ONSC 6980, affirmed 2018 ONCA 597, para. 30. And see *Foley v. McIntyre*, 2015 ONCA 382, paras. 31, 32; and *Neuberger v. York*, 2016 191, paras. 41-43, leave to appeal refused 2016 CarswellOnt 14408.

⁸⁴ Court File No. CV-16-005069-00ES, 21 February 2019 (Ont. S.C.J.).

⁸⁵ 2017 ONCA 640.

⁸⁶ [1994] 2 S.C.R. 9.

⁸⁷ 2015 SCC 23.

⁸⁸ The evidence must be: (a) logically relevant; (b) necessary to assist the trier of fact; and (c) not subject to any other exclusionary rule. In addition, (d) the expert must be properly qualified and able to fulfill his or her duty to the court to provide evidence that is: (i) impartial; (ii) independent; and (iii) unbiased. And finally, (e) for opinions based on novel or contested science, or science

does not meet the threshold requirements, it is excluded. If it does meet those requirements, the court moves on to stage two, where the court exercises a gatekeeper function, which requires it, in the exercise of its discretion, to determine whether the benefits of admitting the evidence outweigh the costs of its admission. If the court is not satisfied in stage two the evidence will be excluded.

The court concluded that Dr. Shulman met the threshold requirements of stage one and rejected the defendant's contention that any expert retrospective testamentary capacity assessment is based on novel or contested science and is therefore unreliable. The court stated that a retrospective assessment is viewing the same issue from a different perspective. Therefore the court found that the cost benefit analysis favoured admission of the evidence.

9. Should the *Banks v. Goodfellow* Criteria Be Restated in Modern Form?

As already noted, the courts have occasionally recast the *Banks* criteria in a modern form. Laskin J.A., in dissent, did so in *Schwartz v. Schwartz*.⁸⁹ However, he retained the substance of the criteria.

Others have considered whether the criteria should be modernized and should reference modern neuroscientific knowledge about mental capacity. In 2013 the British Columbia Law Institute considered whether the criteria (as well as other capacity tests) ought to be codified. However, its Common-Law Tests of Capacity Project Committee concluded that it would be preferable to retain the common law criteria, since their purpose is to achieve just outcomes, more than to achieve certainty.⁹⁰

used for a novel purpose, the underlying science must be reliable for that purpose.

⁸⁹ Footnote 33, *supra*, at 1970 CarswellOnt 243, para. 44.

⁹⁰ British Columbia Law Institute (BCLI), "Report on Common-Law Tests of Capacity: A Report Prepared for the British Columbia Law Institute by the Members of the Common-Law Tests of Capacity Project Committee", BCLI Report No 73 (September 2013), online: <www.bcli.org/wordpress/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf>.

In 2003, the Manitoba Law Reform Commission published Report 108, *Wills and Succession Legislation*.⁹¹ Recommendation 1 of that Report recommended that the requirements of intention, testamentary capacity, and knowledge and approval be added to the *Wills Act*,⁹² but the Report did not otherwise address testamentary capacity. None of the Report's recommendations were implemented, so in 2019 the Commission issued a Consultation Paper, *Reform of the Wills Act Revisited*,⁹³ in which it seeks comments and suggestions about the matters raised in the Paper. Chapter addresses the matter of testamentary capacity. The Commission reviews the common law criteria of testamentary capacity and examines what other jurisdictions have done about this topic. On page 6 it raises the following two issues for discussion: 1. whether testamentary capacity should continue to be entirely a matter of common law, or whether a statutory definition should be enacted; and 2. whether the common law about the presumption of mental capacity should be replaced with a statutory iteration of that presumption and a shifting of the burden of proof.

No other Canadian jurisdiction or law reform body appears to have addressed the matter.

Although invited to do so, the English Court of Appeal declined to restate the criteria in *Sharp v. Adam*,⁹⁴ stating, “we do not consider on reflection that the *Banks v. Goodfellow* formulation needs to be reformulated”.

In 2005 England enacted the *Mental Capacity Act 2005*.⁹⁵ The Act creates a new court, the Court of Protection. It has power to declare whether a person has or lacks capacity to make specific decisions.⁹⁶ The relevant provisions of the Act regarding capacity are:

⁹¹ http://www.manitobalawreform.ca/pubs/pdf/archives/108-full_report.pdf.

⁹² R.S.M. 1988, c. W150.

⁹³ Manitoba Law Reform Commission, June 2019.

⁹⁴ [2006] EWCA Civ 449, para. 82.

⁹⁵ 2005, c. 9.

⁹⁶ *Ibid.*, s. 15.

2(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

[...]

3(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

[...]

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another, or

(b) failing to make the decision.

These criteria are not unlike the *Banks* criteria as those have been applied in the cases, but they are more extensive and clearer.

If a person lacks capacity, s. 16 empowers the court to make a decision for the person concerning, *inter alia*, the person's property and affairs. Section 18 specifically says that those powers extend to the execution of a will for the person. However, the Act does not expressly affect the test for capacity to make a will when that issue is being determined retrospectively, which is what happens in most cases where the testator's capacity is raised.⁹⁷

⁹⁷ In passing, it may be of interest that in New Brunswick the court also has power to make, amend, and revoke the will of a mentally incompetent person,

There were some *dicta* in early cases suggesting that the Act applies also to retrospective determinations of capacity. However, the matter came squarely before the court in *James v. James*,⁹⁸ a decision of HHJ Paul Matthews (sitting as a Judge of the High Court). The person opposing the will argued that it was unsatisfactory that the Court of Protection applies a different test of capacity during a person's lifetime than the test applied by a court retrospectively after the testator's death. Thus the court had to determine whether the *Banks* criteria applied or whether the Act applied. In a carefully reasoned judgment the court discussed and followed *Walker v. Badmin*.⁹⁹ The court concluded that the tests under the earlier case law and the Act were different, that the *Banks v. Goodfellow* criteria are not a recent innovation but have stood the test of time, and that, if it wished, Parliament could have said that the Act applied also to retrospective assessments. It did not do so and therefore the Act does not apply to them; instead the *Banks v. Goodfellow* criteria do.¹⁰⁰ The court further concluded that on the particular facts of the case the will satisfied those criteria and was therefore valid.

In contrast, in its consultation paper, *Making a Will*, the English Law Commission favours adopting the *Mental Capacity Act* test for retrospective determinations in will cases.¹⁰¹

There have been a number of papers in Canada over the years that argued in favour of a modernized version of the *Banks* criteria. These were discussed in a recent learned article by six authors, some with medical and others with legal training.¹⁰²

or direct the person's committee to do so, subject to the court's approval. *Infirm Persons Act*, R.S.N.B. 1973, c. I-8, ss. 3(4), 11.1, 15(1), enacted by S.B.C. 1994, c. 40, ss. 1, 3, 4.

⁹⁸ [2018] EWHC 43 (Ch).

⁹⁹ [2014] EWHC 71 (Ch).

¹⁰⁰ See in particular *James v. James*, footnote 98, *supra*, paras. 76-87.

¹⁰¹ See Law Commission, *Making a Will*, Consultation Paper 231 (2017), §§2.66-2.73.

¹⁰² Kenneth I. Shulman, Susan G. Himel, Ian M. Hull, Carmelle Peisah, Sean Amadeo, and Courtney Barnes, "*Banks v. Goodfellow* (1870): Time to Update the Test for Testamentary Capacity" (2017), 95 Can. Bar Rev. 251. And see also Kimberly A. Whaley, Megan Brenkel, Kenneth I Shulman, and Kerri L.

The authors do not wish to abolish the criteria, but to update them so that they reflect modern legal and medical advancements and developments in clinical neuroscience. Thus they propose the following criteria:¹⁰³

The testator must be:

1. Capable of understanding the act of making a will and its effects;
2. Capable of understanding the nature and extent of their property relevant to the disposition;
3. Capable of evaluating the claims of those who might be expected to benefit from his estate, and able to demonstrate an appreciation of the nature of any significant conflict and or complexity in the context of the testator's life situation;
4. Capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure from previously expressed wishes or prior wills; and
5. Free of a mental disorder, including delusions, that influences the distribution of the estate.

Should we adopt a modernized version of the *Banks* criteria along these lines? Indeed, would it be desirable to codify the criteria and in doing so take account of the provisions of the *Mental Capacity Act 2005* reproduced in part above?

The cases have made it clear that the determination whether a person has testamentary capacity is a legal determination, not a medical one.¹⁰⁴ Indeed, sometimes there is no medical evidence at all, while at other times a court may

Crawford, "Standardizing the Assessment of Testamentary Capacity" (2017), 46 Adv. Q. 441.

¹⁰³ "Time to Update the Test", *ibid.*, p. 266.

¹⁰⁴ See, e.g., *Laszlo v. Lawton*, footnote 24, *supra*, para. 198; *Halliday v. Halliday Estate*, footnote 44, *supra*, para. 29; *Mah v. Zukas*, footnote 6, *supra*, 56; *Stevens v. Crawford*, footnote 59, *supra*, paras. 19-20; *Devore-Thompson v. Poulain*, footnote 60, *supra*, para. 54; *Re Singh Estate*, footnote 60, *supra*, para. 94; *Yeas v. Yeas*, footnote 69, *supra*, paras. 273, 274; Poyser, footnote 4, *supra*, p. 95.

reach a conclusion about capacity that conflicts with a medical diagnosis.¹⁰⁵ Nevertheless, the determination is often informed by medical assessments and that is as it should be.¹⁰⁶

Part of the problem in a multi-jurisdictional country such as Canada is that, over time, courts in different jurisdictions begin to follow cases in their own jurisdiction and cease to quote what have always been the authoritative ones. The danger then is that changes are introduced that conflict with the original criteria and that can cause a Balkanization of the criteria. We do have the Supreme Court of Canada to keep us on the straight and narrow, of course, but that court does not hear many cases on the issue. Thus, I believe that there is merit in adopting a modern version of *Banks* to give us a new start. For the same reason, I think that there may be merit in codifying the criteria, but that is difficult in Canada where the provinces and territories have jurisdiction over property and civil rights. Perhaps an initiative on the part of the Uniform Law Conference of Canada along these lines would be a good idea.

10. Conclusion

It is clear that the *Banks v. Goodfellow* criteria remain the law in Canada, as do the concomitant principles of knowledge and approval, the onus and standard of proof, the principle of suspicious circumstances, and the time when testamentary capacity should be measured. Modern attempts to rephrase the criteria, while helpful, have not really deviated from the original. In my opinion, it is worth exploring whether a modern restatement of the criteria and their codification would be desirable and would provide greater clarity, without sacrificing the flexibility of the original.

¹⁰⁵ *Laszlo v. Lawton*, footnote 24, *supra*, para. 199.

¹⁰⁶ See Poyser, footnote 4, *supra*, p. 724.

SCHEDULE

A Selection and Discussion of Recent Canadian Cases

ALBERTA

*Christensen v. Bootsman*¹⁰⁷

The testator was a resident in an assisted living home when she died in 2010 at age 80, survived by her four children. She had made a formal will in 1976 in which she appointed her oldest daughter, Yvonne, her executor and left her estate equally among her children. But in 2010 she made a holograph will that gave most of her estate to another daughter, Sandra, and smaller amounts to the other children. The court directed that Sandra prove the holograph will. The other children challenged the validity of the will for lack of capacity and undue influence. All agreed that it was written and signed by the testator. Four medical doctors gave evidence at trial. Three had seen the testator while she was in hospital in 2008: a psychiatrist, a neuropsychologist, and the co-chair of geriatrics at the hospital. However their reports were made for clinical purposes and were not relevant to determining the testator's decision-making capacity when they were written or at a later date. The fourth was the testator's general physician. The court found that the general physician, who saw her on a regular basis, provided the most relevant medical evidence in relation to the testator's capacity at the time she made the holograph will and the court gave his evidence significant weight. The general physician had no concerns about the testator's mental capacity. Consequently, the court held that the mother had testamentary capacity when she made the holograph will. It also held that Sandra's influence over her mother did not amount to undue influence.

The court quoted from *Vout v. Hay* and did not find any suspicious circumstances. It quoted and followed the criteria for testamentary capacity set out in *Banks v. Goodfellow*, and also referred to the more contemporary criteria in *Schwartz v. Schwartz*. The court quoted from *Re Weidenberger Estate*,¹⁰⁸ which makes the point that the *Banks* criteria must not be applied in a way that serves to defeat a

¹⁰⁷ 2014 ABQB 94.

¹⁰⁸ Footnote 9, *supra*.

testator's intentions. It also quoted from *Stevens v. Crawford*,¹⁰⁹ which said that soundness of mind is a practical question. Medical evidence may be of assistance in answering the question, but is not necessarily conclusive.

Mah v. Zukas Estate¹¹⁰

The deceased was living in a hospice and asked a social worker there to call a lawyer so that he could make his will. He executed his will in the hospice in 2015 and died nine days later. He was survived by three children. The deceased had a strained relationship with his children and none of them visited him in the hospice. The lawyer used a standardized questionnaire and wrote down the answers given. Initially the deceased wanted to leave each of his children a small amount so that they could not contest the will, but the lawyer told him that that was not the law. So he told the lawyer that he would not leave his children anything, but would leave everything (approximately \$700,000) to his friend, Anne, who worked at his bank. They had a professional relationship for 13 years and would meet together for coffee occasionally. Once he was admitted to the hospice Anne visited him every day until he died 18 days later. He made a number of factual errors in his instructions to the lawyer, but the court found that none raised a genuine issue about the testator's capacity. On that point the court quoted the following from *Laramée v. Ferron*:¹¹¹

We must be careful not to substitute suspicion for proof. We must not by an extensive doing 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 on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.

¹⁰⁹ Footnote 59, *supra*.

¹¹⁰ 2016 ABQB 587.

¹¹¹ Footnote 6, *supra*, at 409.

The lawyer formed the opinion that there were no issues regarding testamentary capacity. However, the social worker called him a few days later and told him that Anne's name was misspelt. He returned to the hospice shortly before the testator died and found that then the testator did not have capacity. The court found that the children's allegations of lack of capacity were unsupported by medical evidence. It also found that the lawyer knew what testamentary capacity meant and noted that the law does not mandate a set of "correct questions" that a solicitor must ask. It noted that the test for testamentary capacity was established by *Banks v. Goodfellow* and stated that the law does require that the five elements listed by Laskin J.A. in *Schwartz v. Schwartz*, which it quoted, and which in turn was a restatement of the *Banks* test, be satisfied.

The court also noted,¹¹² by reference to *Stevens v. Crawford*,¹¹³ that testamentary capacity is time specific and task specific and that testamentary capacity is a legal construct, for which medical evidence is not required.

Wasylynuk v. Bouma¹¹⁴

The deceased was a long-time alcoholic. He had seven children and executed a number of documents dealing with the disposition of his property between 1997 and 2001, including a will, beneficiary designations, a deed of gift, and a further will. The defendants, who were four of the deceased's children, brought a summary judgment application. The court directed that the validity of the beneficiary designations, the deed of gift, and the later will be examined on the application. The first will left the residue of the estate equally to all the children, whereas the second left all to one child. A number of witnesses testified in regard to the later will (and the other matters), including the lawyer who took instructions for the will, a couple of medical doctors who had treated the deceased from time to time, and a number of lay persons who had regular contact with him. Dr. Kenneth Shulman was asked to provide a retrospective assessment of the deceased's mental capacity during the years in question. He never met or treated the deceased, but reviewed the medical records and other documents provided. He concluded that it

¹¹² At para. 57.

¹¹³ Footnote 59, *supra*, at 2001 ABCA 195, paras. 17 and 19-20.

¹¹⁴ 2018 ABQB 159.

was unlikely that the deceased had the requisite capacity to execute testamentary documents during this time and that aspects of his chronic alcoholism were relevant to concerns about his capacity.

The court concluded that Dr. Shulman's conclusory opinions regarding a man he never had an opportunity to observe did not undermine and indeed did not address the evidence of those who came into contact with the deceased over the years and especially those who dealt with him at the time of the execution of the documents. The lawyer testified that the deceased was sober when he took instructions and when the deceased signed the will and that he would have reviewed the document with him. The court held that the will was valid.

The court referred to a number of cases, including *Vout v. Hay* and several Alberta cases, but did not discuss them in detail.

Mawhinney v. Scobie¹¹⁵

This case is not directly relevant to the issue of testamentary capacity as its focus was a "no contest" clause in a will. In four prior wills the testator had left the residue equally to his romantic partner and his three adult children. In his last will, executed less than a month before he died, the partner received a bequest, but the residue was left to the children. The no contest clause provided that any beneficiary who brought proceedings to contest the will, other than an application for necessary judicial interpretation, or to enforce rights conferred by law, would forfeit any entitlement under the will. The partner brought an application for advice and directions to determine whether an application under R. 75(1)(a) of the Surrogate Rules requesting the personal representatives to obtain formal proof of a will would trigger the no contest clause. The partner wanted to raise evidence of suspicious circumstances on the application. The application judge held that the application for advice and directions did not trigger the clause, because it fell under the judicial interpretation exception and that an application under the Rule would not trigger the clause either, as it fell under the exception of seeking to enforce rights conferred by law. However, the Court of Appeal reversed. The majority held that an application under the Rule would constitute a challenge to the validity of the will or litigation in connection with it. The partner thus had a choice: she could

¹¹⁵ 2019 ABCA 76, reversing 2017 ABQB 422. leave to appeal refused 2019 CarswellAlta 1654.

proceed with the application and if successful the will, including the no contest clause would be void; but if unsuccessful, she would forfeit the bequest to her in the will.

The court considered *Vout v. Hay* and referred to a number of Alberta and Saskatchewan cases that followed it. However, it did not discuss any of them in detail.

BRITISH COLUMBIA

Laszlo v. Lawton¹¹⁶

The deceased made a will in 1986 in which she named her husband her sole beneficiary and if he failed to survive her by 30 days she established two small trusts for two of her husband's nephews and directed that the residue be distributed equally among the eight plaintiffs (including the two nephews) who survived her. The validity of that will was not contested. Her husband's will of that same year was a mirror image of hers. The deceased and her husband again made mirror wills in 2000. They named each other as executors and the first defendant, a family friend, as substitute executor. The will left five percent to the first defendant and the rest equally to two charities, who were the other two defendants. The will was drawn by a notary, who was not aware of the deceased's previous wills or her psychiatric problems. The deceased was committed to a psychiatric ward in 2001, in 2002, and again later. Her husband died in 2005. She died in 2008.

The first three plaintiffs were the children of the deceased's husband's sister, who lived in Canada. The other plaintiffs were her husband's other nephews and nieces, who lived outside Canada and did not testify at trial. The plaintiffs challenged the validity of the will for lack of capacity and for undue influence on the part of the deceased's husband. The court held that the deceased lacked capacity and therefore it did not need to consider the issue of undue influence. The court found that the first three plaintiffs gave credible evidence. They had a close relationship with their aunt. The testified that their aunt's mental health declined over the years, that she showed signs of confusion and forgetfulness in about 1997 and suffered from a number of hallucinations and delusions, and that she displayed other bizarre habits.

¹¹⁶ 2013 BCSC 305.

Her bank's branch manager confirmed the deceased's confusion and mentioned it to her doctor. She also saw a psychiatrist, whose reports were admitted in evidence, along with the report of the deceased's doctor.

The court quoted the *Banks v. Goodfellow* test, as well as the earlier test of a "sound disposing mind" in *Harwood v. Baker*,¹¹⁷ to the same effect. It also quoted the test from *Schwartz v. Schwartz* and referred to other leading cases. The court then went on to consider the concept of suspicious circumstances and relied on *Vout v. Hay* for that purpose. With respect to delusions, it relied on *Skinner v. Farquharson*,¹¹⁸ which defines a delusion as a persistent belief in a supposed state of facts that no rational person would hold to be true. It also relied on *O'Neill v. Royal Trust Co.*¹¹⁹ on this issue.

It is therefore somewhat surprising that the court did not share what it called a "narrow view" of delusions, which is that delusions are relevant to the issue of testamentary capacity only if they are shown to have actually influenced the dispositions in the will, a view maintained by the above cases. Instead the court held that "delusions may be symptomatic of an impairing degenerative disease of the mind, such as Alzheimer's disease, and their presence may speak to the depth of the mental impairment experienced by a testator in consequence of that affliction."¹²⁰ The court accepted evidence to the effect that the deceased probably suffered from the early stages of Alzheimer's disease. In any event, the court held that there were a sufficient number of suspicious circumstances that required the defendants to reassume their burden to prove capacity and they failed to do so.

Devore-Thompson v. Poulain¹²¹

This was a predatory marriage case, the main focus of which was capacity to marry. However, since the deceased executed a will in favour of the predator, the issue of testamentary capacity was perforce also considered.

¹¹⁷ Footnote 29, *supra*, at 13 E.R. 120.

¹¹⁸ Footnote 22, *supra*, S.C.R., p. 76.

¹¹⁹ Footnote 23, *supra*.

¹²⁰ 2013 BCSC 305 at paras. 225, 226.

¹²¹ 2017 BCSC 1289.

The older adult, now deceased, met the predator at a mall. As found by the court, he preyed on her for financial gain, alienated her from friends and family, and persuaded her to marry him and to change her will in his favour. She suffered from senile dementia and Alzheimer's disease. Her out-of-province niece with whom she was close, brought an application to challenge the marriage and the will. The court held that the deceased lacked capacity to marry and did not have testamentary capacity either. Hence, both the marriage and the will were void.

The lawyer who took instructions for the will could not recall anything about its execution apart from his notes. So the court concluded that his evidence should be treated "cautiously as it was based entirely on a reconstruction from his notes, which were sparse".

There were a number of suspicious circumstances. The predator remained with the deceased when she gave instructions to the lawyer and he had written the suggested changes to be made on the deceased's previous will, including his appointment as executor. There was no evidence about whether the lawyer read or explained the will to the deceased, but it was unlikely, since one clause was "missing some words and so is incomprehensible, which would have been caught had the Will been reviewed closely". In addition, the predator's evidence was inconsistent.

The deceased's medical doctor, who saw her regularly, gave evidence that supported the conclusion that she did not have testamentary capacity. Her dementia had advanced to such an extent by the time she executed her Will that she could neither understand the extent of her property, nor who her natural beneficiaries would be. Justice Griffen stated:¹²²

I find there to be a high probability that [the deceased] sat in front of Mr. Schwarz [the lawyer] and pretended to know what was going on by nodding and smiling a lot and saying very little. Others noted her smiling a lot and [the deceased] was quite determined not to let on that she was having cognitive difficulties.

Thus the deceased lacked even a basic understanding of her estate and her natural beneficiaries.

¹²² *Ibid.*, para. 294.

The court quoted the *Banks v. Goodfellow* criteria, as well as the modern restatement of them in *Schwartz v. Schwartz*, which was adopted by the BC Supreme Court in *Laszlo v. Lawton*.¹²³ It also referred to *Vout v. Hay*.

Re Singh Estate¹²⁴

The deceased was the mother of eight children. She made a will in 2013 in which she named two children her executors. Another sibling produced another will, executed a month and a half before the testator died in 2016, that named him as executor. The deceased had been admitted to hospital before making the second will and certain medical records concerning her mental capacity, including paranoid behaviour, dementia, and confusion, were admitted in evidence. These records raised suspicious circumstances, as did the change in her living environment and the fact that the testator disinherited two of her children. The drafting lawyer gave evidence, but the court discounted the lawyer's evidence because he failed to testify about specific questions he asked to determine the capacity of his 92-year old client, such as, whether she had a prior will, why she was disinheriting two children, and the nature of her ownership in jointly held property. Based on the medical records and the petitioner's evidence, the court was unable to find that the deceased was capable of forming an orderly desire about the disposition of her property and thus held the will void.

The court considered, *inter alia*, *Banks v. Goodfellow*, *Schwartz v. Schwartz*, *Vout v. Hay*, *Laszlo v. Lawton*,¹²⁵ and *Devore-Thompson v. Poulain*.¹²⁶

Halliday v. Halliday Estate¹²⁷

The testator made a will in 2001 in which he appointed his second wife as his trustee and his son as substitute trustee. In 2012 he was diagnosed with dementia and he was committed to a hospital psychiatric ward in 2015 when his cognitive functions declined. In March and April of 2014 he made new wills in which he

¹²³ Footnote 24, *supra*, at para. 188.

¹²⁴ 2019 BCSC 272.

¹²⁵ Footnote 24, *supra*.

¹²⁶ Footnote 60, *supra*.

¹²⁷ 2019 BCSC 554.

named his second wife as trustee and her two children as substitute trustees. These wills gave \$50,000 to his son and the residue to the second wife, or to her children if she predeceased him. She died in 2015 and he died in 2017. The testator's son brought proceedings for a declaration that the 2014 wills were invalid for lack of capacity and lack of knowledge, and undue influence by the second wife. There were a number of lay witnesses. The lawyer who drafted the 2014 wills had retired and the parties agreed that he did not perform as one would expect of a competent wills and estates practitioner. He did not consider the issue of capacity and was unaware of the dementia diagnosis. The testator's doctor administered a cognitive assessment in 2012 and referred him for psychiatric evaluation. In 2014 she assessed him as having moderately severe cognitive difficulties and his second wife also commented on her husband's progressive dementia at that time. Other doctors, who had not attended the testator, gave evidence about the testator's condition based on assumed facts. One thought he was capable, the other thought he was not. The court concluded that there were a number of suspicious circumstances and held that the defendants did not discharge the burden of proving capacity and knowledge. The court also stated that the potential for dependence or domination was present when the testator made the 2014 wills and thus it was unable to conclude that the wills were executed in the absence of undue influence. In that respect the court noted that s. 52 of the *Wills, Estates and Succession Act*¹²⁸ changed the common law rule that the attacker of a will always has the burden of proving undue influences and replaced it with the principle that once it is shown that a person is in a position where the potential for dependence or domination of the testator exists, the attacker is aided by the presumption of undue influence. The court held the wills invalid.

The court followed *Banks v. Goodfellow* and *Schwartz v. Schwartz* on the issue of capacity, and *Vout v. Hay* on the burden of proof.

¹²⁸ S.B.C. 2009, c. 13.

MANITOBA

*Schrof v. Schrof*¹²⁹

The testator made her will in 2001. She had three sons and all three benefited under her will. The three sons worked the family farm together with their father, who died in 1998. In 2007 relations between the three brothers began to deteriorate. The testator became concerned about the mental health of her son, Glen, and made a codicil in 2009 removing him as executor. Later that year she obtained a protection order against Glen, so she made another codicil removing him as beneficiary of the residue. In 2010 she made a third codicil in which she removed Glen entirely as beneficiary of her estate. She died a year later. Glen brought an application for a declaration that the three codicils were invalid for lack of testamentary capacity. Evidence was given by the drafting lawyer, the sons and the doctor who had been the testator's personal doctor for 30 years and examined her on a regular basis. The doctor testified that the testator was not cognitively impaired. Toews J. quoted from *Banks v. Goodfellow*, *Vout v. Hay* and other cases and concluded that the testator had capacity at the time she made each codicil.

NEW BRUNSWICK

*Marsden v. Talbot*¹³⁰

The testator was 80 years old when she died in hospital of respiratory problems. She was survived by five children, but she had been estranged from two of them, Keith and Kenneth, the respondents, for about 20 years. She told her daughters that she had made her funeral arrangements, but had not yet made her will, so one daughter contacted a lawyer, who came to the hospital with his assistant to take instructions. She told the lawyer about being estranged from the respondents and that they would likely oppose the will. The will provided that the respondents would each receive \$100 and the rest was divided equally among the other three children. Unfortunately the testator died before the will could be executed, so the propounder made an application for a declaration that the will was valid and fully

¹²⁹ 2017 MBQB 51.

¹³⁰ 2018 NBCA 82, affirming *Re Estate of Jean Agnes Marsden*, 2017 NBQB 199.

effective under the statutory substantial compliance provision.¹³¹ The lawyer gave evidence by affidavit about his meeting with the testator and that he found her alert and knowledgeable about her assets. He concluded that she had capacity. The Application Judge agreed and therefore granted the application. The Court of Appeal affirmed.¹³²

NOVA SCOTIA

*Wittenberg v. Wittenberg Estate*¹³³

The testator had two children, a son and a daughter. She and her husband operated a successful farm. They sold the farm to the son in the early 1990s. The husband died in 1997. In 2007 the mother and son had a falling out. She made a new will in 2008 in which she removed her son as beneficiary. She explained to the lawyer that she was removing her son because he had already received financial support from her and her husband, had lied to her, and was financially well-off whereas the daughter was not. She died in 2012. The son brought proceedings to set aside the will for lack of capacity and undue influence. The trial judge held that the testator had capacity and was not unduly influenced. The son appealed.

The court quoted extensively from *Vout v. Hay* and also referred (indirectly) to the *Banks v. Goodfellow* criteria. The court stated that only the son questioned his mother's capacity and that no one else, including the testator's lawyer, doctor, and a psychiatrist, questioned it. The son made serious allegations with no factual foundation. Moreover, he was heavy-handed and self-motivated. The court dismissed the appeal.

*Whitford v. Baird*¹³⁴

In 2006 the testator made a will in which she appointed two of her daughters as executors. In 2011 she executed a new will in which she appointed her son as

¹³¹ *Wills Act*, R.S.N.B. 1973, c. W-9, s. 35.1.

¹³² Contrast *Cutts v. Phillips*, footnote 60, *supra*, in which testamentary capacity was lacking, so that the substantial compliance provision could not be applied.

¹³³ 2015 NSCA 79, affirming 2014 NSSC 301.

¹³⁴ 2015 NSCA 98, affirming *Re Baird Estate*, 2014 NSSC 266.

executor. The new will was prompted by a falling out between her four children. Two of them alleged that the executors of the 2006 will were taking money from their mother. The first lawyer that was approached refused to draft the 2011 will, as she was concerned that the instructions were coming from the son. The son and the testator then saw another lawyer, who insisted on a doctor's assessment, but he didn't get one. Nonetheless, he thought the testator was competent. Finally the mother was taken to a third lawyer, who took the instructions and drafted the 2011 will. The testator died in 2013. The application judge found that the mother was competent when she signed the 2011 will and it was admitted to probate. She relied on the evidence of the lawyer who took instructions and witnessed the will, as well as the evidence of the son and his wife and of the sister who supported the son. She rejected the evidence of the other two sisters. Those sisters appealed and argued that the application judge failed to consider insane delusions that their mother entertained about them. Evidence of those delusions came from the notes of the second lawyer. The Court of Appeal stated that it was reasonable to look at the will to see if the alleged delusions had any meaningful impact. In fact, the will only changed the executors and did not disinherit the two daughters. Further, the evidence of "insane delusions" was uncertain and the court noted that it was hard to see that the mother's minimal change in her will could be explained only by an insane delusion.

The court followed *Banks v. Goodfellow* and *O'Neill v. Royal Trust Co.*¹³⁵

ONTARIO

*Orfus Estate v. Samuel & Bessie Orfus Family Foundation*¹³⁶

Bessie Orfus died in 2009. She and her late husband had three children, a son who predeceased her and two daughters, Sharon and Elaine. Sharon was estranged from her mother and her sister. In May 2004 Bessie made two wills. She left Sharon shares in three private Orfus companies, but removed her as executor and treated her less generously than Elaine. Later in 2004 Sharon began oppression proceedings in respect of the Orfus companies. All parties consented to winding up

¹³⁵ Footnote 23, *supra*.

¹³⁶ 2013 ONCA 225, affirming 2011 ONSC 3043.

the companies, as a result of which Sharon received a significant sum of money. Shortly thereafter Bessie executed a codicil to each of her two wills and, except for a small bequest, disinherited Sharon. Sharon objected to both wills, alleging incapacity, lack of knowledge and approval, and undue influence by Elaine. The respondents moved for summary judgment to set aside the notice of objection and declare the wills and codicil valid. Penny J. granted summary judgment, holding that there were no genuine issues requiring trial, that Bessie had capacity and knew and approved of the contents of the two wills and the codicil, and that Elaine did not exercise undue influence. The motion judge referred to *Banks v. Goodfellow* and noted, with reference to *Royal Trust Corp. v. Saunders*,¹³⁷ that in considering whether there are suspicious circumstances, the court may consider:

- 1) the extent of physical and mental impairment of the testator around the time the will is signed; 2) whether the will in question constitutes a significant change from the former will; 3) whether the will in question generally seems to make testamentary sense; 4) the factual circumstances surrounding the execution of the will; and 5) whether a beneficiary was instrumental in the preparation of the will.

The Court of Appeal dismissed Sharon's appeals. The evidence was clear that Bessie knew what she was doing, that she had a good relationship with Elaine and that Sharon had no real relationship with her mother. Bessie's family doctor had no concerns about her cognitive functions and a psychiatrist, who assessed her when she made the wills, concluded that she had capacity. The lawyers who drafted and attended to the execution of the wills met several times with Bessie and concluded that she had capacity, knew the extent of her property at least in outline, and gave understandable reasons for disinheriting Sharon. The evidence about the execution of the codicil was less satisfactory, but the motion judge held that it was valid as there was no evidence that Bessie's capacity had deteriorated. The court concluded that the motion judge did not err in granting summary judgment and noted, by reference to *Schwartz v. Schwartz*, that a competent testator does not need to know the exact make up of her estate, but only needs to know in a general way the nature and extent of her property

¹³⁷ Footnote 46, *supra*, para. 58.

Walman v. Walman Estate¹³⁸

The testator was diagnosed with Parkinson's Disease and Lewy Body Dementia in 2003. He was in hospital for the last six months of his life and died in 2009, survived by his second wife and three adult sons from his first marriage. In earlier wills his sons were substantial beneficiaries, but in his final will, made in 2007, they received only very small bequests. The second wife was the main beneficiary. The testator had also transferred capital property to her during the last five years of his life. The wife had tried to have the testator's own lawyer draft the will, but he wanted a capacity assessment done first, so the wife found another lawyer. He was not told about the testator's illnesses. The court found that while the lawyer interviewed the testator alone and kept good notes, he should have conducted a "more probing" inquiry to determine whether he knew what his wife's assets were and whether he understood the gifts he had already made to his wife. The court found that the testator lacked capacity and was unduly influenced by his wife.

The court referred, *inter alia*, to *Banks v. Goodfellow*, the trial decision in *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*,¹³⁹ and *Schwartz v. Schwartz*.

Yeas v. Yeas¹⁴⁰

The testator suffered a mild stroke in 2011 and was assessed by a geriatric psychiatrist later that year, who reported that the testator suffered mild to moderate dementia and could not manage his personal affairs or property. However, his personal doctor reached the opposite conclusion in 2012. The testator then retained a lawyer to prepare powers of attorney for property and personal care in favour of his two sons. The lawyer engaged a capacity assessor to determine the testator's capacity for this purpose, who concluded that the testator had capacity. The lawyer also drafted a will for the testator in 2013 and concluded that he had testamentary capacity. The parties contesting the will hired a neurologist to assess the testator's testamentary capacity retrospectively. The neurologist, relying on medical records concluded that he did not have testamentary capacity. However, the court relied on the more recent assessments by the personal doctor and the capacity assessor,

¹³⁸ 2015 ONSC 185.

¹³⁹ Footnote 14, *supra*.

¹⁴⁰ 2017 ONSC 7402.

noted that the lawyer and the testator had reviewed each of the potential beneficiaries to ensure that the testator understood who should be included and who should not.

Although the court referred to the standard authorities, including *Schwartz v. Schwartz* and *Vout v. Hay*, the case is unsatisfactory in that the court relied on assessments to manage property and the person (among other evidence) to find that the testator had capacity.

Birtzu v. McCron¹⁴¹

The testator died in 2009, survived by three children. Sometime before he died he moved in with his daughter. Medical records showed that he showed signs of early dementia and short-term memory loss in 2002. His daughter was his primary caregiver. The testator made his will in 2006, appointing the daughter as executor and leaving his entire estate to her. Her two brothers launched a will challenge in 2011, more than two years after the testator died. The court concluded that the action was statute barred. Nonetheless, the court went on to hold that the brothers discharged the evidentiary burden with regard to suspicious circumstances. However, it also held that the daughter proved capacity on the basis of her evidence and the evidence of a long-time friend and of the family physician, as well as the retrospective assessment of Dr. Kenneth Shulman.

The court considered, *inter alia*, *Schwartz v. Schwartz* and *Vout v. Hay*.

Stekar v. Wilcox¹⁴²

The deceased had long-term diabetes, a psychological history of depression, and a drug and alcohol addiction. In 2012 the police were called and he was confined involuntarily for six weeks in a psychiatric ward. He suffered from hallucinations, delusions and confusion. Two months after his release he made his will. It was typed, although he did not have the means to create a typewritten document and it was not prepared by a lawyer. So it was unknown who prepared it. It was witnessed by persons who were cleaning his yard and a pastor, who could not be located to give evidence. A month later he was readmitted to hospital, suffering from confusion and reduced alertness. He died soon thereafter. The trial judge

¹⁴¹ 2017 ONSC 1420.

¹⁴² 2017 ONCA 1010, affirming 2016 ONSC 5835.

found several instances of suspicious circumstances. The will was a radical departure from previous wills, the deceased made multiple, contradictory statements about the identity of his intended beneficiaries, and a retrospective assessment concluded that he would have been vulnerable to influences exerted on him. The judge concluded that the presumption of testamentary capacity had been displaced and that the propounder of the will did not meet the burden of proving that the testator had testamentary capacity. There was no evidence of anyone probing his capacity, nor was there medical evidence to show that his delusions did not affect his mental health. The Court of Appeal agreed and dismissed the appeal.

The court followed *Banks v. Goodfellow* and *Skinner v. Farquharson*,¹⁴³ which adopted the *Banks* criteria. It also referred to *Vout v. Hay*.

Shannon v. Hrabovsky¹⁴⁴

The testator had a brother and a son and daughter who survived him. He made a will in 2006 in which he appointed all three his executors and left his home to his daughter. He made a new will in 2007 in which he appointed only his brother and his son as executors and left nothing to his daughter. The will said that he had lent money to her which she had not paid back and that he forgave her the loan. The son said that the loan was as a result of the daughter's unauthorized use of her father's credit cards. The daughter said that they were authorized. In 2008 the testator gave the daughter jewellery that had belonged to her mother and the deed to his home, thinking that if she had the deed, she was effectively the owner. The testator suffered strokes in 2002, 2005, 2010, and 2011. He was diagnosed as having mixed dementia and Alzheimer's and two geriatric specialists gave evidence of his deteriorating mental capacity. He died in 2014. The daughter sought a declaration that the will was invalid for lack of testamentary capacity or undue influence on the part of the applicant brother. The court held the action was not barred, since the daughter did not learn of the will until 2015. The court found that there were a number of suspicious circumstances that were not removed by the propounders

¹⁴³ Footnote 22, *supra*.

¹⁴⁴ 2018 ONSC 6593.

The court followed *Vout v. Hay* and *Scott v. Cousins*¹⁴⁵ on the capacity issue. Unfortunately the court also considered *Goodman Estate v. Geffen*¹⁴⁶ on the issue of undue influence. That case was not relevant as it concerned an *inter vivos* gift and spoke of the presumption of undue influence that is raised against a person who occupies a position of influence over the donor in that context. There is no such presumption in the context of wills.¹⁴⁷ However the court assumed that there was.

Dujardin v. Dujardin¹⁴⁸

Jack and his brother Noel held equal interests in the corporation that owned the family farm.¹⁴⁹ In 2009 they executed mirror wills leaving their equal interests in the farm to each other. Jack was married, but left nothing to his wife in the will. Noel was not married. Jack suffered heart attacks in 2007, 2010, and 2011. He died in 2011. His wife brought a will challenge, arguing that he lacked testamentary capacity as a result of chronic alcoholism. This was based on the hospital's discharge summary after his heart attack in 2007. The summary stated: "main problem with cognitive dysfunction and confusion disorientation thought to be due to organic brain syndrome secondary to alcohol abuse. The wife called an expert who had never met Jack, but who testified that organic brain syndrome "definitively" would have impaired Jack's comprehension. The propounder of the will got a contradictory opinion from a capacity assessor and the wife's expert then submitted a second report that was much more tentative in its findings. The trial judge ruled that the "watered-down opinion provides little, if any, assistance to the court" and disregarded the evidence. The Court of Appeal agreed with the Trial Judge's conclusion that the expert evidence "was inadmissible on a cost/benefit analysis". So the case was decided on the evidence of those who knew, interacted with, or treated Jack, not on the basis of the evidence of experts who never met

¹⁴⁵ Footnote 38, *supra*.

¹⁴⁶ [1991] 2 S.C.R. 353.

¹⁴⁷ *Seguin v. Pearson*, 2018 ONCA 355.

¹⁴⁸ 2018 ONCA 597, affirming 2016 ONSC 6980.

¹⁴⁹ The judgment says, incorrectly, that they owned the family farm jointly. If that were so, they could not dispose of their interests by will, since the interest of the first to die would pass by the *jus accrescendi* to the survivor.

him. The Court of Appeal also upheld the Trial Judge's holding that while Jack had issues with alcohol and that his health suffered from it, he was of sound mind when he executed the will.

The court considered *Vout v. Hay*, *Stekar v. Wilcox*,¹⁵⁰ and other cases

Re Estate of Gertrude Rellinger¹⁵¹

While not directly on point, this case is significant, as it addressed the admissibility of retrospective assessments of testamentary capacity. It consists of the Trial Judge's reasons on a *voir dire* on that issue. Dr. Shulman was retained by the plaintiff to provide expert evidence on the deceased's testamentary capacity based on medical records. The defendant objected to the evidence because of its retrospective nature, referring to it as "novel science". The court disagreed and held that the evidence would be received and submissions would be made on the issue of admissibility. The court reviewed the two-stage test for the admissibility of expert opinion evidence. It held that a retrospective assessment is simply viewing the same issue from a different perspective. In fact, many medical and psychiatric opinions are retrospective in nature and are far from novel. The court found that Dr. Shulman's evidence was reliable for the purpose of its admission and that the cost benefit analysis favoured its admission. The court would assess its use, application, and weight as part of the adjudication of the issues raised in the trial.

Graham v. Graham¹⁵²

A mother executed a will and a power of attorney a few weeks before she died. The will was her only testamentary document. She appointed a son as executor and attorney and named him sole beneficiary. The will and power of attorney were signed before a lawyer and his assistant. The assistant's notes showed that the mother gave inaccurate statements to the lawyer about why she was disinheriting her other children. Justice Sheard found that there was insufficient evidence to show that the mother understood the nature and effect of the will. The lawyer's evidence was unreliable as he accepted the mother's statements at face value and

¹⁵⁰ Footnote 26, *supra*.

¹⁵¹ Court File No. CV-16-005069-00ES, 21 February 2019 (Ont. S.C.J.).

¹⁵² 2019 ONSC 3632.

did not press her on why she was disinheriting the other children. Consequently the will and power of attorney were both declared invalid.

Justice Sheard considered *Vout v. Hay* as applied in *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*.¹⁵³ She also considered *Banks v. Goodfellow* and other cases.

Kay v. Kay Sr.¹⁵⁴

The testator made her last will in 2010. It made some changes to an earlier will made in 1992. The last will named her son and two of her three grandchildren to share equally in the residue of her estate. One of the grandchildren was named as the substitute trustee and she applied to be appointed estate trustee. The litigation guardian of the son filed a notice of objection to the application on the ground that the testator lacked capacity. Medical assessments done in 2009 and 2010 found that the testator had mild to moderate Alzheimer's type dementia and had difficulty with tasks involving language and memory skills. The testator met with her lawyer alone for one and a half hours to give her instructions. The lawyer took notes and filled out a checklist. The lawyer concluded that the testator had capacity. A posthumous capacity assessment by a neuropsychologist stated that there was "reasonable evidence in support of a determination of incapacity" when the testator gave her instructions. Justice Maranger admitted this evidence, but gave it only modest weight, since it did not really assess the testator. In his view "a retrospective capacity assessment ... is, in my view, inherently frail in terms of reliability".¹⁵⁵ He also concluded that while the lawyer's evidence was not perfect it was more persuasive. Further, the will was "logical" and the testator knew her assets in general terms. Also she made her new will to be "more fair" and knew she was excluding family members. Thus the court held the will valid.

The court followed *Banks v. Goodfellow* and considered *Vout v. Hay* and other cases.

¹⁵³ Footnote 14, *supra*.

¹⁵⁴ 2019 ONSC 3166.

¹⁵⁵ *Ibid.*, para. 21.

Quaggiotto v. Quaggiotto¹⁵⁶

A mother made a will in 2008 in which, in the events that happened, she left the residue equally to her two sons, Franco and Livio. In 2014 she made a codicil in which she left her estate entirely to Livio. There was extensive evidence to show that the testator believed Franco to be in a better financial position than Livio and that the codicil would get rid of the discrepancy. Franco opposed the will. The trial judge held that Livio had met the burden of proving testamentary capacity and rebutted any inference of undue influence. The Trial Judge held that the testator had a general knowledge of her assets and that that was enough to meet the knowledge requirement. The Court of Appeal agreed, holding that a testator does not have to know the value of her assets and does not need to have “an encyclopaedic knowledge” of her assets. The finding of knowledge of her assets was supported by the evidence, including detailed notes of the lawyer’s assistant, and evidence by capacity assessors and a practicing geriatric nurse consultant.

The courts relied on *Orfus v. Samuel & Bessie Family Foundation*,¹⁵⁷ *Scott v. Cousins*,¹⁵⁸ *Vout v. Hay*, and other cases.

QUEBEC***Gidney v. Lemieux***¹⁵⁹

The Supreme Court of Canada has held a number of times that the test for testamentary capacity in Quebec is the common law test.¹⁶⁰ Although the Quebec Court of Appeal did not mention any common law cases in this recent decision, it seems clear that the common law test is applied in Quebec. One of the issues raised in the case was the matter of the shifting evidentiary onus once those who oppose the will adduce sufficient evidence to call the testator’s capacity into question. The court agreed that this is the law in Quebec, but noted that the Trial Judge found as a fact that the testator had capacity. It also held that the Trial judge did not err in

¹⁵⁶ 2019 ONCA 107, affirming 2018 ONSC 345.

¹⁵⁷ Footnote 14, *supra*.

¹⁵⁸ Footnote 38, *supra*.

¹⁵⁹ 2016 QCCA 1381.

¹⁶⁰ For further details, see Poyser, footnote 4, *supra*, pp. 43-44.

considering that the will was “logical and plausible”, as that is a legitimate consideration when considering testamentary capacity.

SASKATCHEWAN

*Cutts v. Phillips*¹⁶¹

The testator had four children. He had made a will, which left everything to his children equally. After a head injury he went to live with his daughter and son-in-law. The daughter whited out the residuary beneficiary provisions in the existing will and had written over it “whole benefice Wendy Cutts” [*sic*]. The testator signed the change. The daughter then called a lawyer to come to her home to prepare a will for her father. The lawyer met alone with the testator and signed an amended draft naming the daughter as the sole residuary beneficiary. The lawyer was the sole witness, so the will could only be admitted to probate under the substantial compliance provision.¹⁶² The daughter sought to probate the will, but the court dismissed the application. The presumption of testamentary capacity did not apply, since the will was attested by only one witness, the testator had vision problems and there was no evidence that the will was read to him or that he understood the will. Neither was there evidence showing that the testator knew the nature and extent of his property. The lawyer’s evidence was problematic, because he suffered from frontal lobe dementia and that affected his short-term memory. The court found that there were suspicious circumstances and that the suspicions were not removed. It held that the testator lacked capacity. It followed that the daughter could not rely on the substantial compliance provision.¹⁶³

The court applied Saskatchewan cases that followed *Schwartz v. Schwartz* and *Vout v. Hay*.

¹⁶¹ 2016 SKQB 126.

¹⁶² *Wills Act*, 1996, S.S. 1996, c. W-14.1, s. 37.

¹⁶³ Contrast *Marsden v. Talbot*, footnote 57, *supra*, where the court found that the testator had capacity.

Bachman v. Scheidt¹⁶⁴

The testator made a will in 2009, naming his son as executor. The will was drafted by a lawyer who knew the testator well and had also prepared the testator's previous will. In 2009 the testator met the lawyer and told him that wanted his son to have his farmland that had been given to the daughter in the previous will. During the interview the lawyer became aware that the testator was beginning to experience memory failure and that the testator was aware of it himself. But the lawyer's notes indicated that at the time of the signing of the will he had a regular conversation with the testator and that there were no complaints about memory loss. A month later the testator was assessed as having mild to moderate dementia. He died in 2014. The daughter brought an application to have the will proved in solemn form because of the testator's alleged lack of capacity and undue influence by the son. The judge of first instance dismissed her application, holding that there was no genuine issue to be tried on those allegations. The daughter appealed. The Court of Appeal dismissed the appeal. The chambers judge had carefully reviewed the affidavit evidence, including the lawyer's uncontradicted evidence of capacity. The chambers judge also placed great emphasis on the lawyer's 30-year relationship with the testator and his finding that the testator was aware of his property and beneficiaries and was therefore capable of giving instructions for the will.

The court considered, *inter alia*, *Dieno Estate v. Dieno Estate*,¹⁶⁵ *Royal Trust Corp. of Canada v. Ritchie*,¹⁶⁶ and *Kapacilla Estate v. Otto*.¹⁶⁷

Karpinski v. Zookewich Estate¹⁶⁸

The testator was never married and lived on the family farm his whole life. He made a will in which he appointed his sister and brother-in-law his executors and sole beneficiaries. He did not leave anything to his brother and said in the will that the brother was "well off" and did not need more money or assets. The drafting

¹⁶⁴ 2016 SKCA 150, affirming 2016 SKQB 102.

¹⁶⁵ Footnote 40, *supra*.

¹⁶⁶ 2007 SKCA 64.

¹⁶⁷ 2010 SKCA 85.

¹⁶⁸ 2018 SKCA 56, affirming 2017 SKQB 278.

lawyer had died, but his file noted a reference to the brother being “well off” and “soon to be pensioned off”. The brother brought an application requiring the executors to prove the will in solemn form. He said that the testator knew that he was not well off, that he lacked education and sophistication and potentially had difficulty interpreting the will. The chambers judge rejected the brother’s arguments, regarded them as the brother’s subjective opinion that was not supported by independent evidence, held that they did not raise a genuine issue to be tried, and dismissed the application. On appeal the court found that the chambers judge did consider the issue of knowledge and approval in addition to capacity. But even if he considered capacity only, proof of capacity, combined with execution is enough to discharge the onus on the propounder, since knowledge and approval will then be presumed. The brother also raised the “doctrine of righteousness”. The Court of Appeal opined,¹⁶⁹ relying on the first edition of John Poyser’s text,¹⁷⁰ that the doctrine appears to be falling out of vogue. But regardless, it did not apply since the Chambers Judge found that the sister was not instrumental in having the testator make his will.

The court followed *Vout v. Hay*, as well as *Kapacilla Estate v. Otto*,¹⁷¹ which relied on *Schwartz v. Schwartz*.

Olson v. Skarsgard Estate¹⁷²

The deceased was a successful farmer. He was diagnosed with oesophageal cancer 2015 and married his common law spouse in March 2016. He had been in a relationship with her since 2000 and had a daughter with her. He made a will in which he named his wife his executor and sole beneficiary and died two months later. His sister opposed the wife’s application for probate and questioned the validity of the marriage. She argued that the wife was only a caregiver, that her brother was not the biological father of the wife’s child, and that he suffered from cognitive impairment. The pastor who performed the marriage testified about its

¹⁶⁹ *Ibid.*, para. 47.

¹⁷⁰ The passage can now be found in the second edition at 273-74. See footnote 4, *supra*.

¹⁷¹ Footnote 167, *supra*.

¹⁷² 2018 SKCA 64.

validity and the lawyer who drafted the will had no concerns about testamentary capacity. The sister claimed that she was the testator's sole surviving next of kin, but the chambers judge found that the sister did not have standing to contest the will, because she had not met the evidentiary burden of proving that she was a person interested in the testator's estate. and had not raised a triable issue regarding testamentary capacity. The Court of Appeal agreed and dismissed the appeal.

The court followed *Royal Trust Corp. of Canada v. Ritchie*,¹⁷³ which was confirmed in *Bachman v. Scheidt*,¹⁷⁴ both of which followed the principles set out in *Vout v. Hay*. The court also held that even if the wife was a caregiver and thus in a special relationship to the testator, that did not shift the onus of proof with respect to undue influence to the propounder.

Carlson v. Carlson Estate¹⁷⁵

A mother made a will in 1975 in which she left her property equally among all her children. In 2011 she made a new will in which she named her son, Warren, her executor and left him the bulk of her estate. Warren had taken her to her long-time lawyer. She told the lawyer that she disinherited her other children because they were all "millionaires", but did not present proof of that assertion. The lawyer had taken instructions from her on a number of occasions and testified that there was no confusion about who her family members were, what her property consisted of, and how the property should be distributed. A neurologist provided affidavit evidence, diagnosing the mother with Parkinson's, mild dementia, and no short-term memory recall. Warren brought an application for probate. Another son sought an order directing trial on the issues of capacity and undue influence. The court found that Warren had provided the evidence required to overcome the suspicions about testamentary capacity and so did not order a trial on that issue. However, it held that there was a genuine issue requiring a trial on the matter of undue influence.

¹⁷³ Footnote 166, *supra*.

¹⁷⁴ Footnote 164, *supra*.

¹⁷⁵ 2018 SKQB 196.

The court followed *Schwartz v. Schwartz* on the test for capacity. It followed *Dieno Estate v. Dieno Estate*,¹⁷⁶ *Bachman v. Scheidt*,¹⁷⁷ and other cases on the issue of the evidentiary burden and on the process to be followed in will challenge cases.

¹⁷⁶ Footnote 40, *supra*.

¹⁷⁷ Footnote 164, *supra*.