A few thoughts on testamentary capacity

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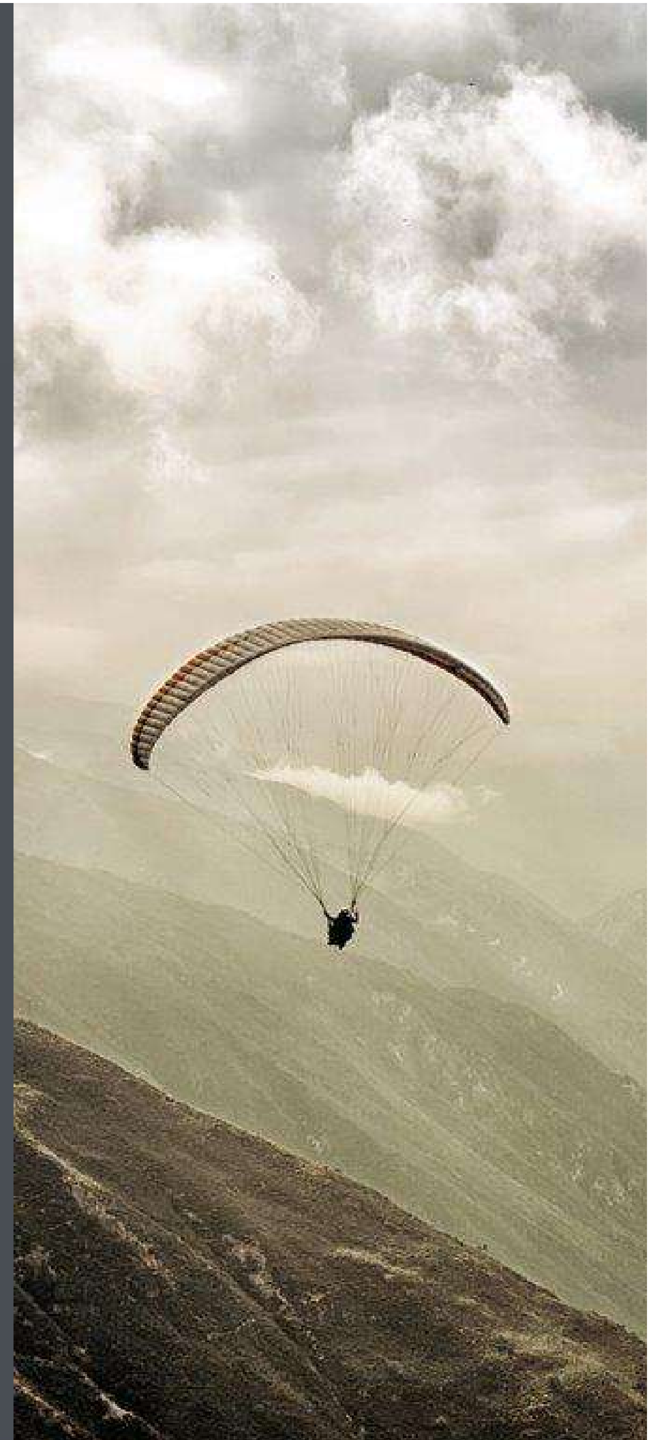

Sound mind

The age-old riddle of a sound mind has intrigued lawyers for hundreds of years.

The primary principle is that even if you are “situated in the struggle of death”, you may make a will if you are still sound in mind.

The four limbs test of *Banks v Goodfellow* (1870) is still widely excepted.

The testator must:

(1) understand the **nature and effect** of making a will; is the testator’s mind and memory “sufficiently sound to enable him to know and to understand the business in which he is engaged”?

(2) be aware of **the extent of the property** he is disposing of

(3) be able to comprehend and appreciate **the potential claim beneficiaries** who have a moral claim upon his estate, may have; and

(4) establish whether **a disorder of the mind** could have affected the testamentary intention.

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Rationality

- A specific and detailed knowledge of his assets is not required, provided that he **understands** the general proportions in which he wishes to leave his estate, and the reasons for such distribution are **rational**.
- As a general rule it can be accepted that the more complex the will, the more cognitive function is required.
- Testator capacity often goes hand in hand with allegations of undue influence by individuals close to the testator.
- In some matters it can be very challenging to determine whether a testator's limitations could have resulted in being influenced or manipulated in formatting a testamentary disposition. (*M.E.K v Pokroy*)

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United Kingdom

The approach in *Banks v Goodfellow* was again confirmed and applied by the England and Wales High Court, Chancery Division, in *Leonard v Leonard* [2024].

It was held that the first limb requires a consideration of the provisions of the particular document under consideration and not the ability to understand the effect of a will in the abstract. *The relative complexity or simplicity of the provisions of the disputed will may be relevant in this evaluation*.

In evaluating the fourth limb, the court acknowledged that dementia could cause a testator to fail. In past cases, *medical experts have disagreed on whether the fourth limb encompasses long-lasting illnesses such as dementia or only short episodes such as the onset of psychosis or delusions*.

What about a *lucidum intervallum?* (a temporary period of mental clarity).

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South Africa – sound mind

The *Banks* tests has been applied by South African courts since 1939.

In *Tregea v Godart:* the testator must be possessed of *sound and disposing mind and memory*, <u>even if he is not able</u> "to digest all the parts of a contract; and yet be competent to direct the distribution of his property by will".

The question was not so much the degree of memory possessed, but whether he had a **disposing memory**.

<u>Is he capable of recollecting the property he was about to bequeath, the value thereof, and the manner of distributing it?</u>

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South Africa – undue influence

In *Spies v Smith* (1957) the question was whether a person with limited mental capacity was unduly influenced by his uncle in the making of a will. The court required an action that amounts to *coercion or fraud* of such a nature that "the authentic wishes of the testator" has been replaced "with **a displacement of volition**".

The following factors had to be considered:

(i) the testator's mental state

(ii) his or her ability to resist prompting and instigation

(iii) the relationship between the people concerned.

It may not necessarily result in the will of the testator being replaced with that of the *heredipeta* (a legacy-hunter or erfenisjagter).

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Undue influence

In *Rea v Rea* (2010), the Court of Appeal explained that subjecting a testator to *persuasion* is both lawful and a less serious allegation than *coercion*. As a result, it becomes very difficult to infer that undue influence has been exercised in relation to a will. The Court described undue influence as 'inherently improbable'. *In most instances, it is a matter of persuasion rather than coercion*.

General principle: mere **persuasion** is lawful / **coercion** is unlawful.

The reality is that advanced age, cognitive limitations, and undue influence are often interconnected.

Coercion can present itself in various ways: from actual confinement or violence to a person at the end of his life, becoming so weak that very little pressure is sufficient to influence him in his decision-making.

For a court to make a finding of undue influence, it must first determine that the testator did possess testamentary capacity.

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M.E.K v Pokroy (2024)

In the recent matter of *M.E.K v Pokroy*, the plaintiff alleged that the deceased's mental state or capability to have appreciated the nature and effect of the acts of testation was compromised, leading to invalidity of the last three wills he signed.

To succeed in a challenge against the validity of a will, it must be proved on a balance of probabilities that the testator was mentally incapable of appreciating the nature and effect of his act.

The court asked the following questions:

(1) did the testator understand that he was making a will?

(2) did the testator understand the extent of his property?

(3) did the testator comprehend and appreciate the people he might benefit?

(4) is there any disorder of the mind that might poison his affections or pervert his sense of right or prevent his exercising his natural faculties?

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M.E.K v Pokroy

The court considered the following factors for an alleged displacement of volition:

(1) the testator's mental state

(2) The testator's ability to resist prompting and instigation

(3) the relationship between the people concerned.

The court relied substantially on the evidence of four medical experts, one being a psychiatrist.

The court ruled that the testator's "mental faculties were compromised by his illness, the effect and the treatment thereof, exacerbated particularly by the influence the relationship and his interaction with the second defendant had on him." The testator was vulnerable and at the mercy of the second defendant, resulting in him not being in a position "to resist the coxing or coercion".

The testator lacked the required testamentary capacity and the ability to exercise and execute a will at his own free will. The will did not reflect the testator's wishes but those of the second defendant.

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Legislation

Do the four limbs after 150 years still provide an adequate test for testamentary capacity?

Is the formulation still sufficient in the modern context, or is it necessary to review the test for establishing testamentary capacity?

The England and Wales Law Commission recently proposed replacing the common-law test in *Banks v Goodfellow* with the statutory definition of capacity under the *Mental Capacity Act* of 2005.

In South Africa the *Mental Health Care Act* 17 of 2002 includes in the definition of "severe or profound intellectual disability" the following as progressive stages:

(a) self-maintenance under close supervision

(b) limited self-protection skills in a controlled environment

(c) limited self-care and requiring constant aid and supervision

(d) requiring nursing care

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Conclusion

The international golden rule requires a **medical practitioner** to satisfy himself of the capacity and understanding of an aged testator or one who suffers from a serious illness. It is, however, not always possible and affordable to secure a diagnostic evaluation by a medical professional.

The **fiduciary practitioner** must understand exactly what they are assessing and how to conduct the assessment, without compromising the testator's wishes.

Contemporaneous assessment requires the following:

(1) an understanding of all relevant facts

(2) an appreciation of the consequences of taking or not taking specific actions.

In case of a significant change from prior wills, the assessor must determine the testator's ability to explain the rationale for the changes.

The **witnesses** to a will should fulfil not only the role of verifying the signature, but should at least be encouraged to form an opinion of whether the person signing the will as testator is familiar with and understands the contents of it.

Can it be expected of a 14-year-old child to make a sound summative assessment?

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Diagnostic Assessment Guidelines

- Understand the legal tests and formalities for making a will
- Set aside sufficient time for a comprehensive assessment
- In case of existing medical conditions, such as dementia, consider an assessment by a professional
- Apply the following criteria:

  (1) the testator's understanding and appreciation of any conflicts or tensions in his environment

  (2) an appreciation of the consequences of his wishes

  (3) clarity as to the exclusion of potential beneficiaries

  (4) evidence of behavioural or psychiatric symptoms

  (5) evidence of an inability to communicate his wishes in a clear and consistent manner
- Keep a detailed record of the meetings
- Inquire about previous wills and the reasons for changes in beneficiaries and asset distribution.
- When in doubt, do not destroy the old wills.

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Forms of assessment

A **contemporaneous assessment** of testamentary capacity means evaluating a person's mental competence to make a will at the time they are creating the will, rather than after their death.

This process may include both formative and summative elements.

A **formative assessment** would involve ongoing, low-stakes evaluation to gauge a testator's cognitive state over time and identify potential concerns early, allowing for adjustments or more in-depth assessment.

A **summative assessment** would be a final, high-stakes evaluation, such as a comprehensive clinical report at the time the will is signed, to determine the final conclusion on the testator's mental capacity to make a will.

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