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Determination of testamentary capacity involves not only application of standard tests for decisional competency but also consideration of such special factors as the testator’s “moral duty” to those entitled to her or his bounty (also referred to as “common obligations of life”), and the concept of emotional capacity. It is important for medical and legal practitioners who are involved in assessment of testamentary capacity to be aware of these special factors or requirements, their nature and their effect on the validity of the testator’s will. The relevant tests and special factors are examined from an historical perspective.

**INTRODUCTION**

Sir William Blackstone (1723-1780), in his *Commentaries on the Laws of England*, suggested:

> “It might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments at least so far as relates to the formal part of their execution.”1

Blackstone’s suggestion is as pertinent today as it was in 1765. The involvement of medical practitioners in the law of succession relates to the assessment of the testator’s mental capacity. Common law has adopted many aspects of the Roman testamentary law, including the requirement of legal capacity as a prerequisite of the will’s validity (iust testamenti faciendi).2 Indeed, Book 2.10 of Justinian’s *Institutes* begins with an etymologically absurd but telling statement: “Testamentum ex eo appellatur, quod testation mentis est” (“A testament is so called because it attests to the state of mind”). The required “state of mind” was that of “sound mind” (mens sana), which acquired a particular legal interpretation.

Persons suffering from mental illness (furiosi) did not have capacity to make a will because they were devoid of reason (quia mente carent).4 A will made by an insane testator remained invalid even if he became sane (compos mentis) afterwards. However, if the will was executed during a lucid interval,5 it remained valid, as did a will made before the onset of a mental illness. For, according to Justinian’s *Institutes*, the validity of wills or any other acts duly executed is not nullified by supervening mental illness.6 In the Digest 28.1.2, the 1st century CE Roman jurist, Domitius Labeo, is quoted as stating: “In the case of someone who is making his will, at the time when he makes the will, soundness of mind is required, not health of the body.” These principles still govern the modern law of wills (see below). Though in *Banks v Goodfellow* (1870) LR 5 QB 549 at 561, Lord Cockburn CJ, having pointed out that Roman authorities are silent on “what shall constitute madness or

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2 Under Roman law, the testator, witnesses to the will, and the heirs under the will had to have legal competence in relation to will-making (testamenti faciendi).
4 *Justinian’s Institutes*, Book 2.12.1.
5 For a modern example see *Kantor v Vosahlo* [2004] VSCA 235.
6 *Justinian’s Institutes*, Book 2.12.1: “furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est iure testasti esse videntur, certe eo quod ante furorum fecerint testamento valente: nam neque testamenta recte facta neque aliud ullam negotium recte gestum postea furor interveniens peremit.”
7 In eo qui testatur eius temporis, quo testamentum facit, integritas mentis, non corporis sanitas exigenda est.
defectiveness of intelligence, sufficient to prevent the exercise of the testamentary right”, devised his own – still authoritative – tests for testamentary capacity (see below).

The law of succession was always important, but it has become even more so with the rapid ageing of the Australian population and the corresponding increase in litigation between family members, beneficiaries and executors contesting the validity of wills (usually after the testator’s death, when the will is offered for probate). As in classical Rome, a testator’s capacity is determined by a judge or an administrative body empowered to make guardianship decisions. Unlike classical Rome, where it would have been rare for medical practitioners to act as expert witnesses, today medical practitioners, including psychiatrists, neurologists and geriatricians, are often asked to assist in ascertaining a testator’s decision-making capacity.10

Medical practitioners are generally aware that determination of testamentary capacity involves the application of standard tests for decisional competency to make binding dispositions and directions. General tests for competency focus on cognitive ability to understand the subject-matter of the decision (memory, language, complex motor and sensory tasks as well as visual and spatial performance). However, even a cursory examination of the case law suggests that both lawyers and medical practitioners are less aware of such additional factors as the testator’s “moral duty” to those entitled to her or his bounty (also referred to as “common obligations of life”) and the concept of emotional capacity, which are often critical to the court’s assessment of the deceased’s testamentary capacity. These factors limit the doctrine of absolute right of the testator to dispose of her or his property by will, which has its origins in the 18th century.11 Today the doctrine of freedom of testamentary disposition is based on the concept of personal autonomy,12 and it is considered an “important human right of any person to dispose of his or her property as he or she thinks fit”.13 The general tests of decisional competency and specific elements of testamentary capacity are discussed in turn.

**GENERAL PRINCIPLES GOVERNING DETERMINATION OF CAPACITY**

It is a fundamental rule in this area of the law that an individual’s capacity to make a will is a question of fact, whereas the assessment of whether the testamentary dispositions contained in the will are reasonable is a matter of law – and falls within curial discretion. When determining whether the testator had the required capacity at the time of making and executing the will, the court considers the whole evidence (both lay and medical) regarding the mental state of the deceased person and the surrounding circumstances. Medicine may provide a diagnosis and an explanation of the condition that impaired the person’s decision-making capacity; however, as Isaacs J pointed out in Bailey v Bailey (1924) 34 CLR 558 at 572: “While … the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge

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8 According to the last census, in 2001, 12% of the Australian population was aged 65 and over. The life expectancy at birth of Australian males and females is 76 and 82 years respectively. See Australian Bureau of Statistics: http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca2568200192af27DC312B50F2943ECA256B350010B3FF?opendocument viewed 19 October 2006.
9 In classical Rome most medical practitioners were either slaves or freedmen, who would not have had standing to either assess or testify in court.
from the facts they state and not from their opinions.”

In other words, testamentary jurisdiction differs from other branches of the law, insofar as the medical opinion, though admissible, will be disregarded unless it concerns facts, specifically the testator’s “soundness of mind” at the time of making the will.

Principally, testamentary capacity is presumed where the will has been duly executed, complies with all the formal requirements of the relevant legislation, and is rational on its face. This is because the law presumes that all adults of "sound mind" are legally competent. A competent adult can validly enter into binding contracts, make gifts, draw up a will, consent to or refuse medical treatment. Legal competence has three elements:

- legal adulthood;
- sound mind; and
- ability to communicate one’s decisions.

Thus, a will is not valid unless devised by an adult (a person of 18 years and over), who has legal capacity (sound mind). The concept of “sound mind” or, more precisely, “sound disposing mind” refers to the capacity of the decision-maker to understand, retain, believe and evaluate (ie, process), and weigh the information which is relevant to the will and dispositions therein. Since Roman times, the notion also involves the ability to understand the significance of one’s actions in terms of right or wrong. In the context of testamentary capacity, the requirement of sound mind involves, inter alia, adequate memory and understanding that is not unduly impaired by old age, enfeebled by illness, or affected by undue influence. Subsequent suicide of the testator, though a consideration in the determination of whether a deceased had testamentary capacity, is not regarded as conclusive proof of testamentary incapacity.

Where the party contesting the will presents evidence that the testator lacked mental capacity, the propounder of the will has to show on the balance of probabilities that the deceased person at the relevant time had the required testamentary capacity.

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14 His Honour referred to *Durnell v Corfield* (1859) 1 Sw & Tr at 402; 163 ER 961. See also *Scattini v Matters* [2004] QSC 459, in which Muir J rejected medical opinion stating that it was “highly unlikely … that the testator would have had capacity to sign the documents”.

15 In *Sutton v Sadler* (1857) 3 CB (NS) 87 at 98-99; 140 ER 671 at 676 Cresswell J said: “If, indeed, a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence offered, the jury would be properly told that they ought to find for the will, and, if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the will: and in each case the presumption in favour of competency would prevail.” See also *Perkess v Crittenden* (1965) 114 CLR 164; *Re Estate of Hodges (dec’d)*; *Shorter v Hodges* (1988) 14 NSWLR 698 at 705; *In Estate of TLB* [2005] SASC 459 at [43] (Gray J).

16 Legal competence or capacity and “sound mind” are legal, not medical, concepts. Hale M, *The History of the Pleas of the Crown* (E and R Nutt and R Gossling, Savoy, 1730) Vol 1, Ch 4, p 33: “In presumption of law every person of the age of discretion is presumed of sane memory, unless the contrary be proved; and this holds as well in cases civil as criminal.”

17 *Age of Majority Act 1977* (Vic), s 3; *Law Reform Act 1995* (Qld), s 17; *Age of Majority (Reduction) Act 1970* (SA), s 3; *Age of Majority Act 1972* (WA), s 5; *Age of Majority Act 1973* (Tas), s 3; *Age of Majority Act 1974* (ACT), s 5; *Age of Majority Act 1974* (NT), s 4; *Minors (Property and Contracts) Act 1970* (NSW), s 9. Under the *Succession Act 1981* (Qld), s 9, a married minor can make a valid will; a will made by a minor in contemplation of a marriage can only be validated if the contemplated marriage takes place.

18 The testator must be of sound mind at the time of signing the will: *Marquess of Winchester’s Case* (1598) 6 Co Rep 23a; 77 ER 287; *Arthur v Bokenham* (1708) 11 Mod Rep 148.

19 *Boughton v Knight* (1873) LR 3 P & D 64 at 76; *Bailey v Bailey* (1924) 34 CLR 558.

20 *Greenwood v Greenwood* (1790) 163 ER 930; *Harwood v Baker* (1840) 13 ER 117.


22 *Smith v Tubbs* (1867) LR 1 P & D 398 at 400.

23 In *Estate of TLB* [2005] SASC 459 at [46] per Gray J, who referred to *American Jurisprudence* (2nd ed, 1975) Vol 79, pp 358, 367 and 387-388. On the facts of the case, his Honour found (at [47]) that the testatrix’s suicide of itself did not indicate “that she was not of sound mind when she gave instructions for the preparation of the will or that she lacked testamentary capacity at the time of her death”. According to the testator’s treating psychiatrist, at the time of making the will the deceased had testamentary capacity.

24 In some cases, particularly where the testator was elderly or in a vulnerable position, an issue of duress or undue influence may arise, which, if established, has the effect of invalidating the disposition, even if the person was otherwise competent. Curial refusal of the grant of probate on the ground of the testator’s lack of testamentary capacity at the time of making the will means either intestacy or admission to probate of an earlier will.
Wills that have been substantially changed not long before the death of an elderly testator tend to be carefully scrutinised for testamentary capacity. The case of Norris v Tuppen [1999] VSC 228 illustrates the importance of understanding the principles of testamentary capacity assessment by medical practitioners. In this case, the testatrix, Mrs Tuppen, was 88 when her husband died in December 1990. The couple were childless and wealthy (in 1996 the estate was valued at approximately $1,213,700). They both abused alcohol, and Mrs Tuppen’s health was frail. In early 1991 Mrs Tuppen made a will, which was substantially the same as an earlier (1982) will, except that by a codicil, she willed an Arthur Boyd painting to one of her husband’s nephews, Robert Tuppen, and a Rosenthal tea service to Robert’s sister. Robert Tuppen, who had been a solicitor, and was by then a magistrate, under powers of attorney did “a good deal of work” to put the late Mr Tuppen’s financial affairs back into order (at [11]). Then in September 1992 a new solicitor, Mr Lukaitis, who was suggested to Mrs Tuppen by another nephew, Digby Norris, prepared a third will, in which Robert Tuppen and his sister were removed from the will, and instead, Digby Norris received much of their share of the residue (as well as the Boyd painting and the Rosenthal tea service).

Although on its face the 1992 will appeared rational, Ashley J refused the grant of probate, on the ground that at the time of executing the third will, Mrs Tuppen lacked testamentary capacity. In his judgment, Ashley J accepted the evidence of Dr Wood, who was Mrs Tuppen’s treating psychiatrist, that she had mild to moderate dementia (she scored 18 out of 30 on the Folstein test) and had delusions, which principally involved a belief that her husband was alive. However, the principal reason for Ashley J’s finding that she was incompetent to draw the 1992 will was Dr Wood’s evidence that Mrs Tuppen had developed a paranoid set (ideation) against Robert Tuppen. Her allegations against Robert Tuppen, which were the reason for his removal from the third will, had no basis in reality, and her “paranoid set” prevented her from being able to evaluate and discriminate between the respective strengths of claims upon her bounty by the potential beneficiaries. This was particularly so in view of the medical evidence that dementia made Mrs Tuppen extremely susceptible to suggestions, and that she was unable to formulate her own opinions. There was also corroborated evidence that the testatrix was unable to remember much of what had gone on in the preceding five minutes, or even a lesser period.

Mr Lukaitis knew that Dr Wood was Mrs Tuppen’s treating psychiatrist and that Dr Pick was her general practitioner for more than 30 years. Yet he asked his own general practitioner, Dr JFX Murphy, to assess Mrs Tuppen’s testamentary capacity on the day she executed her third will (at [78]). Ashley J noted (at [79]-[80]) that Mr Lukaitis’s covering letter to Dr Murphy was inaccurate, and that the solicitor “did not provide the doctor, who had never seen Mrs Tuppen before, with any of the medical reports” (which were in his possession). Dr Murphy did not seek any information about Mrs Tuppen’s clinical history, personal history or present treatment. He understood that his task “was to decide whether on the particular day Mrs Tuppen had testamentary capacity”. Dr Murphy diagnosed Mrs Tuppen as “essentially in the Alzheimer’s dementia realm”, but able to give fairly prompt, succinct and forthright answers to his questions. He noted short-term memory impairment but considered that Mrs Tuppen’s attention, concentration and long-term memory were “quite reasonable”, and that she was orientated in time, place and person. Mrs Tuppen gave...
him a “comprehensive run down of her family tree”, spoke of great fondness for Digby, and specifically
desired to exclude Robert Tuppen – but not his children. Although Dr Murphy did not know whether Mrs
Tuppen’s description of the family tree was in fact accurate, he opined that she possessed testamentary
capacity on that day.

In the course of cross-examination, Dr Murphy was asked whether it was part of his function to investigate
whether what appeared to be realities to Mrs Tuppen were rational or irrational. Dr Murphy replied that he
“respected her ability … to be as difficult or irrational about this” (the will) as she decided. He thought she
was a “slightly sort of contentious woman”, determined to “get back” at Robert Tuppen, but apparently
weighing up the other prospective beneficiaries in a very reasonable manner. Ashley J observed that Dr
Murphy’s opinions were somewhat compromised “by his having no information – personal or medical –
available when he interviewed Mrs Tuppen”. In particular, Dr Murphy was unaware that she had recently
been observed by Dr Wood to have taken a paranoid set against Robert Tuppen, and that in the period from
late 1991 onwards had made a series of irrational accusations against him.31 Moreover, according to his
Honour, having grudgingly acknowledged that dementia, with loss of higher cortical function, generally
involves at least some impairment of insight and judgment, Dr Murphy accepted at face value everything
he was told by the testatrix about the claims of various potential beneficiaries. Ashley J concluded that Dr
Murphy “seems not to have considered whether, by taking the approach that the testatrix was entitled to be
as irrational as she chose, he was effectively closing off a line of relevant enquiry as to whether or not her
decision-making capacity was impaired”. Ashley J’s conclusion reaffirms the rule articulated by Sir John
Nicholl in

\[ \text{Marsh v Tyrrell (1828) 2 Hagg Ecc 84 at 122; 162 ER 793 at 806:} \]

It is a great but not uncommon error to suppose that because a person can understand a question put to him,
and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will
for any purpose whatever, whereas the rule of law, and it is the rule of common sense, is far otherwise; the
competency of the mind must be judged by the nature of the act to be done, and from a consideration of all
the circumstances of the case.

Mrs Tuppen was diagnosed with dementia. Many patients with mild dementia have a syndrome known as
“word-finding difficulty”, and are often unable to articulate ideas (expressive aphasia).32 If an adult lacks,
whether permanently or at the time of making the will, ability to communicate in a coherent manner, he or
she will be deemed incompetent.33 However, where the person is lucid and has capacity to communicate, it
can be oral, via computer or by means of a coded system of nods, blinks or other bodily movements. Once
drafted, a will can be validly executed by a mere mark. Thus in

30 Though she was able to give her name and address, Mrs Tuppen was not sure of her age, gave her birth date incorrectly, nominated
the year as 1991 instead of 1992, could not recall what month it was and nominated the wrong day of the week, but explained in detail
the reasons for her desire to exclude Robert Tuppen from the will (at [83]).
31 According to Ashley J, the case did not require him to determine whether ascribing all kinds of conduct to Robert Tuppen was the
product of the testatrix’s own mind, or the product of Digby Norris’s suggestions.
32 Helme R and Mendelson D, “Causation in Alzheimer’s Disease and the Law” in Freckelton I and Mendelson D (eds), Causation in
33 Lord Goff of Chieveley in

\[ \text{Re F (Mental Patient: Sterilisation) [1990] 2 AC 1 at 73-77.} \]

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\[ \text{Bailey v Bailey (1924) 34 CLR 558, the High Court (Isaacs, Gavan Duffy and Rich JJ; Knox CJ and Starke J dissenting) declared valid a will of an 88-year-old testator who, three days before his death on 17 May } \]

1923, too weak to write his name, executed his will by signing it with a mark. On 11 May 1923 he gave
instructions to revoke all former wills (which favoured some of his children over others), and gave all his
property upon trust for division equally between all his children.34 Though he did not explicitly mention it,
Isaac J (at 572) adopted the Roman approach when he cited with approval Kent Ch in

\[ \text{Van Alst v Hunter 5 Johns Ch (NY) 148 at 158 (1821) who in turn was quoting from Henry Swinburne’s A Brief Treatise on Testaments and Last Wills,} \]

35 when he said that “a man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments”36.

BANKS V GOODFELLOW TESTS OF TESTAMENTARY CAPACITY

The classic exposition of the jurisprudence and test of testamentary capacity was provided by Lord
Cockburn CJ in

\[ \text{Banks v Goodfellow (1870) LR 5 QB 549.}\]

In this case the testator, Mr John Banks, who
died unmarried in 1865, made the will in 1863 in favour of his sister’s daughter, Margaret Goodfellow.38

The will was contested by the son of the testator’s half-brother (also called John Banks), on the basis that it was invalid because in 1841 the testator was for some months confined in a county lunatic asylum, and though discharged, remained till his death subject to delusions (claiming that he was being molested by a man who was dead, and pursued by evil spirits). Nevertheless, he managed his own money affairs, and at the time of making the will was also negotiating the lease of one of his properties. The lawyer who drafted the will testified that Mr John Banks “fetched from his room a will which he had made in 1838, in favour of his sister, who had since died, and said he wished to give all his property to his niece, Margaret Goodfellow, in the same way” (at 552).

The case was appealed from a jury’s finding that at the time of making the will, irrespective of his delusions, the testator had the required capacity. The question before the court (at 555) was whether “delusions arising from mental disease”, that neither “prevent the exercise of the faculties essential to the making of a will”, nor “interfere with the consideration of the matters which should be weighed and taken into account on such an occasion”, and which did not in point of fact have any “influence whatever on the testamentary disposition in question, are sufficient to deprive a testator of testamentary capacity and to invalidate a will”.

Lord Cockburn (at 556) rejected those legal precedents,39 which held that “any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator” on the basis that they were based on the then current medical theory of mind being “one and indivisible”. Instead, his Lordship declared (at 560) that whatever is the “essence” of the mind, its faculties and functions such as the senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination and

memory are distinct. Noting that the power of disposing of property in anticipation of death involves moral responsibility, Lord Cockburn (at 565) devised a test of testamentary capacity comprising of four cumulative elements (all must be present):

It is essential to the exercise of such a power that a testator shall [1] 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 ought to give effect; and, with a view to the latter object, [4] that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.40

His Lordship then explained the reason for the fourth element (at 565, emphasis added):

If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its function, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.

Persons suffering from an “insane delusion” will lack testamentary capacity, if their mind is “overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life” (emphasis added). All delusions are false
beliefs – that is, they have no foundation in reality. In *Dew v Clark and Clark* (1826) 3 Addams 79 at 90-91, Sir John Nicholl stated that a “patient is said to be under delusion” wherever he “conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or at least being permanently, reasoned out of that conception”. More recently, “insane delusions” have been defined as beliefs and ideations that are “not capable of rational explanation or amenable to reason, and … [are] not explicable by reference to the subject person’s education and culture”. A

Lord Cockburn emphasised – in the flowery language of the 19th century – that sometimes delusions are circumscribed, in the sense that a person may have delusions about a particular subject while being entirely rational about other matters. Indeed, according to his Lordship, a person is considered to have testamentary capacity if the “insane delusions” are of the kind that “leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life”.

For example, in *Wechsler v Du Maurier* [2002] NSWCA 13, the deceased, Mrs Fiala, made a will in October 1995 (two years before her death), in which she devised her residual estate of over $6 million in the proportions of 60% to her daughter Mary Du Maurier and 40% to her daughter Katie Wechsler. The reasons for the unequal distribution were explained thus. In 1994, having given Mary and Katie equal gifts amounting to $1 million each over a period of five years, Mrs Fiala was told by Katie and her husband, Dr Wechsler, that the gifts she made to Katie resulted in a large debt to the Wechslers’ company of which she was a partner. The Wechslers told her that the debt had to be repaid with interest. Mrs Fiala accepted that as a result of her gifts to Katie she owed the Wechslers $779,000, but believed that Katie and Dr Wechsler should have either refused the gifts, or warned  

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In *Wechsler v Du Maurier*, the court (at [26]) accepted evidence of Mrs Fiala’s treating psychiatrist that she did not suffer from any delusion in the clinical sense, or from any other condition which would compromise her capacity to make a will. However, the validity of a properly executed will may not be impeached even where the evidence points to some degree of cognitive impairment, or a psychiatric disorder, providing these conditions do not affect the testator’s emotional and moral capacity to discharge her or his “common obligations of life”.

**“COMMON OBLIGATIONS OF LIFE” AND EMOTIONAL AND MORAL CAPACITY**

The question whether the testator possessed emotional and moral capacity to create the will is critical to determining its validity. The concept of moral capacity refers to the “common obligation of life”, also
called “natural duties”, whereby testators are expected to fairly and adequately provide for their families.45 This concept too, goes back to the Roman law (the lex Falcidia, Digest 35.2.1.pr), which stipulated that close relatives (descendants, ascendants, brothers and sisters) must take “not less than a quarter” of what they would receive on intestacy.46 This was known as the “statutory share” (legitima portio) rule.47 Unless there were valid reasons for providing less than the statutory share, for outright exclusion or for unequal treatment of the next relations, the will was open to challenge on the ground that the testator disregarded his natural duties, and his will was “irresponsible”.48 In civil law countries, this rule found its modern expression in the institution of legitim (statutory right to a share of the deceased’s estate).49 Common law rejected the legitima portio rule in favour of the doctrine of freedom of testamentary disposition; however, under family maintenance legislation in each Australian State and Territory,50 a person for whom the deceased had responsibility to make “proper provision” has the right to make an application to the court to order that an adequate provision be made out of the estate of the testator for the claimant’s proper maintenance and support.51

49 See eg Planiol M (with collaboration of Ripert G), Treatise on the Civil Law No 3049 (11th ed, translated by the Louisiana State Law Institute, West Pub Co, St Paul, Minnesota, 1958) p 490.
45 Stein JA (at [39]) cited the statement of Gleeson CJ in Easter v Griffith (unreported, NSWCA, 7 September 1995), p 10 that “the law treats as critical the distinction between mere antipathy, albeit unreasonable, towards one who has a claim, and a judgment which is affected by a disorder of the mind”.
46 Vigolo v Bostin (2005) 221 CLR 191. In Wechsler v Du Maurier, for instance, the court noted (at [5]) that Katie’s 40% share of the residue amounted to about $2.4 million, and hence “was not a case of a testator making no provision for her child”.
47 In Inheritance (Family and Dependants Provision) Act 1972 (WA), ss 6, 7, Family Provision Act 1982 (NSW), ss 7, 8, Family Provision Act 1970 (NT), ss 7, 8, Family Provision Act 1969 (ACT), ss 7, 8; Inheritance (Family Provision) Act 1972 (SA), ss 6, 7, Testator’s Family Maintenance Act 1912 (Tas), ss 3, 3A; Succession Act 1981 (Qld), Pt IV.
48 In Administration and Probate Act 1958 (Vic), s 91; Inheritance (Family and Dependants Provision) Act 1972 (WA), ss 6, 7; Family Provision Act 1982 (NSW), ss 7, 8; Family Provision Act 1970 (NT), ss 7, 8, Family Provision Act 1969 (ACT), ss 7, 8; Inheritance (Family Provision) Act 1972 (SA), ss 6, 7, Testator’s Family Maintenance Act 1912 (Tas), ss 3, 3A; Succession Act 1981 (Qld), Pt IV.

In Vigolo v Bostin (2005) 221 CLR 191, which involved a claim under Inheritance (Family and Dependants Provision) Act 1972 (WA), s 7(1), Gummow and Hayne JJ (at 218) criticised the use of the notion of “moral duty” or “moral obligation” owed by testators to their spouses and children as inappropriate – “liable to be misunderstood” – in relation to the interpretation of the modern family maintenance provisions.52 However, in the same case, Gleeson CJ explained (at 199-200) that the statutory phrase “proper provision” refers to the notion of “testamentary duty”, which historically “justified legislative interference with a free exercise of testamentary capacity, that is, the duty of a man to make provision for his wife and children, was seen as a moral duty”. His Honour added that “judicial explanation of what was meant by proper provision was based upon the idea of a moral obligation arising from a familial relationship”. Hargrave J of the Supreme Court of Victoria in Herszikowicz v Czarny [2005] VSC 354 followed a line of Victorian authorities when he reiterated (at [109]) the continuing relevance of moral duty as the idea that informs “the determination of the question whether a responsibility exists to make provision for a claimant” under the Administration and Probate Act 1958 (Vic).53

Although the relevance of the concept of “moral duty” to the family maintenance legislation is still to be refined, Green’s study of many cases of contested wills revealed that courts tend to uphold as valid testamentary dispositions which appear to have reasonable distribution of assets to the family, even though the conduct or medical/psychiatric condition of the testator may suggest quite severe impairment of testamentary capacity.54 Conversely, wills of testators who have been assessed as competent by medical practitioners and lay witnesses have been set aside, where the testator’s bounty was left to strangers rather than the family.
An example of the “unarticulated standard” of moral obligation in determining testamentary capacity is the case of *Sharp v Adam* [2006] EWCA Civ 449. The testator, Mr Adam, who for nearly 20 years suffered from progressive multiple sclerosis (MS), died in 2002, aged 70. In June 2001 he changed his 1997 will, which left the residue of his estate to his two daughters. The 2001 will excluded his daughters, and the residue was left to two employees who worked for Mr Adam and managed his business for many years. Although at the time of making the will, the testator was paralysed from the neck downwards, his carers, two solicitors and a general practitioner, all of whom had regular contacts with the deceased and were present when he made the 2001 will, testified that he had sufficient understanding to make a valid will and to communicate his instructions for it (at [4]). Nevertheless, Lord May MR (Jacob LJ agreeing) preferred the opinions of two medical witnesses who had never seen Mr Adam. One, Professor Ron, opined that the testator probably did not have testamentary capacity in June 2001; while the other, Dr Hawkes, was “satisfied” that, despite the presence of MS, “at the time he gave instructions for the Will (1 May 2001) and at the time of final execution of the Will (1 June 2001), he was of testamentary capacity as defined by *Banks v Goodfellow* … and understood the content and consequences of his final Will”.

However, Dr Hawkes also expressed concern that the 2001 will marked “an abrupt change of plan” one year before the testator’s death, noting: “This might be considered irrational conduct and indeed I am sure his daughters would believe that to be the case. As a lay observer I do find it odd that he did not leave a penny to his two daughters.”

The court agreed, declared the 2001 will invalid (which meant that the 1997 will became operative), on the ground that Mr Adam lacked testamentary capacity. According to Lord May MR (at [93]):

[[T]he fourth element in *Banks v Goodfellow* – “poison his affections, pervert his sense of right or prevent the exercise of his natural faculties”, “no insane delusions …” – is concerned as much with mood as with cognition.

Referring (at [72]) to the passage in *Banks v Goodfellow* which speaks of “an obligation of the moral law” as remaining “essentially true today”, Lord May MR pointed to the total exclusion of Mr Adam’s daughters from the will, and answered in the affirmative the question whether “the damage to Mr Adam’s mind resulting from multiple sclerosis deprived him of the necessary clarity of thought to enable him to make a rational decision or affected his natural feelings for his daughters or his sense of right”.

Between 1 May and 1 June, Mr Adam’s solicitors, as well as his medical practitioner, tried to persuade him to include his daughters in the will. While placing great emphasis on the testator’s cognitive capacity, they did not consider the issue of his “moral obligations” to the daughters – had they advised him that by excluding his children he created a risk of the will being declared invalid, he would probably have made some provision for them (Mr Adam at one stage contemplated leaving the house to the two daughters).

**EMOTIONAL CAPACITY**
The standard for determining the existence of testamentary capacity is subjective. The question is not how a reasonable person in the shoes of the testator would have decided to dispose of the property in question, but what the actual testator would have done, absent the “disorder of mind”. As noted, a “disorder of mind” may involve either cognitive impairment or an emotional disturbance. In Sharp v Adam Lord May MR noted (at [93]) that the test in Banks v Goodfellow “is concerned as much with mood as with cognition”. His Lordship did not elaborate; however, the reference to “mood” suggests the notion of diminished emotional capacity (through depression or other mood-altering conditions), which may influence the testator’s disposition of the property in a way in which he or she would not have done otherwise. Disease at any stage of life is frequently accompanied by stress and/or pain, productive of depression, which may impair the patient’s ability to function competently in evaluating information and making decisions.60 Mild to moderate dementia is frequently co-morbid with depression.61 Consequently, when assessing the testamentary capacity of a demented person in the period of a lucid interval, medical practitioners need to ascertain (i) whether the patient’s decisions and statements adequately reflect her or his affective state; and (ii) whether the cognitive and affective changes stemming from dementia and depression have deprived the patient of testamentary capacity

61 A person’s “affect” refers to her or his immediate emotional experience. In psychiatric practice, subjective affective sensations such as pleasure, displeasure, irritation, etc, as reported by the patient, are equivalent to symptoms; the observed mood and affective display (anger, joy, sadness, hurt, etc) serve as objective signs. The term “mood” refers to a more sustained and less flexible mental state over a longer period of time. In depression, the affective sensations are often shallow, inadequate or flattened: Ketal R, “Affect, Mood, Emotion and Feeling: Semantic Considerations” (1975) 132 Am J Psychiatry 1215.

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by “poisoning” her or his attachment and solicitude to close relatives.62 As Ashley J pointed out in Norris v Tuppen, it is the role of the psychiatrist to ascertain whether what appears to be a reality to the testator is rational or irrational (has no basis in fact).

To sum up, the test for testamentary competence includes moral, emotional and cognitive capacity: all three aspects of competence must be present at the time the testator executes the will. In making a will, a testator must understand the concept of the will, the nature of testamentary disposition and its effects, the extent and value of the property being disposed of,63 and appreciate the claims of possible beneficiaries.64 When assessing testamentary capacity, the medical practitioner has to consider the patient’s cognitive and emotional capacity specifically in the context of making the will, aware of the fact that unless close relatives of the testator have been adequately provided for (either through gifts inter vivos or under the will), its dispositions may be open to challenge.

Danuta Mendelson

62 Re Estate of Hodges (dec’d); Shorter v Hodges (1988) 14 NSWLR 698.
63 Re Beaney (dec’d) [1978] 1 WLR 770; Grynberg v Muller [2001] NSWSC 532.
64 Banks v Goodfellow (1870) LR 5 QB 549 at 565; In Will of Wilson (1897) 23 VLR 197 at 199.