

# **TESTAMENTARY CAPACITY OF COGNITIVE-IMPAIRED ELDERLY – WHEN IS OLD TOO OLD TO EXECUTE A WILL?**

MC Schoeman-Malan  
*BA(Law) LLB LLD*  
*Professor of Law*  
*University of Pretoria*

## **SUMMARY**

Freedom of testation is a foundational principle of South African testate succession, and there are relatively few restrictions on a testator's sudden and impulsive change of heart. Two requirements need to be met, namely a person must have testamentary capacity and the prescribed formalities must be complied with. The requirement for testamentary capacity is assumed if one complies with the formalities. Testamentary capacity has a minimum age but is not restricted by old age. However, it calls for the testator to be of an unsound mind and therefore to have mental capacity at the time of executing a will. World statistics show that there is an increase in the number of older and often also wealthier people as modern research and medicine allow people to live longer and healthier lives, resulting in the increase in the average lifespan. Cognitive impairments such as dementia and Alzheimer's disease often arise with the elderly which have become more prevalent over the last 30 years.

This article explores testamentary capacity of the elderly against the backdrop of cognitive impairments and the ability to accumulate wealth, which means that old people often have more assets that can devolve (often to their relatives) upon their demise. In the contest of wills testamentary incapacity of the testator (at the time of the execution of the will), has become the most frequent reason for challenging a will. In this contribution, recent case law from South African and other jurisdictions relating to testamentary capacity, from which we can gain knowledge, are discussed to establish how the courts deal with old age combined with cognitive impairments such as dementia and Alzheimer's disease. The focus is on impairments affecting the mental status of older testators and to observe to what degree these aspects influence or negate testamentary capacity. The conduct of another person, such as undue influence, fraud and duress are distinguished from the testamentary capacity of an individual and is not the focus of this contribution. In conclusion the question is considered whether elderly people, who are vulnerable due to age and other impairments, enjoy freedom of testation and if their testamentary capacity is sufficiently protected by the common-law principles.

## **1 INTRODUCTION**

When Nelson Mandela (1918–2013) passed away at the advanced age of 95 he was regarded as “a frail, distant, unsmiling, emotionless and numb old

man”.<sup>1</sup> The legacy of this dignified elderly man left people all over the world in awe. The late anti-apartheid icon left an estate valued at more than R46 million. His will (a 40-page document) was executed on 12 October 2004 with final amendments made in 2008.<sup>2</sup> This means that he was aged 90 when he last made amendments to his will.<sup>3</sup>

The death of Richard Doll on 24 July 2005 at the age of 92, after a short illness, ended his extraordinarily productive life in science.<sup>4</sup> A plaque inside the Richard Doll building in Oxford, Oxfordshire County, contains the following quotation from Doll:

“Death in old age is inevitable, but death before old age is not. In previous centuries 70 years used to be regarded as humanity’s allotted span of life, and only about one in five lived to such an age. Nowadays, however, ... in Western countries, the situation is reversed: only about one in five will die before 70, and the ... death rates are still decreasing, offering the promise, at least in developed countries, of a world where death before 70 is uncommon.”

These were in fact insightful words from Doll, which were shown to be true.<sup>5</sup> People in modern times are living longer (becoming older) and are wealthier than before.<sup>6</sup> It is projected that, by 2025, the proportion of older South Africans will increase to 10,5% and the number of older people to 5,23 million.<sup>7</sup> This is a global tendency and the number of older persons (aged 60 years or over) is expected to more than double, from 841 million people in

<sup>1</sup> Tiki “Madiba’s Will Didn’t Honour the ANC of Today” 9 February 2014 *City Press* <http://www.citypress.co.za/you-say/madibas-will-didnt-honour-anc-today/> (accessed 2014-10-29).

<sup>2</sup> *Ibid.*

<sup>3</sup> Recently his testamentary capacity came to the fore when his ex-wife Winnie Madikizela Mandela challenged the validity of his will. Sapa “Mandela Executors to Oppose Winnie’s Qunu Bid” 15 December 2014 <http://www.timeslive.co.za/politics/2014/12/15/mandela-executors-to-oppose-winnie-s-qunu-bid> (accessed 2015-01-06).

<sup>4</sup> See Kinlen “Sir Richard Doll, Epidemiologist – A Personal Reminiscence with a Selected Bibliography” 2005 93 *British Journal of Cancer* 963–966.

<sup>5</sup> Statistics South Africa “Report-03-19-00 – Social Profile of Vulnerable Groups in South Africa” 2002-2011 12 July 2012 [http://www.statssa.gov.za/publications/report-03-19-00/report-03-19-002009\\_93ff](http://www.statssa.gov.za/publications/report-03-19-00/report-03-19-002009_93ff) (accessed 2014-10-17). When Augusto Pinochet, head of state of Chile, died in 2006 he was aged 91. He left a will which was apparently prepared shortly before his death. The late dictator’s known wealth, including real estate, cars and several million dollars in bank accounts, remains embargoed. See “Augusto Pinochet’s Will to be Opened Despite Family Protests” 25 April 2012 *The Guardian* <http://www.telegraph.co.uk/news/worldnews/southamerica/chile/9225337/html> (accessed 2014-12-09).

<sup>6</sup> Censky “Older Americans are 47 times Richer than Young” 28 November 2011 [http://money.cnn.com/2011/11/07/news/economy/wealth\\_gap\\_age/](http://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/) (accessed 2014-12-01); United Nations Department of Economic and Social Affairs Population Division Report “World Population Ageing” 1950-2015 <http://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2013.pdf> 3ff (accessed 2014-10-05). In the United States older adults hold a disproportionate amount of wealth and, although people older than 65, currently comprise only 13 % of the population they hold 34 % of the nation’s wealth.

<sup>7</sup> Ramashala *Living Arrangements, Poverty and the Health of Older Persons in Africa* (2002) 14 states: “As the number of older people in Africa continues to increase, particularly those who are 75 years of age and older, growing public policy and service delivery attention must, of political and human necessity, be focused on the problems and needs of older adults.” [http://www.un.org/esa/population/publications/bulletin42\\_43/ramashala.pdf](http://www.un.org/esa/population/publications/bulletin42_43/ramashala.pdf) (accessed 2014-11-09). See also Joubert and Bradshaw “Growing Numbers of Older Persons in South Africa Ageing Information Sheet” 2006 *Medical Research Council, Burden of Disease Research Unit* 4 June 2013 <http://www.sahealthinfo.co.za/bod/older.htm> (accessed 2014-11-17): “The growth in numbers is expected to occur in each five-year age group above 60, with substantial growth particularly in the number of older women.”

2013 to more than 2 billion in 2050.<sup>8</sup> An inevitable consequence is that as the number of people over the age of 80 years continues to increase, so too will the number of deaths.<sup>9</sup> As people grow older they at times have a greater opportunity to accumulate wealth, which means that there are more assets that can devolve (in anticipation of the relatives) at their passing.<sup>10</sup> When an elder testator's will is challenged, on the basis of testamentary incapacity (lack of mental capacity),<sup>11</sup> the impact of age and additional impairments such as dementia and Alzheimer's disease is often raised. The combination of old age, wealth, cognitive decline and financial incapacity, represent a

<sup>8</sup> *Ibid.*

<sup>9</sup> The 2013 *United Nations Report* 43 indicates that population ageing, along with population growth, results in a rapidly growing number of deaths in the world. Further it indicates that older persons are projected to exceed the number of children for the first time in 2047. See *In The Will of Edward Victor Macfarlane, Deceased* [2012] Queensland Supreme Court 20, where testator died aged 96; *Kerr and Anor v Badran and Anor, Estate of Badran* [2004] New South Wales Supreme Court 735, where a will was executed when the testator was 87 and he died aged 95; *Trust Company of Australia Limited v Daulizio* [2003] Victoria Supreme Court 358, where the testator was aged 93 when he executed a will and died at the same age; *Key v Key* [2010] England and Wales High Court 408 (EWHC) (Ch) the testator died aged 90; *Simon v Byford* [2013] EWHC 1490 (Ch) the testatrix died aged 91 and executed her will on her 88<sup>th</sup> birthday; *Re Bechal, Blackman v Man* [2008] WTLR 389; [2007] CH D 7, where testatrix died aged 89; *Matter of Astor* 2008 New York Slip Op 50198 (U) 18 Misc 3d 1124 (A), where the testatrix died aged 105; *In re Estate Lacey* 84 Massachusetts Appeal Court 1108 (29 August 2013), where the testatrix was born in 1917, and died in 2007 (just before her 90<sup>th</sup> birthday); *In the Estate of Wilbur Waldo Lynch, Deceased* 2011 (Court of Appeals of Texas, San Antonio) number 04-09-00777-CV; *In The Matter of the Estate of Blanche Riordan, Deceased* Superior Court of New Jersey (Appeal Division) (unreported) 2011-06-17 Case number A-4123-09T4, A-4464-09T4 died aged 91; *Frizzo & Anor v Frizzo & Ors* [2011] Queensland Court of Appeal 308; *Hawes v Burgess* [2013] EWHC Civ 74; and Atkinson and Kanani "Satisfying Banks v Goodfellow" 2013 *Trusts and Estates Law & Tax Journal* 26.

<sup>10</sup> Censky [http://money.cnn.com/2011/11/07/news/economy/wealth\\_gap\\_age/](http://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/). See also "Huguette Clark Faithful Nurse" 21 September 2013 *Daily Mail Reporter* <http://www.dailymail.co.uk/news/article-2427914/Huguette-Clark-faithful-nurse-ordered-5M-relatives-met-reclusive-heiress.html> (accessed 2014-11-28); Huguette Clark died aged 104 in 2011 and left millions to philanthropic foundations, her nurse, her attorney and accountant. Her last will and testament stated that her copper fortune should not go to her relatives. 19 Family members contested the will. The only reference to the proceedings is *In the Estate of Huguette M Clark, deceased* (unreported) 2011-06-22 File number 1995/1375A. See also *In re: Estate of Betty M Harris, deceased* (Estate no 13-e-000463) County of Gwinnett State of Georgia where the rich, lonely woman Betty Harris, who died aged 95, leaves a \$12.5 million estate to her neighbour. The will was contested in *Gray v Hart & Ors* [2012] NSWSC 1435. Harris disinherits her relatives and leaves her multi-million-dollar estate to the nice people who live next door. Prior to her death in 2009, she was a childless widow who lived alone in her mansion on Sydney's "millionaire's row". She became convinced that her "pathetic" nieces and nephews were trying to put her in a nursing home and seize control of her estimated \$12.5 million fortune. The will gave her entire estate to her neighbours, the Grays.

<sup>11</sup> See Du Toit "Mental Capacity as an Element of Testamentary Capacity" 2005 *SALJ* 661ff; Du Toit "Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?" 2013 6 *Journal of Civil Law Studies* 509-551; Sonnekus "Testeer-bevoegdheid en Testeervryheid as Grondwetlik Beskermdte Bates" 2012 75 *THRHR* 1ff; 2012 76 *THRHR* 171ff; Sonnekus "Freedom of Testation and the Ageing Testator" in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007) 78ff; De Waal and Schoeman-Malan *Law of Succession* (2008) 36; Frolik "The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?" 2001 24 *International Journal of Law and Psychiatry* 253-266; Regan and Gordon "Assessing Testamentary Capacity in Elderly People" 1997 *Southern Medical Journal* 13-15.

tremendous and growing challenge to societies.<sup>12</sup> In the law of succession it is apparent that as people live longer and become older, there is an increase in the percentage of cases where the testamentary capacity of the elderly (usually combined with another factor), is challenged. The limits to life expectancy and lifespan are not as obvious as once thought.<sup>13</sup>

As people live longer, there has, in recent years been an explosion of research in the field of testamentary capacity and cognitive impairments of elderly and dementia-affected people.<sup>14</sup> Testamentary capacity poses, on the one hand, a legal question and on the other hand, a medical question as to the mental capacity of elderly persons (who have been diagnosed with such an illness) to execute a will.<sup>15</sup>

In this contribution some of the recent judgments in South Africa law and other jurisdictions, where the testamentary capacity of an elderly person was pertinent, are discussed.<sup>16</sup> The issues are dealt with from a law-of-succession point of view. The increase in lifespan and its impacts on testamentary capacity, is discussed. The effect of recent research in the field of aging and dementia is surveyed to determine whether this contributes to a better understanding of testamentary capacity when executing a will at an advanced age.<sup>17</sup> It will be shown that an individual can retain legal capacity despite

<sup>12</sup> Hoffman "The Basics of Testamentary Capacity for Geriatric Neuropsychologists" 2010 *The California Psychologist* 15–18; Chafetz [http://expertpages.com/news/assessing\\_testamentary\\_capacity.htm](http://expertpages.com/news/assessing_testamentary_capacity.htm) "Assessing Testamentary Capacity: Some Sensible Advice" *Expert Article Library* [http://expertpages.com/news/assessing\\_testamentary\\_capacity.htm](http://expertpages.com/news/assessing_testamentary_capacity.htm) (accessed 2014-11-26).

<sup>13</sup> See *Gildenhuys v Gildenhuys* [2010] ZAWCHC 21 where the testatrix in her 80s; *Levin v Levin* [2011] ZASCA 114, where the testatrix died aged 107; *Lipchick v Master of the High Court* [2011] ZAGPJHC 49 the testatrix died a few days short of her 95 birthday; *Vermeulen v Vermeulen* [2012] NAHC 23; *Vermeulen v Vermeulen* 2014 NASC 7 (exact age not established but diagnosed with Alzheimer's disease); *Scott v Master of the High Court Bloemfontein* [2012] ZAFSHC 190 testator died aged 95; and *Malan v Strauss* FSHC (unreported) 2013-11-28 Case number 1462/2012, where the testatrix was 96 when she passed away. See also Satow "He Left a Fortune, to No One" 27 April 2013 *The New York Times* reports on the death of Roman Blum who died aged 97 and left behind an estate valued at almost \$40 million. He died without a will.

<sup>14</sup> Chafetz *Expert Article Library*; Moye and Marson "Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research" 2007 62 *Journal of Gerontology* 3. See also Michelon "What are Cognitive Abilities and Skills, and How to Boost Them?" 18 December 2006 <http://sharpbrains.com/blog/2006/12/18/what-are-cognitive-abilities/> (accessed 2014-11-05): "Cognitive abilities are brain-based skills we need to carry out any task from the simplest to the most complex. They have more to do with the mechanisms of how we learn, remember, problem-solve, and pay attention rather than with any actual knowledge. For instance, answering the telephone involves at least: perception (hearing the ring tone), decision-taking (answering or not), motor skill (lifting the receiver), language skills (talking and understanding language), [and] social skills, interpreting tone of voice and interacting properly with another human being."

<sup>15</sup> See fn 9 10 and 13 above.

<sup>16</sup> There are literally hundreds of reported and unreported cases. This discussion only deals in detail with some recent SA cases and a few cases from other jurisdictions.

<sup>17</sup> In the case *Matter of Astor supra*, Brooks Astor suffered from dementia over several years and died aged 105; see fn 14 above; Hoffman 2010 *California Psychologist* 15; Chafetz *Expert Article Library* states: "A dementing illness such as Alzheimer's disease by itself may not be sufficient to deprive Dad [one] of his testamentary capacity, because state laws usually hono[u]r a testator's wishes and rarely legalize roadblocks against the wishes of a testator." See also Ryznar and Devaux "Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests" 2013 *Nevada LJ* 1 5; Sonnekus 2012 *THRHR* 1ff.

aging, demonstrating strange behaviour, eccentric beliefs or experiencing medical conditions which cause confusion and memory deficits (signs of dementia and Alzheimer's disease).<sup>18</sup>

## 2 FREEDOM OF TESTATION AND OLD AGE

The freedom to leave your belongings to whomever you please is a principle that is highly valued in most societies.<sup>19</sup> The common law underlines the principle of freedom of disposition, sometimes subject to some common-law and statutory-law restrictions.<sup>20</sup> However, none of these common-law or statutory-law restrictions has a linkage to old age *per se*.<sup>21</sup> Testamentary freedom is underscored by testamentary capacity which is a prerequisite to exercise your freedom of testation.<sup>22</sup> Notwithstanding a person's age, testamentary freedom is pivotal and his or her last will and testament should be adhered to as far as possible.<sup>23</sup> Croucher remarks as follows:<sup>24</sup>

“English law trusted the testator to do what was right, because, as Cockburn CJ concluded in perhaps the leading case on testamentary freedom *Banks v Goodfellow* the instincts, affections, and common sentiments of mankind may

<sup>18</sup> Australian Education *Capacity to Make a Will – Contents* Ch 4 (2011) Online edition <http://www.austlii.edu.au/au/journals/SydUPLawBk/2011/6.txt/cgi-bin/download.cgi/.pdf> 3 (accessed 2015-01-13); Shulman, Peisah, Jacoby, Heinik and Finkel “Contemporaneous Assessment of Testamentary Capacity” 2009 21 *International Psychogeriatrics* 433–439; Du Toit 2013 *Journal of Civil Law Studies* 509–551; Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 86; Atkinson and Kanani 2013 *Trusts and Estates Law & Tax Journal* 26–28; Gorman “Testamentary Capacity in Alzheimer's Disease” 1996 4 *Elder LJ* 225; Shulman Cohen and Hull “Psychiatric Issues in Retrospective Challenges of Testamentary Capacity” 2004 20 *International Journal of Geriatric Psychiatry* 63–69; Herral “An Aging Population and Dementia as a Cause of Death: Testamentary Capacity to Make a Will?” 13 April 2012 <http://www.findlaw.com.au/articles/4575/an-aging-population-and-an-increase-in-dementia-as.aspx> (accessed 2014-11-05).

<sup>19</sup> De Waal and Schoeman-Malan *Law of Succession* 36; Croucher “Statutory Wills and Testamentary Freedom Imagining the Testator's Intention in Anglo-Australian law” 2007 7 *Oxford University Commonwealth LJ* 241 246; Hoffman 2010 *California Psychologist* 15.

<sup>20</sup> Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 86; De Waal and Schoeman-Malan *Law of Succession* 4 and 41; Sonnekus 2012 *THRHR* 9; Du Toit 2013 *Journal of Civil Law Studies* 525; Champine “A Blueprint for Testamentary Capacity Reform” 31 March 2005 <http://ssrn.com/abstract=696081> (accessed 2015-01-29) 1.

<sup>21</sup> Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 79; Sitkoff “Trusts and Estates: Implementing Freedom of Disposition” 2014 58 *Saint Louis University LJ* 644.

<sup>22</sup> Du Toit 2005 *SALJ* 661; Hoffman 2010 *California Psychologist* 15; and Atkinson and Kanani 2013 *Trusts and Estates Law & Tax Journal* 26.

<sup>23</sup> Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 79; and Sitkoff 2014 58 *Saint Louis University LJ* 644.

<sup>24</sup> 2007 7 *Oxford University Commonwealth LJ* 246. See also Atkinson and Kanani 2013 *Trusts and Estates Law & Tax Journal* 26. See also Hall, Hall, Myers and Chapman “Testamentary Capacity: History, Physicians' Role, Requirements, and Why Wills Are Challenged” 2009 17 *Clinical Geriatrics* 18–24, state that older persons are at particularly high risk for having their testamentary capacity challenged “due to the higher frequency of illnesses they may be experiencing at the time a will is written. For many reasons, illness can affect cognitive abilities, insight, perception, impulse control, susceptibility to influence, and both short- and long-term memory” <http://www.cfmal.com/PDFs/Testamentary%20Capacity.pdf> 1–11 (accessed 2015-02-12).

be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law".<sup>25</sup>

It is quite noticeable that wills are often executed by older persons and who may also be trailing in their mental capacity due to disease.<sup>26</sup> Bequests in wills by the elderly are sometimes not what relatives and close friends had hoped for and the wills are often challenged by the disappointed hopefuls.<sup>27</sup> This might result in conflict between the principles of testamentary capacity and freedom of testation.<sup>28</sup> In *Scott v Master of the High Court Bloemfontein*<sup>29</sup> a will that was executed by an elderly Mr De Buys Scott (who died at the aged of 95), in which he disinherited his son, was challenged but upheld by the Court.<sup>30</sup> In *Lipchick v Master of the High Court*<sup>31</sup> the testatrix died a few days short of her 95 birthday. She disinherited her son and his children (her grandchildren). Despite her old age at the time of executing her will, her will

<sup>25</sup> *Banks v Goodfellow* (1870) LR 5 QB 549. See also Australian Education *Capacity to Make a Will* Ch 4; Shulman *et al* 2009 21 *International Psychogeriatrics* 433–439; Croucher "An Interventionist, Paternalistic Jurisdiction? The Place of Statutory Wills in Australian Succession Law" 2009 32 *University of New South Wales Law Journal* 674 691; Champine 31 March 2005 <http://ssrn.com/abstract=696081> 3, states that the right of an individual to will her property to whomever she chooses rests on the assumption that the individual has some measure of ability to exercise judgment in making those choices.

<sup>26</sup> See fn 9, 10 and 13 above. See also Lawson "The Golden Rule – Time to Move on" 2011 *Step Journal* <http://www.step.org/golden-rule-%E2%80%93-time-move> (accessed 2015-01-23).

<sup>27</sup> See *Lipchick v Master of the High Court supra* par 1; *In the Estate of Huguette M Clark supra*; *In re Estate of Betty M Harris supra*; deceased *Vermeulen v Vermeulen supra* SC par 1: "Here a sister and brothers were engaged in a legal battle over the assets of their own deceased mother. These siblings could not dissolve their squabbles peacefully and turned to the Court to settle their internal feud. After three weeks in Court, during which they testified against each other, accused each other of being liars and where mention was even made of death threats by some of them, the Court had to decide what they were unable to dissolve". See also Turner "Bitter Legacy: A Writer Discovers she was Disinherited" 1 January 2011 <http://www.dailymail.co.uk/home/you/article-1342718/Louisa-Turner-discovers-disinherited> (accessed 2014-11-26). Turner writes the story of her own disinheritance and also refers to some real-life stories (some of the names have been changed by the writer): "Elderly twins Ethel Willson and Mabel Cook drew up a joint will in 1991 leaving their possessions to family and friends. Mabel died in 1995, but in 2006, two months before she died, Ethel changed the will, leaving life savings of £390,000 to the hairdresser who had styled her hair every week for more than 40 years. Fifteen close friends and family members, who had been in the previous will, received nothing". Further "Jo Corre, son of the late Malcolm McLaren, is contesting the will in which his music-mogul father left everything to his girlfriend Young Kim. The late Lord Feversham, who died in March last year, made headlines when he disinherited his son Jasper, 41, appalled by Jasper's reputation as a pornographer. The former MP Leo Abse, who died two years ago at 91, provoked a public family feud by leaving his entire £1.2 million fortune to his second wife – 50 years his junior – and not a bean to his children".

<sup>28</sup> Hoffman 2010 *California Psychologist* 15. Frolik 2001 24 *International Journal of Law and Psychiatry* 259, contends that disqualifying wills with questionable dispositive provisions on the ground of testators' incapacity will seriously erode freedom of testation. *Gray v Hart & Ors supra* the deceased (Mrs Harris) was 91 when she executed the testamentary documents in issue. She was diagnosed as having moderately severe dementia: see par 14. She disinherited her relatives and the court concluded that she had the capacity to make both her will dated 23 March 2005 and her will dated 4 April 2005: See par 387.

<sup>29</sup> *Supra* par 17–19.

<sup>30</sup> Also see par 16 "When the deceased made the disputed will (annexure 'D') he was 85 years old. His general health was deteriorating."

<sup>31</sup> *Supra*.

was upheld. In *Re Bechal, Blackman v Man* the 89-year old Golda Bechal left the majority of her £10 million estate to the owners of her favourite Chinese restaurant to the exclusion of her relatives.<sup>32</sup> The Court concluded that she had testamentary capacity when she executed the will that benefitted them.<sup>33</sup>

In the case of *In re Estate Lacey*<sup>34</sup> the Massachusetts Appeals Court upheld a trial Court's finding of undue influence but upheld a prior will that the testatrix made, where she left her estate to friends. The testatrix was born in 1917 and at the time of her death in 2007 (just before her 90<sup>th</sup> birthday) had no surviving spouse, children or heirs. She had been closely involved with a nearby family (the McGuires) and regularly attended family holidays, birthdays, weddings, barbecues and other gatherings with them. She was even referred to as "Aunt Betty" by them. She executed a will benefiting the family. Her ex-husband's son suddenly began bringing her lunch almost daily. She executed and bequeathed her entire estate to this son and alternatively to his sons, whom she had virtually no knowledge of. Upon her death several years later both the McGuire family and her ex-husband's son filed petitions for probate of each of the wills in their favour. It was found that the first will was valid and that the McGuire family would inherit.

Another example of how freedom of testation is highly honoured is the case of *Levin v Levin*.<sup>35</sup> This case concerns the validity of a will (the disputed will) allegedly executed on 4 August 2002 by the late Mrs Breslawsky, who died two months later at the age of 107. The last will she executed before the contested will was in 2001 at the age of 106 (the last in a series of at least nineteen such documents said to have been made by her during her lifetime). Although her testamentary capacity was not questioned, the importance of this case is that she still had testamentary capacity and executed a valid will at the age of 107.<sup>36</sup>

### 3 TESTAMENTARY CAPACITIES

"Capacity" (faculty) usually refers to the ability of an individual to perform a defined act (to make a will), while "competency" (proficiency) is usually a matter of a specific legal question.<sup>37</sup> Testamentary capacity describes a

<sup>32</sup> *Re Bechal, Blackman v Man supra* 7. After an expensive Court action, the will was upheld after being challenged by her nephews and nieces on the grounds that she didn't understand the implications of the will due to suffering a mild form of dementia, thus impairing her testamentary capacity.

<sup>33</sup> Also see *Vermeulen v Vermeulen supra* HC, where the will was upheld by the High Court but found to be invalid by the Supreme Court. In *Malan v Strauss supra* par 18 the deceased changed her will by disinheriting her adopted son and left her estate to her doctor's wife. She was found to be incapable at the time of execution.

<sup>34</sup> *Supra*.

<sup>35</sup> *Supra* par 1. Also see *In the Estate of Huguette M Clark supra*; *Matter of the Estate of Blanche Riordan supra*; and *Lipchick v Master of the High Court supra*.

<sup>36</sup> She was a very astute and successful businesswoman and personally managed her business and financial affairs until her death, this despite being extremely frail, wheelchair-bound and blind in one eye in the latter phase of her life. See par 7; and see also *Woodward v Smith* [2009] NZCA 215 involved a family member challenging the validity of changes made to the will of an elderly man after he had suffered a stroke.

<sup>37</sup> Author's own emphasis. See Chafetz *Expert Article Library*, and Catanzariti "To Remember, to Reflect and to Reason – Capacity" 15 July 2011 13 *Wentworth Chambers* <http://www.13>

person's ability to make a legal will.<sup>38</sup> With elderly people there is no further requirement other than the specific capacity of understanding the testamentary act.<sup>39</sup> The onus to prove *incapacity* is on the person alleging the same.<sup>40</sup> Testamentary capacity is therefore assumed until the contrary has been proved.<sup>41</sup> The principles of testamentary capacity are based on the common-law requirements that need to be complied with namely (i) that the testator must have reached a certain minimum age and (ii) the testator must not have been of unsound mind (at the time of execution).<sup>42</sup> The common-law age of testamentary capacity was the age for puberty.<sup>43</sup>

The second requirement (that one must not be of an unsound mind) is set to determine whether the testator understood the *nature* and *effect* of the will-making process.<sup>44</sup> The criteria for possessing testamentary capacity are perceived of as lying at a low level, perhaps the lowest level of demands on the subject of capacity. Frolik states as follows:<sup>45</sup>

“An examination of case law reveals how liberally the courts interpret these requirements ... and how frequently a testator with conspicuously diminished capacity is nevertheless found to have possessed testamentary capacity.”

### 3 1 Age restriction

Formal testamentary capacity is defined in section 4 of the Wills Act.<sup>46</sup> Section 4 is seen as a codification of the common law and specifies that any person can make a will subject to a minimum age.<sup>47</sup> The age at which a will can be executed is set in South Africa at 16 years or older and is modelled on the English Wills Act of 1837.<sup>48</sup> Most states in America, Australia and New Zealand have set a minimum age of 18.<sup>49</sup>

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wentworthselbornechambers.com.au/pdfs/capacitypaper.pdf (accessed 2014-11-21). See also Hamilton and Cockburn “Capacity to make a Will and Enduring Power of Attorney: Issues New and Old” 2008 *Queensland Law Society Journal* 14.

<sup>38</sup> Hoffman 2010 *California Psychologist* 15; and Moye and Marson 2007 *Journal of Gerontology* 3.

<sup>39</sup> Chafetz *Expert Article Library* indicates that the ability to sign one's name is rather automatic, and also does not indicate testamentary capacity merely because the will is signed.

<sup>40</sup> Author's own emphasis. The “test” to establish testamentary capacity and the “burden of proof” will be discussed in another contribution by the author.

<sup>41</sup> Sonnekus 2012 *THRHR* 1. See also the cases referred to in fn 9, 10 and 13 above.

<sup>42</sup> See De Groot 2 15 3; Voet 28 1 31; Du Toit 2005 *SALJ* 661; De Waal and Schoeman-Malan *Law of Succession* 39; Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 86; Williams, Mortimer and Sunnucks *Executors, Administration and Probate* 19ed (2008) 174; Australian Education *Capacity to Make a Will* Ch 4; and Shulman *et al* 2009 21 *International Psychogeriatrics* 433–439.

<sup>43</sup> Sonnekus 2012 *THRHR* 8; and Williams *et al Executors, Administration and Probate* 174.

<sup>44</sup> Gutheil “Common Pitfalls in the Evaluation of Testamentary Capacity” 2007 35 *Journal of the American Academy of Psychiatry and the Law* 514–517.

<sup>45</sup> 2001 *International Journal of Law and Psychiatry* 257; and Gutheil 2007 35 *Journal of the American Academy of Psychiatry and the Law* 515.

<sup>46</sup> 7 of 1953. *Tregea v Godart* 1939 AD 16 51.

<sup>47</sup> Williams *et al Executors, Administration and Probate* 174; and Du Toit 2005 *SALJ* 661.

<sup>48</sup> De Waal and Schoeman-Malan *Law of Succession* 38; Sonnekus 2012 *THRHR* 5; *Vermeulen v Vermeulen supra* SC par 5; *Vermeulen v Vermeulen supra* HC par 9: “The competency to make a will and the onus in that regard has been clearly defined in section 4 of the Wills Act,



In principle there is no maximum-age deficiency on any person to deal with his or her financial affairs and to execute a will.<sup>50</sup> Old age is not a scientifically recognized cause of death. There is almost always a more direct cause although it may be unknown in certain cases and could be one of a number of aging-associated diseases.<sup>51</sup> Old age, without any other impairment, would therefore not inevitably lead to incapacity.<sup>52</sup> It can, however, like various other impairments, indirectly impact on the *second requirement*, namely, the qualification that a person should not be mentally incapable of appreciating the nature and effect of his or her act. In the case of *The Will of Edward Victor Macfarlane Deceased*,<sup>53</sup> the testator was aged 94, at the date of signing his last will. The Court found: "This of itself does not establish that the testator lacked testamentary capacity".<sup>54</sup> In *In Re Estate of Lawrence A Laveglia*<sup>55</sup> the Court held that neither old age, nor its infirmities including untidy habits, partial loss of memory, inability to recognize acquaintances and incoherent speech will deprive a person of the right to dispose of his own property.<sup>56</sup> In *In re Estate of Erwin W Schlueter*<sup>57</sup> the Supreme Court of Wyoming refers to *Matter of Estate of Buchanan*.<sup>58</sup>

"Mere proof that the decedent suffered from old age, physical infirmity and chronic, progressive senile dementia when the will was executed is not necessarily inconsistent with testamentary capacity and does not alone preclude a finding thereof, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made."

The *Schlueter* case also referred to *Street v Waddell*, where the Tennessee Supreme Court had found:<sup>59</sup>

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No. 7 of 1953, which is applicable in Namibia"; and *Williams et al Executors, Administration and Probate* 174.

<sup>49</sup> Hoffman 2010 *California Psychologist* 16: "In the state of California, a person must be over the age of 18 and of 'sound mind' in order to execute a valid will and the testator is presumed competent and can leave their property to whomever they please." See also Chafetz *Expert Article Library*: "The legal requirement of testamentary capacity is present in all state jurisdictions. The rules about testamentary capacity are similar in all states but have language that varies from state to state." Further also Hamilton and Cockburn 2008 *Queensland Law Society Journal* 14; and Sonnekus 2012 *THRHR* 5 fn 17 for minimum age requirements in other jurisdictions.

<sup>50</sup> *Tregea v Godart supra* 50; *Essop v Mustapha and Essop* 1988 (4) SA 213 (D). See also fn 9, 10 and 13 above; and Du Toit 2005 *SALJ* 661. There is no age cut-off point: Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 89; Ryznar and Devaux 2013 *Nevada LJ* 5; Haurly <http://www.investopedia.com/financial-edge/0412/last-will-and-testament-not-just-for-the-elderly.aspx>; and Anderson <http://www.aplaceformom.com/blog/2-6-2014/>.

<sup>51</sup> See Radford "Do People Really Die of Old Age" 2 November 2012 <http://www.livescience.com/32241-do-people-really-die-of-old-age.html> (accessed 2015-01-12).

<sup>52</sup> *Banks v Goodfellow supra* 565–566. For old age see also *Levin v Levin supra*; *Malan v Strauss supra*; *Hawes v Burgess supra*; *Re Bechal*, *Blackman v Man supra*; and *Matter of Astor supra*.

<sup>53</sup> *Supra* 20.

<sup>54</sup> *The Will of Edward Victor Macfarlane Deceased supra* par 12.

<sup>55</sup> Unreported Case number 11-9066 (2013-06-21) (Carbon County Court Pennsylvania).

<sup>56</sup> Par 3 of the case summary.

<sup>57</sup> No 98-311 (11 January 2000) WY Supreme Court par 14. See <http://caselaw.findlaw.com/wy-supreme-court/1435282.html#sthash.g2ml0WvR.dpuf>.

<sup>58</sup> New York (App Div 1997).

<sup>59</sup> 3 SW 3d 504 505-06 (Tenn App 1999).

“While evidence regarding factors such as physical weakness or disease, old age, blunt perception or failing mind and memory is admissible on the issue of testamentary capacity, it is not conclusive and the testator is not thereby rendered incompetent if her mind is sufficiently sound to enable her to know and understand what she is doing.”

### 3 2 Understanding the act of making a will

As seen above the second qualification for all testators (above the statutory required aged) is that a person, in order for a will to be valid, must have had “a *sound mind to understand*” the nature and consequences of the act (will-making process).<sup>60</sup> Several criteria were developed to establish whether the testator had the necessary cognitive abilities in order to have the requisite soundness of mind.<sup>61</sup> Section 4 does not give the meaning of “not mentally incapable of appreciating the nature and effect of his act”.<sup>62</sup> This is understood to mean that the testator must not be incapable of understanding both elements of the act namely, the nature and effect thereof.<sup>63</sup> In *Vermeulen v Vermeulen* the Court referred to the remarks by Van Niekerk J, in *Lerf v Nieft*.<sup>64</sup>

“In order to show that the deceased in this matter did not have the necessary mental capacity it must be shown that he failed to appreciate the nature and effect generally of the testamentary act; or that he was at the time unaware of the nature and extent of his possessions; or that he did not appreciate and discriminate between the persons, whom he wished to benefit and those whom he wished to exclude from his bounty; or that his will was inofficious in the sense that it benefited persons to the exclusion of others having higher equitable claims to the estate”.

It is not only required that the testator should have known that he or she is making a will (nature) but furthermore he or she must appreciate the

<sup>60</sup> Author’s own emphasis. *Banks v Goodfellow* supra 568; *Tregea v Godart* supra 49; *Kirsten v Bailey* 1976 (4) SA 108 (C); *Essop v Mustapha and Essop* supra; *Vermeulen v Vermeulen* supra HC par 6.

<sup>61</sup> *Banks v Goodfellow* supra 565; *Tregea v Godart* supra 19; *Katz v Katz* [2004] 4 All SA 545 (C) par [22]; *Gildenhuis v Gildenhuis* supra par 11; *Lipchick v Master of the High Court* supra; *Malan v Strauss* supra; *In the Estate of Wilbur Waldo Lynch, Deceased* supra; *In the Will of Edward Victor MacFarlane, Deceased* supra par 3; *Williams v Wimot* [2012] EWHC 221; and *Vermeulen v Vermeulen* supra HC par 17.

<sup>62</sup> Wills Act 7 of 1954. See also Hoffman 2010 *California Psychologist* 17; Atkinson and Kanani 2013 *Trusts and Estates Law & Tax Journal* 26–28; Du Toit 2013 *Journal of Civil Law Studies* 529; Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 86; and O’Neill and Peisah “Capacity and the Law” [electronic resource] 2012 *Sydney University Press* (in co-operation with the *Australian Legal Information Institute*) par 4.1 <http://www.austlii.edu.au/au/journals/SydUPLawBk/2011/2.html> (accessed 2014-11-17).

<sup>63</sup> These criteria or so-called “test” is not discussed in this contribution. See also De Waal and Schoeman-Malan *Law of Succession* 39–43; Sonnekus 2012 *THRHR* 13; and Du Toit 2005 *SALJ* 662.

<sup>64</sup> 2004 NR 184 (HC) 1901B–C; and see also *Cloete v Marais* 1934 EDL 239 250.

consequences (effect) of the act.<sup>65</sup> The *Vermeulen* case also referred to the case of *Harlow v Becker*, where it was stated:<sup>66</sup>

“Obviously, it is a prerequisite to the execution of a valid will that the person who executes the will has to intend it to be his will. But the mental capacity or competency to execute a valid will embraces more than a mere intention on the part of the testator that the draft will to which he puts his signature should be his will. He may appreciate the meaning of the document and approve of its contents and yet may lack the understanding or mental capability necessary for the execution of a valid will.”

### 3 3 Situation specific

The question whether an old person has the necessary testamentary capacity to execute a will differs from case to case and is therefore situation specific.<sup>67</sup> It reflects on the status of an elderly individual and deals with his or her personality rights that are attached to him or her.<sup>68</sup> This means that an old person who has a *lucidum intervallum*, or even a person placed under guardianship or curatorship, can still have testamentary capacity.<sup>69</sup> In *D’Apice v Gutkovich, Estate of Abraham*<sup>70</sup> the testatrix, aged 93 and suffering from dementia for five years, was found to have testamentary capacity, despite being subject to a guardianship order.<sup>71</sup> In *Vermeulen v Vermeulen* the Supreme Court of Appeal stated:<sup>72</sup>

“The court *a quo* correctly identified the issue to be decided as whether the deceased was so mentally incapacitated at the time when she executed the disputed will, that she could not legally do it, i.e. that she did not possess testamentary ability at the time, and referred to s 4 of the Wills Act 7 of 1953 which is applicable in Namibia regarding the competency to make a will and the burden of proof.”

<sup>65</sup> *Scott v Master of the High Court Bloemfontein supra* par 3: “The validity of the said will was challenged on the basis that, when the deceased (testator) made and signed it, he was mentally incapable of doing so and could consequently not appreciate the nature and effect of his conduct.”

<sup>66</sup> 1998 (4) SA 639 (D) 644A–B in *Vermeulen v Vermeulen supra* SC par 139.

<sup>67</sup> *Tregea v Godart supra* 16. Du Toit 2005 SALJ 662; and Chafetz *Expert Article Library*: “The analysis of testamentary capacity must therefore be specific to each case, and must be detailed enough to provide relevant information about capacity.”

<sup>68</sup> Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 79; Sitkoff 2014 58 *Saint Louis University LJ* 649; and Moye, Marson and Edelstein “Assessment of Capacity in an Aging Society” 2013 68 *American Psychologist* 158–171.

<sup>69</sup> *Vermeulen v Vermeulen supra* HC par 17; Croucher 2007 7 *Oxford University Commonwealth LJ* 251; and Sonnekus 2012 *THRHR* 7 and 21.

<sup>70</sup> [2010] (No 2) New South Wales Supreme Court 1333. See also *Geldenhuys v Bornman* 1990 (1) SA 161 (EC); and Du Toit 2005 SALJ 668.

<sup>71</sup> *Catanzariti 13 Wentworth Chambers*. See the reference to *Zorbas v Sidiropoulous*, where Debelle J, said “although the testatrix may times have suffered delirium or at least severe distress because of the serious nature of her illness and the severity of the particular afflictions from which she suffered, she conducted herself on quite a number of occasions rationally. In particular, I find that on 14 December 2004 she was quite rational and had the capacity to understand the nature and effect of what she was doing”.

<sup>72</sup> *Vermeulen v Vermeulen supra* SC par 5: See also *Re Bechal, Blackman v Man supra*; *In re Estate Lacey supra*; *In the Estate of Wilbur Waldo Lynch, Deceased supra*; *Simon v Byford supra*; and *Frizzo & Anor v Frizzo & Ors supra*.

The case *In The Matter of the Estate of Blanche Riordan*<sup>73</sup> the importance of general capacity to act *versus* testamentary capacity was illustrated.<sup>74</sup> The testatrix died leaving a will in 2006 at the age of 91. Four years before her death, in 2002, she executed a will. The will was contested on grounds of lack of testamentary capacity and undue influence. Prior to the time that the will was executed, she was living on her own in her house and was described as “smart, funny and extremely independent”. After she fell and fractured a vertebra in 2002 she was hospitalised. During that time records note that she made eye contact, with “appropriate” affect and speech. Her motor behaviour was cooperative and she explained to the admitting staff that she fell because she lost her balance. At the same time she exhibited problems with her short-term and long-term memory, expressed symptoms of sadness, depression or anxiety and was prone to wandering. On 22 August 2002 she had written the disputed will herself. Her condition deteriorated over the next two years. In 2004, two years after executing the will, two opinions from physicians were obtained which stated that she had Alzheimer’s disease and was not competent to care for herself. She was moved to a nursing home in 2005 where she died in June 2006. The will was contested and some family members testified that she was (at the time of executing the will) “agitated and very jittery and that she babbled, repeated things and rambled a lot”. The Superior Court of New Jersey confirmed the trial Court’s finding that the testatrix suffered from “a dementia condition of undefined specific proportions in the summer of 2002”. Despite this condition, the Court concluded that she possessed the requisite testamentary capacity when she executed her will.

To the contrary in *Malan v Strauss*<sup>75</sup> the testatrix’s physical and mental condition was such that she was in need of constant care as she was incapable (of performing any act) to take care of herself. She was therefore found to be unable to deal with financial matters in general including being incapacitated to execute a will.

## 4 DIMINISHED TESTAMENTARY CAPACITIES

### 4.1 Financial capacity

There is a direct linkage between testamentary capacity and financial capacity. One of the key aspects of diminished capacity in older people is their increased vulnerability to deal with their finances (and also to be manipulated by others).<sup>76</sup> Financial security is a matter of particular importance and urgency, especially at an advanced age.<sup>77</sup> As old people’s

<sup>73</sup> *Supra*. See also the discussion <http://law.justia.com/cases/new-jersey/appellate-division-unpublished/2011/a4464-09-opn.html> (accessed 2015-01-04).

<sup>74</sup> See also *Simon v Byford supra* and the other cases referred to in fn 9, 10 and 13 above.

<sup>75</sup> *Supra* par 18.

<sup>76</sup> The underlying key causes of declining financial capacity in elders have to do with brain aging and accompanying cognitive disorders such as Alzheimer’s disease and related dementias. See Regan and Gordon 1997 *Southern Medical Journal* 13–15; Gorman 1996 4 *Elder LJ* 225; Herrald <http://www.findlaw.com.au/articles/4575/an-aging-population-and-an-increase-in-dementia-as.aspx>; Atkinson and Kanani 2013 *Trusts and Estates Law & Tax Journal* 26; Michelon <http://sharpbrains.com/blog/2006/12/18/what-are-cognitive-abilities/>.

<sup>77</sup> Moye, Marson, and Edelstein “Assessment of Capacity in an Aging Society” 2013 68 *American Psychologist* 158–171.

capacities are deteriorating it brings about a proliferation of their financial incapability and vulnerability.<sup>78</sup> Considerable wealth brings with it excessive responsibilities and often anxiety for old people as they realise that it might be the last opportunity they have to dispose of their earthly possessions.<sup>79</sup> Eisenberg identified a tremendous and underappreciated “financial capacity problem” posed by the rapidly growing-older adult population.<sup>80</sup> These are then the same (old) people who have to encompass the capacity to dispose of their assets.

## 4 2 Lack of capacity

Various impairments can contribute to an elderly’s lack of ability to understand the nature and effect of the will-making process. Lack of testamentary capacity typically revolves around accusations that the testator, due to senility, dementia, insanity, or other unsoundness of the mind, lacked the mental capacity to make a will.<sup>81</sup> The focus in this discussion is specifically on (i) age and (ii) mental impairments due to cognitive disability.

In order to establish to what degree testamentary capacity has been impaired by age and age-related mental illness, can be challenging.<sup>82</sup> Regan and Gordon remark as follows:<sup>83</sup>

“Some conditions may invalidate a will, including insane delusions and undue influence; however, the mere presence of severe mental illness, such as schizophrenia or dementia, does not automatically render elderly people incompetent to execute a valid will.”

It can be difficult for the Courts to decide whether the testator was merely eccentric (in not adequately providing for those attacking the will) or alternatively, whether he was actually suffering from delusions that were the cause of the failure to provide for the disappointed beneficiary.<sup>84</sup> To assess the mental testamentary capacity of the testator is no easy task and what is complicating matters is the reality that incapacity in one domain does not automatically mean incapacity in other domains of functioning.<sup>85</sup> If the testator

<sup>78</sup> “How Aging Impacts Our Financial Decisions” 9 October 2013 <http://www.nextavenue.org/blog/how-aging-impacts-our-financial-decisions> (accessed 2014-11-05). See also Williams *et al* *Executors, Administration and Probate* 174.

<sup>79</sup> Jacoby and Steer “How to Access Capacity to Make a Will” 2007 *British Medical Journal* 155; and Marson and Sabatino “Financial Capacity in an Aging Society” 2012 *Generations* 6–11.

<sup>80</sup> Eisenberg <http://www.nextavenue.org/blog/how-aging-impacts-our-financial-decisions>; and Marson and Sabatino 2012 *Generations* 6–11.

<sup>81</sup> See “Contesting a Will” 30 June 2014 <http://www.nacollawfirmblog.com/tag/disposing-mind-and-memory> (accessed 2014-12-13); Du Toit 2005 *SALJ* 661; Frolik 2001 24 *International Journal of Law and Psychiatry* 253ff; and see also Williams *et al* *Executors, Administration and Probate* 178.

<sup>82</sup> Todd “Delusions and Testamentary Capacity” 19 November 2013 <http://disinherited.com/delusions-and-testamentary-capacity/> (accessed 2014-11-22).

<sup>83</sup> 1997 *Southern Medical Journal* 13–15.

<sup>84</sup> Todd <http://disinherited.com/delusions-and-testamentary-capacity/>: “The courts have consistently found that, in order for a delusion to affect testamentary capacity, the delusion must have such a hold on the testator’s mind that it governs the making of the will.”

did not have a sound mind the will is invalid due to lack of testamentary capacity.<sup>86</sup>

Recent case law shows that cognitive impairment, combined with old age, does not necessarily impact negatively on a testator's testamentary capacity.<sup>87</sup> However, when there is doubt as to an old person's testamentary capacity it requires a detailed analysis and assessment by the Courts of the old person's capacity (ability) to know and comprehend the significant elements of a testamentary act.<sup>88</sup> How complicated it can get is explained by Chafetz:<sup>89</sup>

"An aphasic testator might not be able to tell anyone about the nature of his will, but still be able to identify the natural objects of bounty and the assets in his estate, and to gesture, point, and choose among various options. On the other hand, if a high functioning testator has a stroke that renders him unable to understand anything spoken to him, read to him, or that he attempts to read himself, he might not have capacity to execute a will, although he might even be able to drive."

### 4 3 Legal and medical perspective on capacity

As seen above the act of making a will requires the mental capability to deal with your estate, in anticipation of your passing.<sup>90</sup> Testamentary capacity is one of those mental functions that cross both legal and medical domains.<sup>91</sup> "Mental capacity" is a term that refers to a person's ability to perform a specific act, such as making a medical decision, managing finances, or driving.<sup>92</sup> From a medical (clinical) perspective, "mental capacity" is a physician's opinion regarding an individual's ability to make decisions and to act (make a will).<sup>93</sup> From a legal perspective, mental capacity is an individual's

<sup>85</sup> *Matter of the Estate of Blanche Riordan, Deceased supra; Nicholson v Knaggs* [2009] Victoria Supreme Court 64; *Katz v Katz supra; Stoffels v Brand* [2006] JOL 18540 (T); and *Harlow v Becker supra*.

<sup>86</sup> See also *Kerr and Anor v Badran and Anor, Estate of Badran supra* 735.

<sup>87</sup> *Nicholson v Knaggs* par 89: "If I am satisfied that a doubt has arisen as to the testamentary capacity of the testatrix at the time she gave instructions for and executed any of the testamentary instruments which are under challenge, then the propounders of those wills and codicils, who are the surviving executors and who are all Defendants to this proceeding, bear the burden of establishing that probate should be granted to them."

<sup>88</sup> See also Du Toit 2005 *SALJ* 661ff; Sonnekus 2012 *THRHR* 1ff; Sonnekus in Reid De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 87; De Waal and Schoeman-Malan *Law of Succession* 36; and Du Toit 2013 *Journal of Civil Law Studies* 509–551.

<sup>89</sup> *Expert Article Library* [http://expertpages.com/news/assessing\\_testamentary\\_capacity.htm](http://expertpages.com/news/assessing_testamentary_capacity.htm). The contested will, burden of proof and expert evidence will be discussed in a later following-up article.

<sup>90</sup> See also Du Toit 2005 *SALJ* 661; Williams *et al Executors, Administration and Probate* 174; Du Toit 2013 *Journal of Civil Law Studies* 509–551; Sonnekus 2012 *THRHR* 1ff; Frölik 2001 *24 International Journal of Law and Psychiatry* 253ff; Regan and Gordon 1997 *Southern Medical Journal* 13–15; and Moye and Marson 2007 *Journal of Gerontology* 3.

<sup>91</sup> Chafetz *Expert Article Library* indicates that the medico-legal framework under which clinical evaluators are asked to answer specific questions regarding capacity often renders these terms interchangeable.

<sup>92</sup> Lawson <http://www.step.org/golden-rule-%E2%80%93time-move>.

<sup>93</sup> Moye and Marson 2007 *Journal of Gerontology* 7.

ability to understand that he or she is about to bequeath assets to someone else (the nature and effect of what he or she is doing).<sup>94</sup>

The 2009 case *Nicholson v Knaggs*<sup>95</sup> clearly shows the interaction between medical diagnosed brain disease and testamentary capacity.<sup>96</sup> Betty Dyke lived alone on her farm but grew increasingly disabled as she aged. She had to rely upon friends for support and assistance so that she could remain in her home. She executed three wills and made bequests to the three couples who supported and helped her. A year after the last will was executed a formal diagnosis of Alzheimer's disease was made on her. Vickery J, of the Supreme Court of Victoria found that the evidence, as a whole, was sufficient to place a question mark on the competency of the testatrix.<sup>97</sup> However, the Court ruled that she was in fact of sound mind, memory and understanding when she executed her 1999 will and her 2000 codicil.<sup>98</sup> The key issue was the severity of the dementia and whether it impaired insight, judgment and decision-making skills. Although Vickery J, found that by mid-1999 she was suffering from cognitive impairment characteristic of the pre-dementia stage of Alzheimer's disease, that degree of mental impairment did not necessarily disqualify her from having will-making capacity as defined in law.<sup>99</sup> However, he was affirmatively satisfied that by December 2000 and in 2001 she was not of sound mind, memory and understanding.<sup>100</sup> Consequently, the December 2000 codicil and the 2001 will were not valid and were set aside.

## 5 ALLEGATIONS OF MENTAL IMPAIRMENT

### 5.1 Contesting a will

In the contest of wills, testamentary incapacity of the testator (at the time of the execution of the will), has become the most frequent reason for challenging a will.<sup>101</sup> Alleged mental impairment can lead to extensive litigation on the subject of testamentary capacity.<sup>102</sup> Often a conflict between

<sup>94</sup> O'Neill and Peisah 2012 *Sydney University Press* par 4.1; and Champine 31 March 2005 <http://ssrn.com/abstract=696081> 4ff.

<sup>95</sup> [2009] Victoria Supreme Court 64. This case consists of 706 paragraphs. See par 89: "If I am satisfied that a doubt has arisen as to the testamentary capacity of the testatrix at the time she gave instructions for and executed any of the testamentary instruments which are under challenge, then the propounders of those wills and codicils, who are the surviving executors and who are all Defendants to this proceeding, bear the burden of establishing that probate should be granted to them."

<sup>96</sup> See par 70, 89 and 147.

<sup>97</sup> See par 95–100.

<sup>98</sup> See also *In re Estate of Stoker* 122 California Court of Appeal 2011 3d 529.

<sup>99</sup> See par 431.

<sup>100</sup> See par 668–670.

<sup>101</sup> Ryznar and Devaux 2013 *Nevada LJ* 5.

<sup>102</sup> See Hoffman 2010 *California Psychologist* 15; and *Essop v Mustapha and Essop supra*. See also the recent case of *Walker v Badmin* [2014] All ER (D) 258 (reported 2014-12-08) dealing with an elderly woman suffering from a brain tumor who made a will five weeks before her death, leaving her property to her partner. The daughters challenged the will's validity on testamentary-capacity grounds.

testamentary freedom and testamentary capacity arose between relatives and other “stakeholders”. Moye and Manson ask the following question:<sup>103</sup>

“What should we do when an older adult, particularly one who is frail, vulnerable, dementing, or eccentric, begins to make decisions that put the elder or others in danger or that are inconsistent with the person’s long-held values? At what point does decision making that is affected by a neuropsychiatric disease process no longer represent ‘competent’ decision making? These are some of the essential, and perplexing, questions of clinical capacity assessment.”

In the recent case of *Simon v Byford*<sup>104</sup> there were indications and allegations of cognitive impairments that possibly resulted in testamentary incapacity. The deceased died in 2009 at the age of 91. She was a widow with four children, one of whom had pre-deceased her. The testatrix made several wills before she executed the disputed will. The will questioned was executed on 18 December 2005 and was made at her 88<sup>th</sup> birthday party. The will differed in substance from her earlier will. Although suffering from mild to moderate dementia and old age (cognitive impairments) at the time of making the will, the Court ruled that she still had testamentary capacity when she executed the last will.

## 5.2 Effect of diminished mental impairments

Ultimately if the testator did not have the capacity to understand the nature and effect of the act of making a will (was of “unsound mind”) the will becomes invalid.<sup>105</sup> Case law indicates that old age and cognitive decline due to dementia, including Alzheimer’s disease, can contribute to incapacity depending on the seriousness of the diseases. Signs that may suggest incapacity include short-term memory loss, comprehension problems, difficulty with simple math, delusions, hallucinations, disorientation, problems with the expression or comprehension of language as well as poor hygiene and grooming. If the testator, on the contrary, was of “sound mind” it suggests that a person is free of delusions or hallucinations that might otherwise interfere with good judgment.<sup>106</sup> The will is then assumed valid (except if undue influence is proved).<sup>107</sup>

## 5.3 Claims of an unsound mind as an impairment

In older cases concerned with testamentary capacity, claims were usually based on “incapacity due to mental illness, unsound mind, delusion and

<sup>103</sup> 2007 *Journal of Gerontology* 3; and Sonnekus 2012 *THRHR* 178.

<sup>104</sup> *Supra*.

<sup>105</sup> Regan and Gordon 1997 *Southern Medical Journal* 13–15: “Including insane delusions and undue influence, however, the mere presence of severe mental illness, such as schizophrenia or dementia, does not automatically render elderly people incompetent to execute a valid will.”

<sup>106</sup> Du Toit 2005 *SALJ* 662; Sonnekus 2012 *THRHR* 7; Hoffman 2010 *California Psychologist* 16; Hill and Hill *The People’s Law Dictionary* (2010) <http://www.law.com> (accessed 2014-11-17); and Todd <http://disinherited.com/delusions-and-testamentary-capacity/>.

<sup>107</sup> See above fn 9, 10 and 13.



insanity”.<sup>108</sup> In more recent case law claims of incapacity based on unsound mind, refer to “unsound mind” cases of “dementia and/or Alzheimer’s disease”.<sup>109</sup> “Unsound mind” is therefore a flexible term and includes impairments that affect “a state of mind which prevents normal perception, behaviour, or social interaction or seriously mentally ill”.<sup>110</sup> In this contribution the focus is on the modern understanding of what an unsound mind is.

### 5 3 1 *Claims of insanity as an impairment*

There are differences between insanity and cognitive impairments. Insanity is defined as meaning:<sup>111</sup>

“[A] mental illness of such a severe nature that a person cannot distinguish fantasy from reality, cannot conduct her/his affairs due to psychosis, or is subject to uncontrollable impulsive behaviour. *Insanity is distinguished from low intelligence or mental deficiency due to age or injury.*”<sup>112</sup>

When the term “insanity” is referred to, in the context of making a will, the courts understand it in the sense of a severe disorder of the mind.<sup>113</sup> Insanity and delusions are associated with common symptoms of mood swings and is a personality-related mental illnesses.<sup>114</sup> Owing to insanity an older person might have “an unsound mind” and might not have the capacity to execute a will, however, insanity is not so directly related to age as dementia. Insanity is also classified as a general mental illness, as opposed to cognitive impairment that is typically age-related.

<sup>108</sup> *Cloete v Marais supra*; *Spies v Smith* 1957 (1) SA 539 (A); and *Smith v Strydom* 1952 (2) SA 799 (T). See the discussion by Stimmel, Stimmel & Smith Law Offices “Proof of Testamentary Incapacity – What Does It Take to Show Someone Is Incapable of Creating a Will” 2006 [http://stimmel-law.com/articles/testamentary\\_incapacity.html](http://stimmel-law.com/articles/testamentary_incapacity.html) (accessed 2014-12-02) of *Estate of Martin* (1969) 270 California Appeal 2d; *Estate of Bliss* (1962) 199 Cal App 2d 630 where the testator, age 83, executed a will, leaving his entire estate to his male nurse, revoking an earlier will which left his estate evenly divided to his nieces and nephew. He had chronic brain syndrome and structural brain damage that would affect his behaviour, personality, intelligence and coordination. See also *Estate of Wolf* (1959) 174 Cal App 2d 144 where the testimony of testatrix’s treating physician, who was a gerontologist, showed that testatrix had been suffering from arteriosclerosis and had been mentally incompetent for some years before executing the will in question and *Estate of Johnson* (1948) 85 Cal App 2d 760, 193 P2d 782 where the testatrix, a woman in her 80’s, was not of sound and disposing mind and memory at time of execution of codicil to will.

<sup>109</sup> *Gildenhuys v Gildenhuys supra*; *De Reszke v Maras* 2006 (2) SA 277 (SCA); and cases referred to in fn 9, 10 and 13. See Zabow “Wills and Curators – Decision-making in Adults with Impaired” 2012 30(4) *Continuing Medical Education* <http://www.cmej.org.za/index.php/cmej/article/view/2404/2276> (accessed 2014-12-03). See also Du Toit 2005 SALJ 673.

<sup>110</sup> Hill and Hill *People’s Law Dictionary* <http://www.law.com>.

<sup>111</sup> The term, therefore, includes insane persons, idiots, and imbeciles. See also Garner *Black’s Law Dictionary* 8ed (2004) <http://thelawdictionary.org/legal-insanity/> (accessed 2014-11-17).

<sup>112</sup> Author’s own emphasis.

<sup>113</sup> Du Toit 2005 SALJ 663. He also adds that these may include schizophrenia, shared psychotic disorder, major depressive disorder, and bipolar disorder.

<sup>114</sup> O’Neill and Peisah 2012 *Sydney University Press* par 4.1.

The leading case on insane delusion is the 1870 case of *Banks v Goodfellow*.<sup>115</sup> The testator had made his will in favour of his niece. At the time the will was executed, he was under a delusion that a man who had died was still alive and tormenting him. This delusion, however, could have had no effect on the testator's testamentary bequests and the will was upheld. The effects of an insane delusion combined with old age must have been of such a degree that it would have had an impact on the capacity of the deceased to make a testamentary disposition.<sup>116</sup> In *Lipchick v the Master of the High Court*<sup>117</sup> Willis J found:

"It is nonsense to suppose that when she wrote her will in December 2004, the testatrix was *not of sound mind*. Moreover, it is the second respondent's own version of events that after her father's death (which occurred approximately two weeks after she wrote her will), the testatrix "was left to deal with her affairs by herself". [T]he second respondent's protests that the signs of the testatrix's *mental incapacity* are to be found in her "paranoia" about the way in which she had been treated by her son."<sup>118</sup>

For years senility and dementia were still considered part of the aging process and did not become a common term or even a large concern until neurological research exploded in the late 1970s.<sup>119</sup> Many elderly individuals with unpredictable behaviour were sent to institutions in the past, as the line between mental disorders and dementia was blurred.

### 5.3.2 Claims of cognitive impairments

In recent times it is more appropriate to refer to "cognitive impairments" rather than insanity. The current approach that favours "cognitive impairment" to "insanity" can be explained as follows:<sup>120</sup>

"The context in which 'insanity' is usually mentioned is in colloquial conversation and in law (eg 'insanity defence'). It's no longer an acceptable term for those who act in unpredictable and 'mad' ways. It was used in former times to describe people who were somewhat unusual and acted in 'irrational' ways, usually due to a psychiatric condition, such as schizophrenia, obsessive compulsive disorders. I'm certain that people who have conditions that have

<sup>115</sup> *Supra*. See also Du Toit 2005 SALJ 663-667 for the discussion of SA law: *Rapson v Putterill* 1913 AD 417; *Estate Rehne v Rehne* 1930 OPD 80; and *Kethel v Estate Kethel* 1948 (3) SA 797 (E).

<sup>116</sup> Todd <http://disinherited.com/delusions-and-testamentary-capacity/> states: "In a leading Canadian case *Leger v Poirier* 1944 3 DLR. 1 (SCC) Justice Rand, speaking for the Supreme Court of Canada, said that a 'disposing mind and memory' is: 'capable to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing disposition, and the like'."

<sup>117</sup> *Supra* par 23.

<sup>118</sup> Author's own emphasis. Also see *Vermeulen v Vermeulen supra* HC par 60.

<sup>119</sup> See fn 14 above. Reger "Alzheimer's Disease: A Brief History and Avenues for Current Research" 2002 6 *Journal of Young Investigators* <http://legacy.jyi.org/volumes/volume6/issue2/features/reger.html> (accessed 2015-01-25). See the cases discussed below and above in fn 9, 10 and 13; Gorman 1996 4 *Elder LJ* 225; Shulman *et al* 2004 20 *International Journal of Geriatric Psychiatry* 63-69; and Herral <http://www.findlaw.com.au/articles/4575/an-aging-population-and-an-increase-in-dementia-as.aspx>.

<sup>120</sup> One "Cyberia C" on the Yahoo website 18 September 2008 <https://ca.answers.yahoo.com/question/index?qid=20080918022238AArpGxe> (accessed 2014-12-01). It is not known whether Cyberia C gave an expert opinion. See also Williams *et al Executors, Administration and Probate* 178.

caused dementia may be labelled 'insane' by others, *but that's not really appropriate if you deal with people in a professional setting.*<sup>121</sup>

The blurring between the diseases associated with unsound mind (insanity as opposed to dementia and Alzheimer's) causes considerable difficulties in Courts as these terms are used interchangeably. It is very difficult to separate one diagnosis from another as mental impairments often overlap.<sup>122</sup> In order to establish what condition the testator had will depend on the evidence of an expert psychiatric or medical assessment and statements by nearby family and friends.<sup>123</sup>

In laymen's terminology the difference between dementia (cognitive impairments) and insanity is that insanity is a mental illness, whilst dementia is a loss of mental capacity (brain function) that usually occurs when one gets older.<sup>124</sup> Dementia is not a single disease but refers to a combination of illnesses that involve memory, behaviour, learning and communicating problems. The problems are progressive, which means they slowly get worse.<sup>125</sup>

#### 5 4 Alzheimer's disease and dementia

Cognitive impairments such as senile dementia and Alzheimer's disease are concepts that have evolved in the 19<sup>th</sup> century from a rather vague notion that mental decline occurred inevitably in old age. In recent times it has developed to be defined by a distinctive set of clinical and pathological features with the potential for treatment and prevention within grasp.<sup>126</sup>

Between thirty and forty years ago, the legal and medical fraternities knew little about Alzheimer's disease.<sup>127</sup> Since then, scientists have made important advances and many scientists and physicians are now working together to untangle the genetic, biological and environmental factors that, over many

<sup>121</sup> Author's own emphasis.

<sup>122</sup> See Du Toit 2005 *SALJ* 661; Chafetz *Expert Article Library*; Moye, Marson, and Edelstein 2013 *American Psychologist* 158-171; and Ryznar and Devaux 2013 *Nevada LJ* 5.

<sup>123</sup> O'Neill and Peisah 2012 *Sydney University Press* par 4.1; Jacoby and Steer 2007 *British Medical Journal* 155: "The mental functions or cognitive abilities of a person are based on specific neuronal networks or brain structures."

<sup>124</sup> Reger 2002 *Journal of Young Investigators*. See also Cyberia C <https://ca.answers.yahoo.com/question/index?qid=20080918022238AarpGxe>; Herrald <http://www.findlaw.com.au/articles/4575/an-aging-population-and-an-increase-in-dementia-as.aspx>.

<sup>125</sup> Jacoby and Steer 2007 *British Medical Journal* 155; and Moye, Marson, and Edelstein 2013 *American Psychologist* 158-171.

<sup>126</sup> See Berchtold and Cotman "Evolution in the Conceptualization of Dementia and Alzheimer's disease: Greco-Roman period to the 1960s" 1998 19 *Neurobiology of Aging* 173ff; Rettner "Alzheimer's vs Normal Aging: How to Tell the Difference" 27 April 2011 *MyHealthNewsDaily* <http://www.livescience.com/35643-alzheimers-disease-signs.html> (accessed 2014-11-20); Announcement University of Sydney "First Alzheimer's Case has Full Diagnosis 106 Years Later" 9 January 2013 <http://sydney.edu.au/news/84.html?newsstoryid=10804> (accessed 2015-01-31).

<sup>127</sup> Alzheimer's disease was discovered in 1907 by Alois Alzheimer, but was not considered a major disease or disorder. Alzheimer's disease is also known as "senile dementia of the Alzheimer type" or simply "Alzheimer's". See Rettner <http://www.livescience.com/35643-alzheimers-disease-signs.html>.

years, ultimately result in Alzheimer's disease.<sup>128</sup> Although not limited to old people, Alzheimer's is known as "old person's disease" and people are increasingly falling victim to this detrimental and gradually worsening illness.<sup>129</sup> Alzheimer's differs from normal aging.<sup>130</sup> It is normal for a person as he or she gets older, that he or she forgets things but then remembers them again. In people with Alzheimer's disease, the memory doesn't come back.<sup>131</sup>

## 6 COGNITIVE IMPAIRMENTS AND THE COURTS

### 6.1 Case law

From the discussion above it became apparent that there is an increase in court cases where it is claimed that the deceased lacked the necessary testamentary capacity at the time of execution of his or her will. The case of *Gildenhuys v Gildenhuys*<sup>132</sup> is one of the first South Africa reported cases on the subject of dementia and Alzheimer's disease where the diagnoses was acknowledged and spelled out in no uncertain terms.<sup>133</sup> In this 2010 case the Western Cape High Court relied on the expert witness's evidence – doctor Zabow – to establish exactly what the diagnoses entails:

"The medical evidence adduced at that trial showed that, as at 9 October 2000, the deceased was suffering from senile dementia, more accurately described as chronic brain syndrome with Alzheimer's disease: that she suffered from disorientation in respect of place and time; and that she lacked insight and judgment to the extent that she could not take rational decisions."

Dementia was described as problems that (usually old) people might have with their memory, language and thinking due to various underlying brain disorders or damages.<sup>134</sup> In the *Gildenhuys* case Yekiso J, gave a thorough explanation of the disease:<sup>135</sup>

<sup>128</sup> See also "Alzheimer's Disease Fact Sheet" 27 August 2014 *National Institute on Aging*, <http://www.nia.nih.gov/alzheimers/publication/alzheimer-disease-fact-sheet> (accessed 2014-11-25). The research has expanded knowledge of brain function in healthy older people, identified ways that might lessen normal age-related declines in mental function, and deepened the understanding of the disease.

<sup>129</sup> *Williams et al Executors, Administration and Probate* 178. See also Hubbard "Is it Alzheimer's or Normal Aging?" 22 February 2013 <http://www.Newsmaxhealth.com/Headline/Alzheimers-normal-aging-memory-problems-seniormoments/2013/02/22/id/491623/#ixzz3JVVbj900> (accessed 10-11-2014) who refers to Dr Richard Isaacson who says that everyone forgets occasionally, and episodes usually increase with age but as time goes on, short-term memory declines. While it's common for people as they age to occasionally forget things, like names, and even misplace objects, usually they are able to remember the names later, as well as find the missing objects.

<sup>130</sup> Rettner <http://www.livescience.com/35643-alzheimers-disease-signs.html>. See *Martin & Ors v Fletcher & Ors* [2003] West Australia Supreme Court 59; *Shorten v Shorten* [2002] New South Wales Court of Appeal 73; and *Williams et al Executors, Administration and Probate* 179; See also Hubbard <http://www.Newsmaxhealth.com/Headline/Alzheimers-normal-aging-memory-problems-seniormoments/2013/02/22/id/491623/#ixzz3JVVbj900>.

<sup>131</sup> O'Neill and Peisah 2012 *Sydney University Press* par 4.1; and Gorman 1996 4 *Elder LJ* 225.

<sup>132</sup> *Supra*.

<sup>133</sup> Par 8. See also *Harlow v Becker supra* 648 for testamentary capacity of an elderly person; *Meyer v Meester, Vrystaat Hoë Hof, Bloemfontein* [2010] ZAFSHC 85 and *Mafuya v Lizwe* (15290/12) [2013] ZAWCHC 195 for dementia and capacity to get married.

<sup>134</sup> See also "What is Dementia? The Signs, Symptoms, and Causes of Dementia" 29 October 2014 <http://www.medicalnewstoday.com/articles/142214.php> (accessed 2014-11-22); Moye,

“The evidence of the witnesses ... tends to show a slow progressive dementia and memory impairment which clinically became detectable until it reached the level of severity where the deceased clearly forgot names of relatives and, at times, confused one relative with the other. ... This clearly accords with Prof Zabow’s evidence and the description of the disease as being characterised by an insidious gradual onset, progressive declining cognition”.

From the 1990s onwards, dementia and/or Alzheimer’s disease became one of the most common grounds to contest testamentary capacity.<sup>136</sup> Case law shows that, although a person might have some symptoms of dementia, he or she could still retain the abilities to understand the nature and effect of the will-making process.<sup>137</sup> This was illustrated in the case of *In re Estate of Erwin W Schlueter*,<sup>138</sup> by the deceased’s testamentary capacity, when he executed his last will and testament. He left a large portion of his estate to a younger woman, whom he had known since she was a toddler and of whom he and his wife (before she passed) were very fond. The woman moved in and cared for them. She helped to manage their affairs. It was argued that the testator’s medical and mental condition raised issues of fact regarding his testamentary capacity. His physician testified that he suffered from senile dementia but declined to offer an opinion as to whether he lacked testamentary capacity. The Court held that a diagnosis of senile dementia is not incompatible with a finding of testamentary capacity.<sup>139</sup> Similarly, in the case of *In Re Estate of Lawrence Laveglia*<sup>140</sup> the deceased passed away at the age of 90. At the time of his death, his two sons had not been speaking to each other for 25 years. The deceased had a long history of illness and was diagnosed by a neurologist with mild dementia, probably of the Alzheimer’s type. The deceased made some changes to his will effectively removing one son, and naming the other, as the sole primary beneficiary upon his death. It was claimed that he lacked the necessary testamentary capacity. However, the Court found him to have capacity.<sup>141</sup>

## 6 2 Assessment by the courts of testamentary capacity

While it is for the Court to decide whether a will is valid or not, a careful medical assessment, fully documented, reflecting the mental state of a

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Marson, and Edelstein 2013 *American Psychologist* 158-171 state: “Brain functioning is lost as a dementing illness progresses or as the brain is subjected to the loss of blood flow and oxygen from multiple strokes.”

<sup>135</sup> Par 54 and further “This further accord with Prof Zabow’s evidence to the effect that patients with Alzheimer’s-type dementia usually deteriorate to an end stage when the patient would need full nursing care.

<sup>136</sup> See fn 9 10 and 13. There are literally hundreds more reported cases.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Supra* par 14.

<sup>139</sup> Par 15 and 16. See also *Gray v Hart & Ors supra*; *Estate of Raymond W Harper, Deceased* (unreported) Case number 2013-687/A 2014-11-14 <http://www.newyorklawjournal.com/id=1202676164731/Estate-of-Raymond-W-Harper-Deceased-2013687A#ixzz3J7SRyp7Y> (accessed 2014-12-10).

<sup>140</sup> *Supra.*

<sup>141</sup> In *Erasmus v Jacobs* [2012] ZAFSHC 175 par 5 it was claimed that the deceased suffered from Alzheimer’s disease and it was questioned whether she was *doli incapax* and could form any intention to sell the farms to first respondent’s company.

deceased (at the time the will was made) can be very helpful to the Court, or even remove the need for legal proceedings completely. In modern times (20<sup>th</sup> and 21<sup>st</sup> century), the advancements that were made in the medical field (research on the cognitive abilities and the effect of impairments), contribute to a better understanding of these conditions and can effectively be used in analysing the behaviour and abilities, with respect to brain functioning and pathology, of older people.<sup>142</sup> Medical evidence can assist the Court when there is doubt as to the competency of the testator's capacity.<sup>143</sup>

Medical assessment of an impaired elderly usually takes place after the death of the testators. A *post mortem* evaluation implies that after the passing of the person an "autopsy" of the deceased's medical records, behaviour, friends and family's experience with the deceased, can help to establish if he or she had testamentary capacity.<sup>144</sup> Hall *et al* remarks as follow:

"Although assessing an individual's testamentary capacity while he or she is alive is a good way to diminish the likelihood of a challenge, most examinations of an individual's testamentary capacity occur after the testator has died. In these circumstances, the examiner usually does a post mortem review of the patient's records to try to determine the state of mind of the individual at the time the will was written, not at the time of his or her death. Post mortem evaluations are, in general, more difficult since they often take place years after the will was written, when less information is available (eg, the individual who wrote the will is dead, collaborating witnesses may have died or moved), and the information is distorted (eg, individuals' memories are influenced by their recollection of the testator's mental state at the time of the testator's death, not at the time the will was executed."

If the evaluation of a person's mental state of mind takes place while the testator is still alive (*ante mortem*) the examiner (who can also be an attorney or medical doctor) should establish whether the potential testator is demented or not and if he or she could appreciate the examiner's questioning.<sup>145</sup> *Ante mortem* assessment takes place before or during the *executing process* when

<sup>142</sup> See fn 14.

<sup>143</sup> Champine 31 March 2005 <http://ssrn.com/abstract=696081> 69; O'Neill and Peisah 2011 *Sydney University Press* par 4.1; and see Welch "Testamentary Capacity" *Trust and Probate Navigation* [http://www.hutchlegal.com/os/resources/media/NAVIGATOR\\_NEWSLETTER\\_issue\\_3-SM.pdf](http://www.hutchlegal.com/os/resources/media/NAVIGATOR_NEWSLETTER_issue_3-SM.pdf) (accessed 2015-02-11): "When evaluating testamentary capacity, courts will consider consistency of behaviour as part of this evaluation, which may involve medical evaluations. Most medical tests performed pre- and post-mortem focuses on the deceased's ability to manage core cognitive domains of competency: comprehension of information, information processing, and communication of decisions. If there are sudden changes in the deceased's actions, lifestyle, or even beliefs, that could be evidence of lack of testamentary capacity."

<sup>144</sup> Gutheil 2007 35 *Journal of the American Academy of Psychiatry and the Law* 514–517: "The examination for testamentary capacity poses several unique challenges to the forensic evaluator, especially when performed, as is often the case, postmortem." Ryznar and Devaux 2013 *Nevada LJ* 16; Chafetz *Expert Article Library*; Champine 31 March 2005 <http://ssrn.com/abstract=696081> 69 3 "Probate procedure imposes a serious obstacle to accessing probative evidence about a testator's capacity because will contests occur after the testator's death when forensic examination of the testator's mental acuity is impossible."

<sup>145</sup> Chafetz *Expert Article Library*: "On the other hand if the testator is alive an examiner can take into account an interview with the testator to establish if he or she is not demented and if he or she can appreciate the examiner's questioning." Also see the Mental Capacity Act of 2005 below.

the testator is evaluated.<sup>146</sup> Some scholars argue that submitting an old person to *ante mortem* evaluation can give the testator surety as to the validity of his will and protect the estate against possible claims of incapacity.<sup>147</sup> Others argue that this can be degrading for old people to be subject to cognitive tests.<sup>148</sup>

As the understanding, of what mental capacity and cognitive impairments are, have changed over time,<sup>149</sup> the Courts also gave recognition to the fact that major medical progress was made in the assessment of cognitive capacities between the 19th century and modern times. In *Kerr and Anor v Badran and Anor Estate of Badran*, the deceased passed away at the age of 95.<sup>150</sup> The Court referred to the changes of time:<sup>151</sup>

“In dealing with the *Banks v Goodfellow* test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well-off under 50 years: the average life expectancy of male in Australia in 1995 was 75 years.”

As further research is done and more knowledge is gained on the topic of cognitive impairments, the Courts appear to have moved in a direction, where notwithstanding diagnoses of decline in cognitive abilities, testamentary capacity remains a factual question and can prove to be unaffected.<sup>152</sup> This is demonstrated by the facts in the case *Lipchick v Master of the High Court*, where the testatrix’s mental capacity was questioned.<sup>153</sup> Although it has been confirmed by a neighbour and friend of the testatrix that she was very frail, she was “up to the time of her death, mentally stable, mentally alert, had

<sup>146</sup> Author’s own emphasis. In the later stages of Alzheimer’s and other dementias, a person may be unable to remember or even recognise family members. *Simon v Byford supra* par 13: “It was common ground that from 2001, when Mrs Simon was 83, her mental health deteriorated. The experts called before the judge agreed that by 18 December 2005, when the disputed will was made, Mrs Simon was suffering from mild to moderate dementia, to such a degree as to put her testamentary capacity in doubt. But neither expert had examined her during her lifetime and neither was able to say with certainty whether she did or did not have testamentary capacity on that date.” See also *Matter of the Estate of Blanche Riordan, Deceased supra*; *In re Estate Lacey supra*; Gorman 1996 4 *Elder LJ* 225; and Shulman *et al* 2004 20 *International Journal of Geriatric Psychiatry* 63–69.

<sup>147</sup> Champine 31 March 2005 <http://ssrn.com/abstract=696081>; O’Neill and Peisah 2011 *Sydney University Press* par 4.1; Hoffman 2010 *California Psychologist* 15; Chafetz *Expert Article Library*; Ryznar and Devaux 2013 *Nevada LJ* 5; and Sonnekus 2012 *THRHR* 1ff.

<sup>148</sup> This *ante mortem* evaluation is preferred over a post-mortem process. See Greene “Ante mortem Probate: A Mediation Model” 1999 14 *Ohio St Journal* 663 671–672: “There are, however, a few drawbacks to ante mortem probate, including the necessity of the testator to confront contestants in court (creating discomfort and family disunity), the openness of the process to the public, and the litigation costs that may deplete the funds of the estate.”

<sup>149</sup> From “an unsound mind due to insanity”, to claims of “dementia and Alzheimer’s disease”.

<sup>150</sup> Fn 9 above.

<sup>151</sup> Par 1 and 3.

<sup>152</sup> Australian Education *Capacity to Make a Will* Ch 4; Shulman *et al* 2009 21 *International Psychogeriatrics* 433; and Gutheil 2007 35 *Journal of the American Academy of Psychiatry and the Law* 514–517.

<sup>153</sup> Also see the cases referred to in fn 9, 10 and 13 above.

complete clarity of mind and showed no sign whatsoever of mental deterioration".<sup>154</sup>

In *Frizzo & Anor v Frizzo & Ors* the Supreme Court of Queensland Court of Appeal heard the case of Mrs Frizzo, a wealthy 81-year old widow who was starting to exhibit some symptoms of mild dementia.<sup>155</sup> She had a fall and broke her hip in 2006. Consequently, she was admitted to hospital. At various times in the days after her admission she was incoherent and confused but she improved significantly over the next week. She required surgery to fix her hip, and due to her age, she carried a risk that she may not survive the surgery. She executed a will just before the surgery, with the assistance of a doctor and nurses. She was found to have testamentary capacity.<sup>156</sup>

The recent Namibian case of *Vermeulen v Vermeulen*<sup>157</sup> involves a bitterly-fought battle over the validity of a second will of the deceased, the mother and grandmother of the contesters.<sup>158</sup> This case once again illustrates how difficult it might be to establish testamentary capacity as the Supreme Court overturned the trial Court's decision on testamentary capacity. On appeal, (as opposed to the High Court) the testatrix was found *not to have the necessary mental state* at the time of the execution of the will (seven years before her death) as, at the time, she was suffering from Alzheimer's disease to such a degree that she was unable to appreciate the nature or contents of her acts.<sup>159</sup>

In the context of testamentary capacity the Courts are frequently confronted with "strange behaviour" of an elderly. This behaviour can result in the capacity of an old person being questioned but is not conclusive to establish incapacity. In *Scott v Master of the High Court, Bloemfontein*<sup>160</sup> the validity of the last will of the deceased made on 4 October 2011, was challenged by his son, claiming that the deceased showed strange behaviour and therefore lacked testamentary capacity.<sup>161</sup> When the deceased made the disputed will he was 85 years old.<sup>162</sup> His general health was deteriorating.<sup>163</sup> According to the applicant:

<sup>154</sup> Par 23: "The second respondent's protests that the signs of the testatrix's mental incapacity are to be found in her 'paranoia' about the way in which she had been treated by her son, Leon are dashed on the rocks of hard fact: it is incontestable that the testatrix was justifiably incensed with Leon in December 2004."

<sup>155</sup> Also see *In re Estate of Marsh* 2011-Ohio-5554; *Hawes v Burgess supra*; *Malan v Strauss supra*; and *Vermeulen v Vermeulen supra* HC par 17.

<sup>156</sup> See also *Simon v Byford supra*; *D'Apice v Gutkovich, Estate of Abraham* where testamentary capacity was found to be present at the execution of the will.

<sup>157</sup> 2004 NR 184 (HC); and *supra* SC.

<sup>158</sup> SC par 150. See also Welch [http://www.hutchlegal.com/os/resources/media/NAVIGATOR\\_NEWSLETTER\\_issue\\_3-SM.pdf](http://www.hutchlegal.com/os/resources/media/NAVIGATOR_NEWSLETTER_issue_3-SM.pdf).

<sup>159</sup> Author's own emphasis. See SC par 148: "To repeat, I find the judge a *quo's* remark in par 58 of his judgment that the incident which occurred approximately July 2000 had nothing to do with the deceased's testamentary ability, untenable when one properly has regard to how the disputed will came to be made ..." See also Menges "Vermeulen's Disputed Will Declared Invalid?" 7 April 2014 *The Namibian*.

<sup>160</sup> *Supra*; *Vermeulen v Vermeulen supra* HC par 41.

<sup>161</sup> Par 1; and Atkinson and Kanani 2013 *Trusts and Estates Law & Tax Journal* 26–28.

<sup>162</sup> Par 2 and 16.

<sup>163</sup> Par 3. The validity of the will was challenged on the basis that, when the testator executed it, he was "mentally incapable" (not of sound mind) of doing so and could consequently not appreciate the nature and effect of his conduct.



“The testator would search for a light which was not there; his speech was confused; he kept on ringing the bell; was not able to conduct a meaningful discussion; would make ridiculous demands that his electric wheelchair be placed on top of a cupboard where there was no space for it; he would indicate the wall on which there was no light switch and ask that the light be switched on and in the last few months he did not react at all when told about his family”.<sup>164</sup>

Although a bed chart of the old age home, where the deceased lived, remarked that he was disorientated in the days before executing his will, it is also clear that in the days that followed, his health improved. Despite indications of dementia and delirium, the Court found the deceased to have testamentary capacity.<sup>165</sup>

In the case *In re Estate of Erwin W Schlueter* in addition to senile dementia, it was also claimed that the testator’s behaviour is indicative of lack of capacity.<sup>166</sup> Some of his relatives supplied affidavits reporting that he did not recognise a car he had previously owned and he had forgotten how to drive a car. He could not decide for himself what to eat and once urinated in his clothes. Other relatives reported that he could not carry on a simple conversation or operate a candy dispenser. The home health-care nurse noted in her report that his short-term memory was poor.<sup>167</sup> Despite his peculiar behaviour he was found to have capacity.

## 7 UNDUE INFLUENCE VERSUS TESTAMENTARY CAPACITY

Often undue influence is claimed as an alternative to testamentary capacity.<sup>168</sup> The core of undue-influence claims, however, differs from testamentary-capacity claims.<sup>169</sup> The South African position on undue influence was recently discussed thoroughly by Du Toit.<sup>170</sup> He states that the

<sup>164</sup> Par 4.

<sup>165</sup> See also Hall *et al* 2009 17 *Clinical Geriatrics* 7: “Delirium can be a particularly difficult question to address due to the waxing and waning nature of its presentation. It is possible for an individual to have capacity at one point in time (eg, lucid interval) and not have the capacity a short time later. The level of functioning of patients with dementia at the time the will is executed is the critical question that must be addressed, because such patients may have symptoms related to dementia but still have the ability to meet the five criteria (Cockburn’s rules) necessary to execute the will.”

<sup>166</sup> Fn 59 above.

<sup>167</sup> Par 15. See also *In The Will of Edward Victor Macfarlane, Deceased* par 14 for paranoia delusional behaviour and *Key v Key supra*, where the will of a 90-year old testator, who instructed his solicitor to change his will shortly after the death of his wife of 65 years, was challenged by his sons. Despite the evidence of two medical experts and numerous witnesses it was still difficult to determine incapacity from the evidence. The testator was found not to have had capacity and the will was invalid.

<sup>168</sup> *Hutchison v Hutchison* [2006] Ontario Superior Court of Justice No 3231; *Katz v Katz*; *Matter of the Estate of Blanche Riordan, Deceased supra*; *In re Estate of Lacey supra*; *Hawes v Burgers supra*; *Nicholson v Knaggs*; Gorman 1996 4 *Elder LJ* 225; Sonnekus 2012 *THRHR* 13; and Hoffman 2010 *California Psychologist* 16.

<sup>169</sup> *Birt and Anor v The Public Trustee of Queensland and Anor* [2013] QSC 013. See also Du Toit 2013 *Journal of Civil Law Studies* 549; and Sitkoff 2014 58 *Saint Louis University LJ* 650. The emphasis in this discussion is on testamentary capacity and not on undue influence as the latter has been discussed frequently by scholars.

<sup>170</sup> 2013 *Journal of Civil Law Studies* 545ff.

doctrine of undue influence refers to a (third) person using power over another, often for the purpose of financial exploitation.<sup>171</sup> Where a claim of mental incapacity or insane delusion is a question of status, a claim of undue influence relies on the wrongdoing by a third party.<sup>172</sup> In practice, status and conduct claims tend to overlap because the mental ability of the testator is a relevant aspect to ascertain his or her vulnerability to be influenced by others. There seems to be a perception that it is easier to challenge a will on the basis of testamentary capacity, rather than undue influence.<sup>173</sup>

Du Toit further states:<sup>174</sup>

“South African scholars generally regard testamentary undue influence as a benign construct that protects the testamentary freedom of particularly aged or otherwise vulnerable testators against the importunities of false persuaders or enterprising impostors”.

In the case of *Estate of Wilbur Waldo Lynch* the will of the testator was contested when he died in 2005, aged 92.<sup>175</sup> Since 2000 he needed help with everything, including bathing and eating. He could not read, and he needed help using the telephone and the television. In 2003, the attorney who prepared the 2003 will hired a clinical psychologist to conduct a testamentary-capacity evaluation of the testator. The will was contested on the grounds of (i) lack of testamentary capacity to execute the 2003 will and that the testator (ii) executed the will as a result of undue influence. The important question in this case was whether a finding that a testator lacks testamentary capacity, conflicts with a finding that he was unduly influenced. It was claimed that these findings create an irreconcilable conflict because a person cannot lack both testamentary capacity and be unduly influenced. It was argued that these findings implicate the same material facts and that a person’s lack of testamentary capacity and undue influence are mutually exclusive. The Court ruled that the one does not exclude the other.<sup>176</sup>

In will contests, the question of testamentary capacity must first be addressed. If the testator had capacity it can still be proved that there was undue influence by another party.<sup>177</sup> The case of *Gill v RSPCA*<sup>178</sup> indicates

<sup>171</sup> Both “testamentary capacity” and “undue influence” are legal concepts that are rather difficult to assess. See Hoffman 2010 *California Psychologist* 15–18; Sitkoff 2014 58 *Saint Louis University LJ* 650; and Ryznar and Devaux 2013 *Nevada LJ* 5: “[I]ssues of capacity and undue influence are inextricably intertwined. In fact, many claims for undue influence are accompanied by allegations of lack of capacity and vice versa”. See also Champine 31 March 2005 <http://ssrn.com/abstract=696081> 69.

<sup>172</sup> Author’s own emphasis. Sitkoff 2014 58 *Saint Louis University LJ* 650. The key question therefore is whether there has been a displacement of desire and thus whether the will contains the wishes of someone other than the testator. Old age of a person can make him or her more viable for undue influence. The testator’s mental state, his or her ability to resist prompting and instigation; and the relationship between the people concerned, are all factors to be taken into account. See also De Waal and Schoeman-Malan *Law of Succession* 39–44.

<sup>173</sup> *Malan v Strauss supra*; *Lipchick v Master of the High Court supra*; *Scott v Master of the High Court, Bloemfontein supra*; and Du Toit 2013 *Journal of Civil Law Studies* 544 “A survey of case law reveals that South African courts opt frequently to resolve challenges to wills where undue influence is averred (invariably as one among a number of alternatives) on grounds other than undue influence.”

<sup>174</sup> 2013 *Journal of Civil Law Studies* 512.

<sup>175</sup> *Supra*.

<sup>176</sup> Croucher 2007 7 *Oxford University Commonwealth LJ* 251ff.

<sup>177</sup> See also *Katz v Katz supra*; and *Malan v Strauss supra*.

how difficult it can be to establish if an old person who executed a will which disinherited her only daughter (and leaving £2 million to the RSPCA), was invalid. Her daughter suggested that her mother had suffered from anxiety and agoraphobia and her father was “domineering and bombastic ... utilizing her anxiety and fear of his explosive character ... to coerce her into making the Will which she did”. While a lack of testamentary capacity was relevant in this case, it also contains elements of undue influence. It was found that the testatrix had known and approved the contents of the will (she had testamentary capacity) but that the will was the product of undue influence exerted by her domineering husband. In *Birt and Anor v The Public Trustee of Queensland and Anor*<sup>179</sup> a claim was made to set aside a will based on the alleged lack of testamentary capacity and undue influence of the testatrix by her son. She executed a will and left the entire estate to her son, and in the event that the disposition to him failed, she left her estate to her daughter. She had made a prior will in which she left her estate to her children who survived her in “equal shares”. Mrs Brooks was diagnosed with dementia and was experiencing a marked decrease in mental functioning at the time she executed her will. She was noted to be experiencing delusions, and according to a medical opinion, her agitation, paranoia, hallucinations and delusions were noted. The Court found that on all of the evidence, Mrs Brooks was not acting in a considered and rational way on 23 September 2004. In particular the Court was not satisfied that Mrs Brooks was able to comprehend the nature of the act of making a will and its effect.<sup>180</sup> Once it has been established that there was no testamentary capacity the question of undue influence falls away. The Court found in the *Birt*-case that, although the son managed to convince his mother (the deceased) that his sister was taking over the house and removing him, there is no evidence that he had convinced his mother to change her will.

In *Weedon v Weedon*<sup>181</sup> the testatrix’s children challenged the validity of their mother’s 2008 will, arguing that their mother lacked the mental capacity to execute the will. They also argued that the beneficiary (their sibling) exerted undue influence on their mother when she executed her last will. The elderly testatrix, confined to the hospital, executed a new will four days before she died, leaving all of her assets to the one child to the exclusion of the remaining four children. The trial Court held that (i) the testator lacked the requisite testamentary capacity at the time she executed the will and (ii) even if the testator did have capacity, then the testator was subject to the undue influence of the beneficiary child when she executed the 2008 will. The

<sup>178</sup> [2009] EWHC 2990 (Ch). See Champine 31 March 2005 <http://ssrn.com/abstract=696081> 3.

<sup>179</sup> Fn 169 above. In the case of *Hawes v Burgess* testamentary incapacity versus undue influence was illustrated. Mrs Burgess has left her estate equally between her three children in a previous will. Ten years later her health was beginning to deteriorate. She gave instructions for a new will and executed it about three weeks later. The will-drawer note stated that she was “entirely compos mentis” and that he had no hesitation in taking instructions from her. However, he did not carry out a formal assessment of her capacity and his note referred to information given to him by her daughter who accompanied her.

<sup>180</sup> Regarding undue influence it was stated by Vickery J, in the 2009 decision *Nicholson v Knaggs* as follows: “In order to establish undue influence to vitiate a will it is not sufficient to establish merely a *prima facie* opportunity for its exercise.”

<sup>181</sup> No 101901 2012 Virginia Lexis 7 (13 January 2012).

Supreme Court of Virginia reversed the trial Court's decision and held that the trial Court focused on circumstantial evidence that raised the presumption of undue influence while overlooking the ultimate inquiry: whether the testatrix's own free will was overridden. The *Weedon*-case shows how difficult it can be to challenge a will on the basis of mental incapacity and/or undue influence.

In is quite clear that each case will continue to be assessed and decided on its own set of specific facts and circumstances.

## 8 CONCLUSION

The common-law standard for testamentary capacity has not changed over time, though life expectancy of people has changed.<sup>182</sup> Frolik emphasises how liberally the Courts interpret the requirements for testamentary capacity and how frequently a testator with visibly diminished capacity is nevertheless found to have possessed testamentary capacity.<sup>183</sup>

This contribution provides an overview and analysis of recent judgments where testamentary capacity is challenged due to old age and old-age-related impairments. Upon consideration of relevant case law, it became clear that both the common-law principle of freedom of testation and testamentary capacity (specific to old people), have always been respected and are still highly valued.<sup>184</sup> As the capacity to execute a will remains a factual question that is specific to every situation it is very difficult to narrow down guidelines.

The elderly, (although a degree of dementia or other mental or behavioural disorders occur), still desire to dispose of their assets (wealth), as can be gathered from the elevation of case law where wills are contested.<sup>185</sup> Although the mere fact of old age and strange behaviour or cognitive illness, does not necessarily mean that a person is incapable of appreciating the nature and effect of the will (he or she is executing), it may well give rise to the question of testamentary capacity.<sup>186</sup> Considering that people are becoming older in modern times it can be expected that their capacity will increasingly be contested.

Over time, wills were less likely to be challenged on the basis of delusions (due to insanity) and it became more prevalent to challenge a will on the basis of deficits in the cognitive skills of memory, judgment and reasoning

<sup>182</sup> See also Regan and Gordon 1997 *Southern Medical Journal* 13-15; and Chafetz *Expert Article Library*.

<sup>183</sup> 2001 *International Journal of Law and Psychiatry* 257. See also Gutheil 2007 35 *Journal of the American Academy of Psychiatry and the Law* 515.

<sup>184</sup> Case law can be traced back to the 18<sup>th</sup> and 19<sup>th</sup>-century: See *In the Will of Wilson* [1898] Victoria Law Report 39; *Den v Vancleve* 1819 WL 1272 (NJ); *Harwood v Baker* [1840] EngR 1087; 3 Moo PC 282; *Swinfen v Swinfen* [1858] EngR 157; and *Bailey v Bailey* [1924] HCA 21: "[G]reat age, while it necessarily excites the vigilance of the Court, does not of itself establish want of capacity. Mr Bailey was 88 and suffering from pneumonia when in 1923 he made what was his seventh will. He died three days later. The majority of the High Court upheld this will rather than his sixth will made in 1914." See also Sonnekus 2012 *THRHR* 9–13 for his criticism of *Banks v Goodfellow supra* (the leading case on testamentary capacity).

<sup>185</sup> *Malan v Strauss supra* par 18–19. See also fn 9,10 and 13; and Shulman *et al* 2009 21 *International Psychogeriatrics* 433.

<sup>186</sup> Sitkoff 2014 58 Saint Louis University LJ 649. See also Michelon <http://sharpbrains.com/blog/2006/12/18/what-are-cognitive-abilities/>.

(dementia and Alzheimer's). When these conditions are experienced the law is not concerned with whether people are functioning at their highest possible level but whether they have a basic level of understanding about what is required to execute a will.<sup>187</sup>

Case law furthermore unveils that a person can never be too old to execute a will. There has never been a maximum age for a person to execute a will.<sup>188</sup> With regard to the requirement that one must be of sound mind, an elderly is presumed to have capacity, and if incapacity is alleged, it must be proved.<sup>189</sup> The Courts have adopted and applied these basic principles over centuries, despite the fact that people are becoming older and more vulnerable.<sup>190</sup>

Elder law has developed as an area of law to promote and encourage professionalism, expertise and knowledge regarding issues affecting the elderly.<sup>191</sup> The question prompted is whether there is enough protection for elderly testators in the common law and statutory law (despite loss of some cognitive abilities) to execute a will or whether additional steps should be taken to protect old testators?

In some jurisdictions additional measures are taken to specifically protect elderly testators. In the United Kingdom the Mental Capacity Act was designed to protect and empower individuals (including old testators) who may lack the mental capacity to make their own decisions about their care and treatment.<sup>192</sup> The MCA requires a professional (such as an attorney, or solicitor, or an estate planner) to follow the so-called "golden rule" when older impaired people execute wills, which implies that the testator should be subject to a doctor's assessment, opinion and evaluation.<sup>193</sup> This MCA and the "golden rule" have already been criticized in case law and by scholars.<sup>194</sup> Lawson<sup>195</sup> goes as far as to take exception against the "golden rule":

<sup>187</sup> *Re Smith* [2014] EWHC 3926 Ch; and Frolik 2001 24 *International Journal of Law and Psychiatry* 253ff.

<sup>188</sup> Hamilton and Cockburn 2008 *Queensland Law Society Journal* 14; and Atkinson and Kanani 2013 *Trusts and Estates Law & Tax Journal* 28.

<sup>189</sup> Champine 31 March 2005 <http://ssrn.com/abstract=696081> 3.

<sup>190</sup> The general vulnerability of older people is not discussed here: See <https://www.google.co.za/webhp?tab=ww&ei=J9ukVOGvC8X7UpPcgOAC&ved=0CAwQqS4oAQ#q=vulnerability+of+elderly>.

<sup>191</sup> Elder law is a legal term coined to cover an area of legal practice. See Lewis *Elder Law in Australia* (2011) Ch 11–13, where a number of topics unique to the elderly including: mistreatment in aged care, elder abuse, discrimination, capacity to execute legal documents and challenges to wills and estates, are discussed.

<sup>192</sup> Act 2005 (MCA) set statutory "issue-specific" capacity tests. See also "Law Commission Plans Reform of Will-making Regime" 24 July 2014 *Step Journal* <http://www.step.org/golden-rule-%E2%80%93time-move#sthash.01u7a6Hx.dpuf> (accessed 2015-01-21). See also *Walker v Badmin* [2014] EWHC (Ch), where it was concluded that the *Banks v Goodfellow supra* test should be applied in such cases rather than the Mental Capacity Act 2005 (UK) test. See also *Re Joyce Smith, deceased*; [2014] EWHC (Ch) (2014-22-25), where Morris QC (sitting as a Deputy High Court Judge) confirmed that the common-law test is preferred for testamentary capacity.

<sup>193</sup> See for the application of the act: *Fischer v Diffley* [2013] EWHC 4567 (Ch); *Greaves v Stolkin* [2013] EWHC 1140; and *Re Ashkettle (deceased)* [2013] EWHC 2125.

<sup>194</sup> *Walker v Badmin* [2014] All ER (D) 258; Lawson <http://www.step.org/golden-rule-%E2%80%93time-move>.

<sup>195</sup> <http://www.step.org/golden-rule-%E2%80%93time-move>.

“The rule states that in the case of an aged testator the rule is said to apply to an ‘aged testator’ – I contend that this is an utterly meaningless phrase. What is an ‘aged testator’ – does this mean someone who is an ‘old age pensioner’, i.e. over the age of 65 – or someone who is, for example, 75 years old, 85 years old – or over a 100? Unless there is an agreement about what an ‘aged testator’ is then the rule is plainly meaningless and cannot be complied with ... It will be appreciated that the judicial retirement age is now 70”.

The Law Commission (England and Wales) has since planned to reform the will-making regime in the near future.<sup>196</sup> They plan fundamental changes to the law on wills and testamentary capacity. In July 2014 the following was reported in *The Step Journal*:<sup>197</sup>

“The requirement for testamentary capacity is not statutory but derives from Victorian case law – the 1870 judgment in *Banks v Goodfellow* (5 QB 549). Though both regimes have been substantially clarified by later case law, they still bear the marks of a long-past era. The vast increase in the incidence of senile dementia has brought the issue of testamentary capacity into prominence, leading to many more challenges that can be expensive to resolve. Work on the project will start early 2015. The Commission’s conclusions, along with final recommendations and a draft Bill, are expected to appear early in 2018.”

Purser<sup>198</sup> states that Australia also lacks a satisfactory, national paradigm for assessing competence and capacity in the context of testamentary documents. This is because capacity assessments are conducted on an *ad hoc* basis by legal or medical professionals. Seen against the backdrop of an increase in the occurrence of diseases such as dementia and Alzheimer’s disease, he suggests that it becomes increasingly necessary for collaboration between the legal and medical professions, when assessing the effect of mentally-disabling conditions upon capacity.<sup>199</sup> In Australia section 12(2) of the United Nations Convention on the Rights of Persons with Disabilities provides for “an obligation on Australia to recognise that persons with disabilities enjoy the exercise of the right to freedom of testamentary disposition on an equal basis with all other persons”.<sup>200</sup>

South Africa has no similar specific provisions where the testamentary capacity of old people is regulated. The Older People’s Act<sup>201</sup> aims to maintain and protect the status, wellbeing, safety and rights of elder persons. This act has no reference to the possibility of limited mental capacity relating to the execution of wills.<sup>202</sup> Sonnekus advocates that the law should intervene more than what is currently the position and that in case of potentially-impaired elderly persons, he proposes that a cap should be placed on

<sup>196</sup> <http://www.step.org/golden-rule-%E2%80%93-time-move#sthash.01u7a6Hx.dpuf>.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Assessing Testamentary and Decision-Making Competence/Capacity in the Australian Context* (2013) Paper presented at XXXIII rd International Congress on Law and Mental Health (14–19 July 2013) Amsterdam, Netherlands.

<sup>199</sup> See also Champine 31 March 2005 <http://ssrn.com/abstract=696081> 69.

<sup>200</sup> United Nations 6 December 2006 <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>. Member states include South Africa who signed the treaty on 30 March 2007. The date of formal confirmation, accession and ratification is indicated as 7 November 2007 but there is no formal declaration of acceptance. See also *Nicholson v Knaggs supra*; and *Birt and Anor v The Public Trustee of Queensland and Anor supra*.

<sup>201</sup> 13 of 2006.

<sup>202</sup> Sonnekus 2012 *THRHR* 7.

automatic testamentary capacity or, there should be a requirement that impartial professional persons should witness the will.<sup>203</sup> He recommends that there should either be a move in the direction of a notary will or the legislator should reverse the onus of proof where the testator has reached a certain age.<sup>204</sup> He favours a shift in the onus of proof rather than to accept that an old person had a *lucidum intervallum*.<sup>205</sup>

I tend to agree with Lawson's remarks that an age restriction on testamentary capacity or additional requirements that disqualify wills on the ground of testators' incapacity will seriously interfere with the principle of freedom of testation. His concerns are the following.<sup>206</sup>

"I express particular concern about the comment that if there is an aged testator then 'however straightforward matters may appear' a testator should have the will witnessed by a 'medical practitioner' – leading to an implicit criticism in every case where this arrangement is not made. This advice is not borne out by experience of the real world. Just suppose an aged testator whose wife has predeceased him and who has one adult son and a modest value estate and who appears to be perfectly capable of giving instructions – is it seriously suggested that, in default of any other suspicious circumstances, the will should not be made?"

My submission is that additional statutory requirements for elderly people to execute a will would most probably give rise to even more wills being contested. It seems as if the stance of Courts when assessing testamentary capacity is satisfactory. The basic requirements, as set within the boundaries of the common law, are utilised by the Courts to assess and evaluate the capacity of old testators and to judge whether the old person has had the capacity (and opportunity) to leave his or her worldly possessions to be disposed of according to the individual's wishes. There is no need to burden an old person who wants to execute a will with additional *ante mortem* assessments. If the Court is satisfied that a person had testamentary capacity the disgruntled allegor can still revert and prove undue influence.

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<sup>203</sup> 2012 *THRHR* 24-25; Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 87–88. See the criticism of Lawson <http://www.step.org/golden-rule-%E2%80%93time-move> above.

<sup>204</sup> Sonnekus in Reid and De Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* 90 refers to the age of 70 and pleads for a shift in the burden of proof when the testator has reached the age. In his contribution in the 2012 *THRHR* 24 he proposes the age of 75 as a cut of age where the onus should revert. A testator above this age (or a certain age) will be regarded as incapable until proven the contrary. Capacity can then be proved by an *ante mortem* test or diagnoses. See also Du Toit 2013 609.

<sup>205</sup> Author's own emphasis.

<sup>206</sup> See also Frolik 2001 24 *International Journal of Law and Psychiatry* 259.