

# The requirements and test to assess testamentary capacity (1)

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## OPSOMMING

### Die vereistes en toets om testamentêre bevoegdheid te bepaal

Die beginsels van testeerbevoegdheid en testeervryheid is gebaseer op gemeenregtelike beginsels. Artikel 4 van die Wet op Testamente 7 van 1953 bevestig die gemeenregtelike beginsels ten aansien van testeerbevoegdheid en stel twee vereistes waaraan voldoen moet word. Eerstens is daar 'n ouderdomsbegrensing van sestien jaar en tweedens mag 'n persoon nie onbevoeg wees om die aard en uitwerking van sy handeling te begryp nie. Die artikel skep voorts die vermoede dat 'n persoon testeerbevoeg is. 'n Persoon wat beweer dat die testateur nie sodanig bevoeg was om 'n testament te verly nie, sal op 'n oorwig van waarskynlikhede moet bewys dat die testateur onbevoeg was.

Vooruitgang op die mediese terrein ten aansien van kognitiewe gestremdheid en vermoëns van ouer, geestesbelemmerde persone, het daartoe gelei dat daar 'n skerp toename in hofsake is wat verband hou met testeerbevoegdheid en veral met die tweede been van die vereistes, naamlik dat 'n persoon die aard en uitwerking van sy handeling moet begryp. Die vraag na onbevoegdheid om te testeer is 'n feitevraag waarvoor die hof telkens moet beslis. Ten einde te bepaal of 'n persoon onbevoeg was om die aard en uitwerking van sy handeling rakende die verlyding van 'n testament te begryp, is daar oor die afgelope 150 jaar hoofsaaklik gesteun op die Engelse saak *Banks v Goodfellow*. Dié saak is reeds in 1870 beslis en word steeds vandag in Anglo-Amerikaanse jurisdiksies as die aanvaarde toets voorgehou om te bepaal of die testateur oor die nodige geestesvermoë beskik het om 'n testament te verly. *Banks* het 'n toets neergelê vir die "assessering van testeerbevoegdheid". Met verloop van tyd het die "vereistes vir testeerbevoegdheid" met die "assessering daarvan" ineengestrengel geraak.

In hierdie bydrae word die komponente van die vierledige toets (soos geformuleer in *Banks*), wat deur die hof oorweeg word, aan die hand van onlangse regspraak uit verskeie jurisdiksies bespreek. Die oogmerk is om vas te stel of dié toets, soos dit destyds geformuleer is, hedendaags steeds die geldende toets is en of dié toets tred gehou het met moderne ontwikkelinge op die terrein van mediese navorsing en veral vooruitgang op die gebied van kognitiewe gestremdhede by ouer persone. Daar word met verwysing na ontwikkelinge en regshervorming in ander jurisdiksies besin oor die relevansie van *Banks*. Daar word aan die hand gedoen dat die riglyne soos neergelê in *Banks v Goodfellow* wel die toets van tyd deurstaan het aangesien dit met verloop van tyd aangepas is om voorsiening te maak vir moderne vooruitgang. Daar word geredeneer dat die trefwydte van die toets so ver strek dat die neergelegde riglyne, met inagneming van onlangse ontwikkelinge, toegepas kan word. Ten spyte van hervormingstappe in sekere jurisdiksies blyk dit dat die *Banks v Goodfellow*-toets steeds die aanvaarde toets is en daar blyk geen rede te wees om af te wyk van die beginsels soos daarin neergelê en oor die afgelope 150 jaar toegepas nie.

## 1 INTRODUCTION

The freedom to leave your possessions to whomever you please is a principle that is highly respected in most societies.<sup>1</sup> De Waal states that the law of succession facilitates continuity and prevents self-help (by potential heirs) as it ensures a smooth transfer of wealth and guarantees that the property of the testator reaches its destination as determined by the testator.<sup>2</sup> Testamentary freedom goes hand in hand with testamentary capacity. The principles of testamentary capacity stem from the common law and are well established in South Africa and other common law jurisdictions.<sup>3</sup> To execute a valid will and dispose of property at death there are two basic requirements that must be complied with in all jurisdictions where freedom of testation and testamentary capacity prevail.<sup>4</sup> Firstly, the prescribed formalities required for executing a will must be complied with,<sup>5</sup> and, secondly, the person who wants to execute a will must have the necessary mental capacity to do so.<sup>6</sup>

In almost all common law jurisdictions, the delineation of testamentary capacity has become a controversial topic in recent times. One of the reasons is that as people live longer, their cognitive abilities are questioned. Furthermore, the

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- 1 Du Toit "Mental capacity as an element of testamentary capacity" 2005 *SALJ* 661ff; Sonnekus "Testeerbevoegdheid en testeervryheid as grondwetlik beskermde bates" 2012 *THRHR* 1 9; 2012 *THRHR* 171ff; Sonnekus "Freedom of testation and the ageing testator" in Reid *et al* (eds) *Exploring the law of succession: Studies national, historical and comparative* (2007) 78 86; De Waal and Schoeman-Malan *Law of succession* (2008) 39ff.
  - 2 In Reid *et al* (eds) "A comparative overview" in *Exploring the law of succession: Studies national, historical and comparative* (2007) 1 2. See also Du Toit 2005 *SALJ* 661; Sonnekus (fn 1) 79; Hoffman "The basics of testamentary capacity for geriatric neuropsychologists" 2010 *The California Psychologist* 15 (*Cal Psych*); Atkinson and Kanani "Satisfying *Banks v Goodfellow*" 2013 *Trusts and Estates Law & Tax J* 26 (*TEL&TJ*).
  - 3 Du Toit "Succession law in South Africa – a historical perspective" in Reid *et al* (eds) "A comparative overview" in *Exploring the law of succession: Studies national, historical and comparative* (2007) 67 explains the historical background in the South African law of succession and the influence of both civil law (Roman-Dutch) and common law (English law). See Sonnekus (fn 1) 78ff; De Waal and Schoeman-Malan (fn 1) 39ff. The law of succession is for other jurisdictions, see Champine "A blueprint for testamentary capacity reform" 2005 available at <http://ssrn.com/abstract=696081> (accessed 29 January 2015) 1 at 3 who 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. See also Croucher "Statutory wills and testamentary freedom imagining the testator's intention in Anglo-Australian law" 2007 *Oxford University Commonwealth LJ (OUCLJ)* 241 246; Hoffman 2010 *Cal Psych* 15–18; Du Toit "Criticism of the testamentary undue influence doctrine in the United States: Lessons for South Africa?" 2013 *J of Civil Law Studies* 509 525 (*JCLS*); Sitkoff "Trusts and estates: Implementing freedom of disposition" 2014 *Saint Louis University LJ* 644 (*St Louis ULJ*).
  - 4 Du Toit 2005 *SALJ* 661; De Waal and Schoeman-Malan (fn 1) 40; Schoeman-Malan *et al* "Section 2(3) of the Wills Act 7 of 1953: A retrospective and critical appraisal of some unresolved issues" 2014 *Acta Juridica* 80–81.
  - 5 Corbett, Hofmeyr and Kahn *The law of succession in South Africa* (2001) 74; De Waal and Schoeman-Malan (fn 1) 39ff; Schoeman-Malan *et al* 2014 *Acta Juridica* 81.
  - 6 Corbett *et al* (fn 5) 74; Du Toit 2005 *SALJ* 661; De Waal and Schoeman-Malan (fn 1) 39ff. Van Erp "New developments in law of succession" 2007 *Electronic J of Comp L* available at <http://www.ejcl.org> (accessed on 19 May 2015) warns that a comparative examination might very well bring to the surface that legal systems do resemble one another much more closely than previously thought.

expectation to inherit amongst potential heirs builds up and the disappointment of not being instituted as a beneficiary prompts disgruntled disinherited beneficiaries to contest the will of sick, vulnerable and older testators.<sup>7</sup> In recent times, such law suits have come to count among the most frequent types of litigation.<sup>8</sup>

Some scholars attribute the increase in contested wills to the aging society and to the Baby Boomers (of the sixties)<sup>9</sup> who have now aged and whose wealth is about to be transferred from their generation to the next.<sup>10</sup> A further reason given is the extraordinary advances that have been made in the diagnosis and treatment of mental disorders as it has become possible to establish different stages of incapacity.<sup>11</sup>

- 7 People live longer than before and with old age come certain impairments that can contribute to incapacity. See Sonnekus (fn 1) 90; Shulman *et al* "Contemporaneous assessment of testamentary capacity" 2009 *International Psychogeriatrics* 433–439 (*Int Psycho*); Atkinson and Kanani 2013 *TEL&TJ* 26–28; Sitkoff 2014 *St Louis ULJ* 644; Catanzariti "To remember, to reflect and to reason – Capacity" available at <http://bit.ly/1NdZlWQ> (accessed on 28 November 2014).
- 8 *Netshituka v Netshituka* 2011 5 SA 453 (SCA); Gorman "Testamentary capacity in Alzheimer's disease" 1996 *Elder LJ* 225 (*Elder LJ*); Sonnekus (fn 1) 86; Hoffman 2010 *Cal Psych* 15–18; Chafetz "Assessing testamentary capacity: Some sensible advice" *Expert Article Library* available at <http://bit.ly/1OdeZPm> (accessed on 26 November 2014); Du Toit 2013 *JCLS* 509–551; Atkinson and Kanani 2013 *TEL&TJ* 26–28.
- 9 Shulman *et al* 2009 *Int Psycho* 434; Hoffman 2010 *Cal Psych* 15; Pilson "Declining cognitive ability presents challenges to Boomer finances" 2011 *Real Time Economics* available at <http://on.wsj.com/1GOslPw> (accessed on 16 November 2014); Aitchison "Baby boomers – The end of the world?" 2011 *Pensions World* 18–19. See also Mowat "Suspicious wills: The rise of 'want of knowledge and approval' claims" 2012 and "Invalid wills – the challenge of proving lack of 'testamentary capacity'" *Dispute Resolution Law Blog* April 2013 available at <http://bit.ly/1HUvsnA> (accessed on 27 February 2015).
- 10 De Waal (fn 2) 2; Moye, Marson and Edelstein "Assessment of capacity in an aging society" 2013 *American Psychologist* 158–171 (*Am Psycho*); *Gildenhuis v Gildenhuis* [2010] ZAWCHC 21 where the testatrix was in her 80s; *Levin v Levin* [2011] ZASCA 114 where the testatrix died aged 107; *Netshituka v Netshituka* (fn 8) para 16ff for chronic illness; *Lipchick v Master of the High Court* [2011] ZAGPJHC 49 where the testatrix died a few days short of her 95th birthday; *Vermeulen v Vermeulen* [2012] NAHC 23 (exact age not established but diagnosed with Alzheimer's disease); *Scott v Master of the High Court, Bloemfontein* [2012] ZAFSHC 190 where the testator died aged 95; *Malan v Strauss* FSHC (unreported) case no 1462/2012 of 28 November 2013 where the testatrix was 96 when she passed away. For other jurisdictions, see *Trust Company of Australia Limited v Daulizio* [2003] VSC 358 where the testator was aged 93; *Kerr v Badran, Estate of Badran* [2004] NSWSC 735 where the testator died aged 95; *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; *Key v Key* [2010] EWHC 408 (Ch) where the testator died aged 90; *In the Estate of Wilbur Waldo Lynch, Deceased* 2011 (CA of Tex SA) no 04–09–00777–CV; *Frizzo v Frizzo* [2011] QCA 308; *In the Estate of Huguette M Clark, deceased* (unreported) case no 1995/1375A of 22 June 2011 where the testatrix died aged 104; *Gray v Hart & Ors* [2012] NSWSC 1435 where the testatrix passed away at 95; *In The Will of Edward Victor Macfarlane, Deceased* [2012] QSC 20 where testator died aged 96; *Simon v Byford* [2013] EWHC 1490 (Ch) where the testatrix died aged 91; *In re Estate Lacey* 84 Mass App Crt 1108 (2013) where the testatrix died just before her 90th birthday.
- 11 See Gorman 1996 *Elder LJ* 225; Shulman, Cohen & Hull "Psychiatric issues in retrospective challenges of testamentary capacity" 2005 *Int J of Geriatric Psychiatry* 63–69 (*IJGP*); Hall *et al* "Testamentary capacity: History, physicians' role, requirements, and

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Whenever incapacity is claimed (in common law jurisdictions) it remains a factual question that the court has to establish on a case-by-case basis.<sup>12</sup> Therefore, no two cases are the same.<sup>13</sup> However, in dealing with testamentary capacity (mental capacity) there is one case that the courts have over the past 150 years, whenever testamentary capacity has been challenged, constantly referred to and that is “the guidelines for the assessment of capacity” as set in the 1870 case of *Banks v Goodfellow*.<sup>14</sup>

In this contribution some of the recent judgments on testamentary capacity from South African and other common law jurisdictions influenced by the English law are reviewed to establish whether the test, as formulated in *Banks*, has fallen into disfavour. The jurisdictions that will be discussed all have a similar approach to testamentary capacity and all constantly refer to the *Banks* case as if it is trite law. It will be investigated whether the common law rules (as stated in *Banks*) remain intact or whether over time they have been replaced by a “new test”.<sup>15</sup> In a review of present-day case law pertaining to testamentary capacity, it will be demonstrated how the courts tend to approach these evidentiary issues. The focus will be on the four components in the *Banks* case and the meaning and interpretation of the second component of the requirements for testamentary capacity, namely, that a testator should have the “ability to understand the nature and effect of the will-making act”.<sup>16</sup>

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why wills are challenged” 2009 *Clinical Geriatrics* 18–24; Jacoby and Steer “How to access capacity to make a will” 2007 *British Medical J* 155 (*BMJ*); Shulman *et al* 2009 *Int Psycho* 433; Hoffman 2010 *Cal Psych* 15; Ryznar and Devaux “*Au revoir*, will contests: Comparative lessons for preventing will contests” 2013 *Nevada LJ* 1 5 (*NLJ*); Du Toit 2013 *JCLS* 509–551; Sonnekus (fn 1) 86; Atkinson and Kanani 2013 *TEL&TJ* 26–28; Sitkoff 2014 *St Louis ULJ* 648.

- 12 See the cases in fn 10 and, specifically, *Simon v Byford* para 19: “In essence, therefore, the judge’s findings about testamentary capacity and knowledge and approval are findings of fact, based on his appreciation of the evidence as a whole. As such an appeal court should be wary of interfering with them for all the reasons that I set out in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114].” See also Mortimore and Weintraub 2003 *Clark Wilson LLP* 1–9; Champine (fn 3) 52; Atkinson and Kanani 2013 *TEL&TJ* 26–28.
- 13 In this regard Ebrahim J remarks in *Malan v Strauss* (fn 10) para 16 as follows: “The question that arises is what test is to be employed in deciding whether this onus has been discharged. The answer lies simply in deciding the further enquiry of whether the testatrix was at the material time of sufficient intelligence, possessing sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all its different bearings.” Scalise in discussing “Undue influence and the law of wills” 2008 *Duke J of Comp & Int L* 41 96 indicates that the common law and civil law also have similarities regarding aspects of testamentary capacity but he warns that when common law and civil law jurisdictions are compared “... the similarities should not be overstated. Despite the similarity in outcome of cases, differences in fundamental approach between the common law and civil law remain.” (He refers to the principles of undue influence.) In this regard, he states: “The laws of France and Germany are still motivated by beliefs in equal treatment of children and familial conceptions of property ownership, while robust notions of individualism and resistance to governmental intrusion still pervade the United States.”
- 14 1870 LR 5 QB 549 568. For this discussion, case law from England and Wales, Australia, New Zealand and the United States of America will be referred to.
- 15 See the cases in fn 10 above and *Sharp v Adam* [2006] EWCA Civ 449 (quoting from the classic judgment of Cockburn CJ in *Banks*); see also *Vermeulen v Vermeulen* 2014 NASC 7; *Walker v Badmin* [2014] All ER (D) 258; *Gangemi v De Vita* [2014] WASC 306.
- 16 See *Kirsten v Bailey* 1976 4 SA 108 (C) 109H–110; *Tregea v Godart* 1939 AD 16 19 where Tindall JA held that “in cases of impaired intelligence caused by physical infirmity,

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## 2 THE REQUIREMENTS FOR TESTAMENTARY CAPACITY

In general, two requirements are set for testamentary capacity. First, there is an age restriction and, secondly, a qualification that a person must be sane. When a testator's testamentary capacity is questioned, the point of departure for a court is the common law presumption that a testator has the prerequisite capacity to make a will.<sup>17</sup> The person who claims that the testator was incapacitated bears the onus of proof and the standard of proof is set relatively low for a person to have the required capacity.<sup>18</sup> The common law only requires that a testator should not have had an unsound mind at the *time of executing a will*.<sup>19</sup> This requirement centres round a person's ability to understand the second requirement, namely, the *nature and effect of the will-making act*.<sup>20</sup> This requirement has been incorporated in contemporary law by statutory provisions and case law.<sup>21</sup>

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though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains". For the UK, USA and Australia see Gorman 1996 *Elder LJ* 225; Shulman *et al* 2005 *IJGP* 63–69; Herral (fn 17); Atkinson and Kanani 2013 *TEL&TJ* 26–28.

17 See s 4 of the Wills Act 7 of 1953; Gorman 1996 *Elder LJ* 225; Shulman *et al* 2005 *IJGP* 63–69; Shulman *et al* "Assessment of testamentary capacity and vulnerability to undue influence" 2007 *Am J Psychiatry* 722–727; Herral "An aging population and dementia as a cause of death: Testamentary capacity to make a will?" 2012 available at <http://bit.ly/1Ne1H7W> (accessed on 5 November 2014); Atkinson and Kanani 2013 *TEL&TJ* 26–28.

18 Sonnekus 2012 *THRHR* 17 refers to *Levin v Levin* (fn 10) where the testatrix was 107 years old when she executed her will and where her capacity was not really an issue despite her age. The person contesting the testator's capacity will have to rebut the presumption of capacity.

19 Own emphasis. See, for mental incapacity that may arise because of unsound mind, Voet 28 1 34; and as a result of disease or drunkenness Voet 28 1 35. See also s 4 of the Wills Act 7 of 1953 which is declaratory of the common law with regard to the test for testamentary capacity: See De Waal 2010 *Annual Survey* 1172; Corbett *et al* (fn 5) 74; Victoria Law Reform Commission "Testamentary capacity" 2013 para 2 47 available at <http://bit.ly/1CYfZSj> (accessed on 28 November 2014).

20 Own emphasis. The age requirement differs in jurisdictions but this is not discussed here. For the position in America, see Glover "Rethinking the testamentary capacity of minors" 2014 *Missouri LR* 70ff. See also *Netshituka v Netshituka* (fn 8); *Naidoo v Crowhurst* [2010] 2 All SA 379 (WCC) para 9: "It was claimed that at the time when the deceased made the disputed will, he was mentally incapable of appreciating the nature and effect of his act." See Van der Merwe and Rowland *Suid-Afrikaanse erfreg* (1990) 205 for the position before 1954 and their reference to Grotius 2 15 3 and Voet 28 1 31–35; Du Toit 2005 *SALJ* 661; Sonnekus (fn 1) 86; De Waal and Schoeman-Malan (fn 1) 39; Atkinson and Kanani 2013 *TEL&TJ* 26.

21 The common law requirements for capacity have been retained and codified in some jurisdictions through legislation. See Glover 2014 *Missouri LR* 73 who refers to different states and the Unified Probate Code and states: "As the UPC illustrates, this requirement typically mandates that a testator be of 'sound mind' at the time he executes a will." In *Lipchick v Master of the High Court* (fn 10) para 18 it was said: "As the argument gathered momentum, it emerged that the second and third respondents' main contention is that, at the time when the testatrix signed that document ... she was mentally incapable of appreciating the nature and effect of her act and that the court ought to declare the document invalid as a will in terms of section 4 of the Wills Act." See Sonnekus 2012 *THRHR* 8; Denning and Thomas *Oxford textbook of old age psychiatry* (2013) 797: "Under the common law, and consistent with Article 12 of the UN Convention on the Rights of Persons with Disabilities, a person is always presumed to have capacity to make decisions. Where a person has dementia this may be a trigger for a capacity assessment if a decision

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In general (when compared with other capacities), the requirements for testamentary capacity are regarded as minimal.<sup>22</sup> Besides the required age, one needs to have the mental capacity to understand the nature and effect of the act one is about to complete.<sup>23</sup> It seems that when it comes to the second component of the “requirements”, this component has become blurred by the “test” to establish whether these requirements have been met. It seems as if the repeated references to the *Banks* case over the years have resulted in the confusion between the requirements for capacity and the so-called “test” to establish capacity.

The *Banks* case dealt with the general testamentary capacity of Mr John Banks who had made a will in which he left his estate to a niece. He had for some time, both before and after he gave instructions for and executed his will, believed that he was pursued and molested by devils and evil spirits. There was a medical opinion that he was insane and incapable of managing his affairs, but there was also evidence that he did manage his own funds and financial interests. The court found him to have had capacity, taking into account four different components of understanding.

The difference between the requirements for capacity and the assessment for capacity is important. *Banks* laid down components for the assessment of testamentary capacity.<sup>24</sup> Sometimes the different components of the test (factors that the court will take into account) can be conflated with the statutory requirements.<sup>25</sup>

### 3 TEST FOR TESTAMENTARY CAPACITY

#### 3.1 General test for capacity

There is no single test for “mental capacity” under the general law as capacity is decided relative to the specific task and the definite act performed or the particular legal instrument being executed.<sup>26</sup> As testamentary capacity is situation-specific, the answer to whether the testator had capacity will differ from testator to testator and, consequently, from one case to another.<sup>27</sup> As far as testamentary capacity goes, Hoffman states as follows:<sup>28</sup>

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needs to be made.” Shulman *et al* 2007 *Am J Psychiatry* 723 state that the US doctrine of insane delusion is distinct from testamentary capacity; Shulman *et al* 2009 *Int Psycho* 434ff. For the English law, see the Wills Act of 1837 s 7; Williams *et al Executors, administration and probate* (2008) 174; Edwards “Testamentary capacity and the Mental Capacity Act” 2014 (39) *Essex Street Mental Capacity Law Newsletter* 1–5.

22 Wilson “What is incapacity” 2015 available at <http://bit.ly/1IMQxAt> (accessed on 27 March 2015).

23 Corbett *et al* (fn 5) 74; De Waal and Schoeman-Malan (fn 1) 39ff; Glover 2014 *Missouri LR* 73–74.

24 See also Shulman *et al* 2007 *Am J Psychiatry* 723.

25 *Molefi v Nhlapo* [2013] JOL 30227 (GSJ).

26 Regan and Gordon “Assessing testamentary capacity in elderly people” 1997 *Southern Medical J* 13–15; Du Toit 2005 *SALJ* 662; Hoffman 2010 *Cal Psych* 16; Moye, Marson, and Edelstein 2013 *American Psychologist* 158–171; Chafetz (fn 8); Catanzariti (fn 7) 1.

27 *Tregea v Godart* (fn 16) 19; *Brown v Wade* [2010] WASC 367 para [98]; *In the Will of Edward Victor MacFarlane, Deceased* (fn 10) para 3; *Williams v Wilmot* [2012] EWHC 2211; *Vermeulen v Vermeulen* (fn 10) para 17. See also *Harlow v Becker* 1998 4 SA 639 (D) 648 for testamentary capacity of an elderly person; *Meyer v Meester, Vrystaat Hoë Hof, Bloemfontein* [2010] ZAFSHC 85 and *Mafuya v Lizwe* [2013] ZAWCHC 195 for dementia and capacity to get married.

28 2010 *Cal Psych* 16.

“Unfortunately there is no specific test or battery of tests designed to measure ‘sound mind’, so the clinician who receives a referral for an evaluation of testamentary capacity has to be creative in their approach to the assessment process.”<sup>29</sup>

Whether a person did or did not have testamentary capacity at the time he or she had made a will or codicil is a matter that only a court with the requisite jurisdiction can determine.<sup>30</sup> The court has to establish whether the testator had “a sound mind to understand” the nature and consequences of the act (will-making process).<sup>31</sup> As indicated above, when the validity of a will is attacked on grounds of lack of testamentary capacity, there is a legal presumption that the testator was in fact of sound mind and competent when he executed the will.<sup>32</sup> This presumption can only be overcome by clear and convincing evidence. In this regard, experts may be approached by the alleged to testify on the testator’s age and the diagnosis of possible cognitive impairments<sup>33</sup> as the person alleging incapacity bears the onus to prove same.<sup>34</sup>

Several criteria have been developed by the courts to assess whether the testator had the necessary vital cognitive abilities (in order to have the requisite soundness of mind) to execute a will.<sup>35</sup> As indicated above, there is one particular “test” that has been accepted widely and seems to still prevail in all the jurisdictions. Most Anglo-American jurisdictions today still base the legal criteria for testamentary capacity on the assessment criteria set in *Banks*.<sup>36</sup> The case has over the past century and a half been regarded as the leading case on the

29 *Cal Psych* 2010 17. See also *Essop v Mustapha and Essop* 1988 4 SA 213 (D).

30 *Essop v Mustapha and Essop* (fn 29); *Katz v Katz* [2004] 4 All SA 545 (C) para 22; *Vermeulen v Vermeulen* (fn 10); *Vermeulen v Vermeulen* (fn 15); *Scott v Master of the High Court, Bloemfontein* (fn 10); *Malan v Strauss* (fn 10); *In the Will of Edward Victor Macfarlane* (fn 10); *In The Matter of the Estate of Blanche Riordan, Deceased* SC New Jersey (App Div) (unreported) 2011-06-17 case no A-4123-09T4, A-4464-09T4; *In Re Estate of Elizabeth Lacey* (fn 10); *King v Hudson* [2009] NSWSC 1013 paras 58–59. See also Gorman 1996 *Elder LJ* 225; Shulman *et al* 2005 *IJGP* 63–69; Du Toit 2005 *SALJ* 662.

31 Being of sound mind suggests that a person is free of delusions or hallucinations that might otherwise interfere with good judgment. It is therefore situation-specific: *Banks v Goodfellow* (fn 14); *Rapson v Putterill* 1913 AD 417; *Tregea v Godart* (fn 16) 49; *Vermeulen v Vermeulen* (fn 10) para 6.

32 See s 4 of the Wills Act 7 of 1953; *Vermeulen v Vermeulen* (fn 10); *Kantor v Vosahlo* [2004] VSCA 235 para 92; *Nicholson v Knagg* [2009] VSC 64 para 91; Gutheil “Common pitfalls in the evaluation of testamentary capacity” 2007 *J of the American Academy of Psychiatry and the Law* 514–517 (*JAAPL*); Du Toit 2005 *SALJ* 665–666; Sonnekus (fn 1) 90; Sonnekus 2012 *THRHR* 13; Glover 2014 *Missouri Law Review* 73.

33 *Gangemi v De Vita* (fn 15) para 17; Gorman 1996 *Elder LJ* 225; Shulman *et al* 2005 *IJGP* 63–69; Herrald (fn 17); Atkinson and Kanani 2013 *TEL&TJ* 26–28.

34 See fn 30 above; *Key v Key* (fn 10) para 98 where Briggs J says that “the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insights into the workings of the mind otherwise entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges”.

35 Du Toit 2005 *SALJ* 662; Sonnekus (fn 1) 86. S 4 does not give the meaning of “unless at the time of making the will he is not mentally incapable of appreciating the nature and effect of his act”.

36 (Fn 14) 565. The well-known citations from *Banks v Goodfellow* are not repeated here as they have become trite law.

assessment of testamentary capacity in South Africa and several other jurisdictions.<sup>37</sup> When testamentary capacity is considered it is almost inevitable that it starts with a citation of a passage from the judgment in *Banks*.<sup>38</sup> Justice Denzil Lush,<sup>39</sup> a senior judge of the Court of Protection, stated as follows in this regard:<sup>40</sup>

“One of the reasons why *Banks v Goodfellow* is still cited and respected as a leading authority worldwide is because the judgment contained an extensive overview of the law relating to testamentary capacity, not only in England, but in a number of other jurisdictions. The Court considered: eight earlier English cases, the earliest of which was the Marquis of Winchester’s case in 1598; four French authorities, one German and one Italian on testamentary capacity; Roman law, Dutch law and five decisions in American courts, about which the judge was particularly complimentary.”

In the recent Namibian Supreme Court case of *Vermeulen v Vermeulen*,<sup>41</sup> the will of the mother and grandmother was contested on grounds of mental impairment due to Alzheimer’s disease. The court once again confirmed the *Banks* guidelines after setting out the various tests drawn from reported cases used in determining testamentary capacity in terms of section 4 of the Wills Act. Mtambanengwe AJA remarked as follows:<sup>42</sup>

37 See the cases in fn 10. More recent cases include *Hawes v Burgess* [2013] EWHC Civ 74; *Walker v Badmin* (fn 15); *Lock v Phillips* [2014] WASC 92; *Re Joyce Smith, deceased*; [2014] EWHC (Ch) where Morris QC (sitting as a deputy High Court judge) confirmed that the common law test is preferred for testamentary capacity; *Matter of Ruth Mae Johnson, deceased* 2015 NY Slip Op 50051; *Simon v Byford* (fn 10). See also *Fischer v Diffley* [2013] EWHC 4567 (Ch); *Greaves v Stolkin* [2013] EWHC 1140; *Re Ashkettle* (deceased) [2013] EWHC 2125.

38 Edwards 2014 (fn 21) 1–5. See also *Kirsten v Bailey* (fn 16); *Katz v Katz* (fn 30); *In the Will of Edward Victor Macfarlane, Deceased* (fn 10); *King v Hudson* (fn 30) paras 58–59; *Malan v Strauss* (fn 10); *Gildenhuis v Gildenhuis* (fn 10); *Vermeulen v Vermeulen* (fn 10); *Scott v Master of the High Court, Bloemfontein* (fn 10); *Vermeulen v Vermeulen* (fn 15); *Simon v Byford* (fn 10).

39 See his 2012 address to the *STEP Organisation* titled “*Banks v Goodfellow* (1870)” available at <http://www.step.org/banks-v-goodfellow-1870> (accessed on 8 March 2015). He states: “It dates from 1870 and is still the leading authority worldwide on testamentary capacity. And it exerts a gravitational pull on other tests of capacity, such as the test in *Re Beaney* [1978] 1 WLR 770 for making a substantial lifetime gift.” See also *King v Hudson* (fn 30) paras 58–59; *Vermeulen v Vermeulen* (fn 10); *Vermeulen v Vermeulen* (fn 15); *Scott v Master of the High Court, Bloemfontein* (fn 10); *Malan v Strauss* (fn 10).

40 The Court of Protection in English law is a superior court of record created under the Mental Capacity Act 2005. The Mental Capacity Act 2005 itself is not decisive on this point, but its *Code of Practice* states as follows in para 4 32: “There are several tests of capacity that have been produced following judgments in court cases (known as common law tests)” and in para 4 33: “The Act’s new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think it is appropriate. The Act will apply to all other cases relating to financial, healthcare or welfare decisions.”

41 (Fn 15) paras 129 and 130. 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. See also *Molefi v Nhlapo* (fn 24).

42 (Fn 15) para 16. S 4 is also applicable in Namibia. As mentioned above the principles are the same in all jurisdictions that are discussed. See also the New Zealand case *Woodward v Smith* [2009] NZCA 215 which involved a family member challenging the validity of changes made to the will of an elderly man after he had suffered a stroke. The Court of

*continued on next page*

“Over the years a number of tests for testamentary capacity has [*sic*] been formulated. It is apparent that all these tests are an elaboration of the principles spelt out in s 4 of the Act. Because the parties in this matter accept these tests it may not be necessary to refer to all of them. It is the application of these tests to the facts of this matter as revealed by the evidence that is of cardinal importance. A classic statement of testamentary capacity was provided by Cockburn CJ in the English case of *Banks v Goodfellow* [1987] LR 5 QB 549 at 564.”

The court also referred to the Australian case of *Nicholson v Knaggs* where Vickery J stated:<sup>43</sup>

“In the end it is for the Court, assessing the evidence as a whole, to make its determination as to testamentary capacity . . . The Court must judge the issue from the facts disclosed by the entire body of evidence . . . The manner in which she gave her instructions, the content of those instructions, the setting in which the instructions were given and the outcome of enquiries made by the solicitor acting in the matter, all assume importance.”

The classic test formulated in *Banks* has four components.<sup>44</sup> To establish whether a testator had testamentary capacity to understand the act of executing a will, it requires that the testator must: (i) understand the nature and effect of a will; (ii) know the nature and extent of his or her property; (iii) comprehend and appreciate the claims to which he or she ought to give effect; and (iv) not be suffering from a disorder of the mind or insane delusion that would result in an undesirable disposition.<sup>45</sup> Normally these components are not established (tested) one by one, but are entangled in the facts of the particular case.<sup>46</sup> These four guiding principles are known as the “*Banks v Goodfellow* test” and have been reaffirmed and refined over time.<sup>47</sup>

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Appeal carefully described the test for testamentary capacity, and the correct process by which this should be carried out. See also *McFadzean v Moleta* [2013] NZHC 1601.

43 The judge also referred to *Timbury v Coffee* (1941) 66 CLR 277 283 and stated in para 133: “I, with respect, accept, as the court *a quo* did, that the test for testamentary capacity is as stated in the South African Appeal Court case of *Tregea and Another v Godart and Another* 1939 AD 16 at 49; Voet (28 1 36) states that not only the healthy but also those situated in the struggle of death, uttering their wish with a half-dead and stammering tongue, can rightly make a will provided they are still sound in mind.”

44 See Du Toit 2005 *SALJ* 662 who refers to it as a test for mental capacity; Jacoby and Steer 2007 *BMJ* 155; Hoffman 2010 *Cal Psych* 17; *Katz v Katz* (fn 30); *Gangemi v De Vita* (fn 15) para 16. Some scholars combine the third and fourth components.

45 *Lock v Phillips* (fn 37) para 32 “An applicant for a grant of probate whether in common form or solemn form will always need to prove, to the satisfaction of the court, that the deceased made the will being propounded of his own volition; without duress and with a fully comprehending mind; understanding the nature and effect of the will; its consequences, with a general knowledge of his property and the persons to whom consideration should be given when determining his testamentary intentions.”

46 See the cases in fn 10 and 15 above; *Hawes v Burgess* (fn 37) where the evidence on incapacity was not clear but it was found that the testatrix lacked knowledge and appreciation. Atkinson and Kanani 2013 *TELTJ* 26.

47 See O’Neill and Peisah “Capacity and the law” 2012 *Sydney University Press* (in cooperation with the Australian Legal Information Institute (*AustLII*)) para 4 1 available at <http://bit.ly/1IMSj1h> (accessed on 17 November 2014).

### 3 2 Four components of *Banks v Goodfellow* test

There is only one test to establish testamentary capacity. Although there are four components to the *Banks v Goodfellow* test it remains only one test, the components of which are likely to be intertwined.<sup>48</sup> It might be that one specific component of the test is emphasised or deliberated more in a particular case, but to have capacity the testator must, at the end of the assessment, have complied with all of them.<sup>49</sup> The 2013 English case *Simon v Byford*<sup>50</sup> illustrates the application of the test as reference was once again made to the general common law test for testamentary capacity in *Banks* and the interaction between the different components of the test was discussed. The *Simon* case also refers to *Hoff v Atherton*,<sup>51</sup> a case concerning the will of a testatrix who left the substantial residuary estate to her friend, Mrs Atherton. Her testamentary capacity was challenged by disappointed legatees who argued that the judge erred in not requiring proof of an actual understanding of the nature of the act of making a will, the nature and extent of the property being disposed of, and the people who might be expected to benefit. To the contrary it was argued that capacity to understand is a distinct concept from actual understanding, proof of which is unnecessary and is rarely found. When it comes to the four components, proof of capacity is required to understand certain important matters.<sup>52</sup>

*Hoff* illustrates how the different components are interwoven. They can, however, also be separated.

#### 3 2 1 Understanding the nature and effect of a will

The first component of the *Banks v Goodfellow* test (understanding the nature and effect of a will) is a general expansive phrase that is also used in the broader framework of capacity in general. In the context of will-making and executing a will, this component requires that the testator should understand the nature and effect of executing a *specific will*.<sup>53</sup> In a broad sense, the testator therefore needs to be mentally capable (of sound mind) and he or she has to have an understanding of his actions and reasonable knowledge of his family, possessions and surroundings.<sup>54</sup> The words “nature and effect” in the adage is understood to mean that the testator, in performing the act (drawing up and signing a will) must be aware of and appreciate the significance of the act upon which he or she is about to embark.<sup>55</sup>

48 O'Neill and Peisah (fn 47) para 4 1.

49 Mortimore and Weintraub 2003 *Clark Wilson LLP* 4–5 state: “It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.” *Naidoo v Crowhurst* (fn 20) para 16 refers to *Tregea v Godart* (fn 16) 49 and *Banks v Goodfellow* (fn 14) 568. *Hawes v Burgess* (fn 37). See also Croucher 2007 *OUCLJ* 246; Hoffman 2010 *Cal Psych* 15.

50 (Fn 10) para 39. See Glover 2014 *Missouri LR* 73–4.

51 [2004] EWCA Civ 1554; [2005] WTLR 89.

52 See also *Hawes v Burgess* (fn 37).

53 Own emphasis. Hoffman 2010 *Cal Psych* 16. See also *A v X* [2013] WTLR 187; *Williams v Wilmot* (fn 27).

54 See also Sonnekus 2012 *THRHR* 7; Hoffman 2010 *Cal Psych* 16; Hill & Hill *People's law dictionary* (2010) available at <http://www.law.com> (accessed on 17 November 2014).

55 De Waal and Schoeman-Malan (fn 1) 42; Victoria Law Reform Commission (fn 19) para 2 51; Mortimore and Weintraub 2003 *Clark Wilson LLP* 1–9.

To test for the required abilities the court must at first establish whether the testator had the ability to understand what the will-making process is (being a voluntary act, executing a document to appoint beneficiaries and to take effect at the testator's death).<sup>56</sup> Secondly, the testator should also have the ability to realise the effect of what is going to happen with his or her assets (who is going to inherit what assets)<sup>57</sup> at his or her death.<sup>58</sup> Hoffman discusses the requirement of "understanding the nature of a will" and states that it implies that a person must have intact semantic memory or memory for words and their meaning and states:<sup>59</sup>

"They also need to be able to express their understanding of these concepts to the evaluator, either verbally or in written form. This requires intact verbal comprehension and some ability for verbal abstraction (i.e. 'what will the consequences be if you leave your oldest child out of your will?') and can be evaluated by asking the testator direct questions."<sup>60</sup>

In *Scott v Master of the High Court, Bloemfontein*,<sup>61</sup> the will that was executed by an elderly father in which he disinherited his son was challenged but upheld by the court. Reference was made to the test as confirmed in *Kirsten v Bailey* where the following was stated:

"The test to be applied in deciding the question the testatrix was at the time of sufficient intelligence, possessing a sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all different bearings."

In *Gangemi v De Vita* the following was found on the component of understanding the nature and effect of the act:<sup>62</sup>

"For a testator to have had testamentary capacity, he must have had sufficient mental capacity to comprehend the nature of the act of making a will and its effects, to understand the extent and character of the property being dealt with, and

56 Champine (fn 3) 52: "How, if at all, the standard requires testators to possess the capability of manipulating relevant knowledge, reasoning from it or drawing determinate conclusions based upon it is unclear."

57 S 4 of the Wills Act; *Tregea v Godart* (fn 16) 19; *Naidoo v Crowhurst* (fn 20) – this first important component was not established in this case; *Netshituka v Netshituka* (fn 8); *Kirsten v Bailey* (fn 16) 109H–110A; *Katz v Katz* (fn 30) para 22; *Gildenhuis v Gildenhuis* (fn 10) para 11; *Vermeulen v Vermeulen* (fn 10); *Lipchick v Master of the High Court* (fn 10); *Malan v Strauss* (fn 10) paras 16 and 18; *Molefi v Nhlapo* (fn 24) where components were confused; *In the Estate of Wilbur Waldo Lynch, Deceased* (fn 10); *Tobin v Ezekiel*; *Estate of Lily Ezekiel* [2011] NSWSC 81; *Nicholson v Knaggs* (n 32).

58 De Waal and Schoeman-Malan (fn 1) 44; Shulman *et al* 2005 *IJGP* 63–69; O'Neill and Peisah (fn 47) para 4 1; Croucher 2007 *OUCLJ* 251; Victoria Law Reform Commission (fn 19) para 2 54.

59 2010 *Cal Psych* 15; *Gildenhuis v Gildenhuis* (fn 10) para 11 and authorities such as *Lewin v Lewin* 1949 4 SA 241 (T) 280; *Smith v Strydom* 1953 2 SA 799 (T) 802. A person should be able to give a simple definition of the words will, death, property and inheritance.

60 (Fn 10). Also *Banks v Goodfellow* (fn 14) 565; *Timbury v Coffee* (fn 43) 280; *King v Hudson* (fn 30) paras 58–59; *Malan v Strauss* (fn 1) para 19.

61 (Fn 10) para 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." In para 15 the court refers to the *Kirsten* case (fn 16) 109–110 and *Smith v Strydom* 1953 2 SA 799 (T) 801A–C; *Tregea v Godart* (fn 16) 49–50.

62 (Fn 15) paras 15–17; see also *D'Apice v Gutkovich, Estate of Abraham* [2010] (No 2) NSWSC 1333; *Katz v Katz* (fn 30); *Kantor v Vosahlo* (fn 32).

to comprehend and appreciate the claims which naturally ought to press upon him in making his will. In order to understand these matters, the testator's mind must be free to act in a natural, regular and ordinary manner."

### 3 2 2 *Knowledge of the nature and extent of his or her property*

Traditionally, the *Banks v Goodfellow* test is said to have a second component that is regarded as one of the fundamental elements of establishing capacity.<sup>63</sup> The testator must understand (or be aware of) the "nature and extent of his or her property" (estate).<sup>64</sup> In this context, the two words *nature* and *extent* have different meanings. This implies that for a person to qualify to exercise this responsibility, it has to be demonstrated that the testator had an understanding what property (the nature of it) he or she has available (the extent or value of it) for disposal.<sup>65</sup> According to Hoffman,<sup>66</sup> it means that a person making a will must be able to remember what property they are bequeathing and to whom.<sup>67</sup> She states:

"This requires intact semantic memory and the ability to convey an understanding of the extent and value of the property to the evaluator. This requires both short and long-term memory skills as well as the ability to estimate the value of the property."

This component has been the object of extensive discussions in several judgments.<sup>68</sup> In the High Court case of *Vermeulen v Vermeulen*<sup>69</sup> it was once again stated that the testator should not be incapacitated and he or she must positively be aware of the *nature and extent* of his or her property, (i.e. know the persons to whom he or she will give his or her property, and understand the effects of his or her acts).

Apparently, in the assessment of the deceased's capacity to understand the nature and extent of his or her property, the courts only require a general knowledge of the assets in his or her estate.<sup>70</sup> The approach to assess this component is rather flexible.<sup>71</sup> In *Kerr v Badran* it was acknowledged by Windeyer J that the

63 *Banks v Goodfellow* (fn 14). Cockburn CJ said that the testator should understand the extent of their property. See Catanzariti (fn 7) 2.

64 *Kerr v Badran* (fn 10) para 48; *Brown v Wade* (fn 27) para 98 for the common law test. In *the Will of Edward Victor MacFarlane, Deceased* (fn 10) para 3; *Williams v Wilmot* (fn 27); *Vermeulen v Vermeulen* (fn 10) para 17.

65 Du Toit 2005 SALJ 662; Du Toit 2013 JCLS 529; Sonnekus 2012 THRHR 9; *Vermeulen v Vermeulen* (fn 15).

66 2010 *The Cal Psych* 15.

67 *Nicholson v Knaggs* (fn 32) para 100; *Vermeulen v Vermeulen* (fn 15); Du Toit 2005 SALJ 662; Du Toit 2013 JCLS 529; Sonnekus 2012 THRHR 18.

68 See the case law referred to in fn 10; *Geldenhuys v Bornman* 1990 (1) SA 161 (EC); *Sharp v Adam* (fn 15); *D'Apice v Gutkovich, Estate of Abraham* (fn 62).

69 (Fn 10); In *the Will of Edward Victor Macfarlane Deceased* (fn 10) para 3 per McMeekin J. In *Netshituka v Netshituka* (fn 8) para 18 the fact that the testator bequeathed property of which he was not the owner did not render him incapacitated.

70 See *Scott v Master of the High Court, Bloemfontein* (fn 10) para 14: "The second respondent's case is that the deceased was possessed of sufficient mental capacity to appreciate the contents and extent of the disputed will when he made and signed it." See also *Martin v Fletcher* [2003] WASC 59; Jacoby and Steer 2007 *BMJ* 155. To comply with the requirement that the testator understands the extent of the property of which he is disposing, it is not necessary to establish that the testator recollected each and every item of property he or she possessed. See also *Lipchick v Master of the High Court* (fn 10).

71 Catanzariti (fn 7) 2; *Williams et al* (fn 21) 175 indicate that there is uncertainty as to whether it is the capacity to understand or actual understanding. See also *Williams v Wilmot* (fn 27); *Hoff v Atherton* (fn 51).

current day reality of understanding of assets has, in effect, lowered the threshold in this regard.<sup>72</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. ... In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an *accurate understanding* of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income.”<sup>73</sup>

In *D’Apice v Gutkovich, Estate of Abraham* the testatrix had little functional comprehension but knew she owned some flats.<sup>74</sup> Sometimes she remembered she also had an investment in property.<sup>75</sup> She knew she owned a car, but was not confident of the make of it and did not know the name of her bank. A more lenient approach was followed and she was held to have testamentary capacity. Shulman and others posed the question and made the following remarks:<sup>76</sup>

“Does the preoccupation with the extent of the testator’s assets appear misguided? It has been suggested that the testator only requires knowledge of the “general extent” of his assets and in some countries there have been case precedents for a relatively lowered threshold for asset knowledge. For example, one can lack knowledge of the specifics or even the extent of one’s assets but theoretically retain capacity. As long as a testator knows that he wants to leave the assets in a specific proportion for reasons that are clear, rational and consistent, then he might be considered capable.”<sup>77</sup>

This tendency was also followed in the New South Wales Supreme Court case of *Nicholson v Knaggs*,<sup>78</sup> where Vickery J observed that many people have now handed over the management of their share portfolios and real estate to advisers and may not have a proper understanding of the value of the assets that generate

72 (Fn 10) para 49 explained this component.

73 It is accepted that when *Banks v Goodfellow* was decided in 1870, many testators’ assets were relatively simple and included only a house, perhaps some land, perhaps some shares in a family company.

74 (Fn 62). It was in fact a block of flats.

75 (Fn 67). See also *Geldenhuis v Bornman* (fn 68); *Nicholson v Knaggs* (fn 32) para 98; Du Toit 2005 *SALJ* 668; Sonnekus 2012 *THRHR* 18.

76 2009 *Int Psycho* 435.

77 In assessing the second component of the test account must also be taken of new knowledge of medical and psychological matters and changing circumstances in society. Gorman 1996 *Elder LJ* 225; Champine (fn 3) 69; O’Neill and Peisah (fn 47) para 4 11; Shulman *et al* 2007 *Am J Psychiatry* 722; Shulman *et al* 2009 *Int Psycho* 433–439; Sonnekus 2012 *THRHR* 13; Atkinson and Kanani 2013 *TEL&TJ* 26–28; Welch “Testamentary capacity” *Trust and probate navigation* available at <http://bit.ly/1Ct4a35> (accessed on 11 February 2015): “When evaluating testamentary capacity, courts will consider consistency of behaviour as part of this evaluation, which may involve medical evaluations.” See also Gutheil 2007 *JAAPL* 514–517; Ryznar and Devaux 2013 *NLJ* 16; Chafetz (fn 8).

78 Fn 32. See also *King v Hudson* (fn 30) paras 58–59; Catanzariti (fn 7) 3.

their income.<sup>79</sup> In *Matter of Ruth Mae Johnson, deceased*<sup>80</sup> it was alleged that the deceased lacked capacity by virtue of her inexperience in financial affairs and her lack of *knowledge of her assets*. The deceased's real estate consisted of the family farm and homestead which may have been the most important asset to her and to the rest of her family, but it was not her only asset.

### 3 2 3 Knowledge and appreciation

The third component of the *Banks v Goodfellow* test refers to the testator's ability to comprehend (have knowledge) and appreciate (realise) the claims he ought to give effect to and those who might expect to benefit from his estate.<sup>81</sup> This requires that a testator should be able to identify persons who may have a claim on his or her bounty,<sup>82</sup> and be able to evaluate their claims.<sup>83</sup> When a person cannot identify his nearest family and other loved ones, or tries, for example, to leave property to fictional characters or famous deceased people, this is an indication that the person does not comply with this component.<sup>84</sup> In *Lipchick v Master of the High Court*, the testatrix had knowledge of who her children were and wanted to disinherit her son and his children (her grandchildren) because she felt betrayed by them. In *Scott v Master of the High Court, Bloemfontein* that court found that:<sup>85</sup>

“The relationship between the deceased and the first applicant had deteriorated to such an extent that the deceased wanted to completely change the regime he had set in place in his previous will. The deceased was aware of the farm workers that had died or left his farm . . . The deceased could logically motivate each and every bequest he made and could remember that he bought the farm Helderfontein and had it registered in the name of the first applicant.”

79 In para 98 it was stated that, in addition, the following elements need to be considered: “[I]n demonstrating the testator's ability to realise the extent and character of the property being dealt with, it is not necessary to establish that there existed a ‘specific and accurate knowledge of every atom of his property’ (*Waters v Waters* (1848) 64 ER 263 at 276). The testator ought to have had a *general* knowledge of the state of the property and what it consisted of (*McDonald v Watson* (1871) 11 SCR (NSW) 4 at 33.)”

80 (Fn 37). It was not certain if she was aware of the relative value of her bank accounts. *Nicholson v Knaggs* (fn 32) para 98: “Finally, the testator, it must be shown, should have been able to weigh the claims which naturally pressed upon him. That is, the testator must not have suffered from some malady “reasonably calculated to affect the view which [he] would take of his relations to those who might be regarded naturally as the probable recipients of what he had to leave.”

81 See *Katz v Katz* (fn 30) para 22; *Gildenhuis v Gildenhuis* (fn 10) para 11; *Vermeulen v Vermeulen* (fn 15) para 135; *Nicholson v Knaggs* (fn 32).

82 Du Toit 2005 *SALJ* 682; Jacoby and Steer 2007 *BMJ* 155; De Waal and Schoeman-Malan (fn 1) 40–44; Hoffman 2010 *Cal Psych* 17; Catanzariti (fn 7) 3–4; Du Toit 2013 *JCLS* 520.

83 The testator executing or amending a will must know family members and/or friends who will be his or her beneficiaries. See also *Kirsten v Bailey* (fn 16); *Harlow v Bekker* (fn 26); Du Toit 2005 *SALJ* 680.

84 The person must know the so-called natural objects of his bounty, the people that would be the expected recipients of the person's assets. *In Re Estate of Lawrence A Laveglia* unreported case no 11-9066 of 21 June 2013 (Carbon County Court Penn); *In re Estate of Erwin W Schlueter* No 98-311 (2000) WY Supreme Court para 14. See also *NSW Trustee and Guardian v Pittman, Estate of Koltai* [2010] NSWSC 501 where White J held that the testatrix did not have capacity, as she would not be able to rationally weigh the claims of persons who were potential objects of her testamentary bounty.

85 (Fn 10) para 14.

To the contrary, in *Re Estate of Elizabeth Lacey* the testatrix lacked knowledge and appreciation when she executed a second will that gave her entire estate to her stepson, alternatively to his sons, of whom she had virtually no knowledge.<sup>86</sup> In *Virginie-Pitel v Campbell*<sup>87</sup> it was accepted that the testator was suffering from a disorder of the mind and that she was unable to weigh, identify, evaluate and discriminate between the respective strengths of the claims of persons on her testamentary bounty.

Once the court is satisfied that the component is adhered to, it does not mean that the testator must bequeath something to these people (that he should know of).<sup>88</sup> The freedom of testamentary disposition includes the freedom to be unfair, unwise or harsh with or in respect of one's own property. If the testator can identify persons, he can still decide to exclude them as beneficiaries. In *Tobin v Ezekiel* the testatrix's daughters argued that the testatrix did not have testamentary capacity because she forgot to include them in her will.<sup>89</sup> Brereton J held that on the facts the testator did not forget the daughters, as a matter of fact, she was aware of the daughters' claims but she elected to exclude them.<sup>90</sup>

It is argued that this leg of the test (which requires that the testator should comprehend and appreciate the claims that others may have) adds a moral element to the test by looking for awareness of who has a reasonable claim to the estate, which in turn raises the threshold for this component.<sup>91</sup> However, as indicated, the mere existence of a will that fails to meet the testator's moral obligations does not necessarily indicate a lack of capacity.<sup>92</sup>

A claim that can sometimes be confused with "knowledge and appreciation" as a component of the *Banks* test is "want of knowledge and approval" that often goes hand in hand with accusations of "suspicious circumstances".<sup>93</sup> Such a

86 *Ibid.*

87 [2010] NSWSC 1440. See *Catanzariti* (fn 7) 3.

88 *Williams et al* (fn 21) 175; *O'Neill and Peisah* (fn 47) para 4 1. *Wilson* (fn 22): "The law does not say that a man is incapacitated from making a will if he is moved by capricious, frivolous, mean or even bad motives . . . he may disinherit, either wholly or partially, his children and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued." See also *Jacoby and Steer 2007 BMJ* 155.

89 Fn 55.

90 Fn 57. See also *Scott v Master of the High Court, Bloemfontein v Master* (fn 10) para 12. *Champine* (fn 3) 52: "To illustrate the differences in these cognitive abilities, consider the case of *Estate of Angle*, (777 A.2d 114) which involved the will of a father of seven surviving children. Mr Angle devised real property to the only two children who did not own homes. He devised real property to his youngest son, with whom he enjoyed a particularly close relationship, as well. These dispositions accounted for nearly 2/3 of the total estate. Comprehension of information in the abstract requires only that the testator understand the size of his estate generally; that children generally are natural (or potential) objects of a testator's bounty; and that the will benefits the children disproportionately."

91 *Sonnekus 2012 THRHR* 13 criticises this requirement and states that a testator's capacity is never established by another person's position.

92 *Victoria Law Reform Commission* (fn 19) para 2 52.

93 *Wilson* (fn 22): "A person seeking to submit a will may not be able to rely simply on due execution and capacity where the circumstances surrounding its preparation or execution 'excite the suspicion of the Court' – where, for instance, the Will was drafted by a person who benefits under it, or contains complex provisions which the testator was unlikely to understand." *Church v Mason* [2013] NSWCA also concerned a will of an elderly testator who made and executed a will in suspicious circumstances.

claim should not be conflated with “want of knowledge and approval” of the will-making process (the requirement for testamentary capacity in general).<sup>94</sup> The latter requires actual knowledge and approval of the contents of a will. This claim is discussed in Part 2 of this contribution.

### 3 2 4 *Absence of disorder of the mind or insane delusion*

This component mentioned in the *Banks* case indicates that the testator must not have suffered from a disorder that would result in an unwanted disposition.<sup>95</sup> In *Kerr v Badran* it was held that a person may be able to appreciate that he or she is executing a will, the extent of their property and the claims on their bounty, but may still be suffering from a delusion or such other disorder that poisons him or her against a potential beneficiary, so that the testator is unable to properly evaluate the competing claims on her wealth.<sup>96</sup>

Modern understanding of “disorders of the mind” or “insane delusions” is more nuanced as there can be a slight variation between nearly identical conditions.<sup>97</sup> Advancements that were made in the medical field contribute to a better understanding of mental and cognitive conditions and can effectively be used in accurately analysing brain functioning and pathology of people and different capacities.<sup>98</sup> Regan and Gordon remark as follows:<sup>99</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.”<sup>100</sup>

<sup>94</sup> *Hoff v Atherton* (fn 51).

<sup>95</sup> There must not be a mental illness that impacts on the testator to bequeath his estate. See *Netshituka v Netshituka* (fn 8) para 16; *Lipchick v Master of the High Court* (fn 10) para 19; *Simon v Byford* (fn 10).

<sup>96</sup> See also fn 10; *Essop v Mustapha and Essop* (fn 29); *Walker v Badmin* (fn 15) dealing with an elderly woman suffering from a brain tumour who made a will five weeks before her death leaving her property to her partner; *Nicholson v Knagg* (fn 32) para 100; Hoffiman 2010 *Cal Psych* 15; Victoria Law Reform Commission (fn 19) para 2 53.

<sup>97</sup> O'Neill and Peisah (fn 47) para 4 1.

<sup>98</sup> Moye, Marson, and Edelstein 2013 *American Psychologist* 158–171; Moye and Marson “Assessment of decision-making capacity in older adults: An emerging area of practice and research” 2007 *J of Gerontology* 3. See also Chafetz (fn 8); Michelon “What are cognitive abilities and skills, and how to boost them? (18 December 2006) available at <http://bit.ly/1Cz2Vz8> (accessed on 5 November 2014).

<sup>99</sup> (Fn 27). See also *Woodward v Smith* (fn 42). The person must also be “free of any disorder of the mind which would poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made”. Victoria Law Reform Commission (fn 19) para 2 53.

<sup>100</sup> Du Toit 2005 *SALJ* 661; Frolik 2001 *IJLP* 253ff; see also Williams *et al* (fn 21) 178; Catanzariti (fn 7). A person who suffers from dementia or Alzheimer’s disease can still have the ability to testate. See fn 10 for *Frizzo v Frizzo*; *Gildenhuis v Gildenhuis*; *Levin v Levin*; *Lipchick v Master of the High Court*; *Vermeulen v Vermeulen*; *Scott v Master of the High Court*, *Bloemfontein*; *Simon v Byford*; *Re Bechal*, *Blackman v Man*; *In re Estate Lacey* (fn 10); *In the Estate of Wilbur Waldo Lynch, Deceased* (fn 10); *The Matter of the Estate of Blanche Riordan, Deceased* (fn 30); *King v Hudson* (fn 30); *Virginie-Pitel v Campbell* (fn 87). In *D’Apice v Gutkovich* (fn 62), the testator revoked her gifts to her carer because she said that the previous carer had stolen her car. White J considered the evidence and held that this was not a delusion, that the carer had in fact had the car that

*continued on next page*

As seen above, there is no specific test to establish testamentary capacity in all cases as it is clear that what appear to be similar situations can, in fact, differ slightly to the extent that capacity is absent in one instance but exists in another. Wilson states:<sup>101</sup>

“It is of note that the four elements of the *Banks v Goodfellow* test are all required to be met before the Court will find that a testator had the required capacity to execute a will. With respect to the fourth element, the Court must find that the testator was suffering from no delusions with respect to any of the persons one would expect him to provide for in his will, such as his spouse and children.”

### 3 3 Distribution of property

It is claimed that a further component to the test developed in the 20th century, namely, that the testator must also be able “to plan for the distribution of his or her property”.<sup>102</sup> It is claimed that to distribute property after death requires all of the cognitive abilities listed above with emphasis on the executive functions which allow a person to organise his or her property and plan for its dispensation.<sup>103</sup> In this regard, Gutheil remarks as follows:<sup>104</sup>

“In some contexts, there is a fourth element that adds a deliberative aspect to ‘knowledge’: the testator should have a rational plan for distribution of property after death. Note that, as in other capacity determinations, the testator enjoys the presumption of competence until proven otherwise. Experience proves, however, that even with these modest requirements, expert witnesses may encounter pitfalls that weaken or vitiate the expert’s relevant testimony in the determination of testamentary capacity.”

It is argued in *Key v Key* that modern psychiatric knowledge allows the *Banks v Goodfellow* test to be developed by having a further element added and that is for the testator to have the capacity to exercise his decision-making power.<sup>105</sup>

(to be continued)

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the testator bought registered in the carer’s name and the carer took the car when she left the testator’s house.

101 Fn 22.

102 Hoffman 2010 *Cal Psych* 16–17; Mortimore and Weintraub 2003 *Clark Wilson LLP* 1–9.

103 O’Neill and Peisah (fn 47) para 4 3.

104 2007 *JAAPL* 515; *NSW Trustee and Guardian v Pittman, Estate of Koltai* (fn 84); Frolik 2001 *Int JLP* 257.

105 (Fn 10) para 108 for the *Key* case and para 24 for the *Lipchick* case.