BANKS V GOODFELLOW (1870): TIME TO UPDATE THE TEST FOR TESTAMENTARY CAPACITY

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The test for testamentary capacity as outlined in Banks v Goodfellow has endured for almost 150 years. The criteria have been clarified and focused throughout decades of jurisprudence, clinical experience and developments in neuroscience, but the wording of the test has remained unchanged. In this paper, we propose a modest update to the legal test for testamentary capacity, adopting a medico-legal approach that incorporates advances in both science and social contexts and modernizes the language used. The updated criteria will continue to facilitate flexible and reliable assessments of testamentary capacity.

Le critère concernant la capacité de tester établi dans l'arrêt Banks v Goodfellow existe depuis presque 150 ans. Au cours des décennies qui ont suivi , ce critère a été élucidé et raffiné par la jurisprudence, ainsi qu' à la suite d'expériences cliniques et d'avancées dans le domaine de la neuroscience. Néanmoins, le critère est demeuré inchangé dans sa formulation. Les auteurs proposent une légère adaptation du critère juridique de la capacité de tester, en adoptant une approche médico-légale intégrant les progrès réalisés dans les contextes scientifique et social, tout en modernisant les termes employés. Ce critère révisé continuera de faciliter les méthodes d'évaluation flexibles et sûres relatives à la capacité de tester.

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1. Introduction

Banks v Goodfellow is the leading case on testamentary capacity, and has been for nearly 150 years.[1] The durability of the case attests to the astuteness and continuing relevance of the legal reasoning of Chief Justice Cockburn who wrote the appeal judgment on behalf of the English High Court, Queen's Bench Division. However, the test in *Banks v Goodfellow* did not contemplate many of the modern issues we face, or the subsequent developments in clinical neuroscience. As such, it should not be immune to revision and adaptation to modern neuroscience and social changes to family structures.

It is an understatement to say that things have changed since 1870. *Banks v Goodfellow* concerned a testator with probable paranoid schizophrenia who drafted a relatively simple will, leaving the entirety of his estate to his niece.[2] Modern estate litigation can involve multiple families and corporate entities, contesting complex estates executed by testators who are often suffering from dementia or delirium, some of whom lie vulnerable on their deathbed.[3] This is unlike the schizophrenic disorder in *Banks v Goodfellow*, which features far less commonly than does cognitive impairment in modern will challenges,[4] although the identification of delusions and their impact upon disposition still remains salient. The criteria for testamentary capacity

1 (1870), LR 5 QB 549 (WL Can), 39 LJ Reports (NS) (Common Law, 1870) 237 (HeinOnline) [cited to WL Can] [*Banks v Goodfellow*].

2 For greater detail with regard to the background and personal stories of the people involved in this landmark case, see Martyn Frost, Stephen Lawson & Robin Jacoby, "In Search of John Banks" (2015) 13:2 Trust Q Rev 8.

3 Carmelle Peisah, Jay Luxenberg, Benjamin Liptzin, Ann PF Wand, Kenneth I Shulman, Sanford I Finkel, "Deathbed Wills: Assessing Testamentary Capacity in the Dying Patient" (2014) 26:2 Intl Psychogeriatrics 209.

4 Kelly Purser, "Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?" (2015) 38:3 UNSW LJ 854 [Purser].

should be attuned to modern legal and medical contexts by adapting to these complexities and additional new realities.[5]

Furthermore, the old English wording used to articulate the test is antiquated and imprecise, particularly in light of advancements in medical understanding of the structure of the brain and associated cognitive functions. By updating the wording and incorporating medical and neuropsychological advances, the legal community would ensure greater clarity and precision with regard to the test for testamentary capacity. Disciplined legal reasoning requires precision, and such precision would also assist experts in drafting more accurate and useful capacity assessments when needed in disputed cases.

Based on these contemporary developments, we contend that the *Banks v Goodfellow* criteria for testamentary capacity should be updated. In order to update the test, we must first understand it. This paper outlines the test for testamentary capacity found in *Banks v Goodfellow*. It then surveys some relevant intervening jurisprudence with particular attention to important applications of the test, as well as notable developments in the test itself. The paper then reviews the medical literature, exploring developments in the medical and neuroscientific considerations that are central to capacity assessments. While the question of testamentary capacity is ultimately a legal decision, it is informed by medical and neuropsychiatric considerations—hence this medico-legal collaborative approach. Experts who do assessments of testamentary capacity, both contemporaneous and retrospective, need guidance on the criteria they should be exploring in their assessments used by the courts.[6] Clear criteria will help to inform the history, mental status and cognitive factors needing to be probed and reported to the court. To facilitate this, we propose a modest update to the criteria for testamentary capacity, below.

2. Testamentary Capacity in *Banks v Goodfellow*

Prior to *Banks v Goodfellow*, a provision in the British *Statute of Wills* that required testators to be competent when drafting a will was interpreted by the courts to mean that a will written by someone with any mental disorder

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5 Arthur I Fish notes: "The law of mental capacity is incomplete if it does not properly incorporate medical expertise and practice", see "Cognitive Neuroscience and the Solicitor's Approach to Mental Incapacity" in The Law Society of Upper Canada, ed, *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011) 133 at 134 [Fish].

6 Purser, *supra* note 4 at 863–64.

was invalid.[7] *Banks v Goodfellow* broke new ground and heralded the notion that capacity is not "diagnosis-bound"; that is, no assumptions about capacity can be made from a diagnosis.[8] The Queen's Bench held that a will, dictated by a man who clearly had a significant mental disorder, was valid. The real question, Chief Justice Cockburn said, was not whether Mr. Banks suffered at times from an unsound mind because, indeed, "there was a body of evidence which, if believed, was strong to establish a case of general insanity."[9] The real question, the Chief Justice said, was whether "the testator was of [a] sound mind, so as to be capable of making a will."[10] That is, testamentary capacity was viewed as state-dependent, not trait-dependent.

In determining whether a testator has the capacity to make a will, the Court laid out four broad criteria:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[11]

While Mr. Banks suffered from delusions and was, at times, confined in a "county lunatic asylum",[12] Mr. Banks carefully managed his financial affairs and showed himself capable of transacting business with regard to a cottage he owned and leased to others. He understood the value of his property and was capable of instructing his agent with regard to rents and the terms of leases.

With regard to his dispositions, in an earlier will, Mr. Banks left his estate to his sister. After she passed away, Mr. Banks changed his will in

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7 Brian Schnurr, Felice Kirsh & Elizabeth A Bozek, "Revisiting Testamentary Capacity" (Paper delivered at the 14th Annual Estates and Trusts Summit, 9 November 2011), Tab 11 at 3, 20. See also *Waring v Waring* (1848), 13 ER 715 (PC).

8 Carmelle Peisah, Orestes Forlenza & Edmond Chiu, "Ethics, Capacity, and Decision-Making in the Practice of Old Age Psychiatry: An Emerging Dialogue" (2009) 22:6 Current Opinion Psychiatry 519.

9 *Banks v Goodfellow*, *supra* note 1 at 552.

10 *Ibid* at 551.

11 *Ibid* at 565.

12 *Ibid* at 551.

favour of the daughter of this deceased sister. In this latter will, Mr. Banks confirmed his intentions on two occasions, nearly a month apart.[13]

The Court held that a gift to a beloved sister, and later a beloved niece, were rational dispositions. A beloved sister and her issue were rational objects of Mr. Bank's affections. Therefore, whatever mental impairment he had, it did not poison his affections so as to bring about a disposition which would not have been made otherwise. As such, the Court held that Mr. Banks had the capacity to make a will even though he may have been regarded as having "general insanity."

A) Applying the *Banks v Goodfellow* test

While *Banks v Goodfellow* broke new ground, and the courts have universally applied it, the case raised interpretative issues. For example, what does it mean to understand the extent of one's property? What does it mean to comprehend and appreciate the claims to which one ought to give effect?

With regard to the first and second criteria of the test—understanding the nature of the act of making a will and the extent of one's property—in *Leger v Poirier*, the Supreme Court of Canada held that the standard required for testamentary capacity was not merely the ability to provide rational responses to simple questions.[14] What is required, the Supreme Court said, is a "sound and disposing mind" that can comprehend the act of making a will, the extent of one's property, and those who might have a rightful claim upon the estate of the testator. In other words, "There must be a power to hold the essential field of the mind in some degree of appreciation as a whole."[15] In *Scott v Cousins*, the Ontario Superior Court of Justice held that if a testator is able to communicate, but only with a superficial impression of alertness, that is not enough to find the testator capable.[16] Mental soundness when interacting at a superficial level is not sufficient to demonstrate testamentary capacity.[17] In other words, while applying the *Banks v Goodfellow* test, in practice, courts have expanded what constitutes "understanding" to include higher-level cognitive functioning.

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13 Rodney Hull, QC, "Lest We Forget Banks v. Goodfellow" (2007) 31 ETR (3d) 15 at 15 [Hull, "Lest We Forget"]; His Honour Judge Denzil Lush, "Banks v Goodfellow (1870)" (2012) 10:3 Trust Q Rev 18.

14 [1944] SCR 152 at 162, [1944] 3 DLR 1; see also *Schwartz v Schwartz*, [1970] 2 OR 61, 10 DLR (3d) 15 (CA), aff'd [1972] SCR 150, 20 DLR (3d) 313 [*Schwartz* cited to DLR].

15 *Leger*, *ibid* at 161–62; quoted affirmatively in *Hall v Bennett Estate* (2003), 64 OR (3d) 191, 227 DLR (4th) 263 (CA) at paras 19–20 [*Hall*].

16 37 ETR (2d) 113, 2001 CarswellOnt 50 (WL Can) (SC) [*Scott* cited to WL Can].

17 *Re Davis Estate*, [1963] 2 OR 666, 40 DLR (2d) 801 at 808.

In other ways, modern contexts have lowered the threshold for criterion two—the understanding of the extent of one's property. An Australian case acknowledged the differences between 1870 and today, as follows:

> 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 advisors. 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. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing "the extent" of the estate is considered.[18]

On a practical level, it has been suggested that understanding "the extent of the property of which one is disposing" in a contemporary context merely requires the testator to understand the extent of property and its form (for example, cash, bonds, or real estate) in a "general way." That is, the testator may not necessarily have an exact dollar figure in mind as to net worth, but should know whether they have a substantial amount or very little.[19] However, in the modern context of complex estate planning mechanisms, it is actually the disposition itself that determines how much the testator needs to understand about the nature and extent of the estate. As stated by Kelly Purser:

> It is not uncommon for an estate plan to utilise a potentially complicated series of mechanisms, such as trusts, companies and self-managed superannuation funds, to ensure wealth management, retention and protection.[20]

For example, in a simple disposition where a testator is leaving their whole estate to a single person, an approximate understanding of "a lot or a little" might suffice. In contrast, with a complex disposition—which distributes an apartment to one son and the balance of the estate to another, or a house to

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18 *Kerr v Badran*, [2004] NSWSC 735 at para 49, Windeyer J.

19 Daniel J Sprehe & Ann Loughridge Kerr, "Use of Legal Terms in Will Contests: Implications for Psychiatrists" (1996) 24:2 Bull American Academy Psychiatry L 255. See also *Re Estate of Romero*, 126 P.3d 228 (Colo Ct App 2006) and *Re Estate of Khazaneh*, 834 NYS.2d 616, 15 Misc.3d 515 (2006) (Surr Ct).

20 Purser, *supra* note 4 at 864.

one niece and the superannuation fund to the other, or percentages of the estate or share parts to various parties—an understanding of the relative values of such assets becomes more important.

With regard to the third criterion, the requirement that the testator must comprehend and appreciate the claims to which he ought to give effect, the case of *Murphy v Lamphier* highlighted the importance of memory in the criteria for testamentary capacity.[21] In *Murphy*, the testator was said to be required not only to know who they were including but must have been able to remember and appreciate who they were excluding from their will, so as to exercise judgment with regard to why they were doing so. Quoting *Simpson v Gardner's Trustees*, Chancellor Boyd said, "The grand criterion by which to judge whether the mind is injured or destroyed, is to ascertain the state of the memory. It is memory that affords us all the materials on which to exercise judgment, and to arrive at a conclusion or resolution."[22]

In the case of *Sharp v Adam*, the English Court of Appeal held that the will was invalid because the testator lacked capacity.[23] The case involved a man, Mr. Adam, diagnosed with secondary progressive multiple sclerosis. Eventually, he could not speak. He communicated by spelling boards, thumbs up or thumbs down, nodding or shaking his head and finally, as his health degenerated, by blinking. The medical evidence was contradictory. The tipping point in the decision was that, "[N]otwithstanding certain urging by involved persons to have the testator provide for his daughters … [he] refused to do so without giving any reasons for not doing so."[24]

While the disposition to long-standing friends and business partners was not irrational, and while a medical expert, the testator's physician and the drafting solicitor were each of the view that the testator had capacity, the Court held otherwise because the testator's lack of a clear rationale suggested that he did not comprehend nor appreciate the claims of his daughters. *Sharp* highlights the subjectivity of the test. Indeed, at times, the test has been used to "push judicial rulings toward an outcome that is deemed

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21 31 OLR 287, [1914] OJ No 32 (QL) (SC (HC Div)) [*Murphy*]; see also *Hall, supra* note 15 at paras 16–23 in which Charron JA (as she then was) favourably applied *Murphy*; *Leger*, *supra* note 14 and *Scott*, *supra* note 16.

22 *Simpson v Gardner's Trustees* (1833), 11 S 1049 at 1051–52 (Ct Sess) [*Simpson*]; see also *McEwan v Jenkins*, [1958] SCR 719 at 725–26, 1958 CanLII 69.

23 [2006] EWCA Civ 449 [*Sharp*].

24 Hull, "Lest We Forget", *supra* note 13 at 18. See *Sharp, supra* note 23 at para 94, where Lord Justice May states that despite medical evidence to the contrary, "Leaving the residuary estate to Mr Sharp and Mr Bryson was entirely understandable. Leaving nothing at all to his daughters was not. The question did not relate exclusively to his *cognitive* powers" [emphasis in original].

equitable in the circumstances."[25] However, the subjectivity of the test also gives testamentary capacity its flexibility. In 2013, the British Columbia Law Institute surveyed common law tests for capacity and explored the idea of a statutory provision for the test. The Capacity Project Committee decided that the purpose of the test for capacity is to ensure just outcomes more than it is to achieve certainty. As such, the Committee recommended maintaining the current common law test.[26]

Furthermore, the modern day interpretation of "comprehending and appreciating the claims to which one ought to give effect" is not merely about providing a rationale for who is in, and who is out of the will. It is also about providing a rationale for changes in distribution over later versions of wills, the theory being that a will-making pattern may provide some kind of evidence for determining to which claims a testator ought to give effect. Since 1924, Australian courts have cast suspicion on the capacity of testators who have revoked prior wills and executed entirely different dispositions during a period of "mental enfeeblement."[27] In *Bool v Bool*, Senior Puisne Justice Macrossan said: "A great change of testamentary disposition evidenced by a departure from other testamentary intentions long adhered to always requires explanation."[28] When there is a change in the will-making pattern, the testator should show awareness that their new will revokes their previous will, recognise the differences between the old will and the new will and be able to explain the rationale for the changes.[29] This view is further affirmed in *Schwartz v Schwartz*, in which Justice Evans of the Ontario Court of Appeal stated that a "marked departure from a previously existing pattern" of dispositions necessitates "the reason for such change."[30] Applying this approach, it could be said that Mr. Banks showed consistency in his disposition, further evidencing his testamentary capacity.

With regard to the fourth criterion, that no disorder of the mind poison the testator's affections, in *Skinner v Farquharson*, a testator accused his

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25 Kenneth I Shulman et al, "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007) 164:5 American J Psychiatry 722 [Shulman et al, "Assessment of Testamentary Capacity"].

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

27 *Bailey v Bailey*, [1924] HCA 21, 34 CLR 558 at 571.

28 *Bool v Bool*, [1941] St R Qd 26 at 39.

29 Harvey D Posener & Robin Jacoby, "Testamentary Capacity" in Robin Jacoby & Catherine Oppenheimer, eds, *Psychiatry in the Elderly*, 3rd ed (Oxford: Oxford University Press, 2002) at 932.

30 *Schwartz*, *supra* note 14 at 23.

wife and son of a crime for which there was no foundation.[31] However, the delusion was said not to poison his affections for his wife and son because the testator made provisions for them and also appointed his wife as an executrix of his will and guardian of his minor daughter. The Supreme Court held that he had capacity. On the other hand, in *Ouderkirk v Ouderkirk*, a testator suffered from delusions with regard to his wife's fidelity.[32] The Supreme Court held that the delusions "did affect the testator's mind so that he could not rationally take into consideration the interest of his wife."[33] The testator was found to lack capacity. In both cases, as in *Banks v Goodfellow*, the courts assessed whether the testator's disorder of the mind had poisoned their affections by reference to the testamentary disposition. *Banks v Goodfellow* dealt with a testator who managed his assets capably and with a simple will that provided a rational disposition in favour of a beloved family member, in which the testator demonstrated dispositive consistency. The test for his capacity focused on his ability to "understand" and "appreciate" a number of relevant but uncomplicated factors. Subsequent jurisprudence has affirmed the essential elements of the test, but as seen above, there have been some significant developments.

B) Considerations for an Updated Test for Testamentary Capacity

As the legal profession adapts to modern complexities, there are some important considerations to bear in mind if the test for testamentary capacity is to be updated. First, the *Banks v Goodfellow* test for testamentary capacity needs to reference the modern, more nuanced understanding of capacity, namely that it is time-, situation-, person- and task-specific. The wording of the test tends to treat capacity in global terms without consideration of the context of the testator, which may include complicated family dynamics, blended families, or a potential history of conflict among family members. This situation-specific context should be incorporated explicitly into the test for testamentary capacity.

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31 32 SCR 58, 1902 CarswellNS 54 (WL Can) [*Skinner*]. Similarly, in *Weidenberger Estate (Re)*, 2002 ABQB 861, 324 AR 286, the "delusional belief system" of the testator did not prevent the court from upholding the validity of his will, since his beliefs did not impair his thinking regarding his family or the disposition of his assets. Ballance, cited *Skinner* with approval and defined a delusion as "a persistent belief in a supposed state of facts that no rational person would hold to be true" in *Laszlo v Lawton*, 2013 BCSC 305, 45 BCLR (5th) 125 at para 208. However, here, the court held that the deceased lacked testamentary capacity.

32 [1936] SCR 619, [1936] 2 DLR 417 [*Ouderkirk* cited to SCR].

33 *Ibid* at 622.

Courts have acknowledged that the threshold for capacity is determined in relation to the complexity of the circumstances.[34] However, in order to explicitly include context in the test, we suggest the following: rather than asking, "Is an individual competent?" the standard required should be "Is an individual competent to do X in the context of Y?"[35] The question must not be whether a testator can make a will, but whether this particular person, with their particular mental abilities or disabilities, in the particular situation, can make this particular will, at this particular time.[36]

However, there has been little movement to incorporate context into the language of the criteria for testamentary capacity. In circumstances where it is incorporated, the language varies and is imprecise. Where courts have considered the context of the testator—such as added complexity in their life situation—they have not been explicit in the incorporation of the language of context within the test for testamentary capacity. For example, in *Scott*, the Ontario Superior Court identified the heightened complexities in the testator's life. *Scott* involved a second marriage for both the testator and her husband, who had predeceased her. The testator had no children, but her deceased second husband had children from a previous marriage. The testator and her husband executed a marriage contract providing that each would keep their own property separate. Further, the testator had executed two prior wills in which she left the residue of her estate to her niece, nephew and great-nieces. After a possible stroke, an eight-week hospitalization and period of apparent cognitive confusion, the testator changed her will in favour of her second husband's children from his first marriage. In this case, the context of the testator was highly complex and required a higher level of mental capacity in order to meet the threshold for testamentary capacity.[37] While these realities were recognized in the case, the analysis could have

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34 Rodney Hull, QC & Ian M Hull, *Probate Practice*, 4th ed (Toronto: Carswell, 1996) at 36; John ES Poyser, *Capacity and Undue Influence* (Toronto: Carswell, 2014) at 6; *Wynne v Wynne* (1921), 62 SCR 74, 60 DLR 45; *Kaptyn Estate, Re*, 43 ETR (3d) 219, 2008 CarswellOnt 6071 (WL Can) (SC).

35 Daniel C Marson & SD Briggs, "Assessing Competency in Alzheimer's Disease: Treatment Consent Capacity and Financial Capacity" in Serge Gauthier & Jeffrey L Cummings, eds, *Alzheimer's Disease and Related Disorders Annual* (UK: Martin Dunitz, 2001) at 165; Kenneth I Shulman, Carole A Cohen & Ian Hull, "Psychiatric Issues in Retrospective Challenges of Testamentary Capacity" (2005) 20:1 Intl J Geriatric Psychiatry 63 at 63 [Shulman et al, "Psychiatric Issues"].

36 Kenneth I Shulman et al, "Contemporaneous Assessment of Testamentary Capacity" (2009) 21:3 Intl Psychogeriatrics 433 [Shulman et al, "Contemporaneous Assessment"]; Nick O'Neill & Carmelle Peisah, *Capacity and the Law*, 2nd ed, Australasian Legal Information Institute (AustLII) Communities. online—<http://austlii.community/wiki/Books/CapacityAndTheLaw/>

37 *Scott*, *supra* note 16 at paras 99, 103, 116–17.

benefited from a more explicit incorporation of the role of context within the test for testamentary capacity.

The courts have had some appreciation for the importance of memory in the test for capacity.[38] Memory—particularly working memory, which involves holding information while the mind evaluates it, and long-term autobiographical memory regarding beneficiaries and the testator's relationships with those beneficiaries—is crucial to will-making. However, it is important not to overstate the role of memory *per se*. Memory alone does not provide us with all the materials necessary to arrive at a conclusion about testamentary capacity. Rather, in modern will-making, judgment and reasoning are "the grand criterion."[39] As stated previously, the testator should be able to recall the content and direction of a prior will(s) or expressed wishes and then provide a clear, consistent rationale for any significant changes. In short, the testator should be able to link their beliefs and values and the nature of their personal relationships to the proposed disposition.[40]

3. Testamentary Capacity in Medical Literature

From a medical perspective, the test for testamentary capacity outlined in *Banks v Goodfellow* is not in keeping with a modern neuroscientific understanding of mental capacity.[41] The original *Banks v Goodfellow* criteria did reference many of the relevant cognitive skills required for the execution of a will.[42] For example, reference to concepts such as "understanding" and "appreciating" claims seem very prescient in relation to the subsequent emergence of these concepts over a century later in relation to testamentary capacity and consent to treatment, both in common law and medical scientific literature.[43] As suggested by Martyn Frost et al: "Today the test might be expressed a little more scientifically."[44] In contemporary contexts, we understand these concepts to refer to the testator's "ability to manipulate relevant knowledge, reason from that knowledge or draw determinate

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38 *Murphy*, *supra* note 21.

39 *Simpson*, *supra* note 22 at 1051. Fish, *supra* note 5 at 145, calls this "memory of the future".

40 Pamela Champine, "Expertise and Instinct in the Assessment of Testamentary Capacity" (2006) 51 Vill L Rev 25 at 75–78 [Champine].

41 *Ibid* at 75–78; see also Fish, *supra* note 5. Fish highlighted how developments in cognitive neuroscience offer an opportunity for a collaborative approach between neuroscience and the law.

42 Champine, *supra* note 40 at 75–78.

43 *Re C*, [1994] 1 FLR 31, [1994] 1 All ER 819 at 822, 824; Thomas Grisso & Paul S Appelbaum, "Comparison of Standards for Assessing Patients' Capacities to Make Treatment Decisions" (1995) 152:7 American J Psychiatry 1033.

44 Martyn Frost, Stephen Lawson & Robin Jacoby, *Testamentary Capacity: Law, Practice and Medicine* (Oxford: Oxford University Press, 2015) at 46.

conclusions based on that knowledge."[45] In other words, this third criterion of the original *Banks v Goodfellow* test is a more "deliberative" component that addresses key cognitive functions performed on the logically-connected path from fundamental knowledge of assets and heirs leading to a final plan for distribution.[46]

The need for this deliberative component is made clear by the fact that most wills are challenged not on the presence or absence of knowledge of potential beneficiaries, but on the more sophisticated ability to "identify, evaluate and discriminate between the respective claims of their potential beneficiaries."[47] Indeed, in many applications of the *Banks v Goodfellow* test, an additional component has been considered to address these deliberative functions. For example, "[T]he testator should have a rational plan for distribution of property after death."[48] If the testator has the capacity to identify, evaluate, and discriminate between respective claims, then the end result should be a clear, consistent rationale for the distribution of assets.

When considering the relationship between psychiatric illness and testamentary capacity, it has been argued that one must be aware of more subtle cognitive influences on testamentary capacity than those defined in *Banks v Goodfellow*.[49] This is largely a result of the fact that this 1870 case was based on an instance of psychosis (most likely schizophrenia in modern terms), the prevalence of which is today far outnumbered by dementia and other forms of cognitive impairment as the basis for will challenges.[50] Dementia is characterized by progressive cognitive decline that, especially in the early stages, can present with subtle deficits in specific cognitive domains (e.g. working memory). These subtle cognitive deficits are not well captured by the *Banks v Goodfellow* test which merely states that "no disorder of the mind shall […] prevent the exercise of his natural faculties," but these specific deficits may be just as important to testamentary capacity as the overt "insane delusions" emphasized in the original criteria. Furthermore, mild forms of cognitive impairment, such as memory deficits complicated by misperceptions, can be the root cause of more subtle changes in mental

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45 Champine, *supra* note 40 at 75.

46 On the notion of "deliberative" reasoning, see Thomas G Gutheil, "Common Pitfalls in the Evaluation of Testamentary Capacity" (2007) 35:4 J American Academy Psychiatry Law 514 [Gutheil].

47 Carmelle Peisah, "Reflections on Changes in Defining Testamentary Capacity" (2005) 17:4 Intl Psychogeriatrics 709 [Peisah, "Reflections on Changes"].

48 Gutheil, *supra* note 46 at 515, citing Regan WM & Gordon SM, "Assessing Testamentary Capacity in Elderly People" (1997) 90 South Medical J 13.

49 Shulman et al, "Assessment of Testamentary Capacity", *supra* note 25.

50 Shulman et al, "Psychiatric Issues", *supra* note 35 at 63–69; A Jovanović et al, "Medical Reasons for Retrospective Challenges of Testamentary Capacity" (2008) 20:4 Psychiatry Danub 485.

status such as suspicion, doubt or even overt paranoia regarding previously trusted family members who are often accused of stealing.[51] These changes in mental status and behavior are commonly known as the "behavioral and psychological symptoms of dementia" (BPSD), a very frequent component of dementia and other forms of cognitive impairment.[52] A medical expert can help courts understand the nature and potential significance of such symptoms in an individual case.

In the Australian case of *Read v Carmody*, Justice Powell of the New South Wales Court of Appeal casts a wide net over the definition of mental disorders, encompassing psychosis, dementia and other more transient disturbances of intellectual functioning—all of which may affect a person's cognition and hence potentially impact their testamentary capacity.[53]

Executive (frontal) functioning is believed to be fundamental to testamentary capacity and is an umbrella term that includes higher-level cognitive skills such as working memory, reasoning, planning, impulse control and judgment.[54] Executive functions are similar, in effect, to the "deliberative" functions described above that are necessary to reach conclusions and assess competing claims based on relevant knowledge. For example, working memory is the second-by-second system in the brain responsible for holding information while actions such as comparison, evaluation and discrimination are performed on that information. In the context of testamentary capacity, deficits in working memory may render a person unable to appraise their relationships in the context of their past and present simultaneously. This may render them prone to making shallow, superficial and impulsive judgments of people or situations.[55] An example of the challenge facing the courts and experts is that one of the most commonly used screening tests, the Mini-Mental State Examination (MMSE)—which is often cited in evidence in cases involving a challenge on the basis of lack of testamentary capacity—does not formally test for executive brain functions.

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51 Carmelle Peisah, Henry Brodaty & Carolyn Quadrio, "Family Conflict in Dementia: Prodigal Sons and Black Sheep" (2006) 21:5 Intl J Geriatric Psychyciatry 485; Shulman et al, "Assessment of Testamentary Capacity", *supra* note 25.

52 Sanford I Finkel et al, "Behavioral and Psychological Signs and Symptoms of Dementia: A Consensus Statement on Current Knowledge and Implications for Research and Treatment" (1997) 8:Suppl 3 Intl Psychogeriatrics 497.

53 *Read v Carmody*, [1998] NSWCA 182 at 185–86.

54 Kieran M Kennedy, "Testamentary Capacity: A practical guide to assessment of ability to make a valid will" (2012) 19:4 J Forensic & Leg Medicine 191 [Kennedy]; Kenneth I Shulman, Ian M Hull & Carole A Cohen, "Testamentary Capacity and Suicide: An Overview of Legal and Psychiatric Issues" (2003) 26:4 Intl J L & Psychiatry 403.

55 Peisah, "Reflections on Changes", *supra* note 47 at 709–12.

An increasing array of disorders, beyond schizophrenia and dementia, have been recognized as having an effect on testamentary capacity. In 2010, in the case of *Key & Anor v Key & Ors*, Justice Briggs included bereavement in "circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision-making."[56] Delirium (an acute state of confusion due to an underlying medical or neurological disorder) also figures commonly in modern challenges to wills.[57]

Increased complexity or conflict in an individual's social environment raises the threshold for the level of cognitive function needed to be considered capable (see Figure 1 in Appendix).[58] For example, in a complicated family with a complex history, the testator's working memory would be tested to a greater degree in holding all these relationships, events and facts in mind long enough to form a sound judgment that would connect their prior values, beliefs and relationships to a related estate plan.[59] A testator deemed incapable in such a situation may very well be capable in a simpler environment with less strain on their working memory and frontal/executive functions. This again illustrates the importance of being aware of subtle cognitive and perceptual deficits. Especially when social graces are preserved, those with early or milder forms of dementia may appear cognitively intact to the lay observer or even to physicians, yet have an underlying cognitive impairment that is not evident unless relevant cognitive functions are probed.[60]

Other elements of will-making should be considered and could alter the threshold for capacity depending on the situation-specific circumstances of an individual testator. Each will is unique, hence the insistence on the question, can a person make *this* will? A testator, even with substantial mental disorder, may be capable of making a simple disposition (e.g. leaving all assets to one beneficiary) but not a complex will (e.g. with multiple distributions among a number of beneficiaries). If the testator makes a radical change from their previously expressed wishes, this should invite a more detailed probing of their cognitive functioning.[61] Similarly, if there have been multiple changes to the will, this could be reflective of

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56 *Key v Key*, [2010] EWHC 408 (ChD) at 95.

57 Benjamin Liptzin et al, "Testamentary Capacity and Delirium" (2010) 22:6 Intl Psychogeriatrics 950; see also Peisah, "Reflections on Changes", *supra* note 47.

58 Shulman et al, "Contemporaneous Assessment", *supra* note 36; Kennedy, *supra* note 54 at 191–95.

59 Champine, *supra* note 40.

60 Shulman et al, "Psychiatric Issues", *supra* note 35.

61 Kennedy, *supra* note 54; Shulman et al, "Assessment of Testamentary Capacity", *supra* note 25.

cognitive concerns or even undue influence and should warrant probing and documentation of a clear, consistent rationale for those changes.[62]

4. Proposal: An Updated Test for Testamentary Capacity

After almost 150 years, there is a need for the traditional *Banks v Goodfellow* criteria to be updated with respect to the modern understanding and environmental context of testamentary capacity. The testamentary capacity criteria should be attuned to the broad array of psychiatric, neurological and medical conditions that may affect testators, as well as the more subtle aspects of cognition, rather than a global notion of "disorder of the mind" or "insane delusion." Executive functioning, in particular, should play a greater role in the modern interpretation of the test. This can be done by adding "deliberative" components that capture these functions, particularly in relation to the third criterion. Furthermore, the test should recognize that capacity is not only task-specific, but also situation and time-specific. To this end, the language of the criteria should incorporate a discussion of the will-making context, with particular attention to situational complexity. An inclusion of situation-specificity is not only important in its own right, but also because it raises the threshold for the level of cognitive functioning necessary to have testamentary capacity to be concordant with the complexity of the testator's environment (see Figure 1).

A potentially useful conceptual model for a modern understanding and assessment of testamentary capacity can be derived from the fundamental components of all mental capacities, namely "understanding" and "appreciation." "Understanding" in the context of will-making has, thus far, included the ability to procure, from memory: the nature and extent of one's assets, those individuals who might expect to benefit from the will, and the nature of a will and its effects. This encompasses the basic elements of the current *Banks v Goodfellow* criteria. However, we propose two additional elements: first, the recollection and appreciation of significant conflict or complexity in their life situation; and second, the recall of previously expressed wishes with respect to estate distribution and prior wills.

"Appreciation" refers to the evaluative and discriminative functions that are performed after the identification of relevant facts and persons has occurred. Evaluation and discrimination include the executive or "deliberative" functions, outlined above, that come into play as the testator undergoes the process of evaluating, comparing, and reasoning with relevant knowledge. It also includes the evaluation of potential options, in

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62 Robin Jacoby & Peter Steer, "How to Assess Capacity to Make a Will" (2007) 335:7611 Brit Med J 155; Shulman et al, "Assessment of Testamentary Capacity", *supra* note 25.

that the testator must be capable of evaluating the impact and consequences of a particular distribution plan. Overall, adequate appreciation on the part of the testator can best be ascertained by the communication and documentation of a clear and consistent rationale for the distribution of their property, especially when there has been a significant departure from prior wills or expressed wishes. These proposed criteria for testamentary capacity retain the essential elements of the original *Banks v Goodfellow* test, which has stood the test of time, but adds elements and issues that should be considered in the modern context as compared to the 1800s.

The following is a list of the proposed criteria for an updated test of testamentary capacity that assesses whether a testator with a specific level of cognitive abilities has the capacity to execute a particular will, in a particular life context at a particular time:

The testator must be:

1. Capable of understanding the act of making a will and its effects;

2. Capable of understanding the nature and extent of their property relevant to the disposition;

3. Capable of evaluating the claims of those who might be expected to benefit from his estate, and able to demonstrate an appreciation of the nature of any significant conflict and or complexity in the context of the testator's life situation;

4. Capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure from previously expressed wishes or prior wills; and

5. Free of a mental disorder, including delusions, that influences the distribution of the estate.

5. Conclusion

The test outlined in *Banks v Goodfellow* in 1870 has withstood the test of time and should remain a guide for assessing testamentary capacity. However, jurisprudence over many years has helped to hone the criteria that are critical to the determination of testamentary capacity. Furthermore, our understanding of mental and brain disorders has advanced, including the nature and significance of underlying cognitive functions and behavioural and psychological symptoms. These advances in clinical

neuroscience should in turn inform the legal criteria. In particular, the updated criteria should reflect the consensus that the most common context for testamentary capacity challenges by far in modern times is dementia. Unlike schizophrenia, dementia is a neurodegenerative condition that is often associated with a change in preferences and judgment, particularly in relation to complex decision-making. Accordingly, any scrutiny of a testator's decision-making should not only focus on delusions or cognitive misperceptions and their impact on a disposition, but also on the testator's ability to handle complexity in their social environment and particularly in their relationships, as well as their ability to provide a rationale for changes in the disposition. From a neuropsychological perspective, this probably involves both memory and executive cognitive functions, which need to be explored empirically with future research as part of a scientifically-supported approach to the assessment of testamentary capacity. We propose that a modest update of the legal test for testamentary capacity that is based on recent legal and neuroscientific developments will help lawyers, experts—and ultimately the courts—to assess testamentary capacity more reliably in the modern context, while retaining the flexibility to deal with an individual testator's specific circumstances.

Figure 1: Relationship Between Level of Cognition and Situation-Specific Complexity (adapted from Shulman et al, 2007 (Permission provided by the American Psychiatric Association))