

Report on

COMMON-LAW TESTS OF CAPACITY



Supported by:



Building better communities, one grant at a time.

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**

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, BC, Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org
WWW: <http://www.bcli.org>

The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its strategic mission is to be a leader in law reform by carrying out:

- the best in scholarly law reform research and writing; and
 - the best in outreach relating to law reform.
-

The members of the Institute are:

R. C. (Tino) Di Bella (Chair)
Lisa A. Peters (Treasurer)
Roy Cammack
Prof. Margaret I. Hall
Prof. Robert G. Howell
Hon. Kenneth C. Mackenzie, QC
D. Peter Ramsay, QC
Stanley T. Rule

Prof. Joost Blom, QC (Vice-chair)
Hon. Marion J. Allan
Jan Christiansen
Prof. Douglas C. Harris
Fiona Hunter
Geoff Plant, QC
Andrea L. Rolls
Thomas L. Spraggs

The members emeritus of the Institute are:

Arthur L. Close, QC

Gregory K. Steele, QC

This project was made possible with the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Justice for British Columbia. The Institute gratefully acknowledges the support of the Law Foundation and the Ministry for its work.

Introductory Note

Report on Common-Law Tests of Capacity

The Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project has concerned itself with how the law determines whether a person has the mental capacity to make a legally effective decision, to enter into a transaction, or to form a relationship with another person. For a very long time, the law's basic position has been that a medical diagnosis of mental illness, disability, or impairment is not enough, standing on its own, to compel the conclusion that a person is mentally incapable. Instead, the law has applied a series of distinctive tests of capacity, which are geared to the specific type of decision, transaction, or relationship at issue.

This project has examined nine tests of capacity that have developed, and that continue to be embodied, in court decisions. These selected tests of capacity cover some major legal decisions, such as those that are made when a person wants to make a will, to make a gift, to enter into a contract, and to marry or separate from a spouse. The project's final report makes 31 recommendations for reform of the law governing the selected tests of capacity. Some of these recommendations call for legislative changes, which the report illustrates with a draft statute.

On behalf of the board of directors of the British Columbia Law Institute, I want to thank the members of the Common-Law Tests of Capacity Committee for their hard work over the course of this two-year project. The BCLI fully supports their recommendations and endorses this final report.



R. C. (Tino) Di Bella
Chair,
British Columbia Law Institute

September 2013

Common-Law Tests of Capacity Project Committee

Formed in October 2011, the Common-Law Tests of Capacity Committee was an all-volunteer BCLI project committee dedicated to studying and illuminating selected common-law tests of mental capacity, determining where the current law has shortcomings that require modernization or harmonization, and recommending legislative reforms to address those shortcomings.

The members of the committee were:

Andrew MacKay—chair
*(partner, Alexander Holburn
Beaudin & Lang LLP)*

R. C. (Tino) Di Bella
(associate, Jawl & Bundon)

Russell Getz
*(legal counsel, Ministry of Justice
for British Columbia)*

Kimberly Kuntz
(partner, Bull Housser & Tupper LLP)

Roger Lee
(partner, Davis LLP)

Barbara Lindsay
*(director—advocacy and public policy,
Alzheimer Society of British Columbia)*

Catherine Romanko
*(Public Guardian and Trustee for
British Columbia)*

Laurie Salvador
*(principal, Salvador Davis & Co.
Notaries Public)*

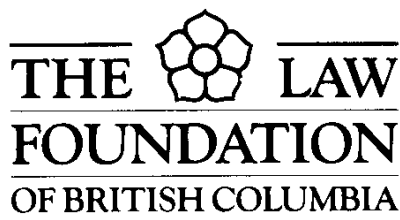
Jack Styan
*(managing director, RDSP Resource
Centre/vice president for strategic
initiatives, Community Living British
Columbia)*

Geoffrey White
*(principal, Geoffrey W. White
Law Corporation)*

Kevin Zakreski (staff lawyer, BCLI) was the project manager.

For more information, visit us on the World Wide Web at:
<http://www.bcli.org/bclrg/projects/rationalizing-and-harmonization-bc-common-law-tests-capacity>

Supported by:



Building better communities, one grant at a time.

TABLE OF CONTENTS

ACKNOWLEDGMENTS	xiii
EXECUTIVE SUMMARY	xv
CHAPTER I. INTRODUCTION	1
A. Background on the Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project	1
B. The Common-Law Tests of Capacity Project Committee	2
C. The Consultation Process	6
D. The Structure of This Report	7
CHAPTER II. MENTAL CAPACITY AND THE LAW	11
A. Introduction	11
B. Terminology	11
1. Meaning of “Capacity”	11
2. Meaning of “Mental Capacity”	12
3. Meaning of “Test of Capacity”	12
C. Sources of Cognitive Decline	13
1. Introduction	13
2. Dementia	14
3. Delirium	15
4. Depression	15
5. Drugs	16
D. Legal Approaches to Mental Capacity	16
E. Characteristics of Common-Law Tests of Capacity	18
1. Introduction	18
2. Purposes of Common-Law Tests of Capacity	18
3. Baseline Common-Law Test of Capacity	19
4. Comparing Common-Law Tests of Capacity	19
F. Reasons for Studying Common-Law Tests of Capacity	20
1. Introduction	20
2. Legal Factors	20
3. Social Trends	20
G. Overview of the Committee’s Recommendations	23
CHAPTER III. CAPACITY TO MAKE A WILL	25
A. Introduction	25
B. Background	25
1. Introduction	25
2. Relevant Statutory Provisions	25
3. Test of Testamentary Capacity	26
(a) The Test	26

Report on Common-Law Tests of Capacity

(b) General Unsoundness of Mind	27
(c) Specific Delusions	28
4. Timing: When the Testator Must Have Testamentary Capacity	29
5. Comparison of Test of Testamentary Capacity to Other Tests of Capacity	30
6. Legal Advisor's Responsibilities in Assessing Testamentary Capacity	32
7. Related Concepts	33
(a) Introduction	33
(b) Formal Validity	34
(c) Knowledge and Approval	34
(d) Presumption of Capacity	34
(e) Suspicious Circumstances	35
(f) Undue Influence	36
(g) Summary	37
C. Issues for Reform	37
1. Should the Specific-Delusion Element of the Test of Capacity to Make a Will Be Abrogated?	37
2. Should Any of the Elements of Test of Capacity to Make a Will Relating to General Unsoundness of Mind Be Modified?	40
3. Should the Common-Law Test of Capacity to Make a Will be Restated in Legislation?	42
4. Should Legislation Contain a Presumption that a Person has the Capacity to Make a Will?	43
5. Should Legislation Provide More Guidance on How to Assess Capacity to Make a Will?	46
CHAPTER IV. WILLS FOR INDIVIDUALS WHO LACK TESTAMENTARY CAPACITY	49
A. Introduction	49
B. Background	50
1. United Kingdom Legislation	50
(a) Mental Health Act 1959 & Mental Health Act 1983	50
(b) Mental Capacity Act 2005	53
2. Australian Succession Legislation	56
3. Other Jurisdictions	59
(a) New Brunswick	59
(b) New Zealand	60
(c) California	61
4. Range of Statutory-Will Cases	61
C. Issues for Reform	62
1. Should British Columbia Enact Legislation Authorizing the Making, Modifying, or Revoking of a Will for an Individual Who Lacks Testamentary Capacity? ..	63
2. To Whom Should British Columbia's Statutory-Will Legislation Apply?	66
3. What Public Institution, Body, or Individual Should Have Decision-Making Authority Under British Columbia's Statutory-Will Legislation?	68
4. Who Should Be Allowed to Apply Directly for Authorization of a Statutory Will?	69

Report on Common-Law Tests of Capacity

5. Who Should Receive Notice of and Be Entitled to Participate in a Statutory-Will Proceeding?	71
6. Who Should Execute a Statutory Will?	73
7. Should British Columbia's Statutory-Will Legislation Adopt a Best-Interests Standard for Decision-Making?	73
8. Should a Statutory Will be Subject to Revision under British Columbia's Wills-Variation Legislation?	75
D. Postscript: Application of Statutory-Will Legislation to Individuals Who are Younger than the Statutory Age at Which an Individual Becomes Legally Capable to Make a Will	75
CHAPTER V. CERTIFICATION OF TESTAMENTARY CAPACITY BEFORE THE DEATH OF THE TESTATOR	79
A. Introduction	79
B. Background	79
1. Introduction	79
2. Michigan's Antemortem-Probate Legislation	79
3. Academic Models for Antemortem-Probate Legislation	81
(a) Introduction	81
(b) Contest Model	82
(c) Conservatorship Model	83
(d) Administrative Model	84
4. Current American Antemortem-Probate Legislation	86
(a) Introduction	86
(b) North Dakota	86
(c) Ohio	87
(d) Arkansas	88
C. Issue for Reform	88
1. Should British Columbia Enact Legislation Creating a Procedure that Would Allow a Testator to Obtain Certification of Testamentary Capacity Before the Death of the Testator?	89
CHAPTER VI. CAPACITY TO MAKE A GIFT	93
A. Introduction	93
B. Background	93
1. Introduction	93
2. Legal Conception of a Gift	94
3. Test of Capacity to Make a Gift	96
(a) Introduction	96
(b) Cases Applying Elements of the Contractual Test	98
(c) Cases Applying Elements of the Testamentary Test	99
(d) Other Aspects of the Law of Capacity to Make a Gift	101
4. Legislation Applicable to Capacity to Make a Gift	103
(a) Consequences of Transfer of Property by an Incapable Adult	103
(b) Gifts by Property Guardians	106
(c) Gifts by Attorneys	107

Report on Common-Law Tests of Capacity

C. Issues for Reform.....	107
1. Should Any of the Elements of the Test of Capacity to Make a Gift Be Modified by Legislation?	108
2. Should Gifts that Are Used to Create Inter Vivos Trusts Be Analyzed by a Special Test of Capacity that Is More Explicitly in Tune with the Elements of a Trust?	110
CHAPTER VII. CAPACITY TO MAKE A BENEFICIARY DESIGNATION	113
A. Introduction.....	113
B. Background.....	113
1. What Is a Beneficiary Designation?	113
2. What Is the Test of Capacity to Make a Beneficiary Designation?	116
3. Legislation Relating to Mental Capacity and Beneficiary Designations.....	119
C. Issues for Reform.....	121
1. Should Any of the Elements of the Test of Capacity to Make a Beneficiary Designation Be Modified by Legislation?	121
2. Should the Test of Capacity to Make a Beneficiary Designation be Restated in Legislation?	123
CHAPTER VIII. CAPACITY TO NOMINATE A COMMITTEE	125
A. Introduction.....	125
B. Background.....	125
1. Patients and Committees.....	125
2. What Is a Nomination of a Committee?	126
3. What Is the Test of Capacity to Nominate a Committee?	127
4. Adult Guardianship Act and Nominating a Committee	129
C. Issue for Reform.....	130
1. Should Any of the Elements of the Test of Capacity to Nominate a Committee Be Modified by Legislation?	130
CHAPTER IX. CAPACITY TO ENTER INTO A CONTRACT.....	133
A. Introduction.....	133
B. Background.....	133
1. Overview.....	133
2. A Summary of the Basic Elements of the Test of Capacity to Enter into a Contract.....	133
3. Scope of the Test of Capacity to Enter into a Contract.....	135
4. Purposes of the Test of Capacity to Enter into a Contract	136
5. Development of the Test of Capacity: Protecting the Other Contracting Party's Interests and Security of Contracts.....	137
6. Effect of a Contract with an Incapable Person: Void or Voidable?	140
7. A Functional Test: The Range of Contracts Covered by the Test of Capacity	141
8. The Role of Fairness in the Test of Capacity to Enter into a Contract.....	142
9. Other Contract-Law Concepts	143
(a) Introduction.....	143
(b) Unconscionability	143

Report on Common-Law Tests of Capacity

(c) Undue Influence.....	144
(d) Non Est Factum	145
10. Necessaries.....	145
(a) Introduction	145
(b) What Are Necessaries?	146
(c) Sale of Goods Act	146
(d) The Common-Law Rule	147
11. Other Relevant Legislation	147
(a) Introduction	147
(b) Presumption of Capacity to Enter into a Contract.....	148
(c) Contracts with Persons Under a Committeeship Order.....	148
(d) Statutory Tests of Capacity for Specific Contracts.....	149
C. Issues for Reform	149
1. Should the Common-Law Test of Capacity to Enter into a Contract Be Abrogated?	150
2. Should any Aspects of the Common-Law Test of Capacity to Enter into a Contract be Modified by Legislation?	152
3. Should Legislation Provide that the Common-Law Test of Capacity to Enter into a Contract Include an Element Directing the Court to Review the Fairness of the Contract?	155
4. Should Legislation be Enacted to Unify the Common-Law and Statutory Rules on the Supply of Necessaries to a Person Who Does Not Have the Capacity to Enter into a Contract?.....	156
CHAPTER X. CAPACITY TO RETAIN LEGAL COUNSEL.....	159
A. Introduction	159
B. Background.....	159
1. Overview	159
2. Test of Capacity to Retain Legal Counsel	160
(a) The Contractual Aspect of the Test of Capacity	160
(b) The Agency Aspect of the Test of Capacity.....	161
(c) Presumption of Capacity.....	162
(d) Comparison to Other Tests of Capacity	163
3. Legal Services as Necessaries.....	163
4. Liability for Costs for Breach of Implied Warranty of Authority.....	164
5. Professional Obligations on Legal Counsel	165
(a) Introduction	165
(b) Rules for Lawyers Taking on New Clients.....	165
(c) Rules for Lawyers Dealing with Existing Clients.....	166
(d) Rule for Notaries Public	167
6. Capacity to Conduct Civil Litigation	167
C. Issues for Reform	169
1. Should British Columbia Enact Legislation Setting out a Test of Capacity to Retain Legal Counsel?	170

Report on Common-Law Tests of Capacity

2. Should British Columbia Enact Legislation Allowing a Person with Diminished Capacity to Retain Legal Counsel for Advising on and Drafting a Representation Agreement with Standard Provisions?.....	171
3. Should British Columbia Enact Legislation to Confirm that a Person May Retain Legal Counsel to Act for the Person in a Proceeding in Which the Person's Mental Capacity Is at Issue?.....	172
CHAPTER XI. CAPACITY TO MARRY	175
A. Introduction.....	175
B. Background.....	175
1. Overview.....	175
2. Test of Capacity to Marry	176
(a) Introduction.....	176
(b) Purposes of the Test of Capacity to Marry.....	177
(c) Basic Elements of the Test of Capacity.....	178
(d) Delusions.....	179
3. Additional Elements of the Test of Capacity to Marry	179
(a) Capacity to Manage Oneself and/or One's Finances	179
(b) Capacity to Appreciate Effect on Previous Marriages and Children	181
(c) Summary	182
4. Comparison to Other Tests of Capacity.....	183
5. Standing to Challenge a Marriage	185
6. Onus of Proof.....	186
7. Consequences of a Finding that a Person Lacks the Capacity to Marry	187
8. Intoxication	187
9. Legislation Relating to the Test of Capacity to Marry	188
(a) Existing Legislation.....	188
(b) Authority to Enact Legislation in Relation to Mental Capacity and Marriage	189
(c) Equality Rights and Legislation on the Test of Capacity to Marry	190
C. Issues for Reform.....	191
1. Should any Aspect of the Common-Law Test of Capacity to Marry Be Modified by Legislation?	191
2. Should the Test of Capacity to Marry Be Restated in Legislation?	195
CHAPTER XII. CAPACITY TO FORM THE INTENTION TO LIVE SEPARATE AND APART FROM A SPOUSE	197
A. Introduction.....	197
B. Background.....	197
1. Overview.....	197
2. Family-Law Legislation	197
(a) Introduction.....	197
(b) Divorce Act.....	198
(c) Declaratory Judgments under the Family Relations Act	199
(d) Legislative Authority to Enact Family-Law Legislation	200
3. Test of Capacity to Separate.....	201

Report on Common-Law Tests of Capacity

(a) Introduction	201
(b) Elements of the Test of Capacity	201
(c) Rationales for the Test of Capacity	202
(d) Delusions	203
(e) Comparison to Other Common-Law Tests of Capacity	204
C. Issue for Reform	205
1. Should Any Aspects of the Common-Law Test of Capacity to Form the Intention to Live Separate and Apart from a Spouse Be Modified by Legislation?	205
CHAPTER XIII. CAPACITY TO ENTER INTO AN UNMARRIED SPOUSAL RELATIONSHIP	207
A. Introduction	207
B. Background	207
1. Overview: Mental Capacity and Unmarried Spousal Relationships	207
2. Range of Legislation Applying to Unmarried Spousal Relationships	207
3. Definition of “Spouse”	208
4. What Is a Marriage-Like Relationship?	209
5. Implications for Mental Capacity	210
6. Ending an Unmarried Spousal Relationship	212
C. Issue for Reform	213
1. Should British Columbia Enact Legislation Setting out a Test of Capacity to Enter into an Unmarried Spousal Relationship?	213
CHAPTER XIV. CONCLUSION	217
APPENDIX A—LIST OF RECOMMENDATIONS	219
APPENDIX B—DRAFT LEGISLATION	223
APPENDIX C—SELECTED LEGISLATION	239
APPENDIX D—RESPONDENTS TO THE CONSULTATION PAPER	243
PRINCIPAL FUNDERS IN 2012	245

ACKNOWLEDGMENTS

The British Columbia Law Institute thanks the members of the Common-Law Tests of Capacity Project Committee, without whose dedication this project would not have been possible. Committee members generously shared their time and expertise over the course of the project as volunteers. Additional acknowledgment is due to Andrew MacKay, who took on the responsibility of serving as committee chair.

The BCLI also thanks all those individuals and organizations that participated in this project's public consultation. Their responses and comments helped the committee in shaping and evaluating the final recommendations contained in this report.

Several organizations hosted talks or presentations by BCLI staff or committee members on this project. The BCLI thanks the National Association of Public Trustees and Guardians, the Victoria Wills and Trusts and Young Lawyers Sections of the Canadian Bar Association, the Vancouver and Okanagan CBA Wills and Trusts Sections, the Vancouver and Kelowna branches of the Estate Planning Council, the University of British Columbia Faculty of Law, the Kamloops law firm Fulton & Company LLP, and the Continuing Legal Education Society of British Columbia.

This project was made possible by grants from the Law Foundation of British Columbia and the Notary Foundation of British Columbia. The BCLI thanks both foundations for their generous contributions to the project. The BCLI also thanks the Vancouver law firm Alexander Holburn Beaudin and Lang LLP for hosting committee meetings.

Finally, the staff of the BCLI played a key role in designing, managing, and executing this project. Jim Emmerton (executive director) provided executive planning and management for the project. He and Greg Blue, QC (senior staff lawyer) were both involved in the early design and planning of the project. Kevin Zakreski (staff lawyer) was the project manager, and was also responsible for drafting this report and the consultation paper that preceded it. And the following staff members also contributed to the research and administration of the project: Emma J. Butt (staff lawyer), Sarah Chao (administrative assistant), Deborah Cumberland (research lawyer), Rachel Kelly (articled student and research lawyer), Elizabeth Pinsent (office administrator), Ana Carolina Costa Rodrigues (administrative assistant), and Ariadne Vanzela (ISS intern).

EXECUTIVE SUMMARY

INTRODUCTION

The Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project was a major law-reform project that studied judge-made rules on the level of mental capacity required to enter into certain transactions or relationships and considered whether British Columbia should enact legislation to reform those rules. The British Columbia Law Institute started work on the project in October 2011. With the publication of its final report, the project comes to a close.

This report contains the project's final recommendations for reform. Each of these recommendations sets out policy proposals that are meant to contribute to the development of the law in the areas studied in this project. In some cases, the recommendations propose legislative reform. Draft legislation illustrating how these reforms may be implemented has been included in an appendix to this report.

The Common-Law Tests of Capacity Project has been made possible by funding from the Law Foundation of British Columbia and the Notary Foundation of British Columbia.

COMMON-LAW TESTS OF CAPACITY PROJECT COMMITTEE

The Common-Law Tests of Capacity Project was carried out with the assistance of an all-volunteer project committee. The project committee was formed shortly after the commencement of the project, and it met regularly from December 2011 to January 2013, and again from June to August 2013. The members of the committee were:

Andrew MacKay—chair
*(partner, Alexander Holburn
Beaudin & Lang LLP)*

R. C. (Tino) Di Bella
(associate, Jawl & Bundon)

Russell Getz
*(legal counsel, Ministry of Justice
for British Columbia)*

Kimberly Kuntz
(partner, Bull Housser & Tupper LLP)

Roger Lee
(partner, Davis LLP)

Barbara Lindsay
*(director—advocacy and public policy,
Alzheimer Society of British Columbia)*

Report on Common-Law Tests of Capacity

Catherine Romanko

*(Public Guardian and Trustee for
British Columbia)*

Laurie Salvador

*(principal, Salvador Davis & Co.
Notaries Public)*

Jack Styan

*(managing director, RDSP Resource
Centre/vice president for strategic
initiatives, Community Living British
Columbia)*

Geoffrey White

*(principal, Geoffrey W. White
Law Corporation)*

Kevin Zakreski (staff lawyer, British Columbia Law Institute) was the project manager.

WHAT ARE COMMON-LAW TESTS OF CAPACITY?

It is basic law that mental disability, illness, or impairment does not, in and of itself, leave a person incapable under the law to carry out transactions, enter into relationships, or manage his or her affairs. The law's focus is on the degree of mental disability, illness, or impairment. If a person's mental disability, illness, or impairment exceeds in degree a legal threshold, then that person will be considered incapable in the eyes of the law. This legal threshold is commonly called a *test of capacity*.

There is no single, global test of capacity. Instead, the law has developed many different tests of capacity, each geared to a specific type of transaction or relationship. Over the past 20 years, British Columbian and Canadian law has seen significant development of legislation relating to mental capacity, which has yielded modern and sophisticated rules on when a person is mentally competent to perform certain tasks or enter into certain relationships. But many other areas of the law continue to rely on tests of capacity that find their expression in court judgments. This report calls these tests of capacity *common-law tests of capacity*.

Common-law tests of capacity hold sway over many important areas of the law. They are engaged, for example, when a person whose capacity is in doubt makes a will, enters into a contract, or gets married.

THE STRUCTURE OF THE REPORT

The report opens with an introductory chapter that explains the goals and organization of the Common-Law Tests of Capacity Project. The introductory chapter is followed by a chapter that presents some general information on mental capacity and the law. This chapter discusses a diverse set of topics, ranging from the medical sources of cognitive decline and legal approaches to tests of capacity to characteris-

tics of mental-capacity jurisprudence and reasons for taking on a project to reform common-law tests of capacity.

The bulk of the report is taken up with discussing the current law, issues for reform arising from the law, the options to address those issues, and the committee's recommendations for reform. This discussion is organized into separate chapters for each of the common-law tests of capacity examined in this report. These common-law tests of capacity are the tests of capacity to:

- make a will;
- make an *inter vivos* gift;
- make a beneficiary designation;
- nominate a committee;
- enter into a contract;
- retain legal counsel;
- marry;
- form the intention to live separate and apart from a spouse; and
- enter into an unmarried spousal relationship.

SUMMARY OF THE COMMITTEE'S RECOMMENDATIONS

Introduction

The committee's focus through much of this report is on the elements that make up these nine common-law tests of capacity. In assessing its options for substantive reform of these elements, the committee considered whether the common law was deficient. If so, then it asked if legislation could bring about a significant improvement in the law. It found that this rigorous standard could only be met in a few cases.

The committee also considered a number of areas collateral to the common-law tests of capacity considered in this report. It proposed several fine-tuning reforms in these areas.

Capacity to Make a Will

The committee is not proposing any reforms to the well-known test of capacity to make a will. This test of capacity has two components: (1) a general component, focussed on the capacity to understand the nature of the will, and how it affects a person's own interests, the person's property, and the person's family (and others who

might have a moral claim on the person's property); (2) a component aimed at delusions that directly affect the will.

The committee is proposing a legislative presumption of capacity to make a will, which would be harmonized with the presumptions of capacity to make other important personal-planning documents, such as enduring powers of attorney and representation agreements.

Wills for Individuals Who Lack Testamentary Capacity

One of the implications of having a test of capacity to make a will is that certain people will not be able to meet this test. Their estate-planning options will accordingly be limited, and this may cause hardship for them and their families.

The committee addresses this concern by recommending that British Columbia enact legislation creating a court-based procedure to allow people with diminished capacity to make a will. The procedure would be modeled on existing statutory-will procedures in the United Kingdom and Australia.

Certification of Testamentary Capacity Before the Death of the Testator

Another consequence of having a test of capacity to make a will is that the test may spawn estate litigation. The committee examined an American procedure that is often advanced by commentators as a means to reducing estate litigation. The procedure essentially involves an application to court, on notice to interested parties, for a declaratory order that a person has the mental capacity to make a will at the time when the will is executed.

In the committee's view, this procedure would be of limited utility. It has not proved to be significantly effective in stemming estate litigation in the handful of American states that have adopted it.

Capacity to Make a Gift

The common-law test of capacity to make an *inter vivos* gift has become confused and uncertain. The committee recommends clarifying the law by adopting a test of capacity to make an *inter vivos* gift that is analogous to the test of capacity to make a will. This recommendation is in accordance with recent trends in the case law and with the protective purpose of the test of capacity.

Capacity to Make a Beneficiary Designation

The committee is proposing no changes to the common-law test of capacity to make a beneficiary designation. The test of capacity does not appear to be causing any problems in practice. Its elements are similar to the elements of the test of capacity to make a will. As a result, the existing test effectively harmonizes the approach to mental capacity for two important aspects of estate planning.

Capacity to Nominate a Committee

A useful, but often overlooked, personal-planning device is the nomination of a committee under the *Patients Property Act*. The common-law test of capacity to nominate a committee is obscure. The committee proposes clarifying the law by adopting the better-known legislative test of capacity to make a representation agreement with non-standard provisions. In the committee's view, this proposal should help to make these planning documents more accessible and more widely used.

Capacity to Enter into a Contract

The committee is not proposing substantive changes to the common-law test of capacity to enter into a contract. It is proposing a clarification of one of the collateral rules to this test. Under this rule, anyone who provides necessities to a person with diminished capacity is entitled to reasonable compensation for the necessities. This rule currently has two aspects: a rule for necessary goods (found in the *Sale of Goods Act*) and a rule for necessary services (found in the common law). The committee is recommending the enactment of a harmonized rule, in a more appropriate location in the statute book than the *Sale of Goods Act*.

Capacity to Retain Legal Counsel

The committee is not proposing substantive changes to the common-law test to retain legal counsel. It is proposing two reforms that should help to improve access to legal services in two specific situations. The first situation involves proceedings in which a person's mental capacity is at issue. The second involves the creation of a representation agreement. In both situations, uncertainty over a person's mental capacity to retain legal counsel can serve as a barrier to needed legal services. The committee's proposals would remove those barriers by clarifying the law.

Capacity to Marry

Possibly the most challenging subject addressed in this report is the common-law test of capacity to marry. The committee is sympathetic to criticisms of the test's low

threshold of mental capacity. But it was not convinced that a general legislative rule was the best means to address concerns about the common-law test of capacity to marry. The committee is not proposing substantive changes to the test of capacity to marry.

Capacity to Form the Intention to Live Separate and Apart from a Spouse

The committee is not recommending any changes to the common-law test of capacity to form the intention to live separate and apart from a spouse. This test of capacity has traditionally been linked to the test of capacity to marry. In the committee's view, it is important that the law maintain this link.

Capacity to Enter into an Unmarried Spousal Relationship

The committee is not proposing substantive changes to the common-law test of capacity to enter into an unmarried spousal relationship. This is an emerging area of the law. The courts have only just begun to define the applicable test of capacity. In the committee's view, the time is not ripe for legislative intervention on this subject.

CONCLUSION

The publication of this report concludes this project, but it is only one step on the path of reforming the law on tests of mental capacity. The committee calls on the legislature and the courts to consider implementing the recommendations set out in this report.

CHAPTER I. INTRODUCTION

A. Background on the Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project

The British Columbia Law Institute began work on its Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project in October 2011. The aim of the project was to study selected tests of mental capacity and to make recommendations for reform of the law. This report contains the project's final recommendations, along with draft legislation that shows how the subset of those recommendations that call for legislative change may be implemented.¹

It is basic law that mental disability, illness, or impairment does not, in and of itself, leave a person incapable under the law to carry out transactions, enter into relationships, or manage his or her affairs. The law's focus is on the degree of mental disability, illness, or impairment. If a person's mental illness, disability, or impairment exceeds in degree a legal threshold, then that person will be considered incapable in the eyes of the law. This legal threshold is commonly called a *test of capacity*.

There is no single, global test of capacity. Instead, the law has developed many different tests of capacity, each geared to a specific type of transaction or relationship. Over the past 20 years, British Columbian and Canadian law have seen significant development of legislation relating to mental capacity, which has yielded modern and sophisticated rules on when a person is mentally competent to perform certain tasks or enter into certain transactions. For example, the *Power of Attorney Act*² was recently amended and now contains a legislative framework for the test of capacity to make an enduring power of attorney.³ Health-care decisions are also subject to a legislative test of capacity.⁴ And British Columbia has enacted (but not yet brought into force) comprehensive reforms to its adult-guardianship regime—that is, the system by which a representative is appointed to manage the day-to-day affairs of a person with diminished capacity.⁵

1. See, below, appendix B at 223.

2. RSBC 1996, c. 370.

3. See *ibid.*, s. 12.

4. See *Health Care (Consent) and Care Facilities (Admission) Act*, RSBC 1996, c. 181, ss. 4–9.

5. See *Adult Guardianship Act*, RSBC 1996, c. 6, as amended by *Adult Guardianship and Planning Statutes Amendment Act, 2007*, SBC 2007, c. 34, ss. 4–39 (not in force). See also *Patients Property Act*, RSBC 1996, c. 349 (British Columbia's current adult-guardianship statute).

But many areas of the law continue to rely on older common-law tests of capacity. Common-law tests of capacity are prominent in wills-and-estates law, contract law, and family law. In order to find the relevant tests of capacity in these areas of the law, it is necessary to trace the rules through court decisions, until one arrives (frequently) at a definitive statement in a nineteenth-century English judgment. This report focusses, for the most part, on the tests of capacity that apply to making a will, entering into a contract, making a gift, and getting married. It also tackles a few additional areas of the law that are connected to these four.

The Common-Law Tests of Capacity Project was generously supported by grants from the Law Foundation of British Columbia and the Notary Foundation of British Columbia.

B. The Common-Law Tests of Capacity Project Committee

The British Columbia Law Institute carried out this project with the assistance of an all-volunteer project committee. The members of the committee were:

Andrew MacKay—chair
*(partner, Alexander Holburn
Beaudin & Lang LLP)*

R. C. (Tino) Di Bella
(associate, Jawl & Bundon)

Russell Getz
*(legal counsel, Ministry of Justice
for British Columbia)*

Kimberly Kuntz
(partner, Bull Housser & Tupper LLP)

Roger Lee
(partner, Davis LLP)

Barbara Lindsay
*(director—advocacy and public policy,
Alzheimer Society of British Columbia)*

Catherine Romanko
*(Public Guardian and Trustee for
British Columbia)*

Laurie Salvador
*(principal, Salvador Davis & Co.
Notaries Public)*

Jack Styan
*(managing director, RDSP Resource
Centre/vice president for strategic
initiatives, Community Living British
Columbia)*

Geoffrey White
*(principal, Geoffrey W. White
Law Corporation)*

Andrew MacKay practises estate planning and estate litigation at Alexander Holburn Beaudin & Lang LLP. He has been a lawyer for over 25 years. Mr. MacKay has presented and written for the Continuing Legal Education Society of British Columbia,

including chapters in the *Probate and Estate Administration Practice Manual*⁶ and *Annotated Estates Practice*,⁷ and is active with the British Columbia Law Institute in legislative reform in the estates area.

R. C. (Tino) Di Bella is a lawyer with the Victoria law firm Jawl & Bundon, whose preferred areas of practice are wills, trusts, and estate law, elder law, bankruptcy and insolvency law, and real-estate and strata law. Mr. Di Bella is a former adjunct professor at the Faculty of Law, University of Victoria, and a frequent lecturer for the Continuing Legal Education Society of British Columbia, the Canadian Bar Association (BC Branch), and the Professional Legal Training Course program. He is a former president of the Victoria Bar Association, the Estate Planning Council of Victoria, Chair of the Wills and Trusts (Victoria) Section of the Canadian Bar Association (BC Branch), a past member of the Succession Law Reform Committee of the British Columbia Law Institute, and current legislative liaison for the Wills and Trusts (Victoria) Section of the Canadian Bar Association (BC Branch). In 2008, the Canadian Bar Association (BC Branch) appointed Mr. Di Bella to the British Columbia Law Institute board. From September 2010 to September 2012, Mr. Di Bella served as vice-chair and since September 2012, has served as Chair of the BCLI. In 2012, Mr. Di Bella was named a jurisdictional representative for British Columbia to the Uniform Law Conference of Canada.

Russell Getz is legal counsel in the Justice Services Branch of the British Columbia Ministry of Justice. His area of practice is civil-law policy and legislation, and he is the ministry's representative on the federal Advisory Group on Private International Law. Mr. Getz has also been active in law-reform endeavours in his volunteer work. These commitments include serving as the jurisdictional representative for British Columbia to the Uniform Law Conference of Canada. He was chair of the conference's civil section in 2006, and president of the conference in 2009–10. Mr. Getz has contributed to the development of a number of Uniform Law Conference statutes, and has been chair or co-chair of various initiatives, including the project respecting a *Uniform Trustee Act* (2012), the *Uniform Prevention of Abuse of Process Act* (2010), the *Uniform Apology Act* (2007), and the *Uniform Unclaimed Intangible Property Act* (2003).

6. Continuing Legal Education Society of British Columbia, *British Columbia Probate and Estate Administration Practice Manual*, looseleaf (consulted on 20 June 2013), 2d ed., 2 vols. (Vancouver: Continuing Legal Education Society of British Columbia, 2007).

7. Continuing Legal Education Society of British Columbia, *Annotated Estates Practice*, 2013 ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2013).

Report on Common-Law Tests of Capacity

Kimberly Kuntz is a partner at Bull, Housser & Tupper LLP and practices primarily in the area of estate and trust litigation. Ms. Kuntz represents executors, beneficiaries, and trustees in a variety of estate- and trust-related disputes, including litigation brought pursuant to the *Wills Variation Act*.⁸ Ms. Kuntz also assists clients in disputes involving the interpretation of wills and trust instruments, matters involving suspected undue influence or incapacity of testators and settlors of trusts, and applications for committeeship of incapacitated adults.

Roger Lee is a partner at Davis LLP. Since his call to the bar in 1994, Mr. Lee has developed an extensive practice in trust and estate litigation, and has dealt with all manners of contested wills and estates. Mr. Lee also deals with construction disputes, commercial fraud and recovery of assets, mortgage fraud, lease issues, and other land-related disputes. Mr. Lee has been listed in *The Best Lawyers in Canada* directory under trusts and estates (litigation) since 2006, and is recognized by Lexpert as a leading practitioner in the field of estate and trust litigation.

Barbara Lindsay has been with the Alzheimer Society of British Columbia since 1994 and is currently the society's director of advocacy and public policy. Her work with the society involves planning, implementing, and evaluating public policy and advocacy, and liaising with government agencies and regional health authorities. A lawyer whose passion is for improving the lives of people affected by dementia, Ms. Lindsay also assists society staff in their work supporting families facing dementia with advocacy and legal planning, as well as providing advocacy skills training to staff and volunteers. Ms. Lindsay is committed to ensuring the voices of people with dementia, caregivers, and families are heard as we work toward transforming British Columbia's dementia system of care.

Catherine M. Romanko was appointed the Public Guardian and Trustee of British Columbia on 10 October 2011 for a six-year term. Previous to her appointment as PGT, Ms. Romanko held the position of deputy public guardian and trustee, the director of legal services and chief legal counsel to the public guardian and trustee for 10 years, and before that legal counsel to the public guardian and trustee. Ms. Romanko was called to the Bar of British Columbia in 1987 and has a background in wills, estates, and guardianship law. She has balanced her legal practice between the private and public sectors. She is an active member and past chair of the Vancouver Wills and Trusts Section of the Canadian Bar Association (BC Branch) and she is a frequent contributor to continuing legal education programs. Ms. Romanko completed her undergraduate studies at the University of Toronto and obtained both a Master of Arts and a Bachelor of Laws from the University of British Columbia.

8. RSBC 1996, c. 490.

Laurie Salvador became a notary public in 1986. Before becoming a BC notary, Ms. Salvador worked in the travel business as manager of an inbound tour company. In the early 1980s, Ms. Salvador was executive assistant to Grace McCarthy, then minister of human resources. The commonality in her work experience was serving people. When asked why she chose to become a BC notary, Ms. Salvador responded, “Working for government taught me something important about myself. I wanted to be self-employed.” Her father, Sidney notary John Salvador, was thinking of retiring and encouraged Ms. Salvador to take the notary program with his assistant Susan Davis. Ms. Davis and Ms. Salvador studied together and went on to be successful notary partners. Ms. Salvador has practised exclusively in the area of estate planning for 25 years in Sidney. She has served on the board of the Society of Notaries Public of British Columbia and the Notary Foundation of British Columbia for ten years. She currently develops and teaches estate-planning courses for BC notaries and serves as a director on the Saanich Peninsula Hospital Foundation board. Ms. Salvador has also served as a board member of SANSHA community hall and has been involved in politics, Big Brothers and Sisters, and was a founding director of Victoria AM Tourist Association.

Jack Styan has recently joined with Ability Tax Group to launch the RDSP Resource Centre, a social-purpose venture committed to pursuing financial security for Canadians with disabilities. As managing director, Mr. Styan is responsible for outreach, partnerships, and public policy. Previously Mr. Styan was executive director and director of public policy at the Planned Lifetime Advocacy Network. While at PLAN, he led the advocacy efforts to get the federal government to implement the registered disability savings plan. An equally important accomplishment was getting 13 provinces and territories to accommodate the RDSP so that people are able to save in their RDSP and not lose their disability benefits. Mr. Styan authored the RDSP section in PLAN’s best-selling book, *Safe & Secure*. Prior to joining PLAN, Mr. Styan was the executive director of the Burnaby Association for Community Inclusion, long recognized as one of British Columbia’s most progressive and innovative community living service providers. Mr. Styan is a member of the Wills & Estate Planning Council of Vancouver, treasurer of the Family Support Institute of BC, and holds an MSW from the University of British Columbia. In spring 2012, Mr. Styan took a one-year appointment as vice president for strategic initiatives for Community Living British Columbia.

Geoffrey W. White is the principal of the Geoffrey W. White Law Corporation. He has received honours in wills, estates, and client counseling. Mr. White is the treasurer of the Canadian Bar Association’s National Elder Law Section, chairperson of the British Columbia Elder Law Section, co-chair of the Wills and Trusts (Okanagan) Section,

and a member of the Charity Law Section and the Tax Law Section. He is past president of the Kelowna Estate Planning Society and a past member of the Succession Law Reform Committee of the British Columbia Law Institute. Mr. White is also a member of the Kelowna Gift Planning Roundtable, the Central Okanagan Foundation Grants Committee, the Planned Lifetime Advocacy Network, the Canadian Tax Foundation, and the International Society of Trust and Estate Practitioners (STEP). Mr. White is currently a director of the BC Centre for Elder Advocacy and Support, which operates British Columbia's only elder-law clinic, with the support of the Law Foundation of British Columbia. Mr. White is a frequent lecturer for the Continuing Legal Education Society of British Columbia on topics such as trust law, will-and-estates matters, and elder law. Mr. White is a co-editor of BC CLE's *Probate and Estate Administration Practice Manual*⁹ and is helping to design the lawyer-education program for British Columbia's new *Wills, Estates and Succession Act*.¹⁰

C. The Consultation Process

This report was preceded by a consultation paper,¹¹ which was published in February 2013. The *Consultation Paper on Common-Law Tests of Capacity* set out the committee's research and its 31 tentative recommendations for reform for public review and comment. The consultation paper was made widely available, both through downloading from the BCLI website and the publication of paper copies. The consultation period for the project ran from February to June 2013.

The consultation paper was issued in two versions. The full consultation paper contained all 31 of the committee's tentative recommendations for reform and an analysis of all of the legal research undertaken in the project. In addition, a summary consultation document was available for public review. The summary consultation provided six highlighted proposals from the committee's 31 tentative recommendation. It contained minimal background information.

The committee received 11 responses to the full consultation paper¹² and two responses to the summary consultation. Each response was carefully considered in drafting this final report. The committee is grateful to those individuals and organizations that took the time to respond to the consultation paper.

9. *Supra* note 6.

10. SBC 2009, c. 13 (in force 31 March 2014).

11. British Columbia Law Institute, *Consultation Paper on Common-Law Tests of Capacity* (Vancouver: The Institute, 2013).

12. *See*, below, appendix D at 243 (for a list of respondents to the full consultation paper).

In general, respondents agreed with the consultation paper's tentative recommendations. As will be discussed in greater detail in the relevant areas of this report, a few proposals generated a sharp division between support and disagreement.

Although the number of responses was about average for a law-reform project focussed on legislative change, the range of philosophical approaches to and the engagement with the issues for reform in the respondents were at a notably high level. While several respondents urged the committee to be cautious in the face of proposals for legislative reform, at least one respondent encouraged the committee to consider a comprehensive legislative restatement of the various common-law tests of capacity and related areas.

Many respondents also included alternative proposals to address some of the issues for reform raised in the consultation paper. These alternatives stimulated considerable committee discussion. They will be noted later in this report, in connection with the issues for reform that they address.

In addition to publishing the consultation paper, the BCLI sought to engage the public in the issues covered by this project by presentations and speaking engagements. Before and during the consultation period, BCLI staff and committee members discussed the project at events held by the following organizations:

- National Association of Public Trustees and Guardians;
- Wills and Trusts—Victoria and Young Lawyers—Victoria Sections of the Canadian Bar Association (BC Branch);
- Wills and Trusts—Vancouver Section of the CBA (BC Branch);
- Estate Planning Council of Vancouver;
- University of British Columbia Faculty of Law at Allard Hall;
- Fulton & Company LLP;
- Wills and Trusts—Okanagan Section of the CBA (BC Branch);
- Estate Planning Council of Kelowna;
- The Continuing Legal Education Society of British Columbia.

D. The Structure of This Report

At its first committee meeting, the committee did a preliminary review of the many areas of the law that feature a common-law test of capacity. After completing this

review, the committee selected nine topics for further study. These topics are the common-law tests of capacity to:

- make a will;
- make an *inter vivos* gift;
- make a beneficiary designation;
- nominate a committee;
- enter into a contract;
- retain legal counsel;
- marry;
- form the intention to live separate and apart from a spouse; and
- enter into an unmarried spousal relationship.

These common-law tests of capacity were chosen because they gave the committee a broad range of subjects to tackle in the areas of estate planning, contract law, and family law—that is, in the major areas of the law that employ common-law tests of capacity. The relatively large number of topics chosen for further study reflects the emphasis of this project on comparing tests of capacity and on attempting to cover as wide a range among common-law tests of capacity as is practical.

This report is structured around these nine topics. The chapters that follow deal with each of these topics in a systematic way. Chapters typically begin with an exploration of background information on a given common-law test of capacity. This information is pursued in detail: topics covered usually include the historical development of the test of capacity being considered, the current position of the law (which for many common-law tests of capacity consists not of a single, universally accepted view but rather of multiple majority and minority positions), how the common-law test of capacity that is the subject of the chapter compares to other common-law tests of capacity, any arrangements that the law may provide for those people who fail to meet the common-law test of capacity, and relevant legislation. This information is provided to readers on the theory that a comprehensive understanding of the current law is necessary to make the best decisions on potential reforms to that body of law.

After exploring this background information, chapters consider a range of issues for reform. In each case, these issues contemplate potential reforms to the elements of a test of capacity itself. In some cases, the issues go further to consider reforms in collateral areas of the law. In discussing issues for reform, a number of options are can-

vassed, and readers are presented with arguments for and against the adoption of each option. At the end of this discussion, the committee's recommendation for reform is set out.

As will be seen, a number of the committee's recommendations call for legislative changes to the law. Appendix B to this report¹³ provides draft legislation and commentary, which illustrates how these recommendations could be implemented.

Before embarking on the topic-focussed chapters, this report begins with a chapter discussing some general characteristics of common-law tests of capacity.

13. See, below, at 223.

CHAPTER II. MENTAL CAPACITY AND THE LAW

A. Introduction

This chapter examines mental capacity and the law in general terms. It is a challenge to make general statements about the law's approach to mental capacity. The case law favours flexibility in its approach, so it is not too difficult to find judicial statements that undercut even well-known and long-standing conclusions. Often the law needs to be discussed as having majority and minority positions. Further, common-law tests of mental capacity are task specific, which means that they are intimately connected to the body of law to which each applies. The characteristics of a given test of capacity are best understood in relation to the specific area of the law in which the test operates.

With these caveats in mind, this chapter will discuss a range of topics with a goal of shedding light on how the committee analyzed specific common-law tests of capacity and how it chose between options for reform. These topics include the distinctive legal use of the expressions *capacity*, *mental capacity*, and *test of capacity*, the sources of cognitive decline, broad legal trends and approaches to issues involving mental capacity, and why the time is ripe to consider reform of common-law tests of capacity. The chapter concludes with an overview of the committee's recommendations for reform.

B. Terminology

1. MEANING OF "CAPACITY"

In everyday speech, *capacity* is a word that can be defined in multiple ways. *The New Shorter Oxford English Dictionary* lists six definitions of capacity. Its primary entry defines capacity as the "maximum amount or number that may be contained, produced, etc." In this sense, the word is related to *capacious*. It brings to mind images of filling up a container.

When capacity is used in legal writing, its range of meanings is narrower, but the word is still used in different ways. Speaking broadly, capacity means "a legal competency or qualification"¹⁴ or simply "an inherent ability" of someone to do

14. *The New Shorter Oxford English Dictionary*, sub verbo "capacity."

something under the law.¹⁵ It is typically used in discussing whether a person¹⁶ has the power under the law to enter into legal relations¹⁷ with another person.

Usually in legal writing capacity is discussed in terms of a specific person who wants to perform a specific act or create a specific legal relationship. Different sets of rules apply to different subjects. For instance, there are capacity rules relating to children and youths,¹⁸ and to corporations.¹⁹

2. MEANING OF “MENTAL CAPACITY”

This report is concerned with the effect of mental disability, illness, or impairment on a person’s capacity to create or enter into legal relations. The shortened way to express this idea is by referring to a person’s *mental capacity*. Cases and commentary often use the shorthand expression “having mental capacity” to make a decision or perform a task. This is essentially a way of saying that the person meets the test of capacity to make that decision or perform that task.

3. MEANING OF “TEST OF CAPACITY”

One of the side effects of the common-law’s particular approach to mental capacity is that it makes it rather complicated to determine when capacity is lost.²⁰ There is no obvious objective factor—such as a medical diagnosis or a flagrantly irrational decision—to point to as a means of grounding the determination for all cases. Instead, the courts are directed to analyze subjective mental processes. The difficulty of this task was appreciated right away. As an early case put it, when it comes to mental functioning, “[t]here is no possibility of mistaking midnight from

15. *Kendall v. Kendall* (1978), 18 OR (2d) 310 at 312, 82 DLR (3d) 278 (HCJ), Boland J.

16. Bear in mind here that *person* is typically understood as including both natural persons (that is, human beings) and artificial persons (entities that the law recognizes as having personhood, such as corporations).

17. This expression should be understood as broadly embracing anything that changes a person’s legal position or that affects the legal position of another person—for example, entering into a contract, making a will or an *inter vivos* gift, or creating a spousal relationship.

18. *See Infants Act*, RSBC 1996, c. 223, ss. 19 (enforceability of minor’s contract), 21 (court application for declaration of capacity).

19. *See Business Corporations Act*, SBC 2002, c. 37, s. 30 (“A company has the capacity and the rights, powers and privileges of an individual of full capacity.”).

20. *See*, below, section II.D at 16 (discussion of various legal approaches to mental capacity).

noon, but at what precise moment twilight becomes darkness is hard to determine.”²¹

Under the common law, “the question of [mental] capacity must be regarded as one of degree.”²² If a person’s mental illness or disability exceeds in degree a legal threshold, then that person will be considered incapable in the eyes of the law. This legal threshold is commonly called a *test of capacity*.

C. Sources of Cognitive Decline

1. INTRODUCTION

Scholars have noted that “a wide variety of ailments”²³ have been cited in cases involving mental capacity. The law has long recognized an almost limitless array of causes of diminished mental capacity, which may act on different aspects or functions of the mind. A leading nineteenth-century judgment pointed to “[t]he senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory” as examples of mental processes that may be considered in a case involving mental capacity.²⁴

Nevertheless, modern medicine has shone a spotlight on “four conditions” that have proved to have an enhanced “propensity to impair competence.”²⁵ These four conditions are considered in turn.²⁶

21. *Boyse v. Rossborough* (1857), 6 HLC 2 at 45, 10 ER 1192 (CA), Lord Cranworth.

22. *Field v. James*, 2001 BCCA 267 at para. 87, 87 BCLR (3d) 235, Rowles JA (dissenting) [*Field*].

23. Alexander M. Meiklejohn, “Contractual and Donative Capacity” (1988) 39 Case W. Res. L. Rev. 307 at 343.

24. *Banks v. Goodfellow* (1870), LR 5 QB 549 at 560 (Eng. CA), Cockburn CJ (for the court).

25. Nathan Herrmann, “Common Medical Conditions that Might Affect Competence in the Elderly: The 4Ds (Depression, Delirium, Dementia, Drugs),” in Law Society of Upper Canada, *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011) [*Special Lectures 2010*].

26. It should be emphasized that these conditions were selected for discussion simply to reflect their prominence in the commentary, and not to suggest that they are the only sources of cognitive decline. Many other conditions—or even events in a person’s life—may play a role in causing diminished capacity. For example, one respondent to the consultation paper pointed to the significance of traumatic brain injuries, because of their “prevalence and effects on insight and judgment” and because such injuries “can have catastrophic and lifelong consequences and may occur well before the age a will can be made.”

2. DEMENTIA

Dementia is “a large class of disorders characterized by the progressive deterioration of thinking ability and memory as the brain becomes damaged.”²⁷ Among the range of illnesses that make up the class of dementias, the best known is Alzheimer’s disease. “[T]he second most common form of dementia” is vascular dementia.²⁸ It is possible to suffer from both types of dementia; in fact, “[m]any individuals with Alzheimer’s disease also have Vascular Dementia.”²⁹ Other forms of dementia “include Frontotemporal Dementia (FTD, which includes Pick’s Disease), dementia with Lewy Bodies and Creutzfeldt-Jacob Disease.”³⁰ It is estimated that 500 000 people in Canada suffer from one or more forms of dementia.³¹

Among the effects of dementia are impairments in memory, “language ability,” and “abstract thinking, planning, or organization of activities.”³² Sufferers from dementia are also liable to be affected by personality changes, often accompanied by delusions or paranoia.³³ A troubling aspect of dementia is that all of these effects may “accompany *early* dementia—in other words, dementia that has not reached a point at which it would cause impairment that is immediately obvious.”³⁴

Although it can strike at any time in a person’s life,³⁵ dementia is primarily an affliction of older adults. “The risk of developing dementia is linked to age,” a scholarly article notes, “and almost 30 percent of people over the age of eighty-five and about 60 percent of people over the age of ninety-five will meet criteria for this disorder.”³⁶

27. Alzheimer Society of Canada, *Rising Tide: The Impact of Dementia on Canadian Society* (Toronto: The Society, 2010) at 10.

28. *Ibid.* at 11 (noting that the “two main types” of vascular dementia are “stroke-related” and “small vessel disease-related” dementia).

29. *Ibid.*

30. *Ibid.*

31. *See ibid.* at 1

32. Douglas Mossman & Amanda N. Shoemaker, “Incompetence to Maintain a Divorce Action: When Breaking Up is Odd to Do” (2010) 84 St. John’s L. Rev. 117 at 142.

33. *See ibid.* (“A substantial fraction of demented individuals become paranoid.” [footnote omitted]).

34. *Ibid.* [emphasis in original].

35. *But see Rising Tide, supra* note 27 at 11 (“[Alzheimer’s] disease never sets in until some minimum adult age is reached” [footnote omitted]).

36. Herrmann, *supra* note 25 at 113.

3. DELIRIUM

Delirium is “an acute transient potentially reversible fluctuating syndrome occurring in the context of an acute medical or surgical condition.”³⁷ Its symptoms include difficulties in concentration, lack of awareness of environmental stimuli, language difficulties, and delusions and hallucinations.³⁸

The fluctuating nature of delirium poses a particular challenge for capacity assessment.³⁹ A person with delirium may not be legally capable of making a decision at one time, only to regain capacity a short time later.⁴⁰

Delirium is not typically found among people living in the community, but it is common among individuals who are in a hospital.⁴¹

4. DEPRESSION

Depression involves the persistence of a depressed mood and a loss of interest or pleasure in previously enjoyed activities. It may be accompanied by other factors.⁴² Depression is apparently more prevalent among younger adults than older adults.⁴³

Depression raises manifold concerns for mental capacity. A person suffering from depression may be afflicted by “psychotic symptoms such as delusions.”⁴⁴ Depression may “also [be] associated with impaired cognition,” which, in severe cases, can

37. *Ibid.* at 112.

38. *Ibid.*

39. *Ibid.*

40. *See ibid.* (“It is possible that at one point in the day [a patient with delirium] will be completely disoriented, agitated and experiencing vivid hallucinations while several hours later, they might be quite lucid.”).

41. *See ibid.* (“While rare in the community, approximately 14 to 24 percent of all individuals admitted to an acute care hospital will have some degree of delirium on admission. Anywhere from 6 to 56 percent of individuals will develop symptoms of delirium at some point in their hospitalization. In elderly individuals who undergo surgery, between 15 and 53 percent will have delirium.”).

42. *See ibid.* at 111 (noting the following accompanying factors: “appetite and/or weight change (usually loss of appetite or loss of weight), sleep disturbance (usually insomnia), agitation or retardation, fatigue or energy loss, feelings of worthlessness or guilt, concentration and/or memory problems, and suicidal ideation”).

43. *See ibid.* (“in patients being seen in a primary care physician’s office, between 30 and 50 percent of those individuals might meet the criteria for depression”).

44. *Ibid.*

impair concentration and memory in a manner analogous to sufferers from dementia.⁴⁵ Depression has the propensity to affect a person's mood, clouding and distorting judgment.⁴⁶ Mood disorders are accommodated within common-law tests of capacity,⁴⁷ but they pose difficult challenges for capacity assessment. Finally, depression may also bring with it substance abuse and drug problems.⁴⁸

5. DRUGS

The drugs that are used to treat these conditions (among others) may themselves cause a diminishment in a person's mental capacity. "Most drugs can penetrate into the brain and many drugs," notes a recent article, "can cause dementia, cognitive impairment, depression, delirium, and psychotic symptoms."⁴⁹

Intoxication generally—a category that includes impairment by alcohol and illegal drugs as well as drugs used for medical treatment—has always been understood in legal circles as raising issues that are similar to those raised by mental capacity. As a result, the law has developed a set of rules to deal with intoxication that are closely related, though not identical, to the set of rules that apply to mental capacity. This report will take note of those rules on intoxication wherever it is appropriate.

D. Legal Approaches to Mental Capacity

Commentators have identified three legal approaches to mental capacity. The three approaches are called the status approach, the outcome approach, and the functional approach.⁵⁰

The status approach "judges an individual's capacity according to his physical or mental status. . . ."⁵¹ Under this approach, a diagnosis of a mental disability or illness would be enough to conclude that an individual lacks mental capacity. This

45. *Ibid.*

46. *See ibid.*

47. *See Sharp v. Adam*, [2006] EWCA Civ 449 at para. 93, [2006] WTLR 1059 [Sharp].

48. *See Herrmann, supra* note 25 at 111.

49. *Ibid.* at 113.

50. *See, e.g.*, Law Commission for England and Wales, *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, CP 119 (London: HMSO, 1991) at 50–53; Law Reform Commission of Ireland, *Consultation Paper on Vulnerable Adults and the Law: Capacity*, LRC CP 37-2005 (Dublin: The Commission, 2005) at 41–50.

51. *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview, supra* note 50 at 51.

judgment is “based on a once-off [*sic*] look at [a person’s] status generally.”⁵² This point has two implications. First, a person who is found to lack the mental capacity to undertake one task is considered to lack the mental capacity needed to effect *any* change in the person’s legal relations. Second, a judgment that a person lacks mental capacity holds its force for the rest of the person’s life. The status approach does not recognize fluctuating mental capacity.⁵³

Under the outcome approach “capacity is determined by the content of an individual’s decision.”⁵⁴ This determination is done after the fact: if the consequences or results of a person’s decision appear not to be in the person’s best interests or seem to flout social norms, then that person can be judged to lack mental capacity. So “a person who makes a decision that reflects values which are not widely held or which rejects conventional wisdom is found to lack capacity.”⁵⁵

The functional approach “focuses upon the personal ability of the individual concerned to make a particular decision and the subjective processes followed by him in arriving at it.”⁵⁶ This approach is “decision-specific” and “emphasises the fluctuating nature of capacity.”⁵⁷ That is, capacity is determined by reference to a specific decision at a specific time. Under the functional approach, “[a]bsolute incapacity will be rare except in the case of a comatose patient.”⁵⁸

Although the status and outcome approaches have prevailed in earlier times and in connection with other subjects, the functional approach is currently the dominant

52. *Consultation Paper on Vulnerable Adults and the Law: Capacity*, *supra* note 50 at 43.

53. An example of the status approach would be the rules that prevailed until recently in election law forbidding a person “detained in a mental health facility” from voting. *See Election Amendment Act, 1984*, SBC 1985, c. 5, s. 4. *See also Canada Elections Act*, RSC 1985, c. E-2, s. 51 (f). In the late 1980s, the federal law was struck down as being in violation of the *Canadian Charter of Rights and Freedoms*; in the 1990s, British Columbia repealed its law. *See Canadian Disability Rights Council v. Canada*, [1988] 3 FC 622, [1988] FCJ No. 933 (QL) (TD).

54. *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, *supra* note 50 at 50–51.

55. *Consultation Paper on Vulnerable Adults and the Law: Capacity*, *supra* note 50 at 44 [footnote omitted].

56. *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, *supra* note 50 at 52.

57. *Ibid.*

58. *Ibid.*

legal approach to mental capacity. All of the common-law tests of capacity that are taken up in this report can be characterized as adopting the functional approach.⁵⁹

E. Characteristics of Common-Law Tests of Capacity

1. INTRODUCTION

It is particularly difficult to make general statements about common-law tests of capacity. Such statements often need elaborate qualifications, to take into account conflicting comments from judges and commentators. But there are several themes that recur throughout the jurisprudence. A high-level review of these themes can help readers to get a grasp of the law on common-law tests of capacity. A detailed consideration of the issues comes in the chapters that follow, which return to many of these themes in discussing specific common-law tests of capacity.

2. PURPOSES OF COMMON-LAW TESTS OF CAPACITY

As a starting point, it should be noted that common-law tests of capacity function as exceptions to general common-law rules—such as the general rules that promises made for consideration are binding on the parties and that wills that meet certain formal requirements and other strictures should be given effect. This point raises the question of why the common law should have evolved such exceptions.

When this question has been tackled by the courts, the most common answer is to say that the purpose of a test of capacity is to protect the person with diminished capacity.⁶⁰ The law recognizes that such people are vulnerable to exploitation by others or to harming themselves. So it provides a remedy—in the form of setting aside a transaction or relationship—if the person does not meet the applicable test of capacity.

The protective purpose of common-law tests of capacity gives the case law in this area one of its most distinctive characteristics—its flexibility. Cases applying tests of capacity tend to be fact driven. In this way, they resemble cases applying other protective concepts, such as unconscionability in contract law. The result can often be an emphasis on doing justice in an individual case, which can sometimes come at the cost of the overall certainty and predictability of the law.

59. *See ibid.* (functional approach “most frequently adapted in theory by English law”). *But see ibid.* (speculating that status and outcome approaches are still often relied on in practice).

60. For some common-law tests of capacity this protective purpose is framed in broader terms, as the test of capacity is intended to protect the person with diminished capacity and other people who are in a close relationship with the person, such as family members.

Some cases and commentary have found other purposes for tests of capacity, in addition to the protective purpose. The most common other purpose that is mentioned is enhancing the decision-making autonomy and self-determination of people with diminished capacity. This policy goal can be in tension with a goal of protecting people with diminished capacity. Courts sometimes have to balance considerations to achieve a result that respects both goals.

3. BASELINE COMMON-LAW TEST OF CAPACITY

There is “a basic common law test of capacity,” which holds that “the person concerned must at the relevant time understand in broad terms what he is doing and the likely effects of his action.”⁶¹ This baseline test of capacity finds its way into each of the common-law tests of capacity that are taken up in this report. But knowing the baseline test of capacity only provides part of the picture. Many common-law tests of capacity incorporate elements in addition to the baseline test of capacity.

4. COMPARING COMMON-LAW TESTS OF CAPACITY

The proliferation of common-law tests of capacity has led to a desire to organize the tests. The most common organizational tool is to rank the tests of capacity in a capacity “hierarchy.”⁶² The idea underlying this hierarchy is that certain decisions invariably require a higher level of mental capacity than others. This idea ties into the baseline test of capacity, as the common-law tests of capacity that build the most on its basic elements tend to come out on top of the hierarchy, while those that hew closest to the baseline tend to be ranked at the bottom.

This capacity hierarchy can be a helpful way to get a handle on the various common-law tests of capacity. But it can also be somewhat at odds with the functional approach to mental capacity that the common law favours. So some judges have cautioned against thinking of common-law tests of capacity in this way, preferring instead maximum flexibility in the application of tests of capacity.

61. *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, *supra* note 50 at 19–20.

62. *Wolfman-Stotland v. Stotland*, 2011 BCCA 175 at para. 26, 16 BCLR (5th) 290, Kirkpatrick JA [*Wolfman-Stotland*].

F. Reasons for Studying Common-Law Tests of Capacity

1. INTRODUCTION

There were a number of reasons motivating the BCLI to take on a project studying reform of common-law tests of capacity. Those reasons can be divided into two groups. The first group focusses on legal factors for considering reform of common-law tests of capacity at this time. The second group draws on broader social trends.

2. LEGAL FACTORS

There were three legal factors that contributed to the decision to study common-law tests of capacity.

First, common-law tests of capacity form a relatively neglected area of the law. There are numerous studies on mental capacity as it relates to the adult-guardianship system, but comparatively few law-reform agencies have examined common-law tests of capacity. This is despite the fact that common-law tests of capacity are frequently relied on in legal practice.

Second, some of the common-law tests of capacity are obscure and confusing. This presents opportunities to clarify and improve the law.

Third, British Columbia has recently seen legislation brought in to replace a common-law test of capacity. This development occurred for the test of capacity to make an enduring power of attorney, which was long the subject of a common-law test of capacity,⁶³ and is now the subject of a reformed legislative test of capacity.⁶⁴ This example was seen as possibly pointing the way to legislative reform and restatement of other common-law tests of capacity.

3. SOCIAL TRENDS

Three large-scale social trends also informed the decision to examine common-law tests of capacity.

63. See *Re K. (Enduring Powers of Attorney)*; *Re F.*, [1988] 1 Ch. 310 (UK Court of Protection); *Egli (Committee of) v. Egli*, 2004 BCSC 529, 28 BCLR (4th) 375, *aff'd*, 2005 BCCA 627, 48 BCLR (4th) 90.

64. See *Power of Attorney Act*, *supra* note 2, s. 12 (2).

First, the share of the Canadian population made up of older adults is increasing rapidly.⁶⁵ “Seniors accounted for a record high of 14.8% of the population in 2011,” notes Statistics Canada, “up from 13.7% five years earlier.”⁶⁶ Older adults accounted for an even larger share of British Columbia’s population, with the percentage of people 65 years or older in this province making up 15.7% of the province’s population in 2011.⁶⁷

The fact that older adults make up a steadily increasing share of the public has implications for common-law tests of capacity. While older adults should not be seen—and are not seen under the law—as presumptively susceptible to diminished mental capacity, the application of common-law tests of capacity to older adults does attract heightened scrutiny. Legal professionals, such as lawyers and notaries public, tend to view themselves as being subject to an increased level of caution when carrying out a major transaction involving an older adult. In addition, many of the medical conditions that can diminish mental capacity are increasingly prevalent as the population ages. Further, the types of transactions that attract common-law tests of capacity, such as wills and large-value *inter vivos* gifts, tend to be postponed until later in life.⁶⁸ All of these factors will likely cause common-law tests of capacity to loom larger in the law in the years to come.

Second, there have been significant advances in recent years in science’s understanding of the brain. Although tests of capacity are legal (not medical) tests, discoveries in neuroscience⁶⁹ have implications for common-law tests of capacity. Many common-law tests of capacity were articulated in nineteenth-century judgments. The courts in the leading cases often drew on how contemporary science under-

65. See Statistics Canada, *The Canadian Population in 2011: Age and Sex*, Statistics Canada catalogue no. 98-311-X2011001 (Ottawa: Minister of Industry, 2012) at 4 (“The 2011 Census counted 4,945,060 people aged 65 and older in Canada, an increase of more than 609,810, or 14.1%, between 2006 and 2011. This rate of growth was more than double the 5.9% increase for the Canadian population as a whole.”).

66. *Ibid.*

67. See *ibid.* at 11.

68. See, e.g., Michael McKiernan, “Hospitals doubling as estate planning hubs” *Law Times* (20 August 2012), online: *Law Times* <<http://www.lawtimesnews.com/>>.

69. See The [United Kingdom] Royal Society, *Brain Waves Module 4: Neuroscience and the Law*, RS Policy doc. 05/11 (London: The Royal Society, 2011) [*Neuroscience and the Law*] at 1 (“Neuroscience is the empirical study of the brain and the central nervous system, and contemporary neuroscience seeks to explain how human behaviour arises from brain activity.”).

stood the brain and human behaviour.⁷⁰ So the law may be out of touch with current neuroscientific insights. If this is the case, the question then arises whether legislative reform is necessary, or if the courts are better placed to adapt the law to neuroscientific insights.⁷¹ Or it may be the case that neuroscientific discoveries should not drive wholesale changes to the law.⁷²

Third, Canada has recently ratified (in 2010) the UN Convention on the Rights of Persons with Disabilities. Article 12 of the convention affirms the right of “persons with disabilities [to] enjoy legal capacity on an equal basis with others” and calls for parties to the convention to “take appropriate measures” to ensure proper support and access in exercising that right. This potentially opens up a rich area of ideas for reform, though some explanation is required as to the significance of article 12 and its application to common-law tests of capacity.

Experts in the field see article 12 as heralding a major shift in the law.⁷³ Instead of focussing on mental capacity, and devising tests to assess mental capacity, article 12 characterizes capacity as a right⁷⁴ and calls for laws that support the exercise of that right. This raises the question whether the existing tests of capacity should be dramatically scaled back and replaced or augmented with a system that allows for supportive decision-making. For understandable reasons, most of the analysis of article 12 to date has been directed at what its implementation will mean for adult guardianship. But some early commentary on and court decisions applying arti-

70. See generally Susanna L. Blumenthal, “The Default Legal Person” (2007) 54 UCLA L. Rev. 1135 (examining “[t]he project of bringing the science of man and the common law into greater alignment” in nineteenth-century American jurisprudence).

71. See *Neuroscience and the Law*, *supra* note 69 at 16, n. 34 (citing *Carr v. Thomas*, [2008] EWHC 2859 (ChD) as a noteworthy example of the application of neuroscience in a case involving the capacity to make a will).

72. See *Neuroscience and the Law*, *supra* note 69 at v (arguing that “discoveries in neuroscience (or in genetics or psychology) will not completely revolutionize the theory and practice of law in the near future”). But see Arthur I. Fish, “Cognitive Neuroscience and the Solicitor’s Approach to Mental Incapacity,” in *Special Lectures 2010*, *supra* note 25, 133 at 134 (arguing that “law as a discipline is unable to define or describe ‘mental incapacity’ in a practically useful way without drawing on brain science”).

73. See, e.g., Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Toronto: Law Commission of Ontario, 2010); Arlene S. Kanter, “The Promise and Challenges of the United Nations Convention on the Rights of Persons with Disabilities” (2007) 34 Syracuse J. Int’l L. & Com. 287.

74. This is why article 12 refers to *legal* capacity, rather than *mental* capacity.

cle 12 have concluded that its reach extends to common-law tests of capacity and related common-law doctrines.⁷⁵

G. Overview of the Committee's Recommendations

The options for reform canvassed by the committee and the committee's recommendations for reform are spelled out in detail in the chapters that follow. This section provides an overview of some themes that appear in those recommendations.

Much of the committee's focus throughout this project has been on the elements of each of the common-law tests of capacity studied in the course of this project. The committee repeatedly inquired into whether the common law was deficient in regard to a specific test of capacity. If it was found to be deficient, then the committee decided that it would only propose legislative reform if a clear and convincing case could be made that legislation would improve the law. Very few common-law tests of capacity met this rigorous standard. So the committee is only proposing substantive legislative reform for the tests of capacity to make an *inter vivos* gift and to nominate a committee. It is not proposing legislative reform for the major common-law tests of capacity to make a will, to enter into a contract, or to marry.

The committee also examined ways in which the law could provide greater support for persons who do not meet a common-law test of capacity. In this vein, the committee is proposing that British Columbia adopt a statutory-will procedure, similar to procedures found in the United Kingdom and Australia.

Finally, the committee is proposing discrete, fine-tuning reforms to a series of legislative rules that have been developed to address issues that are collateral to a number of common-law tests of capacity. These proposals are intended to clarify and reinforce existing rules on the presumption of capacity, contracts for necessities involving people with diminished capacity, and access to legal services for people with diminished capacity.

75. See *Nicholson v. Knaggs*, [2009] VSC 64 [*Nicholson*] (revising concept of testamentary undue influence in light of art. 12); Bach & Kerzner, *supra* note 73 at 45.

CHAPTER III. CAPACITY TO MAKE A WILL

A. Introduction

This chapter considers the mental capacity required to make a will—which is commonly called testamentary⁷⁶ capacity. The chapter effectively has two parts. Its main focus is concerned with identifying issues for reform and setting out and evaluating options for resolving those issues. A discussion of each issue concludes with the committee’s recommendation for reform.

Before getting to the consideration of options for reform, it’s necessary to provide some background material. This material is an overview of the current law on testamentary capacity in British Columbia. It is pitched at a fairly introductory level. Nevertheless, it is important to have a grasp of the current law before moving on to consider proposals to change the law.

B. Background

1. INTRODUCTION

This section begins by setting out the basics on testamentary capacity, then it provides some information on a few related concepts that often crop up when testamentary capacity is at issue.

2. RELEVANT STATUTORY PROVISIONS

British Columbia does not currently have any legislation on the mental capacity required to make a will. But when the *Wills, Estates and Succession Act*⁷⁷ comes into force it will address testamentary capacity by providing that “[a] person who is 16 years of age or older *and who is mentally capable of doing so* may make a will.”⁷⁸

This type of statutory provision is common in legislation on wills. It has a long pedigree: one of the first amendments to England’s sixteenth-century *Statute of Wills* added a similar mental-capacity requirement to that legislation.⁷⁹

76. = relating to or bequeathed or appointed through a will.

77. *Supra* note 10 (in force 31 March 2014).

78. *Ibid.*, s. 36 (1) [emphasis added].

79. See 34 & 35 Hen. VIII, c. 5, s. 14 (1542), amending 32 Hen. VIII, c. 1 (1540). See also Milton D. Green, “Judicial Tests of Mental Incompetency” (1941) 6 Mo. L. Rev. 141 at 152, n. 50 (“Although the first wills act granted the right [to make a will] to everyone without qualification as to sanity,

Notice that all this legislation says is that a person must meet some threshold of mental capacity in order to make a valid will. It doesn't say what that threshold is, how to determine whether an individual has met the threshold, or how the threshold to make a will compares to the thresholds for other transactions. To find the answers to these questions, it is necessary to turn to court decisions.

3. TEST OF TESTAMENTARY CAPACITY

(a) *The Test*

The test of testamentary capacity developed in a series of nineteenth-century English decisions, “which decided that a testator must be of sound mind, memory and understanding.”⁸⁰ The starting place is Chief Justice Cockburn’s “towering judgment”⁸¹ in *Banks v. Goodfellow*.⁸² In a much-cited passage, Cockburn CJ spelled out four elements to consider in evaluating testamentary capacity:

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.⁸³

This passage sets out two ways by which a testator may lose testamentary capacity: by virtue of a general unsoundness of mind or by means of a fixed and specific delusion.

two years later the statute was amended to exclude idiots ‘or any person *de non sane* memory.’ ”).

80. *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, *supra* note 50 at 26 (citing *Boughton v. Knight* (1873), LR 3 P. & D. 64 (Eng. Prob. & Div. Ct.) [*Boughton*]; *Smith v. Tebbitt* (1867), 1 P. & D. 398 (Eng. Prob. & Div. Ct.); *Harwood v. Baker* (1840), 3 Moo. PC 282, 13 ER 117).

81. *Canada Permanent Toronto General Trust Co. v. Whitton* (1965), 51 WWR 484 at 489, [1965] BCJ No. 53 (QL) (SC), Wilson CJ [*Whitton*].

82. *Supra* note 24.

83. *Ibid.* at 565.

(b) *General Unsoundness of Mind*

The first three elements identified in *Banks v. Goodfellow* describe the inquiries that a court should make to determine whether or not a testator lacked testamentary capacity due to general unsoundness of mind. Although the passage from *Banks v. Goodfellow* appears to create a step-by-step formula for assessing the issue, the test is generally considered not to be beholden to any specific formulation of its elements. A later passage in *Banks v. Goodfellow* set out four elements to look for in assessing testamentary capacity.⁸⁴ The Supreme Court of Canada has also weighed in on this issue with its own, slightly different wording of the test.⁸⁵ The British Columbia Court of Appeal has said that the different formulations of the test “do not lead to any real difference of opinion about the applicable law.”⁸⁶ Bearing in mind the point often made that testamentary capacity should not be assessed in a rigid or mechanistic fashion,⁸⁷ it is still possible for the sake of simplicity to summarize the elements of the test as requiring that the testator be capable of understanding:

- the nature and effect of making a will;
- the extent of the testator’s property that may be disposed by a will;
- the persons who are to receive the property under the will, and the moral claims of persons (such as family members and others who are close to the testator) who should receive a share of that property; and
- the way in which the assets are to be distributed under the will.

All four of these elements must be met for a court to determine that the testator had testamentary capacity.

84. *Ibid.* at 567 (quoting *Harrison v. Rowan*: “he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them”).

85. See *Leger v. Poirier*, [1944] SCR 152 at 161, [1944] 3 DLR 1, Rand J. [*Leger*] (“A ‘disposing mind and memory’ is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like. . .”).

86. *Malcolm v. Rounds*, 1999 BCCA 733 at para. 13, 31 ETR (2d) 97, Lambert JA (for the court) [*Malcolm*].

87. See, e.g., *Field*, *supra* note 22 at para. 68.

The existence of a test of testamentary capacity does result in an inroad on a person's freedom to dispose of property by will.⁸⁸ The policy rationale for limiting testamentary freedom by requiring that a testator have testamentary capacity is that it is necessary to protect the testator, the testator's property, and the testator's immediate family.⁸⁹

(c) *Specific Delusions*

The second way in which a testator may be found to lack testamentary capacity involves delusions. "[A] delusion affecting the subject matter of a will," as a recent judgment puts it, "and operating at the time of its making may be a foundation for a determination that the deceased lacked testamentary capacity even if the deceased is perfectly competent to conduct all other business."⁹⁰ This point holds true even if the testator could pass the test of testamentary capacity relating to general unsoundness of mind.

"The authorities are clear," notes another recent British Columbia case, "that only delusions that bear directly on and influence the testator's deliberations may bottom an attack on testamentary capacity."⁹¹ This point is illustrated by two of the leading cases on specific delusions.

88. See Bradley E. S. Fogel, "The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity" (2007) 42 Real Prop. Prob. & Tr. J. 67 at 74 ("To some extent, the requirement of testamentary capacity inherently conflicts with respect for testamentary freedom.").

89. See Milton D. Green, "Public Policies Underlying the Law of Mental Incompetency" (1940) 38 Mich. L. Rev. 1189 (arguing that "freedom of testation, like freedom of contract, is restricted by the operation of policies looking toward the protection of the family as a social institution" at 1212).

90. *Chalmers v. Uzelac*, 2004 BCCA 533 at para. 45, 35 BCLR (4th) 252, Southin JA [*Chalmers*]. See also *Laszlo v. Lawton*, 2013 BCSC 305 at para. 208, [2013] BCJ No. 337 (QL), Ballance J. [*Laszlo*] ("A delusion is more than just getting the facts wrong. It is a persistent belief in a supposed state of facts that no rational person would hold to be true, and thus exist as real only in the mind of the believer." [citations omitted]). The truth or falsity of the belief is no longer one of the criteria relied on by medical professionals in diagnosing delusions. See Vaughan Bell, "You needn't be wrong to be called delusional" *The Observer* (4 August 2013), online: The Guardian <<http://www.theguardian.com>> ("the new definition of delusions [found in the psychiatrists' diagnostic manual, the DSM-5] describes them as fixed beliefs that are unswayed by clear or reasonable contradictory evidence, which are held with great conviction and are likely to share the common themes of psychosis: paranoia, grandiosity, bodily changes and so on. The belief being false is no longer central and this step forward makes it less likely that uncomfortable claims can be dismissed as signs of madness.").

91. *Fuller Estate v. Fuller*, 2002 BCSC 1571 at para. 32, 47 ETR (2d) 228, Rogers J.

The first case is *Banks v. Goodfellow* itself.⁹² The testator in that case had been confined to an asylum at one point and, upon his release, “remained subject to certain fixed delusions.”⁹³ These delusions concerned beliefs that the testator was being persecuted by a man who was, in fact, long dead and that he was being pursued by evil spirits.⁹⁴ The testator’s will gave his property to his niece, who was his long-time caregiver.⁹⁵ The court upheld the will, finding that “the delusion must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any. . . .”⁹⁶

In *Smee v. Smee*,⁹⁷ another leading case on delusions, the testator believed that his brother (who was his closest living relative) had defrauded him. This belief was a delusion. The court set aside a will leaving the testator’s entire estate to non-relatives, because the delusion appeared to influence the testator’s disposition of his assets.⁹⁸

4. TIMING: WHEN THE TESTATOR MUST HAVE TESTAMENTARY CAPACITY

Testamentary capacity must be present when a testator makes the will at issue. A finding that a testator lacks testamentary capacity does not settle the issue for the remainder of the testator’s life. The jurisprudence is clear that it is possible for a testator who lacks testamentary capacity at one point to regain it at a later date, and to make a valid will during this “lucid interval.”⁹⁹

92. *Supra* note 24.

93. *Ibid.* at 531.

94. *Ibid.*

95. *Ibid.* at 552.

96. *Ibid.* at 561.

97. (1879), 5 PD 84 (Eng. Prob. Div.).

98. Although general unsoundness of mind and specific delusions represent two distinct ways in which a court may find that a testator lacks testamentary capacity, it is important not to over-emphasize this distinction and draw too sharp a dividing line between the two aspects of the test of capacity. These points were drawn out in the thoughtful judgment in the recent case *Laszlo*, *supra* note 90. In *Laszlo*, the court examined “non-vitiating delusions” (at para. 229)—that is, delusions that do not have a direct effect on the gifts made under a will. The court concluded that such delusions might nevertheless be relevant to its analysis under the general-unsoundness-of-mind branch of the test.

99. *Banks v. Goodfellow*, *supra* note 24 at 552.

Generally, testamentary capacity must be present both when a testator gives instructions to make a will and when the will is executed.¹⁰⁰ There is a limited exception to this general rule. The exception has its source in a nineteenth-century English case,¹⁰¹ which has been followed in Canada.¹⁰² It provides that “the lack of testamentary capacity at the date of execution of a testamentary instrument is not fatal to its validity provided that the testator had testamentary capacity at the time he gave instructions therefor, provided also that the testamentary instrument was prepared pursuant to and in compliance with those instructions and further provided that at the time of execution the testator had capacity to understand and did understand that the instrument he signed was a testamentary instrument prepared pursuant to and in compliance with those instructions.”¹⁰³

5. COMPARISON OF TEST OF TESTAMENTARY CAPACITY TO OTHER TESTS OF CAPACITY

In Canadian commentary and jurisprudence, testamentary capacity is usually seen as requiring a higher level of capacity than the level required to enter into other types of legal relations.¹⁰⁴ The reason behind this assessment is that the test of testamentary capacity requires a person to be able to consider the person’s own interests, the nature and extent of the person’s property, and the interests of those close to the person (such as immediate family members). Typically, a common-law test of capacity only requires a person to be capable of considering the first of these things.

The blanket statement that testamentary capacity always requires a high level of capacity should be qualified somewhat in order to reflect the actual state of the jurisprudence. There are two ways in which courts have shown some skepticism about the proposition that the test of testamentary capacity sets a high threshold of mental capacity.

First, there are cases that suggest that the test of capacity can be adapted to conform to the simplicity or complexity of a will.¹⁰⁵ In essence, a simple will would require a

100. See *Laszlo*, *supra* note 90 at para. 189.

101. *Parker v. Felgate* (1883), 8 PD 171 (Eng. Prob. Div.).

102. See *Re Davis Estate*, [1932] SCR 407, [1932] 3 DLR 351.

103. *Re McPhee* (1965), 52 DLR (2d) 520 at 525 (BCSC), Collins J.

104. See, e.g., *Calvert (Litigation guardian of) v. Calvert* (1997), 32 OR (3d) 281 at 294, 27 RFL (4th) 394 (Gen. Div.), Benotto J. [*Calvert*] (“the highest level of capacity is that required to make a will”), *aff’d* (1998), 37 OR (3d) 221, 36 RFL (4th) 169 (CA), *leave to appeal to SCC refused*, [1998] SCCA No. 161 (QL); James MacKenzie, ed. *Feeney’s Canadian Law of Wills*, looseleaf (consulted on 21 June 2013), 4th ed. (Markham, ON: LexisNexis Canada, 2000) at § 2.7.

105. See, e.g., *Araujo v. Neto*, 2001 BCSC 935 at para. 130, 40 ETR (2d) 169, Sigurdson J. [*Araujo*].

lower level of capacity. This point is consistent with the idea that tests of capacity should be applied in as flexible a manner as possible. But this point should not be oversold. Courts that have accepted the notion of a “sliding scale of testamentary capacity”¹⁰⁶ have often done so reluctantly, holding the idea at arm’s length. This caution is understandable, as this concept has yet to be endorsed conclusively by an appellate court.

Second, there are some cases that say that policy considerations sometimes have to take precedence over a strict application of the test of testamentary capacity. The argument here is that freedom to make a will is such an important policy that courts should be especially wary of restricting it.¹⁰⁷ This argument is far more readily accepted in the United States, where it is common for courts to describe the test of testamentary capacity as setting a comparatively low threshold of mental capacity.¹⁰⁸

The fact that a person lacks the mental capacity to enter into some other type of transaction or legal relationship does not necessarily mean that the person also lacks testamentary capacity. This point is illustrated most clearly in the line of cases¹⁰⁹ that have considered whether a person who is under a committee order (that is, a court order holding that the person cannot manage his or her finances or personal care, or both)¹¹⁰ can make a valid will. The answer to this question is a qualified “yes.” There are circumstances in which a person under a committee order

106. *Beaurone v. Beaurone Estate* (1997), 25 OTC 48 at para. 13, [1997] OJ No. 546 (QL) (Gen. Div.), McDermid J.

107. *See Laramée v. Ferron* (1909), 41 SCR 391 at 409, Idington J. (“We must not by an extensive doing so render it impossible for old people to make wills of their little worldly goods. The eye may grow dim, the ear may lose its acute sense, and even the tongue may falter at names and objects it attempts to describe, yet the testamentary capacity be ample. To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.”); *Murphy v. Lamphier* (1914), 31 OLR 287 at 320, [1914] OJ No. 32 (QL) (SC (HC Div.)), Boyd C. [*Murphy*] (“capacity may be diminished almost to the vanishing point and yet sufficient be left to sustain a will made *in extremis*, especially where the alternative is intestacy”), *aff’d* (1914), 32 OLR 19, 20 DLR 906 (SC (AD)).

108. *See, e.g., Bye v. Mattingly*, 975 SW 2d 451 at 455 (Ky. 1998), Stephens CJ (“The minimum level of mental capacity required to make a will is less than that necessary to make a deed or a contract.” [citations omitted]); *Re Estate of Weeks*, 329 SC 251, 495 SE 2d 454 at 461 (Ct. App. 1997), Anderson J. (“The degree of capacity necessary for the execution of a will is less than that needed for the execution of a contract.” [citation omitted]).

109. *See O’Neil v. Brown Estate*, [1946] SCR 622, [1946] 4 DLR 545; *Royal Trust Co. v. Rampone*, [1974] 4 WWR 735 (BCSC); *Hamilton v. Sutherland* (1992), 68 BCLR (2d) 115, 45 ETR 229 (CA).

110. *See, below, section VIII.B.1 at 125* (further discussion of committee order).

order still has testamentary capacity, but the courts will treat such cases with a heightened degree of scrutiny.¹¹¹

6. LEGAL ADVISOR'S RESPONSIBILITIES IN ASSESSING TESTAMENTARY CAPACITY

Legal advisors, such as lawyers and notaries public, are in many respects the gatekeepers of the system for determining testamentary capacity. "It is trite law," notes a British Columbia judgment, "that a solicitor has a duty to satisfy himself of the testamentary capacity of a client before asking that client to execute a will."¹¹²

The content of this duty "var[ies] with the situation and condition of the testator."¹¹³ The case law holds that an advisor should, at a minimum, take "personal instructions from the testator,"¹¹⁴ without relying on intermediaries such as family members. "[S]imply taking down and giving legal expression to the words of the client"¹¹⁵ is not sufficient—the advisor should question the testator directly on the elements of the test of testamentary capacity. Finally, "taking and preserving proper notes . . ."¹¹⁶ is part of the advisor's duties.

A vexing question is whether a medical opinion should be obtained. English cases refer to "a so called 'golden rule' that the making of a will by an old and infirm testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings."¹¹⁷ But the English courts are also sensitive to the burdens that an overzealous application of this rule would place on older-adult clients. Judges have cautioned lawyers not to seek medical opinions in a routine or mechanical fashion.¹¹⁸ So the question can only be resolved by the application of professional judgment in each case.

111. See *Whitton*, *supra* note 81 at 492.

112. *Philp v. Woods* (1985), 66 BCLR 42 at 44, 34 CCLT 66 (SC), Hutchison LJSC.

113. *Murphy*, *supra* note 107 at 318.

114. *Ibid.*

115. *Ibid.*

116. *Chalmers*, *supra* note 90 at para. 2, Southin JA.

117. *Sharp*, *supra* note 47 at para. 27, May LJ (for the court). See also British Medical Association & Law Society of England and Wales, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers*, 2d ed. (London: BMJ Books, 2004) at 66.

118. See *Thorpe v. Fellowes Solicitors LLP*, [2011] EWHC 61 at para. 76 (QB), Sharp J. [*Thorpe*] ("[T]here is plainly no duty upon solicitors in general to obtain medical evidence on every occa-

In England, the “golden rule” is considered to be “a rule of solicitors’ good practice, not a rule of law giving conclusive status to evidence obtained in compliance with the rule.”¹¹⁹ The Canadian position is likely the same as the English position: obtaining a medical opinion is good practice (in appropriate cases) but is not required by law and its results are not conclusive of the issue of testamentary capacity. But the point has not expressly arisen in Canadian jurisprudence.

7. RELATED CONCEPTS

(a) Introduction

The typical pattern in estate litigation sees testamentary capacity being considered along with a number of other issues. Concepts such as knowledge and approval, suspicious circumstances, and undue influence are often considered alongside testamentary capacity. Although detailed examination of these concepts is outside the scope of this report, it is worthwhile to have some sense of what they are and what roles they play in estate litigation, because this will shed further light on testamentary capacity and may help in assessing options for reform of testamentary capacity.

In estate litigation, “the propounder of a will¹²⁰ has the burden to prove three things: (1) the formalities of making the will were complied with; (2) the testator possessed the requisite capacity to make the will; and (3) the testator knew and approved the contents of the will.”¹²¹ Much of the commentary on the concepts related to testamentary capacity concerns how these concepts affect this burden of proof. This commentary can be rather abstract, so it is important to bear in mind why a discussion of the burden of proof is especially significant for estate litigation. Estate disputes often turn on the testator’s intentions or the testator’s state of mind when the will was executed. This inquiry is especially difficult because, of course, by the time estate litigation arises the testator is deceased and so is not able to give evidence in the proceeding. The law attempts to make up for the testator’s absence from the trial by applying a set of presumptions. These presumptions are intended to give effect to the underlying purposes of the concepts discussed below, which (as was the case for testamentary capacity) are primarily intended to further the policy of protecting the testator and the testator’s family from exploitation.

sion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary.”).

119. *Sharp*, *supra* note 47 at para. 27.

120. See *Black’s Law Dictionary*, 9th ed., *sub verbo* “propounder” (“An executor or administrator who offers a will or other testamentary document for admission to probate.”).

121. *Araujo*, *supra* note 105 at para. 49.

(b) Formal Validity

There are stringent formal rules that must be followed to create a valid will. The testator must sign the will in the presence of two witnesses, who in turn must sign the will in the testator's and each other's presence. If this procedure is not precisely followed, the will is invalid, and therefore cannot be admitted to probate.¹²²

(c) Knowledge and Approval

As a general requirement of the law of succession, a will is only valid if a testator knows and approves of its contents. This rule overlaps with testamentary capacity, but it is wider in scope. A testator may not be able to know the contents of a will because the testator has a mental impairment that makes understanding the will's contents impossible. On the other hand, a testator with testamentary capacity may not know and approve of the contents of a will because it was obtained by fraud or because the testator did not read it. In each case, the will lacks validity because the testator did not know and approve of its contents.

(d) Presumption of Capacity

As noted above, the propounder of a will bears the burden of proving that the will is valid. This burden includes showing that the testator had testamentary capacity. In carrying out this task the propounder is aided by the following presumption: if "the will satisfied the formalities and was read over to or by the testator, who appeared to understand it, testamentary capacity and knowledge and approval of the contents is generally presumed."¹²³ Some cases also say that the presumption only applies if the will is "rational on its face."¹²⁴ Anyone who wishes to challenge this presumption would have to call evidence to rebut it.

122. *But see Wills, Estates and Succession Act, supra* note 10, s. 58 (empowering court to admit to probate will lacking in formal validity—in force 31 March 2014).

123. *Araujo, supra* note 105 at para. 53.

124. *Re Nelson Estate* (1999), 31 ETR (2d) 230 at para. 14 (BCSC), Parrett J.

(e) Suspicious Circumstances

In estate litigation, courts look at all the circumstances surrounding the preparation and execution of a will.¹²⁵ If these circumstances raise suspicions, then they may have an effect on the outcome of the litigation.

The concept of suspicious circumstances does not create a licence for a free-flowing inquiry into anything that might bear on the will. Typically, courts are looking for suspicious circumstances in relation to one or more of the following: “(1) circumstances surrounding preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.”¹²⁶

Suspicious circumstances have a specific effect on estate litigation. “Where suspicious circumstances are present,” in the words of the leading Canadian case, “then the presumption [of capacity] is spent and the propounder of the will reassumes the legal burden of . . . establishing testamentary capacity.”¹²⁷ This means that the propounder will have to call evidence that proves that the testator had testamentary capacity. If the propounder fails to do this, then the will is invalid. It does not mean that suspicious circumstances will be an issue in every case involving testamentary capacity.¹²⁸

125. See, e.g., *Coleman v. Coleman*, 2008 NSSC 396 at para. 35, 45 ETR (3d) 117, Warner J. [*Coleman*] (“Whether a testator had the requisite mental capacity . . . is a question of fact determined from all of the circumstances. . .”).

126. *Vout v. Hay*, [1995] 2 SCR 876 at para. 25, 125 DLR (4th) 431, Sopinka J. (for the court) [*Vout*]. See also, e.g., *Araujo*, *supra* note 105 at para. 123 (listing following examples of suspicious circumstances in relation to specific will: “the poor health of the aged testator; the removal of the testator from a home where he had lived for a lengthy period; the fact that the testator was taken almost directly from his place of residence to a lawyer to give instructions; the lengthy period of separation from [his stepson]; the person directly benefiting from the will; the dramatic change from the previous will; the fact that the testator had a substantial amount of cash on him; and significantly the fact that his proposed beneficiary (a person from whom he was estranged for over five years) gave the relevant instructions to the lawyer”).

127. *Vout*, *supra* note 126 at para. 27.

128. See *Chalmers*, *supra* note 90 at para. 41 (“[A] question of testamentary capacity does not turn on the presence or absence of suspicious circumstances.”).

(f) *Undue Influence*

Undue influence often arises as an issue in cases involving testamentary capacity.¹²⁹ “The essence of the idea of undue influence,” in the words of a leading commentator, “is that a confidential relationship is violated by the dominant party taking unfair advantage of the subservient party.”¹³⁰ The “confidential relationship” at issue is, more often than not, a relationship between spouses or close family members. Undue-influence cases tend to be studies in family dynamics. Undue influence often arises in cases also involving testamentary capacity because individuals with diminished capacity are typically viewed as being especially vulnerable to subtle pressure being exerted by a caregiver or close family member.¹³¹

Undue influence is more than “[m]ere persuasion or advice from an interested person . . .”: “what is required is coercion.”¹³² “To set aside a will on the ground of undue influence,” in the words of a leading judgment, “the challenger [of the will] must establish that the influence was so great and overpowering that the will reflects the intent of the beneficiary and not the testator.”¹³³

The preceding paragraph reflects the traditional position of succession law, which is that “the burden of proof of undue influence . . . is always on the party challenging the will to prove that the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will.”¹³⁴ When the *Wills, Estates and Succession Act*¹³⁵ comes into force, it will provide for a change in the traditional position on the burden of proof. Section 52 of the act will shift the burden of proof in testamentary undue-influence cases to “the

129. See Milton D. Green, “Proof of Mental Incompetency and the Unexpressed Major Premise” (1944) 53 Yale LJ 271 at 297 [Green, “Proof of Mental Incompetency”] (“Undue influence and mental incompetency are so frequently associated as joint grounds for attacking a transaction, especially in will contests, that they have been called the Gold Dust Twins.”).

130. Milton D. Green, “Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts” (1943) 43 Colum. L. Rev. 176 at 190 [Green, “Fraud, Undue Influence and Mental Incompetency”].

131. See Green, “Proof of Mental Incompetency,” *supra* note 129 at 297 (“Mental weakness may . . . be an important evidentiary fact in the proof of undue influence; and some courts have held that undue influence may be an evidentiary fact in proof of mental incompetency.” [footnote omitted]).

132. *Araujo*, *supra* note 105 at para. 131.

133. *Coleman*, *supra* note 125 at para. 50.

134. *Ibid.* at para. 48.

135. *Supra* note 10.

party seeking to defend the will or the provision of it that is challenged.”¹³⁶ This party will be required, in effect, to disprove undue influence. So this legislation “will lessen the evidentiary difficulties that lie in the path of a challenge to a will based on undue influence . . .” and “may lead to increased litigation on grounds of undue influence. . . .”¹³⁷

(g) Summary

As noted above, reform of these concepts related to testamentary capacity falls outside the scope of this report. So none of the options for reform discussed in the proceeding sections proposes any changes in the law governing any of them. But it is important to bear in mind the existence and operation of these related concepts in assessing options for reform of testamentary capacity. These concepts may affect how readers assess the options for reform and the committee’s recommendations on the issues for reform discussed below.

C. Issues for Reform

The sections that follow identify issues for reform that bear directly on the test of capacity to make a will and on some collateral aspects of that test. The first issue for reform examines the most contentious aspect of the test of testamentary capacity: its fixed-and-specific-delusion element. The next two issues are concerned with the elements of the test of capacity that relate to general unsoundness of mind. They consider, first, modification of the test of capacity to make a will, and, second, legislative restatement of the current test of testamentary capacity. The last two issues for reform considered in this chapter discuss the presumption of testamentary capacity and the idea of using legislation to provide lawyers, notaries public, doctors, and the general public with detailed guidance on assessing testamentary capacity.

1. SHOULD THE SPECIFIC-DELUSION ELEMENT OF THE TEST OF CAPACITY TO MAKE A WILL BE ABROGATED?

The test of testamentary capacity establishes two ways in which a testator may be found to be incapable to make a will.¹³⁸ Testamentary capacity may be compromised if the testator either suffers from a general unsoundness of mind or if the will in question is a product of a fixed and specific delusion affecting the testator. Of these

136. *Ibid.*, s. 52 (in force 31 March 2014).

137. British Columbia Law Institute, *Report on Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, BCLI Rep. no. 61 (Vancouver: The Institute, 2011) at 3.

138. *See*, above, section III.B.3 at 26.

two ways in which testamentary capacity may be lost, the specific-delusion element has attracted more attention from law reformers.

The “*locus classicus* on insane delusions”¹³⁹ is *Banks v. Goodfellow*.¹⁴⁰ Commentators have recognized that this concept is intimately connected with a nineteenth-century view of the mind. Followed strictly, the concept asks courts to accept that a person could suffer from a delusion that affects only one aspect of a person’s judgment, while leaving the rest of the person’s mental faculties unaffected—that a person could be “partially insane.”¹⁴¹ Modern psychology apparently casts doubt on this theory.¹⁴² But it is the lynchpin of the specific-delusion element of the test. Without it, the element is superfluous, as the test already accounts for general unsoundness of mind.

The specific-delusion element has also been criticized as opening a backdoor way for courts to review testators’ estate plans, in contradiction of the many authorities that hold that reviewing the fairness of a will plays no part in determinations of testamentary capacity.¹⁴³ Critics point out that litigants relying on this concept tend to be successful when the will disinherits a spouse or child.¹⁴⁴ This pattern suggests that such cases involve less of an inquiry into the state of the testator’s mind and more of an evaluation of the contents of the will. Such an evaluation is an open invitation for a court to substitute its own judgment for that of the testator, and to strike down wills that do not correspond to a socially acceptable standard of distribution of assets to close family members.¹⁴⁵ To put it another way, it is more consistent with an

139. Albert H. Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed. (Toronto: Carswell, 2011) at 203.

140. *Supra* note 24.

141. *See* Fogel, *supra* note 88.

142. *See* Milton D. Green, “Proof of Mental Incompetency,” *supra* note 129 at 280 (“Psychiatrists . . . would not agree . . . with the well-established legal doctrine of the so-called insane delusion, the theory that a person may be perfectly normal except on one subject as to which he entertains a so-called ‘insane delusion.’”).

143. *See, e.g., Chalmers, supra* note 90 at para. 49 (“A testatrix cannot be found not of testamentary capacity simply because she chooses to leave her estate in a manner that may be thought unkind.”); *Sharp, supra* note 47 at para. 79 (“An irrational, unjust and unfair will must be upheld if the testator had the capacity to make a rational, just and fair one, but it could not be upheld if he did not.”). For a stark illustration of this point, *see In the Matter of Clapper*, 279 AD 2d 730, 718 NYS 2d 468 (2001) (court holding that testator had mental capacity to make a will that gave “1,000 loose pennies” to his son and left the remainder of his estate to his daughter).

144. *See* Fogel, *supra* note 88 at 98–100.

145. *See ibid.* at 100–01 (“The law regarding monomania provides an excess of opportunity for fact-finders to insert their own biases. Indeed, by asking fact-finders to determine what the testator

older, outcome-based approach to mental capacity than with the modern, functional approach.¹⁴⁶

In British Columbia, this criticism raises an additional concern. This province has legislation specifically addressing disinheritance of spouses and children.¹⁴⁷ A common-law doctrine that, in practice, largely serves that purpose too is at a minimum redundant and is possibly also a source of baseless litigation.

But there does not seem to be much of an outcry against the specific-delusion element of the test other than in academic settings. This indicates that, although it may be difficult to justify this element of testamentary capacity in theory, it is still a useful addition to the law in practice. Delusions, after all, are a common symptom of diseases affecting the mind, even if they do not exactly make themselves manifest in the way contemplated by the specific-delusion element of the test.¹⁴⁸ It is also noteworthy that, apparently, no common-law jurisdiction has passed legislation abrogating this aspect of the test of capacity to make a will.

Further, the specific-delusion element is apparently a leading source of litigation on testamentary capacity.¹⁴⁹ This suggests that litigators are comfortable working within its confines. And it also suggests that the specific-delusion element may be responding to a need that no other aspect of the law on testamentary capacity—or the broader law of succession—is able to reach.¹⁵⁰ Abrogating the specific-delusion element could leave the law poorer.

In theory, it should be possible to contemplate reforms that change the specific-delusion element but do not abrogate it entirely. In practice, commentators have

would have done absent the delusion, the law all but requires the fact-finder to substitute his judgment for the testator's.”).

146. See, above, section II.D at 16.

147. See *Wills Variation Act*, *supra* note 8. See also *Wills, Estates and Succession Act*, *supra* note 10, ss. 60–72 (provisions on variation of wills that are not yet in force, but are contemplated to replace the *Wills Variation Act*).

148. See, above, section II.C at 13; see also Meiklejohn, *supra* note 23 at 343–44, n. 176.

149. See *Feeney's Canadian Law of Wills*, *supra* note 104 at § 2.8 (“Most attacks on the mental capacity of the testator are of two kinds. Those in which it is alleged that he or she suffered from (a) specific delusions that affected the dispositions of the will; and (b) senile dementia, that is, where it is alleged that his or her mental powers were so reduced by advanced old age that he or she was incapable of making a will.”).

150. Of course, this point could cut the other way: the fact that a large portion of testamentary-capacity claims relies on the specific-delusion element of the test could mean that this element is encouraging the pursuit of dubious litigation.

concluded that there is little legislation can do to address concerns raised by the element than abrogate it.¹⁵¹ So this issue requires an all-or-nothing answer.

The committee discussed this issue extensively. It noted that this element of the test of capacity to make a will is well established in the case law: it has a 200-year-old line of precedent to back it up. The committee was concerned that abrogating this line of authority would dilute the protective purpose of the test of testamentary capacity. Cases involving fixed and specific delusions continue to crop up all the time. It is not clear that all of these cases could be accommodated within the general-unsoundness-of-mind element of the test of capacity. It is also unclear that all of the cases that could not be so accommodated are unworthy of a remedy.

Finally, it should be noted that a strong majority of respondents to the consultation paper agreed with the committee's tentative recommendation not to abrogate this element of the common-law test of capacity to make a will.

The committee recommends:

1. The fixed-and-specific-delusion element of the test of capacity to make a will should not be abrogated.

2. SHOULD ANY OF THE ELEMENTS OF TEST OF CAPACITY TO MAKE A WILL RELATING TO GENERAL UNSOUNDNESS OF MIND BE MODIFIED?

Unlike the specific-delusion element, the elements of the test of testamentary capacity that relate to general unsoundness of mind have not attracted much direct criticism. The bulk of the commentary on them does not question their substance. It is focussed more on their application to a specific set of facts.¹⁵²

Nevertheless, it is important in this project to consider directly the elements of the test of testamentary capacity, even though this task may prove to be difficult. Unlike the other issues for reform considered in this chapter, this issue has not generated any concrete examples in the form of legislation in other jurisdictions, law-reform proposals, or sustained academic consideration which could serve as models for consideration.

151. See Fogel, *supra* note 88 at 102 ("The situation should be remedied by a total abrogation of the law of monomania rather than by small change to the standards.").

152. See, e.g., Coleman, *supra* note 125 at para. 33 ("The general principles are not difficult to enunciate; the difficulty is their application.").

The limited critical commentary on the general-unsoundness-of-mind portion of the test of testamentary capacity has focussed not on changing the elements of the test but rather on the threshold of testamentary capacity. Two competing policy directions can be discerned from these comments on the threshold of testamentary capacity.

One theme that crops up occasionally is that the elements of the test are “too limited.”¹⁵³ These limitations come to light when the test has to accommodate complex modern neuroscientific data or complicated family dynamics. “Many cases of challenges to testamentary capacity,” one article notes, “involve complex and subtle issues that call for a need to go beyond the traditional *Banks vs. Goodfellow* criteria.”¹⁵⁴ The authors of this article call for supplementing the “task-specific” (that is, functional) test of testamentary capacity with a “situation-specific” analysis for such complex cases. This two-pronged analysis would allow for scaling up the threshold of testamentary capacity for more “serious” decisions.¹⁵⁵ The authors offer the following examples of “‘seriousness’ related to testamentary capacity”:

- (1) marked “departure from previously expressed wishes or the extent to which ‘normal’ beneficiaries are excluded”;
- (2) “the consequences of a particular disposition especially in very large estates”;
- (3) wills made “in complex and conflictual environments.”¹⁵⁶

Taking such an approach would reorient British Columbia’s law in a more protective direction and would move it closer to the position that prevails in the United Kingdom.¹⁵⁷

But it is also possible to contemplate reforms that would relax the standard for making a valid will by setting a lower threshold of testamentary capacity. This approach would emphasize the importance of promoting individual autonomy and freedom to

153. Kenneth I. Shulman, Carole A. Cohen & Ian Hull, “Psychiatric Issues in Retrospective Challenges of Testamentary Capacity” (2005) 20 *Int. J. Geriatr. Psychiatry* 63 at 68.

154. *Ibid.* at 67.

155. *Ibid.* at 68.

156. *Ibid.*

157. *See ibid.* (“case law in England and Wales has suggested that the more serious the decision, the higher the threshold for competence”).

distribute property by will, goals that have some support in the case law.¹⁵⁸ It would also move British Columbia's position on testamentary capacity closer to that taken in American case law.¹⁵⁹

The committee was of the view that the flexible and nuanced nature of this element of the test of capacity to make a will was important to preserve. Although legislative change might heighten the level of certainty in the law, it would have to be inordinately detailed to match the ability of the common law to cover variations in fact patterns and to respond to emerging issues. This position was supported by all respondents to the full consultation paper.¹⁶⁰

The committee recommends:

2. The general-unsoundness-of-mind element of the test of capacity to make a will should not be modified by legislation.

3. SHOULD THE COMMON-LAW TEST OF CAPACITY TO MAKE A WILL BE RESTATED IN LEGISLATION?

The committee also examined whether a legislative restatement of the test of capacity to make a will would improve the law in British Columbia.

The rationale for restating the test in legislation is that it would make the law more accessible, particularly to members of the general public without legal training. It would also promote certainty. Although the case law focusses on a range of three or four substantive elements, the courts have used a wide variety of phrases to express the contents of these elements. This variety of expression can be seen as creating confusion.¹⁶¹ Moving from a common-law test to a legislative restatement would not be unprecedented. A few American jurisdictions have restated the test of testamentary capacity.¹⁶² British Columbia has recently opted for a restatement of the test of

158. See *supra* note 107.

159. See *supra* note 108.

160. On the other hand, respondents to the summary consultation disagreed with a tentative recommendation that covered both revising and restating the general-unsoundness-of-mind element of the test.

161. See, e.g., Green, "Fraud, Undue Influence and Mental Incompetency," *supra* note 130 at 181 ("courts are in hopeless confusion in their verbal formulations of the standard").

162. See Cal. Prob. Code § 6100.5 (Deering 2013). See also Ga. Code Ann. § 53-4-11 (2012) (partial restatement—covering fixed-and-specific-delusion element of test).

capacity in a related area of the law, that governing the making of enduring powers of attorney.¹⁶³

The advantage of leaving the test to the common law is that this approach is generally seen to allow for greater flexibility. This sense, which can be quite strong among members of the legal community, holds that legislation has a tendency to set the law in stone. Case law is seen to be better able to respond to emerging trends and new fact patterns. This is the approach in the vast majority of common-law jurisdictions in Canada, the United States, the United Kingdom, and Australia.

In the consultation, this question generated a divergence of opinion. A significant minority of respondents favoured a legislative restatement of the common-law test of capacity. These respondents were primarily concerned with enhancing the law's accessibility and clarity. In their concerns, they raised a number of valid points and reflected to a significant degree the discussion that the committee had about this issue over several committee meetings. But a majority of consultation respondents favoured the flexibility that comes with a common-law test of capacity.

The committee appreciated that some benefits could flow from a legislative restatement. Such legislation could help to educate the public on the legal (as opposed to medical) character of the test of capacity to make a will. It could also serve as a reference point for other common-law tests of capacity. But, in the end, the committee was not convinced that the current common-law approach was deficient. It was also concerned that legislation would rob the law of some of its flexibility.

The committee recommends:

3. The test of capacity to make a will should not be restated in legislation.

4. SHOULD LEGISLATION CONTAIN A PRESUMPTION THAT A PERSON HAS THE CAPACITY TO MAKE A WILL?

With this issue for reform, the discussion moves away from considering the elements of the test of testamentary capacity to examining those areas of the law that may support testamentary capacity.

It is common for legislation that contains a test of capacity to include a provision establishing that a person is presumed to have capacity for the purposes of the subject

163. See *Power of Attorney Act*, *supra* note 2, s. 12.

matter of the legislation.¹⁶⁴ The presumption requires those who challenge a person's capacity to provide evidence to support their position. Legislative presumptions are typically coupled with a further statement declaring that certain types of evidence (usually evidence that focusses on the person's "way of communicating") is not sufficient for proving that the person lacks mental capacity.¹⁶⁵ The purpose of these legislative provisions is to counter stereotypes about people who suffer from mental illnesses or disabilities. They also ensure that any proceeding takes a functional approach to mental capacity, rather than a status approach, by focussing the inquiry on evidence of incapacity to make decisions respecting the subject matter of the statute, rather than on the person's mental illness or disability.

As discussed earlier,¹⁶⁶ the common law on testamentary capacity has developed its own presumption of capacity. This presumption of capacity differs from the typical legislative presumption. The common law attaches some conditions to the operation of its presumption. The will at issue must be formally valid and the testator must have known and approved of its contents (and, possibly, the will must also be rational on its face). In addition, the presumption is ineffective if the will was executed in suspicious circumstances.

The common-law presumption is more complex than a typical legislative presumption. It also does not make as clear a statement against stereotypical views of individuals with mental illnesses or disabilities.

But the common-law presumption may be more in tune with the realities of estate litigation. The focus of estate litigation is on a will. There is less need for a provision relating to the testator's way of communicating, since wills must be in writing and the testator will not be giving evidence in the proceeding. Given the retrospective nature of the inquiry into testamentary capacity, which often requires a court to look back several years into the past, additional protective measures, such as those imposed under the concept of suspicious circumstances, may also be necessary for estate litigation.

The committee believes that there is an opportunity for legislation to bring the presumption of capacity to make a will into line with similar legislative presumptions

164. See, e.g., *Power of Attorney Act*, *ibid.*, s. 11 (1).

165. See, e.g., *Power of Attorney Act*, *ibid.*, s. 11 (2) ("[a]n adult's way of communicating with others is not grounds for deciding that the adult is incapable . . .").

166. See, above, section III.B.7 (d) at 34.

for enduring powers of attorney¹⁶⁷ and representation agreements.¹⁶⁸ This reform would allow for consistent development of the law across the three major personal-planning documents. Such development could be a boon both for the general public and for the legal and notarial professions, as it would make the law more accessible, certain, and predicable. And it should be noted that a tentative recommendation proposing this reform in the consultation paper commanded the support of a strong majority of respondents.

Similar to the presumptions for enduring powers of attorney and representation agreements, the proposed presumption of capacity to make a will affirms that a person's way of communicating is not grounds for determining that the person lacks testamentary capacity. This point is not clearly made in the common-law presumption. Its affirmation in legislation may help to combat stereotypes about the capacity of people with disabilities.

The proposed legislative presumption lays less stress than the common-law presumption on due execution of a will. This approach is in line with a development that will be ushered in with the implementation of the *Wills, Estates and Succession Act*.¹⁶⁹ Once this act is in force, it will empower a justice of the British Columbia Supreme Court to admit to probate a will that is not in compliance with the act's execution requirements.¹⁷⁰ This development will be unprecedented in British Columbia. Taking a cautious approach, the committee's proposal would not extend the legislative presumption of capacity to wills admitted to probate under this provision. Because this provision has yet to be applied in practice, it is unclear how a legislative presumption of capacity could affect its operation. It would be desirable to revisit this decision after the *Wills, Estates and Succession Act* has been brought into force and the courts have had an opportunity to apply its provisions.

The committee's tentative recommendation uses the term *will-maker* rather than *adult* in view of the fact that the *Wills, Estates and Succession Act* will allow people sixteen years of age and older to make a will.¹⁷¹ Since this age requirement allows a person who has not reached the age of majority to make a valid will, it would not be appropriate to follow the usage of the *Power of Attorney Act* and *Representation*

167. See *Power of Attorney Act*, *supra* note 2, s. 11.

168. See *Representation Agreement Act*, RSBC 1996, c. 405, s. 3.

169. *Supra* note 10 (in force 31 March 2014).

170. See *ibid.*, s. 58 (in force 31 March 2014).

171. See *ibid.*, s. 36 (in force 31 March 2014).

Agreement Act presumptions of capacity and restrict the application of the provision to adults.

The committee recommends:

4. British Columbia should enact legislation to provide that: (a) until the contrary is demonstrated, every will-maker is presumed to be capable of making, changing, or revoking a will; (b) the presumption in paragraph (a) does not apply to a record that is the subject of an order under section 58 of the Wills, Estates and Succession Act; (c) a will-maker's way of communicating with others is not grounds for deciding that he or she is incapable of making, changing, or revoking a will.

5. SHOULD LEGISLATION PROVIDE MORE GUIDANCE ON HOW TO ASSESS CAPACITY TO MAKE A WILL?

This issue concerns whether legislation can be used to assist lawyers, notaries public, and the general public in understanding how to apply the test of capacity.

One of the important challenges facing courts deciding cases on testamentary capacity is the weight to be given to medical evidence on applying the legal test of capacity. An understanding of this type of evidence is also very important for legal advisors in carrying out their obligations to testators who may have diminished capacity.

Some jurisdictions outside British Columbia have attempted to supplement the common-law test of capacity with more detail on the medical causes of incapacity. California is noteworthy in this area. In 1995, California enacted detailed provisions as part of its probate code on the types of medical evidence that is relevant to a decision on a person's mental capacity.¹⁷² This legislation lists a number of "deficits" in "mental functions."¹⁷³ A finding that a person lacks the capacity to make a specific decision or carry out a specific act requires evidence that the person suffers from a listed deficit and "evidence of a correlation between the deficit or deficits and the decision or act in question."¹⁷⁴

This type of legislation has several advantages. It is more explicit on the cause of mental incapacity than the case law. It clearly sets out issues ("deficits") for legal advisors to investigate. This combination of explicit focus on medical issues and clarity

172. See Cal. Prob. Code §§ 810–13 (Deering 2013). See, below, appendix C at 239 (text of this legislation).

173. Cal. Prob. Code § 811 (a) (Deering 2013).

174. Cal. Prob. Code § 811 (a) (Deering 2013).

provides solid guidance for legal advisors and makes the law more open and accessible for the general public.

But there are disadvantages to the California approach. It is liable to have the effect of making the law more complex. This complexity is less likely to show up on the page and more likely to have an impact when the test of testamentary capacity is actually applied. It pulls the law away from the older ideal of a common-sense test that can be easily applied by laypersons¹⁷⁵ and more toward a test that demands medical evidence and judgment. Another concern is that legislation may lock in the current state of medical knowledge and, as a result, the law will fail to keep pace with future developments. Some experts believe that neuroscience, in particular, is on the cusp of major discoveries on mental functioning and human behaviour.¹⁷⁶

The committee accepted that there is a need for more information on the test of capacity to make a will (and the other common-law tests of capacity), but it was not convinced that legislation is the best vehicle for providing this information. The danger is that the legislation would end up being too detailed or open-ended. The committee was also of the view that the common law was better positioned than legislation to assimilate developments in neuroscience. The vast majority of respondents to the consultation paper agreed with the committee's tentative recommendation.

The committee recommends:

5. British Columbia should not enact legislation intended to give guidance on how to assess capacity to make a will.

175. See *Sharp*, *supra* note 47 at para. 77 (characterizing nineteenth-century judgment as showing “that the amount and quantity of intellect which is requisite to constitute testamentary capacity is eminently a practical question that does not depend solely on scientific or legal definition”).

176. See *Neuroscience and the Law*, *supra* note 69 at v.

CHAPTER IV. WILLS FOR INDIVIDUALS WHO LACK TESTAMENTARY CAPACITY

A. Introduction

This chapter and the next one are concerned with the implications that flow from the recommendations contained in the previous chapter. One of the implications of affirming a test of capacity to make a will is that some people will fail to meet the standard set by that test of capacity. As a result, these people cannot make a will—or change or revoke an existing will—even in circumstances in which their estate plan (or lack of it) may cause them and their families hardship. British Columbia has enacted legislation that gives some support to people with diminished capacity who may need to make decisions or carry out certain transactions by contract or *inter vivos* gift even though they fail to meet the tests of capacity for those decisions or transactions.¹⁷⁷ But British Columbia has not done what other jurisdictions have: enacting legislation to create a process for a person who lacks testamentary capacity to make a valid will. This chapter examines whether British Columbia should enact such legislation.

For the sake of economy of language, this chapter follows established conventions in legal writing in this area and refers to a person who lacks testamentary capacity as *P* and to the will that is made for *P* as a result of the supportive process as a *statutory will*.

At the outset it should be observed that any statutory-will procedure requires more than just a legislative framework if it is to function in the real world. Making or remaking an estate plan for a person who lacks testamentary capacity “confer[s] an awesome responsibility” on the court or other decision-maker, which must sift through a vast array of medical, financial, and biographical evidence about the person if it is to ensure that its “decision is not an arbitrary one.”¹⁷⁸ The proper home for rules governing the production of this evidence, as well as rules relating to the giving of notices and the participation of *P*, may be the rules of court (or regulations). In addition, the experience of the two common-law jurisdictions that have embraced the statutory-will concept with the highest degree of sophistication (the United Kingdom and Australia) shows that statutory-will cases demand a very

177. See, e.g., *Adult Guardianship Act*, *supra* note 5, s. 17 (gifts by property guardians—not in force); *Power of Attorney Act*, *supra* note 2, s. 20 (gifts by attorneys).

178. Martin Terrell & Brian Bacon, “Statutory Wills” *Back to Basics* (November 2010), online: Thomson Snell & Passmore <<http://www.ts-p.co.uk/>> at 2.

fine-grained form of decision-making. Legislation can go only so far in giving decision-makers direction on how to decide a specific statutory-will case. Invariably, the courts (or other decision-makers) are called on to fill in gaps and formulate more detailed principles to guide subsequent applications.

While this chapter includes some discussion of rules and leading cases,¹⁷⁹ its focus is on potential legislative provisions. And those provisions are framed in fairly broad terms. The emphasis in the issues for reform discussed later in this chapter¹⁸⁰ is on big-picture questions, such as whether a statutory-will system is desirable in British Columbia, who or what institution should be in charge of administering it, to whom should it be applicable, who should have access to it, on what basis should decisions be made under it, and how should it relate to other statutes. But before getting to those questions, this chapter sets out some background information on statutory-will legislation already in force in other jurisdictions.

B. Background

1. UNITED KINGDOM LEGISLATION

(a) *Mental Health Act 1959 & Mental Health Act 1983*

The United Kingdom was the first common-law jurisdiction to enact statutory-will legislation. The enabling legislation was enacted in 1969,¹⁸¹ as an amendment to what might be described as the United Kingdom's already-existing adult-guardianship legislation, the *Mental Health Act 1959*.¹⁸² The statutory-will provision was confirmed in substantially the same form as originally enacted when the United Kingdom revised its mental-health legislation in the early 1980s.¹⁸³

This chapter will not dwell on the mechanics of the statutory-will procedure in the *Mental Health Act 1983*, because that act has been wholly overtaken by new legislation, which is the subject of the next section. But the legislation was in force in Eng-

179. See *Re Davey*, [1981] 1 WLR 164, [1980] 3 All ER 342 (UK Court of Protection); *Re D. (J.)*, [1982] 1 Ch. 237 (UK Court of Protection); *Re C (A Patient)*, [1991] 3 All ER 866 (ChD); *Bolton v. Sanders*, [2004] VSCA 112, 9 VR 495; *G v. Official Solicitor*, [2006] EWCA Civ. 816; *Re P (Statutory Will)*, [2009] EWHC 163, [2010] 1 Ch. 33 [*Re P*]; *Re Fenwick*, [2009] NSWSC 530 [*Re Fenwick*]; *Re M (Statutory Will)*, [2009] EWHC 2525, [2011] 1 WLR 344 [*Re M*]; *Re D (Statutory Will)*, [2010] EWHC 2159, [2012] 1 Ch. 57 [*Re D*].

180. See, below, section IV.C at 62.

181. See *Administration of Justice Act 1969* (UK), c. 58, s. 17.

182. (UK), 7 & 8 Eliz. 2, c. 72, s. 103 (1) (dd).

183. See *Mental Health Act 1983* (UK), c. 20, s. 96 (1) (c).

land and Wales¹⁸⁴ for close to 40 years, and in that time a number of important cases were decided under it. Some aspects of the design of the legislation and the reasoning of those cases have proved to be influential on legislation that is in force in jurisdictions outside England and Wales.

The first point to bear in mind is to recall that the law of succession, in England and in those jurisdictions influenced by the English legal tradition, has since at least the nineteenth century had a firm prohibition against the delegation of will-making powers. A person cannot make, modify, or revoke a will on another person's behalf.¹⁸⁵ When the *Mental Health Act 1959* was revised in 1969 to authorize statutory wills for P, it did not extend any agency principles to bring this reform into being.¹⁸⁶ Instead, it grounded statutory wills in the court's authority to make decisions on behalf of persons who are incapable of making decisions for themselves. This is a long-standing jurisdiction, which was originally part of the royal prerogative, and which was eventually transferred to the courts and, in the twentieth century, given a legislative basis.¹⁸⁷ This broad, mental-health jurisdiction was ultimately settled on the Court of Protection, which historically "[was] not a court, but an office of the Supreme Court with a long and venerable pedigree."¹⁸⁸ Since 2007 the Court of Protection has been a superior court in its own right.¹⁸⁹

The second point to bear in mind is the operative language of the statute, which authorized the Court of Protection to order "the execution for the patient [P] of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he

184. The legislation never extended to Scotland. See Scottish Law Commission, *Report on Succession*, Scot. Law Com. no. 124 (Edinburgh: HMSO, 1990) at para. 4.78.

185. See *Easingwood v. Cockcroft*, 2013 BCCA 182 at paras. 45–48, 42 BCLR (5th) 269, Saunders JA (for the court). See also D. M. Gordon, "Delegation of Will-Making Power" (1953) 69 LQR 334 at 336–40 (reviewing the leading cases). But see *Wills, Estates and Succession Act*, *supra* note 10, s. 85 (3) (person granted power over financial affairs of another by enduring power of attorney or order of committee ship may be authorized by court to make a designation under a benefit plan—in force 31 March 2014).

186. In theory, at least, parliament could have passed legislation expanding the authority of someone acting under, for example, a power of attorney. Parliament did not go this route.

187. See *Re Fenwick*, *supra* note 179 at paras. 29–47, Palmer J. (tracing the historical antecedents of statutory wills). See also Rosalind F. Croucher, "'An Interventionist, Paternalistic Jurisdiction'? The Place of Statutory Wills in Australian Succession Law" (2009) 32 UNSWLJ 674 at 675–78.

188. Law Commission for England and Wales, *Report on Mental Incapacity*, Law Com. no. 231 (London: HMSO, 1995) at para. 2.9.

189. See *Mental Capacity Act 2005* (UK), c. 9, s. 45.

were not mentally disordered.”¹⁹⁰ It’s readily apparent that this provision leaves a lot unsaid about the criteria on which the Court of Protection is to base its decisions. So the jurisprudence ended up elaborating considerably on this section. Judges filled in the missing details by drawing on a concept that had developed in a stream of cases stretching back to the early nineteenth century, which dealt with court-ordered *inter vivos* gifts made out of the surplus income of a person under the court’s protection because the person lacked the capacity to manage his or her affairs.¹⁹¹ This concept is commonly referred to as *substituted judgment*. Substituted judgment involves the court “chang[ing] [its] position from an external point of view to an internal subjective one,” in effect making its decisions on behalf of P by “relinquish[ing] [its] position of judicial objectivity and enter[ing] [P’s] mind.”¹⁹² In a landmark decision¹⁹³ under the *Mental Health Act 1959*, Sir Robert Megarry VC adapted the doctrine of substituted judgment for statutory wills by articulating the following five highly fictionalized principles for applying the legislation:

- (1) “[Assume] that the patient [P] is having a brief lucid interval at the time when the [statutory] will is made.”
- (2) “[D]uring the lucid interval [P] has a full knowledge of the past, and a full realization that as soon as the will is executed he or she will relapse into the actual mental state that previously existed, with the prognosis as it actually is.”
- (3) “[I]t is the actual patient who has to be considered and not a hypothetical patient. One is not concerned with the patient on the Clapham omnibus.”
- (4) “[D]uring the hypothetical lucid interval [P] is to be envisaged as being advised by competent solicitors.”
- (5) “[I]n all normal cases [P] is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant’s pen.”¹⁹⁴

190. *Mental Health Act 1983*, *supra* note 183, s. 96 (1) (e).

191. See *Ex parte Whitbread* (1816), 2 Mer. 99, 35 ER 878 (Ch.); *Re Freeman*, [1927] 1 Ch. 479 (Eng. CA); *Re L. (W. J. G.)*, [1966] Ch. 135 (Eng. ChD).

192. Louise Harmon, “Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment” (1990) 100 Yale LJ 1 at 22. See also Croucher, *supra* note 187 at 675–78.

193. *Re D. (J.)*, *supra* note 179.

194. *Ibid.* at 242–43.

These five principles have exercised an enormous influence over the development of statutory-will jurisprudence both in England and Wales before the advent of the *Mental Capacity Act 2005* and in jurisdictions outside England and Wales.

(b) Mental Capacity Act 2005

The enactment of the *Mental Capacity Act 2005*¹⁹⁵ heralded a significant change of direction for adult-guardianship law in England and Wales. The purpose of this new act was to enshrine modern ideas about adult guardianship within an up-to-date and comprehensive legislative framework. The reform effort that was the spur for the new act's creation had next to nothing to say about statutory wills.¹⁹⁶ But the *Mental Capacity Act 2005* did carry forward the Court of Protection's powers to order that a statutory will be made for P.

In brief, the new act's statutory-will procedure works as follows. The legislative framework applies to a person who is under the court's protection (*i.e.*, persons who are not capable of making decisions respecting their affairs) and who also can be shown to lack testamentary capacity. The second requirement is a nod toward the functional approach to incapacity, that is the modern idea that incapacity is not a global condition but rather one that relates to specific decisions.¹⁹⁷ Certain classes of people are authorized to apply to the Court of Protection, asking the court to make a statutory will for P or to modify or revoke an existing will. The act and the court's rules list these classes; for the purposes of this chapter, the ones to note are the following:

- P—that is, the person who lacks or is alleged to lack capacity;
- the donor or donee of a lasting power of attorney to which the application relates;
- a deputy appointed by the court (this is essentially a guardian);
- an attorney acting under a registered enduring power of attorney;
- the Official Solicitor or Public Guardian;
- a person who, under any known will of P or under P's intestacy, may become entitled to any of P's property or an interest in it;

195. *Supra* note 189.

196. *See Report on Mental Incapacity, supra* note 188.

197. *See Mental Capacity Act 2005, supra* note 189, s. 16 (1).

- a person whom P might be expected to benefit if P had capacity.¹⁹⁸

Anyone else who wishes to apply must first obtain the court's permission (essentially, leave).¹⁹⁹ Notice that among the persons who must obtain leave is anyone who has a personal connection to P but who does not have a financial stake in P's estate.

The application is made using a standard form called a COP1. The form must be supported by an extensive amount of evidence. The full list is set out in the Court of Protection's Practice Direction 9F.²⁰⁰ Highlights of the supporting information include the following:

- a copy of the draft will or codicil;
- copies of any existing wills or codicils;
- details of P's family—preferably in the form of a family tree;
- a schedule of P's assets, with up-to-date valuations;
- a copy of any registered enduring or lasting power of attorney;
- confirmation that P is a resident of England or Wales;
- an up-to-date report of P's present medical condition, life expectancy, and testamentary capacity.²⁰¹

The applicant must name the following as respondents to the application:

- any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application;
- any beneficiary under the proposed will or codicil who is likely to be materially or adversely affected by the application; and
- any prospective beneficiary under P's intestacy where P has no existing will.²⁰²

In addition the court must "consider at the earliest opportunity whether P should be joined as a party to the proceedings and, if he is so joined, the court will consider

198. See *Mental Capacity Act 2005*, *ibid.*, s. 50; *Court of Protection Rules 2007*, SI 2007/1744, rr. 51–52.

199. See *Mental Capacity Act 2005*, *supra* note 189, s. 50.

200. Which may be viewed, online: National Archives <<http://webarchive.nationalarchives.gov.uk/>>.

201. See Practice Direction 9F, *ibid.* at para. 6.

202. *Ibid.* at para. 9.

whether the Official Solicitor should be invited to act as a litigation friend, or whether some other person should be appointed as a litigation friend.”²⁰³

The *Mental Capacity Act 2005* carried forward the same operative language found in the *Mental Health Act 1983* (“make any provision . . . which could be made by a will executed by P if he had capacity to make it”).²⁰⁴ This led early commentators on the new act to make the reasonable assumption that the courts would continue to use the highly subjective, substituted-judgment approach as a basis for making decisions about statutory wills.²⁰⁵ Once the first cases under the new legislation began reaching the courts it quickly became apparent that this assumption would not be borne out.

Here it is important to note that one of the overarching purposes of the new act was to enshrine a best-interests standard for the Court of Protection’s decision-making.²⁰⁶ This standard was enacted as a general criterion applying across the whole range of decisions that may be made under the *Mental Capacity Act 2005*.²⁰⁷ So it ended up applying to statutory wills, even though it clearly was developed without any reference to statutory-will jurisprudence.

The courts were quick to characterize the advent of this best-interests standard as marking a “radical change”²⁰⁸ in statutory-will jurisprudence, one which leaves the leading authorities under the *Mental Health Act 1959* and the *Mental Health Act 1983* “best consigned to history.”²⁰⁹ The substituted-judgment approach was cast out, replaced by “a determination to be made applying an objective test as to what would be in the protected person’s best interests.”²¹⁰ Although a court can take the person’s views into account in deciding what is in the person’s best interests,²¹¹ those

203. *Ibid.* at para. 10.

204. *Mental Capacity Act 2005*, *supra* note 189, sch. 2, s. 2.

205. See, e.g., Alberta Law Reform Institute, *Report on the Creation of Wills*, ALRI Rep. no. 96 (Edmonton: The Institute, 2009) at 25, n. 72.

206. See *Report on Mental Incapacity*, *supra* note 188 at paras. 3.24–3.37.

207. See *Mental Capacity Act 2005*, *supra* note 189, ss. 1 (5), 4.

208. *Re P*, *supra* note 179 at 43, Lewison J.

209. *Re M*, *supra* note 179 at 350, Munby J. See also *ibid.* at 351 (“And there is, in my judgment, no place in that process for any reference to—any harking back to—judicial decisions under the earlier and very different statutory scheme. . .”).

210. *Re D*, *supra* note 179 at 63, Judge Hodge, QC.

211. See *ibid.* (“A protected person’s expressed interests should not be lightly overridden, since adult autonomy is an important part of the overall picture.”).

views are not determinative of the court's task. Instead, the court should figuratively "draw up a balance sheet"²¹² of the benefits and disadvantages of making the proposed statutory will and make its decision accordingly. "Plainly," in the words of a leading judgment, "this exercise [is] not directed at what the vulnerable person would have done if he or she had had mental capacity. . . ."²¹³

This change in the jurisprudence is likely due to more than statutory interpretation. The courts appear to have so forcefully rejected the substituted-judgment approach at least in part out of a frustration with the "mental gymnastics"²¹⁴ the courts felt forced to perform in applying this approach. This frustration was particularly evident in cases in which P was a person who never had testamentary capacity and was unable to express any testamentary wishes. It's likely that the courts fastened on to a change in the legislative framework to chart a new course, one which was more direct and less artificial.

If the application is successful, then the Court of Protection issues an order authorizing a named person to execute the statutory will on behalf of P. The executed will is then sent to the court for sealing. The will bearing the seal of the court is then sent to the person authorized to hold it, "usually the applicant's solicitor."²¹⁵ The effect of a statutory will is in all respects the same as any other will: a statutory will is not some type of legislative hybrid or lesser form of will.

2. AUSTRALIAN SUCCESSION LEGISLATION

A stream of law-reform reports published in Australia in the 1980s and 1990s recommended that Australian states and territories adopt a statutory-will procedure.²¹⁶ Every Australian jurisdiction (with the exception of the Australian Capital Territory)

212. *Re P*, *supra* note 179 at 40.

213. *Ibid.*

214. *Ibid.* at 44. *See also Re M*, *supra* note 179 at 351 (citing this remark with approval).

215. Terrell & Bacon, *supra* note 178 at 4.

216. *See* Victoria, Chief Justice's Law Reform Committee, *Wills for Mentally Disordered Persons* (Melbourne: Government Printer, 1985); Parliament of Victoria, Law Reform Committee, *Reforming the Law of Wills: Report upon an Inquiry into the 1991 Draft Wills Legislation*, Rep. no. 82 (Melbourne: Government Printer, 1994) 34–53; New South Wales Law Reform Commission, *Report on Wills for Persons Lacking Will-Making Capacity*, NSWLRC Rep. no. 68 (Sydney: The Commission, 1992).

ultimately acted on these recommendations, enacting legislation in the late 1990s and early 2000s.²¹⁷

The various Australian statutes differ in their details. In order to avoid being swamped by drafting issues that are not the main focus of this chapter, this section will gloss over many of these small differences in detail. Wherever possible, it will try to articulate a collective Australian position, usually by referring to the draft legislation that was produced as part of a major law-reform project aimed at creating uniform succession acts for the Australian states and territories.²¹⁸

The Australian legislation also differs significantly from the United Kingdom legislation. It provides a major alternative model for reform to the statutory-will provisions of the *Mental Capacity Act 2005*.²¹⁹ The focus of the rest of this section is on the primary differences between the Australian and English approaches to statutory wills.

The first point of contrast to note is that all the Australian provisions are located in succession legislation,²²⁰ rather than in mental-health legislation. As a result, the Australian legislation is somewhat broader in application than the statutory-will provisions of the *Mental Capacity Act 2005*. Like the *Mental Capacity Act 2005*, the Australian legislation only applies to individuals who can be demonstrated to lack testamentary capacity.²²¹ But under the Australian acts it is not necessary for P also to have previously been determined to be incapable of managing his or her own affairs. This is at least a practical difference between the two approaches to statutory wills, but one commentator has gone further and hinted at it being a significant conceptual distinction that creates other differences in approach as well.²²²

Statutory-will applications in Australia are typically heard by the state's or territory's superior court of general jurisdiction—that is, by its equivalent to the Supreme Court of British Columbia. This is in contrast to England and Wales, where

217. See New South Wales: *Succession Act 2006* (NSW), ss. 18–26; Northern Territory: *Wills Act* (NT), ss. 19–26; Queensland: *Succession Act 1981* (Qld.), ss. 21–28; South Australia: *Wills Act 1936* (SA), s. 7; Tasmania: *Wills Act 2008* (Tas.), ss. 21–41; Victoria: *Wills Act 1997* (Vic.), ss. 21–30; Western Australia: *Wills Act 1970* (WA), ss. 39–48.

218. See Draft Wills Bill 1997, being Appendix A to New South Wales Law Reform Commission, *Report on Uniform Succession Laws: The Law of Wills*, NSWLRC Rep. no. 85 (Sydney: The Commission, 1998).

219. *Supra* note 189.

220. See *supra* note 217.

221. See Draft Wills Bill 1997, *supra* note 218, s. 21 (a).

222. See Croucher, *supra* note 187 at 695.

statutory-will proceedings are brought before a specialized mental-health tribunal, the Court of Protection. One Australian state does, however, extend concurrent jurisdiction to an administrative tribunal constituted to deal with guardianship and administration.²²³

The Australian legislation allows anyone at all to make an application for a statutory will for P. As a consequence of this, the Australian acts prescribe a two-stage process for statutory wills. The first stage involves obtaining the court's leave to bring an application for a statutory will. Contrast this approach with the English approach, which allows certain classes of people to bring the application as of right, and required only those not within the listed classes to obtain the court's leave. The Australian courts are authorized to fast-track appropriate cases—that is, “if [the court] is satisfied of the propriety of the application, [it may] allow the application for leave to proceed as an application to authorize the making, alteration or revoking of a will, and allow the application.”²²⁴

The Australian approach to the structure of the proceedings and the evidence that must be presented to the court is similar to that prescribed under the *Mental Capacity Act 2005*.²²⁵ The proceedings are highly structured and detailed, with the legislation describing precisely what sorts of evidence must be presented.²²⁶ The applicant must ensure that “adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the proposed testator.”²²⁷

The operative language of the various Australian acts differs in detail. The provision of the draft uniform act is a useful representative of the legislation. It authorizes the court to make an order if it is satisfied that “the proposed will, alteration or revocation is or might be one that would have been made by the proposed testator if he or she had testamentary capacity.”²²⁸ None of the Australian acts has language laying special emphasis on using the best interests of P as the leading criterion for deciding statutory-will cases. Many of the Australian cases decided after the coming into force

223. See *Wills Act 2008* (Tas.), ss. 29–41.

224. Draft Wills Bill 1997, *supra* note 218, s. 22 (f).

225. See, above, section IV.B.1 (b) at 53.

226. See Draft Wills Bill 1997, *supra* note 218, s. 20 (2).

227. Draft Wills Bill 1997, *ibid.*, s. 21 (e).

228. Draft Wills Bill 1997, *ibid.*, s. 21 (b).

of the various acts looked to Megarry VC's five principles²²⁹ and applied the doctrine of substituted judgment as the basis for their decisions on statutory wills.²³⁰ But a recent major case has questioned this approach, and called for the application of "an objective standard, *i.e.* what a reasonable person of testamentary capacity would have done in the circumstances."²³¹ The Australian jurisprudence appears to be in flux; it isn't clear at this moment whether it will develop along the lines of the English case law after the enactment of the *Mental Capacity Act 2005* or if it will continue to be guided in the main by the subjective, substituted-judgment approach, with the flexibility to turn to an objective standard where circumstances warrant it.²³²

If the application is successful, then the registrar of the court signs the statutory will and seals it with the seal of the court.²³³ The statutory will "is to be regarded as a valid will of [P]."²³⁴

3. OTHER JURISDICTIONS

While much of the focus of this chapter is on English and Australian legislation, it is worthwhile to note that a number of other common-law jurisdictions have a statutory-will procedure.

(a) *New Brunswick*

New Brunswick is the only jurisdiction in Canada to have a statutory-will procedure. The enabling provisions were enacted in 1994,²³⁵ as an amendment to the province's adult-guardianship statute.²³⁶

The New Brunswick statute is similar to the older English legislation, but it contains some eccentric drafting choices.²³⁷ For example, alone among the legislation discussed in this chapter, the New Brunswick act states its operative provision as a

229. See *Re. D. (J.)*, *supra* note 179 at 242–43.

230. See Croucher, *supra* note 187 at 681–89 (reviewing the leading Australian cases).

231. *Re Fenwick*, *supra* note 179 at para. 5, Palmer J.

232. See Croucher, *supra* note 187 at 694–95.

233. See Draft Wills Bill 1997, *supra* note 218, s. 24.

234. *Ibid.*, s. 26 (1).

235. See *An Act to Amend the Infirm Persons Act*, SNB 1994, c. 40, s. 3.

236. See *Infirm Persons Act*, RSNB 1973, c. I-8, ss. 3 (4), 11.1, 15.1, 39 (1), (5).

237. See Eric L. Teed & Nicole Cohoon, "New Wills for Incompetents" (1996) 16 E. & T. J. 1 at 2; *Report on the Creation of Wills*, *supra* note 205 at 35.

negative proposition: “[t]he power of the court to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person shall be exercisable in the discretion of the court where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent and making a will at the time the court exercises the power, would not have wanted.”²³⁸ This language could, in theory, have resulted in New Brunswick’s courts taking a distinctive approach in applying the statute. But the only reported judgment considering the legislation²³⁹ decided to follow Megarry VC’s five principles.²⁴⁰

(b) New Zealand

New Zealand has legislation authorizing its family court to make a statutory will for a person who is subject to a property order (this is roughly the equivalent of a British Columbia committee ship order).²⁴¹ The legislation applies only if it can be shown that P also lacks testamentary capacity. New Zealand’s provisions are somewhat spare. In general terms they authorize the family court to:

- direct that a testamentary disposition for P only be made by leave of the court;²⁴²
- cause inquiries to be made, to determine if a testamentary disposition that was made when P was incapable of managing his or her own affairs expresses the present desire and intention of P;²⁴³
- authorize the making of a statutory will for P.²⁴⁴

Although New Zealand’s legislation differs in some significant ways from the *Mental Capacity Act 2005*, the New Zealand courts have held that Megarry VC’s substituted-judgment approach applies to decisions under New Zealand’s legislation.²⁴⁵

238. *Infirm Persons Act*, *supra* note 236, s. 11.1.

239. *See Re M (Committee of)* (1998), 205 NBR (2d) 96, 27 ETR (2d) 68 (QB).

240. *See Re D. (J.)*, *supra* note 179 at 242–43.

241. *See Protection of Personal and Property Rights Act 1988* (NZ), 1988/4, ss. 54, 55.

242. *See ibid.*, s. 54 (2).

243. *See ibid.*, s. 54 (5).

244. *See ibid.*, s. 54 (6).

245. *See Re Manzoni*, [1995] 2 NZLR 498 at 505 (HC).

(c) California

California's legislation²⁴⁶ resembles the bare bones of the *Mental Capacity Act 2005*. The power to make a statutory will comes at the end of a long list of powers that a court has to make decisions for a person who lacks the capacity to manage his or her own affairs. The power to make a statutory will was added to this list in the mid-1990s.

Unlike the English and Australian legislation, California's provision does not even begin to spell out how the courts are to apply this power. California also seems to lack any body of case law developing principles for applying the legislation.

4. RANGE OF STATUTORY-WILL CASES

Before moving on to the issues for reform, it is worthwhile to note the range of cases in which statutory wills have played a part. The legislation does not put any particular limits on the cases in which it will be applied, but reported judgments (particularly in England and Australia) give a sense of the types of fact patterns that are particularly amenable to a statutory will. A leading English commentator has listed the following "situations where statutory wills are useful":

- [P] has remarried since he made his last will, which has therefore been revoked to the detriment of [P's] family. The results of an intestacy may be inappropriate.
- A property which is the subject matter of a specific legacy has been disposed of by the receiver²⁴⁷ and it may be inappropriate for the proceeds of sale to be preserved . . . especially if the value of the property is no longer proportionate to the value of the estate when the gift was made.
- An asset which is the subject matter of a gift has been disposed of by an attorney under an [enduring power of attorney]. . . .
- A legacy in an existing will has adeemed.
- An executor or principal beneficiary has predeceased [P] so that [P] is intestate. If a couple has no issue, the couple's assets will pass entirely to the survivor's next of kin.
- There has been a major change to [P's] circumstances or in his relationship with the beneficiaries in his will or those who would take on his intestacy.

246. See Cal. Prob. Code § 2580 (b) (13) (Deering 2013).

247. "Receivers" were appointed under the previous legislation (the *Mental Health Act 1983*); they were replaced by "deputies" under the *Mental Capacity Act 2005*. A receiver is roughly the equivalent of a British Columbia committee.

- [P's] existing will or his intestacy fails to make provision for persons for whom [P] might be expected to provide, and the result of not making a new will would be unjust. . . .²⁴⁸

At an extreme end of the range, Australia has seen some cases in which P's incapacity is apparently due to a violent attack from a spouse or family member, and the court has approved a statutory will to ensure that the attacker did not benefit from P's estate.²⁴⁹

Another consideration (one that is particularly apt for British Columbia) is the advent of registered disability savings plans. Funds may accumulate in an RDSP for the benefit of a person with diminished capacity. This beneficiary may lack the capacity to make a will, but may still have wishes about the disposition of the RDSP funds upon the person's death. A statutory will may be a way to ensure that those wishes are respected.

It is also worthwhile to bear in mind that P has tended to fall into one of two groups:

- "lost capacity cases"—"a case in which a person, having made a will, loses testamentary capacity and cannot make a later will or codicil in order to deal with changed circumstances . . .";
- "nil capacity cases"—"cases involving persons who have never had testamentary capacity, usually because of mental infirmity from an early age."²⁵⁰

C. Issues for Reform

This section begins by asking the threshold question of whether there should be statutory-will legislation in British Columbia. Then it moves on to issues connected with the design of such legislation. The discussion of these issues focusses on the

248. Martin Terrell, "Wills for Persons without Capacity" (2004) 154 New LJ 968 at 970.

249. See *Secretary, Department of Human Services v. Nancarrow*, [2004] VSC 450; *De Gois v. Korp*, [2005] VSC 326; *CPMA (Statutory Will)*, [2005] TASGAB 1. Another example of such a case is *Re Fenwick*, *supra* note 179. *Re Fenwick* decided two conjoined appeals. One of the appeals, *Re Charles*, concerned a child who had suffered severe and irreversible brain injury at the age of four months. The child's parents were strongly suspected of inflicting this injury, in a case of shaken-baby syndrome, but were ultimately never charged with a crime. But the child was placed in the care of the state. The child's estate consisted of an AUS\$50 000 victim's compensation award. The state, concerned that child's parents could inherit this award if the child died intestate, sought a statutory will benefiting the child's sister. The court granted the application (New South Wales's legislation explicitly authorizes the making of a statutory will for a minor).

250. *Re Fenwick*, *ibid.* at paras. 24–27.

major points of contrast between the English and the Australian approaches to statutory wills.

1. SHOULD BRITISH COLUMBIA ENACT LEGISLATION AUTHORIZING THE MAKING, MODIFYING, OR REVOKING OF A WILL FOR AN INDIVIDUAL WHO LACKS TESTAMENTARY CAPACITY?

Supporters of statutory-will legislation have advanced a number of policy rationales for the legislation. The major rationale is that such legislation provides an effective method for dealing with changing circumstances and other practical problems. As the list set out in the previous section shows,²⁵¹ there is a vast array of ways in which changing circumstances could call for intervention under this legislation. It would be difficult—if not impossible—for estate planning to anticipate and deal with all of these circumstances in advance of an individual's loss of testamentary capacity. For this reason, one leading English practitioner has described statutory-will legislation as creating “an extraordinarily useful jurisdiction.”²⁵² The legislation allows for the maintenance of the traditional test of testamentary capacity, supplemented by a procedure that helps to soften the occasional harsh result that may flow from the application of that test.

Another argument advanced by proponents of statutory wills is that such legislation “would greatly enhance the rights and dignity of persons with disabilities by enabling their property to be devised appropriately by having regard to their current situation.”²⁵³ In this view, a statute with proper protections and with a mechanism to allow the views of P to be listened to and taken into account would allow P a heightened degree of autonomy in comparison to the current law. The test of capacity would become less of a barrier to P's ability to exercise some control over his or her affairs.²⁵⁴

A related argument could be made in connection with article 12 of the UN Convention on the Rights of Persons with Disabilities. Canada has ratified this convention. Article 12 calls for states parties to the convention to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”

251. See, above, section IV.B.4 at 61.

252. Terrell, *supra* note 248 at 968.

253. *Wills for Persons Lacking Will-Making Capacity*, *supra* note 216 at para. 2.4.

254. See Croucher, *supra* note 187 at 697 (“Where the person lacks capacity, he or she lacks the ability to exercise that autonomy to make decisions—including about their property on death. The statutory will-making power, by allowing a court to step into a person's place, can be seen to be giving back that autonomy, though exercised by a judge.”).

and to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Commentators have argued that this language heralds “a profound shift in the law of legal capacity,”²⁵⁵ which would move the law’s emphasis from assessing mental capacity to designating supportive procedures that would allow for the exercise of legal capacity.²⁵⁶ Both case law and commentary have said that statutory²⁵⁷ and common-law²⁵⁸ capacity tests and concepts are due for revision in light of the demands of article 12. Although no one is on the record as saying that enacting a statutory-will procedure would, by itself, fulfill article 12’s call for enhanced supportive decision-making, it is not hard to see how enacting such legislation would be at least a step toward bringing traditional rules into line with the convention.

Critics of statutory-will legislation tend to have a dramatically different view of the effect of such legislation. Much of the opposition to statutory wills seems to be grounded in a sense that this type of legislation represents an overreach for the courts, or “a euphemism for a radical mode of compulsory property distribution from the estates of persons who were vulnerable to legal process in their lifetimes.”²⁵⁹ Statutory-will legislation is seen as an assault on one of the bedrock principles of succession law: testamentary freedom, the idea that a person should be free to dispose of his or her property on death without state interference.²⁶⁰ In the eyes of some critics, the legislation in effect discriminates against P, because it deprives P of the freedom afforded to persons who have testamentary capacity.²⁶¹

255. Bach & Kerzner, *supra* note 73 at 58.

256. *Ibid.*

257. *See ibid.* at 67 (“On their face, mental capacity statutory provisions which articulate cognitive tests for having one’s legal capacity recognized and protected appear to be in violation of the CRPD.”).

258. *See Nicholson, supra* note 75 (revising concept of testamentary undue influence in light of art. 12).

259. Neville Crago, “Reform of the Law of Wills” (1995) 25 UWA L. Rev. 255 at 260.

260. *See Croucher, supra* note 187 at 674 (noting that for critics “the very idea of statutory wills went to the heart and soul of testamentary freedom”); Teed & Cohoon, *supra* note 237 at 3 (“Is this not another example of the ‘Big Brother’ syndrome where the state can interfere with the discretion of the individual without the individual’s knowledge? To what extent should the state continue to interfere with the individual? What next? In the writers’ opinion, this is a bureaucratic enactment of control without justification and, as such, subject to dangerous development by the courts.”).

261. *See Teed & Cohoon, ibid.* at 2 (“It is ironic that if a mentally competent person chooses not to make a will, so be it. However, if the person is mentally incompetent, the law has now created a substitute will-making power given to another person, albeit a judge.”).

Other critics have focussed less on the effect of the legislation on P and more on how statutory wills fit into general succession legislation. Their argument is that statutory wills can be seen as undermining the general legislation. In this view, the provincial legislature has already decided on the consequences of dying without a will or with a will that makes insufficient provision for family members. These general results should prevail over the court's attempt to remake a specific estate plan.²⁶²

Finally, critics of statutory wills have pointed out that such a major change in the law should enjoy a groundswell of support. But it has been close to 20 years since New Brunswick enacted its legislation and no other jurisdiction in Canada has seen fit to follow its lead. Further, the Alberta Law Reform Institute recently considered a statutory-will proposal and declined to move on it, in part due to the lack of enthusiasm shown by respondents in a public consultation.²⁶³

Respondents to the consultation paper were sharply divided on this issue. A majority favoured the proposal to enact statutory-will legislation. But opinions on this issue were more polarized than was the case for most of the other issues for reform raised in the consultation paper.

Respondents who supported the proposal tended to be strongly in favour of it. One respondent referred to the enactment of statutory-will legislation as "an important equity issue." Another went further and said that "[l]egislation enabling the creation and changing of a statutory will is one of the most progressive steps that could be achieved in any modernization of estate law in BC."

Respondents who opposed the proposal also tended to have engaged deeply with the issue. They often provided detailed explanations of their concerns and, in one case, gave the committee an alternative proposal to consider.

262. See Crago, *supra* note 259 at 260. See also *Report on the Creation of Wills*, *supra* note 205 at 37 (Noting "the view that the statutory laws of intestacy and dependents relief already represent society's considered legal response to situations where a person does not have a will (for whatever reason) or where the will or intestacy laws do not adequately provide for a dependent relative. This view argues that the integrity of these statutory safety nets should be preserved without special treatment for a certain class of persons (those without testamentary capacity) whose estates are then handled by alternative means.").

263. See *ibid.* at 38–39.

This alternative proposal called for, in the place of statutory-will procedure, a single amendment to the *Wills, Estates and Succession Act*²⁶⁴ that would address “the scenario where a person who is responsible for the death or incapacity of an individual takes under their existing will or on intestacy.” The court would be authorized to make a declaration in these circumstances, which would have the effect of ensuring that the attacker did not take any property under the person’s will or upon the intestate distribution of the person’s estate.²⁶⁵

In the committee’s view, this alternative proposal would not make an adequate substitution for a statutory-will procedure, which would be useful in a number of other situations. But the alternative proposal is an interesting idea in its own right. Its adoption would not conflict with a statutory-will procedure. It would be worthwhile to consider the alternative proposal for further study, as a possible discrete amendment to the *Wills, Estates and Succession Act*.

The committee gave this threshold issue and all responses to it careful consideration. The committee ultimately decided that British Columbia should enact legislation authorizing statutory wills. This legislation will create a useful remedy that could help people with diminished capacity and their families avoid hardships. With the advent of registered disability savings plans, and other developments, more and more people with diminished capacity are holding valuable assets. The legal system should respond to these developments and provide a supportive estate-planning procedure in these circumstances.

The committee recommends:

6. *British Columbia should enact legislation authorizing the making, modifying, or revoking of a will for a person who lacks testamentary capacity.*

2. TO WHOM SHOULD BRITISH COLUMBIA’S STATUTORY-WILL LEGISLATION APPLY?

This issue concerns the scope of the legislation. It is clearly undesirable for statutory-will legislation to have a general application. People with testamentary capacity

264. *Supra* note 10 (in force 31 March 2014).

265. See Canadian Bar Association (BC Branch), Wills and Trusts Section, Response to *Consultation Paper on Common-Law Tests of Capacity* (unpublished, archived with the British Columbia Law Institute) at 3 (“On application, the court may make a declaration that for the purposes of inheritance, a person who has been criminally convicted of causing harm to another person resulting in the loss of capacity or death of that person shall be presumed to have predeceased that person. Such an application may be brought by any person who would take under a testamentary instrument or on intestacy, or by the Public Guardian and Trustee (PGT) in the case where the person who caused the harm is the sole beneficiary of the harmed person’s estate.”).

do not need to use a statutory-will process and should not be subject to applications under it. The legislation should only apply to a limited group.

The models for reform discussed in the first part of this chapter all use testamentary capacity as a limiting factor for the scope of the legislation. As part of the application for a statutory will the applicant must produce evidence that shows that P lacks testamentary capacity. This appears to be a sensible approach. It directly addresses the heart of the matter, and it is in tune with the modern functional approach to mental capacity.

The issue, then, really is whether testamentary capacity should stand alone as the limiting factor for the scope of the legislation or if another factor should be added. The Australian acts all rest on testamentary capacity alone. But England and Wales, New Brunswick, and New Zealand all take a different approach. Under those jurisdictions' legislation, in addition to lacking testamentary capacity, P must also be subject to an order that P is incapable of managing himself or herself or his or her affairs.²⁶⁶

The advantage of this double-barreled approach is that it places statutory-will provisions within a well-developed and sophisticated legal framework (this is especially the case in England and Wales), which has general tools and policies for the protection of persons lacking mental capacity. This approach could provide another layer of support for P.

The disadvantage of locating statutory-will provisions within the adult-guardianship system is that, in British Columbia, that system lacks much of the legislative sophistication and many of the policies and institutions (such as a specialized tribunal) that are found in England and Wales. Further, efforts to reform adult guardianship in this province have been slow moving. It is not clear that an added requirement that P be subject to an order placing P within the adult-guardianship system would provide much in the way of additional protections or benefits for P. British Columbia's experience may be closer to Australia's, which located statutory-will provisions in reformed and comprehensive succession legislation.

So the resolution of this issue is also probably of a piece with a larger view of statutory-will legislation. One's views on it are likely guided by whether one sees statutory wills as part of mental-health legislation or as part of wills-and-estates legisla-

266. See *Patients Property Act*, *supra* note 5, s. 4 (British Columbia equivalent of such an order). See also, below, section VIII.B.1 at 125 (further discussion of committee orders under the *Patients Property Act*).

tion. In the committee's view, British Columbia's statutory-will legislation should only apply to people who do not have the capacity to make a will. Adding a second requirement of obtaining a committee order would amount to placing an unneeded barrier to using the legislation.

The committee recommends:

7. British Columbia's statutory-will legislation should only apply to persons who lack testamentary capacity.

8. British Columbia's statutory-will legislation should not require that the person who lacks testamentary capacity may only obtain a statutory will if that person is also subject to an order declaring that the person is incapable of managing himself or herself or his or her affairs.

3. WHAT PUBLIC INSTITUTION, BODY, OR INDIVIDUAL SHOULD HAVE DECISION-MAKING AUTHORITY UNDER BRITISH COLUMBIA'S STATUTORY-WILL LEGISLATION?

Existing statutory-will legislation effectively gives two answers to the question of who is ultimately responsible for making decisions about statutory wills. The Australian approach is to vest decision-making authority in the state's or territory's superior court of general jurisdiction. New Brunswick also vests this authority in its Court of Queen's Bench (but it appears to be exercised by that court's family division). New Zealand's legislation is overseen by its family court, which is a division of the country's district court. Each of these cases represents the equivalent of placing decision-making authority for statutory wills in the hands of a judge of the British Columbia Supreme Court.

England and Wales, on the other hand, make statutory wills the responsibility of a specialized court that deals with adult-guardianship matters generally, the Court of Protection. Tasmania also follows this approach, after a fashion, by giving concurrent jurisdiction for statutory wills to a specialized guardianship administrative tribunal.

Since British Columbia lacks a specialized guardianship court or tribunal, and since it is unlikely that such an institution would be created simply to implement statutory-will legislation, the default choice that emerges from this review of the existing models of statutory-will legislation is to vest responsibility for decision-making under that legislation with the supreme court. This court would clearly have the capacity and the expertise to deal with statutory-will cases, as it is the decision-maker on testamentary capacity and other wills-and-estates matters in this province. The

downside of vesting authority in the supreme court would be the general point that supreme-court litigation tends to be expensive, adversarial,²⁶⁷ and time consuming.

Respondents to the consultation paper tended to agree with the committee's proposals regarding the details of a statutory-will system, except in the case of this issue. While a majority supported the committee's tentative recommendation, several respondents questioned whether the supreme court is the best forum for statutory-will proceedings. These respondents were particularly concerned about the cost of litigation in the supreme court, and with the potential for such litigation to develop an adversarial character.

Nevertheless, the committee sees no practical alternative to vesting decision-making authority on statutory wills in the supreme court. It is unrealistic to expect the creation of specialized tribunal to support this procedure, and other alternative dispute resolution procedures have no track record when it comes to statutory wills.

The committee recommends:

9. British Columbia's statutory-will legislation should vest the power to make, modify, or revoke a will for a person who lacks testamentary capacity in the supreme court.

4. WHO SHOULD BE ALLOWED TO APPLY DIRECTLY FOR AUTHORIZATION OF A STATUTORY WILL?

The resolution of this issue will have a considerable impact on the design of statutory-will legislation. The choices are represented by the Australian approach, which does not allow anyone to apply as of right for a statutory will, and the English approach, which does allow certain classes of people to make a direct application to the Court of Protection for a statutory will.

Australian legislation actually has a liberal rule on who may apply for a statutory will—it allows anyone to be the applicant. This reflects the fact that it can be difficult to know ahead of time for every possible case just who might be the person best placed to seek a statutory will for P. The best applicant could, for example, be a care-

267. See *Re Fenwick*, *supra* note 179 at para. 132, Palmer J. (Describing the statutory-will procedure in the New South Wales Supreme Court as “a remedial and protective jurisdiction [that] is, accordingly, not governed by the rules of adversarial litigation. In other words, the Judge is not a referee; rather, the Judge is to endeavour to rectify a problem which is affecting people's lives, in the best possible way.”).

giver who is not related to P and who expects no benefit from P's estate.²⁶⁸ The price paid for this flexibility is that the applicant is not able to apply directly to the court for an order. Rather, the applicant must first obtain the court's leave to apply. This creates a two-stage process. The first stage is necessary to ensure that frivolous, vexatious, or abusive proceedings do not progress to the final application stage.²⁶⁹ It does appear to result in a longer, more expensive process, but these concerns are mitigated to a degree by giving the court the power to fast track certain cases.

The other approach would be to follow England and Wales's lead and designate certain classes of people who may as of right apply for a statutory will. For example, in British Columbia these classes could embrace the following people:

- P;
- P's attorney acting under an enduring power of attorney;
- P's representative acting under a representation agreement;
- P's committee;²⁷⁰
- a person who, under any known will of P or under P's intestacy, may become entitled to any of P's property or an interest in it;
- a person whom P might be expected to benefit if P had capacity, including a person with a claim under the *Wills Variation Act*;
- the public guardian and trustee.

Anyone else who wished to apply would need to obtain the court's leave. This approach should allow for a faster, less-expensive process in most cases. But it does not directly address the concern about frivolous or vexatious applications. Such an application could conceivably come from someone within the listed classes.

The committee favoured restricting eligibility to apply for a statutory will to a limited class of people. It was concerned that an open-ended approach would drive up

268. See *Wills for Persons Lacking Will-Making Capacity*, *supra* note 216 at para. 2.9 ("Solicitors, social workers and health care workers who may be closely involved with the person should be entitled to make applications.").

269. See *Hoffmann v. Waters*, [2007] SASC 273 at para. 10, DeBelle J. ("This requirement has been included to provide a process by which to screen out baseless or unmeritorious applications and, in particular, baseless claims that a person lacks testamentary capacity." [citations omitted]).

270. See, below, section VIII.B.1 at 125 (further discussion of committees under the *Patients Property Act*).

the costs of applying for a statutory will and could also present opportunities for exploitation and fraud.

The committee recommends:

10. British Columbia's statutory-will legislation should allow the following persons to apply for a will to be made, modified, or revoked on behalf of a person who lacks testamentary capacity: (a) the person who lacks testamentary capacity; (b) the person's attorney acting under an enduring power of attorney; (c) the person's representative acting under a representation agreement; (d) the person's committee; (e) anyone who, under any known will of the person or under the person's intestacy, may become entitled to any of the person's property or an interest in it; (f) anyone whom the person might be expected to benefit if the person had capacity, including anyone with a claim under wills-variation legislation; (g) the public guardian and trustee.

5. WHO SHOULD RECEIVE NOTICE OF AND BE ENTITLED TO PARTICIPATE IN A STATUTORY-WILL PROCEEDING?

There are essentially three classes of people who should be considered for notice of a statutory-will proceeding.

The first class embraces people who may have a financial or other interest in P's estate. This group is identified in a practice direction set out under the English legislation as comprising the following people:

- any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application;
- any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and
- any prospective beneficiary under P's intestacy where P has no existing will.²⁷¹

Although it may add to the cost and complexity of proceeding under the legislation, it is likely worthwhile to have a broad rule in place for this class, both as a safeguard against abuse under the legislation and to ensure that the decision-maker is fully informed of all relevant facts.

The next class to consider is P himself or herself. At first glance, it seems obvious to include P, since the statutory will has a direct impact on P's interests.²⁷² But some

271. See Practice Direction 9F, *supra* note 200, at para. 9.

jurisdictions have taken a more discretionary approach. For example, the procedure in England and Wales directs the Court of Protection to “consider at the earliest opportunity whether P should be joined as a party to the proceedings.”²⁷³ This approach appears to be an implicit acknowledgement of practical difficulties that may be present in ensuring the participation of a person who lacks testamentary capacity.

The third class that sometimes has rights to notice and participation is a public official who can act to protect the rights of P. For example, the procedure in England and Wales directs the Court of Protection to consider “whether the Official Solicitor should be invited to act as a litigation [guardian]” for P, if P is joined as a party to the proceedings.²⁷⁴ This approach could be taken further, by ensuring that the official is notified of each proceeding under the legislation and given the right to participate, if it decides that it wishes to participate.²⁷⁵ Taking this approach would add another valuable safeguard to the legislation. But it could also place a burden on the resources of the official, who would have to review applications under the legislation and decide whether or not to participate in the proceedings.

The committee favoured a broad approach to notice of a statutory-will proceeding, as it provides an additional safeguard against abuse.

The committee recommends:

11. British Columbia’s statutory-will legislation should provide for notice to and a right to participate for: (a) any beneficiary under an existing will of the person who is the subject of the application or under the proposed will of the person who is the subject of the application who is likely to be materially or adversely affected by the application; (b) if the person has no will, any prospective intestate successor of the person who is the subject of the application in existence at the time of the application who is likely to be materially or adversely affected by the application; (c) anyone whom the person might be expected to benefit if the person had capacity, including anyone with a claim under wills-variation legislation; (d) if the person has a life-insurance policy or benefit plan, any beneficiary under the policy or plan; (e) the person who is the subject of the application; (f) the public guardian and trustee; (g) any other person that the court directs.

272. See *Report on Wills for Persons Lacking Will-Making Capacity*, *supra* note 216 at para. 2.10.

273. See Practice Direction 9F, *supra* note 200, at para. 10.

274. *Ibid.*

275. See *Report on Wills for Persons Lacking Will-Making Capacity*, *supra* note 216 at paras. 2.12–2.13.

6. WHO SHOULD EXECUTE A STATUTORY WILL?

England and Wales and Australia provide two different answers to the question of who should execute a statutory will. In England and Wales, the court orders that the applicant execute the draft will that was part of the application made on behalf of P. In Australia, the court's registrar signs the will and places it under the seal of the court. So statutory wills in Australia are essentially court-ordered wills.

The committee preferred the approach taken in England and Wales. If the will is embodied in a court order, then this could potentially cause confusion. It is worthwhile to foreclose this possibility.

The committee recommends:

12. British Columbia's statutory-will legislation should provide that a statutory will be executed by the applicant, on behalf of the person who lacks testamentary capacity, at the direction of the court.

7. SHOULD BRITISH COLUMBIA'S STATUTORY-WILL LEGISLATION ADOPT A BEST-INTERESTS STANDARD FOR DECISION-MAKING?

Most statutory-will legislation uses operative language similar to that found in the *Mental Capacity Act 2005*, which authorizes the Court of Protection to "make any provision . . . which could be made by a will executed by P if he had capacity to make it."²⁷⁶ This language has been seen as authorizing a highly subjective, substituted-judgment form of decision-making. When England and Wales adopted an overarching best-interests criterion for the *Mental Capacity Act 2005* as a whole, the courts responded by moving toward an objective, balance-sheet approach to decision-making. So in resolving this issue it is important to bear in mind that what is likely at stake is the selection of the criterion that will guide how statutory-will cases are decided.²⁷⁷

Enshrining a best-interests criterion as the guiding principle of statutory-will legislation would, in all likelihood, align British Columbia with recent developments in English jurisprudence.²⁷⁸ This could be seen a positive light, as it might make the move to a statutory-will procedure less fraught with uncertainty if one could tie it to the experience and jurisprudence in England and Wales. A best-interests criterion would also set a suitably high standard of decision-making, which may allay any

276. *Mental Capacity Act 2005*, *supra* note 189, sch. 2, s. 2.

277. *See Report on Mental Incapacity*, *supra* note 188 at para. 3.24.

278. *See Re P*, *supra* note 179; *Re M*, *supra* note 179; *Re D*, *supra* note 179.

concerns about a statutory-will procedure being used a vehicle for abuse or exploitation of P. Finally, as demonstrated in recent English and Australian case law, a best-interests standard may be the only workable standard when the statutory-will application involves a person with nil capacity, that is someone who has never been able to express any testamentary wishes.²⁷⁹

But some commentators have expressed reservations about the adoption of a best-interests standard for statutory wills. The concept can be seen as an idea from adult-guardianship law that would be a jarring alien import into the law of wills and estates. In the words of one critic, “the introduction of a concept of ‘best interests’ into the wills arena does not sit comfortably with its conceptual history and theoretical underpinnings.”²⁸⁰ In this view, a subjective, substituted-judgment approach is likely to be more respectful of P’s wishes and testamentary freedom. Directing the court to make decisions based on its sense of P’s best interests could give the court too much say over the disposition of P’s property.

Finally, it should be noted that even staunch supporters of the best-interests approach concede that it does not need to be starkly opposed to the substituted-judgment approach.²⁸¹ It may be possible to finesse this issue in any number of ways. For instance, one approach would be to have the legislation set out a list of factors that should be considered in statutory-will cases.²⁸² A best-interests standard could be one factor on this list. Such an approach could allow nil-capacity cases to be decided on the basis of P’s best interests and lost-capacity cases to be guided by a closer examination of P’s previously expressed testamentary wishes.

The committee favoured an approach that would emphasize subjective decision-making. This approach would be more in tune with traditional considerations in will drafting and interpretation. It would also place more emphasis on individual autonomy than would be found under a best-interests standard.

The committee recommends:

13. British Columbia’s statutory-will legislation should adopt a subjective standard of decision-making, which emphasizes the importance of respecting any testamentary wishes expressed by the person who lacks testamentary capacity.

279. See *Re Fenwick*, *supra* note 179.

280. Croucher, *supra* note 187 at 695.

281. See *Report on Mental Incapacity*, *supra* note 188 at para. 3.25.

282. See *Report on Wills for Persons Lacking Will-Making Capacity*, *supra* note 216 at para. 2.29.

8. SHOULD A STATUTORY WILL BE SUBJECT TO REVISION UNDER BRITISH COLUMBIA'S WILLS-VARIATION LEGISLATION?

It might be surprising at first glance that a statutory will could be subject to British Columbia's wills-variation legislation.²⁸³ It can seem like a terrible waste of resources to go through an extensive process to make a statutory will, only to have that will's provisions subsequently revised in a wills-variation proceeding.²⁸⁴ Nevertheless, Australian and English statutory-will legislation does provide that a statutory will is subject to revision under those jurisdictions' equivalent of British Columbia's *Wills Variation Act*.

The reason for this is likely a desire to ensure that statutory-will proceedings remain tightly focussed on the issues raised by the legislation. Practitioners in England have cautioned against using statutory-will legislation as a means to cure unrelated defects in estate planning.²⁸⁵ Further, a lengthy amount of time may pass between the making of a statutory will and P's death. So wills-variation issues may only arise sometime after the statutory-will proceeding. Pre-empting wills-variation proceedings by means of a statutory will could lead to unfair results.

The committee recommends:

14. *A statutory will should be subject to variation under British Columbia's wills-variation legislation.*

D. Postscript: Application of Statutory-Will Legislation to Individuals Who are Younger than the Statutory Age at Which an Individual Becomes Legally Capable to Make a Will

All jurisdictions in the common-law world have legislation establishing a minimum age at which an individual is legally capable to make a will. In British Columbia, the *Wills Act* sets this minimum age at 19 years.²⁸⁶ The *Wills Act* also contains two excep-

283. See *Wills Variation Act*, *supra* note 8. See also *Wills, Estates and Succession Act*, *supra* note 10, ss. 60–72 (in force 31 March 2014).

284. See *Re Fenwick*, *supra* note 179 at para. 194 (“It would produce needless and wasteful litigation to authorize a statutory will which was bound to provoke a successful claim under the family provision legislation. . . . The policy of the law is to quell disputes, not to create them.”).

285. See *Terrell & Bacon*, *supra* note 178 at 2 (“the jurisdiction should not be abused to resolve disputes over a will made in the testator’s lifetime”).

286. RSBC 1996, c. 489, s. 7 (1).

tions to its general rule. If the individual is or has been married²⁸⁷ or is a member of the Canadian forces on active service,²⁸⁸ then the individual may make a valid will, even though the individual is younger than 19 years. The *Wills, Estates and Succession Act* will, when it comes into force, lower the statutory age to 16 years.²⁸⁹

The legislation in force in some of Australia's states expressly empowers the states' courts to authorize statutory wills for children who lack the mental capacity to make a will.²⁹⁰ Most Australian succession acts also contain a parallel process in which the court may authorize a statutory will for a child for whom there is no issue over mental capacity.²⁹¹

The rationale for empowering the court to make a statutory will for any incapable individual, regardless of the individual's age, is that it would give the court greater flexibility to grant a remedy in cases that would otherwise yield a harsh or unfair result. A child may have been injured in an intentional attack or through the negligence of someone and may now have a sizable estate due to a damage award. Yet it may be inappropriate for that estate to go on intestacy to the child's parent, if (for example) the parent is responsible for the injury or "the parent has deserted the family."²⁹² It may be no answer in some cases to say that the application can simply be brought after the child reaches the statutory age, as the evidence may be clear that the child cannot be expected to live to that age. Since these types of cases bear directly on the reasons for having a statutory-will procedure in the first place, it may be frustrating if that procedure were not available due to an age requirement. With an eye to these examples, the New South Wales Law Reform Commission, in its report on uniform succession legislation for Australia, concluded "[t]here is no reason why the jurisdiction [to authorize a statutory will] should be denied merely because the person is a minor."²⁹³

287. *Ibid.*, s. 7 (1) (a).

288. *Ibid.*, s. 7 (1) (b). See also *ibid.*, s. 5.

289. *Supra* note 10, s. 36 (2) (in force 31 March 2014). Note that the *Wills, Estates and Succession Act* preserves the exception for members of the Canadian forces on active service but does not carry forward the exception for individuals who are or have been married. See *Wills, Estates and Succession Act*, *ibid.*, s. 38 (1) (in force 31 March 2014).

290. See, e.g., *Succession Act 1981* (Qld.), s. 21 (7) (defining "person without testamentary capacity" to include a minor). But see *Wills Act 1970* (WA), s. 40 (2) (b) (providing that court may authorize statutory will only if "person concerned" "has reached the age of 18 years").

291. See, e.g., *Succession Act 1981* (Qld.), s. 23; *Wills Act 1997* (Vic.), s. 20.

292. *Report on Uniform Succession Laws: The Law of Wills*, *supra* note 218 at para. 5.33.

293. *Ibid.*

This issue is difficult both in terms of the policy questions involved and because it is tied up with issues related to legal capacity and age that are outside the mandate of this project committee. Although the committee considered the issue extensively, it decided that it should not make a recommendation in respect of this issue, as it would be straying from the project's mandate if it did so. This postscript is included to stimulate further discussion of this issue, which may be worthy of consideration for reform in its own right.

CHAPTER V. CERTIFICATION OF TESTAMENTARY CAPACITY BEFORE THE DEATH OF THE TESTATOR

A. Introduction

The existence of a test of capacity to make a will breeds estate litigation. While this fact alone was not enough to cause the committee to propose the elimination of the test of capacity, the committee did examine in detail a mechanism that has been used in other jurisdictions that may reduce needless estate litigation. This mechanism is a procedure to certify conclusively that a testator has testamentary capacity at the time that the will is executed.²⁹⁴

For the sake of economy of language, this chapter will follow the convention in legal writing about this subject and refer to the process of certifying a person's testamentary capacity before that person's death as *antemortem probate*.

B. Background

1. INTRODUCTION

British Columbia does not have antemortem-probate legislation, nor does any other jurisdiction in Canada. It is also not found in the United Kingdom, Australia, or New Zealand. But the United States has long had experience with antemortem probate, stretching back to the nineteenth century. This part of the chapter examines that experience, along with some academic proposals for reform, with the goal of extracting information that may be useful in considering possible reforms for British Columbia.

2. MICHIGAN'S ANTEMORTEM-PROBATE LEGISLATION

Michigan enacted an antemortem-probate statute in 1883.²⁹⁵ But this early attempt to create a workable antemortem-probate system ended up being less a model for reform and more a cautionary tale.

294. See *Banton v. Banton* (1998), 164 DLR (4th) 176 at para. 162, 66 OTC 161 (Gen. Div.), Cullity J. [*Banton*] (Canadian judge calling for a modified antemortem-probate procedure to be created by extending existing jurisdiction under Ontario's *Substitute Decisions Act*), *aff'd* (2001), (*sub nom. Banton v. CIBC Trust Corp.*) 53 OR (3d) 567, 197 DLR (4th) 212, *leave to appeal to SCC refused*, [2001] SCCA No. 242 (QL).

295. See 1883 Mich. Pub. Acts 17.

In 1885, the Michigan Supreme Court struck down the act, declaring it unconstitutional.²⁹⁶ The case concerned the use of the antemortem-probate procedure to certify a will that attempted to disinherit one of the testator's sons and his wife.²⁹⁷ Chief Justice Cooley, who delivered the court's lead judgment, noted two bases on which the statute was invalid: "(1) it enabled the testator to avoid the rights of a spouse and child; and (2) it failed to provide for finality of judgment."²⁹⁸ The first ground was primarily concerned with notice, while the second was based on the testator's ability to modify or revoke a will that had been granted antemortem probate.

The Michigan statute did not contain any express notice provision. Instead, it called for a testator simply to file in the county court a petition with the will annexed.²⁹⁹ The petition was to list "the names and addresses of every person who at the time of making and filing the same would be interested in the estate of the maker of such will as heir. . . ."³⁰⁰ The court was then to issue citations to those listed people and publish notice of a hearing of the petition.³⁰¹ Cooley CJ was concerned that this system left too much risk that a spouse would not receive notice of the proceeding.³⁰² Further, even if the spouse learned of the proceeding, no provision was made for the testator's spouse to be heard from in the hearing.³⁰³ It was argued on behalf of the testator that a spouse was always free to contest a will granted antemortem probate by commencing an action after the testator's death under Michigan's family-provision statute, but the court held that this was not an adequate reason to deny a spouse notice of and standing in the antemortem-probate hearing.³⁰⁴

296. See *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 NW 28 (1885) [*Lloyd* cited to NW].

297. *Ibid.* at 28.

298. Aloysius A. Leopold & Gerry W. Beyer, "Ante-Mortem Probate: A Viable Alternative" (1990) 43 Ark. L. Rev. 131 at 153.

299. See 1883 Mich. Pub. Acts 17, s. 1. The petition was to "contain averments that such will was duly executed by the petitioner without fear, fraud, impartiality, or undue influence, and with a full knowledge of its contents, and that the testator is of sound mind and memory and full testamentary capacity . . ." (*ibid.*, s. 2).

300. *Ibid.*, s. 2

301. See *ibid.*, s. 3.

302. See Howard Fink, "Ante-mortem Probate Revisited: Can An Idea Have a Life After Death?" (1976) 37 Ohio State LJ 264 at 269 (speculating that this conclusion was due to the spouse "not [being] considered to be included in those who would take *as heir* if the testator died intestate" [emphasis in original; footnote omitted]).

303. See *Lloyd*, *supra* note 296 at 28–29.

304. *Ibid.*

Nothing in the Michigan statute prevented a testator from modifying or revoking a will that had been granted antemortem probate. This raised more concerns for Cooley CJ.³⁰⁵ If the will could be modified or revoked, then it was felt that the process did not lead to a final judgment. So it was premature to ask the court to make a ruling.³⁰⁶

In a concurring judgment, Campbell J. cast some doubts on broader issues with antemortem-probate legislation. Notably, he pointed to the potential for such legislation to stir up family discord.³⁰⁷

3. ACADEMIC MODELS FOR ANTEMORTEM-PROBATE LEGISLATION

(a) *Introduction*

Interest in antemortem probate waxed and waned from the 1890s to the 1970s.³⁰⁸ There was a burst of academic interest in the late 1970s, which produced three models for reform that were designed to remedy the flaws that were discovered in the Michigan legislation. These academic models provide a blueprint for modern and workable antemortem-probate legislation.

305. *Ibid.* at 29. Campbell J.'s concurring judgment is even more explicit on this point. *See ibid.* at 29 ("[I]nasmuch as the statute only makes the decree effective in the single case of the establishment of the will and subsequent death without revocation or alteration, and leaves it open to the testator to make any subsequent arrangement which he may desire . . . the proceeding is still more anomalous. I am disposed to think . . . that this is not in any sense a judicial proceeding. . ."), 31 ("The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his heirs.").

306. This aspect of the judgment turns in part on a feature of nineteenth-century American jurisprudence that may be somewhat alien to twenty-first-century British Columbia law. In basic terms, the American courts in the nineteenth century believed that they did not have the jurisdiction to issue a declaratory judgment. As one commentator explained, "reliance was placed on the controlling law of the time which set forth the prerequisite of a 'case or controversy' before judicial power could be invoked. . . . [D]eclaratory judgments were considered to be outside the realm of judicial competence." *See* Leopold & Beyer, *supra* note 298 at 155.

307. *See Lloyd, supra* note 296 at 30 ("It is a singular, and in my judgment, a very unfortunate spectacle to see a man compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases.").

308. *See* Daniel H. Redfearn, "Ante-Mortem Probate" (1933) 38 Com. LJ 571; David F. Cavers, "Ante Mortem Probate: An Essay in Preventative Law" (1934) 1 U. Chi. L. Rev. 440.

(b) Contest Model

Under the contest model, antemortem probate is structured as an adversarial court proceeding. In effect, the model “accelerate[s] the contest [potential litigation over the testator’s capacity] into the testator’s lifetime.”³⁰⁹

Once a will is executed, if a testator wishes to obtain antemortem probate, then the testator must apply to court for a declaratory judgment.³¹⁰ The testator is required to serve “all those named as beneficiaries under the will and all those who would take by intestate succession should the will be declared invalid and the testator die presently.”³¹¹ These people would all become opposing parties in the antemortem-probate application.

A potential problem with this approach is that, if a long period of time passes between the proceeding and the testator’s death, there is a good chance that “[a] wholly different array of intestate successors might be in existence at the time of the testator’s death than were parties to the ante-mortem proceeding.”³¹² The model addresses this problem by providing for the appointment of a litigation guardian to “protect those future interests.”³¹³ The model also provides that those later intestate successors would be bound by the outcome of the proceedings.³¹⁴

The hearing focusses on whether the testator has testamentary capacity, is free from undue influence, and has executed the will in accordance with the required formalities. If the testator satisfies the court on these points, then “a judgment would be entered. . . . [and] the will would then be placed on file with the court.”³¹⁵ If the testator subsequently wished to modify or revoke a will that had been granted antemortem probate, the testator would have to go through the antemortem-probate process once again.³¹⁶

309. See John H. Langbein, “Living Probate: The Conservatorship Model” (1978) 77 Mich. L. Rev. 63 at 73.

310. See Fink, *supra* note 302 at 275.

311. *Ibid.*

312. *Ibid.* at 286.

313. *Ibid.*

314. *Ibid.*

315. *Ibid.* at 276.

316. See *ibid.* In response to the “risk that disgruntled losers of the former judgment would threaten to drag the testator through repeated court battles every time he wanted to change his will,” Prof. Fink noted that “to the extent that issues which had been determined in a prior declaratory

(c) *Conservatorship Model*

Like the contest model, the conservatorship model draws its inspiration from court proceedings. The distinction between the two models lies in the choice of proceedings that inspired the model. The contest model draws on postmortem wills litigation. The conservatorship model draws on adult-guardianship proceedings, “adapting a long-established procedure for determining the competence of the living that has been constructed with due regard for the interests of the person whose property is at stake, his relatives, and others.”³¹⁷

Under the conservatorship model, “[t]he testator would petition the court [in this province, the British Columbia Supreme Court] that now makes capacity determinations in conservatorship and guardianship cases [*i.e.*, in British Columbia, commitment cases] for a declaration that he possesses capacity to execute a particular will, and he would attach the will in executed form to his petition.”³¹⁸ The proceedings would be public.³¹⁹ If appropriate, a medical examination would be conducted before the petition is heard.³²⁰

The same “liberal provision for notice and right of appearance in existing conservatorship practice” would be made for antemortem-probate proceedings.³²¹ But a litigation guardian would be appointed to “represent all persons whose ultimate property interests might be adversely affected by a mistaken determination that the testator possessed capacity to execute a will.”³²² (In the event of “a significant conflict of interest” more than one litigation guardian could be appointed.)³²³ The litigation

proceeding would arise in a subsequent one, the former findings would be controlling on the same parties who had previously litigated the issues, by the doctrine of *res judicata* or collateral estoppel” (*ibid.* at 276–77) [footnote omitted].

317. Langbein, *supra* note 309 at 77. A *conservator* in the United States is roughly the equivalent of a committee of the estate in British Columbia.

318. *Ibid.* See, below, section VIII.B.1 at 125 (further discussion of committees under the *Patients Property Act*).

319. *Supra* note 309 at 77.

320. *Ibid.* at 80.

321. *Ibid.* at 78.

322. *Ibid.*

323. *Ibid.* at 78, n. 54.

guardian “would have powers of discovery” and “would be obliged to put the testator to fair proof” of his or her testamentary capacity.³²⁴

Appointment of a litigation guardian would be “mandatory.”³²⁵ The model’s author believes that the existence of the litigation guardian would create a strong incentive for family members and others to allow the guardian to represent their interests in the hearing.³²⁶ But nothing in the model would compel anyone whose interest may be affected by the will to accept representation by the litigation guardian. A person whose interests were at stake would still have a right to participate in the hearing.

The outcome of the proceeding would be a court order: “[i]f persuaded that the testator possessed the requisite capacity and freedom from undue influence, the court would issue an ante-mortem judgment that would be conclusive on the point in post-mortem proceedings to probate the will.”³²⁷ The model does not contemplate “impos[ing] [any] particular requirement for the revocation or amendment of a will that has been the subject of a successful living probate action.”³²⁸ The costs of the proceeding, including “the reasonable costs of the [litigation guardian]” would be borne solely by the testator.³²⁹

(d) Administrative Model

The administrative model is based on “an administrative proceeding, [which is] neither adjudicative nor adversarial.”³³⁰ This model is patterned after the conservatorship model, but with much more limited requirements for notice and public disclosure. The administrative model “is not an accelerated will contest, but rather an ex parte proceeding in which the state satisfies its interest in certain factual conditions of testate succession.”³³¹

324. *Ibid.* at 79.

325. *Ibid.* at 78.

326. *See ibid.* (“The heirs would, therefore, have the attractive choice of declining to contest the testator’s suit in their own names, while still being represented by the guardian ad litem. They would be able to communicate any relevant information or suspicions to the guardian ad litem in confidence, without having to take actions overtly hostile to the testator.”).

327. *Ibid.* at 80.

328. *Ibid.* at 81.

329. *Ibid.* at 79.

330. Gregory S. Alexander & Albert M. Pearson, “Alternative Models of Ante-mortem Probate and Procedural Due Process Limitations on Succession” (1979) 78 Mich. L. Rev. 89 at 112.

331. *Ibid.*

Antemortem-probate proceedings under this model “would be initiated with a petition to the conservatorship court for a declaration that the testator duly executed the will, possessed the requisite capacity, and was free from undue influence.”³³² The testator would submit “the will that the [testator] wishes to certify” with the petition, but “[t]o ensure confidentiality of the testamentary plan, . . . the will should be inspected only by the trier, in camera.”³³³

Like the conservatorship model, the administrative model calls for the appointment of a litigation guardian, but the guardian is intended to play a different role in the proceedings. Rather than acting as the representative of those persons with a potential interest in the estate, the litigation guardian would act “as the court’s agent.”³³⁴ The guardian’s role would be “analogous to a court-appointed special master.”³³⁵ The guardian’s primary responsibility would be investigatory; its powers would “extend to interviewing the testator, . . . members of the family, and other relatives and friends.”³³⁶ In the ordinary course, the guardian would not get to see the will’s contents, but the court would have the “discretion” to grant access to it.³³⁷

Under the administrative model, notice of the proceeding would typically only be given to the litigation guardian.³³⁸ The proceeding would essentially be *ex parte*.³³⁹ In view of this extremely restricted notice requirement, the authors of the model suggest that “a state might choose to exempt the nuclear family from the binding effects of the ante-mortem proceeding.”³⁴⁰

332. *Ibid.*

333. *Ibid.* at 112–13 [footnote omitted].

334. *Ibid.* at 113.

335. *Ibid.* A *special master* is “[a] parajudicial officer (such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings.” See *Black’s Law Dictionary*, 9th ed., *sub verbo* “master.” See also Fed. R. Civ. P. 53 (example of American federal court’s authority to appoint a master). In British Columbia, a *special referee* would be roughly the equivalent of an American special master. See British Columbia, *Supreme Court Civil Rules*, r. 18 (1).

336. *Supra* note 330 at 113–14.

337. *Ibid.*

338. *Ibid.* at 115.

339. *Ibid.*

340. *Ibid.*

If the court is satisfied that the will was duly executed, with testamentary capacity and free from undue influence, then “it would issue an order declaring that the will has been duly executed and free from testamentary defects.”³⁴¹ The order would be a “conclusive” determination of these matters; it could not be challenged in postmortem proceedings.³⁴² If the testator subsequently wished to revoke or modify the will, the testator would have to give notice to the court of the revocation or modification.³⁴³

4. CURRENT AMERICAN ANTEMORTEM-PROBATE LEGISLATION

(a) *Introduction*

Three American states have enacted antemortem-probate legislation. All three statutes adhere closely to the contest model.

(b) *North Dakota*

North Dakota was the first state to move on antemortem probate, enacting its legislation in 1977.³⁴⁴ The legislation has been described as “providing a simple method for the testator to obtain a declaratory judgment regarding various aspects of his will.”³⁴⁵

The legislation authorizes “[a]ny person who executes a will” to apply to court “for a judgment declaring the validity of the will as to the signature on the will, the required number of witnesses to the signature and their signature, and the testamentary capacity and freedom from undue influence of the person executing the will.”³⁴⁶

The testator must name all beneficiaries listed in the will as well as the testator’s “present intestate successors” as opposing parties to the application and serve them with notice of the application.³⁴⁷ If the application is successful, the court “declare[s]

341. *Ibid.* at 116.

342. *Ibid.*

343. *See ibid.* at 119.

344. *See* ND Cent. Code §§ 30.1-08.1-01 to -04 (2013).

345. Leopold & Beyer, *supra* note 298 at 170.

346. ND Cent. Code § 30.1-08.1-01 (2013).

347. ND Cent. Code § 30.1-08.1-02 (2013).

that the will [is] valid and order[s] it placed on file with the court.”³⁴⁸ This declaratory judgment is considered to “constitute an adjudication of probate” for the will.³⁴⁹

The testator is not permitted to modify or revoke the will, unless he or she “executes a new will and institutes a new proceeding” for antemortem probate.³⁵⁰ Any facts found in the antemortem-probate proceedings are not admissible in any other proceeding to determine the will’s validity, and the outcome of the antemortem-probate proceeding is not binding on the parties in any proceeding “not brought to determine the validity of a will.”³⁵¹

(c) Ohio

Enacted in 1978, Ohio’s legislation is the longest and most complex of the three American antemortem-probate acts.³⁵² At its core, it establishes a procedure for a testator to petition the state probate court for a declaratory judgment of a will’s validity.³⁵³ The beneficiaries set out in the will and anyone “who would be entitled to inherit from the testator . . . had the testator died intestate on the date the [petition] was filed” must be named as defendants in the action.³⁵⁴

The probate court conducts a hearing that “shall be adversary in nature” to determine the validity of the will.³⁵⁵ If the will is found to be “properly executed” and the testator is found to have “the requisite testamentary capacity and [not have been] under any restraint,” the will is declared to be valid.³⁵⁶ This declaration of validity, along with the will, is sealed and held by the probate court, which does not make it available to anyone other than the testator.³⁵⁷ Removal of the will from the court renders the declaration of validity void.³⁵⁸

348. ND Cent. Code § 30.1-08.1-03 (2013).

349. ND Cent. Code § 30.1-08.1-03 (2013).

350. ND Cent. Code § 30.1-08.1-03 (2013).

351. ND Cent. Code § 30.1-08.1-4 (2013).

352. *See* Ohio Rev. Code Ann. §§ 2107.081–.085 (LexisNexis 2013).

353. *See* Ohio Rev. Code Ann. § 2107.081 (A) (LexisNexis 2013).

354. Ohio Rev. Code Ann. § 2107.081 (A) (LexisNexis 2013).

355. Ohio Rev. Code Ann. § 2107.083 (LexisNexis 2013).

356. Ohio Rev. Code Ann. § 2107.084 (A) (LexisNexis 2013).

357. *See* Ohio Rev. Code Ann. § 2107.084 (B) (LexisNexis 2013).

358. *See* Ohio Rev. Code Ann. § 2107.084 (B) (LexisNexis 2013).

The legislation has strict rules on revocation or modification of a will that has been granted a declaration of validity. A testator is required to go through the process again to make an effective revocation or modification of the will.³⁵⁹ Similar to the North Dakota act, the Ohio act restricts the use of facts found and determinations made in an antemortem-probate proceeding in other types of proceedings.³⁶⁰

Unlike North Dakota's and Arkansas's legislation, Ohio's statute has been given some consideration by the state's courts. Notably, Ohio's supreme court has recently confirmed the constitutionality of the statute.³⁶¹

(d) *Arkansas*

Arkansas was the latest state to enact antemortem-probate legislation, bringing in its statute in 1979.³⁶² Arkansas's statute was "closely modeled after the North Dakota provisions,"³⁶³ with the following significant changes:

- Arkansas's legislation gives the court a broad jurisdiction to issue a declaratory judgment on "the validity of the will," rather than a jurisdiction that is circumscribed in scope to issues of formal validity, testamentary capacity, and undue influence;³⁶⁴
- Arkansas's legislation provides that a will that has been granted antemortem probate may be revoked or modified "by subsequently executed valid wills, codicils, and other testamentary instruments"—which is a much more liberal approach to this issue than is found in either North Dakota or Ohio.³⁶⁵

C. Issue for Reform

This chapter concludes by considering the arguments for and against the basic issue for reform, which is whether British Columbia should follow the lead of these three American jurisdictions and enact a form of antemortem probate.

359. See Ohio Rev. Code Ann. § 2107.084 (C)–(D) (LexisNexis 2013).

360. See Ohio Rev. Code Ann. § 2107.085 (LexisNexis 2013).

361. See *Hayes Memorial United Methodist Church v. Artz*, 2011 Ohio 3847.

362. See Ark. Code Ann. §§ 28-40-201 to 203 (2012).

363. Leopold & Beyer, *supra* note 298 at 174.

364. Ark. Code Ann. §§ 28-40-202, 28-40-203 (a) (2012).

365. Ark. Code Ann. § 28-40-203 (b) (2012).

1. SHOULD BRITISH COLUMBIA ENACT LEGISLATION CREATING A PROCEDURE THAT WOULD ALLOW A TESTATOR TO OBTAIN CERTIFICATION OF TESTAMENTARY CAPACITY BEFORE THE DEATH OF THE TESTATOR?

Proponents of antemortem probate have typically made two closely related arguments in favour of the procedure.

First, antemortem probate is seen as a way to promote certainty and testamentary freedom. This result is said to flow from the likelihood that “an ante-mortem procedure would greatly cut down on will contests.”³⁶⁶ The argument is that a significant amount of that litigation flows from allegations of incapacity and undue influence, so if those two issues were conclusively dealt with in advance of the testator’s death there will be little incentive, in many cases, to challenge the will postmortem.³⁶⁷

Second, proponents argue that antemortem probate improves the evidence available to the court in a given testamentary-capacity case. This is because “the star witness, the testator” is able to present evidence directly to the court.³⁶⁸ Testamentary capacity is assessed as of the date of executing the will, but in traditional postmortem estate litigation some time, often a lengthy time, will have elapsed between the will’s execution and the litigation. In antemortem probate, the court has the advantage of considering this issue a relatively short time after the will has been executed.³⁶⁹

Opponents of antemortem probate have tended to focus their arguments on American constitutional issues that are of limited relevance for British Columbia. But some commentators have also advanced policy concerns about antemortem probate.

The main concern is that each of the major models of antemortem probate is unfair, to a varying degree, to any of the testator’s potential beneficiaries or intestate successors who may be disadvantaged by the will.³⁷⁰ The contest and conservatorship models place these people in the position of “having to choose between unattractive

366. Fink, *supra* note 302 at 289–90.

367. See Langbein, *supra* note 309 at 64.

368. Leopold & Beyer, *supra* note 298 at 139.

369. See Langbein, *supra* note 309 at 67 (“The basic insight is that since the substantive question is capacity as of the time of execution of the testament, execution would be the ideal time to determine capacity. The longer adjudication of any question is postponed, the more likely it is that the quality of the evidence available to the trier will deteriorate.”).

370. See Mary Louise Fellows, “The Case Against Living Probate” (1980) 78 Mich. L. Rev. 1066 at 1095; Tracy Costello-Norris, “Is Ante-mortem Probate a Viable Solution to the Problems Associated with Post-mortem Procedures?” (1995) 9 Conn. Prob. LJ 327 at 351.

alternatives: they can either remain silent, allowing the will to be validated and to extinguish their expectancies, or they can challenge the will, disrupting family harmony and incurring litigation costs earlier than otherwise necessary to retain the possibility of inheriting an indeterminate amount of property.”³⁷¹ If such a challenge is unsuccessful, then the testator is typically free to make changes to the will, further disadvantaging the challengers. And, even if the challenge is successful, it could amount to a pyrrhic victory, as the testator may still be able to expend the challengers’ share of the estate by other means, such as *inter vivos* gifts.³⁷² The administrative model, which does not even provide for notice to potential beneficiaries or intestate successors, is even more unfavourable to their interests.

Opponents of antemortem probate have also argued that supporters have oversold its benefits. This argument tends to be linked into the first argument. The claim is that the major models of antemortem probate effectively deter disappointed potential beneficiaries and intestate successors from coming forward, so the court is left to decide the issues with only some of the relevant evidence.³⁷³

A third argument that could be advanced against antemortem probate is less policy-based and more an evaluation of the practical impact of the three American statutes. Of these three, only Ohio’s act appears to be used with any frequency,³⁷⁴ and even in Ohio’s case the number of testators using the procedure is rather small. Further, it has been over 30 years since the three statutes were enacted, and no other state has followed the lead of these three. In Canada, there does not even appear to be any group that is actively promoting this reform.

While the committee saw some advantages to antemortem probate, it was reluctant to propose that British Columbia invest the time and resources needed to develop this procedure. The American experience shows that antemortem probate is rarely used by testators. The cost of litigation would likely constitute a barrier to its widespread adoption in British Columbia. In addition, it is unlikely that many testators would be willing to publicize their estate plans in their lifetimes. But relying on an administrative system that circumvents the publicity of court proceedings would run the risk of abuse of and prejudice to family members. Finally, American jurisdictions that have enacted antemortem probate did not have to grapple with wills-

371. Fellows, *supra* note 370 at 1095.

372. *See ibid.*

373. *See* Costello-Norris, *supra* note 370 at 350.

374. *See* Leopold & Beyer, *supra* note 298 at 171–75.

variation legislation of the kind found in British Columbia.³⁷⁵ So long as issues under this legislation are not resolved by antemortem probate (and there is no practical way to incorporate wills-variation issues within the procedure), there will be a significant gap in the procedure's coverage. This gap will undercut its ability to hold estate litigation in check.

The majority of respondents agreed with the committee's proposal not to pursue legislation in this area. But several respondents felt that antemortem probate could make a useful addition to a comprehensive and wide-ranging statutory regime governing mental capacity.

The committee recommends:

15. British Columbia should not enact legislation creating a procedure that would allow a testator to obtain certification of testamentary capacity before the death of the testator.

375. See *Wills Variation Act*, *supra* note 8.

CHAPTER VI. CAPACITY TO MAKE A GIFT

A. Introduction

With this chapter, this report moves from considering testamentary gifts to gifts made between living persons—what the law typically calls *inter vivos* gifts. For the sake of brevity, this chapter refers to *inter vivos* gifts simply as *gifts*.³⁷⁶

This chapter begins by providing some background information on gift law in general and on capacity to make a gift specifically. Then it discusses issues for reform, with a focus on reform of the elements of the test of capacity to make a gift.

B. Background

1. INTRODUCTION

This section contains background information on three topics. First, it describes the legal conception of a gift. Second, it discusses the test of mental capacity to make a gift. Third, it notes legislation in force (or coming into force) in British Columbia that is relevant to capacity to make a gift.

376. There is a third type of gift—typically described in legal writing by its Latin name *donatio mortis causa* (= gift in view of death). A *donatio mortis causa* has some of the qualities of a testamentary gift and some of the qualities of an *inter vivos* gift. It is best defined in the words of a leading case, which identified three essential elements needed to make a valid *donatio mortis causa*: “(1) the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; (2) there must have been delivery to the donee of the subject-matter of the gift; (3) the gift must be made under such circumstances as shew [*sic*] that the thing is to revert to the donor in case he should recover.” See *Cain v. Moon*, [1896] 2 QB 283 at 286 (Eng. Div. Ct.), Lord Russell CJ. A sizable body of case law and commentary on *donatio mortis causa* has grown up since the eighteenth century, one which shows the complexity of locating these elements in specific fact patterns. Curiously, given that *donationes mortis causa* are made by definition when a person is facing the real prospect of death, very little of this case law or commentary addresses the mental capacity required to make a *donatio mortis causa*. For this reason, and because a *donatio mortis causa* is a rare occurrence in contemporary British Columbia, this report does not address *donatio mortis causa*. Readers who are interested in pursuing this topic in detail may consult the following court decisions, textbooks, and articles: *Koh Cheong Heng v. Ho Yee Fong*, [2011] SGHC 48, [2011] 3 SLR 125; *Sen v. Headley*, [1991] Ch. 728, [1991] 2 WLR 1308 (Eng. CA) (both cases trace the historical development of *donatio mortis causa*, reviewing the leading English cases and international commentary); Donovan W. M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters’ Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 187–88, 235–40; Andrew Borkowski, *Deathbed Gifts: The Law of Donatio Mortis Causa* (London: Blackstone Press, 1999) (see especially at 28–29 for a rare scholarly discussion of the test of capacity to make a *donatio mortis causa*); James Schouler, “Oral Wills and Death-bed Gifts” (1886) 2 LQR 444.

2. LEGAL CONCEPTION OF A GIFT

It is difficult to formulate a concise definition of *gift* for the purposes of legal writing because, unlike contracts, gifts are “not constituted by the law but merely regulated by it.”³⁷⁷ This difficulty is compounded by two other qualities of the law. First, cases analyzing specific types of gifts have formulated some difficult and complex rules. Second, there is an overriding sense that the nature of a gift is so straightforward and obvious that it is not worthwhile to dwell on it at length.³⁷⁸

It isn’t the purpose of this chapter to cover all aspects of the law of gifts in their full complexity. It’s sufficient for the chapter’s purposes to set out a working definition of gift that is suitable to ground the discussion of mental capacity that is this report’s focus. For this purpose, it is possible to define a gift as something that is (1) gratuitous, (2) made with donative intent, (3) made *inter vivos*, and (4) a transfer of property rights “rather than services or other types of advantage.”³⁷⁹ It is worthwhile to spend a little time considering each of these elements.

- **Gratuitousness.** This quality is “variously defined in terms of a lack of quid pro quo or consideration, the absence of an obligation on the part of the donor, or the presence of liberality or generosity.”³⁸⁰ This means that gifts take place outside bargaining and the marketplace, which is the domain of contracts.
- **Donative intent.** Donative (= having the nature of a gift or donation) intent has been described as “the essence of a gift.”³⁸¹ “The relevant criterion,” which establishes the existence of a donative intent, “is intent to transfer an ownership interest gratuitously, as opposed to engaging in an exchange transaction or making an involuntary transfer.”³⁸² Donative intent is usually distinguished from a person’s motive for making a gift. Assessing motives

377. Richard Hyland, *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009) at § 208.

378. *See ibid.* (“The assumption [in much legal writing] seems to be that what constitutes a gift is both so difficult to resolve into elements and yet so obvious that a proper definition is not needed.”).

379. *Ibid.* at § 10.

380. *Ibid.* at § 224.

381. *Restatement (Third) of the Law of Property (Wills and Other Donative Transfers)* § 6.1, comm. b (2001).

382. *Ibid.*

plays no role in classifying a transaction as a gift or determining a person's capacity to make a gift.³⁸³

- **Inter vivos.** Gifts may be made during a person's lifetime or to take effect on a person's death. In legal writing, the first category of gifts is usually modified by the Latin words *inter vivos*. *Inter vivos* gifts are the sole subject of this chapter. The second category of gifts is called *testamentary gifts*. As the name suggests, a testamentary gift is made by a person's will, and therefore it must meet the formalities that apply to the making of a valid will.
- **Property rights.** Gifts are concerned with the transfer of interests in property, not with the gratuitous performance of services.³⁸⁴

Some cases analyze gifts less in terms of an abstract definition and more in terms of what the donor (= the person who makes a gift) must do to perfect a gift. British Columbia cases tend to require two steps: (1) donative intent—that is, an intention to make a gift; and (2) delivery of the subject matter of the gift to the donee (= the person who receives a gift).³⁸⁵ Some cases have identified a third element: acceptance of the gift by the donee.³⁸⁶

The most important of these elements, both for cases in which capacity is an issue³⁸⁷ and for cases in which it isn't, is the intention to make a gift.³⁸⁸ Because "intention is often difficult to ascertain"³⁸⁹ the courts sometimes apply a series of presumptions in cases involving gifts. So if "evidence as to the [donor's] intention is unavailable or

383. See, e.g., *ibid.*; *Assessment of Mental Capacity: Guidance for Doctors and Lawyers*, *supra* note 117 at 71 ("Anyone who is asked to assess whether a person is capable of making a gift should (a) not let the underlying purpose or motive affect the assessment, unless it is so perverse as to cast doubt on capacity. . . .").

384. See *Restatement (Third) of the Law of Property (Wills and Other Donative Transfers)* § 6.1, comm. a (2001); Hyland, *supra* note 377 at § 353.

385. See, e.g., *Singh Estate (Trustee of) v. Shandil*, 2007 BCCA 303 at para. 9, 68 BCLR (4th) 108, Thackray JA (for the court); *Kooner v. Kooner* (1979), 100 DLR (3d) 76, [1979] 1 ACWS 381 (BCSC).

386. See, e.g., *St. Onge Estate v. Breau*, 2009 NBCA 36 at para. 28, 48 ETR (3d) 162, Robertson & Quigg JJA [*St. Onge*]; *Robertson (Attorney for) v. Hayton* (2003), 4 ETR (3d) 115 at para. 30, 126 ACWS (3d) 738 (Ont. SCJ), Lofchik J.

387. See *St. Onge*, *supra* note 386 at para. 28 ("mental capacity and intention are inextricably linked").

388. See *Pecore v. Pecore*, 2007 SCC 17 at para. 5, [2007] 1 SCR 795, Rothstein J. [*Pecore*] ("the focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer").

389. *Ibid.*

unpersuasive,”³⁹⁰ the “general rule” is that the *presumption of a resulting trust* applies.³⁹¹ In other words, the donee holds the subject matter of the purported gift in trust for the donor.³⁹²

This general rule is subject to some exceptions. The major exception applies when the donee is in a certain type of relationship with the donor.³⁹³ If the donee is the donor’s wife³⁹⁴ or minor child,³⁹⁵ then the *presumption of advancement* applies,³⁹⁶ and “it will fall on the party challenging the transfer to rebut the presumption of a gift.”³⁹⁷ Recent case law has made it clear that the presumption of advancement does not apply to transfers from a parent to an adult child.³⁹⁸

3. TEST OF CAPACITY TO MAKE A GIFT

(a) Introduction

The case law on capacity to make a gift has not developed an independent test of capacity. Instead, it has focussed its attention on applying elements of two tests applicable to other types of transactions. These are the test of capacity to make a will and the test of capacity to enter into a contract.

390. *Van De Keere v. Van De Keere Estate*, 2012 MBQB 33 at para. 31, 274 Man. R. (2d) 119, Spivak J. [Van De Keere].

391. *St. Onge*, *supra* note 386 at para. 26. See also *Kerr v. Baranow*, 2011 SCC 10 at para. 19, [2011] 1 SCR 269, Cromwell J. (for the court) [Baranow].

392. See *Waters’ Law of Trusts in Canada*, *supra* note 376 at 394 (“[A] resulting trust arises whenever legal or equitable title to property is in one party’s name, but that party is under an obligation to return it to the original title owner, or to the person who paid the purchase money for it.” [footnote omitted]). See also *ibid.* at 21 (“Property ‘results’ when it goes back to the transferor. . .”).

393. See *Pecore*, *supra* note 388 at para. 27; *Baranow*, *supra* note 391 at para. 20.

394. See *Mehta Estate v. Mehta Estate* (1993), 104 DLR (4th) 24, 88 Man. R. (2d) 54 (CA). British Columbia and Manitoba are the only provinces that have not abolished the presumption of advancement for transfers from a husband to a wife. See, e.g., *Family Law Act*, RSO 1990, c. F.3, s. 14.

395. See *Pecore*, *supra* note 388 (father to child); *McLear v. McLear Estate*, [2000] OTC 505, 33 ETR (2d) 272 (SCJ) (mother to child).

396. See Mark R. Gillen & Faye Woodman, eds., *The Law of Trusts: A Contextual Approach*, 2d ed. (Toronto: Emond Montgomery, 2008) at 492, n. 19 (“The term ‘advancement’ is rarely used now. It was used to refer to a situation in which a husband or father is, during his lifetime, providing a portion of his assets to a wife or child who might have reasonably expected to receive a share of the assets of the husband or father on the death of the husband or father.”).

397. *Pecore*, *supra* note 388 at para. 27.

398. See *ibid.* at paras. 34–41.

For ease of reference, the testamentary test may be summarized³⁹⁹ as containing two grounds. First, the testator must, in a general sense, have a sound and disposing mind and memory, which requires that the testator be capable to have an understanding of:

- the nature and effect of making a will;
- the extent of the testator's property that may be disposed by a will;
- the persons who are to receive the property under the will, and the moral claims of persons (such as family members and others who are close to the testator) who should receive a share of that property; and
- the way in which the assets are to be distributed under the will.

Second, the testator must also be free from any fixed and specific delusions affecting the subject matter of the will.

The contractual test has the following elements:

- a contracting party must be able to "understand [the contract's] terms";
- this contracting party must also be able "[to form] a rational judgment of its effect upon his interests"; and
- the other contracting party must not have "actual or constructive" knowledge of the first contracting party's "mental incompetency."⁴⁰⁰

The "real difference" between the two tests is that "the contractor is required to be capable of appreciating his own interest whereas the testator is required to be capable of appreciating the interests of other persons, those interests consisting of their claims to his bounty."⁴⁰¹ As a result of this difference, the testamentary test can be seen as setting a higher standard than the contractual test, though some judges have said otherwise.⁴⁰²

399. See *Banks v. Goodfellow*, *supra* note 24; *Leger*, *supra* note 85; *Malcolm*, *supra* note 86; *Chalmers*, *supra* note 90.

400. *Bank of Nova Scotia v. Kelly* (1973), 41 DLR (3d) 273 at 275, 5 Nfld. & PEIR 1 (PEISC), Nicholson J [*Kelly*].

401. *Re Rogers* (1963), 39 DLR (2d) 141 at 148, 42 WWR 200 (BCCA), Wilson JA [*Rogers* (CA)].

402. See *ibid.* ("I do not think that a man requires any higher or lower degree of capacity to consider his own interest than he needs to consider the interests of other persons."). See also *York v. York*, 2011 BCCA 316 at para. 37, [2011] BCJ No. 1308 (QL), Garson JA [*York*].

(b) Cases Applying Elements of the Contractual Test

The “starting point for a consideration, in this province, of what constitutes a lack of capacity”⁴⁰³ to make a gift is the leading case of *Royal Trust Co. v. Diamant*.⁴⁰⁴ At stake in this case was the ownership of a sealed parcel and suitcase. The contents of the parcel and suitcase were cloaked in mystery; it was alleged that they contained valuable items of crystal, silverware, and jewelry.⁴⁰⁵ The suitcase and parcel belonged to Ms. Diamant. Her son, the defendant, alleged that she had made a gift of them to him.⁴⁰⁶ This alleged gift took place on the eve of Ms. Diamant’s admission to a seniors’ home, at a time when her “mental condition had become more and more confused.”⁴⁰⁷ Shortly thereafter, Ms. Diamant died. In proceedings to set aside the gift the executor of her will argued (among other things) that the defendant obtained possession of the suitcase and parcel at a time when Ms. Diamant was not mentally capable of making a gift.

Mr. Justice Whittaker determined that the test of capacity to make a gift is essentially made up of the first two elements of the contractual test. In his view, “[t]he degree of mental incapacity which must be established in order to render a transaction *inter vivos* invalid is such a degree of incapacity as would interfere with *the capacity to understand substantially the nature and effect of the transaction*.”⁴⁰⁸ Whittaker J. also pointed out that the test only requires proof that the donor was not *capable* of understanding the nature and effect of the gift, not that the donor *actually failed* to understand it.⁴⁰⁹

Diamant has been cited favourably in a large number of subsequent cases on capacity to make a gift.⁴¹⁰ But there is also a stream of cases that says, in effect, that *Dia-*

403. *Ewart v. Abrahams* (1988), 22 BCLR (2d) 138 at 143, 8 ACWS (3d) 180 (CA), Lambert JA (for the court) [*Ewart*].

404. [1953] 3 DLR 102, [1953] BCJ No. 126 (QL) (SC) [*Diamant* cited to DLR].

405. See *ibid.* at 104, Whittaker J.

406. See *ibid.* at 106.

407. *Ibid.*

408. *Ibid.* at 111 [emphasis added].

409. See *ibid.*

410. See, e.g., *Ewart*, *supra* note 403 at 143; *Dahlem (Guardian ad litem of) v. Thore* (1994) 2 ETR (2d) 300 at para. 45, 47 ACWS (3d) 440 (BCSC), Melnick J. [*Dahlem*]; *Booth Estate v. McGowan* (1998), 72 OTC 115, [1998] OJ No. 3464 at para. 52 (QL) (Gen. Div.), Sheard J.; *Lodge (Attorney for) v.*

mant does not provide the full answer to the question of what test to apply to determine capacity to make a gift.

(c) Cases Applying Elements of the Testamentary Test

Some courts have held that examining simply whether the donor was capable of understanding the nature and effect of the gift is appropriate for the broad run of gifts cases, but in certain cases—namely those in which the gift at issue represents a large portion of the donor’s property—courts should supplement this test of capacity by also applying elements of the testamentary test. The leading exponent of this view is the judgment in the English case *Re Beaney*.⁴¹¹

Beaney concerned a gift of a house from a mother to the eldest of her three children. The donor’s “mental condition began to deteriorate” in the late 1960s and early 1970s.⁴¹² This “deterioration got progressively worse after her husband’s death” in 1971 and was ultimately found to be caused by senile dementia.⁴¹³ The donor was admitted to a hospital in May 1973. A few weeks later, the donor executed a deed of transfer for the house in favour of the donee. The deed was witnessed by the donor’s solicitor, who made a rudimentary examination of the donor’s mental capacity.⁴¹⁴ The house was the donor’s “only asset of value.”⁴¹⁵ After the donor’s death, her other two children challenged the gift, arguing that the donor did not have the capacity to make it.

The court felt that there was no applicable authority as to “the degree or extent of understanding required for the validity of a voluntary disposition made by deed,” so it based its decision on “general principles.”⁴¹⁶ The court accepted “the principle that the question in each case is whether the person is capable of understanding what he does by executing the deed in question when its general purport has been fully explained to him.”⁴¹⁷ But “[t]he degree or extent of understanding” is “relative to the

Royal Trust Corp. of Canada, 2003 BCSC 1416 at para. 51, [2003] BCJ No. 1416 (QL), Goepel J. [Lodge]; *St. Onge*, *supra* note 386 at para. 29; *York*, *supra* note 402 at para. 38.

411. (1977), [1978] 1 WLR 770, [1978] 2 All ER 596 (ChD) [*Beaney* cited to WLR].

412. *Ibid.* at 772, Nourse, QC.

413. *Ibid.*

414. *See ibid.* at 775–76.

415. *Ibid.* at 772.

416. *Ibid.*

417. *Ibid.* at 773.

particular transaction.”⁴¹⁸ So “if the subject matter and value of a gift are trivial in relation to the donor’s other assets a low degree of understanding will suffice.”⁴¹⁹ But “if [the gift’s] effect is to dispose of the donor’s only asset of value and thus, for practical purposes, to pre-empt devolution of his estate under his will or on his intestacy, then the degree of understanding is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.”⁴²⁰

A number of judges from British Columbia and elsewhere in Canada have applied elements of the testamentary test in circumstances similar to those that the English court faced in *Beaney*. Some of these judges arrived at this position after citing *Beaney* approvingly.⁴²¹ Others appear to have reached this conclusion independently or through consideration of other authority.⁴²²

If *Beaney* is correct and the testamentary test sets a higher threshold of mental capacity than the contractual test, then it would seem to be important to know what types of gifts should be analyzed just in terms of elements of the contractual test and what types should also attract scrutiny under elements of the testamentary test. *Beaney*’s position on this issue sets a very high standard (the effect of the gift must be such that it pre-empts devolution of the donor’s estate by will or intestacy). Not many gifts will reach this standard. But, as one commentator has pointed out, Canadian case law apparently “imposes the standard of testamentary capacity for gifts that comprise less than the majority of the estate.”⁴²³ A recent Alberta case has gone even further and said that the testamentary test applies to all gifts, regardless of

418. *Ibid.* at 774.

419. *Ibid.*

420. *Ibid.*

421. See *Canada Trust Co. v. Ringrose*, 2009 BCSC 1723 at para. 100, [2009] BCJ No. 2530 (QL), Savage J. [Ringrose]; *MacGrotty v. Anderson* (1995), 9 ETR (2d) 179 at para. 20, 57 ACWS (3d) 253 (BCSC), Josephson J.; *Van De Keere*, *supra* note 390 at para. 27; *Lynch Estate v. Lynch Estate* (1993), 8 Alta. LR (3d) 291 at para. 96, 138 AR 41 (QB), Picard J.

422. See *York*, *supra* note 402 at para. 37; *Quallie v. Vandervelde*, 2009 BCSC 5 at para. 9, 45 ETR (3d) 307, Macaulay J.; *Brydon v. Malamas*, 2008 BCSC 749 at para. 230, 41 ETR (3d) 104, Halfyard J. [Brydon]; *Shkuratoff v. Carter Estate*, 2007 BCSC 1061 at para. 44, 33 ETR (3d) 253, Romilly J.; *Dacyshyn v. Dacyshyn Estate* (1996), 62 ACWS (3d) 208, [1996] BCJ No. 626 (QL) at para. 25 (SC), MacKenzie J.

423. Kimberly Whaley, *Comparing the Various Tests of Capacity* (November 2010), online: Whaley Estate Litigation <www.whaleyestatelitigation.com> at 19 [Whaley, *Tests of Capacity*] (citing for support of this assertion *Mathieu v. Saint-Michel*, [1956] SCR 477, 3 DLR (2d) 428).

their value.⁴²⁴ Unfortunately, this issue has not been given sustained consideration in any Canadian case, so it is difficult to state with any precision just where to draw the line dividing gifts that will be analyzed only in terms of elements of the contractual test and those that will also be analyzed in terms of elements of the testamentary test.

(d) Other Aspects of the Law of Capacity to Make a Gift

The major issue for the law of capacity to make a gift is whether, in any given case, the test of capacity's elements should conform to the contractual test or the testamentary test. There are a few minor aspects of the test and the law surrounding it that should also be noted. They can be summarized in point form.

- A gift may be set aside if it is the product of a delusion.⁴²⁵ But there are relatively few reported cases in which delusions have played a significant role in a court's reasoning about a donor's capacity to make a gift. So delusions don't loom as large in the law of capacity to make a gift as they do in the law of capacity to make a will. Note that the fixed-and-specific-delusion concept applies to both the contractual and the testamentary tests of capacity.⁴²⁶
- There is some authority that supports examining the donor's capacity to understand the nature and effect of a gift in cases in which that gift is used

424. See *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 392, 47 ETR (3d) 161, Moen J. ("The mental capacity required to give effect to an *inter vivos* transfer is the same as that for the execution of a will. The standard for capacity applied to an *inter vivos* transfer is no less stringent than that for testamentary dispositions." [citations omitted]).

425. See *Ringrose*, *supra* note 421 at para. 99 ("In my opinion, in a case such as this, it makes no sense to say that an *inter vivos* transfer is valid if the donor 'understands' the nature and effect of the transaction but is under an unfounded or insane delusion that influenced or precipitated the transfer. In other words, in a case where there are unfounded or insane delusions, it is not sufficient for a court to find merely that the donor understands the nature and effect of the transaction in some abstract sense."); *Brydon*, *supra* note 422 at para. 230 ("In my opinion, in order to rebut the presumption of resulting trust, the defendants must prove not only that Stella intended to make gifts, but also that her intention in this regard was not affected by any insane delusion.").

426. See G. H. L. Fridman, "Mental Incompetency" (1963) 79 LQR 502 at 515 & (1964) 80 LQR 84 ("If a contracting party is suffering from delusions at the time of contracting, they must have affected the making of the contract or other disposition if they are to render the deluded person incapable of contracting. From this it would seem that the meaning of 'unsoundness of mind' in relation to contractual capacity is the same as in respect of testamentary capacity.").

to create an *inter vivos* trust.⁴²⁷ But one commentator has pointed out that the case law on this issue is not very clear.⁴²⁸

- The relevant time to determine the donor's capacity is at the time the gift is made.⁴²⁹
- The party who alleges incapacity in a lawsuit bears the onus of proving incapacity.⁴³⁰ An opposing or interested party in a proceeding by or against "a person who is found to be of unsound mind" or a person who is a patient in a mental-health facility "is not entitled to obtain a verdict, judgment or decision, on his or her own evidence, unless that evidence is corroborated by other material evidence."⁴³¹
- Capacity to make a gift should be assessed functionally. The fact that a donor is incapable of carrying out other transactions does not necessarily lead to the conclusion that the donor is incapable to make a gift. Further, the appointment of a committee to manage the donor's finances and affairs does not, in and of itself, determine that the donor is incapable of making a gift, but it does raise a rebuttable presumption of incapacity.⁴³² This conclusion flows from the interpretation of a statutory provision on point, which is the subject of the next section of this chapter.

427. See *Lodge*, *supra* note 410.

428. See Whaley, *Tests of Capacity*, *supra* note 423 at 23.

429. See *Ringrose*, *supra* note 421 at para. 100. But see *Lodge*, *supra* note 410 at para. 50 ("The relevant time for determining capacity is when instructions are given for the preparation of the instrument.").

430. See *Archer v. St. John*, 2008 ABQB 9 at para. 22, 37 ETR (3d) 101, Erb J. ("The onus of establishing whether an individual has the legal capacity to make an *inter vivos* gift reposes with the party alleging incapacity. . . .").

431. *Evidence Act*, RSBC 1996, c. 124, s. 9. See also *Lasky (Public Trustee of) v. Prowal* (1994), 7 ETR (2d) 70 at paras. 42–43, 50 ACWS (3d) 147 (BCSC), Koenigsberg J. (applying section 9).

432. See *Taylor v. Jenkins* (1986), 1 BCLR (2d) 207 at 209, 37 ACWS (2d) 38 (SC), Macdonell J. [*Taylor*]. See, below, section VIII.B.1 at 125 (further discussion of committees under the *Patients Property Act*).

4. LEGISLATION APPLICABLE TO CAPACITY TO MAKE A GIFT

(a) *Consequences of Transfer of Property by an Incapable Adult*

Under section 60.2 of the *Adult Guardianship Act*,⁴³³ a transfer of property by an incapable adult is “voidable against the adult,” unless the transferee paid “full and valuable” consideration for the property or the transferee had no reasonable way of knowing that the adult was incapable. This section only recently came into force (on 1 September 2011). It replaced section 20 of the *Patients Property Act*,⁴³⁴ a long-standing provision that held that a “gift, grant, alienation, conveyance or transfer of property” was “deemed to be fraudulent and void” against a person’s committee if it was “made by a person who is or becomes a patient,” unless the transfer was made for “full and valuable consideration” or the transferee did not have notice of “the mental condition” of the person.

Many jurisdictions have similar legislation. Typically, the rationale for such legislation is that it is necessary to enable an incapable adult’s committee to carry out the management of the adult’s finances and affairs without the possibility of being undercut by conflicting transactions made by the adult.⁴³⁵ But the British Columbia courts found a different, and broader, purpose for section 20 by holding in a number of cases that the rationale for the legislation was protection of an incapable person.⁴³⁶

Section 20 was considered a number of times in the British Columbia courts.⁴³⁷ The section was widely viewed as being poorly drafted.⁴³⁸ Read literally, the section appeared to say that “any conveyance that is not made for full and valuable consideration by a person who becomes a patient can be set aside, no matter how long before the committal the transfer took place.”⁴³⁹ This interpretation would have cast a

433. *Supra* note 5. See, below, appendix C at 239 for the text of the legislation discussed in this section.

434. *Supra* note 55.

435. See *Beaney*, *supra* note 411 at 772.

436. See *Taylor*, *supra* note 432 at 209; *Dahlem*, *supra* note 410 at para. 38.

437. See *Canou v. King* (1968), 70 DLR (2d) 141, [1968] BCJ No. 198 (QL) (SC) [*Canou* cited to DLR]; *Taylor*, *supra* note 432; *Dahlem*, *supra* note 410; *Hemminger (Guardian ad litem of) v. Sande*, 2001 BCSC 728, 39 ETR (2d) 196 [*Hemminger*]; *Ringrose*, *supra* note 421.

438. See, e.g., *Simon (Public Trustee of) v. Simon*, [1995] BCJ No. 2748 (QL) at para. 4 (SC), Meredith J. See also Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2d ed. (Scarborough, ON: Carswell, 1994) at 203–04.

439. *Taylor*, *supra* note 432 at 208.

shadow of doubt over every gift made in British Columbia, as no one could be certain whether at some later date a committee would be appointed to manage the finances and affairs of the donor and, by virtue of section 20, the gift “shall be deemed” to be “fraudulent and void against the committee.” The courts rejected this interpretation, read the section “from a practical point of view,” and decided that “the sensible approach is to inquire into the capacity of the donor at the time of the gift or transfer.”⁴⁴⁰ The appointment of a committee would only have the effect of raising “a rebuttable presumption of incompetence at the time of the transfer.”⁴⁴¹

Section 60.2 of the *Adult Guardianship Act* has some noteworthy differences from the provision it replaced, section 20 of the *Patients Property Act*. First and foremost, section 60.2 does not refer to the appointment of a property guardian (which is the *Adult Guardianship Act*’s equivalent of a committee of a person’s estate appointed under the *Patients Property Act*). Section 60.2 simply applies to transfers made “while the adult was incapable.” This change in wording should address the awkwardness highlighted in the cases that interpreted section 20. It should also bring the drafting of the legislation into closer alignment with the broad, protective purpose that the case law under section 20 identified as the legislation’s rationale. But in practice it means that section 60.2 is also broader in scope than section 20. It will apply to more cases.

Second, section 60.2 provides that a transfer that is subject to its provisions is “voidable” against the transferor. This result is in contrast to section 20’s declaration that such a transfer is “deemed to be fraudulent and void.” When a court determines that a transfer is void, it is saying in effect that the transfer never existed. A voidable transfer, on the other hand, is one that could be ratified by the injured party. This distinction generates two important consequences. One is that a voidable transfer will be enforceable or unenforceable at the option of the injured party. So, under this provision, an adult transferor with diminished capacity (or that person’s representative) may or may not opt to have the transaction set aside. The other consequence is that a finding that a transfer is voidable affords the courts with tools to protect the interests of any third party who has, in good faith, relied on the transfer.⁴⁴²

Third, under both section 60.2 and section 20, a transferee could escape the consequences of the legislation if the transferee did not have knowledge of the transferor’s incapacity. But section 60.2 goes further than section 20 and makes it clear

440. *Ibid.* at 209.

441. *Ibid.* See also Dahlem, *supra* note 410 at para. 42; Hemminger, *supra* note 437 at para. 85.

442. See John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012) at 382–83.

that the transferee's knowledge is subject to an objective test (what a "reasonable person" would have known in the circumstances) and that the burden is on the transferee to prove that it did not have knowledge of the transferor's incapacity.

The last two points are arguably instances in which the drafters of section 60.2 made policy decisions that amount to restatements of the common-law position on contracts entered into by incapable persons, but that are also changes to the common-law position on gifts made by incapable persons. At common law, contracts made by incapable persons were voidable,⁴⁴³ but gifts were void.⁴⁴⁴ In addition, knowledge of the incapable person's incapacity is an important element of the test of capacity to enter into a contract, because that test has "had to counterbalance two important policy considerations": protecting the incapable person and promoting certainty of contacts by "ensur[ing] that other persons are not prejudiced by the actions of persons who appear to have full capacity."⁴⁴⁵ For gifts, knowledge of the donor's incapacity is not part of the test of capacity.⁴⁴⁶ The leading British Columbia case, *Diamond*, notably leaves this element out in discussing the elements of the contractual test that are applicable in cases considering gifts.⁴⁴⁷

One thing that section 60.2 does not do is define what "incapable" means for its purposes. This leaves an opening for the common law to operate. Although the courts haven't yet confirmed it,⁴⁴⁸ it is reasonable to assume that the courts will rely on earlier cases considering test of capacity to make a gift in applying section 60.2.

443. See G. H. L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 158–59 (in cases in which no property guardian or committee has been appointed for the incapable person, the courts of Canada and England have held that contracts entered into by a person without the capacity to contract are "voidable at the option of the insane person").

444. See *Lagoski v. Shano* (2007), 232 OAC 21, 37 ETR (3d) 141 at para. 45 (Div. Ct.), Ferrier J. (for the court) [*Lagoski*] ("[A] more stringent rule applies where the transaction is in the nature of a gift as opposed to a contract. . . . If a donor of a gift lacks capacity, the gift is void, not merely voidable." [citations omitted]).

445. *Assessment of Mental Capacity: Guidance for Doctors and Lawyers*, *supra* note 117 at 85.

446. See *Nova Scotia Trust Co. v. Corkum* (1961), 31 DLR (2d) 27 at 41 (NSSC), Ilesley CJ ("If there is any requirement . . . that before a disposition can be set aside on the ground of mental disorder, it must be shown not only that the person making it was suffering from such mental disorder but that it was known to the person or persons in whose favour it was made, I am satisfied that this requirement does not apply to voluntary dispositions.").

447. See *supra* note 404 at 111.

448. There are no reported cases that consider section 60.2.

(b) Gifts by Property Guardians

Section 17 of the *Adult Guardianship Act* will, when it is brought into force, authorize a property guardian to make a gift on behalf of an incapable adult.⁴⁴⁹ A property guardian will be authorized to make a gift under the section through one of two ways.

The first way is if the proposed gift meets three statutory conditions, which are:

- after the gift is made, the adult will have sufficient property to meet the personal care and health care needs of the adult and any of the adult's dependents and to be able to meet the legal obligations of the adult;
- the adult made gifts of the type proposed when the adult was capable; and
- the total value of the gift is less than a value prescribed by regulation.⁴⁵⁰

The second way to make a gift under the legislation is to apply to the British Columbia Supreme Court and obtain that court's permission for the gift.⁴⁵¹ The legislation places no conditions on the court's granting of permission to make a gift, other than to say that its permission "must be express."⁴⁵² The court may grant its permission to a specific gift or to gifts generally⁴⁵³ and it may permit the property guardian to receive a gift from the incapable adult.⁴⁵⁴

The second way to make a gift under section 17 clearly bears a resemblance to the concept of statutory wills for individuals who lack testamentary capacity, which was the subject of a previous chapter.⁴⁵⁵

449. See *Adult Guardianship Act*, as amended by *Adult Guardianship and Planning Statutes Amendment Act, 2007*, *supra* note 5, s. 4 (not in force). The provision applies to gifts, loans, and charitable gifts, but the text will only refer to gifts, as gifts alone are the subject of this chapter.

450. See *Adult Guardianship Act*, *supra* note 5, s. 17 (5) (a)–(c) (not in force). There is, as yet, no regulation prescribing the value referred to in the third bullet point.

451. See *ibid.*, s. 17 (5) (not in force).

452. *Ibid.*, s. 17 (7) (a) (not in force).

453. See *ibid.*, s. 17 (7) (b) (not in force).

454. See *ibid.*, s. 17 (6) (not in force).

455. See, above, chapter IV at 49.

(c) *Gifts by Attorneys*

An attorney acting under an enduring power of attorney of a person who lacks the mental capacity to make a gift may make a gift on behalf of the person.⁴⁵⁶ The legislation authorizing these gifts has the same source as the legislation empowering a property guardian to make a gift on behalf of an incapable adult.⁴⁵⁷ Like section 17 of the *Adult Guardianship Act*, section 20 of the *Power of Attorney Act* offers two ways to make a gift on behalf of a person who lacks the capacity to do so. The first way involves meeting three statutory conditions that parallel the conditions found in the *Adult Guardianship Act* and set out in the previous section of this chapter.⁴⁵⁸ The second way is if the enduring power of attorney permits the gift to be made.⁴⁵⁹ Such permission may relate to a specific gift or to gifts generally.⁴⁶⁰ It may even permit the attorney to receive the gift.⁴⁶¹ In all respects, however, the permission to make a gift by power of attorney “must be express.”⁴⁶²

C. Issues for Reform

The issues for reform of the law of capacity to make a gift are much smaller in number than those identified for the law of capacity to make a will. This difference is, in part, a function of legislation British Columbia has in place (or is going to put in place) that addresses a number of aspects of the law of capacity to make a gift. This legislation is all relatively new, which makes it difficult to determine whether it might be causing problems in practice that could call out for reform. As a result, this chapter focusses simply on issues derived from the case law and commentary on the elements of the test of capacity to make a gift. It does not delve into any issues that may be related to that core group of issues.

456. See *Power of Attorney Act*, *supra* note 2, s. 20.

457. See *Adult Guardianship and Planning Statutes Amendment Act, 2007*, *supra* note 5, s. 38.

458. For the third condition, a regulation has established that the “total value of all gifts, loans and charitable gifts made by an attorney in a year must not be more than the lesser of (a) 10% of the adult’s taxable income for the previous year, and (b) \$5 000.” See *Power of Attorney Regulation*, BC Reg. 20/2011, s. 3.

459. See *Power of Attorney Act*, *supra* note 2, s. 20 (1).

460. See *ibid.*, s. 20 (3) (b).

461. See *ibid.*, s. 20 (2).

462. *Ibid.*, s. 20 (3) (a).

1. SHOULD ANY OF THE ELEMENTS OF THE TEST OF CAPACITY TO MAKE A GIFT BE MODIFIED BY LEGISLATION?

The current law on the test of capacity to make a gift can be characterized as obscure and confusing. The case law has variously applied elements of two different tests of capacity, has expressly acknowledged that these tests set very different standards of the degree of mental capacity needed to effect a valid gift, and has not provided any consistent guidelines on when to apply a test based on one approach or the other. Further, while many recent cases have been moving in the direction of a test based on the test of capacity to make a will, still more recent legislation appears to have the effect of incorporating elements of the test to make a contract which have not previously featured in any significant way in the common law's approach to capacity to make a gift. As a result, it can be a challenge to answer basic questions about the application of the law, such as whether a person's capacity to make a specific gift should be examined in terms of whether the person has the capacity to understand the nature of the gift and the effect of it on the person's interests or whether it should be examined in those terms plus in terms of the effect of the gift on the interests of close family members and others who may be expected to benefit from the person's property, after the person's death.

This problem can be addressed by enacting legislation that clearly spells out the elements of the test of capacity to make a gift. Such legislation need not be a dramatic departure from the common law. In fact, the case law itself provides two options for reform to consider.

The first option would be to propose the enactment of legislation that provides that capacity to make a gift is to be assessed by using the elements of the test of capacity to make a will. Such a proposal would clarify the law and make it more accessible, particularly to individuals without legal training. It would also enhance the main purpose of the test of capacity, which is to protect the interests of the person who lacks capacity and the interests of that person's family. The additional elements and higher degree of capacity required under the testamentary test would serve as safeguards against the dissipation of the person's property. But the testamentary test could also be inappropriate for certain types of gifts. Critics could say that it should not be necessary to analyze low-value gifts in the same way as major gifts that clearly have an impact on the donor's estate. Further, setting a high threshold of capacity could have the effect of encouraging marginal litigation over gifts, as disappointed family members could feel that the gift is vulnerable under a stringent test of capacity.

The second option would be to propose the enactment of legislation that boils the test of capacity to make a gift down to the two elements identified in *Diamant*:⁴⁶³ the capacity of the donor to understand the nature of the transaction and the capacity to understand the effect of the transaction on the donor's interests. Like the first option, this option would have the benefit of clarifying the law and making it more accessible. A test based on this option would also be simpler to apply and likely more flexible in practice. An argument could also be made that a lower threshold of capacity to make a gift could be empowering for persons whose capacity is at or near that threshold. But it could also be argued that a lower threshold would leave such persons more vulnerable to exploitation and abuse. In addition, adopting a test based on elements of the contractual test could be seen as being at odds with the trend in recent cases, which have increasingly looked to the testamentary test, especially when dealing with gifts of significant value.

A third option would be simply not to propose the enactment of legislation modifying the current law. Although the cases on capacity to make a gift are difficult to reconcile, and the case law is difficult to reconcile with section 60.2 of the *Adult Guardianship Act*, it is not clear whether these doctrinal inconsistencies are causing any real problems in practice. The jurisprudence could be cast in a positive light as giving the courts a flexible set of principles, which may be used to reach the best results in individual cases. This point can draw support from the fact that there have been relatively few voices raised against the law of capacity to make a gift. Law-reform agencies, courts, and commentators have tended not to criticize this body of law. All that said, choosing not to propose the enactment of legislation that would clarify the test of a capacity to make a gift could be a missed opportunity for reform. It would leave unaddressed concerns about the obscurity and inaccessibility of this body of law.

In the committee's view, the current state of the common law is deficient. Legislative intervention is needed to clarify the test of capacity to make a gift. The proposed legislative test of capacity should be analogous to the common-law test of capacity to make a will. The higher standard of mental capacity under this test is appropriate for *inter vivos* gifts. It better serves the protective purpose of the law than the lower standard set by the contractual test of capacity. It is also more in tune with recent developments in the case law.

A clear majority of consultation respondents supported the committee's proposal in the consultation paper.

463. *Supra* note 404.

The committee wrestled with the question of whether this higher standard should only apply to high-value gifts. In the end, it found no practical way to incorporate a layered approach to the test of capacity to make a gift in legislation. Any line that the legislation would draw would end up being arbitrary. Worse, there was a potential that this approach could be exploited. A person with diminished capacity could make a series of low-value gifts that ends up depleting the person's estate just as a single high-value gift would have done. A single test would be easier to administer. And, in practice, it should not pose too many difficulties in cases involving one-off, low-value gifts. Realistically, the incentive to commence litigation over such gifts is very low.

The committee emphasized that its tentative recommendation is only intended to apply to the test of capacity to make an *inter vivos* gift. It is not intended as a comment on, or a proposal to change, the common-law test of capacity to make a will, or any other common-law test of capacity.

The committee recommends:

16. British Columbia should enact legislation that provides that, in order for an individual to make a valid inter vivos gift, (1) the individual must have the capacity to understand (a) the nature of making the gift, (b) the effect of making the gift on the individual's interests, (c) the extent of the individual's property that is affected by making the gift, and (d) the claims of potential beneficiaries under the individual's will or intestacy, or by other means, to which the individual ought to give effect; and (2) the gift must not be the product of any delusion affecting the individual.

2. SHOULD GIFTS THAT ARE USED TO CREATE INTER VIVOS TRUSTS BE ANALYZED BY A SPECIAL TEST OF CAPACITY THAT IS MORE EXPLICITLY IN TUNE WITH THE ELEMENTS OF A TRUST?

One commentator has recently argued that when a gift is used to create a trust the donor's capacity should be examined by "a more comprehensive capacity test" than the test derived from elements of the contractual test.⁴⁶⁴ Such a test could examine the donor's capacity to understand issues that are specific to trusts, such as "the fact that a trust may be irrevocable, and that another person handles the [trust] funds. . . ."⁴⁶⁵

464. Whaley, *Tests of Capacity*, *supra* note 423 at 23.

465. *Ibid.*

The commentator's stated rationale for adopting a more comprehensive test is that it would clarify the law.⁴⁶⁶ This may be the result of making explicit questions that would be implicit in any examination of the nature of the transaction for the purpose of assessing the donor's capacity. For instance, in assessing whether the donor understands the nature of a gift, some attention could be paid to irrevocability and the role of the trustee.

Another rationale for adopting a more comprehensive test would be to build in more safeguards to protect a potentially vulnerable population. A test that required a donor to focus on more than the donor's own interests would be a test that required a higher level of capacity than the baseline test for capacity to make a gift. This could enhance the protective purpose that serves as the rationale for this test of capacity.

It is possible to see moving to a more stringent test of capacity for gifts that create trusts as a step backward. Tests of capacity typically do not require a layperson to be capable of understanding the legal effect of a transaction, but this proposed test moves significantly in that direction. In doing so, it may set the bar too high. In addition, it is open to question whether legislation is needed to achieve the result desired by the commentator. Court cases typically focus on the nature and effect of a gift; interpreted generously, those elements allow for a consideration of factors that may be of importance in a specific gift that creates a trust.

In the consultation paper, the committee tentatively recommended not enacting legislation to implement this proposed change to the law. The majority of respondents agreed with this proposal, with several characterizing their support as "strong."

The committee recommends:

17. British Columbia should not enact legislation to create a distinct test of capacity for gifts that result in the creation of an inter vivos trust.

⁴⁶⁶ *Ibid.*

CHAPTER VII. CAPACITY TO MAKE A BENEFICIARY DESIGNATION

A. Introduction

Beneficiary designations are a common estate-planning device. This chapter explores potential reforms to the test of capacity to make a beneficiary designation. It begins by setting out background information on the nature of beneficiary designations, the test of capacity to make a beneficiary designation, and British Columbia legislation relating to beneficiary designations.

B. Background

1. WHAT IS A BENEFICIARY DESIGNATION?

Anyone who has purchased life insurance or opened a registered retirement savings plan likely recalls being asked to provide the name of the person who is to be the policy's or plan's beneficiary. The point of this inquiry is to allow a policyholder or a planholder to designate a person to receive insurance money or plan funds directly upon the policyholder's or planholder's death.⁴⁶⁷ This is the most common form of beneficiary designation.

Beneficiary designations are not limited to life-insurance policies and RRSPs. They can also be made under accident-and-sickness-insurance policies and under all sorts of employee pension, retirement income, and other types of retirement savings plans.

Beneficiary designations do not have to be made when a policy is purchased or a plan is opened. They can be made⁴⁶⁸ at any time thereafter by way of a freestanding document called a *declaration*. They can also be made as part of a will. However made, a beneficiary designation is a simple document (or a simple clause in a larger document), which, thanks to some legislation discussed later in this chapter,⁴⁶⁹ requires only a minimal level of formality to be effective.

467. If no selection is made, the funds by default go into the policyholder's or planholder's estate upon that person's death.

468. For simplicity's sake, this chapter will refer consistently to *making* a beneficiary designation. Mental capacity can also be an issue when a beneficiary designation is revoked or changed. References to *making* a beneficiary designation should be read to include revoking and changing a beneficiary designation.

469. See, below, section VII.B.3 at 119.

Beneficiary designations are popular because they provide a simple, straightforward means to achieve a number of highly desirable results. The purpose of a beneficiary designation is to provide for payment of insurance money or funds in a plan directly to a third person on the policyholder's or planholder's death. This arrangement has a number of practical advantages. Since the benefit funds do not go into the deceased's estate, delays associated with probate are avoided and the funds can be paid out quicker to the beneficiary. The funds are also not subject to probate fees. Finally, the funds can be protected from creditors.

Although beneficiary designations are familiar, popular, and simple documents, they have proved to be highly resistant to legal analysis. They have been called "odd creatures."⁴⁷⁰ The leading cases "provide little help on their nature."⁴⁷¹ Despite a fairly extensive body of commentary on beneficiary designations, their "essential nature . . . still seems elusive."⁴⁷²

There are a number of reasons for this difficulty. First, the results that flow from a beneficiary designation may be achieved by a number of legal devices. A beneficiary designation could be set up as a kind of testamentary document—that is, it could be made to take effect on the policyholder's or planholder's death.⁴⁷³ On the other hand, it could be structured using contractual or trust-law principles, or by reliance on a power of appointment.⁴⁷⁴

Second, recall that beneficiary designations are set up under a number of different types of insurance policies and retirement plans. The approach to beneficiary designations taken under, for example, a life-insurance policy may differ from the approach taken under an RRSP.

Third, bear in mind that these insurance policies and retirement plans are each private contracts. The parties to them have a certain amount of flexibility in how they structure the document's provisions. So, for example, one company's retirement

470. *Re Danish Bacon Co. Ltd. Staff Pension Fund Trusts* (1970), [1971] 1 WLR 248 at 256, [1971] 1 All ER 486, Megarry J.

471. *Ibid.*

472. Ralph E. Scane, "Non-insurance Beneficiary Designations" (1993) 72 Can. Bar Rev. 178 at 179.

473. *See Cock v. Cooke* (1866), LR 1 Pro. & Div. 240 at 243, Sir J. P. Wilde (noting that the class of testamentary documents extends beyond just wills to embrace all documents that rely on a person's death for their "vigour and effect").

474. *See Waters' Law of Trusts in Canada*, *supra* note 376 at 1173 ("A power of appointment is the authority given to a person to choose who shall be the transferee of someone else's property.").

plan may create a beneficiary designation that is based on testamentary principles while another may draw on powers of appointment as the model for its beneficiary designations.

So to grasp the nature of a specific beneficiary designation it is necessary to interpret a policy's or a plan's governing documents. This is not merely an academic question. The characterization of a beneficiary designation can have some significant consequences for the beneficiary designation's validity and operation.

One example of how the characterization of a beneficiary designation can affect its validity involves the formalities that are required to execute a valid beneficiary designation. If the beneficiary designation is contractual in nature, then a relatively low level of formality is required. But if it is testamentary in nature, then the consequence of this characterization is that the beneficiary designation must be executed in a manner that satisfies the requirements of the *Wills Act*.⁴⁷⁵ Legislation has been enacted to make it clear that all types of beneficiary designations (no matter how they are characterized) need only meet the lower, contractual threshold of formalities in order to be validly executed.⁴⁷⁶

A second example involves a consequence that may flow from characterizing a beneficiary designation as a contractual instrument. If this characterization is accurate for a given case, then the beneficiary designation runs afoul of longstanding rules relating to privity of contract⁴⁷⁷ and "it could fail as unenforceable by the third-party stranger to the contract."⁴⁷⁸ Once again, legislation was enacted to deal with a potential problem.⁴⁷⁹ As was the case with the previous example on execution formalities, this example involving privity of contract was met with a legislative provision nar-

475. *Supra* note 286, s. 4 (will not valid unless (a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction, (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time, and (c) two or more of the attesting witnesses subscribe the will in the presence of the testator). *See also MacInnes v. MacInnes* (1934), [1935] SCR 200, (*sub nom. Re MacInnes Estate*) [1935] 1 DLR 401.

476. *See Insurance Act*, RSBC 2012, c. 1, ss. 59, 61, 117; *Law and Equity Act*, RSBC 1996, c. 253, ss. 49–51. *See also Wills, Estates and Succession Act*, *supra* note 10, s. 85 (in force 31 March 2014).

477. *See Tweddle v. Atkinson* (1861), 1 B. & S. 393 at 398, 121 ER 762 (QB), Wightman J. ("no stranger to the consideration can take advantage of a contract, although made for his benefit").

478. David Norwood & John P. Weir, eds., *Norwood on Life Insurance in Canada*, 3d ed. (Toronto: Carswell, 2002) at 291–92.

479. *See Insurance Act*, *supra* note 476, ss. 64, 122. *See also Wills, Estates and Succession Act*, *supra* note 10, s. 93 (in force 31 March 2014).

rowly addressing the specific problem and not with legislation aimed at making a general characterization of all types of beneficiary designations.

Other legal issues involving beneficiary designations, which have not attracted legislation, have been settled by the courts interpreting the policy or plan documents and characterizing the beneficiary designation.⁴⁸⁰

2. WHAT IS THE TEST OF CAPACITY TO MAKE A BENEFICIARY DESIGNATION?

One way to approach the issue of the mental capacity required to make a valid beneficiary designation would be to adopt the characterization exercise described in the previous section. The policy or plan documents would be examined closely to determine the nature of the beneficiary designation and the test of capacity would be geared to its nature. So if a beneficiary designation were testamentary in nature, the test of capacity would be similar to the test of capacity to make a will. If the beneficiary designation relied on other legal devices, then something similar to the test of capacity to enter into a contract would be more appropriate.⁴⁸¹

Re Rogers,⁴⁸² the leading British Columbia case on capacity to make a beneficiary designation, started down this path but ended up veering in another direction. The case involved a beneficiary designation under a life-insurance policy. Rogers, the policyholder, had taken out the policy in 1958, designating his parents as beneficiaries.⁴⁸³ In July 1961, Rogers married. About a month after his wedding, he filled out and signed a change of beneficiary form at his insurers' office. While "[t]here was nothing out of the ordinary about his behaviour at that time,"⁴⁸⁴ Rogers had in fact "suffered a nervous breakdown a week before [the] marriage"⁴⁸⁵ and was displaying signs of mental illness throughout the short marriage.⁴⁸⁶

480. See Scane, *supra* note 472 at 197.

481. See *ibid.* at 199.

482. (1962), 36 DLR (2d) 661, 40 WWR 317 (BCSC) [*Rogers* (SC) cited to DLR], *aff'd Rogers* (CA), *supra* note 401.

483. *Rogers* (SC), *supra* note 482 at 663, Ruttan J.

484. *Ibid.* at 665.

485. *Ibid.* at 664.

486. See *ibid.* (noting that Rogers "was continually depressed," "drank heavily," "was given to fits of extreme rage," and "laboured under the delusion that he was being persecuted by the Benchers of the Law Society, and also that he was being unjustly accused of fraud by the manager of the bank where he kept his accounts").

A little over two weeks after executing the beneficiary designation, Rogers committed suicide.⁴⁸⁷ Rogers's wife and his parents disputed a number of issues surrounding the marriage and Rogers's estate plan. This dispute ultimately landed in court, with Rogers's wife applying for directions on a number of stated issues.⁴⁸⁸

One of the issues was whether Rogers "had the mental capacity to execute the said change of beneficiary."⁴⁸⁹ The trial judge approached this issue by paying particular heed to the expert and lay evidence of Rogers's mental state at the time he changed his beneficiary designation.⁴⁹⁰ He described this evidence as showing that "Rogers [was] mentally disturbed, but not suffering from delusions so as to be unaware of the nature and quality of his acts."⁴⁹¹

The last part of this quotation invokes the main elements of the test of capacity to enter into a contract. The court concluded that Rogers had the mental capacity to make a beneficiary designation under this test.⁴⁹² But the court immediately proceeded to hedge on the applicable test of capacity. In the next sentence in the judgment, the court added, "[m]y decision is not altered if I apply to this transaction the rules of testamentary capacity."⁴⁹³

Rogers's parents appealed the trial decision.⁴⁹⁴ One of the issues on appeal was Rogers's mental capacity. Rogers's parents argued that the correct test to apply was the testamentary test and that, by this standard, Rogers did not have the capacity to change his beneficiary designation.⁴⁹⁵ This argument put the question of the correct test to apply squarely before the court of appeal. The judgments in that court took two different approaches to resolving the question.

Sheppard JA focussed strictly on characterizing the beneficiary designation at issue. In his view, Rogers's beneficiary designation could not be characterized as "a testa-

487. *See ibid.* at 665.

488. *See ibid.* at 662–63.

489. *Ibid.* at 663.

490. *See ibid.* at 671 ("Here the evidence of three witnesses is of significant value.").

491. *Ibid.*

492. *See ibid.*

493. *Ibid. See also ibid.* at 672 ("I find therefore there is no evidence of mental incapacity whether it be testamentary or otherwise.").

494. *See Rogers (CA)*, *supra* note 401.

495. *See ibid.* at 144.

mentary disposition” because “it takes effect not at death but immediately.”⁴⁹⁶ Instead “[t]he transaction was essentially a change of contract between the insured and the insuring company and therefore the validity of the changes of beneficiary would depend on the insured’s capacity to contract.”⁴⁹⁷ Sheppard JA applied the test of capacity to enter into a contract and found that, on the evidence, Rogers possessed contractual capacity when he changed his beneficiary designation.⁴⁹⁸

Wilson JA (Davey JA concurring) agreed that Rogers was capable of making a valid beneficiary designation, but “for other reasons” than those relied on by Sheppard JA.⁴⁹⁹ Wilson JA began by reviewing the applicable legislation⁵⁰⁰ and then moved on to characterize the beneficiary designation at issue. Wilson JA found that the beneficiary designation was not a testamentary document, but rather “a special power of appointment limited to a class, the power including the right to revoke previous appointments.”⁵⁰¹ But for Wilson JA this characterization of the beneficiary designation did not determine which test of capacity to apply.

Wilson JA proceeded to consider the policy rationales for the testamentary and contractual tests. In his view, a key distinction is “that the contractor is required to be capable of appreciating his own interest whereas the testator is required to be capable of appreciating the interests of other persons, those interests consisting of their claims to his bounty.”⁵⁰² Wilson JA also noted that the contractual test of capacity had an additional element, going to the knowledge of the other contracting party: the additional element probes whether that contracting party knew, or should reasonably be expected to know, that the contract was being made with a person with diminished capacity. Wilson JA concluded that this element was inappropriate for beneficiary designations.⁵⁰³ On the other hand, the “donee of the power [*i.e.*, Rogers]

496. *Ibid.*

497. *Ibid.* at 145.

498. *See ibid.* at 145–46.

499. *Ibid.* at 146.

500. *See Insurance Act*, RSBC 1960, c. 197, s. 148.

501. *Rogers (CA)*, *supra* note 401 at 147.

502. *Ibid.* at 148.

503. *See ibid.* Wilson JA said that the reason this element was inapplicable was obvious. What he appears to have in mind is that the benefit of a beneficiary designation does not flow to the other contracting party (the insurance company) but rather to a third person who is not a party to the contract.

was concerned with the interests of others rather than his own interest, [so] the testamentary test is the right one to apply.”⁵⁰⁴

There have been a number of recent cases⁵⁰⁵ involving mental capacity and beneficiary designations, but they tend to treat the question of which test of capacity to apply as a matter of settled precedent. The typical approach is to cite either Wilson JA’s judgment in *Re Rogers* or a leading Ontario decision.⁵⁰⁶ Then, the court briefly concludes that “the test [to make a beneficiary designation is] the same as that for testamentary capacity.”⁵⁰⁷

There is at least one reported court decision that came to a different conclusion and applied a test of capacity to make a beneficiary designation that more closely resembled the contractual test.⁵⁰⁸ But the court in this case did not engage in the kind of weighing of the merits of various tests of capacity that was done in *Re Rogers*. It simply applied the contractual test without comment.

3. LEGISLATION RELATING TO MENTAL CAPACITY AND BENEFICIARY DESIGNATIONS

There is some legislation bearing on mental capacity and beneficiary designations that is worth noting. The legislation empowers someone acting in a representative capacity for a person with diminished capacity to make certain specified decisions with respect to that person’s beneficiary designation. Since many beneficiary designations can be characterized as testamentary documents, they are caught by a long-standing rule that provides that a person cannot delegate will-making authority to an agent, such as an attorney acting under a power of attorney.⁵⁰⁹ Legislation has been enacted to soften the hard edges of this rule.

504. *Ibid.* at para. 29.

505. See *Little Estate v. Knol* (2006), 21 ETR (3d) 309, 144 ACWS (3d) 1132 (Ont. SCJ) [*Little Estate* cited to ETR]; *Carter v. Carter* (1999), 85 OTC 371, 26 ETR (2d) 79 (Gen. Div.); *Turner Estate v. Bezanson* (1995), 139 NSR (2d) 296, 6 ETR (2d) 282 (SC), *aff’d* (1995), 143 NSR (2d) 123, 8 ETR (2d) 169 (CA), *leave to appeal to SCC refused*, [1995] SCCA No. 438 (QL); *Fontana v. Fontana* (1987), 28 CCLI 232, [1987] BCJ No. 452 (QL) (SC).

506. *Stewart v. Nash* (1988), 65 OR (2d) 218, 30 ETR 85 (HCJ).

507. *Little Estate*, *supra* note 505 at para. 20.

508. See *McInnis Estate v. Heckbert*, 2003 PESCTD 12, 50 ETR (2d) 244.

509. See generally Dawn Dudley Oosterhoff, “Alice’s Wonderland: Authority of an Attorney for Property to Amend a Beneficiary Designation” (2002) 22 ETPJ 16. See also *Desharnais v. Toronto Dominion Bank*, 2001 BCSC 1695, 42 ETR (2d) 192, *varied on other grounds*, 2002 BCCA 640, 9 BCLR (4th) 236.

The provisions of one of the relevant statutes are already in force. Under the *Power of Attorney Act*⁵¹⁰ an attorney acting under an enduring power of attorney is authorized to:

- change the donor's existing beneficiary designation, so long as the attorney obtains the supreme court's approval of the proposed change; or
- make a new beneficiary designation for the donor if
 - the newly designated beneficiary is the donor's estate, or
 - the designation is made in an instrument "that is renewing, replacing, or converting a similar instrument" the donor made while capable and the new instrument designates the same beneficiary that was designated under the instrument it is replacing.⁵¹¹

The "instrument" referred to in the above passage can be any type of document, other than a will.⁵¹²

There are two statutes that have been passed by the legislature but that have not yet been brought into force that also deal with the authority of representatives to make decisions about an incapable person's beneficiary designation.

First, the *Adult Guardianship Act*,⁵¹³ as amended in 2007,⁵¹⁴ extends some limited powers to a property guardian to make or amend a beneficiary designation for a person who has been determined to lack the capacity to manage his or her financial affairs. The authority granted in these provisions parallels the authority granted to attorneys acting under enduring powers of attorney.⁵¹⁵

Second, the *Wills, Estates and Succession Act*⁵¹⁶ contains provisions on the authority of a "representative" to make decisions regarding an incapable person's beneficiary

510. *Supra* note 2.

511. *Ibid.*, s. 20 (5).

512. *See ibid.*, s. 20 (5).

513. *Supra* note 5.

514. *Adult Guardianship and Planning Statutes Amendment Act, 2007*, *supra* note 5, s. 4 (not in force).

515. *See Adult Guardianship Act*, *supra* note 5, s. 17 (4) (not in force).

516. *Supra* note 10 (in force 31 March 2014).

designation.⁵¹⁷ These provisions are similar to (but not exactly the same as) the provisions in the *Power of Attorney Act* and the *Adult Guardianship Act*.

C. Issues for Reform

This is an area that has attracted very little attention from law-reform agencies.⁵¹⁸ There appears to be only a small set of issues for reform for the test of capacity to make a beneficiary designation. In fact, the only relevant issues for the purposes of this report concern the elements of the test itself and whether they should be reformed by or restated in legislation.

1. SHOULD ANY OF THE ELEMENTS OF THE TEST OF CAPACITY TO MAKE A BENEFICIARY DESIGNATION BE MODIFIED BY LEGISLATION?

As discussed above, the vast majority of courts, when confronted with an issue relating to the mental capacity to make a beneficiary designation, have simply said that the test of capacity to make a beneficiary designation is the same as the test of capacity to make a will. This conclusion seems to rest on the policy decision made in the leading case, *Rogers* (CA).⁵¹⁹ But this policy decision doesn't need to be set in stone. There may be other, better approaches to this area of the law.

One approach would be to enact legislation establishing that the test of capacity to make a beneficiary designation is a modified version of the test of capacity to enter into a contract. The contractual test of capacity has the following elements:

517. See *supra* note 10, ss. 85 (3), 90 (in force 31 March 2014). Section 90 provides that a representative “includes one of the following: (a) a committee acting under the *Patients Property Act*; (b) an attorney acting under an enduring power of attorney as described in section 8 of the *Power of Attorney Act*; (c) a representative acting under a representation agreement made under section 9 (1) (g) of the *Representation Agreement Act*; (d) a person appointed under section 51 (2) of the *Indian Act* (Canada) or the Minister of Indian Affairs and Northern Development” (*ibid.*).

518. There have been a number of law-reform reports that address beneficiary designations, but their focus has tended to be on issues related to the execution of those documents and legislation providing a framework for a relatively informal method of execution. See Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills*, LRC 52 (Vancouver: The Commission, 1981) at 81–91; Manitoba Law Reform Commission, *Report on Statutory Designations and the Retirement Plan Beneficiaries Act*, MLRC Rep. no. 73 (Winnipeg: The Commission, 1990); Alberta Law Reform Institute, *Report on Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act*, ALRI Rep. no. 68 (Edmonton: The Institute, 1993); British Columbia Law Institute, *Report on Wills, Estates and Succession: A Modern Legal Framework*, BCLI Rep. no. 45 (Vancouver: The Institute, 2006) at 71–84, 171–86.

519. *Supra* note 401.

- a contracting party must be able to “understand [the contract’s] terms”;
- this contracting party must also be able “[to form] a rational judgment of its effect upon his interests”; and
- the other contracting party must not have “actual or constructive” knowledge of the first contracting party’s “mental incompetency.”⁵²⁰

As Wilson JA pointed out the third element of this test is inappropriate for beneficiary designations.⁵²¹ But the first two elements could be used as the test of capacity to make all beneficiary designations (no matter how any given beneficiary designation is characterized).

There would be several advantages to taking this approach. It would establish a simpler test of capacity. Many beneficiary designations are made in informal settings, typically when an insurance policy is purchased or a retirement plan is opened. The persons present may not have the training or expertise to apply the more intricate testamentary test of capacity. This is in contrast to wills, which still typically involve a visit to a lawyer’s or a notary public’s office. A simpler legislative test of capacity would also be in harmony with other legislative developments relating to beneficiary designations. Much of this legislation is dedicated to creating an informal means of executing beneficiary designations, based on contractual principles, and avoiding the more elaborate formalities needed to execute a will.

This approach could be questioned, though. Beneficiary designations are usually seen as part of an estate plan. An argument could be made that the testamentary test of capacity is a better fit for them. Adopting the contractual test of capacity would also represent a significant change in the law. To justify it there should be some clear evidence that the current approach is causing some problems in practice. But the cases and commentary do not appear to provide any evidence of such difficulties. The vast majority of cases simply apply the testamentary test of capacity, without any comment.

In the committee’s view, the current test of capacity to make a beneficiary designation is not in need of reform. The test does not appear to be deficient or to be causing problems in practice. As it currently stands, the test of capacity to make a beneficiary designation is harmonized with the test of capacity to make a will. Since these documents are commonly made as part of a comprehensive estate plan, it makes

520. *Kelly*, *supra* note 400 at 275.

521. *See Rogers (CA)*, *supra* note 401 at 148.

sense to retain a test of capacity that treats them on an equal footing. Finally, consultation respondents supported the committee's proposal by a wide margin.

The committee recommends:

18. British Columbia should not enact legislation that changes the common-law test of capacity to make, change, or revoke a beneficiary designation.

2. SHOULD THE TEST OF CAPACITY TO MAKE A BENEFICIARY DESIGNATION BE RESTATED IN LEGISLATION?

A second legislative reform that should be considered is the possibility of restating the test of capacity to make a beneficiary designation. A restatement would set the current common-law test of capacity in legislation without changing any of its elements.

Restating the test of capacity to make a beneficiary designation would have the advantage of making the test more accessible, particularly to the general public. It could also help, potentially, to clarify the law. The courts have tended not to delve into construing the policy or plan documents that make up beneficiary designations. But if they did in the future adopt this approach, it could lead to differing treatment of beneficiary designations, since the underlying legal makeup of various types of beneficiary designations may differ. It would be advantageous, in such circumstances, to have legislation that establishes a consistent approach to the test of capacity to make a beneficiary designation.

On the other hand, the law as it currently stands seems to be well settled. It appears to be clear that the test of capacity to apply to determine whether someone has the mental capacity to make a beneficiary designation is the testamentary test. Further, this test does not appear to be causing significant problems in practice.

While there might be an educational value to restating the test of capacity to make a beneficiary designation, the committee was not convinced that this reason alone was enough to support a call for legislation. The test of capacity appeared to be well settled and reasonably well known. And this proposal was supported by a strong majority of respondents to the consultation paper.

The committee recommends:

19. British Columbia should not enact legislation that restates the common-law test of capacity to make, change, or revoke a beneficiary designation.

CHAPTER VIII. CAPACITY TO NOMINATE A COMMITTEE

A. Introduction

Legislation allows for a person to nominate someone to serve as the person's committee—that is, someone who will make decisions on the person's behalf if the person is ever judged to be incapable of managing his or her person or affairs.⁵²² This often-overlooked part of the estate-planning process is the subject of this chapter. The chapter's main focus is considering reforms to the test of capacity to nominate a committee. Before getting to this issue for reform it provides background information on the nature of committees, the process of nominating a committee, the test of capacity to nominate a committee, and how the full implementation of the *Adult Guardianship Act* will affect this area of the law.

B. Background

1. PATIENTS AND COMMITTEES

The *Patients Property Act*⁵²³ establishes a court-based process for determining whether a person is incapable of managing his or her affairs or incapable of managing himself or herself (or both). As a result of that process, a court may make an order declaring a person to be (1) incapable of managing his or her affairs, (2) incapable of managing himself or herself, or (3) incapable of managing himself or herself or his or her affairs. A person who is declared incapable in one of these ways is referred to in the act as a *patient*.

When a person is declared a patient the court will typically also appoint a committee for the patient. In basic terms, a *committee* is “[a] person entrusted with the charge of another or of his or her property.”⁵²⁴

As this definition implies, there are two types of committees. One type is called a *committee of the person*. In the language of the act, a committee of the person has “custody of the person of the patient.”⁵²⁵ In practice, this means that the committee

522. See *Patients Property Act*, *supra* note 5, s. 9 See also *Adult Guardianship Act*, *supra* note 5, s. 8 (4) (carrying forward this concept for guardians under this act—not in force).

523. *Supra* note 5.

524. *The New Shorter Oxford English Dictionary*, *sub verbo* “committee.”

525. *Supra* note 5, s. 15 (1) (b) (ii).

of the person is empowered to make personal and health-care decisions for the patient. The other type of committee is called a *committee of the estate*. A committee of the estate is empowered to make financial decisions for the patient. As the act puts it, a committee of the estate “has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind.”⁵²⁶

A patient may have either a committee of the person or a committee of the estate—or both. The type of committee appointed relates back to the nature of the court’s declaration of incapacity. If the court declared that the patient is incapable of managing his or her affairs, then a committee of the estate is appointed. If the court declared that the patient is incapable of managing himself or herself, then a committee of the person is appointed. Finally if the court declared that the patient is incapable of managing himself or herself or his or her affairs, then both types of committee should be appointed. A single person may act as both the patient’s committee of the person and committee of the estate. But, in practice, the roles are often assigned to different people.⁵²⁷

2. WHAT IS A NOMINATION OF A COMMITTEE?

The act provides a mechanism for a patient to influence the selection of a committee. “Most [patients],” notes a leading practice guide, “will have strong views about whom they would like to manage their finances and make health-related decisions for them if they are incapacitated.”⁵²⁸

If those views are not recorded before the court application is made, then it may be too late for the patient to influence the proceedings. At this point, the patient’s capacity is in doubt and the court application is being carried out by another person (such as a family member) or a public body (such as the Office of the Public Guardian and Trustee). A nomination of a committee is a planning document that allows the patient, while the patient is capable, to identify the person or persons whom the patient would want to act as committee, if the patient is ever declared incapable under the act. The legislation provides that the nomination must be given effect, with the

526. *Ibid.*, s. 15 (1) (b) (i).

527. See Peter W. Bogardus & Mary B. Hamilton, *Wills Precedents: An Annotated Guide*, looseleaf (consulted on 24 June 2013), (Vancouver: Continuing Legal Education Society of British Columbia, 1998) at § 29.1.

528. *Ibid.*

nominee appointed as committee, “unless there is good and sufficient reason for refusing the appointment.”⁵²⁹

The *Patients Property Act* contains some directions on how to create a valid nomination of committee. The nomination must be “executed in accordance with the requirements for the making of a will under the *Wills Act*.”⁵³⁰ And, of more importance for this report, the nomination must be “made and signed by the patient at a time when the patient was of full age and of sound and disposing mind.”⁵³¹ Those last words import a mental-capacity requirement into the execution of a nomination of a committee. Since the legislation does not contain a test of capacity applicable to nominations of committees, it is necessary to look to the common law.

3. WHAT IS THE TEST OF CAPACITY TO NOMINATE A COMMITTEE?

The only case directly on point is a relatively recent decision, *Fraser v. Fraser*.⁵³² The only “issue in dispute [in *Fraser* was] the appropriate committee for the estate and person of Andrew Fraser Sr.”⁵³³

Mr. Fraser had five biological children and two adopted children. He suffered from untreatable vascular dementia.⁵³⁴ Over the years, arguments over his care and the management of his property had created an “acrimonious dispute among members of the Fraser family.”⁵³⁵ One son had taken primary responsibility for Mr. Fraser’s care. Acting under a power of attorney granted by Mr. Fraser, this son had also been largely responsible for managing his financial affairs. Other family members levelled “[a]ccusations of undue influence, want of proper care, theft, fraud, and other acts of dishonesty . . .” against this son.⁵³⁶

529. *Supra* note 5, s. 9.

530. *Ibid.*, s. 9 (b). *See also Wills Act*, *supra* note 475, s. 4 (will not valid unless it is in writing and (a) at its end it is signed by the testator or signed in the testator’s name by some other person in the testator’s presence and by the testator’s direction, (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time, and (c) two or more of the attesting witnesses subscribe the will in the presence of the testator).

531. *Supra* note 5, s. 9 (a).

532. 2008 BCSC 1733, 445 ETR (3d) 285 [*Fraser*].

533. *Ibid.* at para. 6, Bruce J.

534. *See ibid.* at para. 5.

535. *Ibid.* at para. 8

536. *Ibid.* at para. 10.

In 2006, concerned about plans that his son had to move him into a care facility, Mr. Fraser sought legal advice. The result of this advice was the creation of a new estate plan that favoured other children over the son who had previously been providing Mr. Fraser's care. In particular, Mr. Fraser executed a nomination of committee that nominated two of his other sons.

In 2007, the matter was brought to a head in an application to declare Mr. Fraser to be incapable of managing himself and his affairs. All sides agreed that Mr. Fraser was incapable; the focus of the dispute was on who should be named committee. The court had to consider the nomination of committee. In doing so, the court remarked that "[t]here is a qualitative difference between managing one's business affairs and attending to one's daily care needs and choosing who among family members one wishes to have in charge of these matters."⁵³⁷ The contrast drawn here appears to be between the test of capacity for a declaration under the *Patients Property Act* and the test of capacity to execute a valid nomination of committee. The point is that the capacity required to nominate a committee is lower than the level of capacity that would justify a declaration under the act.

The court went on to say that the test of capacity to nominate a committee was "[s]imilar to testamentary capacity. . . ."⁵³⁸ But this remark apparently did not mean that the test of capacity to nominate a committee shared the same elements as the test of capacity to make a will. Instead, the court apparently meant that the two tests occupy what it viewed to be a similarly low rung on the capacity hierarchy.⁵³⁹ The court concluded "[Mr. Fraser] was, at the relevant time, capable of understanding the nomination and selecting whom he wished to manage his estate and person."⁵⁴⁰ This conclusion makes it sound as if the court applied a test with elements similar to some of the elements of the test of capacity to enter into a contract.⁵⁴¹ What the court appears to be saying is that the test of capacity to make a valid nomination of committee has two elements, requiring a person to be capable of understanding (1) the nature of a nomination of committee and (2) the effect that making a nomination of committee has on the person's interests.

537. *Ibid.* at para. 20.

538. *Ibid.*

539. *See ibid.* (citing *McLean v. Gonzalez-Calvo*, 2007 BCSC 646, 36 ETR (3d) 54, as support for assertion that making a will requires only a modest level of capacity).

540. *Ibid.* at para. 19.

541. *See Kelly*, *supra* note 400 at 275.

Fraser's approach to handling capacity to nominate a committee was cited with approval in a subsequent case, but it was not a case dealing with a nomination of a committee.⁵⁴²

4. ADULT GUARDIANSHIP ACT AND NOMINATING A COMMITTEE

The *Adult Guardianship Act*⁵⁴³ contains, among other provisions, sections establishing a new adult-guardianship regime for British Columbia, one that would replace the *Patients Property Act*.⁵⁴⁴ These sections of the *Adult Guardianship Act* are not in force, and it is not clear when the government plans to bring them into force, but it is worthwhile paying some attention to them, as they could point to where guardianship law in British Columbia is headed.

The *Adult Guardianship Act* does carry forward nominations of committees made under the *Patients Property Act* and it also contains a similar framework for the nomination of a guardian.⁵⁴⁵ (A *guardian* under the *Adult Guardianship Act* is functionally the equivalent of a committee.)

The *Adult Guardianship Act* also contains another relevant provision relating to the appointment of a guardian. This provision simply provides that “the court must consider the wishes the adult, when capable, expressed orally or in writing respecting who should, or should not, act as guardian.”⁵⁴⁶ So, in the place of a relatively formal document, this provision of the *Adult Guardianship Act* allows “wishes” to be considered. These “wishes” do not even have to be in writing. And the court is granted enhanced flexibility in dealing with these wishes. They only have to be “considered.” Under the *Patients Property Act*, the court must appoint the person nominated in a nomination of committee to be the committee, “unless there is good and sufficient

542. See *Re Palamarek*, 2011 BCSC 563 at paras. 158–59, [2011] BCJ No. 831 (QL), Harris J.

543. *Supra* note 2.

544. *Supra* note 5.

545. See *supra* note 5, s. 8 (4) (“Unless there is good and sufficient reason for refusing the appointment, the court must appoint as guardian a committee nominated under the *Patients Property Act*, before that Act was repealed, or a person nominated by the adult as a guardian, if the nomination was (a) made in writing and signed by the adult at a time when the adult was both an adult and mentally capable of nominating a committee or guardian, and (b) executed in accordance with the requirements for the making of a will under the *Wills Act*.”) (as amended by *Adult Guardianship and Planning Statutes Amendment Act, 2007*, *supra* note 5, s. 1—not in force).

546. *Supra* note 5, s. 8 (3).

reason for refusing the appointment.”⁵⁴⁷ The proposed *Adult Guardianship Act* provision’s approach is closer to that of legislation found elsewhere in Canada.⁵⁴⁸

C. Issue for Reform

This is a rather obscure area of the law. Nominations of committees have not attracted much commentary. No other law-reform agency has examined them. Since nominations of committees appear to be unique to British Columbia’s legislation (no other province has them in the same form), there is nothing from other jurisdictions to assist readers in considering options for reform. Nevertheless, the only real issue for this topic is whether legislation is necessary to reform any of the elements of the common-law test of capacity to nominate a committee.

1. SHOULD ANY OF THE ELEMENTS OF THE TEST OF CAPACITY TO NOMINATE A COMMITTEE BE MODIFIED BY LEGISLATION?

One approach to reforming the test of capacity to nominate a committee would be to bring that test into alignment with the test of capacity to make a will. There are two reasons for favouring this option for reform. First, it appears to have a basis in the language of the *Patients Property Act*. The section that enables nominations of committees calls for the same formalities of execution as are used for wills. Further, it describes mental capacity in terms of a “sound and disposing mind.” This language has been commonly used to describe the level of capacity needed to make a valid will.⁵⁴⁹

Second, a nomination of committee tends to be created as part of a broader estate plan. In a typical scenario, a person will engage a legal advisor and make a will, make an enduring power of attorney, and nominate a committee.⁵⁵⁰ The tests of capacity to make a will and to make an enduring power of attorney⁵⁵¹ require more than an

547. *Supra* note 5, s. 9.

548. *See, e.g., Adult Guardianship and Trusteeship Act*, SA 2008, c. A-4.2, s. 28 (1) (b) (i); *Substitute Decisions Act*, 1992, SO 1992, c. 30, s. 24 (5) (b).

549. *See supra* note 80 and accompanying text.

550. *See* Bogardus & Hamilton, *supra* note 527 at § 29.1.

551. *See Power of Attorney Act*, *supra* note 2, s. 12 (“(1) An adult may make an enduring power of attorney unless the adult is incapable of understanding the nature and consequences of the proposed enduring power of attorney. (2) An adult is incapable of understanding the nature and consequences of the proposed enduring power of attorney if the adult cannot understand all of the following: (a) the property the adult has and its approximate value; (b) the obligations the adult owes to his or her dependants; (c) that the adult’s attorney will be able to do on the adult’s behalf anything in respect of the adult’s financial affairs that the adult could do if capable, except

understanding of the nature and effect of those documents. So this proposed reform could also have the effect of harmonizing the law on tests of mental capacity for different types of estate-planning documents.

But it could be argued that the test of capacity to make a will, which is generally viewed as requiring a higher threshold of mental capacity than other types of common-law tests of capacity, is not appropriate for a nomination of a committee. A more modest test of capacity is a better fit for nominations of committees. A lower threshold would also enable more people to create these planning documents.

The committee decided that the common law has failed to provide a sufficiently clear and certain test of capacity for nominating a committee. Legislation is needed. In the committee's view, nominating a committee is a useful personal-planning device, which should be encouraged. For this reason, the committee favoured a test of capacity that set a lower threshold of mental capacity than is required under either the common-law test of capacity to make a will or the statutory test of capacity to make an enduring power of attorney. In the committee's view, the statutory test of capacity to make a representation agreement under section 9 of the *Representation Agreement Act* strikes the right balance between certainty and flexibility.⁵⁵² The committee considered whether the lower standard of mental capacity required for representation agreements under section 7 of the act⁵⁵³ was appropriate for the nomination of a committee of the person, but decided that bifurcating the test of capacity would introduce an undesirable element of complexity into the law.

A large majority of respondents who commented on nominating a committee in the consultation agreed with the committee's tentative recommendation.

The committee recommends:

20. British Columbia should enact legislation that provides that the test of capacity to nominate a committee under section 9 of the Patients Property Act or a guardian under section 8 of the Adult Guardianship Act is the same as the test of capacity set out in section 10 of the Representation Agreement Act.

make a will, subject to the conditions and restrictions set out in the enduring power of attorney; (d) that, unless the attorney manages the adult's business and property prudently, their value may decline; (e) that the attorney might misuse the attorney's authority; (f) that the adult may, if capable, revoke the enduring power of attorney; (g) any other prescribed matter.").

552. See *supra* note 168, s. 10 ("An adult may authorize a representative to do any or all of the things referred to in section 9 unless the adult is incapable of understanding the nature and consequences of the proposed agreement.").

553. See *ibid.*, s. 8.

CHAPTER IX. CAPACITY TO ENTER INTO A CONTRACT

A. Introduction

With this chapter the focus of this report shifts from areas of the law primarily concerned with estate planning to the law of contracts. A person may enter into a contract in a wide variety of situations and there is a staggering range of types of contracts. The common-law test of capacity to enter into a contract has some features that set it apart from other common-law tests of capacity. The relationship between the test of capacity and the broader set of legal rules that govern the subject (in this case, contract law) is also markedly different from the other subjects considered in this report. These factors have influenced the issues for reform considered in this chapter, which relate to the fundamental question of whether British Columbia should retain its test of capacity to enter into a contract, whether that test of capacity should be modified by or restated in legislation, and whether rules relating to the test of capacity and contracts for necessities should be reformed.

B. Background

1. OVERVIEW

This background section summarizes the law on mental capacity and contracts. This area of the law has some aspects that have no equivalents in the other subjects examined in this report. As a result, this chapter has to deal with a wider range of background topics than in other chapters, in order to present a complete picture of the law. The sections that follow are something of a miscellany summarizing the following subjects: the basic elements of the test of capacity; the scope of the test of capacity; the test's underlying purposes; how the law developed to provide protection for a capable contracting party's interests and to address the issue of whether a contract with an incapable person is void or voidable; the functional and flexible nature of the test; the role of fairness in the test; other relevant contract-law concepts; the issue of necessities; and relevant British Columbia legislation.

2. A SUMMARY OF THE BASIC ELEMENTS OF THE TEST OF CAPACITY TO ENTER INTO A CONTRACT

The leading case *Bank of Nova Scotia v. Kelly*⁵⁵⁴ has summarized the basic elements of the test of capacity to enter into a contract as follows:

554. *Supra* note 400.

- a contracting party must be able to “understand [the contract’s] terms”;
- this contracting party must also be able “[to form] a rational judgment of its effect upon his interests”; and
- the other contracting party must not have “actual or constructive” knowledge of the first contracting party’s “mental incompetency.”⁵⁵⁵

The first two elements of this test are familiar parts of the “basic common law test of capacity,”⁵⁵⁶ which shows up as a part of each of the tests of capacity that are examined in this report. As is the case for all common-law tests of capacity, these elements of the contractual test of capacity are directed toward a person’s ability or capacity to understand the nature and effect of a transaction. The test does not require a court to determine that a person was actually considering the contract’s nature and effect at the time it was entered into.⁵⁵⁷

The second element is concerned not with “the legal effect of the contract generally,” but rather with “the effect on this particular [person with diminished capacity] in his particular circumstances.”⁵⁵⁸ The reference to “forming a rational judgment” upon that effect is not intended to import a rationality standard to decision-making under the test of capacity. The court should not attempt to weigh the merits of the contract against an objective measure of what a rational person would do in the circumstances. Rather, the focus should be on a person’s capacity to provide reasons for entering into the contract, even if those reasons diverge from objective or community standards of rationality.⁵⁵⁹

555. *Ibid.* at 275, Nicholson J. See also *Imperial Loan Co. Ltd. v. Stone*, [1892] 1 QB 599, 8 TLR 408 (Eng. CA) [*Stone* cited to QB]; *York Glass Co. v. Jubb* (1925), 42 TLR 1, 134 LT 36 (Eng. CA); *Gibbons v. Wright*, [1954] HCA 17, 91 CLR 423 [*Gibbons* cited to CLR]; *Hart v. O’Connor*, [1985] UKPC 1 (BAILII), [1985] 1 AC 1000 [*Hart* cited to AC].

556. *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, *supra* note 50 at para. 2.10.

557. See Robertson, *supra* note 438 at 194 (“It is also clear that the relevant issue is not whether the person did in fact understand the nature of the contract . . . but rather whether the person was capable of such understanding.” [footnote omitted]).

558. *Ibid.* at 195–96. See also Nick O’Neill & Carmelle Peisah, *Capacity and the Law* (Sydney: Sydney University Press, 2011) at § 3.3.2 (“It is the understanding of the effect of the transaction which has the broadest interpretation and probably requires a fairly high level of cognitive function, particularly frontal lobe functions of planning, judgment, reasoning and working memory.”).

559. See Robertson, *supra* note 438 at 196 (“The term ‘rational’ is potentially ambiguous, and its use in the present context is apt to obscure an important distinction between capacity to make a *reasoned* judgment and capacity to make a *reasonable* judgment. The court should be concerned with the former but not with the latter.” [emphasis in original]).

The third element is a distinctive part of the contractual test of capacity that has no equivalent in other common-law tests of capacity. It is discussed in some detail later in this chapter.⁵⁶⁰ But it is worthwhile to note here that this element calls for actual *or* constructive knowledge of a contracting party's diminished capacity. Constructive knowledge is "[k]nowledge [that] will be imputed in circumstances where one party ought to have known of the other's mental capacity or ought to have been sufficiently suspicious as to warrant making further inquiries."⁵⁶¹

These elements of the contractual test of capacity are described as "basic elements" of the test because there is no controversy over their inclusion in the test. Some courts and commentators have posited the inclusion of a fourth element, concerning the fairness of the contract at issue. The status of this potential fourth element in Canadian law is unclear. The issue is discussed in more detail later in this chapter.⁵⁶²

Finally, the test of capacity to enter into a contract has a fixed-and-specific-delusion element that operates in a manner similar to the specific-delusion element for the test of capacity to make a will. That is, "[e]ven where the delusion is shown to have been related to the subject matter of the transaction, it must still be determined whether it prevented the party from understanding the nature and effect of the contract."⁵⁶³ But it should be noted that there are vastly fewer cases involving delusions and contracts than those involving delusions and wills.

3. SCOPE OF THE TEST OF CAPACITY TO ENTER INTO A CONTRACT

In British Columbia, the *Patients Property Act*⁵⁶⁴ provides for a court-based process to determine whether or not an individual has the mental capacity to manage his or her affairs.⁵⁶⁵ If the court determines that the individual lacks this capacity, then it may appoint another person (called a *committee of the estate*) to manage the incapable person's affairs. This result would seem to have some bearing on the incapable person's capacity to enter into contracts. So how does the appointment of a committee of the estate for a person relate to the application of the common-law test of capacity to enter into a contract to that person?

560. See, below, section IX.B.5 at 137.

561. Robertson, *supra* note 438 at 197 [footnote omitted].

562. See, below, section IX.B.8 at 142.

563. Robertson, *supra* note 438 at 197 [footnote omitted].

564. *Supra* note 5.

565. *Ibid.*, s. 3. See also, above, section VIII.B.1 at 125 (further discussion of committees).

The short answer is that an appointment of a committee of the estate for a person takes that person outside the scope of the contractual test of capacity. There is a longstanding distinction in the law between the capacity to enter into a contract of a person who is subject to a committee order and of a person who is not.⁵⁶⁶ As a leading case explains, cases involving a person who is subject to a committee order “should be put on one side at the outset” of any inquiry into the common-law test of capacity to enter into a contract for the following reason: “[s]uch a person is held incompetent to dispose of his property, not because of any lack of understanding (indeed he remains incompetent even in a lucid interval), but because the control, custody and power of disposition of his property has passed to the [committee] to the exclusion of himself.”⁵⁶⁷

The background discussion in this chapter follows this distinction. The main focus is on contracts involving persons with diminished capacity who are not subject to a committee order. The statutory adult-guardianship system is only touched on where it comes into contact with the common-law test of capacity. All the issues for reform raised later in this chapter relate to the common-law test of capacity alone.

4. PURPOSES OF THE TEST OF CAPACITY TO ENTER INTO A CONTRACT

There are at least three broad purposes underlying the common-law test of capacity to enter into a contract. The first purpose, widely identified by courts⁵⁶⁸ and commentators,⁵⁶⁹ is to protect the interests of the person with diminished capacity. This purpose should be familiar, as it is shared with all the common-law tests of capacity that are being studied in this report.

But the contractual test of capacity differs from other common-law tests of capacity in that the test is framed also to take into account and protect other interests. These

566. See, e.g., *Restatement (Second) of Contracts* §§ 13, 15 (1979).

567. *Gibbons*, *supra* note 555 at 439–40, Dixon CJ, Kitto, and Taylor JJ.

568. See, e.g., *Rossander v. Rossander* (1998), 44 BCLR (3d) 233 at para. 43, 20 ETR (2d) 56 (SC), Melnick J. [*Rossander*] (“Provisions in law relating to making such contracts with incompetents voidable [are], in large measure, for the protection of the incompetent.”).

569. See, e.g., Jack Beatson, Andrew Burrows & John Cartwright, eds., *Anson’s Law of Contract*, 29th ed. (Oxford: Oxford University Press, 2010) at 245 (“The underlying policy of rules limiting contractual capacity is to protect those under the incapacity.”).

are the material interests of the other contracting party⁵⁷⁰ and the broader social interest in security of contracts.⁵⁷¹ So one of the test's underlying purposes is to strike an appropriate balance in protecting these competing interests. The effect that carrying out this purpose has had on the law is discussed in more detail in the next section of this chapter.

There is potentially a third purpose to bear in mind. The Law Reform Commission of Ireland has identified this third purpose as the “goal of facilitating persons with a mental disability to live their lives as independently as possible.”⁵⁷² This purpose has not received anywhere near the attention of the first two purposes, so it may be a reach to place it on the same footing as those two purposes. That said, its existence would explain some aspects of the law⁵⁷³ and would be useful to consider in relation to reform of the law.

5. DEVELOPMENT OF THE TEST OF CAPACITY: PROTECTING THE OTHER CONTRACTING PARTY'S INTERESTS AND SECURITY OF CONTRACTS

As noted in the previous section, a unique feature of the test of capacity to enter into a contract is that test's attempt to balance protection of an incapable person's interests with protection of the interests of the other contracting party and of society's broader interest in security of transactions. As the law in this area has developed, this balance has tended to move from one side to the other, leaving either the interests of the incapable person or the other contracting party in the ascendency.⁵⁷⁴ This movement has had a marked effect on the law, to the extent that to understand it fully it is necessary to trace the historical development of this element of the test of capacity.

570. That is, the party or parties whose capacity is not in issue and who has or have entered into the purported contract with the person with diminished capacity that is at issue. For the sake of simplicity, this chapter will refer simply to “the other contracting party.”

571. *See Restatement (Second) of Contracts* § 15, comm. a (1979) (“A contract made by a person who is mentally incompetent requires the reconciliation of two conflicting policies: the protection of justifiable expectations and of the security of transactions, and the protection of persons unable to protect themselves against imposition.”).

572. *Consultation Paper on Vulnerable Adults and the Law: Capacity*, *supra* note 50 at para. 5.01. *See also Fowler Estate v. Barnes* (1996), 142 Nfld. & PEIR 223, 13 ETR (2d) 150 at para. 27 (NFSC (TD)), Green J. [*Barnes*] (“In determining contractual capacity of an aged person the court must be careful not to substitute suspicion for proof so as to remove from elderly people an important aspect of individual autonomy, the right to make bargains according to their own views of what is in their best interests.”).

573. *See*, below, section IX.B.10 at 145 (necessaries).

574. *See Restatement (Second) of Contracts* § 15, comm. a (1979).

As a first step, it is worthwhile to get a handle on the problem that the law is attempting to address. This problem is twofold. First, at an individual level, a person might in good faith enter into a contract with someone with diminished capacity, and perform the obligations required of that person under the contract, only to find out that the courts will not enforce the obligations imposed on the incapable person. As a result, the other contracting party could be in complete innocence and yet suffer a monetary loss. The courts have always chafed against rules that impose such a blunt and rigid allocation of losses.

Second, at a societal level, an overly liberal approach to striking down agreements can erode public confidence in the security of contracts. If people rationally conclude that they cannot have confidence that a contract may be enforced in the courts, then they may take individual steps to protect themselves that could harm both the marketplace and other participants in it. Specifically in this case, people may decide that it is not worth the risk to enter into a contract with someone who fits into a stereotype of an incapable person, such as an older adult or a person who suffers from a mental disability. As a result, such people may end up disadvantaged in the marketplace by a rule that is meant to protect their interests.

Notice that there is no real analogue to these concerns in the other areas being studied in this report.

There are a few twists and turns to the story of how the common law arrived at its current balance between protecting the interests of incapable people and other contracting parties in the test of capacity to enter into a contract. The original position of the common law seems to have been that an incapable person was absolutely enjoined from entering into a contract—the “contract” was treated as a nullity.⁵⁷⁵ So, at this time, the law governing capacity and *inter vivos* transactions resembled the law governing testamentary capacity. But this position would not survive the rise of the modern law of contracts in the late sixteenth century, which demanded the routine enforcement of promises supported by consideration, in the name of security of contracts.⁵⁷⁶

575. See J. A. Coutts, “Contracts of Mental Incompetents,” in *Special Lectures of the Law Society of Upper Canada* (Toronto: De Boo, 1963) 49 at 49 (“It is said that the earliest rule of the common law was that a lunatic could claim to avoid the transaction—even a deed.” [footnote omitted]); Man-
nie Brown, “Can the Insane Contract? A Review of the Law Relating to the Contracts of Persons
of Unsound Mind” (1933) 11 Can. Bar Rev. 600 at 602.

576. See *ibid.* at 605 (“It is probable that the reason for the departure from the strict rule of immunity
from liability is to be found in the fact that England was at this time rapidly becoming a nation of
traders, and such a rule would of course find no favour in a mercantile community.”).

The law did not directly address these policy concerns by adopting substantive reforms. Instead, the mechanism it chose to deal with the issues was a procedural rule.⁵⁷⁷ In a series of cases decided in the late sixteenth century⁵⁷⁸ the courts articulated a “rule against disabling [a litigant’s] own person, or stultifying himself.”⁵⁷⁹ This rule of pleading held that “no man of full age should be heard to set up in the courts his own insanity.”⁵⁸⁰ The rule was definitively confirmed in the watershed judgment in *Beverley’s Case*.⁵⁸¹ In that case, Snow had made a bond to Beverley. It was common ground that Snow lacked the capacity to enter into a contract at the time the bond was made. Having regained capacity, Snow applied to court to set the bond aside. The court held that Snow could not plead this case.

The effect of this rule was that a person who did not meet the test of capacity to enter into a contract was unable to obtain a remedy in the courts.⁵⁸² This approach resolves the issue of balancing competing interests by dramatically favouring the interests of the other contracting party, with what may be harsh results flowing to the incapable person. The courts ultimately became dissatisfied with how the balance was set. Their solution was not to discard *Beverley’s Case* (which has never been overruled) but rather to chip away at its reach by finding exceptions to its application.⁵⁸³ By the nineteenth century, “the exceptions [had become] more numerous than the rule itself.”⁵⁸⁴

This state of affairs created obvious problems for the clarity and consistency of the law. The solution to this problem evolved over the course of a series of nineteenth-

577. See *ibid.* at 604 (noting that reforms “originated, of course, as a rule of pleading in a day when it was quite the vogue to decide cases upon technicalities in the pleadings”).

578. See *Stroud v. Marshall* (1595), Cro. Eliz. 398, 78 ER 643 (QB); *Cross v. Andrews* (1598), Cro. Eliz. 622, 78 ER 863 (QB).

579. *Gibbons*, *supra* note 555 at 440. See also *The Shorter Oxford English Dictionary*, *sub verbo* “stultify” (“1 Allege or prove to be insane or of unsound mind, esp. in order to evade some responsibility. 2 Cause to be or appear foolish, ridiculous, or absurdly inconsistent; reduce to foolishness or absurdity.”).

580. *Gibbons*, *supra* note 555 at 440.

581. (1603), 4 Co. Rep. 123b, 76 ER 1118 (KB).

582. Someone claiming through the incapable person, such as that person’s heir or representative, was not caught by the rule and, therefore, could obtain a remedy by pleading that person’s incapacity. See *Gibbons*, *supra* note 555 at 440.

583. See *ibid.*

584. Brown, *supra* note 575 at 605.

century English decisions, which gradually created a role for assessing the other contracting party's knowledge of the incapable person's diminished capacity as an element of the test of capacity and applied that element to more and more types of contracts.⁵⁸⁵ There were some questions about the scope of this new approach to the test of capacity (particularly over whether it applied to executory contracts),⁵⁸⁶ but these questions were resolved by the end of the nineteenth century.⁵⁸⁷

6. EFFECT OF A CONTRACT WITH AN INCAPABLE PERSON: VOID OR VOIDABLE?

When a court determines that a transaction is void, the court is saying in effect that the transaction never existed: it is a nullity. A voidable transaction, on the other hand, is one that could be ratified by a contracting party.

For most areas of the law that are subject to a common-law test of capacity, an act by a person who lacks capacity under the common-law test is considered to be void. A "voidable will," for example, is something unknown to the law. Similarly, the common-law position on an *inter vivos* gift by an incapable person is that the gift is void.⁵⁸⁸

The common-law position on a contract made by a person who fails to meet the test of capacity to enter into a contract is different. Such a contract is considered to be voidable.⁵⁸⁹ The law seems to have arrived at this position for reasons related to those discussed in the preceding section concerning the need to balance protection of the incapable person's interests with protection of the other contracting party's

585. See, e.g., *Gore v. Gibson* (1845), 13 M. & W. 623, 153 ER 260 (Ex.); *Molton v. Camroux* (1848), 2 Ex. 487, 154 ER 584 (Ex.) [*Molton* cited to ER], *aff'd* (1849), 4 Ex. 17, 154 ER 1107 (Ex. Ch.). See also *Brown*, *supra* note 575 at 607–16 (reviewing the cases in detail).

586. See *Black's Law Dictionary*, 9th ed., *sub verbo* "executory contract" ("A contract that remains wholly unperformed or for which there remains something still to be done on both sides, often as a component of a larger transaction. . .").

587. See *Stone*, *supra* note 555 at 601, Lord Esher MR ("When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.").

588. See *Lagoski*, *supra* note 444 at para. 45. British Columbia has changed this common-law rule by legislation. See *Adult Guardianship Act*, *supra* note 5, s. 60.2. See also, above, section VI.B.4 (a) at 103 (discussing this change in the law).

589. See, e.g., *Gibbons*, *supra* note 555; *Kelly*, *supra* note 400.

interests. A finding that a contract is voidable also affords the courts tools to protect the interests of any third party who has, in good faith, relied on the contract.⁵⁹⁰

Holding that the contract is voidable means that “the contract is not binding unless ratified, rather than being binding until repudiated. . . .”⁵⁹¹ A person would need to meet the contractual test of capacity to ratify a contract, so this could only be done by the incapable person during a lucid interval. A representative of the incapable person, such as an attorney acting under an enduring power of attorney, could ratify the contract on the incapable person’s behalf.

7. A FUNCTIONAL TEST: THE RANGE OF CONTRACTS COVERED BY THE TEST OF CAPACITY

The test of capacity to enter into a contract applies to all types of contracts. This takes in a wide variety of transactions—everything from mundane, everyday purchases to complex commercial arrangements.⁵⁹² The fact that the test of capacity has to cover such a wide range of contracts has two consequences.

First, the law must take a very flexible and functional approach to determining capacity to enter into a contract. As a leading case puts it “[t]he law does not prescribe any fixed standard of sanity as a requisite for the validity of all transactions.”⁵⁹³ A determination that a person can enter into one type of contract has, in theory, no bearing on whether a person has the capacity to enter into another type of contract. Each case must be examined on its own merits. This approach may be contrasted with the approach the court takes on a committee application, where it “must consider the totality of the property and affairs of the alleged patient. . . .”⁵⁹⁴

Second, it can be difficult to determine in a general way how the test of capacity to enter into a contract compares to other tests of capacity—or where it fits into any capacity hierarchy. The consensus in English and Canadian law is that the mental capacity to enter into a contract occupies a middling position in that hierarchy. That is, the mental capacity required to enter into a contract is typically lower than that required to make a will, but higher than that for family-law matters, such as mar-

590. See McCamus, *supra* note 442 at 382–83.

591. Robertson, *supra* note 438 at 193 [footnote omitted]. Robertson goes on to note “the opposite applies in cases of temporary incapacity caused by intoxication” (*ibid.*) [footnote omitted].

592. See *Assessment of Mental Capacity: Guidance for Doctors and Lawyers*, *supra* note 117 at 84 (“Without really being aware of it, most people enter into some sort of contract everyday. . .”).

593. Gibbons, *supra* note 555 at 437.

594. *Masterman-Lister v. Brutton & Co.*, [2002] EWCA Civ. 1889 at para. 19, [2003] 3 All ER 162, Kennedy LJ.

riage. But this point has to be qualified to take into account the many different types of contracts. As a leading case put it: “In the case of a will the degree [of understanding] required is always high. In the case of a contract . . . the degree required varies with the circumstances of the transaction.”⁵⁹⁵ A particularly complex contract could require a higher level of mental capacity than a simple will. And, finally, some courts have questioned whether there is any hierarchy at all (though this seems to be a minority position).⁵⁹⁶

8. THE ROLE OF FAIRNESS IN THE TEST OF CAPACITY TO ENTER INTO A CONTRACT

One issue that has not been resolved in the jurisprudence is whether courts should evaluate the fairness of the contract as part of the test of capacity. Questions of fairness do not figure in other tests of capacity, but they have appeared repeatedly in cases involving capacity to enter into a contract. This trail of precedent stretches back to some of the leading English decisions of the nineteenth century.⁵⁹⁷ It embraces several major Canadian cases from the early twentieth century too.⁵⁹⁸

But some of the more recent leading cases have criticized this incorporation of fairness into the test of capacity to enter into a contract. In *Kelly*, the court noted that many of the older cases treated fairness as an “essential element” of the test but it flatly rejected this approach.⁵⁹⁹ In the court’s view, there were other contract-law concepts that were better positioned to address fairness.⁶⁰⁰ *Hart*, a decision of the Judicial Committee of the Privy Council on appeal from New Zealand, reviewed the development of the idea that fairness should play a role in the test of capacity to en-

595. *Beaney*, *supra* note 411 at 774.

596. *See Rogers* (CA), *supra* note 401 at 148.

597. *See, e.g., Molton*, *supra* note 585 at 590, Pollock CB (“[W]hen a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property *which is fair and bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such a contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him.” [emphasis added]); *Stone*, *supra* note 555 at 603, Lopes LJ (“In order to avoid a *fair contract* on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties.” [emphasis added]).

598. *See Fyckes v. Chisholm* (1911), 3 OWN 21 at 22, 19 OWR 977 (HCJ), Mulock CJ (“The contract of a lunatic or person mentally incapable of managing his affairs with a person having no notice, actual or constructive, of such lunacy or incapacity, cannot be maintained *unless the other party to such contract shews [sic] that it was fair and bonâ fide.*” [citations omitted; emphasis added]); *Wilson v. Canada*, [1938] SCR 317 at 331–36, [1938] 3 DLR 433, Davis J.

599. *Supra* note 400 at 276.

600. *See ibid.* at 276–77.

ter into a contract in great detail.⁶⁰¹ The privy council concluded that fairness plays no part in the test of capacity, but may be invoked under other contract-law concepts.⁶⁰²

But, despite the conclusions offered in these two leading cases, recent Canadian decisions continue to include references to reviewing the fairness of the contract as one of the elements of the test of capacity to enter into a contract.⁶⁰³ On the other hand, a number of recent cases have not included fairness as a consideration to take into account in applying the test of capacity.⁶⁰⁴ So even though the weight of authority appears to favour the view that fairness does not figure in the test of capacity to enter into a contract, the law in Canada still seems to be undecided on this point.

9. OTHER CONTRACT-LAW CONCEPTS

(a) *Introduction*

It is worthwhile to note here that contract law has developed other concepts that may come into play in a case that also involves the test of capacity. The purpose of this chapter is not to provide a comprehensive review of these related concepts. The discussion that follows simply describes the concepts, in very basic terms, and notes examples of cases in which a related concept was considered alongside the test of capacity to enter into a contract.

(b) *Unconscionability*

An unconscionable contract is one that occurs when a contracting party exploits an inequality of bargaining power arising from the ignorance, need, or distress of the other contracting party in order to produce a substantively one-sided contract.⁶⁰⁵

601. See *supra* note 555 at 1019–24, Lord Brightman.

602. See *ibid.* at 1027 (“[T]he validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of ‘unfairness’ unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.”).

603. See, e.g., *Canadian Imperial Bank of Commerce v. Milhomens*, 2004 SKQB 168 at paras. 11–12, [2004] SJ No. 287 (QL), Barclay J.; *Matheson Estate v. Stefankiw*, 2000 SKQB 127 at para. 41, 191 Sask. R. 241, Zarzeczny J. [Stefankiw]; *Rossander*, *supra* note 568 at para. 42.

604. See, e.g., *Re Sullivan*, 2000 PESCTD 8 at paras. 19–20, [2000] PEIJ No. 10 (QL), Jenkins J.; *Piscitelli v. Dinelle*, [1999] OJ No. 4396 (QL) at para. 66 (SCJ), Binks J. [Piscitelli]; *Barnes*, *supra* note 572 at paras. 25–26.

605. See *Morrison v. Coast Finance Ltd.* (1965), 55 DLR (2d) 710, 54 WWR 257 (BCCA); *Harry v. Kreutziger* (1978), 95 DLR (3d) 231, 3 BCLR 348 (CA).

Unconscionability is one of contract law's major tools to curb unfair contracts.⁶⁰⁶ The types of medical conditions that may diminish a person's mental capacity may also result in an inequality of bargaining power. There are a number of recent cases in which the courts have been asked to consider both unconscionability and the test of capacity to enter into a contract.⁶⁰⁷

(c) *Undue Influence*

Undue influence is intended to guard against unfair bargains obtained by the use of improper pressure in intimate or confidential relationships.⁶⁰⁸ A related concept that goes by the same name and applies to wills was considered earlier in this report.⁶⁰⁹ The major difference between contractual and testamentary undue influence is that contractual undue influence relies on a complex series of presumptions that serve to shift the onus of proof for certain classes of people (typically family members), putting those people in the position of disproving allegations of undue influence in litigation.⁶¹⁰ People with diminished capacity are typically viewed as being especially vulnerable to subtle pressure being exerted by a caregiver or close family member, so capacity issues and undue influence can go hand in hand in some cases.⁶¹¹

606. See British Columbia Law Institute, *Consultation Paper on Proposals for Unfair Contracts Relief* (Vancouver: The Institute, 2010) at 25–32.

607. See, e.g., *Van De Geer Estate v. Penner*, 2004 SKQB 253, [2005] 2 WWR 31 [Penner]; *Stefankiw*, *supra* note 603; *Scott v. Clancy*, [1998] 6 WWR 446, 164 Sask. R. 108 (QB).

608. See E. Allan Farnsworth, *Farnsworth on Contracts*, 2d ed., vol. 1 (New York: Aspen Law & Business, 1998) at § 4.20 (“The concept of undue influence developed in the courts of equity to give relief to victims of unfair transactions that were induced by improper persuasion. In contrast to the common law notion of duress, the essence of which was simple fear induced by threat, the equitable concept of undue influence was aimed at the protection of those affected with weakness, short of incapacity, against improper persuasion, short of misrepresentation or duress, by those in a special position to exercise such persuasion.” [footnote omitted]).

609. See, above, section III.B.7 (f) at 36.

610. See *Allcard v. Skinner* (1887), 36 ChD 145 (Eng. CA); *Geffen v. Goodman Estate*, [1991] 2 SCR 353, 81 DLR (4th) 211. See also *Wills, Estates and Succession Act*, *supra* note 10, s. 52 (shifting the burden of proof in testamentary undue-influence cases to “the party seeking to defend the will or the provision of it that is challenged”—in force 31 March 2014).

611. See, e.g., *Penner*, *supra* note 607; *Piscitelli*, *supra* note 604; *Pickering v. Pickering* (1985), 38 Sask. R. 211, 32 ACWS (2d) 85 (QB).

(d) *Non Est Factum*

“The doctrine of *non est factum*,” explains a leading textbook, “holds that a very particular kind of fraudulent inducement that leads a party to sign a written document, including an agreement, is void at common law on the basis that the person affixing the signature has not genuinely agreed to the document.”⁶¹² *Non est factum* (= it is not my deed) traditionally had a very narrow application—probably extending no further than to blind and illiterate people. More-recent cases have provided for a somewhat wider application of the doctrine.⁶¹³ There may be situations where mental capacity overlaps with mistake based on *non est factum*. But the threshold for a successful plea of *non est factum* remains very high. Nevertheless, there are some cases in which *non est factum* is argued (typically unsuccessfully) alongside mental capacity.⁶¹⁴

10. NECESSARIES

(a) *Introduction*

A person who does not have the mental capacity to enter into a contract may still be liable to a supplier of goods or services if the goods or services can be characterized as necessities. The source of this obligation is not the law of contracts (since the person lacks the capacity to enter into a contract) but rather the law of unjust enrichment. Nevertheless, since this area of the law clearly has a connection to the contractual test of capacity, commentators tend to include it within their consideration of the test of capacity to enter into a contract.⁶¹⁵ The law on necessities is partially codified,⁶¹⁶ but there is also a common-law rule that is broader in scope than the statute, so it must also be considered.

The law on necessities helps to promote some of the policy goals that underlie the common-law test of capacity to enter into a contract. By providing a mechanism for people with diminished capacity to obtain goods and services needed for day-to-day

612. McCamus, *supra* note 442 at 548. See also *Saunders v. Anglia Building Society*, [1970] UKHL 5 (BAILII), [1971] AC 1004; *Marvco Color Research Ltd. v. Harris*, [1982] 2 SCR 774, 141 DLR (3d) 577.

613. See McCamus, *supra* note 442 at 549–56 (tracing the historical development of *non est factum*).

614. See, e.g., *Mohr v. Hayes*, 1999 SKQB 260, 187 Sask. R. 276; *Canadian Imperial Bank of Commerce v. Alberta (Public Trustee)* (1993), 137 AR 352, 8 Alta. LR (3d) 86 (QB); *Cameron v. Dorcic* (1987), 80 NSR (2d) 152, 6 ACWS (3d) 100 (SC (TD)), *aff’d* (1988), 83 NSR (2d) 85, 9 ACWS (3d) 3 (SC (CA)).

615. See, e.g., O’Neill & Peisah, *supra* note 558 at § 3.3.3; Robertson, *supra* note 438 at 205–06.

616. See *Sale of Goods Act*, RSBC 1996, c. 410, s. 7.

life, the rule helps to enable them to live independently. The rule also supports the protective purpose of the test of capacity. It does this by limiting the extent of recovery available to a supplier of necessities.⁶¹⁷

(b) *What Are Necessaries?*

Necessaries constitutes a somewhat elastic category of goods and services. The *Sale of Goods Act* defines the term to mean “goods suitable to the condition in life of a person, and to the person’s actual requirements at the time of the sale and delivery.”⁶¹⁸ The case law provides examples of specific types of necessities. As one commentator has noted, *necessaries* “has been treated as a broad term by the judges,” which “includes the provision of, at least, meat, drink, apparel, medicine, medical services, education and transportation services.”⁶¹⁹ But past cases are only of limited value in determining whether something fits within the category of necessities. This is because the items that make up the category are viewed as changing with the times.⁶²⁰

(c) *Sale of Goods Act*

Under the *Sale of Goods Act*, a person who lacks the capacity to enter into a contract is nevertheless obligated to pay “a reasonable price” for necessities, if the necessities “are sold and delivered” to that person.⁶²¹ As the name of the act implies, this legislation only applies to necessary goods. Since the goods must be delivered to the incapable person, “an executory contract for the sale of necessities to a mentally incompetent purchaser is unenforceable.”⁶²² A reasonable price for the goods is one that will ultimately be determined by the courts; it does not have to be the purchase price.

617. See Law Reform Commission of Ireland, *Report on Vulnerable Adults and the Law*, LRC 83-2006 (Dublin: The Commission, 2006) at para. 3.04 (observing that the necessities rule “has a useful dual function”).

618. *Supra* note 616, s. 7 (1).

619. O’Neill & Peisah, *supra* note 558 at § 3.3.3.

620. See *ibid.* (speculating “whether, in the 21st century, some things that are used on a daily basis by many people such as mobile phones and television sets are necessities for all people or only some people or not necessities at all”); *Consultation Paper on Vulnerable Adults and the Law: Capacity*, *supra* note 50 at para. 5.24 (“[T]he relevant case-law is concerned with lifestyles in the 17th to the early 20th century which have little parallel in today’s world.”).

621. *Supra* note 616, s. 7 (3).

622. Robertson, *supra* note 438 at 205.

(d) *The Common-Law Rule*

There is a common-law rule regarding necessities that pre-dates the enactment of the *Sale of Goods Act*.⁶²³ The common-law rule is broader than the statutory rule. It applies to necessary goods *and* services.⁶²⁴ In addition, “[a]t common law, recovery extends to money that has been lent in order to purchase necessities.”⁶²⁵ Similar to the statutory rule, the common-law rule limits the incapable person’s liability to a reasonable price for the necessities.

The *Sale of Goods Act* is not considered to be a complete code. The act only applies to a subset of contracts (*i.e.*, contracts for the sale of goods) and, even for that subset, the common law continues to apply unless it is inconsistent with the act.⁶²⁶ So there is some space for the common-law rule to operate. The most important area of its operation concerns necessary services. There are recent decisions, from jurisdictions outside British Columbia, that apply the common-law rule on necessities to services.⁶²⁷

11. OTHER RELEVANT LEGISLATION

(a) *Introduction*

This section identifies and briefly discusses three topics on which British Columbia has legislation that is relevant to the consideration of reform of the common-law test of capacity to enter into a contract. These topics are the presumption of capacity to enter into a contract, contracts with persons under a committee order, and statutory tests of capacity for specific contracts.

623. British Columbia’s act, like those of most English-speaking jurisdictions, is based on an English statute enacted in 1893. *See Sale of Goods Act 1893* (UK), 56 & 57 Vict., c. 71.

624. *See Re Rhodes* (1890), 44 ChD 94 (Eng. CA); *Northern Rivers Charity Racing Association v. Lloyd*, [2002] NSWCA 129 [Lloyd].

625. Robertson, *supra* note 438 at 205.

626. *See supra* note 616, s. 73 (1) (“Except so far as they are inconsistent with the express provisions of this Act, the rules of the common law, including the law merchant and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods.”).

627. *See, e.g., Lloyd, supra* note 624 (provision of caregiving services). *See also Sale of Goods Act 1923* (NSW), s. 7 (New South Wales’s equivalent to British Columbia’s legislative rule).

(b) Presumption of Capacity to Enter into a Contract

There was a common-law presumption to the effect that an adult must be presumed to have the capacity to enter into a contract.⁶²⁸ This presumption now appears to be restated in section 3 of the *Adult Guardianship Act*, which broadly provides that “every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.”⁶²⁹

The effect of this presumption is that anyone who alleges in litigation that a person did not have the capacity to enter into a contract bears the burden of proving all the elements of the test of capacity to enter into a contract.

(c) Contracts with Persons Under a Committeeship Order

It was noted at the start of this chapter⁶³⁰ that the law traditionally drew a distinction between a person who was not capable of entering into a contract under the common-law test of capacity and a person who was not capable of entering into a contract because a committee of the estate had been appointed for that person under adult-guardianship legislation. At common law, a contract with a person who was under a committeeship order was held to be void. The rationale for this rule was to ensure that the committee could carry out the management of the incapable person's finances and affairs without the possibility of being undercut by conflicting transactions.⁶³¹

British Columbia has restated the common-law rule in legislation. Until very recently it was found in section 20 of the *Patients Property Act*.⁶³² But on 1 September 2011 that section was repealed when section 60.2 of the *Adult Guardianship Act*⁶³³ came into force. As was discussed more fully earlier in this report,⁶³⁴ section 60.2 does not, on its face at least, appear to be a restatement of the common-law rule on con-

628. See O'Neill & Peisah, *supra* note 558 at § 3.2 (“[A]ll persons who have reached the age of majority . . . are presumed to have the capacity to enter into contracts and other transactions and to execute documents that have legal effect. The onus of proving that they lack legal capacity lies with the person alleging the lack of capacity. These starting points have been long established in the common law.” [footnote omitted]).

629. *Supra* note 5.

630. See, above, section IX.B.3 at 135.

631. See Beaney, *supra* note 411 at 772.

632. *Supra* note 5.

633. *Supra* note 5.

634. See, above, section VI.B.4 (a) at 103.

tracts with a person who is under a committee order. Instead, it reads like a restatement of some of the consequences of entering into a contract with a person who does not meet the common-law test of capacity. Since section 60.2 has only been in force for a very short period, it is impossible to know at this point whether these differences on paper will result in a significant gap in how the law has applied in practice. Although section 60.2 does not restate the rule on contracts with a person under a committee order, its provisions could be interpreted broadly to cover any such case when it arises.

(d) Statutory Tests of Capacity for Specific Contracts

A small number of specific types of contracts have special statutory tests of capacity. The leading example of such a contract is a representation agreement. Speaking in broad terms, representation agreements are used to authorize a specific type of agency arrangement. The governing legislation spells out a set of standard provisions for representation agreements.⁶³⁵ The legislation goes on to provide that an adult may make a representation agreement with any of these standard provisions, so long as the adult can meet the statutory test of capacity.⁶³⁶ This statutory test of capacity is expressly held out as setting a lower threshold than the common-law test of capacity to enter into a contract.⁶³⁷

C. Issues for Reform

The test of capacity to enter into a contract has attracted some sharp criticism in the case law⁶³⁸ and commentary.⁶³⁹ Given the confusion over the elements of the test, it is difficult to propose a legislative restatement of the law. But there have been some law-reform proposals involving changes to those elements. The rules on necessities have also attracted some attention. But before getting to those issues it is worthwhile to ask whether the law should even retain the common-law test of capacity.

635. *Supra* note 168, s. 7.

636. *Ibid.*, s. 8 (2).

637. *Ibid.*, s. 8 (1) (a).

638. *See Kelly, supra* note 400 at 288–89 (“The law relating to the contracts of mentally incompetent persons is not now, and so far as I can tell, never was in a satisfactory state.”).

639. *See A. H. Hudson, “Mental Incapacity in the Law of Contract and Property”* (1984) 48 *Conveyancer* 32 at 42 (“It would be a strange irony if rules to protect the irrational were themselves to remain markedly irrational.”).

1. SHOULD THE COMMON-LAW TEST OF CAPACITY TO ENTER INTO A CONTRACT BE ABROGATED?

Many commentators have noticed the high degree of overlap between the test of capacity to enter into a contract and other contract-law concepts.⁶⁴⁰ This overlap is particularly strong in areas devoted to reviewing the fairness of a contract. Unconscionability and, to a lesser extent, undue influence cover much of the ground that is occupied by the test of mental capacity.

The overlap among these concepts has led some scholars to contemplate,⁶⁴¹ and others to call for,⁶⁴² the abrogation of the common-law test of capacity on the understanding that fairness concepts such as unconscionability and undue influence can continue to support the policy of protecting persons with diminished mental capacity. There appear to be three main arguments in support of this proposal.

First, proponents have argued that other contract-law concepts—in particular unconscionability—can do a better job of advancing the goal of protecting people with diminished capacity. The argument is that the main element of unconscionability (which is an inequality of bargaining power) sets up a broader criterion for relief than is found in any of the elements of the common-law test of capacity to enter into a contract.⁶⁴³ In theory, what would be marginal cases under the common-law test of capacity would be, barring some other defect in the case, resolved in favour of the person with diminished capacity under unconscionability.

640. See, e.g., S. M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) at para. 657.

641. See Waddams, *ibid.* at para. 658 (“it would seem that the law of mental incompetence could be usefully assimilated with the general doctrine of relief in cases of inequality of bargaining power” [footnote omitted]).

642. See George J. Alexander & Thomas S. Szasz, “From Contract to Status Via Psychiatry” (1973) 13 *Santa Clara L. Rev.* 537 at 559 (“In short, we favor doing away with the legal recognition of mental incompetency as a ground of avoiding contracts. . .”).

643. See Waddams, *supra* note 640 at para. 657. See also A. H. Hudson, “Some Problems of Mental Incompetence in the Law of Contract and Property” (1961) 25 *Conveyancer* 319 at 324 (“[T]his jurisdiction in equity to relieve against unconscionable bargains extends far beyond the limits of anything which would normally be called mental defect or derangement but equally mental defect or derangement has been the ground upon which it has been exercised in many of the reported cases. Again it is clear that a far lower standard of incomprehension or weakness than the strict common law requirement of ‘not knowing what he was doing’ will give ground for equitable relief.”).

Second, abrogating the common-law test of capacity to enter into the contract would simplify the law. In the place of overlapping concepts on mental incapacity, undue influence, and unconscionability would be just rules on unconscionability and undue influence.⁶⁴⁴ Further, there is a much larger body of cases on unconscionability and undue influence than exists on mental incapacity. This should contribute to a greater sense of familiarity and certainty around those concepts, as opposed to what exists for mental incapacity.

Third, it has been argued that eliminating the test of capacity to enter into a contract would advance the policy goal of enhancing the dignity and independence of persons with diminished capacity. This goal is furthered by shifting the focus of the court's inquiry. In unconscionability cases, the court is asked first to determine whether there is an inequality of bargaining power, rather than whether one contracting party was incapable of understanding the nature and effect of the contract. Second, the court's inquiry is directed to the actual terms of the contract, as the court must decide whether those terms were substantively unfair. As a result, unconscionability places more emphasis on the purported contract, rather than on the characteristics of one of the contracting parties.⁶⁴⁵

This issue has generated something of a one-sided conversation. There are few-to-none published defences of the test of capacity to enter into a contract. But it is not difficult to see where the emphasis of such a defence would lie. The test of capacity would have to be justified as providing a level of protection to persons with diminished capacity that is not matched in unconscionability, undue influence, or any other contract-law concept. It would be necessary to point to cases that would fall outside unconscionability but would be embraced by mental-incapacity rules. The problem is that, at least on paper, mental incapacity seems to be much more restrictive than unconscionability. The one obvious area of difference is the focus on substantive unfairness under unconscionability. This is not a feature of the test of capacity. In theory, it should be possible to set aside a substantially fair contract under the common-law test of capacity. But this raises the question of why, in practice, it would be necessary to set aside a substantially fair contract.

644. See also British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief*, BCLI Rep. no. 60 (Vancouver: The Institute, 2011) (recommending further integration of unconscionability and undue influence).

645. See Alexander & Szasz, *supra* note 642 at 558 ("it would seem more sensible, and less dangerous to the rights of the alleged incompetent and the 'healthy' party, to look at the bargain, rather than at the parties").

A secondary argument in favour of retaining the test of capacity could be mounted on the view that the test is deeply embedded in the law. As the earlier background discussion in this chapter noted, a number of statutory rules refer to and rely on the common-law test of capacity. One example would be the rule on necessities in the *Sale of Goods Act*;⁶⁴⁶ another would be section 60.2 of the *Adult Guardianship Act*.⁶⁴⁷ Abrogating the common-law test of capacity would involve revising these other areas of the law that refer to or rely on the test.

In the committee's view, there is a range of cases that would fall between the cracks if the test of capacity to enter into a contract were abrogated. There are examples of people obsessively purchasing the same item of property. Each individual transaction would be considered fair, but the cumulative effect of the transactions would be very damaging. It is unlikely that even an expanded conception of unconscionability could provide a remedy in these circumstances. The test of capacity to enter into a contract provides a valuable layer of protection for persons with diminished capacity.

A solid majority of consultation respondents agreed with the committee's proposal on this issue.

The committee recommends:

21. British Columbia should not enact legislation that abrogates the common-law test of capacity to enter into a contract.

2. SHOULD ANY ASPECTS OF THE COMMON-LAW TEST OF CAPACITY TO ENTER INTO A CONTRACT BE MODIFIED BY LEGISLATION?

Several law-reform bodies have proposed changing aspects of the common-law test of capacity to enter into a contract.

The most far-reaching proposals appeared in a recent publication of the Law Reform Commission of Ireland.⁶⁴⁸ The commission proposed replacing the common-law test of capacity with a set of statutory provisions.⁶⁴⁹ The first of these provisions would be "a rebuttable legal presumption of capacity to contract."⁶⁵⁰ Second, the presump-

646. *Supra* note 616.

647. *Supra* note 5.

648. *Supra* note 50.

649. *See ibid.* at para. 5.34.

650. *Ibid.*

tion would be rebutted by showing that the person whose capacity was at issue was not capable of understanding the nature and effect of the contract. The commission proposed eliminating the requirement “of whether a lack of capacity would be reasonably apparent to the other party from the circumstances.”⁶⁵¹ Third, the commission proposed changing the effect of a contract with an incapable person from being voidable to being void.⁶⁵²

There are at least two reasons supporting these proposals. First, they would certainly have the effect of clarifying the law. The law currently has unresolved conflicts over the test’s basic elements. It also embodies the difficulties inherent in trying to strike a balance between competing, and essentially irreconcilable, policy goals. The commission’s proposals represent one way of moving past these concerns.

Second, the commission pointed out that “[a]pproaching capacity to contract in this manner allows for a consistent approach to capacity issues.”⁶⁵³ This argument relies on the fact that the test of capacity to enter into a contract has, at least since the late fifteenth century, differed significantly from the other common-law tests of capacity. The commission’s proposals would have the effect of making this test of capacity operate in a manner similar to, for example, the test of capacity to make a will. They would also have the effect of bringing the common law into line with the approach to contractual capacity that is followed in civil-law countries.

The downsides to the commission’s proposals are that they dramatically shift the law in favour of the incapable person’s interests and they create a real potential for losses among good-faith contracting parties. The commission was aware of this argument and suggested that it could be “considerably tempered by the addition of a revised ‘necessaries rule.’”⁶⁵⁴ But this proposal would only provide partial relief. As the commission acknowledged, transactions out of the ordinary course of affairs would be fully exposed to a rather blunt new rule.⁶⁵⁵

651. *Ibid.* at para. 5.35.

652. *See ibid.*

653. *Ibid.* at para. 5.34.

654. *Ibid.* at para. 5.35.

655. *See ibid.* It should also be noted that the commission’s proposals did not appear in their project’s final report. *See Report on Vulnerable Adults and the Law, supra* note 617.

Other reform proposals have amounted to something more like a fine-tuning of the existing test. One approach, which was explored in two leading American cases,⁶⁵⁶ involved expanding the traditional test of capacity to embrace new psychological insights. The argument is that the common-law test of capacity is “largely a cognitive test.”⁶⁵⁷ The traditional test is closely connected with the state of psychology in the period in which the test arose, which was the nineteenth century.⁶⁵⁸ The court extended the test of capacity to cover cases concerned with “affective or motivational” impairments.⁶⁵⁹ In particular, the court decided that the test of capacity “should provide protection to those persons whose contracts are merely uncontrolled reactions to their mental illness, as well as for those who could not understand the nature and consequences of their actions.”⁶⁶⁰

The facts of the *Ortelere* case illustrate how this approach would work in practice. Ms. Ortelere was a schoolteacher who, at age 60, suffered a nervous breakdown and went on a leave of absence. Shortly thereafter, she was diagnosed with psychosis. She was also suspected to have cerebral arteriosclerosis (which was later confirmed).⁶⁶¹ As her leave of absence ended, Ms. Ortelere made a retirement-plan election for a larger annuity payment with no death benefit. In view of her reduced life expectancy, this election was significantly adverse to her financial interests, as well as those of her husband. The court’s majority held that Ms. Ortelere was capable of understanding the nature and effect of the election, but was unable, due to her psychosis, to make a rational decision concerning it.⁶⁶²

The influential American *Restatement* accepted this analysis and included an additional element in its description of the common-law test of capacity to enter into a

656. *Faber v. Sweet Style Mfg. Corp.*, 40 Misc. 2d 212, 242 NYS 2d 763 (Sup. Ct. 1963); *Ortelere v. Teachers’ Retirement Board of the City of New York*, 25 NY 2d 196, 250 NE 2d 460 (1969) [*Ortelere* cited to NE].

657. *Ortelere*, *ibid.* at 464, Breitel J.

658. *See ibid.* (“The traditional standards governing competency to contract were formulated when psychiatric knowledge was quite primitive.”).

659. *Restatement (Second) of Contracts* § 15, rep. note (1979).

660. *Ortelere*, *supra* note 656 at 465 (quoting Robert M. Bruckner *et al.*, “Mental Illness and the Law of Contracts” (1957) 57 Mich. L. Rev. 1020 at 1036).

661. *Ortelere*, *supra* note 656 at 462.

662. *See ibid.* at 466.

contract.⁶⁶³ The main advantage of such a reform is that it modernizes the law. Although the test of capacity is a legal test rather than a medical test, it does benefit from keeping abreast with advances in the medical field. The disadvantage is that adopting a new element for the test of capacity invariably makes the law more complex.

The committee does not favour changes to the common-law test of capacity to enter into a contract. In the committee's view, it is not clear that the common-law test of capacity is deficient or is causing problems in practice. In fact, it is likely that the common-law test of capacity will be able to accommodate emerging issues such as the issues discussed in *Ortelere*.⁶⁶⁴ The Irish commission's proposal appeared to the committee to be out of step with trends in British Columbia, particularly the affirmation of the voidability of a contract with someone who lacks contractual capacity found in section 60.2 of the *Adult Guardianship Act*.⁶⁶⁵

The committee's proposal was supported by all consultation respondents who commented on this issue.

The committee recommends:

22. British Columbia should not enact legislation modifying any elements of the common-law test of capacity to enter into a contract.

3. SHOULD LEGISLATION PROVIDE THAT THE COMMON-LAW TEST OF CAPACITY TO ENTER INTO A CONTRACT INCLUDE AN ELEMENT DIRECTING THE COURT TO REVIEW THE FAIRNESS OF THE CONTRACT?

As discussed earlier,⁶⁶⁶ the weight of authority appears to favour the view that considerations of the fairness of the contract do not form an element of the common-law test of capacity to enter into a contract. Rather, fairness is a subject for other contract-law concepts. Nevertheless, many recent Canadian cases do recite fairness as an element of the test of capacity. This results in confusion over the identity of the elements of the test of capacity.

663. See *Restatement (Second) of Contracts* § 15 (1) (b) (1979) ("he [*i.e.*, the person with diminished capacity] is unable to act in a reasonable manner in relation to the transaction and the other party had reason to know of his condition").

664. *Supra* note 656.

665. *Supra* note 5.

666. See, above, section IX.B.8 at 142.

One way to resolve this confusion is to consider the underlying policy arguments for and against including fairness in the test of capacity. The cases that support including fairness in the test of capacity tend to see its role as filling in a gap that arises from the focus on the other contracting party's knowledge. In this view, the courts can declare a contract to be voidable even if the other contracting party did not know that the contract was with a person with diminished capacity, so long as the contract can be considered to be unfair. This position was rejected in *Hart*,⁶⁶⁷ but the privy council's judgment in that case is not binding on Canadian courts. There may be some practical value in adopting this rule, even though it was rejected in *Hart*.

But there are several disadvantages to including fairness in the test of capacity to enter into a contract. First, it creates a high degree of overlap between the test of capacity and unconscionability. It comes very close to creating a redundancy in the law. Second, the approach to the other contracting party's knowledge in this proposal is out of step with very recent cases on unconscionability, which insist on knowledge as an essential element to obtain relief for unconscionability.⁶⁶⁸ Third, an element that calls on the courts simply to review the fairness of a contract, without providing the courts with some guiding principles to apply that jurisdiction, could seriously undercut the policy goal of security of contracts.

All consultation respondents who addressed this issue agreed with the committee's proposal not to enact legislation providing for a review of the fairness of a contract as part of the test of capacity to enter into the contract.

The committee recommends:

23. British Columbia should not enact legislation that provides that a consideration of the fairness of a contract involving a person with diminished capacity forms part of the common-law test of capacity to enter into a contract.

4. SHOULD LEGISLATION BE ENACTED TO UNIFY THE COMMON-LAW AND STATUTORY RULES ON THE SUPPLY OF NECESSARIES TO A PERSON WHO DOES NOT HAVE THE CAPACITY TO ENTER INTO A CONTRACT?

Earlier this chapter noted that the law on a supply of necessary goods and services to a person with diminished capacity is found partly in legislation and partly in the

⁶⁶⁷ *Supra* note 555.

⁶⁶⁸ See *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573 at paras. 38, 51–52, 284 DLR (4th) 734; *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437 at paras. 32, 72–73, 263 DLR (4th) 368, Côté JA (at para. 32, listing among “elements which appear to be necessary for unconscionability . . . other party's knowingly taking advantage of [the weaker party's] vulnerability”).

common law.⁶⁶⁹ The Law Commission of England and Wales has recommended that this rule be unified in a single statutory provision.⁶⁷⁰ The Law Reform Commission of Ireland agreed with this recommendation, noting that “the application of the necessities rule is, in some respects, not free from doubt.”⁶⁷¹ A unified rule would make the law clearer, and somewhat more accessible. The *Sale of Goods Act* is not a natural fit for legislation on mental capacity. The United Kingdom has implemented the law commission’s recommendation as part of its *Mental Capacity Act 2005*.⁶⁷²

On paper, it is hard to see a downside to this proposal. Its one drawback may be that few people in British Columbia appear to be calling for this change. It could be argued that the current law works sufficiently well in practice, so there isn’t a pressing need for legislative reform.

The committee favoured a unified rule on necessities. The rules governing necessities can be difficult to locate, even though they come up frequently in practice. It would be helpful if the rules could be unified and relocated to a more appropriate place in the statute book.

Consultation respondents unanimously favoured the committee’s proposal on this issue.

The committee recommends:

24. British Columbia should enact legislation that replaces section 7 of the Sale of Goods Act with a unified statutory rule on the supply of necessary goods or services to a person who is not mentally capable to enter into a contract.

669. See, above, section IX.B.10 at 145.

670. See *Report on Mental Incapacity*, *supra* note 188 at para. 4.9.

671. *Consultation Paper on Vulnerable Adults and the Law: Capacity*, *supra* note 50 at para. 5.41. See also *Report on Vulnerable Adults and the Law*, *supra* note 617 at para. 3.06 (recommending enactment of restated necessities rule).

672. *Supra* note 189, s. 7 (“(1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them. (2) ‘Necessary’ means suitable to a person’s condition in life and to his actual requirements at the time when the goods or services are supplied.”).

CHAPTER X. CAPACITY TO RETAIN LEGAL COUNSEL

A. Introduction

Special rules apply when a contract involves retaining legal counsel.⁶⁷³ This chapter examines how those rules interact with mental-capacity issues and recommends some focussed reforms that serve to fine-tune how the common-law test of capacity to retain legal counsel operates in specific circumstances.

B. Background

1. OVERVIEW

This topic has some features that set it apart from the other topics discussed in this report. There are three points to bear in mind as you read the background discussion that follows.

Much of the case law and commentary on this topic looks at the issues through the eyes of the legal counsel who is retained, rather than from the point of view of the person with diminished capacity. As a result, there is a well-developed body of writing on what legal counsel's obligations are in dealing with a person with diminished capacity, but relatively little on the actual test of capacity to retain legal counsel. So in order to get a complete grasp on this subject, it is necessary to consider both the test of capacity and a body of rules that is solely applicable to the legal counsel dealing with the person with diminished capacity. This body of rules covers a wider range of materials than is canvassed in the other chapters of this report. In addition to statutes and judgments, it is necessary to examine professional codes of conduct and rules of court.

As a function of the way in which these professional obligations are framed, mental capacity is an issue both when a client enters into a relationship with legal counsel ("retaining legal counsel") and throughout the course of that relationship as the client interacts with legal counsel ("instructing legal counsel"). This chapter's subject is retaining legal counsel, but it is necessary in places to discuss instructing legal counsel in order to have a complete sense of the issues at play. This is in contrast with the other subjects (such as capacity to make a will or a gift or to enter into a contract) analyzed in this report, which are focussed on capacity at a single moment and not as a part of an ongoing relationship.

673. This expression has been deliberately used throughout this chapter. It is intended to include both lawyers and notaries public.

Issues related to instructing legal counsel may arise with respect to any type of legal work. Similarly, legal counsel's professional obligations are of general application. That said, it is noteworthy that both come into the sharpest focus in cases involving the litigation process. So it is necessary to discuss how mental capacity interacts with civil litigation in order to get a full sense of this subject.

2. TEST OF CAPACITY TO RETAIN LEGAL COUNSEL

(a) *The Contractual Aspect of the Test of Capacity*

A commentator writing in 1988 asserted that the test of capacity to retain legal counsel is a subject that is “never discussed by the courts.”⁶⁷⁴ While this comment may be taking things too far, it does get at one of the important characteristics of the law in this area. The test of capacity to retain legal counsel lacks a defining court case. There is no judgment that, for example, plays the role that *Banks v. Goodfellow*⁶⁷⁵ plays for the test of capacity to make a will. The cases that do address this issue do not even attempt to articulate a general test that would apply to all cases addressing the capacity to retain legal counsel. Instead, they address the issue strictly as a matter of assessing the facts of a given case.⁶⁷⁶

Commentators have reasoned that a test of capacity to retain legal counsel can be derived from an examination of general principles.⁶⁷⁷ The starting place is that the retainer is a form of contract. So a person must at a minimum be capable of understanding the retainer's terms and of forming “a rational judgment of its effect upon his interests.”⁶⁷⁸

The final element of the contractual test of capacity relates to the knowledge of the other contracting party—in this case, the legal counsel. Legal counsel must have “ac-

674. Norine A. MacDonald, “Tests for Capacity in Various Transactions,” in Norine A. MacDonald, ed., *Incapacity: Materials prepared for a Continuing Legal Education seminar held in Vancouver, B.C. on April 13, 1988* (Vancouver: Continuing Legal Education Society of British Columbia, 1988) 1.1 at 1.1.07.

675. *Supra* note 24.

676. *See, e.g., M. T. R. v. I. S. R.*, 2003 BCCA 513 at para. 19, 48 RFL (5th) 385, Thackray JA (court accepting legal counsel's assertion “as an officer of the court” that client had capacity to retain legal counsel); *Bisoukis v. Brampton (City of)* (1999), 46 OR (3d) 417 at paras. 19–20, 180 DLR (4th) 577 (CA), Borins JA (for the court), *leave to appeal to SCC refused*, [2000] SCCA No. 52 (QL).

677. *See* Robertson, *supra* note 438 at 317–321; MacDonald, *supra* note 674.

678. Kelly, *supra* note 400 at 275.

tual or constructive” knowledge of their potential client’s “mental incompetency.”⁶⁷⁹ Actual knowledge is simply what a person actually knew at the relevant time, but constructive knowledge raises some difficult questions. When can a court say that the existence of certain facts and circumstances allow it to draw the inference that a person should know something? Is a person under a duty to make further inquiries in the face of certain facts? Should legal counsel be held to a higher standard than other people, because they are professionals?

There is a recent English case that delves into these issues in rendering judgment on a claim of solicitors’ negligence.⁶⁸⁰ The court concluded “[a] solicitor is generally only required to make inquiries as to a person’s capacity to contract if there are circumstances such as raise doubt as to this in the mind of a reasonably competent solicitor.”⁶⁸¹ In coming to this conclusion, the court expressly rejected an argument that legal counsel should be held to a higher standard of care.⁶⁸²

(b) The Agency Aspect of the Test of Capacity

Strictly speaking, it should be possible to stop at the contractual test of capacity and conclude that it fully covers the test of capacity to retain legal counsel. Examining the ongoing relationship between a client and legal counsel could be seen as crossing the line into the related but distinct area of instructing legal counsel. Nevertheless, commentators routinely cross this line and incorporate an analysis of that ongoing relationship in the test of capacity.⁶⁸³

As a result of this analysis, most commentators conclude that the test of capacity to retain legal counsel contains, in addition to its contractual elements, elements de-

679. *Ibid.*

680. See *Thorpe*, *supra* note 118.

681. *Ibid.* at para. 75 [citations omitted].

682. *Ibid.* at para. 76 (“The relevant test where professional negligence is alleged is not whether someone should have been more careful. The standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession.” [citation omitted]).

683. Commentators probably take this approach because codes of professional obligations for legal counsel do not draw a sharp distinction between retaining and instructing legal counsel. Instead, the codes state their obligations in such a way as to blur this distinction. The codes are discussed in more detail, below, section X.B.5 at 165.

rived from the law of agency.⁶⁸⁴ The test of capacity to appoint an agent “involves an ability to understand the nature and effect of the appointment.”⁶⁸⁵ The test also incorporates the contractual test of capacity.⁶⁸⁶

There is an important difference between the test of capacity to appoint an agent and the other tests of capacity discussed in this report.⁶⁸⁷ Capacity to appoint an agent must be present throughout the agency relationship. A “supervening incapacity of the principal terminates the agent’s authority and makes the agent liable for breach of warranty of authority.”⁶⁸⁸

(c) Presumption of Capacity

There is a presumption of capacity to retain (and instruct) legal counsel.⁶⁸⁹ So the onus of proving that a person fails to meet the test of capacity to retain legal counsel falls on the person alleging incapacity.

As is the case for other tests of capacity, the outcome of the test of capacity to retain legal counsel is not determined by a person’s incapacity to carry out other transactions.⁶⁹⁰ Simply because a person cannot pass, say, the test of capacity to make a will does not necessarily mean that the person lacks the capacity to retain legal counsel. But, that said, the capacity to retain (and instruct) legal counsel can’t be separated from the transaction or proceeding for which the legal counsel has been retained to represent the client. Legal counsel retained to draft a will for a client, for example, must be satisfied of the client’s testamentary capacity at the time of taking instructions from the client.⁶⁹¹

684. See Robertson, *supra* note 438 at 317 (“a person who is mentally incapable of appointing an agent cannot validly authorize a solicitor to act on his or her behalf”).

685. *Ibid.* at 318.

686. See Peter Watts & F. M. B. Reynolds, eds., *Bowstead and Reynolds on Agency*, 19th ed. (London: Sweet & Maxwell, 2010) at § 2-007 (capacity to appoint agent “co-extensive with the capacity of the principal himself to make the contract”).

687. See Seva Batkin & Valerie Dixon, “Capacity to Instruct Counsel” (2011) 69 *Advocate* 29 at 36 (comparing testamentary capacity with capacity to instruct legal counsel).

688. *Bowstead and Reynolds on Agency*, *supra* note 686 at § 2-009 [footnote omitted]. See, below, section X.B.3 at 163 for more discussion of this point.

689. See Thorpe, *supra* note 118 at para. 75.

690. See Robertson, *supra* note 438 at 318 (“Incapacity to retain counsel should not be presumed merely because the client is mentally disabled or lacks capacity in certain legal areas.”).

691. See *Assessment of Mental Capacity: Guidance for Doctors and Lawyers*, *supra* note 117 at 13.

(d) *Comparison to Other Tests of Capacity*

A pair of commentators have argued that “[i]n a hierarchy of capacities, with the highest being testamentary capacity, capacity to instruct counsel ranks at the high end of the scale since it requires an understanding of financial and legal issues.”⁶⁹² This point likely also applies to the test of capacity to retain legal counsel. Another factor that would tend to place this test of capacity at the higher end of the scale would be its use of elements derived from the contractual and agency tests of capacity.

3. LEGAL SERVICES AS NECESSARIES

The fact that a person does not meet the test of capacity to enter into a contract is not the end of the story for liability. A person with diminished capacity may still be liable, if the goods or services supplied to that person are considered to be necessities.⁶⁹³ This liability does not flow from the law of contracts but from a separate body of law, the law of unjust enrichment.

Are legal services necessities? The first step to answering this question involves defining *necessaries*. This term has a vague and slippery meaning, but the definition included in the *Sale of Goods Act* provides a good encapsulation of the concept. Under the act, necessities are “goods suitable to the condition in life of a person, and to the person’s actual requirements at the time of the sale and delivery.”⁶⁹⁴ By extension, necessary services are services that are suitable to the condition in life of a person, and to the person’s actual requirements at the time of performance of the services.

There are cases from England⁶⁹⁵ and Australia⁶⁹⁶ that have held that a supply of legal services can come within the rule on necessities. In both cases, the legal services involved representation of a person with diminished capacity in a court proceeding to appoint a committee for that person.

692. Batkin & Dixon, *supra* note 687 at 36.

693. See *Re Rhodes*, *supra* note 624; *Lloyd*, *supra* note 624; *Sale of Goods Act*, *supra* note 616, s. 7 (partially codifying the common-law rule, for necessary goods).

694. *Ibid.*, s. 7 (1). See, above, section IX.B.10 at 145 (further discussion of mental capacity and necessities).

695. See *Stedman v. Hart* (1854), Kay. 607, 69 ER 258 (Ch.).

696. See *McLaughlin v. Freehill*, [1908] HCA 15, 5 CLR 858.

Unfortunately, the Canadian courts do not appear to have considered this issue.⁶⁹⁷ So it isn't possible to give a definitive answer on whether a Canadian court would consider legal services to be necessities. It also isn't clear how far the characterization of legal services as necessities would extend. A case involving legal services supplied to a person in an adult-guardianship proceeding would appear to be on the firmest ground, since it would resemble the cases from England and Australia that have held legal services to be necessities. Other cases would likely be resolved by application of a definition of *necessaries* along the lines of the one cited earlier.

4. LIABILITY FOR COSTS FOR BREACH OF IMPLIED WARRANTY OF AUTHORITY

Legal counsel may find themselves liable in certain circumstances if they continue to act for a person who lacks the capacity to instruct legal counsel. This result follows from the application of rules from the law of agency.

Agents implicitly warrant to third parties that they have the authority to act on behalf of their principals. But if a principal becomes incapable of instructing the agent, then the agent's authority is terminated. The agent may be held liable if the agent continues to act for the principal in these circumstances.

These rules have been invoked against legal counsel in cases in which legal counsel is representing a person who loses capacity during the course of litigation.⁶⁹⁸ Opposing parties in such litigation have been awarded costs against legal counsel personally.⁶⁹⁹

697. *But see Re Hanna*, 2002 SKQB 124, [2002] SJ No. 178 (QL). In this case, a law firm provided legal services to a bankrupt person and argued that its fees amounted to a debt that should survive bankruptcy because they related to a supply of necessities. The registrar rejected this argument, but for reasons that turned entirely on interpretation of bankruptcy legislation. So this case is likely of limited value for the issue of whether legal services supplied to a person with diminished capacity amount to necessities.

698. *See Yonge v. Toynbee*, [1904] KB 215 (Eng. CA); *Re Avery*, [1952] OWN 475 (HCJ); *Kennedy v. Kennedy* (1959), 16 DLR (2d) 604 (BCSC); *Tran v. Ha*, 2011 BCSC 1077, [2011] BCJ No. 1514 (QL).

699. *See Robertson*, *supra* note 438 at 319 (reviewing the cases and noting that the "rule has rightly been criticized as creating a disincentive to lawyers to act for mentally disabled clients" [footnote omitted]).

5. PROFESSIONAL OBLIGATIONS ON LEGAL COUNSEL

(a) *Introduction*

Legal counsel must practice their professions in accordance with codes of ethics approved by their governing bodies.⁷⁰⁰ These ethical rules set out standards for legal counsel in dealing with persons whose mental capacity is diminished. Although codes of ethics do not contain tests of capacity (they appear to rely on the common law to provide such tests), they do have a significant practical impact on how the law operates in this area.

The current code of conduct for British Columbia lawyers only came into effect on 1 January 2013, as the committee was completing its final review of its consultation paper.⁷⁰¹ The new code does not appear to substantively change the rules on this issue, though the wording of the rules has changed. The discussion that follows will note in the footnotes parallel provisions of the previous code.⁷⁰²

(b) *Rules for Lawyers Taking on New Clients*

For lawyers, a distinction can be drawn in how mental-capacity issues should be treated for new clients and for existing clients.⁷⁰³ “A lawyer who believes a person to be incapable of giving instructions,” advises the *Code of Professional Conduct for British Columbia*, “should decline to act.”⁷⁰⁴ This advice does not amount to a total prohibition on acting for an incapable client. In cases in which the lawyer believes the client cannot obtain representation and “a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of a person lacking capacity

700. See The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, Vancouver: Law Society of British Columbia, 2013; The Society of Notaries Public of British Columbia, *Principles for Ethical & Professional Conduct Guideline*, Vancouver: Society of Notaries Public of British Columbia, 2011.

701. The *Code of Professional Conduct for British Columbia* was based on a model code that the committee was able to consider as it discussed this subject. See Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended on 13 December 2011), online: Federation of Law Societies of Canada <<http://www.flsc.ca/>>.

702. See The Law Society of British Columbia, *Professional Conduct Handbook*, Vancouver: Law Society of British Columbia, 1993.

703. See Batkin & Dixon, *supra* note 687 at 29–31.

704. See *supra* note 700, r. 3.2-9, commentary para. 2. See also *Professional Conduct Handbook*, *supra* note 702, ch. 3, footnote 4 (“A lawyer may not form a client-lawyer relationship with a person who has never been the lawyer’s client and who lacks the capacity to instruct the lawyer. . .”).

only to the extent necessary to protect the person until a legal representative can be appointed.”⁷⁰⁵

The previous rules contemplated a number of specific exceptions to the general principle that a lawyer should not take on a new client if that client’s capacity is in doubt. These exceptions were:

- a lawyer being appointed to act for a person with diminished capacity “by a court or tribunal”;
- a lawyer who acts for a person with diminished capacity “by operation of statute”;
- a lawyer who acts for a person with diminished capacity “in a proceeding in which some aspect of the client’s mental capacity is in issue.”⁷⁰⁶

The key exception is the third one. It allowed a person to obtain legal representation in a court proceeding to determine a person’s capacity under the *Patients Property Act*.⁷⁰⁷ But the exception is framed in somewhat broader terms. Mental capacity may be an issue in other sorts of proceedings.⁷⁰⁸ This raises the difficult issue of capacity to direct civil litigation, which will be discussed in more detail below.⁷⁰⁹

It’s unclear whether these specific exceptions are captured in the more-general language of the *Code of Professional Conduct for British Columbia*.

(c) *Rules for Lawyers Dealing with Existing Clients*

If an existing client (that is, one who has already retained the lawyer) becomes incapable of instructing the lawyer, then the lawyer’s professional obligation is, “as far as

705. *Supra* note 700, r. 3.2-9, commentary para. 2. *See also Professional Conduct Handbook, supra* note 702, ch. 3, s. 2.4 (lawyer who is “prevented” from taking on a new client by application of these rules may still “provide reasonable and necessary minimal assistance to the person”). *See also ibid.*, ch. 3, footnote 5 (“For example, such assistance might consist of appearing at a scheduled court appearance to protect the person’s interests or advising the Public Guardian and Trustee, family members or others of the person’s need for assistance.”).

706. *Professional Conduct Handbook, supra* note 702, ch. 3, footnote 4.

707. *Supra* note 5.

708. *See Ocean v. Economical Mutual Insurance Co.*, 2009 NSCA 81 at para. 61, 76 CCLI (4th) 1, Bate-man JA (“A party’s mental condition is in issue only if her mental competency must be established in order to prove her cause of action.”).

709. *See, below*, section X.B.6 at 167.

reasonably possible, [to] maintain a normal lawyer and client relationship.”⁷¹⁰ In these circumstances, the lawyer has “an ethical obligation to ensure that the client’s interests are not abandoned.”⁷¹¹ Complying with this ethical obligation may require taking steps to appoint a litigation guardian⁷¹² for a client or obtaining the assistance of a public body like the Office of the Public Guardian and Trustee to assist the client.⁷¹³

(d) Rule for Notaries Public

The applicable rule for notaries public in these circumstances is more succinct. Notaries public are simply advised by their code of professional obligations to “be cautious about accepting instructions from or on behalf of clients whose capacity appears to be limited, whether because of age, mental disability or for some other reason.”⁷¹⁴

6. CAPACITY TO CONDUCT CIVIL LITIGATION

It was noted earlier that the test of capacity to retain legal counsel tends to be connected to the task for which the legal counsel is being retained. Legal counsel considering a retainer to draft a will or negotiate a contract for a client would naturally be interested in the client’s capacity to make a will or enter into a contract. This report has examined those common-law tests of capacity in detail. But one test of capacity that is outside the scope of this report crops up often in the course of assessing a person’s capacity to retain (and instruct) legal counsel. This test of capacity may be called the test of capacity to conduct civil litigation.⁷¹⁵

710. *Supra* note 700, r. 3.2-9. *See also Professional Conduct Handbook*, *supra* note 702, ch. 3, s. 2.1.

711. *Supra* note 700, r. 3.2-9, commentary para. 3.

712. *See ibid.* *See*, below, section X.B.6 at 167 (for more on litigation guardians and the capacity to conduct civil litigation).

713. *See supra* note 700, r. 3.2-9, commentary para. 3. *See also Professional Conduct Handbook*, *supra* note 702, ch. 3, s. 2.2 (lawyer may take “protective action” to assist the client, such as “seek[ing] the appointment of a guardian,” but this action was only authorized if the following specific conditions were met: “if the lawyer (a) reasonably believes that the client cannot instruct counsel, (b) reasonably believes the appointment or other protective action is necessary to protect the client’s interest, and (c) does not take any action contrary to any instructions given to the lawyer by the client when the client was capable of giving such instructions.”) A lawyer who did seek the appointment of a litigation guardian could “continue to act” as the client’s lawyer, but only “to the extent that instructions are implied or as otherwise permitted by law” (*ibid.*).

714. *Principles for Ethical & Professional Conduct Guideline*, *supra* note 700, guideline 4-G3.

715. “Conducting” civil litigation is meant to embrace commencing and defending a civil (that is, not criminal) proceeding in court, and sustaining that proceeding to judgment. The issue of capacity

The *Supreme Court Civil Rules* contain special rules for certain parties.⁷¹⁶ One of these special rules applies to “persons under disability,”⁷¹⁷ which includes a person with diminished mental capacity.⁷¹⁸ The key point of this rule is that a person under legal disability must not conduct a proceeding. Instead, such a person must be represented by a litigation guardian.⁷¹⁹

This rule has been considered to have a protective purpose,⁷²⁰ which links it to the other areas of law studied in this report. And since the *Supreme Court Civil Rules* do not contain a test of capacity to determine when a person is under a legal disability it is necessary to turn to the common law for guidance. There are actually quite a few cases that have considered what may be called the test of capacity to conduct civil litigation.⁷²¹ But these cases have taken some different approaches to how a test of capacity should be formulated.

One approach has attempted to balance the protective purpose of the rule with “the societal value of respect for the individual, and the social expectation that the indi-

to retain (and instruct) legal counsel probably arises most frequently in connection with a proposed retainer to represent a person in civil litigation. This is because it can be difficult to separate issues related to retaining and instructing legal counsel and litigation is something that calls for a client to make multiple decisions over an extended time.

716. See British Columbia, *Supreme Court Civil Rules*, part 20.

717. *Ibid.*, r. 20-2.

718. See *E. M. E. v. D. A. W.*, 2003 BCSC 1878 at para. 16, 4 ETR (3d) 181, Slade J. [*E. M. E.*] (“It appears, on an examination of the rule in its entirety, that persons who are infants or ‘mentally incompetent’ are persons under legal disability for the purpose of the application of the rule.”).

719. See British Columbia, *Supreme Court Civil Rules*, rr. 20-3, 20-3. See also r. 20-2 (6) (*ibid.*) (committee of person with diminished capacity must act as that person’s litigation guardian, unless court orders otherwise); r. 20-2 (5) (*ibid.*) (court appointment of litigation guardian not required if litigation guardian is ordinarily resident in British Columbia and court or enactment do not provide otherwise); r. 20-2 (4) (*ibid.*) (litigation guardian must act by a lawyer, unless public guardian and trustee is litigation guardian).

720. See *Clermont v. Fraser Health Authority (c.o.b. Peace Arch Hospital)*, 2008 BCSC 161 at para. 21, 53 CPC (6th) 389, Allan J. [*Clermont*] (finding twofold purpose of rule: (1) protection of those under mental disability; and (2) protection of litigants opposing a party under a mental disability).

721. See *Holland (Guardian ad litem of) v. Marshall*, 2009 BCCA 311, 96 BCLR (4th) 55 [*Marshall*]; *Clermont*, *supra* note 720; *Pavlick v. Hunt*, 2005 BCSC 285, [2005] BCJ No. 3254 (QL) [*Pavlick*]; *E. M. E.*, *supra* note 718; *Greig v. Stretch*, 2001 BCSC 576, 11 CPC (5th) 291 [*Greig*]; *Finnegan (Guardian ad litem of) v. Gronow* (1998), 53 BCLR (3d) 356, 19 CPC (4th) 173 (SC); *Anderson v. Heyduck* (1979), 14 BCLR 285, [1979] 3 ACWS 99 (SC).

vidual will take responsibility for his or her choices. . . .”⁷²² This approach rejected a test that turns on a relatively low threshold for court intervention based on the provisions of the *Mental Health Act*.⁷²³ Instead, the test should be “comparable to that established in other similar enactments,” which focus attention on “the larger community of which the person was a part, and not just the environment of the court system and process.”⁷²⁴ Under this approach a person must be “significantly impaired in the ability to conduct his affairs generally”⁷²⁵ or “seriously impaired in [the person’s] ability to act appropriately to a minimal standard that would enable her to function in the broader environment of her community”⁷²⁶ to be found incapable of conducting civil litigation.

A second approach eschews these broader questions to focus specifically on aspects of the litigation process. This approach draws on an English judgment.⁷²⁷ It formulates the test of capacity as “[w]hether the person in question is capable, aside from any disability established by law, such as infancy, to instruct Counsel and to exercise judgment in relation to the claims in issue and the possible settlement, as a reasonable person would be expected to do.”⁷²⁸

These approaches seem likely to generate different results, but, so far, no court case has attempted to reconcile them or choose one in favour of the other.

C. Issues for Reform

There has been little to no law-reform research and writing on the main subject of this chapter, which is the test of capacity to retain legal counsel. Starting from general principles, the first issue for reform to consider is whether legislation should be enacted in relation to this test of capacity. This section also considers fine-tuning

722. *E. M. E.*, *supra* note 718 at para. 33.

723. RSBC 1996, c. 288, s. 1 (defining “person with a mental disorder” to mean “a person who has a disorder of the mind that requires treatment and seriously impairs the person’s ability (a) to react appropriately to the person’s environment, or (b) to associate with others.”). See *E. M. E.*, *supra* note 718 at paras. 24–25.

724. See *Marshall*, *supra* note 721 at para. 29, Neilsen JA (for the court).

725. *Ibid.*

726. *E. M. E.*, *supra* note 718 at para. 41. See also *Clermont*, *supra* note 720 at paras. 23–28.

727. *Kirby v. Leather*, [1965] 2 QB 367, [1965] 2 WLR 1318 (Eng. CA) [*Kirby* cited to QB].

728. See *Grieg*, *supra* note 721 at para. 7, Hood J.; *Pavlick*, *supra* note 721 at para. 19, Truscott J. The quoted passage does not appear in *Kirby*, *supra* note 727. It appears to be legal counsel’s paraphrase of certain passages in the reported arguments of counsel and Lord Denning’s judgment. See *Kirby*, *ibid.* at 377–78, 383–84.

rules that apply in two specific areas: representation agreements and certain proceedings in which a person's mental capacity is at issue.

1. SHOULD BRITISH COLUMBIA ENACT LEGISLATION SETTING OUT A TEST OF CAPACITY TO RETAIN LEGAL COUNSEL?

The one commentator who has grappled with this issue has proposed the following as a test of capacity to retain legal counsel:

- the client should understand that the person she or he is dealing with is a lawyer;
- the client should understand generally the advice given;
- the client should understand that the lawyer will act on the instructions of the client and as agent bind her or him (the agency portion of the relationship);
- the client must understand that she or he is responsible for the solicitor's professional fees (the contractual portion of the relationship).⁷²⁹

Adopting this test would clarify an obscure area of the law. It might also make the law more accessible. But this version of the test could have some downsides. It does appear to set a relatively high standard for retaining legal counsel. Such a high standard could impair access to justice for persons with diminished capacity.

The majority of respondents to the consultation paper agreed with the committee's proposal not to enact legislation setting out the common-law test of capacity to retain legal counsel. One respondent did propose that the committee encourage the benchers of the Law Society of British Columbia "to review Chapter 3, Section 3.2-9 of the new [*Code of Professional Conduct*], having regard to the [committee's final report]."⁷³⁰ As the respondent recognized, changes to the *Code of Professional Conduct*

729. MacDonald, *supra* note 674 at 1.1.07.

730. Canadian Bar Association (BC Branch), Wills and Trusts Section, Response to *Consultation Paper on Common-Law Tests of Capacity* (unpublished, archived with the British Columbia Law Institute) at 3-4 (suggesting "a clarification [in the commentary to section 3.29] that the standard expected of lawyers is to ensure that: (1) When a lawyer is initially retained, the lawyer must be satisfied that the client has the capacity to retain the lawyer (subject to the noted exceptions to act in proceedings dealing with the client's incapacity, and to statutory exceptions) and that the test for the determination of capacity to retain a lawyer is that the client is able to understand: (a) the person the client is dealing with is a lawyer; (b) generally, the advice given; (c) the lawyer will act on the instructions of the client and as agent for the client, and that their actions under instruction or as agent bind the client; and (d) the client is responsible for the lawyer's fees. [A]nd (2) When a lawyer has concerns about the capacity of a client to continue to instruct the lawyer, the lawyer must be satisfied that the client has capacity to instruct the lawyer and that the test for the determination of capacity to instruct the lawyer is dependent on the test for capacity of the particular matter the lawyer has been retained to perform (e.g. draft a Will) and, in

are beyond the scope of this project, but the committee does agree that this idea is worthy of further study by the Law Society of British Columbia.

The committee did not favour legislation that deals generally with the test of capacity to retain legal counsel, but did propose two specific reforms, which are discussed in the next two sections.

The committee recommends:

25. British Columbia should not enact legislation in relation to the common-law test of capacity to retain legal counsel.

2. SHOULD BRITISH COLUMBIA ENACT LEGISLATION ALLOWING A PERSON WITH DIMINISHED CAPACITY TO RETAIN LEGAL COUNSEL FOR ADVISING ON AND DRAFTING A REPRESENTATION AGREEMENT WITH STANDARD PROVISIONS?

British Columbia's *Representation Agreement Act* serves a dual purpose: it allows an adult to enter into a specified form of agreement that provides for a representative to make certain decisions on the adult's behalf if the adult becomes incapable; and it avoids the need for intervention by the court-based adult-guardianship system in these circumstances.⁷³¹ Section 7 of the act authorizes the making of a representation agreement with standard provisions. The standard provisions may include provisions authorizing the representative to help the adult in making decisions respecting the adult's personal care, routine financial management, and certain health-care decisions, or to make those decisions on behalf of the adult. A statutory test of capacity applies to the making of these section 7 agreements.⁷³² One of the features of this statutory test of capacity is that it sets a very low threshold of mental capacity. For instance, an adult may enter into a section 7 agreement, even though the adult is "incapable of making a contract."⁷³³

the case of litigation, that the client is able to exercise judgment in relation to the matter in issue.")

731. *Supra* note 168, s. 2 ("The purpose of this Act is to provide a mechanism (a) to allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently, and (b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.").

732. *See ibid.*, s. 8.

733. *Ibid.*, s. 8 (1) (a).

So it is possible, under the various applicable statutory and common-law tests of capacity, for a person to be able to make a section 7 agreement but also to be incapable to retain legal counsel to advise on that agreement. This conclusion flows from the fact that a person who lacks the mental capacity to make a contract may enter into a section 7 agreement. But contractual capacity is an integral part of the test of capacity to retain legal counsel. A person who lacks it is not able to meet the test of capacity, and so cannot retain legal counsel.

In the committee's view, this anomalous state of affairs can be remedied by an amendment to the *Representation Agreement Act*, making it clear that a person who has the capacity to make a section 7 agreement also has the capacity to retain a lawyer for the purposes of advising on and drafting that agreement. This proposal does not compel a person to be represented by legal counsel in making a section 7 agreement, but it does empower a person who wants legal representation to obtain it. In this way, it would enhance the purposes of the act and the protective purposes of the test of capacity. Finally, it is worth noting that all consultation respondents who addressed this issue supported this proposed reform.

The committee recommends:

26. British Columbia should amend the Representation Agreement Act to provide that a person with the mental capacity to make a representation agreement with standard provisions under section 7 of the act also has the mental capacity to retain and instruct legal counsel for the purpose of advising on and drafting the representation agreement.

3. SHOULD BRITISH COLUMBIA ENACT LEGISLATION TO CONFIRM THAT A PERSON MAY RETAIN LEGAL COUNSEL TO ACT FOR THE PERSON IN A PROCEEDING IN WHICH THE PERSON'S MENTAL CAPACITY IS AT ISSUE?

A person whose mental capacity is at issue in a court proceeding can be in an anomalous position. The *Supreme Court Civil Rules* call for the appointment of a litigation guardian if the person lacks capacity to retain (and instruct) legal counsel. A person may be understandably reluctant to submit to this arrangement in proceedings that are meant to establish whether or not the person lacks mental capacity to perform some act. But it can be difficult for such a person to retain legal counsel. Despite some recognition that a person in these circumstances should be presumed to have the capacity to retain legal counsel,⁷³⁴ in practice legal counsel tend to shy away from accepting a retainer from a person whose mental capacity is in issue in a

734. See Batkin & Dixon, *supra* note 687 at 31.

court proceeding.⁷³⁵ So such people can find themselves caught in a grey area in the law.

In the committee's view, this problem is especially acute in proceedings that may result in a substantial deprivation of a person's liberty. Such proceedings arise under the *Mental Health Act*⁷³⁶ and the *Patients Property Act*.⁷³⁷ (And they will arise under the *Adult Guardianship Act*,⁷³⁸ once that act's provisions on adult guardianship are brought into force, replacing the *Patients Property Act*.) The committee proposes adding to those three acts a provision modeled on a section found in Ontario's *Substitute Decisions Act, 1992*.⁷³⁹ Such a provision would make it clear that a person in proceedings under those acts has the right to retain and instruct legal counsel. In addition to clarifying the law, this proposal would serve to empower individuals with diminished capacity and to enhance the broadly protective purposes of these acts.

The committee's tentative recommendation on this issue was favoured by all respondents who addressed it in the consultation. One respondent did suggest that the committee consider extending its tentative recommendation to include among the list of amended statutes the *Health Care (Consent) and Care Facility (Admission) Act*.⁷⁴⁰ A provision in this act that recently came into force allows for court applications that may place the mental capacity of an adult at issue.⁷⁴¹ The committee agreed with this suggestion, and incorporated it into its recommendation.

The committee recommends:

27. British Columbia should amend the Adult Guardianship Act, the Health Care (Consent) and Care Facility (Admission) Act, the Mental Health Act, and the Patients Property Act to provide that if the capacity of a person is in issue in a proceeding under the act the person is deemed to have capacity to retain and instruct counsel for the purpose of representation in the proceeding.

735. See *ibid.*

736. *Supra* note 723.

737. *Supra* note 5.

738. *Supra* note 5.

739. See *supra* note 548, s. 3 (1) ("If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act, ... (b) the person shall be deemed to have capacity to retain and instruct counsel.").

740. *Supra* note 4.

741. See *ibid.*, s. 33.4 (in force 1 September 2011).

CHAPTER XI. CAPACITY TO MARRY

A. Introduction

This chapter is the first of three chapters dealing with family-law matters. This area has seen significant development in recent years. It now hosts some of the most vexing problems for reform of common-law tests of capacity.

B. Background

1. OVERVIEW

The starting place for this discussion is the legal classification of marriage. The law has long regarded marriage to be a type of contract.⁷⁴² But the law has also long considered marriage to be a special kind of contract—"the most important contract of life."⁷⁴³ What sets marriage apart from other contracts are its roots in religion and ecclesiastical law, the intimate character of its promises (or "vows"), and its historically unique role in the organization of society.

The test of capacity to marry is shaped by these considerations. As the sections that follow will discuss, the test of capacity to marry incorporates elements that are similar to the test of capacity to enter into a contract. Some recent judgments have suggested adding elements to this basic test, to ensure that the test keeps pace with legal and social developments. But, more than the elements of the test, the key feature of the test of capacity to marry is its place in relation to other tests of capacity. As will be discussed below, the test of capacity to marry has traditionally been held to require a lower level of capacity than other tests require. This background part of the chapter will conclude with discussions of aspects of challenging a marriage in court (standing, onus of proof, and remedies), intoxication and the test of capacity to marry, and legislation relating to capacity to marry.

742. See, e.g., *Turner v. Meyers* (1808), 1 Hag. Con. 414, 161 ER 600 at 601 (Consist. Ct.), Sir William Scott [*Turner*] ("In more modern times [marriage] has been considered, in its proper light, as a civil contract, as well as a religious vow, and like all civil contracts, will be invalidated by want of consent of capable persons.").

743. *Browning v. Reane* (1812), 2 Phill. Ecc. 69, 161 ER 1080 at 1081 (Consist. Ct.), Sir John Nicholl [*Browning*]. See also *Kerr v. Kerr*, [1952] 4 DLR 578 at 589, 5 WWR (NS) 385 (Man. CA), Dysart JA [*Kerr*] ("Marriage, of course, is a contract, but it is more.").

2. TEST OF CAPACITY TO MARRY

(a) Introduction

Until very recently, courts and commentators considered the test of capacity to marry to have “long been settled.”⁷⁴⁴ There is a long line of leading cases, stretching back to the nineteenth century in the English courts⁷⁴⁵ and the early twentieth century in the Canadian courts,⁷⁴⁶ which generally agreed on the basic elements of the

744. *Barrett Estate v. Dexter*, 2000 ABQB 530 at para. 51, 34 ETR (2d) 1, Wilkins J. [*Dexter*].

745. See *Browning*, *supra* note 743 at 1085 (“[h]ere then is a young man, in the middle of life, marrying an old woman of seventy, an habitual drunkard, and labouring under great infirmities, but possessed of a considerable property, which is to be acquired by this marriage, without the knowledge of any of her friends, or any settlement or security whatever”—court finding that W lacked capacity to marry); *Portsmouth v. Portsmouth* (1828), 1 Hag. Ecc. 355, 162 ER 611 (Ct. of Arches) [*Portsmouth* cited to ER] (H, a person of “considerable natural weakness of mind” married W, who is the daughter of H’s solicitor and trustee of his property—wedding took place in secret, shortly after death of H’s first wife—court finding marriage null and void); *Durham v. Durham* (1885), 10 PD 80, [1885] 1 TLR 338 (Eng. PDA) [*Durham* cited to PD] (W described as “shy” young woman “of low intellectual powers”—after marriage, her mental health declines—H asking court to set aside marriage—court finding that, at the time of the marriage, W met the test of capacity); *Hunter v. Edney* (1885), 10 PD 93 (Eng. PDA) [*Hunter*] (W, suffering from delusions, attempts suicide on wedding night—W subsequently committed to asylum—H asking court to set aside marriage—W not contesting application); *Park v. Park* (1953), [1954] P. 89, [1953] 2 All ER 408 (Prob. Div.) [*Park* (Prob. Div.) cited to P.], *aff’d* (1953), [1954] P. 112, [1953] 2 All ER 1411 (CA) [*Park* (CA) cited to P.] (H, a gravely ill 78 year old, married W—later on his wedding day, H executed a new will—in a probate action, a jury found that H lacked testamentary capacity when he executed his new will—court finding that H had capacity to marry—decision affirmed on appeal).

746. See *Chertkow v. Feinstein*, [1929] 3 DLR 339, 24 Alta. LR 188 (SC (AD)) [*Chertkow* cited to DLR], *aff’d*, [1930] SCR 335, [1930] 1 DLR 137 (W “subject at times to spells of moodiness and eccentric conduct” both before and after marriage—diagnosed with dementia praecox—H applied for decree of nullity five years after marriage—granted at trial—overturned on appeal); *Brosseau v. Belland*, [1932] 2 WWR 632, [1932] AJ No. 22 (QL) (SC) (W suffered from “manic depressive insanity of a mixed type”—was a patient at a mental-health facility immediately prior to marriage—was recommitted to facility 10 days after marriage—W applied (through guardian *ad litem*) for declaration of nullity—granted by court); *O’Neill v. O’Neill*, [1945] 2 WWR 396, [1945] BCJ No. 107 (QL) (SC) (prior to marriage H diagnosed as suffering from schizophrenia—court finding lack of capacity to marry); *Milson v. Hough*, [1951] 3 DLR 725, [1951] OWR 450 (HCJ) [*Milson* cited to DLR] (W, who married at 18, “suffered a most unfortunate childhood” at hands of Children’s Aid Society—considered to have a violent temper—subsequently diagnosed with schizophrenia, two years after marriage—H applied to court for declaration of nullity—court dismissing application); *Whitaker v. McNeilly* (1957), 11 DLR (2d) 90, 23 WWR 210 (BCSC) (H marrying W upon discharge from armed forces in 1945—manifestations of erratic and violent conduct initially dismissed as “war nerves”—couple ceasing to live together after birth of child in 1949—H ultimately diagnosed with schizophrenia and committed to asylum in 1955—court finding that H lacked capacity to marry); *Re McElroy* (1978), 22 OR (2d) 381, 93 DLR (3d) 522

test of capacity and its relationship to other tests of capacity. But some recent cases have raised the prospect of rethinking some aspects of the test of capacity to marry.⁷⁴⁷

Before delving into the elements of the test of capacity and comparing it with other tests of capacity, this chapter will briefly discuss the purposes of the test of capacity to marry.

(b) Purposes of the Test of Capacity to Marry

The primary purpose of the test of capacity to marry is protective.⁷⁴⁸ Marriage can have a significant impact on a person's financial interests. Individuals with diminished capacity can be exploited by means of marriage.⁷⁴⁹

Another important policy promoted by the test of capacity to marry is enhancing the dignity and autonomy of persons with diminished capacity.⁷⁵⁰ This policy goal can be in tension with the protective policy of the test of capacity.

(Surr. Ct.) (H, aged 78 years, executed a will in contemplation of marriage one week before marriage—will not admitted to probate due to lack of testamentary capacity—H found to have capacity to marry).

747. See *Hart v. Cooper* (1994), 2 ETR (2d) 168, 45 ACWS (3d) 284 (BCSC) [*Cooper* cited to ETR] (H informed one month before marriage to W that he had terminal cancer and organic brain syndrome—court finding that H had capacity to marry); *Banton*, *supra* note 294 (H, who was 88 years old and stricken with cancer, married W, a 31-year-old waitress at H's retirement home—H subsequently executed wills and power of attorney in W's favour—court finding that H lacked testamentary capacity, but had capacity to marry); *Dexter*, *supra* note 744 (at time of marriage H was 93 years old and suffering cognitive decline—W was 54 years old—court finding H lacked capacity to marry); *Feng v. Sung Estate* (2003), 1 ETR (3d) 296, 37 RFL (5th) 441 (SCJ) [*Feng* cited to ETR], *aff'd* (2004), 11 ETR (3d) 169, 9 RFL (6th) 229 (CA) (H was 70 years old and suffering from cancer—married W, his 47-year-old housekeeper—H subsequently diagnosed with Parkinson's disease—court finding marriage void due to H's lack of capacity to marry—decision affirmed on appeal).

748. See Simon R. Fodden, *Family Law* (Toronto: Irwin Law, 1999) at 17 ("The rule about mental capacity is a manifestation of the basic requirement in contract law, and indeed in civil law generally, that a person must have an appropriate degree of mental functioning in order to be held accountable for an act.").

749. See generally Ashley E. Rathburn, "Marrying into Financial Abuse: A Solution to Protect the Elderly in California" (2010) 47 San Diego L. Rev. 227.

750. See *Calvert*, *supra* note 104 at 293 ("A person's right of self-determination is an important philosophical and legal principle.").

(c) *Basic Elements of the Test of Capacity*

In the leading nineteenth-century case *Durham v. Durham*,⁷⁵¹ Sir James Hannen P. stated that to have the mental capacity to marry a person must have the “capacity to understand the nature of the contract [of marriage], and the duties and responsibilities which it creates.”⁷⁵² This statement has been cited in many Canadian decisions, right up to the present.⁷⁵³ As a judge in a recent British Columbia case put it, “[d]espite [the] vintage and origin [of Sir James Hannen P.’s comments], there seems to be no better or more authoritative statement of the law.”⁷⁵⁴

This test of capacity requires something more than “a mere comprehension of the words of the promises exchanged. . . .”⁷⁵⁵ A basic understanding of the personal and social significance of marriage must also be present. This basic understanding has tended to evolve with the times. Where older cases emphasized the role of “protection on the part of the man, and submission on the part of the woman,”⁷⁵⁶ more recent cases have excluded these references.⁷⁵⁷ Now, as a commentator has put it, “if the parties are capable of understanding that the relationship is legally monogamous, indeterminable except by death or divorce, and involves mutual support and cohabitation, capacity is present.”⁷⁵⁸

751. *Supra* note 745.

752. *Ibid.* at 82.

753. *See, e.g., Chertkow, supra* note 746 at 342, Harvey CJ (for the court); *Dexter, supra* note 744 at para. 51.

754. *Davison v. Sweeney*, 2005 BCSC 757 at para. 27, 42 BCLR (4th) 69, Bernard J. [*Davison*].

755. *Durham, supra* note 745 at 82.

756. *Ibid.* at 82.

757. *See Park* (Prob. Div.), *supra* note 745 at 99, Karminski J. (“The minds of the parties must also be capable of understanding the nature of the contract into which they are entering. The precise nature of that contract may vary with the religious beliefs which the parties practice or profess. Some people may regard marriage as a sacrament; others, while still regarding marriage as a sacred and solemn obligation, do not believe in its sacramental character. But as Sir James Hannen P. pointed out, the essence of the contract is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others. It may be in the present times that submission on the part of the woman is no longer, as it was in 1885, an essential part of the contract. But so far as the husband is concerned there remains the duty to maintain her which is, I think, implicit in what Sir James Hannen P. described as the duty to protect.”).

758. *Robertson, supra* note 438 at 254. *See also Lacey v. Lacey* (Public Trustee of), [1983] BCJ No. 1016 (QL) at para. 31 (SC), Wong LJSC [*Lacey*] (“Thus at law, the essence of a marriage contract is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others.”).

(d) *Delusions*

The test of capacity to marry incorporates an element dealing with delusions.⁷⁵⁹ As is the case for other tests of capacity discussed in this report, the test of capacity to marry does not disqualify a person who suffers from any form of delusion. The delusion at issue must be directly linked to the person's reasons for marrying.

There are very few cases in which a delusion resulted in a court concluding that someone did not meet the test of capacity to marry.⁷⁶⁰ Unlike the case for wills, for marriage this element of the test of capacity does not appear to be too significant.

3. ADDITIONAL ELEMENTS OF THE TEST OF CAPACITY TO MARRY

(a) *Capacity to Manage Oneself and/or One's Finances*

The elements of the test of capacity to marry discussed above are uncontroversial. This topic and the next touch on additional elements that some courts have considered adding to the test of capacity to marry. Their status under the law is unclear.

The first group of additional elements relates to the capacity of a person to manage himself or herself and to manage his or her finances and affairs. These are the traditional concerns of the adult-guardianship system.⁷⁶¹ The first refers to the capacity of a person to make decisions concerning health care and other personal matters. The second refers to the capacity to make decisions about financial matters.

The idea that the test of capacity to marry incorporates an element probing whether a spouse had the capacity to manage the spouse's own person and finances can be traced back to an early nineteenth-century English decision, *Browning*.⁷⁶² The judge in this case began by drawing a distinction between "total fatuity from the birth" and

759. See *Hunter*, *supra* note 745 at 95, Sir James Hannen P. ("The question which I have to determine is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, *free from the influence of morbid delusions on the subject*." [emphasis added]).

760. See *Portsmouth*, *supra* note 745 at 613, Sir John Nicholl ("In respect to Lord Portsmouth's unsoundness of mind, the case set up is of a mixed nature. . . . [C]onsiderable natural weakness, growing at length, from being left to itself and uncontrolled . . . and . . . actual delusion—a perversion of mind, a deranged imagination, a fancy and belief of the existence of things which no rational being, no person possessed of the powers of reason and judgment, could possibly believe to exist.").

761. See *Patients Property Act*, *supra* note 5.

762. *Supra* note 745.

“mental weakness and imbecility, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind.”⁷⁶³ This distinction corresponds to a traditional distinction made in English adult-guardianship law that would have been current at the time of the judgment.⁷⁶⁴ So although the judge ultimately said that this distinction is not significant for the test of capacity to marry, it may have influenced his formulation of test, which was as follows: “[i]f the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of her person and property by matrimonial contract, any more than by any other contract.”⁷⁶⁵

This version of the test of capacity to marry incorporates a contractual test (“incapable of understanding the nature of the contract itself”) into a broader inquiry that addresses issues that more typically arise in connection with the appointment of a committee for a person (“incapable . . . to take care of his or her own person and property”).⁷⁶⁶ None of the leading English cases on the test of capacity to marry that were handed down later in the nineteenth century mentioned this broader inquiry in connection with the test of capacity.⁷⁶⁷

This idea did crop up again in *Re Spier*,⁷⁶⁸ an English case from the mid-twentieth century. The reported summary of the decision in this case indicates that the judge drew on *Browning* in formulating the test of capacity to marry.⁷⁶⁹ The additional element from *Browning* appears to have been decisive in the judge’s determination that the spouse at issue lacked the capacity to marry.⁷⁷⁰

763. *Ibid.* at 1081.

764. See Croucher, *supra* note 187 at 675–78 (reviewing “the origins of decision making for others” in English law).

765. *Supra* note 745 at 1081.

766. See, above, section VIII.B.1 at 125 (further discussion of committees under the *Patients Property Act*).

767. See *Durham*, *supra* note 745 at 82; *Hunter*, *supra* note 745 at 95.

768. [1947] WN 46 (Eng. PDA) [*Spier*].

769. See *ibid.* at 46 (“There must be capacity to understand the nature of the contract and the duties and responsibilities which it created, and from *Browning v. Reane* . . . he [*i.e.*, Willmer J.] held that there must also be a capacity to take care of his or her own person and property.”)

770. See *ibid.* (“His Lordship also found that the deceased, though he knew perfectly well that he was going through a ceremony of marriage, was lacking in a proper capacity to take care of his own person and property, and that the very nature of the disease was such as to act towards inca-

No Canadian court referred to this idea of an additional element for the test of capacity to marry until it was considered in an Ontario case from the late 1990s. In *Banton*,⁷⁷¹ the court examined the additional element as it appears in the judgments in *Browning* and *Spier*. In the court's interpretation, the two judgments are "not necessarily consistent."⁷⁷² The additional element as described in *Browning* "appears to have required both incapacity to manage oneself as well as one's property."⁷⁷³ *Spier*, "on the other hand, can be interpreted as treating incapacity to manage property by itself, as sufficient to give rise to incapacity to marry."⁷⁷⁴

The court in *Banton* felt constrained to choose between these two interpretations. It favoured the formulation of the additional element in *Browning*.⁷⁷⁵ While allowing that there is a financial dimension to marriage, in the court's view "to treat the ability to manage property as essential to the relationship would . . . attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."⁷⁷⁶

The court's comments in *Banton* have been discussed in a subsequent Ontario decision,⁷⁷⁷ but the distinction between the two approaches to the additional element was merely noted in this later decision.⁷⁷⁸

No British Columbia court has discussed this additional element to the test of capacity to marry. So its status in the law of this province is uncertain.

(b) Capacity to Appreciate Effect on Previous Marriages and Children

The second potential additional element for the test of capacity to marry probes the capacity of a spouse to appreciate the effect of the marriage on previous marriages

pacitating him from deciding whether his own health justified him in taking this very important step.").

771. *Supra* note 294.

772. *Ibid.* at para. 116.

773. *Ibid.*

774. *Ibid.*

775. *Ibid.* at para. 118 ("I prefer the original statement of principle in *Browning v. Reane*").

776. *Ibid.* at para. 124.

777. *See Feng, supra* note 747 at paras. 55–57, Greer J.

778. *See ibid.* at paras. 56–57 (H was unable to care for his person, so it was unnecessary for the court to decide whether incapacity to manage property and affairs was sufficient to ground a finding of lack of capacity to marry).

and children. Unlike the other potential additional element for the test, this element's origin is not in older English jurisprudence but rather in recent Canadian case law. It was first mentioned in a case decided a little over a decade ago in Alberta.

In *Dexter*,⁷⁷⁹ the husband was 93 years old at the time of his second marriage. He had previously been married for 55 years and had three adult children. The wife was 54 years old and had married the husband about six months after meeting him at a seniors' club.

The court heard expert medical testimony. It cited one expert's opinion on the test of capacity to marry, which he framed as follows: "a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."⁷⁸⁰ The court found that the husband lacked capacity to marry,⁷⁸¹ but it is unclear from the reasons for judgment whether this expanded test of capacity to marry figured in any way in the court reaching that conclusion.

The expert's comments were cited again in a judgment from an Ontario court. *Feng*,⁷⁸² like *Dexter*, featured an elderly, previously married husband with adult children marrying a much younger woman. The court raised the idea of an expanded test of capacity to marry alongside a consideration of undue influence.⁷⁸³ Although the marriage was ultimately set aside on the basis of undue influence, the Ontario court signaled that it was willing to accept this broader formulation of the test of capacity to marry.⁷⁸⁴

(c) Summary

There is widespread agreement on the basic elements of the test of capacity to marry. These basic elements are analogous to the basic elements of the contractual test of capacity. They probe whether a person is capable of understanding the nature of the contract of marriage and its effects. Unlike the contractual test, the basic ele-

779. *Supra* note 744.

780. *Ibid.* at para. 72.

781. *See ibid.* at para. 89.

782. *See supra* note 747.

783. *See ibid.* at para. 58.

784. *See ibid.* at para. 61 ("If I had not found that Sung was unduly influenced and coerced into his marriage with Feng, I am satisfied on the evidence that Sung lacked the mental capacity as set out by Dr. Malloy [*i.e.*, the medical expert who formulated the expanded test of capacity in *Dexter*] to enter into the marriage.").

ments of the test of capacity to marry are not focussed on a person's financial interests. Instead, they are focussed on the intimate and social aspects of the relationship.

The two proposed additional elements potentially broaden the test of capacity to consider financial interests and the effect of the marriage on close family members. In this way, these additional elements would make the test of capacity to marry more like the tests of capacity to make a will or an *inter vivos* gift. It's worth bearing this point in mind during the discussion of the next topic.

4. COMPARISON TO OTHER TESTS OF CAPACITY

The test of capacity to marry is often compared to other common-law tests of capacity, which can all be seen as making up a capacity hierarchy. Probably the most distinctive feature of the test of capacity to marry is how it is viewed as setting a lower threshold of capacity (or as occupying a lower position in the hierarchy) than other tests of capacity. Many, many courts⁷⁸⁵ and commentators⁷⁸⁶ have made this point. Since this feature is held to be such an important part of the test of capacity to marry it is worth investigating it a little deeper.

There appears to be two somewhat different ways of making the point that capacity to marry has a low position in any mental-capacity hierarchy. Both approaches turn up in some of the landmark nineteenth-century English cases in this field.⁷⁸⁷

The first approach is to point to certain inherent qualities of the marriage contract itself. In many cases courts simply assert, "the contract of marriage is a simple one, which does not require a high degree of intelligence to comprehend."⁷⁸⁸ Courts tend to leave it at that; they rarely go on to explain why the marriage contract should be

785. See, e.g., *Durham*, *supra* note 745 at 82; *Park* (Prob. Div.), *supra* note 745 at 100; *Park* (CA), *supra* note 745 at 132–33; *Banton*, *supra* note 294 at para. 110 ("not particularly rigorous test"); *Cooper*, *supra* note 747 at para. 30.

786. See, e.g., Albert H. Oosterhoff, "Consequences of a January/December Marriage: A Cautionary Tale" (1999) 18 ETPJ 261 at 271–72 [Oosterhoff, "Consequences"]; Marion Allan, Book Review of *Blood & Money: Why Families Fight Over Inheritance and What To Do About It* by P. Mark Accettura, (2012) 70 Advocate 132 at 134 ("a person requires significantly lower capacity to marry than to make a will"). See also Rathburn, *supra* note 749 at 243–44 (expressing American view that "[o]n a basic scale, marital capacity requires the least amount of capacity, followed by testamentary capacity, and lastly, capacity to enter into contracts" [footnote omitted]).

787. See *Durham*, *supra* note 745; *Boughton*, *supra* note 80.

788. *Durham*, *supra* note 745 at 82. See also *Chertkow*, *supra* note 746 at 342; *Foley v. Foley*, [1955] 1 DLR 580 at 584 (NFSC), *Dunfield J.*; *Lacey*, *supra* note 758 at para. 31; *Cooper*, *supra* note 747 at para. 30.

seen as inherently simple. But these statements are usually made in the course of emphasizing the personal, intimate, and social aspects of marriage. The implicit message is that these qualities are easier to grasp than the financial and legal information that must be considered in order to carry out other types of transactions.⁷⁸⁹

Rather than focussing on any specific qualities of marriage, the second approach involves making a direct comparison between the test of capacity to marry and other tests of capacity. Typically, this approach involves comparing marrying to making a will. The court observes that making a will requires a higher level of mental capacity than, for example, marrying. This type of comparison cropped up first in a decision of Sir James Hannen P. (who authored several of the leading nineteenth-century cases on capacity to marry).⁷⁹⁰ The case⁷⁹¹ actually involved testamentary capacity, but in the course of giving reasons for judgment Sir James Hannen P. described a series of other tests of capacity (including the test of capacity to marry) and concluded that “the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary decision.”⁷⁹²

This comment was seized on in *Park* (Prob. Div.).⁷⁹³ The facts of this case brought the issue of comparing testamentary capacity to capacity to marry to the foreground. In *Park*, the spouse whose capacity was at issue executed a will a few hours after getting married. After his death, a jury refused to admit the will to probate on the basis that he lacked testamentary capacity at the time the will was executed. Family members subsequently launched an action to declare the marriage void due to lack of capacity to marry. The judge expressly said that he “approach[ed] the facts of this case on the basis that a lesser degree of capacity is required to consent to a marriage than in the making of a will.”⁷⁹⁴

789. See *Durham*, *supra* note 745 at 82. See also *Lacey*, *supra* note 758 at para. 31 (“[Marriage] does not involve consideration of a large variety of circumstances required in other acts involving others, such as in the making of a Will. In addition, the character of consent for this particular marriage did not involve consideration of other circumstances normally required by other persons contemplating marriage—such as establishing a source of income, maintaining a home, or contemplation of children.”).

790. See *Durham*, *supra* note 745; *Hunter*, *supra* note 745; *Canon v. Smalley* (1885), 10 PD 96 (Eng. PDA).

791. See *Boughton*, *supra* note 80.

792. *Ibid.* at 72.

793. *Supra* note 745.

794. *Ibid.* at 97, Karminski J.

Interestingly, although *Park* (Prob. Div.) was affirmed on appeal, each of the appellate justices made a point of criticizing this approach. It was noted that, in a subsequent case, Sir James Hannen P. appeared to take back his comments in *Boughton*.⁷⁹⁵ Two of the appellate justices commented, in effect, that each case should be decided on its own facts without attempting to set down a general rule,⁷⁹⁶ while the third went further and asserted “there is no sliding scale of soundness of mind to which different matters on which the law is required to take cognizance may be measured.”⁷⁹⁷ Nevertheless, there are recent Canadian judgments that take this comparative approach.⁷⁹⁸

5. STANDING TO CHALLENGE A MARRIAGE

The rule on who can challenge a marriage’s validity on the basis of mental capacity is actually quite liberal. A person need only have a financial interest in the outcome of the case to have standing.⁷⁹⁹ In the vast majority of cases, this will turn out to be a family member, but the rule is not so limited in principle.

A spouse may even sustain an action to set aside a marriage on the basis of the spouse’s own failure to meet the test of capacity.⁸⁰⁰ The argument in this case would

795. See *Burdett v. Thomson*, reported as a footnote to *Boughton*, *supra* note 80 at 73 (“It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness of mind is required to make a will.”).

796. See *Park* (CA), *supra* note 745 at 122, Singleton LJ (“If a man’s mental condition is such that he is not capable of making a simple will . . . most people would consider that he is not in a fit condition to enter into a contract of marriage. Further considerations may well arise when a complicated testamentary document is propounded. . .”), 133, Birkett LJ (“Some men are very able and some are not, and it is understandable, for example, that one might have an illiterate, uneducated man perfectly sound of mind, but not of high quality, who was able to understand the contract of marriage in its simplicity, but who then came into a sudden succession of wealth . . . who might be quite incapable of making anything in the nature of a complicated will, quite apart from unsoundness of mind. . .”).

797. *Ibid.* at 135, Hodson LJ.

798. See, e.g., *Lacey*, *supra* note 758 at para. 31.

799. See *Cooper*, *supra* note 747 at para. 27 (“[A] person other than a party to a marriage may challenge the capacity of the parties to enter into a marriage contract providing that person has some financial interest in establishing its invalidity. Even a very slight and very contingent interest will suffice.”).

800. See *Turner*, *supra* note 742 at 601 (“It is, I conceive, perfectly clear in law that a party may come forward to maintain his own past incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract.”).

be that the spouse did not meet the test of capacity at the time of the marriage, but has regained capacity to conduct litigation.

6. ONUS OF PROOF

The person challenging the marriage bears the onus of proving that a party to that marriage fails to meet the test of capacity.⁸⁰¹ Some cases make this point by referring to a presumption in favour of the validity of a marriage that was solemnized in a formally regular ceremony.⁸⁰²

Some older cases have held that proof beyond a reasonable doubt was necessary to set aside a marriage.⁸⁰³ This standard no longer appears to be applicable. Proof of lack of capacity need only be shown on the civil standard of a preponderance of the evidence. But on occasion courts say that, although the civil standard still applies, the challenger must furnish particularly clear and convincing evidence⁸⁰⁴—although this point appears to have been overtaken by the recent comments of the Supreme Court of Canada on the onus of proof in civil proceedings generally.⁸⁰⁵

The rationale behind these older comments is the public policy in favour of encouraging marriage.⁸⁰⁶ As a judge in an English case put it, “[p]arties actually joined together are not lightly to be put asunder.”⁸⁰⁷

801. See *Cooper*, *supra* note 747 at para. 31.

802. See *Deal v. Deal* (1966), 60 DLR (2d) 411 at 424, 53 MPR 63 (NSSC), Cowan J. (“It is well settled that the burden rests upon the petitioner to prove that a marriage, regular in form was, in fact, invalid through the incapacity of the respondent to consent to it.”).

803. See *Poteryko v. Malyk*, [1950] 2 DLR 173 at 176, [1950] 1 WWR 469 (Man. CA), Adamson JA (McPherson CJ and Richards and Coyne JJA concurring); *Kerr v. Kerr* (1951), 2 WWR (NS) 652 at 656 (Man. QB), Beaubien J., *rev’d*, *Kerr*, *supra* note 743.

804. See *Cooper*, *supra* note 747 at para. 31 (“The evidence must be of a sufficiently clear and definite character as to constitute more than a ‘mere’ preponderance as is required in ordinary civil cases.”).

805. See *F. H. v. McDougall*, 2008 SCC 53 at para. 40, [2008] 3 SCR 41, Rothstein J. (for the court) (“it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities”).

806. See *Kerr*, *supra* note 743 at 588 (“The interest of the public in upholding marriages is recognized in law by the rule that everything, including capacity of the parties, is presumed in favor of marriages.”).

807. *Sullivan v. Sullivan* (1819), 3 Phill. Ecc. 45, 161 ER 1253 (Ct. of Arches), Sir John Nicholl. See also *Milson*, *supra* note 746 at 726, Gale J. (“Marriage is a sacred state, not lightly to be cast aside....”).

7. CONSEQUENCES OF A FINDING THAT A PERSON LACKS THE CAPACITY TO MARRY

If one of the spouses in a marriage is found not to have had the mental capacity to enter into the marriage, then that supposed marriage is considered to be void *ab initio*.⁸⁰⁸ This means that, in the eyes of the law, it is as if the marriage never had existed. This result is in contrast to the result that flows from a finding that a marriage is voidable. A voidable marriage is one that, despite some legal defect, continues in effect until a spouse obtains a court order setting the marriage aside. The parties to a void marriage do not need to take any steps to set the marriage aside. But, in practice, most people will obtain a declaratory judgment from a court to the effect that a marriage is void, simply for the sake of clarity and certainty.⁸⁰⁹

8. INTOXICATION

A parallel set of rules exists for marriages entered into by a spouse who was intoxicated.⁸¹⁰ The test of capacity is similar to the one described above for marriages involving a spouse of diminished mental capacity. The test probes whether the intoxicated spouse was capable of understanding the nature of the contract of marriage and its responsibilities.⁸¹¹ The onus of proof is on the party arguing that the mar-

808. See, e.g., *Feng*, *supra* note 747 at para. 66; *Reynolds v. Reynolds* (1966), 58 WWR 87, [1966] BCJ No. 21 (QL) (SC).

809. See *Davison*, *supra* note 754 at para. 8 (“A marriage void *ab initio* never existed at law, and a voidable marriage exists until it is annulled by court order. When a party seeks an annulment on a ground that renders a marriage void *ab initio*, the court’s order is merely declaratory—the court simply declares that the marriage never happened. When a marriage is voidable, an order for annulment dissolves an existing marriage and changes the legal relationship between the parties.”).

810. See *Davison*, *ibid.* (“In the wee hours of the morning on July 18, 2004, at the Little White Chapel in Las Vegas, Nevada, [W] and [H] married one another. They had met only hours earlier outside a local hotel. After the ceremony, they retired to their respective hotel rooms. They have not seen each other since.”—court finding that “evidence falls far short of showing that [W] was incapable of understanding that she was entering into a marriage”); *Ward v. Ward* (1985), 66 NBR (2d) 44, 169 APR 44 (QB) [*Ward* cited to NBR] (H “showed up in a state of intoxication which was so advanced that he had to be held up to get through the ceremony”—H remaining “constantly intoxicated” for 45 days after marriage, at which time he deserts W—several years later, W marrying H’s brother—court granting application to declare first marriage void); *Meilen v. Andersson* (1977), 6 AR 427, [1977] 2 ACWS 283 (SC (TD)) [*Meilen* cited to AR] (H “tricked” into taking narcotics and subsequently kept under their influence by W and friend—court declaring marriage void).

811. See *Davison*, *supra* note 754 at para. 30 (“... I accept that the test to apply is the following: was the plaintiff so intoxicated that she was incapable of understanding that she was entering into a marriage?”); *Ward*, *supra* note 810 at para. 30.

riage should be set aside due to a spouse's intoxication.⁸¹² A spouse may raise his or her own intoxication as a reason to set aside a marriage.⁸¹³ If a spouse lacked the capacity to marry due to intoxication, then the marriage is considered to be void.⁸¹⁴

9. LEGISLATION RELATING TO THE TEST OF CAPACITY TO MARRY

(a) Existing Legislation

British Columbia's *Marriage Act*⁸¹⁵ contains a provision that addresses capacity to marry. The provision does not set out a test of capacity. Instead, it creates an offence applicable to marriage-license issuers, marriage commissioners, and religious representatives. If any one of these officials issues a marriage license or solemnizes a marriage "knowing or having reason to believe" that one of the prospective spouses is a "mentally disordered person" or is intoxicated, then that official commits an offence and may be liable to pay a fine of up to \$500.⁸¹⁶

The provision is unusual in that it applies not to the person or persons whose capacity may be at issue, but rather to an administrative official who acts as something of a gatekeeper. It also relies on a definition of *mentally disordered person* that does not correspond exactly with the class of people who don't meet the test of capacity to marry.⁸¹⁷

The *Marriage Act* also contains a provision that allows "a person [to] lodge a caveat with an issuer of marriage licences against the issuing of a licence for the marriage

812. See *Davison*, *supra* note 754 at para. 35; *Ward*, *supra* note 810 at para. 29.

813. See *Davison*, *supra* note 754.

814. See *Davison*, *ibid.* at para. 2; *Ward*, *supra* note 810 at para. 51; *Meilen*, *supra* note 810 at para. 6, McDonald J. ("There is some question whether the marriage is void *ab initio* or voidable. . . . I accept the view that the marriage is void *ab initio*.").

815. RSBC 1996, c. 282.

816. *Ibid.*, s. 35 ("An issuer of marriage licences who issues a licence for a marriage, and a religious representative or marriage commissioner who solemnizes a marriage, knowing or having reason to believe that either of the parties to the intended marriage or to the marriage is a mentally disordered person or is impaired by drugs or alcohol, commits an offence and is liable on conviction to a penalty of not more than \$500.").

817. See *Interpretation Act*, RSBC 1996, c. 238, s. 29 (" 'mentally disordered person,' 'mentally incompetent person,' 'mentally ill person,' or 'person with a mental disorder' means a person with a mental disorder as defined in section 1 of the *Mental Health Act*"); *Mental Health Act*, *supra* note 723, s. 1 (" 'person with a mental disorder' means a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability (a) to react appropriately to the person's environment, or (b) to associate with others.").

of a person named in the caveat.”⁸¹⁸ If the caveat states the “ground of objection” on which it is founded and meets other procedural requirements, then “no marriage licence may be issued by the issuer” until the issuer has inquired into the ground of objection and “is satisfied that it ought not to obstruct the issuing of the licence” or the caveator withdraws the caveat.⁸¹⁹ This provision could be used to try to preempt a marriage involving a person with diminished capacity.

(b) Authority to Enact Legislation in Relation to Mental Capacity and Marriage

The *Constitution Act, 1867*,⁸²⁰ divides legislative authority for topics concerning marriage between the federal parliament and the provincial legislatures. Parliament has the authority to legislate with respect to marriage and divorce,⁸²¹ while the legislatures may pass laws relating to the solemnization of marriage.⁸²²

Legal capacity to marry should fall squarely within the federal head of power to legislate on marriage and divorce. Indeed, parliament has enacted some legislation that touches on legal capacity to marry.⁸²³ The complicating factor comes in the form of provincial age restrictions on marriage. All provinces have legislation setting the minimum age at which a person can marry.⁸²⁴ On its face, this legislation looks like it is addressing the type of legal-capacity issue that should fall within the jurisdiction of parliament. These age restrictions have been challenged on that basis, but the courts have upheld these laws as a valid exercise of the provinces’ solemnization-of-marriage power.⁸²⁵

818. *Supra* note 815, s. 23 (1).

819. *Ibid.*, s. 23 (2).

820. (UK), 30 & 31 Vict., c. 3, reprinted in RSC 1985, App. II, No. 5.

821. *See ibid.*, s. 91 (26).

822. *See ibid.*, s. 92 (12). The *Marriage Act*, *supra* note 815, is an example of the exercise of this legislative power.

823. *See Marriage (Prohibited Degrees) Act*, SC 1990, c. 46 (prohibiting marriage between related persons); *Civil Marriage Act*, SC 2005, c. 33 (extending equal access to marriage to same-sex couples).

824. *See, e.g., Marriage Act*, *supra* note 815, s. 29 (marriage of person under 16 years of age). *See also ibid.*, s. 28 (consent required to marriage of person under 19 years of age).

825. *See Ross v. MacQueen*, [1948] 2 DLR 536 at 540, [1948] 1 WWR 258 (Alta. SC), McLaurin J. (upholding legislation on the basis that “[t]he restrictions placed by s. 24 on the marriage of persons under the age of 16 years, do not go to the matter of capacity but to the question of the solemnization of marriage in the Province . . .”); *Hobson v. Gray* (1958), 13 DLR (2d) 404, 25 WWR 82 (Alta. SC). *See also Kerr v. Kerr*, [1934] SCR 72, [1934] 2 DLR 369 (upholding parental-consent

All this puts the issue of mental-capacity legislation on marriage in a grey area.⁸²⁶ The federal government should have the authority to enact legislation concerning mental capacity and marriage under its marriage-and-divorce power. But, as a practical matter, parliament has demonstrated over the years that it uses this power sparingly. The provinces have shown more openness to exercising their powers in this area. It could be argued that legislation on the test of capacity to marry is analogous to legislation setting a minimum age of marriage. But such an argument would be vulnerable to challenge in the courts.

It must be acknowledged that neither parliament nor any provincial legislature has enacted any legislation dealing with the test of mental capacity to marry. So the question of which level of government has the authority to enact such legislation is theoretical at this time.

(c) Equality Rights and Legislation on the Test of Capacity to Marry

One of the rights guaranteed by the *Canadian Charter of Rights and Freedoms*⁸²⁷ is “equality before and under law and equal protection and benefit of law.”⁸²⁸ This right has received extensive consideration in several recent cases dealing with restrictions on access to marriage.⁸²⁹ Some of the reasoning adopted in these cases could apply, by analogy, to any legislation dealing with the test of capacity to marry. The issues and how they would be resolved are matters of speculation at present.

legislation as valid exercise of province’s solemnization-of-marriage power); *Legebokoff v. Legebokoff* (1982), 136 DLR (3d) 566, 28 RFL (2d) 212 (BCSC) (marriage of 15-year-old girl upheld in the face of BC *Marriage Act* age restriction—court expressing no opinion on constitutionality of provision).

826. See Robertson, *supra* note 438 at 256 (“Several writers have argued that the mental health restrictions [on marriage] are in substance related to capacity to marry and are therefore beyond the legislative authority of the provinces. Although this argument has considerable merit, the case-law on provincial regulation of parental consent and the age of consent to marriage suggests that the courts may well view the mental health restrictions as dealing with solemnization and thus within provincial legislative authority.” [footnotes omitted]).

827. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

828. *Ibid.*, s. 15 (1).

829. See, e.g., *Halpern v. Canada (Attorney General)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 (CA) [*Halpern* cited to OR] (reviewing common-law prohibition on same-sex marriage in light of equality-rights guarantee). See also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 SCR 325 [*Walsh*] (considering access to statutory property-division regime for couples living in a marriage-like relationship).

C. Issues for Reform

This section considers two issues for reform. The first issue raises the question of changing the elements of the test. The second examines whether the test of capacity should be restated in legislation.

1. SHOULD ANY ASPECT OF THE COMMON-LAW TEST OF CAPACITY TO MARRY BE MODIFIED BY LEGISLATION?

A number of commentators have recently called for reforms to the common-law test of capacity to marry.⁸³⁰ Reform is necessary, in their view, because the law has failed to respond to changing social conditions.⁸³¹

The trends are noticeable even in a cursory examination of the leading cases on the test of capacity to marry. The cases from the nineteenth and most of the twentieth centuries concerned mainly young adults who were marrying for the first time. But by about the 1990s, the characteristic fact pattern had seen a change. Now the typical case involves an older adult, who has married at least once before, marrying a much younger person.

Commentators developed a name for this type of marriage: a “predatory marriage.”⁸³² Predatory marriages exploit the property rights that flow from marriage. While these rights may be insignificant in the case of young people, who are just starting out in life, they can be highly valuable for older adults, who have a lifetime of work and saving behind them. The interaction of marriage and estate planning is

830. See Kimberly Whaley *et al.*, *Capacity to Marry and the Estate Plan* (Aurora, ON: Canada Law Book, 2010) [Whaley, *Capacity to Marry*]; Wendy L. Griesdorf, “Crazy in Love: Caregiver Marriages in the Context of Estate Disputes” (2006), 25 ETPJ 315; Oosterhoff, “Consequences,” *supra* note 786. See also Rathburn, *supra* note 749; Terry L. Turnipseed, “How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America” (2008) 96 Ky. LJ 275 (recent examples of American calls for reform).

831. See Oosterhoff, “Consequences,” *supra* note 786 at 284 (“the law needs to be brought into line with modern realities”).

832. See Whaley, *Capacity to Marry*, *supra* note 830 at 69 (predatory marriages “are marriages entered into for the singular purpose of exploitation, personal gain or profit by unprincipled individuals who are taking advantage of the vulnerable, dependant, elderly, cognitively impaired, and incapable”); Kimberly Wallis, “The capacity to marry” *The Last Word: CBA National Wills, Estates and Trusts Newsletter* (December 2012), online: Canadian Bar Association <<http://www.cba.org>> (“With both longevity and late-in-life separation and divorce on the rise, predatory marriages may also be increasing.”).

also significant. Under the current law, marriage revokes a will⁸³³ (but, in British Columbia, the days are numbered for this rule),⁸³⁴ and a spouse receives a preferred share of an intestate spouse's estate.⁸³⁵ The combination of demographic changes leading to an older population and rules developed in relation to nineteenth-century social conditions creates an opportunity for fraudsters to exploit the "tension between the current low threshold for capacity to marry and the financial and estate implications of marriage."⁸³⁶

If "[i]t's easy to get married, maybe too easy,"⁸³⁷ and this creates problems, then the solution to these problems for proponents of reform involves raising the threshold of mental capacity to marry.⁸³⁸ A practical way to achieve this result would be to enact legislation that embraces the direction some courts have been moving in by adding elements to the test of capacity to marry.⁸³⁹ Adding elements to the test of capacity that focus on a potential spouse's capacity to manage his or her finances and to appreciate the effect of the marriage on the interests of other family members would directly address the concerns raised by predatory marriages and would also raise the level of capacity required to meet the test of capacity to marry.

833. See *Wills Act*, *supra* note 475, s. 15 ("A will is revoked by the marriage of the testator, unless (a) there is a declaration in the will that it is made in contemplation of the marriage, or (b) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if the person died intestate.").

834. See *Report on Wills, Estates and Succession: A Modern Legal Framework*, *supra* note 518 at 33–34 (recommending abolition of revocation of will by subsequent marriage). See also *Wills, Estates and Succession Act*, *supra* note 10 (not carrying forward *Wills Act* provision on revocation of will by subsequent marriage—in force 31 March 2014).

835. See *Estate Administration Act*, RSBC 1996, c. 122, ss. 83 (intestate leaving spouse but no issue), 85 (intestate leaving spouse and issue). See also *Wills, Estates and Succession Act*, *supra* note 10, s. 20 (spouse but no descendants), 21 (spouse and descendants) (in force 31 March 2014).

836. Whaley, *Capacity to Marry*, *supra* note 830 at 95.

837. Carmelle Peisah, Henry Brodaty & Marie Bridger, "Abuse by Marriage: The Exploitation of Mentally Ill Older People" (2008) 23 *Int'l J. Geriatric Psychiatry* 883 at 883.

838. See Whaley, *Capacity to Marry*, *supra* note 830 at 4; Oosterhoff, "Consequences," *supra* note 786 at 273. Whaley and Oosterhoff, as well as Griesdorf, *supra* note 830, spent time discussing an alternative path to reform, which involves doing away with the rule that a subsequent marriage revokes a will. In light of the fact that this rule is not preserved in the *Wills, Estates and Succession Act*, *supra* note 10 (in force 31 March 2014), this chapter does not dwell on this aspect of their argument.

839. See Whaley, *Capacity to Marry*, *supra* note 830.

There are several advantages to this proposal. It would enhance the protective purpose of the law. It would modernize the law by recognizing that social trends have changed the effect of marriage for many people. The proposed changes would also serve to harmonize the test of capacity to marry with other important tests of capacity, such as the tests of capacity to make a will and to manage finances and affairs. This may help to simplify the law, as fewer distinct tests of capacity would be on the books. It may also smooth the implementation of a reformed test of capacity in practice, as it would draw on both trends in the case law and on existing, well-developed tests of capacity.

There are potential drawbacks to endorsing this proposal. The downsides to these proposed reforms are perhaps best drawn out by noting the positive case for the law as it currently stands. It is hard to find commentators who have mounted a defence of the test of capacity to marry and its most distinctive feature, the relatively low threshold of capacity to marry. But it is possible to grasp the policy that supports having a low threshold of capacity to marry.

The starting place for such an argument would be the point made by counsel in arguing *Park* (CA): “[i]t would be contrary to public interest to put too high the standard of mental capacity required for a valid marriage, and particularly dangerous to accept as one of the requisites the capacity to take care of one’s own property.”⁸⁴⁰ The danger flows from the longstanding position of the law which views marriage as “the chief foundation on which the superstructure of society rests.”⁸⁴¹ Effectively barring certain individuals with diminished capacity from this important institution runs counter to this societal interest. In addition, more-recent cases on marriage have stressed the “intensely personal”⁸⁴² nature of the decision to marry and marriage’s role in “enhancing an individual’s sense of self-worth and dignity.”⁸⁴³ These com-

840. *Supra* note 745 at 116.

841. *Alspector v. Alspector*, [1957] OR 14 at 21, 7 DLR (2d) 203 (SC), McRuer CJ (quoting *Eversley on Domestic Relations*, 6th ed. at 4).

842. *Walsh*, *supra* note 829 at para. 43, Bastarache J. (McLachlin CJ and Iacobucci, Major, Binnie, Arbour, and LeBel JJ concurring) (“The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual.”).

843. *Halpern*, *supra* note 829 at para. 5, the court (“Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving,

ments could easily be applied to an enhanced test of capacity to marry, characterizing such a test of capacity as undercutting one of the purposes of the law, which is to promote the dignity of persons with diminished capacity.

The committee found this issue to be one of the most difficult it encountered over the course of this project. The committee agrees that some of the older judgments that have helped to shape the test of capacity to marry are out of step with modern social trends. Further, concerns about predatory marriages point to a real and troubling issue. The low threshold of mental capacity set by the traditional test of capacity to marry has opened the door to exploitation in some cases.

But the committee also had concerns about using legislation to modify the test of capacity to marry, creating a higher standard of mental capacity. The main concern was that legislation aimed at stamping out predatory marriages would end up acting as barrier to marriage for other people with diminished capacity. The broad orientation of legislation makes it very difficult to draw lines between cases with subtle differences. Case law may be better situated to handle this task. The advent of the *Wills, Estates and Succession Act*,⁸⁴⁴ which will not contain the rule that a marriage revokes a prior will, may also help to address predatory marriages. Further, the complex set of constitutional-law dictates that operate in this area makes it very difficult to craft legislation that would not attract a challenge in the courts. Finally, the committee was concerned that raising the threshold of mental capacity required under the test of capacity to marry could create incentives for third parties to challenge marriages.

A majority of consultation respondents supported the committee's tentative recommendation on this issue. But several respondents were strongly opposed to it, and offered alternative proposals, which are noted below.

The committee recommends:

28. Legislation should not be enacted to modify any of the elements of the common-law test of capacity to marry.

A number of respondents to the consultation paper proposed changes to a series of statutes that deal with the financial (and, for some respondents, other legal) consequences of marriage as a way to provide enhanced protection against predatory

committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.").

844. *Supra* note 10 (in force 31 March 2014).

marriages without changing the test of capacity to marry.⁸⁴⁵ This struck the committee as intriguing idea that would be worth further study. Ideally, it would be the subject of a law-reform project in its own right, as aspects of this proposal are far-reaching and would require careful consideration and additional consultation.

2. SHOULD THE TEST OF CAPACITY TO MARRY BE RESTATED IN LEGISLATION?

Another possible reform would be to call for legislation to entrench the traditional test of capacity to marry. The main rationale for such a reform would be to clarify and lend certainty to the law. As a commentator has pointed out, British Columbia case law is widely seen as following the traditional view that the test of capacity to marry involves probing a spouse's capacity to understand the marriage contract and the responsibilities it creates.⁸⁴⁶ But decisions in other jurisdictions that draw on a nineteenth-century English precedent may pave the way for the British Columbia courts to accept an enhanced test of capacity to marry. So the law "is not entirely clear."⁸⁴⁷

Legislation clearly establishing that the traditional view of the test of capacity to marry remains the law would have the benefit of making the law simpler and more accessible. But this may not be the best time to propose such legislation. The law appears to be in a state of flux across Canada. By adhering to the traditional view, Brit-

845. See, e.g., Canadian Bar Association (BC Branch), Wills and Trusts Section, Response to *Consultation Paper on Common-Law Tests of Capacity* (unpublished, archived with the British Columbia Law Institute) at 4 (proposing that "the property rights that flow from marriage be denied to the predatory spouse by amending the *Family Law Act*, the *Estate Administration Act* and the *Wills Variation Act* (and the [*Wills, Estates and Succession Act*] when proclaimed). Amendments to those acts should be enacted to provide that a spouse, who has married a person who at the time of the marriage was not capable of managing his or her financial affairs and not capable of appreciating the effect of the marriage on the interests of his or her family members, shall not be entitled to: (1) a division of family assets under Part 5 or to support under Part 7 of the *Family Law Act*; (2) benefit from the estate of the person under Part 10 of the *Estate Administration Act* (Part 3 of [the *Wills, Estates and Succession Act*]) from an intestacy; and (3) participate in or benefit from an action under the *Wills Variation Act* (Part 4 of [the *Wills, Estates and Succession Act*])).

846. AnnaMarie Laing, "Capacity to Marry," in David C. Dundee & Hugh S. McLellan, eds., *Aging, Death and Divorce: Materials prepared for the Continuing Legal Education seminar, Aging, Death, & Divorce: The Big Three and the Perfect Storm, held in Vancouver, B.C., on February 2, 2007* (Vancouver: Continuing Legal Education Society of British Columbia, 2007) 6.1.1 at 6.1.10.

847. See *ibid.* ("The law as it relates to mental capacity to marry in BC is not entirely clear. The writer believes a credible argument can be made that the test is more stringent than commonly understood but that, from a social policy standpoint, courts will be loathe to impose the more stringent test.").

ish Columbia could find itself, in a few years, out of step with the rest of the provinces. In addition, it could be argued that affirming the traditional view could leave vulnerable persons with diminished capacity with less protection from the law than they need. Finally, it is far from clear that British Columbia could act on its own in this area. Federal legislation may be needed.

A strong majority of consultation respondents supported the committee's tentative recommendation on this issue.

The committee recommends:

29. Legislation restating the common-law test of capacity to marry should not be enacted.

CHAPTER XII. CAPACITY TO FORM THE INTENTION TO LIVE SEPARATE AND APART FROM A SPOUSE

A. Introduction

The other side of the coin of the test of capacity to marry is the test of capacity to terminate a marriage. Marriage breakdown engages a host of issues across federal and provincial family-law legislation. From the point of view of mental capacity, the key issue relates to forming the intention to live separate and apart from a spouse, which for the brevity's sake is referred to in this chapter as the "capacity to separate." This chapter considers reform of the elements of the test of capacity to separate, but first it examines developments in the law related to this test of capacity.

B. Background

1. OVERVIEW

The main purpose of the background section of this chapter is to review several recent court cases on the common-law test of capacity to separate. But in order to get a complete grasp on capacity to separate, it is necessary to start with a look at its place in family-law legislation.

2. FAMILY-LAW LEGISLATION

(a) Introduction

Family law is a vast subject. Family-law legislation and proceedings tend to tackle a wide array of interconnected issues. The following summary is not intended as a comprehensive picture of all of these issues.⁸⁴⁸ Instead, it is meant to set out some information on the two areas of family-law legislation where mental capacity has arisen as an issue for judicial consideration.

848. See, e.g., John-Paul E. Boyd *et al.*, eds., *British Columbia Family Practice Manual*, looseleaf (consulted on 25 June 2013), 4th ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2006); Scott Booth *et al.*, eds., *Family Law Sourcebook: A Project of the Vancouver Family Law Section, British Columbia Branch, Canadian Bar Association*, looseleaf (consulted on 25 June 2013), 3d ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2002); James C. MacDonald & K. Ferrier, *Canadian Divorce Law and Practice*, looseleaf (consulted on 25 June 2013), 2d ed. (Toronto: Carswell, 1986); Julien D. Payne & Marilyn A. Payne, *Canadian Family Law*, 4th ed. (Toronto: Irwin Law, 2011).

(b) Divorce Act

The *Divorce Act*⁸⁴⁹ provides for only one ground for obtaining a divorce: a “break-down” of the marriage.⁸⁵⁰ A breakdown of the marriage can be established in one of three ways: (1) by adultery; (2) by cruelty; or (3) by “the spouses hav[ing] lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and . . . living separate and apart at the commencement of the proceeding.”⁸⁵¹ In the vast majority of cases the spouses rely on the third way to establish their entitlement to a divorce.

The courts have long held that living separate and apart is a “disjunctive” concept.⁸⁵² In order to live separate and apart, the spouses must both be physically separated from one another and intend this separation to end the marriage.⁸⁵³ This intentional element brings issues of mental capacity into play. A spouse must meet a test of capacity in order to be able to form the intention to live separate and apart.

It is not necessary for both spouses to form the intention to live separate and apart in order to obtain a divorce, nor is it necessary for the spouses to reach some sort of “consensus” on this issue.⁸⁵⁴ A divorce may be granted in cases in which only one spouse has this intention.⁸⁵⁵

A spouse does not have to sustain the capacity to separate over the entire course of the one-year period. It is sufficient if the spouse has this capacity at the start of the

849. RSC 1985 (2d Supp.), c. 3.

850. *Ibid.*, s. 8 (1).

851. *Ibid.*, s. 8 (2) (a). See also Robertson, *supra* note 438 at 266–70 (discussing mental capacity in relation to adultery and cruelty).

852. *Rushton v. Rushton* (1968), 2 DLR (3d) 25 at 27, 66 WWR 764 (BCSC), McIntyre J. [*Rushton*].

853. See *Rushton*, *ibid.* (“[T]here must be a withdrawal from the matrimonial obligation with the intent of destroying the matrimonial *consortium*, as well as physical separation. The two conditions must be met.”); *Dupere v. Dupere* (1974), 9 NBR (2d) 554 at para. 17, 19 RFL 270 (SC (QB Div.)), Stevenson J. (“To meet the statute there must be both (a) physical separation and (b) a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial *consortium*.”), *aff’d* (1974), 10 NBR (2d) 554 (SC (AD)); *Shorten v. Shorten* (1985), 65 NBR (2d) 429 at paras. 17–18, 167 APR 429 (QB (Fam. Div.)), Deschênes J.

854. *Kennedy v. Kennedy* (1968), 2 DLR (3d) 405 at 407, 67 WWR 91 (BCSC), McIntyre J.

855. See *Divorce Act*, *supra* note 849, s. 8 (3) (a) (“spouses shall be deemed to have lived separate and apart for any period during which they lived apart and *either of them had the intention* to live separate and apart from the other” [emphasis added]).

period. Even if the spouse loses the capacity to separate before the year is up, the divorce proceeding may validly continue.⁸⁵⁶

A spouse who lacks the capacity to separate may be represented in a divorce proceeding by the spouse's committee or litigation guardian.⁸⁵⁷ A committee⁸⁵⁸ may even commence divorce proceedings on behalf of an incapable spouse, so long as it is clearly in the spouse's best interests to do so.⁸⁵⁹

(c) *Declaratory Judgments under the Family Relations Act*

The other area that has seen judicial commentary on the test of capacity to separate has been in cases involving a division of family assets under the *Family Relations Act*.⁸⁶⁰ Now, this act has recently been repealed and replaced with the *Family Law Act*.⁸⁶¹ The *Family Law Act* takes a different approach to division of family assets on the breakdown of a relationship. It is too soon to say how mental capacity will figure into its approach. But, even though the *Family Relations Act's* approach to division of family assets has been overtaken, it is worthwhile to set it out briefly here, as background information that may help to illuminate some of the cases applying the test of capacity to separate.

Under this *Family Relations Act*, "each spouse [was] entitled to an interest in each family asset" when a triggering event occurred.⁸⁶² The act contained four triggering events.⁸⁶³ One of these triggering events was "a declaratory judgment under sec-

856. See *ibid.*, s. 8 (3) (b) (i).

857. See *Beadle (Guardian ad litem of) v. Beadle* (1984), 7 DLR (4th) 762, 56 BCLR 386 (CA) [*Beadle* cited to BCLR]; *M. K. O. (Litigation Guardian of) v. M. E. C.*, 2005 BCSC 1051, 47 BCLR (4th) 333 [*M. K. O.*].

858. See, above, section VIII.B.1 at 125 (further discussion of committees under the *Patients Property Act*).

859. See *Beadle*, *supra* note 857 at 390, Macfarlane JA; *M. K. O.*, *supra* note 857 at para. 36, Ehrcke J. But see *Adult Guardianship Act*, *supra* note 5, s. 17 (10) (b) (property guardian—the act's equivalent of a committee—not authorized to commence divorce proceedings on behalf of an incapable spouse, unless the court orders otherwise—not in force).

860. RSBC 1996, c. 128 (repealed).

861. SBC 2011, c. 25 (in force 18 March 2013).

862. *Ibid.*, s. 56 (1) (repealed).

863. See *supra* note 860, s. 56 (1) (repealed). The *Family Law Act*, in contrast, relies on one triggering event: the separation of spouses. See *supra* note 861, s. 84.

tion 57” of the act.⁸⁶⁴ The supreme court was authorized grant such a declaratory judgment if it could have been shown “that the spouses have no reasonable prospect of reconciliation with each other.”⁸⁶⁵ These declaratory judgments have not been carried forward in the *Family Law Act*.

Courts did consider the mental capacity of a spouse in deciding whether to grant a declaratory judgment. The test of capacity that was applied in these cases was the test of capacity to separate.

Declaratory judgments under the *Family Relations Act* were often obtained early in the course of a divorce proceeding, well in advance of a final order of divorce.

(d) Legislative Authority to Enact Family-Law Legislation

Under the *Constitution Act, 1867*,⁸⁶⁶ the parliament of Canada has the sole authority to enact legislation concerning marriage and divorce.⁸⁶⁷ But this power does not occupy the entire field of family-law legislation. Provincial legislatures may also enact legislation in this area. For example, the provision from British Columbia’s *Family Relations Act* discussed in the previous section deals with the financial consequences of a breakdown of a marriage and was a valid exercise of the province’s authority to legislate on property and civil rights in the province.⁸⁶⁸

Neither the federal parliament nor any provincial legislature has enacted legislation dealing directly with the test of capacity to separate. Both levels of government would likely have the authority to enact such legislation. The crucial question would be the intent of the legislation. If it were intended to affect a person’s capacity to obtain a divorce, then it would have to be enacted by the parliament of Canada. But if the legislation dealt with the financial consequences of marital breakdown, then it would be within the powers of a provincial legislature.

864. *Supra* note 860, s. 56 (1) (b) (repealed). The other triggering events were: (1) a separation agreement; (2) an order for dissolution of marriage or judicial separation; and (3) an order declaring the marriage null and void.

865. *Ibid.*, s. 57 (repealed).

866. *Supra* note 820.

867. *Ibid.*, s. 91 (26).

868. *Ibid.*, s. 92 (13).

3. TEST OF CAPACITY TO SEPARATE

(a) Introduction

The test of capacity to separate was, until recently, a relatively obscure and neglected area of the law. It does not feature a long history of case law that considers, in a principled way, what the elements of the test should be.⁸⁶⁹ But there are several recent decisions, from British Columbia⁸⁷⁰ and elsewhere,⁸⁷¹ that provide some guidance on the elements of the test of capacity to separate.

(b) Elements of the Test of Capacity

The most recent decision on capacity to separate by the British Columbia Court of Appeal⁸⁷² turned to a leading academic commentator⁸⁷³ on the law in formulating a test of capacity to separate. The court adopted the commentator's language and concluded that the test of capacity to separate "involves an ability to appreciate the nature and consequences of abandoning the marital relationship."⁸⁷⁴

869. Compare *Banks v. Goodfellow*, *supra* note 24 (capacity to make a will); *Kelly*, *supra* note 400 (capacity to enter into a contract).

870. See *Wolfman-Stotland*, *supra* note 62 (W was 92 years old and suffering from dementia—H was 93 years old—married 57 years—W seeking declaratory judgment under *Family Relations Act*—concerned that family property would, after her death, fall into hands of nephew—only complaint about H was that he "fell asleep playing bingo"—medical expert concluding that W had capacity to instruct counsel on financial aspects of divorce, but did not have capacity to separate—supreme court adopting expert's opinion—court of appeal reversing); *A. B. v. C. D.*, 2008 BCSC 1155, 60 RFL (6th) 132 [A. B. (SC)], *aff'd*, 2009 BCCA 200, 94 BCLR (4th) 38 [A. B. (CA)], *leave to appeal to SCC refused*, [2009] SCCA No. 287 (QL) (parties were married for 43 years—H was 68 years old, W was 66 years old—H alleging that W was suffering from paranoid delusions that were the direct cause of her desire to separate—court finding W able to form intention to separate—decision upheld on appeal); *M. K. O.*, *supra* note 857 (H was 85 years old and suffering from Alzheimer's disease—W was 83 years old—second marriage for both H and W—H's illness ultimately led to him being placed in a care facility—H's son was appointed H's committee—son withdrew H from care facility and commenced divorce proceedings on H's behalf—court finding H lacked capacity to form intention to separate).

871. See *Calvert*, *supra* note 104 (W suffering from Alzheimer's disease—commencing divorce proceeding through litigation guardian—court finding W capable of forming intention to separate).

872. See *Wolfman-Stotland*, *supra* note 62.

873. See Robertson, *supra* note 438.

874. *Wolfman-Stotland*, *supra* note 62 at para. 24 (quoting Robertson, *supra* note 438 at 272). See also *A. B. (SC)*, *supra* note 870 at para. 23, Kelleher J.

This formulation of the test of capacity is similar to the baseline common-law test of capacity⁸⁷⁵ that tends to find its way into the elements of all common-law tests of capacity.⁸⁷⁶ But, unlike those other tests of capacity, the test of capacity to separate does not appear to incorporate any elements in addition to the baseline test.

(c) Rationales for the Test of Capacity

The primary reason to have a test of capacity to separate is to protect the person with diminished capacity.⁸⁷⁷ Separation and divorce can have serious financial consequences for a person. They can also have a negative effect on a person's mental health.⁸⁷⁸ The test of capacity to separate is intended to guard against the use of legislation and court procedures in a way that may ultimately prove harmful to that person.

Another important theme running through discussions of the test of capacity to separate is that the test should be conceived of in a way that enhances the autonomy of people with diminished capacity. As one court recently put it, "to the extent that the law is able to do so, I would endorse an approach that respects the personal autonomy of the individual in making decisions about his or her life."⁸⁷⁹ This idea tends to crop up less in relation to the elements of the test of capacity to separate and more in how the test should be ranked in comparison to other tests of capacity.⁸⁸⁰

Subsidiary rationales for the test of capacity to separate include preserving the "dignity and integrity of legal processes"⁸⁸¹ and enhancing the therapeutic aspect of the law.⁸⁸²

875. See *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, *supra* note 50 at 19–20.

876. See, e.g., *Banks v. Goodfellow*, *supra* note 24.

877. See Mossman & Shoemaker, *supra* note 32 at 179–80.

878. See *ibid.* at 180–82.

879. *A. B. (CA)*, *supra* note 870 at para. 30, Smith JA (for the court). See also *Calvert*, *supra* note 104 at 293; Mossman & Shoemaker, *supra* note 32 at 184.

880. See, below, section XII.B.3 (e) at 204.

881. Mossman & Shoemaker, *supra* note 32 at 182.

882. See *ibid.* at 183–84.

(d) *Delusions*

A recent British Columbia case has considered the application of the fixed-and-specific-delusion doctrine to capacity to separate. In *A. B.* the wife sought an order for divorce, division of family assets, and other corollary relief. The husband theorized that the wife was “suffering from a condition called ‘delusional disorder.’”⁸⁸³ He sought an order from the court directing the wife to submit to a medical examination.⁸⁸⁴

The chambers judge refused to grant the order sought. Although the husband had met the first condition in the rule of showing that the wife’s mental state was an issue in the proceeding, the order remained a discretionary one and the judge declined to exercise his discretion in favour of the husband.⁸⁸⁵ The judge noted that the husband had conceded that the wife had “general” capacity, including the capacity to instruct legal counsel.⁸⁸⁶ Since, in the judge’s view, capacity to separate was set at a lower threshold,⁸⁸⁷ the wife could be considered to have capacity to separate too.⁸⁸⁸

On appeal, the court affirmed the chambers judge’s decision. But the court also made some comments on how the delusions that the husband alleged that the wife was suffering affected her capacity to separate. It declined⁸⁸⁹ to follow two English decisions⁸⁹⁰ that had held that fixed, specific delusions may form a basis for deciding that a spouse lacks the capacity to separate. Instead, the court favoured an integrated test of capacity. Delusions are only relevant in this integrated test to the extent that they “interfere with the ability to manage [the person’s own affairs] and instruct

883. *A. B.* (SC), *supra* note 870 at para. 16.

884. *See* British Columbia, *Supreme Court Civil Rules*, r. 7-6 (1) (“If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person. . .”).

885. *See A. B.* (SC), *supra* note 870 at paras. 28–29.

886. *Ibid.* at para. 22.

887. *See ibid.* at para. 25.

888. *See ibid.* at para. 32.

889. *See A. B.* (CA), *supra* note 870 at para. 30.

890. *Perry v. Perry* (1963), [1964] 1 WLR 91, [1963] 3 All ER 766 (PDA); *Brannan v. Brannan* (1972), [1973] 1 Fam. 120, [1973] 1 All ER 38 (DC).

counsel.”⁸⁹¹ In the court’s view, treating delusions in this way would enhance the autonomy of the person with diminished capacity.⁸⁹²

This approach to delusions is significantly out of step with the approach taken in cases involving other tests of capacity. For instance, the case law is clear that a will may be set aside if it is the direct result of a fixed and specific delusion, even if the testator has what may be called general testamentary capacity.⁸⁹³ A similar approach has been adopted for contracts,⁸⁹⁴ gifts,⁸⁹⁵ and marriages.⁸⁹⁶ In each of these cases, delusions are treated as a separate basis for assessing mental capacity.

The test of capacity to separate was not directly at issue in *A. B. (CA)*. The court’s comments on it can be seen as *obiter dicta*. So it isn’t completely clear whether the court intended to change the orthodox approach to delusions for the discrete area of capacity to separate. Only time will tell whether later courts will adopt this approach to delusions and the capacity to separate.

(e) Comparison to Other Common-Law Tests of Capacity

The test of capacity to separate is often linked to the test of capacity to marry.⁸⁹⁷ The two tests are said to share a similarly low position on any capacity hierarchy.⁸⁹⁸

The low threshold of capacity to separate is occasionally seen as being the most significant feature of this test of capacity, more important than any of the actual elements of the test. So a person who has the capacity to perform other tasks, such as making financial decisions or instructing counsel, can be taken to have the capacity to separate.⁸⁹⁹

891. See *A. B. (CA)*, *supra* note 870 at para. 36 (“In summary, disordered or delusional thinking which may contribute to an individual’s intention to live separate and apart, does not diminish that individual’s capacity to form that intention, provided it does not reach the level of incapacity that interferes with the ability to manage his or her own affairs and instruct counsel.”).

892. See *ibid.* at para. 30.

893. See *Banks v. Goodfellow*, *supra* note 24 at 565.

894. See *Robertson*, *supra* note 438 at 197.

895. See *Ringrose*, *supra* note 421 at para. 99.

896. See *Hunter*, *supra* note 745 at 95.

897. See, e.g., *Wolfman-Stotland*, *supra* note 62 at para. 27; *Robertson*, *supra* note 438 at 272.

898. See *Calvert*, *supra* note 104 at 294; *Wolfman-Stotland*, *supra* note 62 at para. 27.

899. See *Wolfman-Stotland*, *ibid.* at para. 31.

C. Issue for Reform

The only real issue for reform is whether legislation should be enacted to modify the test of capacity to separate. This issue has not received much attention from commentators and law reformers, but there is one recent academic proposal for reform.

1. SHOULD ANY ASPECTS OF THE COMMON-LAW TEST OF CAPACITY TO FORM THE INTENTION TO LIVE SEPARATE AND APART FROM A SPOUSE BE MODIFIED BY LEGISLATION?

In a recent study of how American courts have handled capacity to separate, two legal academics recommended the enactment of a model statute to address a number of issues arising from the cases.⁹⁰⁰ The heart of this model statute is a re-worked test of capacity to separate, which reads as follows:

A party is competent if that party:

- can express a clear, consistent preference as to whether to divorce;
- can assimilate and understand relevant facts concerning the divorce proceedings and consequences of the proceedings;
- can appreciate the party's situation with regard to those facts;
- can participate in the divorce proceedings using rational thought processes;
- can provide and does articulate reality-based reasons for seeking or pursuing a divorce and for wishing to participate in divorce proceedings.⁹⁰¹

Although this proposed provision refers only to “divorce” it could easily be adapted to refer to “separate.”

This test of capacity was offered as a means to remedy the shortcomings of American case law. There are relatively few American decisions on capacity to separate,⁹⁰² and the cases that do exist offer little in the way of principled reasoning about the elements of the test of capacity to separate.⁹⁰³ Further, to the extent that a clear test of capacity can be discerned, it falls well short of the protection needed by people with diminished capacity.

900. See Mossman & Shoemaker, *supra* note 32.

901. *Ibid.* at 187 [footnote omitted]. Earlier, the model statute defined “competent” to mean “competent to initiate, maintain, and participate in divorce proceedings” (*ibid.* at 186).

902. See *ibid.* at 155–63 (reviewing the seven reported American cases on capacity to separate that the authors were able to locate).

903. See *ibid.* at 164.

Enacting a test of capacity like the one proposed would have several advantages. It would enhance the law's protection of vulnerable people with diminished capacity. Separation and divorce can have severe financial, emotional, and social consequences. Setting a higher threshold for the test of capacity—and a threshold that deals more effectively with delusions—reduces the possibility of a vulnerable person using divorce proceedings to harm himself or herself. The proposed test of capacity would also clarify and lend certainty to an obscure area of the law. Finally, it would strengthen the integrity of court proceedings and lend a hand in ensuring that vexatious proceedings are not sustained in court.

But there may also be some downsides to this proposed legislation. First, it could undermine the autonomy of some people with diminished capacity. The longstanding trend in family-law legislation is toward liberalization of access to separation and divorce. A heightened test of capacity to separate would roll back that trend somewhat for people with diminished capacity. The proposed legislation would also sever the link between capacity to marry and capacity to separate. Finally, in order to affect all aspects of capacity to separate, this test of capacity would have to be enacted by both the federal parliament and the British Columbia legislature. This type of coordination can be difficult to achieve in practice.

The committee did not favour reforming the test of capacity to separate in this manner. In the committee's view, requiring a heightened standard of mental capacity to separate would impinge excessively on personal autonomy. In addition, the committee favoured maintaining the link between the tests of capacity to marry and to separate. Finally, the committee had concerns about the practical difficulties of getting the federal-provincial co-operation needed to settle all aspects of this issue.

A clear majority of consultation respondents supported the committee's proposal on this issue for reform.

The committee recommends:

30. Legislation should not be enacted to modify the common-law test of capacity to form the intention to live separate and apart from a spouse.

CHAPTER XIII. CAPACITY TO ENTER INTO AN UNMARRIED SPOUSAL RELATIONSHIP

A. Introduction

This chapter considers an area that is rarely discussed in terms of mental capacity. This is an unmarried spousal relationship—that is, the creation of a spousal relationship by a couple that lives together in a marriage-like relationship.

B. Background

1. OVERVIEW: MENTAL CAPACITY AND UNMARRIED SPOUSAL RELATIONSHIPS

No courts or commentators in British Columbia or elsewhere in Canada have considered whether a test of mental capacity should apply to individuals who enter into unmarried spousal relationships. But there is a sizable amount of court decisions on the definition of an unmarried spousal relationship and on how to determine whether individuals are in an unmarried spousal relationship. Examining these cases may shed some light on the role that a test of capacity could play in this area of the law.

This background section begins by noting the range of statutes that apply to unmarried spousal relationships. Then it considers the definition of an unmarried spousal relationship and examines how the courts have applied that definition to individual cases.

2. RANGE OF LEGISLATION APPLYING TO UNMARRIED SPOUSAL RELATIONSHIPS

More and more Canadian couples are living together as unmarried spouses.⁹⁰⁴ This is a long-range trend, which has developed over several generations. Over that time, provincial legislatures have responded by extending certain rights and obligations to unmarried spouses.

The vehicle for extending rights and obligations has been an expanded legislative definition of the word *spouse*. In British Columbia, 41 statutes have such an ex-

904. See Statistics Canada, *Portrait of Families and Living Arrangements in Canada: Families, Households and Marital Status, 2011 Census of Population*, Statistics Canada catalogue no. 98-312-X2011001 (Ottawa: Minister of Industry, 2012) at 3 (finding that “[b]etween 2006 and 2011, the number of common-law couples rose 13.9%, more than four times the 3.1% increase for married couples” and that, in 2011, “common-law couples accounted for more than 16.7% of all census families”).

panded definition. A sample of the rights and obligations extended by this legislation includes the following:

- a right to support on breakdown of the relationship;⁹⁰⁵
- a right to division of family property on the breakdown of the relationship;⁹⁰⁶
- a right to a preferred share of a deceased spouse's estate on intestacy;⁹⁰⁷
- a right to claim compensation for the death of a spouse in a fatal accident;⁹⁰⁸
- a right to seek variation of a spouse's will.⁹⁰⁹

3. DEFINITION OF "SPOUSE"

Although there are a few minor variations used in some statutes, the definition of spouse is consistent across most of this legislation. This consistency was achieved by the enactment of two amending acts, one in 1999⁹¹⁰ and the other in 2000.⁹¹¹

In addition to a married couple, this definition of spouse includes "a person who . . . is living with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender." This language incorporates unmarried spouses within the definition of spouse and effectively places unmarried spouses on the same footing as married spouses for the purposes of determining rights and obligations under the legislation that adopts such a definition of spouse.

This legislation provides little guidance on what relationships are marriage-like relationships. This question has been largely left to the courts.

905. See *Family Law Act*, *supra* note 861, ss. 1 "spouse," 3, 160.

906. See *ibid.*, ss. 1 "spouse," 3, 81.

907. See *Estate Administration Act*, *supra* note 835, ss. 1 "common law spouse," 85.

908. See *Family Compensation Act*, RSBC 1996, c. 126, ss. 1 "spouse," 3 (1).

909. See *Wills Variation Act*, *supra* note 8, ss. 1 "spouse," 2. See also *Wills, Estate and Succession Act*, *supra* note 10, ss. 60–72 (in force 31 March 2014).

910. See *Definition of Spouse Amendment Act, 1999*, SBC 1999, c. 29.

911. See *Definition of Spouse Amendment Act, 2000*, SBC 2000, c. 24. Both acts came into force on the same dates: 28 July 2000 (in part) and 1 November 2000. See BC Reg. 280/2000.

4. WHAT IS A MARRIAGE-LIKE RELATIONSHIP?

The “starting point”⁹¹² for analyzing whether a relationship is an unmarried spousal relationship is the “leading authority”⁹¹³ *Gostlin v. Kergin*.⁹¹⁴ In *Gostlin* the court established a “test” with “two aspects.”⁹¹⁵

The first aspect of the test is concerned with “the couple’s subjective intention.”⁹¹⁶ In applying this aspect, the court should be “guided by the scheme and intention of the Act itself.”⁹¹⁷ That is, the court should look to the particular legislative rights and obligations that are at issue in a given dispute. So in a case like *Gostlin* that was concerned with support rights and obligations under the old *Family Relations Act*, the court should consider whether the parties to the relationship would view themselves as being bound to provide support if their partner were suddenly to become disabled.⁹¹⁸ The purpose of this aspect of the test is to “le[ave] room for choice.”⁹¹⁹

But the presence of an express intention resting on a clear-cut choice about the nature of the relationship only crops up in some cases. In other cases, the spouses will simply drift into the relationship.⁹²⁰ And in still other cases, “conduct speaks louder

912. *Takacs v. Gallo* (1998), 157 DLR (4th) 623, 48 BCLR (3d) 265 at para. 53, Huddart JA (dissenting) [*Takacs*], leave to appeal to SCC refused, [1998] SCCA No. 238 (QL).

913. *J. L. S. v. D. W.*, 2010 BCSC 1537 at para. 25, [2010] BCJ No. 2133 (QL), Dillon J. [*J. L. S.*].

914. (1986), 3 BCLR (2d) 264, 1 RFL (3d) 448 (CA) [*Gostlin* cited to BCLR].

915. *Takacs*, *supra* note 912 at para. 37.

916. *Ibid.* See also *Gostlin*, *supra* note 914 at 267–68, Lambert JA (for the court).

917. *Gostlin*, *ibid.* at 267.

918. See *ibid.* at 267–68 (“So I would ask whether the unmarried couple’s relationship was like the relationship of a married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of [the *Family Relations Act*]. If each partner had been asked at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been ‘Yes,’ then they are living together as husband and wife. If the answer would have been ‘No,’ then they may be living together, but not as husband and wife.”).

919. *Takacs*, *supra* note 912 at para. 40. *Gostlin*, *supra* note 914 at 267.

920. See *Yakiwchuk v. Oaks*, 2003 SKQB 124 at para. 10, 1 CELR (3d) 310, Ryan-Froslic J. (“With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of ‘public’ declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to ‘be together.’ Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no

than words. The intention demonstrated by conduct may even be inconsistent with the articulated intention.”⁹²¹ For these cases, it is necessary that the court move on to the second aspect of the test, which examines whether “other, more objective indicators may show the way” to the accurate characterization of the relationship.⁹²²

The analysis under the second aspect of the test “is largely fact-driven and depends on the individual circumstances of each case.”⁹²³ But the courts have developed “numerous indicia”⁹²⁴ to assist in making determinations based on objective indicators. The most comprehensive list of indicia was set out in the Ontario case *Molodowich v. Penttinen*.⁹²⁵ *Molodowich* listed seven areas of examination, with multiple questions posed under each area.⁹²⁶ This approach to the second aspect of the test has been endorsed in subsequent British Columbia decisions.⁹²⁷

5. IMPLICATIONS FOR MENTAL CAPACITY

The case law’s approach to how the spousal relationship is defined has several important implications for mental capacity.

First, the test set out in the cases features an element devoted to intention. This element is significant because it provides some space on which a test of capacity may operate. As one court put it in another context, “mental capacity and intention are inextricably linked.”⁹²⁸ Intention is the key, often decisive, element of all of the other areas of the law studied in this report. The fact that it plays some role in entering into an unmarried spousal relationship links these relationships to those other areas

thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people ‘ease into’ situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.”).

921. *Takacs*, *supra* note 912 at para. 40.

922. *Gostlin*, *supra* note 914 at 268.

923. *Roach v. Dutra*, 2010 BCCA 264 at para. 16, 5 BCLR (5th) 95 [*Dutra*], Prowse JA (for the court).

924. *Ibid.* at para. 21

925. (1980), 17 RFL (2d) 376, 2 ACWS (2d) 486 (Ont. Dist. Ct.) [*Molodowich* cited to RFL].

926. *See ibid.* at 381–82 (calling for consideration of the following areas: (1) shelter; (2) sexual and personal behaviour; (3) services; (4) social; (5) societal; (6) support (economic); (7) children).

927. *See Dutra*, *supra* note 923 at para. 12; *J. L. S.*, *supra* note 913 at para. 26 (“Application of an objective test may involve consideration of factors related to shelter, sexual and personal behaviour, services, social, societal, economic support, and children, depending on the circumstances of the case, as listed and expanded in *Molodowich*. . .”).

928. *St. Onge Estate*, *supra* note 386 at para. 28.

of the law. It also suggests that unmarried spousal relationships could be analyzed in similar ways as the other areas studied in this project with respect to mental capacity.

Second, this intentional element is not always an essential part of what makes up an unmarried spousal relationship. In this way, these relationships stand in contrast to all the other topics taken up in this report. For example, to make a valid *inter vivos* gift, a person must have the intention to make a gift.⁹²⁹ If a person lacks the mental capacity to form this intention, then the gift can be considered invalid. The case law on unmarried spousal relationships suggests that it would not be possible to draw this conclusion in all cases in which a person lacks the mental capacity to enter into such a relationship. The spousal relationship could still be established on objective factors, which do not require delving into the spouses' intentions.

Third, "having regard to the evolution, history and purpose of the various enactments which recognize what are described today as 'marriage-like relationships,' and to the context in which this expression is used," courts in British Columbia have "conclude[d] that such relationships can exist even though one or both partners lacks the capacity to marry."⁹³⁰ This statement should not be over-interpreted, as it does not necessarily mean that a person may fail the test of capacity to marry and still be able to form a valid unmarried spousal relationship. The British Columbia courts have yet to tackle that issue. But there are cases in which a person's lack of legal capacity to marry has not proved to be a barrier to that person entering into a valid unmarried spousal relationship. The courts have held that the fact that a person cannot legally marry because that person is already in a marriage does not bar the person from entering into a valid unmarried spousal relationship.⁹³¹ In other, much rarer, cases "the impediment may stem from a relationship within the prohibited degrees of consanguinity or affinity,"⁹³² and may still not form a complete bar to the formation of a valid unmarried spousal relationship. Finally, although it is only of historical interest now, same-sex couples were able to form unmarried spousal relationships at a time when they were unable to marry.

929. See *Restatement (Third) of the Law of Property (Wills and Other Donative Transfers)* § 6.1, comm. b (2001) (donative intent described as "the essence of a gift").

930. *Austin v. Goerz*, 2007 BCCA 586 at para. 51, 74 BCLR (4th) 39, Frankel JA (for the court) [*Austin*].

931. See *ibid.*

932. Winnifred H. Holland & Barbro E. Stalbecker-Pountney, eds., *Cohabitation: The Law in Canada*, looseleaf (consulted on 25 June 2013), vol. 1 (Toronto: Carswell, 1990) at § 1.1.3. See also *Marriage (Prohibited Degrees) Act*, *supra* note 823.

6. ENDING AN UNMARRIED SPOUSAL RELATIONSHIP

Ending an unmarried spousal relationship can bring into existence a similar set of legal issues as those that may confront a court on determining whether an unmarried spousal relationship has come into being. The contrast with marriage holds true here. While marriages have definite public beginnings (the marriage ceremony) and endings (death or divorce), unmarried spousal relationships often have vague beginnings or endings, because they lack the kind of public ceremonies or proceedings that exist for marriages.⁹³³

The starting point for analyzing whether an unmarried spousal relationship has ended is to note that the relationship does not necessarily end if the spouses are physically separated.⁹³⁴ Instead, “the key issue is when the ‘marriage-like’ quality of the relationship terminated. . . .”⁹³⁵ And the major question to consider in examining this key issue is the parties’ intentions. As a leading case puts it, “subject to whatever provision may be made in a statute, a common law relationship ends ‘when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one.’ ”⁹³⁶ But, as was the case for determining whether a person had entered into an unmarried spousal relationship, this intention is not always clear and must be supplemented by an examination of “objective” factors.⁹³⁷ The “key factors” include “the absence of sexual relations,” a “clear statement” of a spouse’s intention to end the relationship, “physi-

933. See Holland & Stalbecker-Pountney, *supra* note 932 at § 1.1.2.

934. See *Eisener v. Baker*, 2007 BCSC 83 at para. 36, 65 BCLR (4th) 146, Russell J. [*Eisner*] (“[I]t is clear from the cases that the point at which the parties ceased living in the same residence is not necessarily determinative of the date their marriage-like relationship terminated. . . .”). See also *Thompson v. Floyd*, 2001 BCCA 78 at para. 36, 86 BCLR (3d) 56, McEachern CJ (Donald and Low JJA concurring) (unmarried spouse contracting lupus—leaving spousal home to live with her family in another province to receive care—court holding that “[i]n the absence of more compelling evidence of finality bringing this long relationship to an end,” unmarried spousal relation not ended due to separation for health reasons).

935. *Ibid.*

936. *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para. 42, [2004] 3 SCR 357, Binnie J. (for the court) (quoting *Re Sanderson and Russell* (1979), 24 OR (2d) 429 at 432, 99 DLR (3d) 713 (CA), Morden JA).

937. *J. J. G. v. K. M. A.*, 2009 BCSC 1056 at para. 34, 71 RFL (6th) 349, Dardi J. (“The focus of the inquiry is on the parties’ intention to live as ‘husband and wife’ or in a ‘marriage-like’ relationship as ‘divined’ from an objective overview of the facts.”).

cal separation,” and the spouses no longer describing themselves as a couple to the outside world.⁹³⁸

Although the case law does not discuss a test of capacity to end an unmarried spousal relationship, the reliance on the spouses’ intentions gives some space for such a test to operate. Based on how the cases have approached the general issue from first principles, it is possible to speculate that any test of capacity to end an unmarried spousal relationship would be analogous to any test of capacity to enter into such a relationship.

C. Issue for Reform

The only issue for reform to consider is whether legislation is needed to establish a test of capacity to enter into an unmarried spousal relationship and, if so, what that test of capacity should be.

1. SHOULD BRITISH COLUMBIA ENACT LEGISLATION SETTING OUT A TEST OF CAPACITY TO ENTER INTO AN UNMARRIED SPOUSAL RELATIONSHIP?

There is no guidance to be found on this issue for reform in the case law or the commentary. So it is necessary to turn to first principles in considering it.

The main rationale for tests of capacity in the areas of law studied over the course of this project is to provide protection for people with diminished mental capacity. This rationale would likely have to be established to make a persuasive case for a legislative test of capacity to enter into an unmarried spousal relationship. Although there are no published studies that show that unmarried spousal relationships are being used as a vehicle to defraud or abuse persons with diminished capacity, it is possible to see them potentially being used for these purposes. Like marriage, unmarried spousal relationships create a large number of financial rights and obligations that could be appropriated to the benefit of an abuser or a fraudster.

Another rationale for enacting a legislative test of capacity is that it would lend clarity and certainty to the law. Currently, there appears to be something of a vacuum on this point, as there is no judicial or academic commentary on what the test of capacity to enter into an unmarried spousal relationship should be. Enacting a legislative

938. *Eisener, supra* note 934 at para. 36 (“The key factors in determining when a couple have ceased living in a marriage-like relationship include the absence of sexual relations, a clear statement by one of the parties of his or her desire to terminate the relationship, physical separation of the parties into different rooms of the same house or different residences, or the couple no longer presenting themselves to the outside world as a couple.”).

test of capacity would fill that vacuum and provide guidance in an increasingly important area of the law.

There are counterarguments to each of these points. Since (in most cases) two years must elapse before an unmarried spousal relationship comes into being, these relationships make poor vehicles for fraud in comparison to marriage. Unmarried spousal relationships may simply not be used in the same way as predatory marriages. In addition, the fact that there have been no courts or commentators calling for a clear test of capacity may indicate that the absence of a test of capacity is not producing detrimental effects. Both points would tend to show that the time is not ripe for legislation.

If a legislative test of capacity were to be enacted, an obvious starting place to look for inspiration on the test's elements would be the test of capacity to marry. Harmonizing the two tests of capacity would provide some certainty to the law by aligning this area with the large amount of case law and commentary on the test of capacity to marry. But the test of capacity to marry is not all that certain itself, and this uncertainty could undercut any benefits from harmonizing it with the test of capacity to enter into an unmarried spousal relationship.

Another approach would be to create a legislative test of capacity to enter into an unmarried spousal relationship that has a lower threshold than that of the test of capacity to marry. This approach would turn on the apparent lower potential for fraud and abuse in unmarried spousal relationships as compared to marriages. It would also recognize the trend toward lower barriers to entry into such relationships with respect to other legal-capacity issues. But this approach would also provide less protection for persons with diminished capacity and it would lead to further fragmentation among tests of capacity.

A third approach would be to set a higher threshold than capacity to marry for the test of capacity to enter into an unmarried spousal relationship. One way to do this would be to incorporate the refinements proposed by commentators on the test of capacity to marry into the test of capacity to enter into an unmarried spousal relationship. These refinements would ensure that the test of capacity to enter into an unmarried spousal relationship probes the capacity to understand financial consequences of the relationship and the effect of the relationship on close family members. In addition, the complex constitutional issues that arise in connection with such proposals to reform the test of capacity to marry would not arise in this case. British Columbia would clearly be able to enact the needed legislation. But there would be some drawbacks to this approach. First and foremost, it is not clear that

this heightened level of protection is needed. Second, adopting this approach would lead to further fragmentation among tests of capacity.

The committee was of the view that this area of the law presents emerging issues for mental capacity. There will likely be more and more cases arising in this area. The typical fact pattern will likely involve a person engaged as a caregiver who subsequently claims that the relationship was actually an unmarried spousal relationship. But the committee was not convinced that the time is ripe to enact a legislative test of capacity. Doing so would put the legislature out in front of the courts. In the committee's view, it would be better to wait to see what principles emerge from cases in this area.

The committee recommends:

31. British Columbia should not enact legislation setting out a test of capacity to enter into an unmarried spousal relationship.

CHAPTER XIV. CONCLUSION

Issues concerning mental capacity and the law are likely to increase in prominence in the years to come, as the population ages and as medical science continues to increase its sophistication in understanding the mind. The committee calls on the legislature and the courts to consider the reforms recommended in this report, and to move on implementing them.

APPENDIX A

List of Recommendations

1. *The fixed-and-specific-delusion element of the test of capacity to make a will should not be abrogated. (37–40)*
2. *The general-unsoundness-of-mind element of the test of capacity to make a will should not be modified by legislation. (40–42)*
3. *The test of capacity to make a will should not be restated in legislation. (42–43)*
4. *British Columbia should enact legislation to provide that: (a) until the contrary is demonstrated, every will-maker is presumed to be capable of making, changing, or revoking a will; (b) the presumption in paragraph (a) does not apply to a record that is the subject of an order under section 58 of the Wills, Estates and Succession Act; (c) a will-maker's way of communicating with others is not grounds for deciding that he or she is incapable of making, changing, or revoking a will. (43–46)*
5. *British Columbia should not enact legislation intended to give guidance on how to assess capacity to make a will. (46–47)*
6. *British Columbia should enact legislation authorizing the making, modifying, or revoking of a will for a person who lacks testamentary capacity. (63–66)*
7. *British Columbia's statutory-will legislation should only apply to persons who lack testamentary capacity. (66–68)*
8. *British Columbia's statutory-will legislation should not require that the person who lacks testamentary capacity may only obtain a statutory will if that person is also subject to an order declaring that the person is incapable of managing himself or herself or his or her affairs. (66–68)*
9. *British Columbia's statutory-will legislation should vest the power to make, modify, or revoke a will for a person who lacks testamentary capacity in the supreme court. (68–69)*

10. British Columbia's statutory-will legislation should allow the following persons to apply for a will to be made, modified, or revoked on behalf of a person who lacks testamentary capacity: (a) the person who lacks testamentary capacity; (b) the person's attorney acting under an enduring power of attorney; (c) the person's representative acting under a representation agreement; (d) the person's committee; (e) anyone who, under any known will of the person or under the person's intestacy, may become entitled to any of the person's property or an interest in it; (f) anyone whom the person might be expected to benefit if the person had capacity, including anyone with a claim under wills-variation legislation; (g) the public guardian and trustee. **(69–71)**

11. British Columbia's statutory-will legislation should provide for notice to and a right to participate for: (a) any beneficiary under an existing will of the person who is the subject of the application or under the proposed will of the person who is the subject of the application who is likely to be materially or adversely affected by the application; (b) if the person has no will, any prospective intestate successor of the person who is the subject of the application in existence at the time of the application who is likely to be materially or adversely affected by the application; (c) anyone whom the person might be expected to benefit if the person had capacity, including anyone with a claim under wills-variation legislation; (d) if the person has a life-insurance policy or benefit plan, any beneficiary under the policy or plan; (e) the person who is the subject of the application; (f) the public guardian and trustee; (g) any other person that the court directs. **(71–72)**

12. British Columbia's statutory-will legislation should provide that a statutory will be executed by the applicant, on behalf of the person who lacks testamentary capacity, at the direction of the court. **(73)**

13. British Columbia's statutory-will legislation should adopt a subjective standard of decision-making, which emphasizes the importance of respecting any testamentary wishes expressed by the person who lacks testamentary capacity. **(73–74)**

14. A statutory will should be subject to variation under British Columbia's wills-variation legislation. **(75)**

15. British Columbia should not enact legislation creating a procedure that would allow a testator to obtain certification of testamentary capacity before the death of the testator. **(89–91)**

16. British Columbia should enact legislation that provides that, in order for an individual to make a valid inter vivos gift, (1) the individual must have the capacity to understand (a) the nature of making the gift, (b) the effect of making the gift on the indi-

vidual's interests, (c) the extent of the individual's property that is affected by making the gift, and (d) the claims of potential beneficiaries under the individual's will or intestacy, or by other means, to which the individual ought to give effect; and (2) the gift must not be the product of any insane delusion affecting the individual. **(108-10)**

17. British Columbia should not enact legislation to create a distinct test of capacity for gifts that result in the creation of an inter vivos trust. **(110-11)**

18. British Columbia should not enact legislation that changes the common-law test of capacity to make, change, or revoke a beneficiary designation. **(121-23)**

19. British Columbia should not enact legislation that restates the common-law test of capacity to make, change, or revoke a beneficiary designation. **(123)**

20. British Columbia should enact legislation that provides that the test of capacity to nominate a committee under section 9 of the Patients Property Act or a guardian under section 8 of the Adult Guardianship Act is the same as the test of capacity set out in section 10 of the Representation Agreement Act. **(130-31)**

21. British Columbia should not enact legislation that abrogates the common-law test of capacity to enter into a contract. **(150-52)**

22. British Columbia should not enact legislation modifying any elements of the common-law test of capacity to enter into a contract. **(152-55)**

23. British Columbia should not enact legislation that provides that a consideration of the fairness of a contract involving a person with diminished capacity forms part of the common-law test of capacity to enter into a contract. **(155-56)**

24. British Columbia should enact legislation that replaces section 7 of the Sale of Goods Act with a unified statutory rule on the supply of necessary goods or services to a person who is not mentally capable to enter into a contract. **(156-57)**

25. British Columbia should not enact legislation in relation to the common-law test of capacity to retain legal counsel. **(171-71)**

26. British Columbia should amend the Representation Agreement Act to provide that a person with the mental capacity to make a representation agreement with standard provisions under section 7 of the act also has the mental capacity to retain and instruct legal counsel for the purpose of advising on and drafting the representation agreement. **(171-72)**

27. *British Columbia should amend the Adult Guardianship Act, the Health Care (Consent) and Care Facility (Admission) Act, the Mental Health Act, and the Patients Property Act to provide that if the capacity of a person is in issue in a proceeding under the act the person is deemed to have capacity to retain and instruct counsel for the purpose of representation in the proceeding. (172-73)*

28. *Legislation should not be enacted to modify any of the elements of the common-law test of capacity to marry. (191-95)*

29. *Legislation restating the common-law test of capacity to marry should not be enacted. (195-96)*

30. *Legislation should not be enacted to modify the common-law test of capacity to form the intention to live separate and apart from a spouse. (205-06)*

31. *British Columbia should not enact legislation setting out a test of capacity to enter into an unmarried spousal relationship. (213-15)*

APPENDIX B

Draft Legislation

Personal and Estate Planning Statutes Amendment (Mental Capacity) Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Adult Guardianship Act

1 *The Adult Guardianship Act, R.S.B.C. 1996, c. 6, is amended by adding the following sections:*

Legal counsel for adult whose capacity is in issue

- 3.1** If the capacity of an adult who does not have legal representation is in issue in a proceeding under this Act the adult is deemed to have capacity to retain and instruct counsel.

Recommendation no. (27)

Comment: This section is intended to address a dilemma that can arise in proceedings under the *Adult Guardianship Act*. When this act is fully brought into force, it will establish a court-based procedure for the appointment of a guardian for adults who are mentally incapable of making decisions about their finances or personal care (or both). The focus of such proceedings is on the adult's mental capacity; this is the very issue that the court is being asked to determine. Although adults benefit from a presumption of capacity in proceedings under the act, in practice many adults involved in proceedings in which their capacity is in issue find it difficult to obtain representation from legal counsel. Legal counsel are often inhibited from taking on such clients out of sense of caution in applying the rules governing their profession. This can leave adults with diminished capacity at a significant disadvantage in the proceedings. The proposed section is intended to allay legal counsel's concerns in acting for adults with diminished capacity, which will enhance proceedings under the *Adult Guardianship Act*.

Parallel sections are recommended for the *Health Care (Consent) and Care Facility (Admission) Act*, the *Mental Health Act* and the *Patients Property Act*. See, below, sections 3, 5–6.

This section is based on section 3 (1) (b) of the *Substitute Decisions Act*, which has been in force in Ontario since 1995.

Payment for necessary goods and services

- 3.2** (1) In this section, “**necessary**” means suitable to a person’s condition in life and to his or her actual requirements at the time when the goods or services are supplied.
- (2) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he or she must pay a reasonable price for them.

Recommendation no. (24)

Comment: This section is intended to unify the law on contracts for necessities with persons with diminished capacity. Currently, a rule applying to contracts for necessary goods is found in section 7 of the *Sale of Goods Act*, while a broader rule, applying to contracts for necessary goods and services, continues to exist at common law.

An amendment to section 7 of the *Sale of Goods Act*, removing the potential redundancy of two statutory provisions applying to contracts for necessary goods with people with diminished capacity is set out, below, at section 9.

The section is based on section 7 of the United Kingdom’s *Mental Capacity Act 2005*.

2 Section 8 is amended by adding the following subsection:

- (4.1) An adult is mentally capable of nominating a committee or guardian unless the adult is incapable of understanding the nature and consequences of the proposed nomination.

Recommendation no. (20)

Comment: Section 8 of the *Adult Guardianship Act* will, when it is brought into force, carry forward the concept of nominating a committee that is currently found in section 9 of the *Patients Property Act*. (Under the *Adult Guardianship Act* a guardian will be the equivalent of a committee.) This amendment to section 8 will change the common-law test of capacity to nominate a committee (or guardian), which is understood to be similar to the test of capacity to make a will. This proposed amendment replaces the common-law test of capacity with a test of capacity that is the equivalent of the statutory test of capacity to make a representation agreement with non-standard provisions. That statutory test of capacity is found in section 10 of the *Representation Agreement Act*, which provides that “[a]n adult may authorize a representative to do any or all of the things re-

ferred to in section 9 unless the adult is incapable of understanding the nature and consequences of the proposed agreement.” The operative language of this test is found in the reference to being capable of “understanding the nature and consequences of the proposed agreement,” which sets a much lower threshold than the common-law test of capacity to make a will. In the committee’s view, the proposed amendment will improve the law by encouraging people to nominate committees or guardians (which is a useful personal planning device), by making the applicable test of capacity clearer and more certain, and by harmonizing this test of capacity with the test of capacity for another personal-planning document (a representation agreement).

An equivalent amendment for section 9 of the *Patients Property Act* is found in section 7, below.

Health Care (Consent) and Care Facility (Admission) Act

3 *The Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181, is amended by adding the following section:*

Legal counsel for person whose capacity is in issue

33.5 If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act the person is deemed to have capacity to retain and instruct counsel.

Recommendation no. (27)

Comment: This section will make it clear that a person whose capacity is at issue in proceedings under the *Health Care (Consent) and Care Facility (Admission) Act* will not be barred from obtaining legal representation due to the person’s diminished capacity. Section 33.4 of the act, which has been in force since 1 September 2011, authorizes an application to the supreme court for directions and orders. A person’s capacity may be at issue in an application under section 33.4. This section parallels the provisions recommended for the *Adult Guardianship Act* (see, above, section 1), the *Mental Health Act* (see, below, section 5), and the *Patients Property Act* (see, below, section 6).

Law and Equity Act

4 *The Law and Equity Act, R.S.B.C. 1996, c. 253, is amended by adding the following section:*

Test of mental capacity to make an *inter vivos* gift

47.1 (1) In this section, “**gift**” does not include a testamentary gift.

(2) To make a valid gift,

(a) a person must have the mental capacity to understand

- (i) the nature of making the gift,
 - (ii) the effect of making the gift on the individual's interests,
 - (iii) the extent of the person's property that is affected by making the gift, and
 - (iv) the legal and moral claims on the person's property of a potential beneficiary under the person's will or upon the person's intestacy; and
- (b) the gift must not be the product of any delusion affecting the person.

Recommendation no. (16)

Comment: This section is intended to clarify the test of capacity to make an *inter vivos* gift. Some cases on this issue have applied a test of capacity that is similar to the contractual test, while others have endorsed a test that is similar to the testamentary test. This section will make it clear that the test of capacity to make an *inter vivos* gift should be similar in nature to the test of capacity to make a will.

Subsection (1) sets out the scope of this section by defining the key term *gift* to exclude testamentary gifts. The section is not intended to affect the law relating to capacity to make a will.

Subsection (2) contains the restated test of capacity to make an *inter vivos* gift.

Mental Health Act

5 *The Mental Health Act, R.S.B.C. 1996, c. 288, is amended by adding the following section:*

Legal counsel for person whose capacity is in issue

18.1 If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act the person is deemed to have capacity to retain and instruct counsel.

Recommendation no. (27)

Comment: This section will make it clear that a person whose capacity is at issue in proceedings under the *Mental Health Act* will not be barred from obtaining legal representation due to the person's diminished capacity. This section parallels the provisions recommended for the *Adult Guardianship Act* (see, above, section 1), the *Health Care*

(Consent) and Care Facility (Admission) Act (see, above, section 3), and the *Patients Property Act* (see, below, section 6).

Patients Property Act

6 *The Patients Property Act, R.S.B.C. 1996, c. 349, is amended by adding the following section:*

Legal counsel for person whose capacity is in issue

- 2.1** If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act the person is deemed to have capacity to retain and instruct counsel.

Recommendation no. (27)

Comment: This section will make it clear that a person whose capacity is at issue in proceedings under the *Patients Property Act* will not be barred from obtaining legal representation due to the person's diminished capacity. This section parallels the provisions recommended for the *Adult Guardianship Act* (see, above, section 1), the *Health Care (Consent) and Care Facility (Admission) Act* (see, above, section 3), and the *Mental Health Act* (see, above, section 5).

7 *Section 9 is amended*

(a) *by renumbering the section as subsection (1), and*

(b) *by adding the following subsection:*

- (2) A patient is of sound and disposing mind for the purpose of nominating a committee unless the patient is incapable of understanding the nature and consequences of the proposed nomination.

Recommendation no. (20)

Comment: This amendment is a parallel provision to the amendment recommended for the *Adult Guardianship Act*, which is discussed at section 1, above.

Representation Agreement Act

8 *The Representation Agreement Act, R.S.B.C. 1996, c. 405, is amended by adding the following section:*

Legal counsel

- 8.1** An adult who has the capacity to make a representation agreement consisting of one or more of the standard provisions authorized by section 7 [*standard provisions*] is deemed to have the capacity to retain and instruct counsel for the purpose of advising on and drafting the representation agreement.

Recommendation no. (27)

Comment: An adult may make a representation agreement with standard provisions under section 7 of the *Representation Agreement Act* if the adult meets the “test of incapability for standard provisions” set out in section 8 of the act. It is generally accepted that section 8 sets a very low threshold of mental capacity: an adult may meet its test of capacity even if, for example, the adult is “incapable of making a contract.” This low threshold of capacity has created an anomaly in the law, where an adult may have the mental capacity needed to make a representation agreement with standard provisions, but may be unable to obtain legal advice on and assistance to prepare the agreement, because the adult’s diminished capacity makes it unclear whether the adult has the capacity to retain and instruct legal counsel. This section will alleviate this anomaly, by making it clear that the adult has the capacity to retain and instruct legal counsel for the purpose of advising on and drafting the representation agreement. The section should enhance access to representation agreements, a valuable personal-planning document, and strengthen the safeguards in place around the creation of those agreements.

Sale of Goods Act

- 9** *Section 7 (3) of the Sale of Goods Act, R.S.B.C. 1996, c. 410, is amended by striking out “mental capacity or”.*

Recommendation no. (24)

Comment: This amendment is necessary to remove a potential redundancy in British Columbia’s statutory law. The committee has recommended unifying the two rules regarding contracts for necessities with a person who has diminished capacity. These rules are a common-law rule that applies to contracts for necessary goods or services and a narrower statutory rule—currently found in the *Sale of Goods Act*—that applies only to contracts for necessary goods. The committee’s proposed unified rule is set out, above, at section 1. This unified rule is to be located in the *Adult Guardianship Act*, which is a more logical place to find provisions dealing with mental capacity. But its enactment would raise the question of what to do with the existing statutory rule in section 7 of the *Sale of Goods Act*. It would obviously be undesirable to have two statutes addressing the same subject. But section 7 addresses a broader range of topics than contracts for necessary goods with a person who has diminished capacity, so it can’t simply be repealed.

Subsection (3)—the provision in the section dealing with necessities—also has a broader reach than contracts involving a person with diminished capacity. In addition to dealing with this topic, the subsection also states a rule for contracts for necessary goods with a person who is intoxicated. As it would be anomalous for a rule on intoxication to be located in the *Adult Guardianship Act*, the committee recommends striking out the reference to mental capacity in subsection (3) and leaving the rest of the subsection in place to deal with the intoxication issue. After it is amended by this section of the draft legislation, subsection (3) will read as follows: “[d]espite subsection (2), if necessities are sold and delivered to a person who because of drunkenness is incompetent to contract, that person must pay a reasonable price for them.”

Wills, Estates and Succession Act

10 *The Wills, Estates and Succession Act, S.B.C. 2009, c. 13, is amended by adding the following section:*

Will-maker presumed to be capable

- 40.1** (1) Until the contrary is demonstrated, every will-maker is presumed to be capable of making, changing or revoking a will.
- (2) The presumption in subsection (1) does not apply to a record that is the subject of an order under section 58 [*court order curing deficiencies*].
- (3) A will-maker’s way of communicating is not grounds for deciding that he or she is incapable of making, changing or revoking a will.

Recommendation no. (4)

Comment: Subsections (1) and (3) of this section add a presumption of capacity to the *Wills, Estates and Succession Act* that is similar to the presumptions of capacity found in section 11 of the *Power of Attorney Act* and section 3 of the *Representation Agreement Act*. Subsection (2) relates to an issue that is unique to wills. Under section 58 of the *Wills, Estates and Succession Act* a court is empowered to admit to probate a record that does not meet all the formalities required of a will. This power is new to British Columbia law, so the committee decided that the presumption of capacity should not immediately be extended to records that are the subject of an order under section 58. This decision should be revisited once the courts have had some time to apply this power.

This section is not intended to affect the common-law presumption of capacity to make a will or the common-law doctrine of suspicious circumstances.

11 *The following Division is added to Part 4:*

**Division 10 – Wills for Persons Who Do Not Have
Testamentary Capacity**

Introductory comment: This new division will implement the committee’s proposal to create a court-based system that would allow the creation of a will for a person who lacks testamentary capacity. The provisions that follow are largely based on Australian legislation, particularly sections 21–28 of Queensland’s *Succession Act 1981* and sections 39–48 of Western Australia’s *Wills Act 1970*. But this division does not follow the Australian legislation in providing for a two-stage application, so it departs significantly from its models in certain areas. Note also that this division is drafted in an inclusive manner, to give a full picture of the committee’s proposals. There may be some scope to implement some of its provisions as regulations or rules of court, rather than as legislation.

Definition

83.1 In this Division, “**person concerned**” means the person who is the subject of an application under section 83.2 [*court may authorize a will to made, altered or revoked for a person without testamentary capacity*].

Recommendation n/a

Comment: This definition is included to allow for a relatively simple way to refer to the person without testamentary capacity who is the subject of a court application under this division.

Court may authorize a will to be made, altered or revoked for a person without testamentary capacity

- 83.2** (1) The court may, on application by any person mentioned in section 83.3 [*persons who may apply for an order under this Division*], make an order authorizing
- (a) the making or alteration of a will in specific terms approved by the court, or
 - (b) the revocation of the whole or any part of a will,
- on behalf of a person who does not have testamentary capacity.
- (2) The court may make the order under subsection (1) only if
- (a) the person concerned lacks testamentary capacity,
 - (b) the person is alive when the order is made,

- (c) the person has reached the age of 16 years, and
 - (d) the court has approved the proposed will, alteration or revocation.
- (3) An order under subsection (1) may authorize
- (a) the making or alteration of a will that deals with the whole, or with only part, of the property of the person concerned, or
 - (b) the alteration of only part of the person's will.
- (4) For the order, the court may make or give any necessary related orders or directions.
- (5) The court may make the order on the conditions the court considers appropriate.

Recommendation nos. (6), (7), (8), (9)

Comment: This section is the heart of the division. It authorizes, in subsection (1), the British Columbia Supreme Court to order the making, alteration, or revocation of a will for a person who lacks testamentary capacity. ("Court" is defined in section 1 of the *Wills, Estates and Succession Act* to mean the supreme court.) Subsection (2) restricts the operation of this division to persons who lack testamentary and who are older than 16 years (the age at which the *Wills, Estates and Succession Act* allows a person to make a valid will). Subsections (3), (4), and (5) provide the court with additional powers in carrying out its jurisdiction under this section.

Persons who may apply for an order under this Division

83.3 The following persons may apply to the court for an order under section 83.2 [*court may authorize a will to be made, altered or revoked for a person without testamentary capacity*]:

- (a) the person concerned;
- (b) the person's attorney acting under an enduring power of attorney;
- (c) the person's representative acting under a representation agreement;
- (d) the person's committee or guardian;
- (e) anyone who, under any known will of the person or on the person's intestacy, may become entitled to any of the person's property or an interest in it;

- (f) anyone whom the person might be expected to benefit if the person had testamentary capacity, including a person with a claim under Division 6;
- (g) the Public Guardian and Trustee.

Recommendation no. (10)

Comment: This section represents a significant departure from the Australian legislation that serves a model for much of this division. The section sets out an expansive list of persons who are entitled to apply for an order from the court making, altering, or revoking a will for a person who does not have testamentary capacity. This is in contrast to the Australian approach, which places no limits on who may apply for such an order. The benefit of restricting the pool of potential applicants is that it allows this proposed division to avoid the need for a two-step court application, which is used in Australian legislation as a means to weed out frivolous or vexatious applications. Note that “Division 6” concerns variation of wills. A person with a claim under that division is a spouse or child of a will-maker, who asserts that the will fails to make adequate provision for his or her proper maintenance and support.

Information required in support of application

83.4 In an application under section 83.2 [*court may authorize a will to be made, altered or revoked for a person without testamentary capacity*], the applicant must give the court the following information, unless the court directs otherwise:

- (a) satisfactory evidence of the lack of testamentary capacity of the person concerned;
- (b) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the likelihood of the person acquiring or regaining testamentary capacity;
- (c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the person’s estate;
- (d) a draft of the proposed will, alteration or revocation in relation to which the order is sought;
- (e) any evidence available to the applicant of the person’s wishes;
- (f) evidence available to the applicant of the terms of any will previously made by the person, and evidence that the applicant has made reasonable inquiry to locate such a will, or

details of the contents of such a will, as may have been made by the person;

- (g) evidence that the applicant has made a reasonable inquiry concerning the interests of any person who would be entitled to receive any part of the estate of the person concerned under a previous will or if the person were to die intestate, and any evidence of those interests so far as they are known to the applicant;
- (h) evidence that the applicant has made a reasonable inquiry concerning the likelihood of an application under Division 6, and evidence of any facts known to the applicant indicating such a likelihood;
- (i) evidence that the applicant has made a reasonable inquiry concerning the circumstances of any person for whom the person concerned might reasonably be expected to make provision under a will, and any evidence of those circumstances so far as they are known to the applicant;
- (j) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to give by will;
- (k) evidence of any other facts that the applicant considers to be relevant to the application.

Recommendation n/a

Comment: The court must have as full a picture as possible of the person who is the subject of an application under this division and that person's property, if the court is to be in a position to make an order under this division. This section requires an applicant to provide the court with a comprehensive set of information about the person, the person's property and relationships, and the application itself.

Persons who must receive notice of application

83.5 The following persons must receive notice of, and be allowed to be represented in, an application under section 83.2 [*court may authorize a will to be made, altered or revoked for a person without testamentary capacity*]:

- (a) any beneficiary under an existing will of the person concerned or under the proposed will who is likely to be materially or adversely affected by the application;

- (b) if the person concerned has no existing will, any prospective intestate successor of the person in existence at the time of the application who is likely to be materially or adversely affected by the application;
- (c) anyone whom the person concerned might be expected to benefit if the person had testamentary capacity, including a person with a claim under Division 6;
- (d) if the person concerned has a life insurance policy or benefit plan, any beneficiary under the policy or plan;
- (e) the person concerned;
- (f) the Public Guardian and Trustee;
- (g) any other person as the court directs.

Recommendation no. (11)

Comment: This section is intended as an additional safeguard for applications under this division. The section provides an extensive list of persons who must be notified of an application and given a right to participate in it. As with the previous section, the goal is to ensure that the court has as full and complete a picture of the circumstances surrounding the person before making an order under this division. But there may be practical difficulties in some cases in locating all the people embraced by this section. For example, some applicants (particularly those who do not have authority over the person's financial affairs) might find it difficult to determine the identity of a beneficiary under a life-insurance policy. In other cases, it might be difficult to locate a prospective intestate successor. Subsection 83.7 (1) (a), which gives the court a wide jurisdiction to give directions on an application under this division, may be a source of relief for applicants who encounter such practical problems.

Matters court must be satisfied of

- 83.6** (1) In exercising its powers under this Division, the court must refuse an application if it is not satisfied that
- (a) the person concerned is incapable of making a valid will or of altering or revoking the person's will, as the case may be,
 - (b) the suggested will, alteration or revocation, or that will, alteration or revocation as revised under section 83.7 (1) (c) *[further powers of court]*, is one that person concerned would make if the person were to have testamentary capacity,

- (c) the applicant is an appropriate person to make the application, and
 - (d) adequate steps have been taken to allow all persons listed in section 83.5 [*persons who must receive notice of the application*] to be represented in the proceeding.
- (2) Nothing in subsection (1) prevents the court from refusing an application for any other reason.

Recommendation no. (13)

Comment: The key provision in this section is found in paragraph (1) (b). This paragraph calls on the court to take a substituted-judgment approach to decision-making under this division. This means that the court, in crafting its order, should aim to adopt the subjective wishes of the person who is the subject of the application, to the extent that those wishes are known.

Further powers of court

83.7 (1) In proceedings under this Division, the court may

- (a) give directions, including directions about who must receive notice under section 83.5 [*persons who must receive notice of application*] and the attendance of any person as a witness, and, if it thinks fit, the attendance of the person concerned,
 - (b) revise the terms of the suggested draft of the proposed will, alteration or revocation furnished to the court under section 83.4 (e) [*information required in support of application*],
 - (c) inform itself as to any matter in any manner it thinks fit, and
 - (d) make any order it thinks fit as to the costs of and incidental to the proceedings, including requiring the filing of a notice of a will, or a notice of revocation of a will, made pursuant to an order under this Division.
- (2) The court is not bound by the rules of evidence in proceedings under this Division.

Recommendation n/a

Comment: This section is meant to support the broadly remedial purpose of the division. It gives the court a flexible array of powers and relaxes some of the stricter aspects of civil procedure and evidence. Subsection (1) (d) refers to notices of wills and revocations of wills, which are enabled under division 7 of part 4 of the *Wills, Estates and Succession Act*. Such notices are useful safeguards. This reference confirms that the court may direct such a filing for a will, or a revocation of a will, made by way of an order under this division.

Execution of will

- 83.8** A will, or an instrument altering or revoking a will, made pursuant to an order under this Division must be signed by the applicant on behalf of the person concerned.

Recommendation no. (12)

Comment: This section is intended to make it clear that the applicant is the proper person to execute a will (or other instrument) made under this division.

Validity of will or other instrument made under this Division

- 83.9** (1) A will made under this Division has the same effect for all purposes as if the person concerned
- (a) were capable of making a valid will, and
 - (b) had executed the will under section 37 *[how to make a valid will]*.
- (2) An instrument, revoking a will or part of a will, made under this Division has the same effect for all purposes as if the person concerned
- (a) were capable of validly revoking a will or part of a will, and
 - (b) had executed the instrument under section 55 (1) (b) *[how to revoke will]*.
- (3) An instrument, altering a will, made under this Division has the same effect for all purposes as if the person concerned
- (a) were capable of making a valid alteration of a will, and
 - (b) had executed the instrument under section 54 (1) *[how to alter will]*.

Recommendation n/a

Comment: This section is included to remove any doubts as to the status of a will—or a revocation or an alteration of a will—made under this division. They are to have the same effect under the law as a will or an instrument executed by a will-maker with testamentary capacity.

Alteration or revocation of will made under this Division

83.10 (1) This section applies if

- (a) a will has been made on behalf of a person under this Division, and
- (b) the person acquires or regains testamentary capacity.

(2) The will

- (a) may be altered by the person in accordance with section 54 (1) *[how to alter will]*, and
- (b) may be revoked in whole or in part by the person in accordance with section 55 (1) (b) *[how to revoke will]*,

as if it were a will executed in accordance with section 37 *[how to make a valid will]*.

Recommendation n/a

Comment: This section is included to make it clear that a will made under this division may be altered or revoked by the person for whom it has been made, if that person subsequently regains or acquires testamentary capacity. An alteration or a revocation in these circumstances does not require a further application to court.

Variation of will made under this Division

83.11 A will, or an instrument altering a will, made under this Division may be varied under Division 6.

Recommendation no. (13)

Comment: This section is included to confirm that wills (or instruments altering wills) made under this division may be the subject of an application for variation on the basis that the will fails to make adequate provision for the maintenance and support of a spouse or child of the person concerned. This is consistent with the point made expressly in section 83.9, above, that a will made under this division is in all respects the same as a will made in other circumstances.

Recognition of statutory wills

- 83.12** (1) In this section, “**statutory will**” means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity, and includes an alteration to and a revocation of a statutory or other will.
- (2) A statutory will made according to the law of a place where the deceased was resident at the time of execution is to be regarded as a valid will of the deceased or a valid alteration or revocation of a will, as the case may be, for the purposes of the law of this Province.

Recommendation n/a

Comment: This section applies the principle that statutory wills are to be recognized under the law of British Columbia as being the equivalent to any other will to statutory wills that are created outside this province. At this time, such a provision is forward looking: although statutory wills have been on the scene in Australia and the United Kingdom for some time, only one Canadian province (New Brunswick) has legislation in place authorizing them. Nevertheless, it is useful to state this reciprocal principal in the legislation, in the hope that in the future more provinces will take up this type of legislation.

Commencement

- 12** This Act comes into force by regulation of the Lieutenant Governor in Council.

Recommendation n/a

Comment: This section allows the Lieutenant Governor in Council (*i.e.*, the executive arm of the government) to bring the legislation into force at some time after it is enacted by the legislature. It is a standard provision, commonly found in British Columbia legislation.

APPENDIX C

Selected Legislation

CONTENTS

BRITISH COLUMBIA	239
Adult Guardianship Act, RSBC 1996, 6, as am. by Adult Guardianship and Planning Statutes Amendment Act, 2007, SBC 2007, c. 34.....	239
Patients Property Act, RSBC 1996, c. 349	240
Power of Attorney Act, RSBC 1996, c. 370	240
CALIFORNIA	241
Probate Code	241

BRITISH COLUMBIA

Adult Guardianship Act, RSBC 1996, 6, as am. by Adult Guardianship and Planning Statutes Amendment Act, 2007, SBC 2007, c. 34

Powers of property guardian [not in force]

- 17** (1) The court may authorize a property guardian to do, on an adult's behalf, anything in respect of the adult's financial affairs that the adult could do if the adult were capable.
- ***
- (5) A property guardian may make a gift or loan, or charitable gift, from the adult's property if the court permits the property guardian to do so or if
- (a) the adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependants, and to satisfy the adult's legal obligations, if any,
 - (b) the adult, when capable, made gifts or loans, or charitable gifts, of that nature, and
 - (c) the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value.
- (6) A property guardian may receive a gift or loan under subsection (5) if the court permits.

Report on Common-Law Tests of Capacity

- (7) Permission of the court under subsection (5) or (6)
 - (a) must be express, and
 - (b) may be in relation to a specific gift or loan, or charitable gift, or to gifts or loans, or charitable gifts, generally.

Transfer of property by incapable adult

- 60.2** (1) If an adult transfers an interest in the adult's property while the adult is incapable, the transfer is voidable against the adult unless
- (a) the interest was transferred for full and valuable consideration, and that consideration was actually paid or secured to the adult, or
 - (b) at the time of the transfer, a reasonable person would not have known that the adult was incapable.
- (2) In a proceeding in respect of a transfer described in subsection (1), the onus of proving a matter described in subsection (1) (b) is on the person to whom the interest was transferred.

Patients Property Act, RSBC 1996, c. 349

Conveyances [repealed]

- 20** Every gift, grant, alienation, conveyance or transfer of property made by a person who is or becomes a patient is deemed to be fraudulent and void against the committee if
- (a) the gift, grant, alienation, conveyance or transfer is not made for full and valuable consideration actually paid or sufficiently secured to the person, or
 - (b) the donee, grantee, transferee or person to whom the property was alienated or conveyed had notice at the time of the gift, grant, alienation, conveyance or transfer of the mental condition of the person.

Power of Attorney Act, RSBC 1996, c. 370

Attorney's powers

- 20** (1) An attorney may make a gift or loan, or charitable gift, from the adult's property if the enduring power of attorney permits the attorney to do so or if
- (a) the adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependants, and to satisfy the adult's other legal obligations, if any,
 - (b) the adult, when capable, made gifts or loans, or charitable gifts, of that nature, and
 - (c) the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value.

Report on Common-Law Tests of Capacity

- (2) An attorney may receive a gift or loan under subsection (1) if the enduring power of attorney permits.
- (3) Permissions under subsections (1) and (2)
 - (a) must be express, and
 - (b) may be in relation to a specific gift or loan, or charitable gift, or to gifts or loans, or charitable gifts, generally.

CALIFORNIA

Probate Code

810. The Legislature finds and declares the following:

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

811. (a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

- (A) Level of arousal or consciousness.
- (B) Orientation to time, place, person, and situation.
- (C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

- (A) Short- and long-term memory, including immediate recall.
- (B) Ability to understand or communicate with others, either verbally or otherwise.
- (C) Recognition of familiar objects and familiar persons.
- (D) Ability to understand and appreciate quantities.
- (E) Ability to reason using abstract concepts.
- (F) Ability to plan, organize, and carry out actions in one's own rational self-interest.
- (G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

- (A) Severely disorganized thinking.

Report on Common-Law Tests of Capacity

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

812. Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision.

813. (a) For purposes of a judicial determination, a person has the capacity to give informed consent to a proposed medical treatment if the person is able to do all of the following:

(1) Respond knowingly and intelligently to queries about that medical treatment.

(2) Participate in that treatment decision by means of a rational thought process.

(3) Understand all of the following items of minimum basic medical treatment information with respect to that treatment:

(A) The nature and seriousness of the illness, disorder, or defect that the person has.

(B) The nature of the medical treatment that is being recommended by the person's health care providers.

(C) The probable degree and duration of any benefits and risks of any medical intervention that is being recommended by the person's health care providers, and the consequences of lack of treatment.

(D) The nature, risks, and benefits of any reasonable alternatives.

(b) A person who has the capacity to give informed consent to a proposed medical treatment also has the capacity to refuse consent to that treatment.

APPENDIX D

List of Respondents to the Consultation Paper

[Note: This list records respondents to the full consultation only. A firm or organization directly below an individual's name is included for identification purposes only.]

- British Columbia Centre for Elder Advocacy and Support
- British Columbia Medical Association
- Linda Caisley
Notary Public
- Heather Campbell
Barrister and Solicitor
Vantage Point Law
- Canadian Bar Association (BC Branch), Wills and Trusts Section
- Hilde Deprez
Notary Public
Deprez & Associates
- Ian M. Hull
Barrister and Solicitor
Hull & Hull LLP
- Fiona Hunter
Barrister and Solicitor
Horne Coupar
- Les Sheldon, MD
Mental Health and Addiction Services
Northern Health
- Society of Notaries Public of British Columbia
- STEP Canada (Society of Trust and Estate Practitioners)

PRINCIPAL FUNDERS IN 2012

The British Columbia Law Institute expresses its thanks to its principal funders in the past year:

- The Law Foundation of British Columbia;
- The Notary Foundation of British Columbia;
- The Real Estate Foundation of British Columbia;
- Ministry of Justice for British Columbia;
- Continuing Legal Education Society of British Columbia;
- United Way of the Lower Mainland; and
- Boughton Law.

The BCLI also reiterates its thanks to all those individuals and organizations who have provided financial support for its present and past activities.