

# A PRACTICAL APPROACH TO TESTAMENTARY CAPACITY AND UNDUE INFLUENCE ASSESSMENT IN PERSONS WITH DEMENTIA

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Bharathi **BALASUNDARAM**

MBBS, MRCPsych (UK);

Senior Consultant (Old Age Psychiatry), Department of Psychological Medicine, Changi General Hospital.

Esther **LIM**

LLB (University College London), LLM in Global Health Law

(Georgetown University Law Centre);

Associate, Legal Clinic LLC.

John **FRAZER**

MBBS, MRCPsych (UK).

Consultant Psychiatrist, Frazer Medical and Psychological Consultancy, UK.

**TAN** Lay Ling

MBBS (Singapore), MMed (Singapore), MHPE (Maastricht University);

Senior Consultant, Department of Psychological Medicine; Associate Program

Director, National Psychiatry Residency Training Program (Singapore),

Changi General Hospital.

**LIM** Yun Chin

MBBS; DPM (UK); MMedPsych; FAMS;

Consultant Psychiatrist, Raffles Hospital.

## I. Introduction

1 In order for a will to be found valid, a testator must (a) have the mental capacity to make a will; (b) have knowledge and approval of the contents of the will; and (c) be free from undue influence or the effects of fraud.<sup>1</sup> All three may be called into question in the case of persons with dementia. This article

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1 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373.

outlines the key case law and sets out the practical issues concerning the assessment of testamentary capacity and undue influence from a Singapore perspective.

2 Testamentary capacity involves the ability to make complex decisions regarding one’s property and affairs. It is not uncommon for potential beneficiaries to legally challenge the testamentary capacity of an individual with dementia. Dementia is a condition which may lead to increasing dependency on the spouse, children or other caregivers. This physical, psychological and psychiatric vulnerability may also create a nidus for undue influence, which is a common issue of contention in legal challenges.<sup>2</sup> Therefore, one cannot underrate the need for caution and diligence on the part of legal advisers, psychiatrists and other professionals involved in conducting and evaluating the testamentary process.

3 Given the salience of undue influence to testamentary capacity, and in the light of recent case law in Singapore, the authors deemed it imperative to share their experience in this area. This article outlines key case law, both past and recent, and discusses practical issues concerning the assessment of testamentary capacity. The legal and medical issues are set out from a Singapore perspective, and since the English case law of *Banks v Goodfellow*<sup>3</sup> (“*Banks*”) underpins the assessment of testamentary capacity in the Singapore courts, one of the co-authors is a medicolegal expert from England. This article has been written with headers which may serve as useful prompts for those embarking on assessments of testamentary capacity in their roles as psychiatrists, psychologists, medicolegal experts and legal advisers.

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2 K I Shulman *et al*, “Assessment of Testamentary Capacity and Vulnerability to Undue Influence” (2007) 164(5) *American Journal of Psychiatry* 722.

3 (1870) LR 5 QB 549.

## II. Solicitor's perspectives and key case law

### A. *The Mental Capacity Act*

4 As explained above, testamentary capacity is the mental capacity to make a will. Thus, it is prudent to first discuss the law on mental capacity. In Singapore, mental incapacity is defined in s 4(1) of the Mental Capacity Act:<sup>4</sup> “a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”.

5 First, s 4(1) of the Mental Capacity Act provides that there are two aspects to mental capacity: first, whether an individual has an “impairment of, or a disturbance in the functioning of, the mind or brain”, and second, if the impairment or disturbance *caused* the individual to be unable to make a decision. An individual who is “unable to make a decision” is further defined in s 5(1) of the Mental Capacity Act as one who is unable “(a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision; or (d) to communicate his decision (whether by talking, using sign language or any other means)”.

6 Second, s 4(1) of the Mental Capacity Act prescribes that mental incapacity is *task specific* and *time specific* – what matters is whether an individual can make a decision “in relation to a matter” and “at the material time”. These concepts are elaborated upon in case law and are discussed below.

### B. *Singapore cases of Re BKR and Chee Mu Lin Muriel v Chee Ka Lin*

7 In *Re BKR*,<sup>5</sup> the Singapore Court of Appeal held that the test for capacity in s 4(1) of the Mental Capacity Act has a *functional*

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4 Cap 177A, 2010 Rev Ed.

5 [2015] 4 SLR 81 at [134].

component in that the subject is “unable to make a decision” and a *clinical* component that “this inability must be caused by a mental impairment”. While medical expert evidence may address the clinical component of the test for capacity, it is not determinative of whether the subject has mental capacity. The functional component is a judgment for the court to make based on the evidence as to the degree the subject’s mental function is compromised.<sup>6</sup>

8 While the Court of Appeal in *Re BKR* also affirmed that s 4(1) requires a *causative nexus* between the subject’s mental impairment and inability to make decisions, there is *no* requirement that the subject’s mental impairment be the *sole* cause of the inability to make decisions. The practical significance of this is that while an individual’s mental incapacity must be caused by his mental impairment, the requisite causative nexus is established even where the inability to make decisions was caused by *both* the mental impairment and the subject’s actual circumstances (*eg*, the presence of undue influence). The legal concept of undue influence is discussed further below.

9 The Court of Appeal also observed in *Chee Mu Lin Muriel v Chee Ka Lin Caroline*<sup>7</sup> (“*Chee Mu Lin Muriel*”) that the determinative issue in s 4(1) is whether an individual can “make a decision for himself *notwithstanding* that he may be suffering from an impairment of or disturbance in the functioning of his mind” [emphasis added]. Thus, merely having a mental impairment or disturbance “would not by itself conclude the matter” of whether an individual has mental capacity.

10 The above cases were recently cited with approval by the Singapore High Court (Family Division) in *BUV v BUU*<sup>8</sup> (“*BUV*”). In this case, with regard to the clinical component, the medical experts agreed that the testator suffered from dementia. Regarding the functional component, the court took into consideration the testator’s performance in court, noting

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6 *Re BKR* [2015] 4 SLR 81 at [134].

7 [2010] 4 SLR 373 at [45].

8 [2020] 3 SLR 1041.

that the testator was unable to “fully comprehend the nature of the ... proceedings” and understand the questions from counsel, even giving some allowance for the “stresses” of the court environment.<sup>9</sup> The court also noted that the testator’s “lapses in memory and deficiencies in comprehension” were “serious”.<sup>10</sup> The court thus held that the medical experts’ opinions, together with the testator’s performance in court, established that the testator suffered from “a mental impairment that manifested in a deterioration of memory and an inability to understand and use information”, and that her mental abilities fell short of what was stipulated in s 5(1) of the Mental Capacity Act.<sup>11</sup>

**C. Testamentary capacity: *Banks v Goodfellow* and *George Abraham Vadakathu v Jacob George***

11 The leading authority on testamentary capacity is the English case of *Banks*, which has been accepted and followed by the Singapore courts. The legal requisites of testamentary capacity in *Banks* were restated by the Singapore High Court in the case of *George Abraham Vadakathu v Jacob George*<sup>12</sup> (“*George Abraham Vadakathu*”) as follows:

- (a) the testator understands the nature of the act and what its consequences are;
- (b) he knows the extent of his property of which he is disposing;
- (c) he knows who his beneficiaries are and can appreciate their claims to his property; and
- (d) he is free from an abnormal state of mind (*eg*, delusions) that might distort feelings or judgments relevant to making the will.

12 Accordingly, solicitors must take care to ascertain if their clients meet the requirements of testamentary capacity, as stated in *Banks* and *George Abraham Vadakathu*. The Singapore

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9 *BUV v BUU* [2020] 3 SLR 1041 at [47].

10 *BUV v BUU* [2020] 3 SLR 1041 at [48].

11 *BUV v BUU* [2020] 3 SLR 1041 at [107] and [109].

12 [2009] 3 SLR(R) 631.

Court of Appeal in *Chee Mu Lin Muriel* gave the following practical guidance to solicitors dealing with clients who may lack testamentary capacity:

- (a) If a testator is known to be suffering from any mental infirmities, a doctor should be called to certify the testator's mental capacity to ensure that the testator fully understands the will.
- (b) The solicitor should ask the appropriate questions to ascertain the testator's capacity to understand the contents of the will. This includes simple questions such as whether he is making a will for the first time. If not, the solicitor also should ask whether the testator knows he will be revoking the existing will.
- (c) As a matter of "professional prudence", the solicitor should make a contemporary written record of his attendance with the testator.

**D. *Time-specific nature of testamentary capacity and fluctuating mental capacity***

13 Mental incapacity may be permanent or fluctuating. An individual with permanent medical incapacity cannot draft a valid will. However, an individual with fluctuating mental incapacity may be able to draft a will so long as he has testamentary capacity at the material time the will is written. This refers to the *time-specific* nature of mental capacity, which also applies in the context of will-making. For example, in *Chee Mu Lin Muriel*, although it was found that the testator had dementia or another cognitive impairment, it was clear that the testator's condition "varied in severity and fluctuated over time". The Court of Appeal also noted that dementia is a progressive illness, and thus, the testator's mental faculties may not have been affected to the extent she lacked testamentary capacity at an early stage of her illness. Therefore, she may have had "moments of lucidity during which she would have possessed testamentary capacity to execute a will".<sup>13</sup>

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13 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [50].

14 Where an individual has fluctuating mental capacity, the will-making should be postponed to such a time when the testator has the requisite mental capacity. Under s 3(3) of the Mental Capacity Act, a person should not be treated as unable to make a decision unless all practicable steps to help him make the decision have been taken without success. In the context of will-making, the onus is on the solicitor to take all practicable steps. Rule 5(4) of Singapore’s Legal Profession (Professional Conduct) Rules 2015<sup>14</sup> provides that “a legal practitioner must, as far as reasonably possible, continue to act for his or her client in the client’s best interests, after the client’s ability to make any decision is impaired because of any mental disability or for any other reason”. This may include taking instructions at a time of day when the testator is more alert or at a place where the testator feels at ease, such as the testator’s own home. Solicitors should refer to the Office of the Public Guardian’s Code of Practice for the Mental Capacity Act<sup>15</sup> for further details on how to take all practicable steps.

15 Additionally, given the time-specific nature of mental capacity, the medical report must be as contemporaneous to the will-making as possible, particularly where the testator suffers from conditions such as dementia where mental capacity may fluctuate. It is possible for the testator to be lucid in the morning during the medical assessment, but to lack capacity in the evening when instructions are taken for the will. Thus, solicitors should note that a medical report purporting that a testator has testamentary capacity is not infallible, and it is crucial to exercise due diligence during instruction taking. To this end, the solicitor should ensure that the reasons for a testator’s decisions are recorded and be satisfied that the testator understands the consequences of these decisions.

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14 S 706/2015.

15 Office of the Public Guardian, *Code of Practice: Mental Capacity Act (Chapter 177A)* (3rd Ed, October 2016) at pp 29–31.

**E. Task-specific nature of testamentary capacity**

16 Testamentary capacity is also *task specific*. The court in *Chee Mu Lin Muriel* noted that in *Banks* itself, Cockburn LJ observed that although a testator’s mental power may be reduced by physical infirmity or old age to below the average standard, he may still retain sufficient intelligence to understand and appreciate the testamentary act. In the same vein, in *Re BKR*, the Court of Appeal noted that while the testator’s impairment may not have deprived her “of her ability to live independently and to make simple decisions”, making a will involves “relatively complex decisions concerning her property and affairs”, which she was unable to understand.<sup>16</sup>

**F. Singapore and English case law on undue influence**

17 As mentioned above, a will made under undue influence has no legal effect. Undue influence in the probate context has been defined by the Singapore High Court in *ULV v ULW*<sup>17</sup> to mean “coercion, i.e. the testator is coerced into making a will (or part of a will) which he does not want to make”. The High Court went on to say:<sup>18</sup>

There are various ways of expressing the substance of this test. It has been said, for example, that it must be shown that the *testator was not merely persuaded* but was pressured into losing his freedom of choice (*Halsbury’s* at para 190.199); that *there was pressure which overpowered the testator’s volition without convincing his judgment* (*Parry and Kerridge* at para 5–16, citing *Hall v Hall* (1868) LR 1 P & D 481 at 482); and that the will of the testator is coerced into doing that which he or she does not desire to do (*Rajaratnam Kumar v Estate of Rajaratnam Saravana Muthu (deceased)* [2010] 4 SLR 93 (*‘Rajaratnam’*) at [67]). [emphasis added]

18 The High Court in *ULV v ULW* went on to hold that “the test for undue influence in the testamentary context is that of coercion alone”<sup>19</sup> and that “the test for undue influence is a high

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16 *Re BKR* [2015] 4 SLR 81 at [206].

17 [2019] 3 SLR 1270 at [68].

18 *ULV v ULW* [2019] 3 SLR 1270 at [68].

19 *ULV v ULW* [2019] 3 SLR 1270 at [71].

one and requires coercion *overpowering* the testator's volition" [emphasis in original].<sup>20</sup> The common law position on undue influence in the testamentary context thus appears to be that there must be *actual*, and not *presumed*, undue influence.

19 The High Court in *Lian Kok Hong v Lian Bee Leng*<sup>21</sup> also defined undue influence as "not bad influence but coercion, and therefore persuasion and advice do not amount to undue influence as long as the free volition of the testator to accept or reject the same is not impugned" (the case was overturned by the Court of Appeal on separate grounds).<sup>22</sup> Similarly, in *Rajaratnam Kumar v Estate of Rajaratnam Saravan Muthu*,<sup>23</sup> the High Court held that in the testamentary context, it must be established that the party accused of undue influence "dominated [the testators] to such an extent that their independence of decision in relation to the execution of the [wills] was so undermined that his domination *caused* them to execute the said wills" [emphasis added].<sup>24</sup>

20 In the English case of *Wingrove v Wingrove*,<sup>25</sup> the court also held that what constitutes undue influence may vary based on the specific testator's susceptibility to external pressure:<sup>26</sup>

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

21 It should be noted that undue influence and mental capacity may be interrelated. For example, in *BUV*, the court held that the testator's mental impairment affected her ability

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20 *ULV v ULW* [2019] 3 SLR 1270 at [73].

21 [2015] SGHC 205 at [45].

22 *Lian Kok Hong v Lian Bee Leng* [2016] 3 SLR 405.

23 [2010] 4 SLR 93.

24 *Rajaratnam Kumar v Estate of Rajaratnam Saravan Muthu* [2010] 4 SLR 93 at [68].

25 (1885) 11 PD 81.

26 *Wingrove v Wingrove* (1885) 11 PD 81 at 82–83.

to discern whether undue influence was being exerted upon her, which made her more susceptible to undue influence.<sup>27</sup> The court considered that, taken together, the evidence pointed to a clear lack of capacity at the material times. As noted by Gary Chan,<sup>28</sup> the undue influence taken into consideration by the court in its assessment of mental capacity in *BUV* was “presumed undue influence”. It would thus appear that presumed undue influence can be taken to adversely affect one’s mental capacity. Chan further opined that “actual and presumed undue influence are not different types of undue influence but different ways of proving undue influence”.<sup>29</sup> As stated in para 18 above, only actual undue influence, and not presumed undue influence, can invalidate a will. Only time will tell if a party might attempt to argue in the future that “presumed undue influence” is sufficient. This could possibly lower the threshold of evidence necessary to invalidate a will.

### G. **Red flags for undue influence**

22 A subcommittee of the International Psychogeriatric Association Task Force on Testamentary Capacity and Undue Influence has identified “red flags”, which indicate undue influence.<sup>30</sup> These may include:

- (a) **Relationship risk factors.** The testator is dependent on a beneficiary, or someone connected to the beneficiary for their emotional or physical needs.
- (b) **Social and environmental risk factors.** The testator is isolated, recently bereaved, has changes in family relationships/dynamics or is facing family conflict.
- (c) **Psychological and physical risk factors.** The testator has a physical disability, is subject to non-specific psychological factors such as pressure to execute

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27 *BUV v BUU* [2020] 3 SLR 1041 at [108].

28 Gary Chan Kok Yew, “Assessing Mental Capacity: *BUV v BUU* [2019] SGHCF 15” (2020) 32 SAclJ 287.

29 Gary Chan Kok Yew, “Assessing Mental Capacity: *BUV v BUU* [2019] SGHCF 15” (2020) 32 SAclJ 287 at para 34.

30 C Peisah *et al*, “The Wills of Older People: Risk Factors for Undue Influence” (2009) 21(1) *International Psychogeriatrics* 7.

a deathbed will or sexual bargaining from a partner, or is suffering from serious physical illness with physical dependency on a beneficiary, has a mental disorder including the presence of dementia or delirium, suffers from a mood or paranoid disorder, personality disorder, and/or substance misuse problem.

(d) **Legal risk factors.** A beneficiary or someone connected to a beneficiary plays a significant role in procuring the will (*eg*, selects and contacts the solicitor, attends meetings with the solicitor, assists in the drafting of the will). There are sudden drastic changes in the distribution of the assets compared to previous wills or wishes of the testator.

23 While the above “red flags” may not be sufficient to establish undue influence in the law, they should raise suspicion in the solicitor and spur further action.

#### **H. What should a solicitor do in suspected cases of a testator acting under undue influence?**

24 It is well established in Singapore law that lawyers owe their clients fiduciary duties and are thus obliged to act in the best interests of their clients.<sup>31</sup> Arguably, the duty to act in their clients’ best interests extends to protecting clients who are suspected to be acting under undue influence. Solicitors may do so by:

(a) Meeting the client in private so he is able to speak freely about his wishes.

(b) Ensuring that the client understands the consequences of a particular distribution, notably if it excludes “natural” beneficiaries, such as children or spouses.

(c) Asking specific questions, and recording in detail the replies, if there is suspicion of undue influence,

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31 See *Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC* [2015] SGHC 146 at [392].

eg, regarding any drastic changes in the disposition of assets compared to previous wills; any personal disputes that may have influenced the distribution of assets; why potential beneficiaries are excluded from the will or bequeathed lower amounts than expected.

(d) Seeking the expert opinion of psychiatrists and medicolegal experts on the role of undue influence on the client's testamentary capacity, where the client has or is suspected of having any cognitive impairment.

### **III. Psychiatrist's perspectives on preparing a specialist medical report on testamentary capacity and vulnerability to undue influence**

25 It is crucial to assess testamentary capacity and undue influence using a framework that involves a practical approach. The clinical history taken should include how the client arrived at the interview address<sup>32</sup> and the historical account the client gives of his life, as well as the account of relatives who attend with him, paying particular attention to changes in the recent past.

26 The following practical approach and structure for assessment are recommended.

#### **A. Conduct a comprehensive psychiatric assessment**

27 Psychiatrists should first conduct a full psychiatric evaluation and clinical interview.<sup>33</sup> Particular attention should be paid to the presence or absence of mental disorders, including cognitive impairment, dementia, delirium, psychotic disorder and mood disorder (such as depression and bipolar affective disorder).<sup>34</sup> The presence of neurological or mental disorders

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32 Any cognitive deficits with short- and long-term memory could be ascertained if the client had difficulty finding his way or recalling the interview address.

33 K I Shulman *et al*, "Contemporaneous Assessment of Testamentary Capacity" (2009) 21(3) *International Psychogeriatrics* 433.

34 K I Shulman *et al*, "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007) 164(5) *American Journal of Psychiatry* 722.

that may affect cognition, impulsiveness and judgment must be recorded carefully.<sup>35</sup> The presence of abnormal behaviour and symptoms such as agitation, aggression, hallucinations, delusions and disinhibition should also be elicited and recorded.<sup>36</sup> If delusions or hallucinations are present, elicitation as to whether these symptoms directly affect the decision on the distribution of assets is essential.<sup>37</sup> Will-making involves complex decision-making and higher levels of cognitive abilities.<sup>38</sup>

28 Multiple factors may affect an individual's testamentary capacity. Thus, an assessor should be vigilant to the cumulative effects of these factors. For instance, the impact of physical health on testamentary capacity may be more pronounced when there is underlying cognitive impairment or dementia, or when the individual is reliant emotionally, physically and psychologically on others.

29 Capacity to make a will may also be affected by concurrent treatment with medications, especially those receiving palliative care for terminal illnesses and being withdrawn from previously used medications.<sup>39</sup>

30 The examining doctor should examine all the records that are available to him and make an effort to contact other specialists and regular primary care physicians involved in the care of the testator. Medical records, including both psychiatric and general medical records, are likely to assist with the

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35 K I Shulman *et al*, "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007) 164(5) *American Journal of Psychiatry* 722.

36 K I Shulman *et al*, "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007) 164(5) *American Journal of Psychiatry* 722.

37 K I Shulman *et al*, "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007) 164(5) *American Journal of Psychiatry* 722.

38 K I Shulman *et al*, "Contemporaneous Assessment of Testamentary Capacity" (2009) 21(3) *International Psychogeriatrics* 433; P Voskou *et al*, "Testamentary Capacity Assessment: Legal, Medical and Neuropsychological Issues" (2018) 31(1) *Journal of Geriatric Psychiatry and Neurology* 3; C Peisah *et al*, "Deathbed Wills: Assessing Testamentary Capacity in the Dying Patient" (2014) 26(2) *International Psychogeriatrics* 209.

39 K M Kennedy, "Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will" (2012) 19 *Journal of Forensic and Legal Medicine* 191.

psychiatric assessment.<sup>40</sup> These may reveal significant changes in the circumstances of the individual not shown either by them or the beneficiaries.

## **B. Evaluation of social circumstances**

31 Autobiographical memory (memories of one's own past) may be affected by cognitive impairment, especially Alzheimer's disease.<sup>41</sup> Autobiographical memory is comprised of semantic aspects which are individual related facts from different lifetime periods such as addresses, names of people, friends and colleagues. It also includes episodic aspects which involve singular events with the richness of details and personal experience when recalled.<sup>42</sup> Deficits in autobiographical memory may cause the testator to forget past relationships, good and adverse times, including difficulties in recalling past feuds.<sup>43</sup> This can result in impaired judgment when deciding on potential beneficiaries.

32 However, a psychiatrist should not place undue weight on the testator's ability to recall details that may not have any bearing on testamentary decision-making – for example, in the case of *Soong Ah Kiow v Yvonne Markham*,<sup>44</sup> the District Court held that the defendant's ability to recall matters such as her favourite food stall in Kuala Lumpur was not determinative of the testator having the requisite testamentary capacity.

33 Psychiatrists should take into consideration the testator's social circumstances and situation by exploring any family conflict or multiple beneficiaries.<sup>45</sup> The testator should be able

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40 K M Kennedy, "Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will" (2012) 19 *Journal of Forensic and Legal Medicine* 191.

41 P A Thomann *et al*, "Hippocampal Morphology and Autobiographic Memory in Mild Cognitive Impairment and Alzheimer's Disease" (2012) 9(4) *Current Alzheimer Research* 507.

42 P A Thomann *et al*, "Hippocampal Morphology and Autobiographic Memory in Mild Cognitive Impairment and Alzheimer's Disease" (2012) 9(4) *Current Alzheimer Research* 507.

43 C Peisah *et al*, "The Wills of Older People: Risks Factors for Undue Influence" (2009) 21(1) *International Psychogeriatrics* 7.

44 [2014] SGDC 319.

45 C Peisah *et al*, "The Wills of Older People: Risks Factors for Undue Influence" (2009) 21(1) *International Psychogeriatrics* 7; K I Shulman  
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to appreciate the nature of any prevailing complex interpersonal relationships. In conflictual and complex environments, the threshold for testamentary capacity should be higher,<sup>46</sup> necessitating probing during the assessment.<sup>47</sup>

**C. Carry out further cognitive screening tests if necessary**

34 If there is doubt regarding the testator's cognitive functioning, additional screening tests should be carried out. The Montreal Cognitive Assessment<sup>48</sup> has advantages over the Mini-Mental State Examination,<sup>49</sup> as it allows for formal assessment of frontal lobe functions, such as planning and task execution, which are necessary for making a will. In cases of dementia or suspected cases of executive dysfunction, it may be prudent to conduct assessment tests of executive functioning and seek input from a neuropsychologist. While cognitive screening tools can assist in evaluating cognitive impairment, low scores do not always imply the presence of dementia or lack of testamentary capacity.<sup>50</sup> It is noteworthy that cognitive screening tools do not replace an expert's clinical judgment with regard to testamentary capacity.

**D. Specific elements of testamentary capacity**

35 It is useful to ask at the outset if the testator has already made a will and the reasons given for changing it. It is also

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*et al*, "Contemporaneous Assessment of Testamentary Capacity" (2009) 21(3) *International Psychogeriatrics* 433; P Voskou *et al*, "Testamentary Capacity Assessment: Legal, Medical and Neuropsychological Issues" (2018) 31(1) *Journal of Geriatric Psychiatry and Neurology* 3.

46 K I Shulman *et al*, "Contemporaneous Assessment of Testamentary Capacity" (2009) 21(3) *International Psychogeriatrics* 433; K I Shulman *et al*, "Psychiatric Issues in Retrospective Challenges of Testamentary Capacity" (2005) 20 *International Journal of Geriatric Psychiatry* 63.

47 K I Shulman *et al*, "Psychiatric Issues in Retrospective Challenges of Testamentary Capacity" (2005) 20 *International Journal of Geriatric Psychiatry* 63–69.

48 Available at <[www.mocatest.org](http://www.mocatest.org)> (accessed 15 January 2021).

49 M F Folstein *et al*, "Mini-mental State: A Practical Method for Grading the Cognitive State of Patients for the Clinician" (1975) 12(3) *Journal of Psychiatric Research* 189.

50 K M Kennedy, "Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will" (2012) 19 *Journal of Forensic and Legal Medicine* 191.

helpful to review previous wills (if any) and clarify the reasons why particular beneficiaries have been included or excluded.

36 The psychiatrist should interview the testator to ensure that the *Banks* criteria for testamentary capacity are met. The following questions may be asked:

- (a) Can you tell me what a will is?
- (b) Why have you decided to make a will now?
- (c) Who else is involved in your decision to make a will now?
- (d) When does a will come into effect?
- (e) Can you give me a rough estimate of your assets?
- (f) Can you name your beneficiaries? Do you know how much they will receive?
- (g) Why have you chosen some beneficiaries over the others?
- (h) Have you made a will previously?
- (i) Why do you now wish to make a new will?
- (j) Do you understand that making a new will and excluding previous beneficiaries may lead to the will being challenged?

37 Corroborating the testator's account of his assets with a reliable source as part of the assessment is essential. The complexity and substantiality of the estate and reasons for deviation from any pattern of disposition identified in previous wills or wishes should be elicited.<sup>51</sup>

38 A testator's ability or inability to comprehend, retain, weigh or communicate his choices should be recorded. A verbatim

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51 K M Kennedy, "Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will" (2012) 19 *Journal of Forensic and Legal Medicine* 191; K I Shulman *et al*, "Psychiatric Issues in Retrospective Challenges of Testamentary Capacity" (2005) 20 *International Journal of Geriatric Psychiatry* 63.

recording of responses is useful as it may reveal evidence of an underlying or developing mental disorder or confusion.

39 Instead of a single lengthy session, the testator may need to be assessed across multiple sessions to establish consistency and to reduce fatigue which may arise out of a lengthy interview. After two hours, fatigue is likely to set in. Even after multiple interviews, the interviewer may still find that the information available or elicited remains incomplete, for example, because it may not be possible to interview all family members or gain access to all necessary records.

### **E. Assessment of undue influence**

40 Testators with dementia are likely to be dependent on others for nearly all their day-to-day needs. Accordingly, undue influence is arguably a significant factor in the patient's ability to make a will. There may be a need to assess the person independently without the presence of family members to establish whether there is coercion on the part of caregivers or potential beneficiaries. Whether that undue influence is present is a matter for the court to decide, but psychiatrists should not be oblivious to it and must provide their observations to aid the court.

41 If a psychiatrist identifies that the testator is vulnerable to undue influence from a caregiver or family member, this should be highlighted in the report.

42 Physical and psychological dependency on caregivers or the strain of coping with a terminal illness may lead to vulnerability to undue influence.<sup>52</sup> Psychiatrists should also bear in mind that there is often a direct relationship between a patient's vulnerability (taking into account cognitive abilities, mental disorders, personality and psychosocial situation) and the level of influence that must be exerted to be considered "undue". An individual with severe dementia may be susceptible

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52 K M Kennedy, "Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will" (2012) 19 *Journal of Forensic and Legal Medicine* 191.

to undue influence, even where the influence is subtle. On the other hand, an individual with mild cognitive impairment may have to be subject to a severe level of influence before the influence is considered undue.<sup>53</sup> In cases where undue influence is suspected, the psychiatrist should indicate factors such as physical or mental health and personality or social situations which render the testator vulnerable.<sup>54</sup> Contemporaneous notes should be maintained on how capacity was assessed.

**F. Conclusion on testamentary capacity**

43 The expert should provide a clear conclusion as to whether, on the balance of probabilities, the testator has a significant disturbance of mental functioning. In the absence of mental impairment or disturbance in the functioning of mind or brain, there is a presumption of testamentary capacity. However, the presence of cognitive impairment or dementia does *not* equate to testamentary incapacity. If the psychiatrist is asked to comment on the role of undue influence, this could be highlighted in the report.

**G. What is a retrospective assessment of testamentary capacity?**

44 Psychiatrists may be asked to give a medical opinion on a deceased testator's capacity to have made a valid will. This is inevitably fraught with uncertainty due to the absence of a contemporaneous assessment of testamentary capacity. It is essential to review contemporaneous medical records which may show evidence of an existing mental disorder or incapacity at the material time. Any uncertainty must be clearly stated in the report, and a conclusion must be made based on a balance of probabilities.

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53 K I Shulman *et al*, "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007) 164(5) *American Journal of Psychiatry* 722.

54 C Peisah *et al*, "The Wills of Older People: Risks Factors for Undue Influence" (2009) 21(1) *International Psychogeriatrics* 7.

#### **IV. Conclusion**

45 As the population ages and dementia and other causes of cognitive decline become more prevalent, the demand for assessments of testamentary capacity will increase substantially. Such assessments must be brought in line with developments in the law and psychiatric research. It is hoped that this article serves as an update to previously published work on dementia, testamentary capacity and undue influence, and provides further guidance on how to carry out assessments of testamentary capacity and prepare high-quality reports which stand up to scrutiny.