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A TALE OF TWO CAPACITIES

Assessing the Mental Capacity Act's Relevance in Proving Testamentary Capacity in Singapore

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness", Charles Dickens' timeless words is an appropriate description of the ebbs and flows of one's testamentary capacity. In determining whether a testator has testamentary capacity, practitioners always relied on the unintuitive common law rules as stated in the *locus classicus* of *Banks v Goodfellow* (1870) LR 5 QB 549. However, the murky waters are even more unsettled with the introduction of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("MCA"). This article considers the uneasy interaction between the old common law rules and the MCA, and proposes some changes for the law on testamentary capacity.

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I. Introduction

1 The elderly patriarch of a family has died, leaving behind an enormous estate. His children gather around the family home, eagerly waiting for the solicitor to read the deceased's will, with the high hopes of getting their fair share of the estate. But fate has dealt them a cruel twist. The patriarch's will leaves them with absolutely nothing. In fact, some stranger gets to inherit the entire estate. The shell-shocked family members now wish to challenge the will. The first legal question to arise is this – was the old man of unsound mind when he executed this will?

2 The question of testamentary capacity is not simply a matter of probate litigation but also a question of professional ethics. For probate

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solicitors drafting their clients' wills, it is a requirement that they be satisfied that the testator does possess sufficient mental capacity.[2] The solicitor's opinion must be based on a proper assessment and accurate information or such an opinion would be "worthless".[3]

3 How do we assess testamentary capacity? For more than a century, legal and medical practitioners applied the *Banks v Goodfellow* test.[4] However, new questions have emerged since the introduction of the Mental Capacity Act in Singapore[5] and the UK.[6] First, is the Mental Capacity Act test the same as the *Banks v Goodfellow* test? Second, has the *Banks v Goodfellow* test been replaced by the Mental Capacity Act's test for mental capacity? Third, if the *Banks v Goodfellow* test was not replaced, which test should the courts apply? This article seeks to address these pertinent questions, with specific references to the jurisprudence in Singapore and the UK, two jurisdictions that have adopted the Mental Capacity Act.

4 In this article, I will be focusing on the legal aspects of the issue of testamentary capacity.[7] The article is divided into the following parts. First, it examines the current law on testamentary capacity, with reference to various jurisdictions. Second, we consider how the courts viewed testamentary capacity in light of the Mental Capacity Act's enactment. In the third and final part of this article, we will ask what the law ought to be in relation to testamentary capacity, in particular, whether the vintage *Banks v Goodfellow* test deserves a modern restatement or even codification.

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2 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [60]; *Feltham v Freer Bouskell* [2013] WTLR 1363 at [64], *per* Charles Hollander QC sitting as deputy judge; *Pates v Craig, the Estate of the late Joyce Jean Cole* [1995] NSWSC 87 at [143] and [147].

3 *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch) at [42].

4 *Banks v Goodfellow* (1870) LR 5 QB 549. It is well known that medical practitioners have difficulties with the legal tests for testamentary capacity. However, it is outside the scope of this article to consider these issues at length. Readers interested in these areas should look at Kelly Purser, *Capacity Assessment and the Law – Problems and Solutions* (Springer International, 2017) and the secondary materials referred to in this book. It is also useful to refer to Bharathi Balasundaram *et al*, "A Practical Approach to Testamentary Capacity and Undue Influence Assessment in Persons with Dementia" [2021] SAL Prac 10.

5 Mental Capacity Act (Cap 177A, 2010 Rev Ed).

6 Mental Capacity Act 2005 (c 9) (UK).

7 This is as opposed to the practical aspects of assessment performed by doctors and solicitors, which is helpfully canvassed in Bharathi Balasundaram *et al*, "A Practical Approach to Testamentary Capacity and Undue Influence Assessment in Persons with Dementia" [2021] SAL Prac 10.

II. Law on testamentary capacity

5 For a court to be satisfied that the testator's will is legally valid, the proponent of the will must prove the following three elements on a balance of probabilities. First, that the will was duly executed in accordance with the formalities as prescribed by the Wills Act.[8] Second, the testator possessed testamentary capacity when executing this will. Third, that the testator must have had actual knowledge and approval of the will and its contents.[9] In this paper, we are concerned with the second limb of this inquiry – whether the testator possesses the testamentary capacity to make a will.

6 No one is capable of making a will if he is found to be of unsound mind, memory and understanding.[10] At the common law, there is the general principle that the courts will uphold a testator's decision to leave his assets to those who survive him as they see fit, "but only if the testator had the capacity when he exercised his testamentary freedom".[11]

7 In determining the difficult question of testamentary capacity, the courts not only have to grapple with the evidential problems that are commonplace in such cases,[12] they also need to be aware of the tensions between upholding this principle of testamentary freedom and the legal consequences of finding someone lacking mental capacity (namely, that the document cannot be admitted to probate). As Purser observed, an assessment of legal capacity is an invasive process whereby a third person potentially relies on biased information from individuals to reach a verdict that an individual is no longer capable of making his decision.[13] Hence the courts always approach allegations of lack of testamentary capacity with a good degree of caution.[14]

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8 For Singapore, it is the Wills Act (Cap 352, 1996 Rev Ed). In the UK, the equivalent is s 9 of the Wills Act 1837 (c 26) which is then substituted by s 17 of the Administration of Justice Act 1982 (c 53) for wills taking effect after 1982.

9 See the Hong Kong Court of Final Appeal's decision in *Nina Kung v Wang Din Shin* (2005) 8 HKCFAR 387 at [173], *per* Ribeiro PJ, citing *Barry v Butlin* (1838) 2 Moo PC 480 and *Harmes v Hinkson* [1946] 3 DLR 497 (PC).

10 *Williams, Mortimer & Sunnucks – Executors, Administrators and Probate* (Alexander Learmonth *et al* gen eds) (Sweet & Maxwell, 21st Ed, 2018) at para 10-03.

11 *Leow Li Yoon v Liu Ji Chang* [2016] 1 SLR 595 at [28].

12 As Scarman J observed in *Hartley v Fuld* [1966] 2 WLR 717: "Darkness and suspicion are common features in will cases."

13 Kelly Purser, *Capacity Assessment and the Law – Problems and Solutions* (Springer International, 2017) at p 61.

14 See G E Dal Pont & K F Mackie, *Law of Succession* (LexisNexis, 2nd Ed, 2017) at para 2.2 and *Re Griffith; Easter v Griffith* (1995) 217 ALR 284 at 290, *per* Gleeson CJ, where the power to freely dispose of one's assets by will is an important right, and a determination that a person lacked (or has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter.

8 It is more likely than not that given the rise in awareness over mental capacity issues, that the testator's testamentary capacity would be more heavily disputed in the near future. In this section, we now consider how the courts have generally applied the law on testamentary capacity, especially its application of the requirements in *Banks v Goodfellow*.[15]

A. Allocation of burden of proof

9 The court's function in respect of disputes on a person's testamentary capacity is to decide whether they had such capacity at the relevant time of executing the will. This involves making a finding of a fact by applying the legal principles in *Banks v Goodfellow*[16] to the evidence. In matters involving special knowledge, such as mental disorders like schizophrenia, the court has to rely on expert evidence but is not bound to accept any medical opinion if it is not supported by the objective evidence.[17]

10 It is trite law that the propounder of the will has the legal burden of proving that the testator possessed testamentary capacity when executing the will.[18] However, the propounder may not even need to prove that he satisfies the four elements stated in *Banks v Goodfellow*.[19] This is because the courts have stated that there is a *prima facie* evidential presumption that the requirements have been established if the will was executed in ordinary circumstances and the testator was not known to be suffering from any kind of mental disability.[20] A relevant indicator is whether the will appears to be rational having regard to its terms and identities of the beneficiaries.[21]

11 What if one wishes to challenge the will? They will need to adduce evidence to the contrary, such as evidence that the testator suffers from a mental illness that is serious enough for the court to find that he lacks testamentary capacity.[22] Such evidence can either be medical expert

15 (1870) LR 5 QB 549.
16 (1870) LR 5 QB 549.
17 *George Abraham Vadakuthu v Jacob George* [2009] 3 SLR(R) 631 at [64].
18 *Barry v Butlin* (1838) 2 Moo PC 480; *Robins v National Trust Co* [1927] AC 515 at 519, *per* Viscount Dunedin. This was also endorsed by the Singapore Court of Appeal in *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373. Do note that medical evidence from practitioners is to be preferred over expert specialist medical practitioners who have never seen the deceased. See *Revie v Druitt* [2005] NSWSC 902 at [34], *per* Windeyer J.
19 (1870) LR 5 QB 549.
20 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373; see also *Lai Hoon Woon v Lai Foong Sin* [2016] SGHC 113 at [279].
21 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373.
22 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [40].

evidence and evidence from non-expert witnesses as well.[23] That being said, there is a key negative presumption that the courts have noted. This is when it is shown that the testator suffers from an incapacitating mental illness prior to the execution of a will, then it is presumed that the testator continues to lack testamentary capacity up till the time of the will's execution.[24]

B. *The* Banks v Goodfellow *requirements*

12 The starting point for any discussion on testamentary capacity is the *locus classicus* of *Banks v Goodfellow*,[25] which has been widely adopted across the courts of the Commonwealth, including Australia, New Zealand,[26] Malaysia[27] and Singapore.[28] In that case, Sir Alexander Cockburn CJ stated the essential elements of testamentary capacity as follows:[29]

> It is essential … that a testator shall understand the nature of his 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 his mind had been sound, would not have been made.

13 It should be noted that there are jurisdictions that have applied more modern restatements of the *Banks v Goodfellow* test, with Australia and New Zealand adopting a more particularised formulation towards it.[30] That being said, the general principles of the *Banks v Goodfellow* test remain intact, and it remains useful for us to discuss the elements using the traditional tests as applied in Singapore and the UK.

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23 *Zorbas v Sidoropoulos (No 2)* [2009] NSWCA 197 at [65], [77] and [99].
24 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [41].
25 (1870) LR 5 QB 549.
26 *Woodward v Smith* [2009] NZCA 215.
27 See, *eg*, *Gan Yook Chin v Lee Ing Chin* [2005] 2 MLJ 1.
28 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373.
29 *Banks v Goodfellow* (1870) LR 5 QB 549 at 565.
30 See *Read v Carmody* [1998] NSWCA 182 and *Woodward v Smith* [2009] NZCA 215. However, see also the English decision of *Re Loxston; Abbott v Richardson* [2006] EWHC 1291 (Ch); [2006] WTLR 1567 where Nicholas Strauss QC (sitting as a Deputy High Court Judge) also restated (at [187]) the case and added a fifth element that the testator must have the mental capacity to make decisions and arrive at a "rational fair and just" testament, but subsequent courts have not followed this decision.

14 In Singapore, the *Banks v Goodfellow* requirements were restated by Chan Sek Keong CJ in the High Court's decision of *George Abraham Vadakathu v Jacob George* ("*George Abraham*") as follows:[31]

> (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.

15 For starters, the *Banks v Goodfellow* test is not a medical test for capacity. It is a judicial formulation of the necessary level of a testator's understanding for his will to be valid.[32]

16 In assessing the ability of comprehension, the courts will take judicial notice that many wills are made by persons of advanced years where persons are rarely free from illness or infirmities.[33] Hence, a draftsman should form a judgment of his client against the level of understanding that is not necessarily as high as a person free from the infirmities of illness or old age.

(1) Understanding the nature of the act and its consequences

17 For the first element, what does it mean by the testator understanding the nature of the act and its consequences? For starters, what is required is not the testator's actual understanding of the matters referred to but whether he has the capacity or potential to understand.[34]

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31 *George Abraham Vadakathu v Jacob Georg* [2009] 3 SLR(R) 631 at [29], affirmed by the Singapore Court of Appeal in *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [37].

32 Martyn Frost, Stephen Lawson & Robin Jacoby, *Testamentary Capacity: Law, Practice and Medicine* (Oxford University Press, 2015) at para 2.11. See also *Re Key; Key v Key* [2010] WLR 2020; [2010] WTLR 623 at [98], *per* Briggs J and *Zorbas v Sidiropoulos (No 2)* [2009] NSWCA 197.

33 *Re Griffith; Easter v Griffith* (1995) 217 ALR 284 at 295, *per* Kirby P.

34 *Re Byford* [2019] EWHC 646 (Ch) at [33]–[34]; see also *Hoff v Atherton* [2003] EWCA Civ 1554; [2005] WTLR 99. This was endorsed in Singapore by the High Court in *Ng Bee Keong v Ng Choon Huay* [2013] SGHC 107 at [53], but the court's reliance on Peter Gibson LJ's decision in *Hoff v Atherton* was misplaced since the court had incorrectly suggested that Gibson LJ was referring to only the first element in the *Banks v Goodfellow* test when His Lordship was referring to the entire concept of testamentary capacity.

18 It is also clear that in proving this element, it is unnecessary for a testator to view his will with the eyes of a lawyer and comprehend all its provisions in their legal form.[35] In the Singapore High Court's more recent decision of *ULV v ULW*, Tan Puay Boon JC explained that it would suffice if he could understand the elements of which it is composed and the disposition of his property in its simple form.[36]

19 It is submitted that Tan JC's formulation in *ULV v ULW*[37] is more desirable than the ambiguous language in *Banks v Goodfellow*.[38] However, even so, the courts did not specify what it means by certain important matters relating to the will, though this was helpfully expanded upon by Frost, Lawson and Jacoby. The issue is whether the testator was capable of understanding that: (a) he was making a will; (b) the will can be changed or revoked by him while he was alive (if he has necessary capacity to do either act); (c) the will takes effect when he dies and that the will gives no immediate property rights to others; and (d) the will disposes of what he owns when he dies, but until then he was free to spend, give away or otherwise dispose of whatever he owned.[39]

20 It bears reminding that even if the testator does not need to have the capacity of a lawyer's understanding of the legal implications for his decisions. At the very least, the court must be satisfied that the testator has the capacity to understand who he wishes to benefit and the claims of those which he wishes to exclude.[40]

(2) Understanding the extent of the testator's property

21 For the second element, this concerns the testator's ability to understand the extent of his property. It is important to reiterate that this is also a question of capacity, or the potential to understand the extent of the property that he possesses.[41]

35 *Tho Yow Pew v Chua Kooi Hean* [2002] 4 MLJ 97 at 102, *per* Gopal Sri Ram JCA.
36 *ULV v ULW* [2019] 3 SLR 1270 at [25].
37 [2019] 3 SLR 1270.
38 (1870) LR 5 QB 549.
39 Martyn Frost, Stephen Lawson & Robin Jacoby, *Testamentary Capacity: Law, Practice and Medicine* (Oxford University Press, 2015) at para 2.33. See also Bharathi Balasundaram *et al*, "A Practical Approach to Testamentary Capacity and Undue Influence Assessment in Persons with Dementia" [2021] SAL Prac 10 at [36].
40 *Wood v Smith* [1993] Ch 90 at 106.
41 *Williams, Mortimer & Sunnucks – Executors, Administrators and Probate* (Alexander Learmonth *et al* gen eds) (Sweet & Maxwell, 21st Ed, 2018) at para 10-04, citing *Hoff v Atherton* [2003] EWCA Civ 1554; [2005] WTLR 99 and *Re Loxston; Abbott v Richardson* [2006] EWHC 1291 (Ch); [2006] WTLR 1567.

22 Hence on the facts of *Yeo Henry v Yeo Charles*[42] ("*Yeo Henry*"), the court declined to accept the evidence of a medical expert who suggested that this limb of the *Banks v Goodfellow* test was not satisfied. The medical expert asserted that the testatrix was not capable of understanding the extent of her assets because there was no documentation or assessment of whether she was actually aware of their actual monetary worth. However, Andrew Ang SJ reiterated that the law does not require proof of the testatrix's actual understanding, but only that she had the capacity to understand the extent of her assets.[43] Such capacity is not displayed by merely making rational responses or repeating a formula of simple answers.[44]

23 It is sufficient that the deceased had a general knowledge of the nature, value and extent of his assets.[45] Hence, a will shall not be rendered invalid merely because a testator is mistaken about or did not manage to ascertain the full details of his property.[46] However, one must ask what is the level of general knowledge required? The answer is that it depends on the value of the testator's estate as well. As Lewison J helpfully pointed out in *Perrins v Holland*, a testator with a complex estate and many potential beneficiaries may require a greater degree of cognitive capability than a person with a simple estate and few claimants.[47] This takes into account the modern reality that it is not uncommon for testators to have a potentially complicated series of mechanisms, such as trusts and companies, to ensure wealth management.[48]

(3) Testator's understanding of beneficiaries' identities and their claims

24 In this third element, the question is really whether the testator is capable of understanding the nature and extent of the claims upon him, "both those whom he chooses to include in and those who he chooses to exclude from his will".[49]

42 *Yeo Henry v Yeo Charles* [2016] SGHC 220.
43 *Yeo Henry v Yeo Charles* [2016] SGHC 220 at [61].
44 See the Supreme Court of Canada's decision in *Leger v Poitier* [1944] SCR 152 at 162.
45 *d'Apice v Gutkovich – Estate of Abraham (No 2)* [2010] NSWSC 1333 at [105].
46 *Robin Sharp v Grace Collin Adam* [2005] EWHC 1806; see also *Yeo Henry v Yeo Charles* [2016] SGHC 220 at [59].
47 *Perrins v Holland* [2009] WTLR 1387; [2009] EWHC 1945 (Ch) at [40].
48 Kenneth I Shulman *et al*, "*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity" (2017) 95(1) *Canadian Bar Review* 252 at 256; see also *Kerr v Badran* [2004] NSWSC 735 at [49], *per* Windeyer J.
49 *Parsonage v Parsonage* [2019] EWHC 2362 (Ch) at [15].

25 In satisfying this element, the testator should demonstrate sound memory, comprehension and understanding in respect of choosing his beneficiaries.[50] This is an element that safeguards against testators who may unintentionally omit beneficiaries due to their failing memory or lack of understanding.

26 That being said, the courts are however loath to conclude that a testator lacks testamentary capacity because this element has not been satisfied, particularly if the will was drafted by an experienced independent lawyer.[51] This reflects the principle that the courts will strive to uphold testamentary freedom so long as the testator's capacities are not impaired.

27 The courts' conservative attitude is also reflected by judicial warnings that one should not readily treat deficiencies of memory as being necessarily equivalent to incapacity.[52] It is submitted that the better way of understanding the third requirement is that the testator needs to at least have some degree of mental capacity to at least know who his beneficiaries are and can appreciate their claims to his property.

28 Furthermore, it is important to consider that a testator should also have the capacity to understand and reason the changes in distribution over his subsequent wills.[53] After all, it is a common practice for testators to make several or many wills over their lifetime. Therefore, where the latest disposition is inconsistent with prior dispositions, the courts may adopt a more cautious attitude in considering whether the testator has the capacity to make this disposition. That being said, it is clear that testamentary capacity does not require one to show actual memory of the terms of the previous will since the question has always been about the capacity to understand.[54]

(4) Whether the testator is free from an abnormal state of mind

29 Under the traditional test in *Banks v Goodfellow*,[55] the test is whether the delusion affected only one aspect of a person's judgment,

50 *Ng Bee Keong v Ng Choon Huay* [2013] SGHC 107 at [56].
51 See *Hawes v Burgess* [2013] EWCA Civ 94; [2013] WTLR 453 at [57] and [60].
52 *Ng Bee Keong v Ng Choon Huay* [2013] SGHC 107 at [60]; *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [39].
53 Kenneth I Shulman *et al*, "*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity" (2017) 95(1) *Canadian Bar Review* 252 at 258; see also *Bailey v Bailey* (1924) 34 CLR 558 at 571.
54 See Lewison LJ's decision in *Simon v Byford* [2014] EWCA Civ 280 at [41] and *Goss-Custard v Templeman* [2020] EWHC 632 (Ch) at [136].
55 (1870) LR 5 QB 549.

and that it must operate at the particular time when the will was being executed.[56] A delusion is judicially defined as "a fixed and incorrigible false belief which the victim could not be reasoned out of".[57]

30 As the learned authors of *Williams, Mortimer & Sunnucks* explained as follows:[58]

> Delusion has been variously defined, but to almost every definition some objection can be raised. Perhaps the best legal test for determining whether delusion is present in a person's mind is this: 'You must of necessity put to yourself this question and answer it, "Can I understand how any man in possession of his senses could have believed such and such a thing?" And if the answer you give is "I cannot understand it", then it is of the necessity of the case that you should say that the man is not sane' (*Boughton v Knight* (1873) LR 3 PD 64 at 68).

31 According to the traditional test, that delusion must be so severe that he is unable to exercise proper judgment in disposing his property reasonably or take a rational view of the matters to be considered in making a will.[59] That delusion must be due to some mental disorder and to have affected the particular disposition that a party is seeking to set aside.[60] It is also clear that a mere mistaken belief would not satisfy this high bar.[61]

32 The focus on delusions is rightly criticised because it does not take into account a wider range of mental disorders, and also the practical difficulties of distinguishing between a testator making an ill-judged assessment of a possible beneficiary's character and where he holds a completely irrational belief so as to be considered delusional.[62] For instance, a schizophrenic testator was found to have testamentary capacity in leaving his entire estate to the Vegetarian Society even when he was not a vegetarian.[63] Furthermore, it is not easy to draw a distinction between delusions and mere capricious behaviour. As a court once

56 See also the Privy Council's decision of *William Edward Arthur Swan v Marischal Phillips Huntington* [1967] UKPC 12.

57 *Bell v Fulton* (1942) 66 CLR 295 at 337, *per* Williams J; see also *Boughton v Knight* (1873) LR 3 P & D 64 at 68.

58 *Williams, Mortimer & Sunnucks – Executors, Administrators and Probate* (Alexander Learmonth *et al* gen eds) (Sweet & Maxwell, 21st Ed, 2018) at para 10-25; see also *Clitheroe v Bond* [2020] EWHC 1185 (Ch) at [160].

59 *Ng Bee Keong v Ng Choon Huay* [2013] SGHC 107 at [61]–[63].

60 *Halliday v Shoesmith* [1993] 1 WLR 1 at 9B; see also *Kostic v Chaplin* [2007] EWHC 2298 (Ch) and *Walters v Smee* [2008] EWHC 2029 (Ch).

61 *Goss-Custard v Templeman* [2020] EWHC 632 (Ch) at [142]–[143].

62 John Ross Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 18th Ed, 2016) at para 3-004.

63 *Vegetarian Society v Scott* [2013] EWHC 4097 (Ch); [2014] WTLR 525.

observed, "the same acts which would constitute insanity in one eccentric individual might not do so in another".[64]

33 It is useful at this juncture to point out the differences here between the traditional *Banks v Goodfellow* test and how it has been restated in the Singapore High Court's decision of *George Abraham*. Under the Singaporean restatement in *George Abraham*, the focus is no longer just on the issue of delusions since it is now treated as only an example of an abnormal state of mind. This is in recognition of the fact "that psychiatric medicine has come a long way since 1870 in recognising an ever-widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a person of the power of rational decision-making, quite distinctly from old age and infirmity".[65]

34 In the English High Court decision of *Re Key; Key v Key*[66] ("*Re Key*"), Briggs J also acknowledged that bereavement could also impair one's testamentary capacity. In Singapore, this was also mirrored in the case of *Yeo Henry* where Ang SJ was prepared to find that severe depression could in an appropriate case qualify as a mental disorder that was capable of depriving the testatrix of the power of rational decision-making.[67] However, having extensively reviewed the facts of the case, the court found that the testatrix's depression was not so severe that it would have caused her to lose testamentary capacity.[68]

35 Now that we considered the elements in the *Banks v Goodfellow* test, we would need to discuss the rule in *Parker v Felgate and Tilly*[69] ("*Parker v Felgate*"), which covers the situation where the testator loses his mental capacity between the moment he instructs his lawyers and the moment when he executes his will.

64 *Mudway v Croft* (1843) 3 Curt 671; 163 ER 863 at 866. See also Brian Sloan, *Borkowski's Law of Succession* (Oxford University Press, 3rd Ed, 2017) at p 77.

65 *Re Key; Key v Key* [2010] WLR 2020 at [95]. The restatement here is to be preferred over the English Court of Appeal's paraphrasing in *Burns v Burns* [2016] EWCA Civ 37, where the court unfortunately adopted the same terminology of "insane delusions".

66 [2010] WLR 2020; [2010] WTLR 623.

67 *Yeo Henry v Yeo Charles* [2016] SGHC 220 at [83]. It should also be noted that the court cautioned against the use of the word "mood" or references to "mood state" changes since it runs the risk of understating what is required to impugn the testator's testamentary capacity. *Cf* the Malaysian High Court's decision in *Manuel Frank Simon v Jean Sharin a/p DI Williams* [2008] 7 MLJ 290 at [17].

68 *Yeo Henry v Yeo Charles* [2016] SGHC 220 at [167].

69 (1883) 8 PD 171.

C. *Rule in* Parker v Felgate and Tilly

36 The general principle is that the testator must have testamentary capacity at the point in time when the will is executed. However, as with most rules in the law, there will be exceptions. In this case, the exception is when the testator loses his faculties in between the moment he gave instructions to the lawyers and when he executes his will. This exception is based on the reasoning that the will was prepared in accordance with instructions given by a testator when he was of sound mind.

37 The exception is actually known as the rule of *Parker v Felgate*. It was recently affirmed and restated in the English Court of Appeal's decision in *Perrins v Holland*.[70] In that case, Moore-Bick LJ explained that when the testator loses some of his faculties between giving instructions and executing the will, the court has to be satisfied of the following elements before deciding that the will is valid:[71]

> (i) whether at the time he gave the instructions he had the ability to understand and give proper consideration to the various matters which are called for, that is, whether he had testamentary capacity, (ii) whether the document gives effect to his instructions, (iii) whether those instructions continued to reflect his intentions and (iv) whether at the time he executed the will[,] he knew what he was doing and thus have sufficient mental capacity to carry out the juristic act which that involves.

38 The rule of *Parker v Felgate* is justified for two reasons. First, the fact that the courts are more inclined towards upholding the principle of testamentary freedom. Second, the courts do recognise that the testator does not have any further opportunity to give expression to his wishes.[72]

D. Understanding mental capacity in the context of testamentary capacity

39 From the above discussion, we outlined the basic principles of testamentary capacity, but increasingly the courts have been analysing testamentary capacity by making references to mental capacity. At common law, while there has not been a universally accepted definition of mental capacity, it has been described as referring to a person's mental condition that he must possess for his decisions to be considered

70 [2011] Ch 270; [2010] EWCA Civ 840; [2010] WTLR 1415. *Parker v Felgate and Tilly* (1883) 8 PD 171 is also endorsed in Singapore, see the High Court's decision in *Rajaratnam Kumar v Estate of Rajaratnam Saravana Muthu* [2010] 4 SLR 93 at [59].

71 *Perrins v Holland* [2011] Ch 270; [2010] WTLR 1415; [2010] EWCA Civ 840 at [55].

72 *Perrins v Holland* [2011] Ch 270; [2010] WTLR 1415; [2010] EWCA Civ 840 at [23].

autonomous and valid.[73] It is said to be relative to the particular transaction and the legal instrument concerned.[74]

40 Yet, the usage of legal terms such as "testamentary capacity" and "mental capacity" interchangeably has resulted in unnecessary confusion. For instance, in *Chee Mu Lin Muriel v Chee Ka Lin Caroline*[75] ("*Muriel Chee*"), the Singapore Court of Appeal stated that whether the testator had the mental capacity to understand the nature of the will and its consequences "is only one element of testamentary capacity and this element is not necessarily determined by the existence of some form of mental impairment".[76] In support of this proposition, the court then cited the *Banks v Goodfellow* decision where Cockburn LJ explained[77] that a testator's mental powers may be reduced below the ordinary standard, but he may still retain intelligence to understand and appreciate the testamentary act.[78]

41 One should view the Court of Appeal's statement on mental capacity being an element of testamentary capacity with some caution. It should not be interpreted to suggest that there is no need for a sign of mental impairment for a court to find that there is no mental capacity. The court is only suggesting that a mental impairment may have impaired someone to have a less than ordinary standard of mental capacity. However, that does not immediately imply that the person is mentally incapacitated to the extent that he cannot understand the act and its consequences. In other words, it remains a question of degree. The testator's mental impairment must be to such a degree and extent that he can truly be said to have no mental capacity to understand the nature of a will.

42 This interpretation is also consistent with the Court of Appeal's view of the principles that can be found in the Mental Capacity Act[79]

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73 See for instance *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [27].

74 For a good summary of the existing principles, see *Fehily v Atkinson* [2017] Bus LR 695 at [76]–[103]. See also *Gibbons v Wright* (1954) 91 CLR 423 at 438, *per* Dixon CJ, Kitto and Taylor JJ and *Hoff v Atherton* [2003] EWCA Civ 1554; [2005] WTLR 99 at [33].

75 [2010] 4 SLR 373.

76 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [39]. This flawed reasoning is not exclusive to the Singapore courts. See also *Re Loxston; Abbott v Richardson* [2006] EWHC 1291 (Ch) where Nicholas Strauss QC (sitting as a deputy High Court judge) introduced (at [187(5)]) a fifth element that the testator should have the mental capacity to make decisions which take into account the relevant property, persons and circumstances, and arrive at a "rational fair and just" testament.

77 *Banks v Goodfellow* (1870) LR 5 QB 549 at 566.

78 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [39].

79 Cap 177A, 2020 Rev Ed.

("MCA"). The Court of Appeal noted that the MCA also makes it plain that the medical condition establishing the impairment does not conclude the matter *per se*, and that there was a further step in the inquiry where the court must ask if the medical condition has the effect of preventing the person from making the decision.[80]

43 Putting the MCA's statutory definition of mental incapacity aside for a moment, it is questionable as to whether mental capacity as an element itself fits within the essential requisites of testamentary capacity. If it is indeed a separate element, then where does it fall within the four essential prerequisites under the *Banks v Goodfellow* requirements? The court in *Muriel Chee* fails to explain this curious proposition.

44 Looking at the four *Banks v Goodfellow* requirements, it is difficult to see how a person without mental capacity can satisfy these requirements. Would a mentally incapacitated person understand the nature and consequences of his act in executing a will? A mentally incapacitated person may not understand the extent of property that is being disposed. He may not know who his beneficiaries are and appreciate their claims. He cannot be said to be free from an abnormal state of mind (*eg*, delusions) that may distort his feelings.

45 It is therefore difficult to see if an appropriate distinction could be drawn between the concepts of mental capacity and testamentary capacity.[81] As Briggs J noted in *Re Key*[82] the test that has emerged out of decisions such as *Banks v Goodfellow*[83] is "primarily about the *mental capacity* to understand or comprehend" [emphasis added]. Hence, mental capacity should not be seen as a separate legal element in the test. A theoretical distinction between the two concepts is no longer useful, since the *Banks v Goodfellow* requirements is basically an inquiry as to the testator's mental capacity in executing the will.[84]

46 If theoretically speaking, the concepts of mental capacity and testamentary capacity are not that different, does the same logic apply to the statutory concept of mental capacity as embedded in the MCA? In the next section of this paper, I will explain why the statutory concept of

80 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [45].

81 There is at least one leading textbook on the law of succession that has treated the terms "mental capacity" and "testamentary capacity" interchangeably, with the discussion of it primarily focused on the term "mental capacity". See G E Dal Pont & K F Mackie, *Law of Succession* (LexisNexis, 2nd Ed, 2017) at paras 2.2–2.20.

82 *Re Key; Key v Key* [2010] WLR 2020; [2010] WTLR 623 at [96].

83 (1870) LR 5 QB 549.

84 See *Goss-Custard v Templeman* [2020] EWHC 632 (Ch) at [135(i)].

mental capacity in the MCA should not be automatically equated with the common law's conception of testamentary capacity.

III. The Mental Capacity Act and its relevance

47 It is certainly true that the MCA cannot retrospectively apply to wills executed before the enactment date since Parliament is presumed not to alter the law applicable to past events and transactions unless a contrary intention appears otherwise. That being said, what about wills that have been executed after the MCA has been enforced?

48 In discussing the relationship between the MCA test for mental capacity and the common law tests for testamentary capacity, one needs to first address two questions. First, we need to analyse the similarities and differences between the MCA test for mental capacity and the common law test for testamentary capacity. Second, we need to consider if the MCA was ever intended to displace the common law rules of testamentary capacity.

A. *Comparing the Mental Capacity Act and the* Banks v Goodfellow *tests*

49 Before conducting a comparative analysis between the MCA test for mental capacity and the common law tests for testamentary capacity, let us briefly recall what is the statutory test for mental capacity under the MCA. There are actually two components in this statutory test.[85] First, it must be shown that P may be unable to make a decision due to an impairment of, or a disturbance in the functioning of, P's mind or brain. This is known as the "clinical component". Second, it has to be further shown that P is unable to make a decision for himself in relation to a matter at a material time. It is at this stage where the severity of P's impaired functioning due to his mental impairment is taken into account. This is known as the "functional component".

50 The MCA also defines when a person is said to be unable to make a decision for himself. Section 5 states that a person is unable to make a decision for himself if he is unable:

(*a*) to understand the information relevant to the decision;

(*b*) to retain that information;

85 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [29].

(*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).

51 For the avoidance of doubt, s 5(4) of the MCA explicitly states that the information relevant to a decision as covered under s 5(1) would include information about the reasonably foreseeable consequences of either deciding one way or another, and also information on the consequences of failing to make such a decision.

52 Now that we introduced the statutory test for mental capacity, we can now address the question of whether both the common law and statutory tests are similar. In respect of the underlying philosophies, it has been observed that the common law test for testamentary capacity is generally consistent with the MCA. The MCA's underlying philosophy emphasises the individual's autonomy and the right to decide for himself.[86] The common law definition does also uphold the value of autonomy in so far as it seeks to uphold the principle of testamentary freedom.

53 Furthermore, whether practical assistance was rendered by other persons is a relevant broad consideration for both the MCA and the common law tests. Under s 3(3) of the MCA, a person is presumed able to make decisions unless all practicable steps to help him do so were unsuccessful. Section 5(2) of the MCA further states that a person should not be deemed as unable to understand information relevant to a decision if he is able to understand an explanation given to him in a way that is appropriate to his circumstances. Under the common law, a court will consider if the testator was properly advised by his solicitor. Hence, in *Muriel Chee*, where the testator was held to have lacked testamentary capacity to execute the will, the Court of Appeal considered that the solicitor provided inadequate assistance by merely reading a will line by line to a testator who was suffering from the onset of dementia.[87]

54 In respect of the specific limbs of both the common law and the MCA tests, it is submitted that both tests are also largely similar. If we look at the four *Banks v Goodfellow* requirements, the first requirement of the testator understanding the nature of the act and its consequences is the same as the functional component of the MCA test. The fourth requirement that the testator must be free from an abnormal state of mind is consistent with the clinical component of the MCA test, and also

86 See for example *Re S* [2010] 1 WLR 1082 at [51]–[53]; see also the Singapore High Court's decision in *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [27].

87 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [53]–[60].

overlaps with the functional component as well. As for the requirements that the testator knows the extent and nature of property disposed, and also who his beneficiaries are and can appreciate their claims to his property, both these requirements are covered under s 5 of the MCA as "information relevant to a decision".

55 While both tests are largely similar, it is submitted that they are *not exactly the same*. There are at least four aspects in which both tests differ.

56 First, the MCA's test is prospective and forward-looking. It is focused on proxy (as opposed to substituted) decision-making in the best interests of P moving forward. A plain reading of s 19 of the MCA suggests that the courts can only make declarations on P's present capacity as opposed to considering whether P had made decisions in the past.[88] However, the common law test for testamentary capacity is retrospective in nature, where the court has to consider whether the testator had mental capacity when he was alive.

57 Second, in respect of the allocation of the burdens of proof, the common law test for testamentary capacity differs from the MCA. The Singapore High Court in *Wong Meng Cheong v Ling Ai Wah*[89] pointed out that one of the MCA's key statutory principles is that a person is assumed to have capacity to make the decisions unless it is established otherwise.[90] If the MCA applies to the context of execution of wills, then it is presumed that the person has mental capacity to execute the will. In the common law tests of testamentary capacity, it is the propounder of a will who bears the legal burden of proving that the testator had mental capacity when executing the will.[91]

58 That being said, there is actually very little difference between both tests when one considers its practical operation. This is because testamentary capacity is presumed so long as the will is established in ordinary circumstances where the testator was not known to be suffering from any kind of mental disability.

88 Allen Sng Kiat Peng & Tan Kah Wai, "The Deputyship Regime under Singapore's Mental Capacity Act: An Introduction" (2020) 32 SAcLJ 167 at [40]–[41].
89 [2012] 1 SLR 549.
90 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [30].
91 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [30].

59 Third, the *Banks v Goodfellow* test also makes no reference to the issue of retaining information which is present in one of the statutory limbs under s 5 of the MCA.[92]

60 The final key difference is the question of undue influence. As Gary Chan observed in a case comment,[93] while under the MCA, a case of presumed undue influence could be a factor that is taken into account in proving the lack of mental capacity. However, in the law of probate, the courts and academics insisted that the undue influence required to invalidate a will must be actual undue influence.[94] In other words, unlike in the MCA, undue influence simply cannot be presumed in the probate context. This is understandable since applying the test for presumed undue influence in the probate context may invalidate wills made in favour of those whom the testators hold in regard or affection, which is precisely why the testator makes a will in the first place.[95]

B. *Does the Mental Capacity Act apply to the context of wills?*

61 The differences between the *Banks v Goodfellow* test and the MCA, as stated above, are not so significant as to immediately rule out the prospect of the MCA applying to the execution of wills.[96]

62 In Singapore, there has been a recent decision by the High Court which applies the MCA's principles to a case involving the execution of a will. In *BUV v BUU*,[97] the dispute concerned *inter alia*, an application by the plaintiff for an order that his mother be found incapable of conducting the civil suit against him for orders relating to moneys held in a joint bank account. The plaintiff also applied for the mother's will to be set aside as part of the MCA application. Aedit Abdullah J found that the mother's mental abilities fell short of the statutory test in determining whether

92 Alex Ruck Keene & Annabel Lee, "Testamentary Capacity" [2013] *Elder Law Journal* 272 at 276.

93 Gary Chan Kok Yew, "Assessing Mental Capacity: *BUV v BUU* [2019] SGHCF 15" (2020) 32 SAcLJ 287 at [36]–[40].

94 See for instance *ULV v ULW* [2019] 3 SLR 1270 at [69]–[71]. See also John Ross Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 18th Ed, 2016) at para 3-032. Roger Kerridge, *Parry & Kerridge: The Law of Succession* (Sweet & Maxwell, 13th Ed, 2016) at para 5.54.

95 *ULV v ULW* [2019] 3 SLR 1270 at [69(b)], citing Roger Kerridge, *Parry & Kerridge: The Law of Succession* (Sweet & Maxwell, 13th Ed, 2016) at para 5.54.

96 See *BUV v BUU* [2020] 3 SLR 1041.

97 *BUV v BUU* [2020] 3 SLR 1041.

she was able to make a decision for herself.[98] The court thus declared the mother lacked the mental capacity to litigate.

63 In Abdullah J's judgment, he noted that while this was not strictly a case involving a propounder of a will seeking to prove its validity, it followed from his findings as to the mother's lack of capacity at the material time and the presence of undue influence that she did not possess the testamentary capacity in relation to the will.[99] Hence, the court granted the plaintiff's prayer for the will to be set aside for lack of testamentary capacity. It is pertinent to note that in determining the validity of the will, the court made no reference to *Banks v Goodfellow*.[100]

64 With respect to the court in *BUV v BUU*,[101] if it is indeed suggesting that the MCA principles could be immediately applied to the context of wills, that suggestion is doubtful.[102] Just because the underlying principles and requirements are similar, it does *not* immediately entail that the MCA applies to the context of assessing testamentary capacity for the execution of wills. In fact, there is sufficient evidence to suggest that the MCA's statutory test was not intended to replace the common law principles of testamentary capacity here in Singapore.

65 Let us first look at the MCA itself. It is worth noting that the MCA clearly spells out donees that do not have the power to make a will for P. The concept of wills has also been mentioned under s 23(1)(*i*) where the powers under s 20 of the MCA with respect to proxy decision-making on P's property and affairs will include "the execution for P of a will".[103] That being said, this section cannot be read to suggest that the test for mental capacity under MCA's s 5 will automatically apply to the issue of testamentary capacity. Instead, the section has a much limited scope. What s 23 is concerned with is the court's power to make or authorise the making of wills on behalf of persons who have already lacked capacity. The section does not concern itself with ascertaining whether a particular testator had capacity when an actual will was made.[104] It is also evident that when enacting s 23, Parliament clearly intended that the power to

98 For Singapore's Mental Capacity Act (Cap 177A, 2010 Rev Ed), that will be s 5. The English equivalent is s 3 of the Mental Capacity Act 2005 (c 9).

99 [2020] 3 SLR 1041 at [115]–[116].

100 (1870) LR 5 QB 549.

101 [2020] 3 SLR 1041.

102 In *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2009] SGHC 229, Lai Siu Chiu J made the observation (at [124]) that there was doubt as to whether the UK Mental Capacity Act 2005 (c 9) had any relevance to wills made outside the statutory jurisdiction.

103 The Singapore equivalent is s 23(1)(*i*) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) read together with s 20.

104 *Scammell v Farmer* [2008] EWHC 1100 (Ch) at [25].

make statutory wills should be exercised "very, very carefully and very stringently" and not something that the courts would enter into lightly.[105]

66 This brings us to an even more important point – the MCA was *never* intended to apply wholesale to the context of wills. It is important to note that s 4(1) of the MCA states that the mental capacity test under the statute should only be applied "for the purposes of this Act". This indicates that the test is only to be applied in relation to matters specifically arising under the MCA.[106] From a reading of the entire act itself, it is not patently clear that the MCA was intended to affect a retrospective decision by a court as to whether a testator had capacity to make his own will.[107] Furthermore, in cases where Parliament's intention remains ambiguous, Parliament is assumed to intend the most continuity with the pre-existing law.[108]

67 As the Singapore Court of Appeal rightly pointed out in *SGB Starkstrom Pte Ltd v Commissioner for Labour*, the MCA's prevailing purpose is to govern the conferment of legal authority on third parties to manage the matters of mentally incapacitated persons.[109] The conferment of such legal authority will be through the instruments of either a lasting power of attorney or a court-appointed deputy.

68 The MCA is thus applicable as a general statute across all situations where a third person purports to act on behalf of a mentally incapacitated individual.[110] That does not mean it applies across all situations where a person may be alleged to lack mental capacity. Had Parliament wished for this test to be imposed in assessing the substantive validity of the testator's capacity in executing a will, then such intentions should either be explicitly set out in the MCA itself or be reflected through directly amending the Wills Act[111] instead.

69 Such an analysis, as a matter of what the law currently is, leads to an unsatisfactory result. Practically speaking, it is difficult to justify why there should be two tests – one for testators that fall within the coverage of the MCA, and one for testators who fall outside the MCA's scope – when

105 *Parliamentary Debates, Official Report* (15 September 2008), vol 85 at col 151 (V Balakrishnan, Minister for Community Development, Youth and Sports).
106 *Kicks v Leigh* [2014] EWHC 3926 (Ch) at [64].
107 This was also the English High Court's conclusion in *Walker v Badmin* [2014] EWHC 71 (Ch); [2015] COPLR 348 at [12]–[13].
108 *Re P* [2010] Ch 433 at [34].
109 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [25].
110 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [25].
111 Cap 352, 1996 Rev Ed.

both tests are embarking on the same inquiry, that is whether a testator is of sound mind to execute the will?

IV. Legal reform

70 If the MCA's statutory test currently does not replace the common law test for testamentary capacity, does this mean the MCA is completely irrelevant? On the contrary, it is submitted that just because the assessment of testamentary capacity for wills is outside the MCA's scope, does not immediately mean that it forecloses the courts from referring to the MCA's statutory test, and to use it as a point of reference in formulating a new set of common law rules in determining testamentary capacity.[112] In this section, we will first look at the problems of the *Banks v Goodfellow* principles and then consider the possible reform options.

A. *Problems with the* Banks v Goodfellow *Test*

71 There are at least three levels of criticism as to why the current *Banks v Goodfellow* test is unsatisfactory. First, the test does not make it clear that it is ultimately a question of capacity rather than actual knowledge. Contrary to the restatement in *George Abraham*, the *Banks v Goodfellow* test does not demand that the testator actually understand the nature of the act, nor does it demand that the testator should actually know the extent of property he is disposing, or who his beneficiaries are.[113] The problem with the wording in *Banks v Goodfellow*[114] is that it does not explicitly state so. That is why medical practitioners, such as in the case of *Yeo Henry*, adopted the incorrect view that the testatrix did not satisfy the requirement of understanding the extent of her property due to a lack of documentation that stated that she was actually aware of the extent of her estate.[115] The difficulty is also compounded if solicitors

112 See also Martyn Frost, Stephen Lawson & Robin Jacoby, *Testamentary Capacity: Law, Practice and Medicine* (Oxford University Press, 2015) at para 2.84 where the authors assert that there is "no reason why factors from ss 2 and 3 of [the UK Mental Capacity Act 2005 (c 9)] cannot be applied to develop the application of *Banks v Goodfellow*, within the existing framework of the test, where to do so the development would fit more closely with modern circumstances and knowledge."

113 *Cf* Kelly Purser, "Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?" (2015) 38(3) UNSW Law Journal 854 at 864 where the author questions the relevance of a modern testator's ability to understand the nature and extent of his financial assets, in light of increasingly complex wealth management mechanisms.

114 (1870) LR 5 QB 549.

115 *Yeo Henry v Yeo Charles* [2016] SGHC 220 at [61]. Part of the problem is that the legal profession in some jurisdictions may have given little uniform guidance to the medical profession on how testamentary capacity is to be assessed. See, *eg*, Kelly

(cont'd on the next page)

may be unfamiliar with the *George Abraham* test, and not provide proper guidance when making the necessary requests for assessing the would-be testator's capacity and ability to make a will.

72 To argue that the test concerns actual knowledge as opposed to the potential of knowledge would be to adopt an "over-literal approach to the judicial statement".[116] The question, at all times, is *whether he has the capacity* to do so. To suggest that the testator should have actual knowledge of these things is to conflate the test for testamentary capacity with the question of whether the testator has actual knowledge and approval of the will's contents. The wording in *Banks v Goodfellow*[117] and even its subsequent restatement in *George Abraham* do give rise to such unnecessary confusion.

73 Second, it has been questioned by, amongst others, the Law Commission of England and Wales ("Law Commission")[118] as to whether the *Banks v Goodfellow* test is appropriate given its focus is only on disorders of the mind and delusions. According to the Law Commission, the *Banks v Goodfellow* test does not reflect the significance of dementia and a wide range of other factors that could have the potential to affect a person's capacity.[119] The Law Commission's critique is less potent when we look at the legal position in Singapore. With the High Court's restatement in *George Abraham* now deliberately framing the fourth element as a testator being free from an "abnormal state of mind", as opposed to just delusions, the scope has been widened to include mental impairments, and reflects to some extent, a more modern understanding of testamentary capacity.

74 Third, the test is prone to mislead especially given its archaic and imprecise language. While the *Banks v Goodfellow* test is a common law test capable of being influenced by contemporary attitudes,[120] there remains a real risk that practitioners may blindly subscribe to Cockburn CJ's judgment as if his words should be interpreted like a statute. That was what happened in *Hoff v Atherton*[121] where counsel based his analysis on

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Purser, "Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?" (2015) 38(3) UNSW Law Journal 854 at 875–876.

116 As noted by Peter Gibson LJ in *Hoff v Atherton* [2003] EWCA Civ 1554 at [34].

117 (1870) LR 5 QB 549.

118 Law Commission of England and Wales, *Making a Will* (Consultation Paper 231). See the Law Commission's Consultation Paper at <https://www.lawcom.gov.uk/project/wills/> (last accessed 3 November 2021).

119 Law Commission of England and Wales, *Making a Will* (Consultation Paper 231) at para 2.41.

120 *Perrins v Holland* [2009] EWHC 1945 (Ch); [2009] WTLR 1387 at [40], *per* Lewison J.

121 [2003] EWCA Civ 1554; [2005] WTLR 99.

the literal wording of the *Banks v Goodfellow* test and focused his attention on whether the testator actually understood the contents of the will. The Court of Appeal rightly pointed out that the test is really whether the testator was *capable* of understanding the disposition. It is not a test of his actual understanding or a test of memory. The archaic language of the test is such that experts would have difficulty drafting accurate and useful capacity assessments that are necessary in cases of probate disputes.[122]

B. *What should be the new test?*

75 If the *Banks v Goodfellow* requirements are unsatisfactory, then there should be some reform, whether it is enacted in statute or common law. It is always desirable for the codification of the common law rules to lend greater certainty in this area of law. As the Law Commission also noted, placing the *Banks v Goodfellow* test on a statutory footing will enable the test for capacity to be recast in modern terms that are more in line with current psychiatric thinking.[123]

76 The Law Commission's recommendation is to adopt the Mental Capacity Act test for testamentary capacity while outlining the specific elements of capacity necessary to make a will be outlined in their Code of Practice.[124] The recommendation is generally sound. The inquiry on testamentary capacity here is fundamentally a question of mental capacity in respect of the specific decision of disposing one's estate through a will.

77 However, the real issue is that any transplantation of the MCA's principles to the law on probate and testamentary capacity must be calibrated. This is because there remains some difficulty in reconciling the law on testamentary capacity in probate law with the principles in the MCA. For instance, it is questionable whether the *Parker v Felgate* rule can still be maintained if the MCA's test were to apply to the general probate law. As one would recall, the rule retrospectively deems the relevant time for assessing mental capacity is when a person gives instructions on the execution of the will, but loses such capacity in between the time he gives instructions and when the will is being executed. Under the MCA,

122 Kenneth I Shulman *et al*, "*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity" (2017) 95(1) *Canadian Bar Review* 252 at 253.

123 Law Commission of England and Wales, *Making a Will* (Consultation Paper 231) at para 2.76 but, *cf*, Martyn Frost, Stephen Lawson & Robin Jacoby, *Testamentary Capacity: Law, Practice and Medicine* (Oxford University Press, 2015) at para 2.84 where the authors contend that by not applying the test in a rigid way, that test has already been adapted to 21st century circumstances.

124 Law Commission of England and Wales, *Making a Will* (Consultation Paper 231) at para 2.66–2.73.

it seems that the decision to execute this will would be challenged for lack of mental capacity, but the *Parker v Felgate* rule provides for this exception. Hence, any route to reform must consider whether this rule (which practitioners have always relied on) should be kept. It is submitted that in light of the *Parker v Felgate* rule and its practicality, the rule should be kept, but as an exception.

78 While the MCA's principles should be the lodestone for legal reform, the issue is who should effect such reform? One may suggest leaving it to the common law, which is exactly what the Canadian province of British Columbia chose to do, in the hopes that case law can respond to emerging trends and new fact patterns.[125] There is also no principled objection as to why the common law test of capacity to make a will could not evolve to incorporate elements in the MCA's statutory tests. However, given the lack of clarity and certainty in this area of the law, there is still more than an arguable case for statutory reform. After all, it is more likely than not that if a case is on the testator's testamentary capacity, judges or practitioners will still refer to the *Banks v Goodfellow* test wholesale without giving much thought to how it interacts with the MCA, and *vice versa*. A statutory codification of the rules does not immediately equate to setting the law in stone if the codification itself allows for some flexibility. As noted by the Law Commission, a statutory codification has the advantage of enabling the test to be recast in simple, modern terms that are consistent with current psychiatric thinking.[126]

79 That being said, even if Parliament is not minded to introduce legislation to statutorily codify the *Banks v Goodfellow* test, the restatement that I now propose below could also be applied as a new restatement of the common law principles. My proposed restatement is as follows:

> Notwithstanding the enactment of the Mental Capacity Act, a testator has testamentary capacity if he is, at the time of executing the will, capable of understanding, retaining, using and communicating the following information:
>
> (a) the general composition of the will and the consequences of executing or omitting to execute it;
>
> (b) the general extent of property which he is disposing; and
>
> (c) the identity of his beneficiaries and can appreciate their claims to his property.

125 British Columbia Law Institute, "Report on Common-Law Tests of Capacity" (BCLI Report No 73, 2013) at pp 42–43. For a good summary of the report, see Holly Mieville-Hawkins, "What did the Commonwealth Ever Do for Us?" [2014] *Elder Law Journal* 205.

126 Law Commission of England and Wales, *Making a will* (Consultation Paper 231) at para 2.76.

> The will remains valid even if the testator does not satisfy the requirements at the time of executing the will, provided that he had satisfied these requirements when he had given these valid instructions to counsel.

80 It should be noted that this new restatement differs from the *Banks v Goodfellow* elements in the following ways. First, the new test borrows the elements from s 5 of the MCA, in so far as emphasising that the query is whether a testator is capable of "understanding, retaining, using and communicating" the information. It also replaces the delphic wording of "general nature of the act" in the first element of *Banks v Goodfellow* with a more specific requirement – that the testator should be capable of understanding the general elements of the will's composition and the consequences of executing it. The rule in *Parker v Felgate* is also preserved as an exception to the general rule that a testator must possess testamentary capacity at the point of executing the will.

81 It does seem rather obvious from this new restatement that I removed the requirement of "delusions" or an "abnormal state of mind". As we have seen from the courts' elucidation of the three other *Banks v Goodfellow* requirements, the inquiry should take into consideration the element of "delusion". It is, strictly speaking, superfluous to suggest that the testator must suffer from an abnormal or distorted state of mind, if such a state of mind is already capable of diminishing his mental capabilities to such an extent that he would not satisfy the three requirements above. It is also clear that the new restatement should reflect the fact that the MCA was enacted to replace the Mental Disorders and Treatment Act,[127] where the query was whether the person "who is alleged to be mentally disordered is or is not of unsound mind and incapable of managing himself and his affairs".[128]

82 However, to be clear, the removal of the fourth limb of *Banks v Goodfellow* does not mean that mental impairments are irrelevant. In fact, the restatement is not entirely complete. It is submitted that there should be an additional section in the Wills Act[129] that should assist the courts in determining testamentary capacity.

> In determining whether the testator has testamentary capacity, the court shall have regard to the following circumstances:
>
> > (a) the testator suffers from a mental impairment before the execution of the will;

127 Cap 178, 1985 Rev Ed.
128 Mental Disorders and Treatment Act (repealed) (Cap 178, 1985 Rev Ed) s 3(1).
129 Cap 352, 1996 Rev Ed.

(b) the rationality of the terms and identities of the beneficiaries; and

(c) any other suspicious circumstances surrounding the execution of the will.

83 This additional section only codifies the existing position at common law and should not be seen as controversial. What I seek to do here is to codify or restate the law on wills in a more modern form. It is not intended to bring about a change that revolutionises the law. It is also for this reason why there is no statutory presumption of mental capacity for the execution of wills, unlike the one that we have seen in the MCA. To assert otherwise would be too drastic a change. One must be mindful that the true purpose for any restatement is to only readapt the trite but antiquated formulas in *Banks v Goodfellow*[130] to the 21st century, at a time where our understanding of mental capacity is no longer as rudimentary as when Cockburn CJ delivered his judgment some 150 years ago.

V. Conclusion

84 In this article, I examined how the courts applied the traditional *Banks v Goodfellow* test in probate disputes, and further considered whether the MCA is relevant in addressing the question of whether someone has testamentary capacity. As a matter of what the law currently is, while the MCA test simply cannot be applied to probate disputes wholesale, it remains a key relevant tool for jurisdictions to consider when evaluating and reforming this particular area of the law on wills and probate.

130 (1870) LR 5 QB 549.