**Capacity Evidence In Will and Trust Contests**

1. **INTRODUCTION**

 Litigation contesting the validity of wills and trusts on grounds of alleged incapacity and/or undue influence has been on the rise for many reasons, including “the growing number of Americans who are living through the age of risk for dementing illnesses, such as Alzheimer’s Disease,” Sparr, *Assessing Competency To Make A Will*, Am. J. Psychiatry, 149:169-174 (1992), as well as the prevalence of blended and geographically dispersed families. The cases present common factual scenarios. According to one study:

The typical profile for retrospective challenges to testamentary capacity included a radical change from a previous Will (72%), where undue influence was alleged (56%), in a testator with no biological children (52%), who executed the Will less than a year prior to death (48%). Co-morbid conditions were dementia (40%), alcohol abuse (28%) and other neurological/psychiatric conditions (28%).

Shulman, *Psychiatric Issues in Retrospective Challenges of Testamentary Capacity,* Int. J. Geriatr. Psychiatry, 20:63 (2005). In almost all cases, the capacity of the testator/settlor is a critical issue.

1. **CAPACITY STANDARDS**

 To be valid, a will must be signed with a “sound mind,” Mass. Gen. Laws ch. 190B § 2-501, and a trust must be created with “capacity,” Mass. Gen. Laws ch. 203E § 402, with neither statute defining the capacity required. For a will or a revocable trust executed contemporaneously with a pour over will, testamentary capacity is the governing standard. For an *inter vivos* irrevocable trust, the law is unsettled as to whether the standard is testamentary or contractual capacity. As explained below, courts are likely to adopt the higher standard of contractual capacity for irrevocable *inter vivos* trusts, particularly for complex documents that have significant consequences for the settlor’s finances.

1. **Testamentary Capacity**

 “At the time of executing a will, the testatrix must be free from delusion and understand the purpose of the will, the nature of her property, and the persons who could claim it.” O’Rourke v. Hunter, 446 Mass. 814, 826-27 (2006). The testator must be able “to understand and carry in mind, in a general way, the nature and situation of his property and his relations to those persons who would naturally have some claim to his remembrance[,] . . . [be] free from delusion which is the effect of disease or weakness and which might influence the disposition of his property[,] [a]nd . . . [be able] at a time of execution . . . to comprehend the nature of the act of making a will.” Palmer v. Palmer, 23 Mass. App. Ct. 245, 250 (1986), *quoting* Goddard v. Dupree, 322 Mass. 247 (1948).

“Acting during a lucid interval can be a basis for executing a will. ‘[A] person of pathologically unsound mind may possess testamentary capacity at any given time and lack it at all other times.’” Farnum v. Silvano, 27 Mass. App. Ct. 536 (1989), *quoting* Daly v. Hussey, 275 Mass. 28, 29 (1931), citing Wellman v. Carter, 286 Mass. 237, 247 (1934), Sletterink v. Rooney, 1 Mass. App. Ct. 809 (1973).

1. **Contractual Capacity**

“Testamentary capacity is a less demanding standard than contractual capacity, applicable to deeds or written instruments. . . . “ Adler v. Adler, 83 Mass. App. Ct. 1135, 2013 WL 2450576 (2013). Contractual capacity “requires the ability to ‘understand the nature and quality of the transaction’ and to ‘grasp its significance.’” Id., *quoting* Maimonides School v. Coles, 71 Mass. App. Ct. 240, 251 (2008). In Sutcliffe v. Heatley, 232 Mass. 231 (1919), the Supreme Judicial Court held:

The test in cases of this kind is whether the person executing the instrument had sufficient mental capacity to be capable of transacting the business. If she could not understand the nature and quality of the transaction or grasp its significance, then it was not the act of a person of sound mind. There may be intellectual weakness not amounting to lack of power to comprehend. But an inability to realize the true purport of the matter in hand is equivalent to incapacity. When this is established then a contract is voidable.

Id. (emphasis added).

While a lucid interval might support a finding of testamentary capacity, it may not be a sufficient basis for contractual capacity.

Competence to enter into a contract presupposes something more than a transient surge of lucidity. It involves not merely comprehension of what is ‘going on,’ but an ability to comprehend the nature and quality of the transaction, together with an understanding of its significance and consequences. From a testator we ask awareness of the natural objects of bounty. The choice among those objects may be seen by others as arbitrary, but arbitrariness or capriciousness may be allowed a donor. In the act of entering into a contract there are reciprocal obligations, and it is appropriate, when mental incapacity, as here, is manifest, to require a baseline of reasonableness.

Farnum v. Silvano, 27 Mass. App. Ct. 536, 538 (1989) (emphasis added) (citations omitted).

In Farnum the Probate and Family Court upheld a deed by a 90-year old woman of property for half its fair market value finding that it was done during a lucid interval. The Appeals Court reversed in part because the evidence indicated she did not understand the consequences of the transaction for her finances going forward.

Applied to the case at hand, Farnum could be aware that she was selling her house to Silvano for much less than it was worth, while failing to understand the unreasonableness of doing so at a time when she faced serious cash demands for rent, home care, or nursing home charges. That difference between awareness of the surface of a transaction, *i.e.*, that it was happening, and failure to comprehend the unreasonableness and consequences of the transaction by a mentally impaired person.

Id. (emphasis added).

Krasner v. Berk, 366 Mass. 464 (1974), illustrates well the distinction between testamentary and contractual capacity. The defendant, a physician, entered into a written agreement with a colleague, obligating each to continue to pay one-half the rent and taxes due under their lease even if one of them was “unable to occupy his suite as a result of disability or for any other reason.” The defendant suffered progressive presenile dementia. “Within two weeks after signing the agreement, he consulted a doctor specializing in brain disease, and discussed giving up his practice, and within six months that doctor advised him to give up the practice of medicine. The agreement made was an improvident one for a doctor who was about to consider whether he should give up his practice.” Id., p. 901. The trial court found in favor of the defendant on grounds of incapacity, while the appellate division ordered the finding vacated and judgment entered for the plaintiff. On appeal, the Supreme Judicial Court reversed.

Recognizing that the evidence supported that the defendant appreciated and understood the agreement, the Supreme Judicial Court commented, “We have little doubt that on a record like this one a finding that the defendant had testamentary capacity as distinguished from capacity to contact would be upheld.” Id. A key consideration for contractual capacity is whether the person understands the consequences of the transaction for his own future. The Court quoted with favor the following from the Restatement of contracts:

A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect . . . he is unable to understand in a reasonable manner the nature and consequences of the transaction.

Id. 467-68, *quoting* Restatement 2d: Contracts (Tent. drafts 1-7, 1973) § 18C(1)(a). Applying this standard, the court held that the defendant lacked capacity because he could not appreciate the consequences of agreeing to the condition in the agreement.

1. **CAPACITY STANDARDS APPLIED**

The law is settled that the standard of testamentary capacity governs the validity of wills. O’Rourke v. Hunter, 446 Mass. 814, 826-27 (2006). The law is less clear with respect to trusts.

In Maimonides School v. Coles, 71 Mass. App. Ct. 240 (2008) the appellants argued that the Probate and Family Court should have applied the standard of contractual, not testamentary capacity in its review of a trust signed at the same time as a pour-over will. The Court described the differences between the standards as follows:

The motion judge evaluated Brener’s competence to execute the second trust amendment under the standard for testamentary capacity. The contestant schools (Maimonides, Perkins, and Carroll) argue that the complexity of Brener’s trust required the motion judge to apply the standard for capacity to contract. The capacity to contract requires the ability to transaction business, Krasner v. Berk, 366 Mass. 464, 467 (1974), and more specifically the ability to ‘understand the nature and quality of the transaction’ and to ‘grasp its significance.’ In contract, the standard for testamentary capacity ‘requires ability at the time of execution of the alleged will to comprehend the nature of the act of making a will.’ Palmer v. Palmer, 23 Mass. App. Ct. 245, 250 (1986), *quoting* from Goddard v. Dupree*,* 322 Mass. 247, 250 (1948).

Id., 251.

The court held that testamentary capacity governed based on three factors:

 1. The “trust instruments were not complex, even though they disposed of property worth millions of dollars. They did not require contractual capacity for their intelligent creation and execution.” Id., p. 251.

 2. The trust disposed “of property not during the testator’s lifetime in the manner of a more traditional inter vivos trust, but after death in the manner of a will.” Id.

 3. The pour-over will and trust “comprised ‘parts of an integrated whole.’ Id., *quoting* Clymer v. Mayo, 393 Mass. 754, 765 (1985). In this light, “[t]he use of one standard for mental capacity to execute a pour-over will and another standard to execute a simultaneous revocable inter vivos trust would unnecessarily and impractically risk inconsistent results. Id.

The decision leaves unanswered whether an irrevocable *inter vivos* trust must satisfy the requirements of testamentary or contractual capacity. The decision plainly suggests that the more complex the trust scheme and the greater the impact on the settlor’s finances and affairs for the balance of his or her life, the more likely the court will find contractual capacity to govern.

1. **UNDUE INFLUENCE**

 “Undue influence … creates a situation where the victim’s own free will is destroyed or overcome such that what he does, his action, is contrary to his true desire and free will.” *Howe v. Palmer,* 80 Mass. App. Ct. 736, 740 (2011), *citing* *Neill v. Brackett*, 234 Mass. 367, 369-370 (1920); *Rood v. Newberg*, 48 Mass. App. Ct. 185, 191-192 (1999). “Undue influence involves some form of compulsion which coerces a person into doing something the person does not want to do.” *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 464 (1997). “[T]he standard of proof is demanding. ‘Mere suspicion, surmise or conjecture are not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence.’” *Maimonides School v. Coles,* 71 Mass. App. Ct. 240, 256 (2008) (summary judgment dismissal of undue influence claim upheld), *quoting Neill v. Brackett*, 234 Mass. 367, 370 (1920).

To prove undue influence the complaining heir or beneficiary “must show ‘that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means.” *O’Rourke v. Hunter*, 446 Mass. at 828, quoting from *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass 456, 464 (1997).

"A finding of undue influence requires that the will makes ‘an unnatural disposition,’ i.e., that the testator is caused to act in a way which is contrary to her own untrammeled desire." *McGeoghean v. McGeoghean*, No. 04P-4734EP1, 2009 WL 2230884, at \*5 n.6 (Mass. Super. 2009) (property deed held "an unnatural disposition" in view of donor's promises regarding the property to another child and his reliance thereon).

Not surprisingly, contestants generally allege that the testator was susceptible to undue influence (the second element in the test above) due to the testator’s incapacity or diminished capacity. *See, e.g., Howe v. Palmer*, 80 Mass. App. Ct. 736 (2011)(diminished capacity alleged); *Adler v. Adler*, 83 Mass. App. Ct. 1135, 2013 WL 2450576 (Jun. 7, 2013, Mass. App. Ct.) (Rule 1:28 decision) (incapacity claimed); *In Re Estate of Tang*, 69 Mass. App. Ct. 1115, 2007 WL 2264849 (Aug. 8, 2007, Mass. App. Ct.) (Rule 1:28 decision) (incapacity alleged); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240 (2008) (incapacity alleged).“The condition of a testator’s mind has a material bearing on the question of whether [s]he was in fact susceptible to undue influence.” *Dayton v. Glidden,* 303 Mass. 268, 269 (1939)(physician testimony considered in affirming finding of no undue influence where appellant waived appeal on the issue of alleged incapacity).

1. **CAPACITY EVIDENCE IN WILL AND TRUST CONTESTS**

It has been long established that “only ‘the witnesses to the will, the [treating] physician, . . .  and witnesses who by special skill and experience are qualified as experts in the knowledge and treatment of mental diseases . . .  [may] give their opinions of testamentary capacity.” Maimonides School v. Coles, 71 Mass. App. Ct. 240, Fn.8 (2008) *quoting* May v. Bradlee, 127 Mass. 414, 421 (1879).

An attending physician may offer an opinion only within the scope of his or her competence. *See*, *e.g.*, Old Colony Trust Co. v. DiCola, 233 Mass. 119 (1919) (“the mere fact that a witness is [an attending] surgeon or a physician does not of itself qualify him as an expert in mental diseases”.) *See*, *e.g.*, Estate of Tang, 69 Mass. App. Ct. 1115, 2007 WL 2264849 (2007) (trial judge allowed treating neurologist to testify generally but not as an expert on dementia in light of his lack of specialty training in dementia); Neill v. Brackett, 241 Mass. 534 (1922) (family physician could give his opinion as to the condition of the patient at the relevant time, but not permitted to opine on whether there was such a deterioration in his mental faculties to render him susceptible to being unduly influenced).

The medical records of the testator are themselves often important evidence on the issue of capacity. *See*, *e.g.*, Maimonides School v. Harris Coles, 71 Mass. App. Ct. 240 (2008); Susan W. Paine v. Valerie E. Sullivan, 79 Mass. App. Ct. 811 (2011); Krasner v. Berk, 366 Mass. 464 (1974); In the Matter of the Estate of Fred S. Rosen, 86 Mass. App. Ct. 793 (2014); Boston Safe Deposit and Trust Company v. Florence L. Bacon, 229 Mass. 585 (1918).

The testimony of drafting counsel is often of critical importance. “It is true that in circumstances when medical and other evidence call into question a testator’s capacity, we have relied on the testimony of the drafting attorney in resolving the testamentary capacity issue.” Paine v. Sullivan, 79 Mass. App. Ct. 811, 882 (2011) (*citing* Palmer v. Palmer, 23 Mass. App. Ct. at 251-252 & n.5, 500 N.E.2d 1354 (attorney who prepared simple, one-page instrument met with testator prior to execution and just prior to execution, summarized each article and put the practical effect in simple layman’s language); Rempelakis v. Russell, 65 Mass. App. Ct. 557, 561-562, 842 N.E.2d 970 (2006) (attorney met with testator in hospital, hand-wrote will according to testator’s instructions, and read the will to her in front of witnesses; testator agreed it reflected her wishes before executing it); Maimonides Sch. v. Coles, 71 Mass. App. Ct. at 245-247 (attorney spoke with testator in rehabilitation hospital by telephone and took him through the changes of his second trust amendment which testator confirmed; testator made additional changes later that day; attorney met with testator at rehabilitation hospital and went through amendment again; testator made additional change and initialed change in the margin and at all time demonstrated to attorney that he knew what he was doing and did not show any confusion).

The reliability of drafting counsel’s testimony about the capacity of the testator will depend in part on the care counsel took in handling the professional relationship. In Paine, the court held that the Probate and Family Court erred in crediting on the testimony of drafting counsel given his lack of contact with the testator.

Here, however, the attorney was unable to provide any relevant evidence as to John’s capacity on the date the will was signed. The attorney had not seen John in a number of years and only spoke with him by telephone; John simply verified he wanted what Odette wanted. The attorney was unaware that John had been diagnosed with dementia in 2001. While we agree with the judge that it is very likely that the attorney would not have drafted a will for a client he believed to lack testamentary capacity, the attorney admittedly did nothing to determine whether John understood the will as drafted, knew the natural objects of his bounty, had a general understanding of his finances, or was suffering from any ailment that might influence his dispositions.

Id.

 In Old Colony Trust Co. v. DiCola, 23 Mass. 119, 125 (1919), the court approved admission of drafting counsel’s testimony, even though he was not a subscribing witness, as to whether he heard the testator “say or do anything which indicated he was not of sound mind” on grounds that counsel “was not asked his opinion, but to state the facts as he observed him.” Lay testimony that has been admitted bearing on the issue of capacity includes observations of “patterns of mental confusion or misapprehension,” Adler v. Adler, 83 Mass. App. Ct. 1135 (2013) and observations as to whether the testator “was firm or weak in his decision” or showed any appearance of mental decline, Neill v. Brackett, 241 Mass. 534, 540 (1922).

1. **CONTEMPORANEOUS EVALUATION**

Counsel assisting a client with dementia with estate planning may wish to consider a medical capacity evaluation, especially if the proposed plan represents a significant change from prior one.

Although most lawyers recognize the need for psychiatric testimony in will contest cases, even the most careful lawyers seldom call in a psychiatrist to examine the testator at the time the will is executed. But such a practice seems advisable whenever the attorney has reason to expect a contest of his client’s will on grounds of incapacity. This precaution will be necessary, however, only in the relatively rare cases of unusual dispositions, where the shares of beneficiaries under the will and under intestacy are substantially different. The testimony of the expert should insure victor in the contest. The knowledge that this testimony is available might even deter possible contestants from bringing suit.

*Psychiatric Assistance in the Determination of Testamentary Capacity*, 66 Harv. L. Rev. 1116 (1953). A capacity evaluation is especially advisable if the client has been diagnosed with an Alzheimer’s type dementia because the decline is likely to be relentless and total.

[Alzheimer’s] patients eventually lose decision making capacity in every sphere of life. Specific competencies that are lost include the capacity to make medical decisions; to consent to research; to manage financial affairs; to execute a will; to drive; to manage medications; to live independently; and ultimately to handle even the most basis activities of daily life.

Marson, *Assessing Civil Competencies in Older Adults With Dementia: Consent Capacity, Financial Capacity, and Testamentary Capacity in Forensic Neuropsychology*, p. 334.

Counsel must determine whether the medical consultant will provide guidance about the nature and extent of the client’s impairment in strictly in medical terms or will provide an opinion framed in terms of the legal capacity standard. If the latter, counsel should provide the medical consultant careful instruction as to the elements of the capacity requirements.

The medical literature provides guidance for such an evaluation. For example, Dr. James Spar and Attorney Andrew Garb in *Assessing Competency to Make A Will*, Amer. J. Psychiatry, 149:2 (1992), recommend:

In order to perform the assessment of capacity, the examiner must first determine from informed, objective sources the nature of the testator’s assets and, if possible, the names and relationships to the testator of all potential heirs. If necessary, the latter information can be obtained following the interview….

A semistructured interview format is recommended, including a comprehensive mental status examination assessing general appearance, dress, and grooming; orientation; recent and remote memory; attention and concentration; receptive and expressive language and speech function; mood, affect, and psychomotor behavior; thought form, flow, and content; insight and judgment; and higher cognitive functions such as calculations and abstractions. Adjunctive administration of standardized instruments such as the Mini-Mental State examination (10), the Neurobehavioral Cognitive Status Examination (11), and the Hamilton Rating Scale for Depression (12), as appropriate, is also recommended.

*See* *also* Shulman, *Assessment of Testamentary Capacity and Vulnerability to Undue Influence*, Am. J. Psychiatry, 164:5 (2007); Assessment of Older Adults With Diminished Capacity: A Handbook for Psychologists, A.B.A./A.P.A. (2008). Counsel should consider confirming with the consultant that he or she is familiar with the capacity assessment literature/recommendations of his/her medical discipline.