

Index

A

“according to gravity”, 6

active assessment techniques

- charts and graphs, 762
- gearing the plan to capacity level, 763
- generally, 759
- manipulating interview circumstances, 764
- recovered capacity, 760

B

Banks v. Goodfellow, *see also* **controlling for capacity during planning**

- beneficiary designation, and, 211, 212, 218, 220, 221, 305, 389
- codicils, and, 188, 190, 191, 196, 197
- compound transactions, *see* **compound transactions**
- continuum, capacity as, 86
- delusions, and, 157, 164, 172, 175, 178, 185
- elements of test
 - assets, 49
 - common field of view, 75
 - disorders of the mind, 88
 - nature and effect of will, 65
 - objects of bounty, 58
- failing mind, 82
- generally, 41, 46
- gifts, 400, 420, 424, 425, 443
- joint tenancy, transfers into, 435
- modern restatement, 45
- practical nature of test, 95
- relaxing the test, 133
- revocation, and, 209
- settlements of property into trust, 438, 441
- severance, and, 147, 151, 152
- testamentary capacity, generally, 2, 16, 38, 82, 87, 113, 129, 132, 147, 678, 684

beneficiary designations

- capacity test, 212
- concurrent with other dispositions, 223
- contract, interface with, 222
- doctrine of righteousness, 302
- generally, 211

C

capacity hierarchy, 687

codicils

- capacity test, 188, 220, 429
- general rules, 187
- republication
 - confirming, and, 791
 - impact, 195
 - knowledge and approval, 331
 - perfecting earlier will, 168, 195
 - sample letter of commission — codicil making small change to will, 742
- revocation, presumption where lost, 210
- severance, 266
- tear-away will, and, 696, 784, 787

commission letters, samples

- codicil making small change to will, 742
- complex will, part of compound transaction, 746
- inter vivos* gift of property, 756
- medical opinion where equitable challenge feared, 826
- sign and return version where level of concern low, 732
- standard will, commission post-dating execution, lawyer with doubts, 738
- standard will, commission prior to execution, 734

- will disinheriting heir or effecting unequal distribution, 752

compound transactions

- capacity
 - framework for addressing, 692
 - multiple-day transactions, 696
 - same-day transactions, 694
- challenges of, 692
- intention and testamentary knowledge and approval
 - framework for addressing, 698
 - multiple-day transactions, 699
 - same-day transactions, 699
- procurement, and
 - framework for addressing, 704
 - multiple-day transactions, 705
 - same-day transactions, 705
- unconscionable bargain, 706
- undue influence — testamentary and *inter vivos*
 - framework for addressing, 700
 - multiple-day transactions, 701
 - same-day transactions, 701

controlling for capacity during planning

- active assessment techniques
 - charts and graphs, 762
 - gearing the plan to capacity level, 763
 - generally, 759
 - manipulating interview circumstances, 764
 - recovered capacity, 760
- codicils, republishing and confirming, 791
- execution
 - steps, 764
 - where capacity in doubt, 765
 - permissible level of doubt, 777
 - proceeding to execution, 766
- generally, 709

- interviewing and taking instructions
 - additional questions, 718
 - asking questions, 713
 - “bounty” question, 717
 - dealing directly with will-maker, 719
 - medical assessments
 - checklist, 725
 - generally, 723
 - letters of commission, samples
 - codicil making small change to will, 742
 - complex will, part of compound transaction, 746
 - inter vivos* gift of property, 756
 - sign and return version where level of concern low, 732
 - standard will, commission postdating execution, lawyer with doubts, 738
 - standard will, commission prior to execution, 734
 - will disinheriting heir or effecting unequal distribution, 752
 - suggested steps, 730
 - notes, making, 720
 - practice protocols
 - assessing capacity in normal course, 780
 - assessing questionable capacity in emergency setting, 782
 - assessing questionable capacity in non-emergency, 786
 - retainer
 - “bullet proof” will, 791
 - sample, 795
 - structuring, 794
 - tear-away wills, 787
 - verifying information, 722
- ### controlling for other types of challenges
- inter vivos* intention, 816

- *inter vivos* undue influence and other challenges
 - elder abuse, breaching confidentiality, and, 830
 - generally, 818
 - “grey area” execution, 828
 - independent advice, 822
 - medical opinion, possible value, 826
 - protective measures, looking for, 821
 - protocol for dealing with equitable challenges, 829
 - true and complete understanding, 824
 - victimization, looking for, 820
 - warning, client to sign off, 825
 - testamentary knowledge and approval
 - confirmation in ordinary course, 810
 - confirmation when procurer present, 813
 - diminished capacity, interface with, 815
 - generally, 810
 - “grey area” executions, 816
 - identifying procurers, 812
 - responding to doctrine of righteousness, protocol, 815
 - testamentary undue influence
 - ask blunt questions, 801
 - express concern to client, 800
 - fee considerations, 807
 - generally, 800
 - “grey area” course of conduct, 806
 - interview alone, 801
 - medical opinions, 809
 - offer confidential replacement will, 803
 - protocol, checklist, 809
- D**
- delusions, impact on will-making**
- definition, 159
 - delusions as to fact vs delusions as to motive, 170
 - delusions vs disorders of the mind, 178
 - delusions vs mistaken beliefs, 177
 - evidence, lay and medical, 184
 - generally, 157
 - lucid intervals, 167
 - non-dispositive provisions, influence on, 185
 - rational wills caused by, 181
 - requirement that delusion be impelling, 164
- “disposing mind and memory”, 46**
- doctrine of righteousness**
- applicability to beneficiary designations and other transfers, 302
 - bar to probate, as, 307
 - case law, 274
 - generally, 272
 - proper characterization of rule, 310
 - true and informed approval, history and development, 274
 - unconscionable procurement, compared to, 663
- donatio mortis causa***
- intent, 486, 487, 490
 - undue influence, and, 390
- dual roles model of capacity, 685**
- E**
- elder abuse, breaching confidentiality, and, 830**
- equitable fraud, 666**
- G**
- general principles**
- considerations
 - different tests for different purposes, 686
 - dual roles model, 685
 - intrinsic complexity, 682

- linear increase model, 684
- significance, 682
- social purpose, 683
- hierarchy of capacity, 687
- onus, 679
- test for capacity, 675

gifts

- capacity test applicable to
 - application of test, 423
 - modern test, 420
 - traditional test, 419
- equitable challenges generally, 599
- equitable fraud, 666
- unconscionable bargains — exploitation of special disadvantage
 - culpable conduct requirement, 625
 - doctrine
 - best expression of, 617
 - evolution, 607
 - English case law, 606
 - generally, 604
 - impact, 627
 - onus and presumption, 615
 - relational inequality vs special disadvantage, 625
 - remedy, 627
 - special disadvantage
 - relational inequality vs, 625
 - requirement for, 620
 - undervalue, requirement for, 621
- unconscionable procurement
 - culpable conduct requirement, 661
 - defending the transfer, 645
 - doctrine
 - best expression, 633
 - compared to common law doctrine of righteousness, 663
 - current status, 655
 - freestanding, whether, 652
 - situations where applicable, 639

- generally, 627
- impact, 664
- onus and presumption, 630
- remedy, 664
- requirement that gift be significant, 659
- violations of policy of the law, 668

I

inter vivos wealth transfers, capacity, *see also inter vivos* wealth transfers, intention to make, *inter vivos* wealth transfers, undue influence

- generally, 399
- incapacity, impact of finding, 444
- proof
 - onus, generally, 402, 414
 - onus, case law
 - Archer v. St. John* — 2008 (Alberta Court of Queen's Bench), 411
 - Beam v. Mills Estate* — 2015 (British Columbia Supreme Court), 411
 - Fairchild v. Mitchell* — 1959 (Nova Scotia Supreme Court — In Banco), 406
 - Lynch Estate v. Lynch Estate* — 1993 (Alberta Court of Queen's Bench), 408
 - Mathieu v. Saint Michel* — 1956 (Supreme Court of Canada), 404
 - McMillan v. Brown* — 1957 (Nova Scotia Supreme Court), 405
 - Morley v. Loughnan* — 1893 (English Chancery Division), 403
 - Quaillie v. Vandervelde* — 2009 (British Columbia Supreme Court), 412
 - Re Lazaro and Lazaro* — 1981 (British Columbia Supreme Court), 407

- *Re Rogers* — 1963 (British Columbia Court of Appeal), 407
 - *Re W (Enduring Power of Attorney)* — 2000 (English Court of Appeal), 409
 - *The Special Trustees of the Great Ormond Street Hospital v. Rushin* — 2000 (English High Court of Justice), 408
 - *Williams v. Williams* — 2003 (English High Court of Justice), 410
 - *Young v. Paillé* — 2012 (Manitoba Court of Queen’s Bench), 413
 - standard, generally, 402, 418
 - standard for capacity at execution, 441
 - test applicable to gifts
 - application of test, 423
 - modern test, 420
 - traditional test, 419
 - test applicable to other wealth transfers
 - other transfers, 441
 - settlements of property into trust, 437
 - transfers into joint tenancy, 431
 - wards of court, special rule, 456
- inter vivos* wealth transfers, intention to make, see also *inter vivos* wealth transfers, capacity, *inter vivos* wealth transfers, undue influence**
- controlling for, 816
 - generally, 463
 - knowledge and approval, compared to, 504
 - lack of, 518
 - marshalling evidence to establish
 - evidence before and after the act, 503
 - parole evidence rule, 495
 - *non est factum*, 508
- proof
 - onus
 - Canadian approach, 471
 - English approach, 466
 - generally, 465, 476
 - presumption of advancement, applicability of, 484
 - standard, generally, 465
 - rectification, 520
 - requirement for intent
 - *donatio mortis causa*, 490
 - generally, 486
 - *inter vivos* gift, 488
 - settling a trust, 491
- inter vivos* wealth transfers, undue influence, see also *inter vivos* wealth transfers, capacity, *inter vivos* wealth transfers, intention to make**
- actual undue influence
 - distinguishing between persuasion and actual undue influence, 551
 - generally, 542
 - types of conduct, 545
 - categories, 539
 - compound transactions
 - framework for addressing, 700
 - multiple-day transactions, 701
 - same-day transactions, 701
 - conduct, by — actual undue influence
 - distinguishing between persuasion and actual undue influence, 551
 - generally, 542
 - types of conduct, 545
 - controlling for
 - elder abuse, breaching confidentiality, and, 830
 - generally, 818
 - “grey area” execution, 828
 - independent advice, 822
 - medical opinion, possible value, 826

- protective measures, looking for, 821
- protocol for dealing with equitable challenges, 829
- true and complete understanding, 824
- victimization, looking for, 820
- warning, client to sign off, 825
- defences of laches and acquiescence, 591
- generally, 523
- gifts rendered voidable, not void, 591
- presumed undue influence
 - defending transfer, 578
 - duties imposed by relationship, 567
 - generally, 552
 - impact of relationship on conduct threshold, 571
 - relationships that qualify, 553
 - transactions that qualify, 563
- proof
 - onus, 529
 - presumption of undue influence, operation, 532
 - standard, 531
- relationship, by — presumed undue influence
 - defending transfer, 578
 - duties imposed by relationship, 567
 - generally, 552
 - impact of relationship on conduct threshold, 571
 - relationships that qualify, 553
 - transactions that qualify, 563
- return of assets from innocent third parties, 595
- transfers treated as testamentary, 587

J

joint tenancy, capacity for transfers into, 431

K**knowledge and approval**

- boiler-plate and other add-in clauses, 269
- compound transactions
 - framework for addressing, 698
 - multiple-day transactions, 699
 - same-day transactions, 699
- controlling for
 - confirmation in ordinary course, 810
 - confirmation when procurer present, 813
 - diminished capacity, interface with, 815
 - generally, 810
 - “grey area” executions, 816
 - identifying procurers, 812
 - responding to doctrine of righteousness, protocol, 815
- distinct from undue influence and fraud, as, 394
- generally, 225, 256
- inter vivos* wealth transfers, intention to make, compared to, 504
- lack of, impact
 - equitable rectification vs severance, 321
 - ratification by will-maker, 330
 - severance, 315, 321
 - void or voidable where absent, 312
- language and literacy, barriers of, 260
- mistake, 259
- no requirement that will be read, 264
- precursor issue, as, 266
- predators, doctrine of righteousness
 - applicability to beneficiary designations and other transfers, 302
 - bar to probate, as, 307
 - case law, 274
 - generally, 272

- proper characterization of rule, 310
 - true and informed approval, history and development, 274
 - unconscionable procurement, compared to, 663
 - presumption
 - displacing, 246
 - generally, 234
 - relationship between two presumptions, 251
 - triggering, 236
 - proof
 - onus, 227
 - standard, 228
 - ratification by will-maker, 330
 - separate requirement, as, 254
 - severance where lack of, 315
 - true and informed approval, case law
 - Adams v. McBeath* — 1897 (Supreme Court of Canada), 280
 - Atter v. Atkinson* — 1869 (England), 276
 - Barry v. Butlin* — 1838 (England), 275
 - British & Foreign Bible Society v. Tupper* — 1905 (Supreme Court of Canada), 281
 - Connell v. Connell* — 1906 (Supreme Court of Canada), 283
 - Franks v. Sinclair* — 2006 (England), 298
 - Fuller v. Strum* — 2002 (England), 297
 - Fulton v. Andrews* — 1875 (England), 278
 - Hayward v. Thompson* — 1960 (Supreme Court of Canada), 286
 - Johnson v. Pelkey* — 1997 (British Columbia), 296
 - Kostyniuk v. Brychun* — 2002 (Saskatchewan), 294
 - Loftus v. Harris* — 1914 (Ontario), 284
 - MacGregor v. Ryan* — 1965 (Supreme Court of Canada), 288
 - Melendy v. Drodge* — 2016 (Newfoundland & Labrador), 300
 - other modern examples, 301
 - Paske v. Ollat* — 1815 (England), 275
 - Re Griffin's Estate* — 1979 (Prince Edward Island), 289
 - Re McWilliams Estate* — 1930 (Supreme Court of Canada), 284
 - Re Timlick Estate* — 1965 (British Columbia), 287
 - Riach v. Ferris* — 1935 (Supreme Court of Canada), 285
 - Russell v. Fraser* — 1980 (British Columbia), 290
 - Tyrell v. Painton (No. 1)* — 1893 (England), 279
 - Wintle v. Nye* — 1959 (England), 285
 - void or voidable where lack of, 312
- L**
- linear increase model of capacity, 684**
- lost will/codicil, presumption of revocation, 210**
- M**
- medical assessments, controlling for capacity during planning**
- checklist, 725
 - generally, 723
 - letters of commission, samples
 - codicil making small change to will, 742
 - complex will, part of compound transaction, 746
 - inter vivos* gift of property, 756

- sign and return version where level of concern low, 732
- standard will, commission postdating execution, lawyer with doubts, 738
- standard will, commission prior to execution, 734
- will disinheriting heir or effecting unequal distribution, 752

medical evidence/opinion

- capacity, and, 724
- delusions, of, 184
- testamentary undue influence, 809
- value where equitable challenge feared, 826

Melendy v. Drodge

- knowledge and approval, 300
- undue influence, 361, 395

N**negligence during planning process**

- beneficiaries under prior wills, liability to, 833
- case law
 - Banton v. Banton* — 1998, (Ontario), 836
 - Friesen et al. v. Friesen Estate* — 1985 (Manitoba), 835
 - Graham v. Bonnycastle* — 2004 (Alberta), 840
 - Hall v. Bennett Estate* — 2003 (Ontario), 839
 - Petrie v. Burnett* — 2008 (British Columbia), 842
 - Slobodianik v. Podlasiewicz* — 2003 (Manitoba), 838
 - Swanson v. Ransom* — 1994 (Manitoba), 836
 - Townsend v. Johnson* — 2007 (Alberta), 841
- intended beneficiaries, liability to, 831

P**Parker v. Felgate**

- application of case in Canada, 108
- boiler-plate, and, 270
- change of mind, and, 116
- codicils, and, 194, 196, 197
- delusions, and, 168
- execution, steps at, 764
- historical review, 98
- impact of delay, and, 114
- inter vivos* wealth transfers, capacity, 442
- knowledge and approval, 264, 331, 333
- principles from, 110, 113
- ratification by will maker, 330
- republication, 134, 135, 194
- severance, and, 149

practice tips, see controlling for capacity during planning and controlling for other types of challenges**predators and the doctrine of righteousness**

- applicability to beneficiary designations and other transfers, 302
- bar to probate, as, 307
- case law, 274
- generally, 272
- proper characterization of rule, 310
- true and informed approval, history and development, 274
- unconscionable procurement, compared to, 663

presumption of advancement, applicability of, 484**procurement, see unconscionable procurement****R****retainer, sample where capacity in issue, 795****revocation of will**

- capacity test, 203

- generally, 198
- lost will, 210
- onus and standard of proof, 199

S

settlements of property into trust

- capacity to make, 437
- intention, 465, 491

severance

- availability, 142
- knowledge and approval, lack of
 - equitable rectification, vs, 321
 - generally, 315

special disadvantage, exploitation of

- culpable conduct requirement, 625
- doctrine
 - best expression of, 617
 - evolution, 607
- English case law, 606
- generally, 604
- impact, 627
- onus and presumption, 615
- relational inequality vs special disadvantage, 625
- remedy, 627
- special disadvantage
 - relational inequality vs, 625
 - requirement for, 620
 - undervalue, requirement for, 621

T

tear-away wills, 696, 784, 787**testamentary capacity**

- Banks v. Goodfellow*, test
 - elements
 - assets, 49
 - common field of view, 75
 - nature and effect of will, 65
 - objects of bounty, 58
 - generally, 41, 157
 - relaxing the test, 133
 - restatement of test, efforts to, 45

- practical nature of test, 95
- considerations, relevant and irrelevant
 - ability to carry on normal conversation, 119
 - consent by heirs, 124
 - content of the will, 120
 - eccentricity, 119
 - miscellaneous considerations, 122
- diminishing capacity
 - failing mind exhibiting capacity, 82
 - “imprecise divide”, 86
 - judicial policy, 87
- disorders of the mind, 88
- “disposing mind and memory”, 46
- generally, 4
- incapacity, impact generally, 137
- medical assessments, 126
- Parker v. Felgate*
 - application in Canada, 108
 - expanding principles from, 110
 - historical review, 98
- presumption
 - application to other testamentary documents, 39
 - displacing, 30
 - generally, 10
 - nature, 33
 - relying on, 38
 - sidestepping, 34
 - Vout v. Hay*, 12
 - triggering, 20
- proof
 - onus, 5
 - scrutinizing “according to gravity”, 6
 - standard of, 6
- severance, availability, 142
- standard for capacity at execution of will
 - actual understanding vs capacity to understand, 113
 - change of mind, 116
 - delay, impact of, 114

- *Parker v. Felgate*
 - application in Canada, 108
 - expanding principles from, 110
 - historical review, 98
 - timing, 97
- tax structuring, 77
- void or voidable, 137

true and informed approval, case law

- *Adams v. McBeath* — 1897 (Supreme Court of Canada), 280
- *Atter v. Atkinson* — 1869 (England), 276
- *Barry v. Butlin* — 1838 (England), 275
- *British & Foreign Bible Society v. Tupper* — 1905 (Supreme Court of Canada), 281
- *Connell v. Connell* — 1906 (Supreme Court of Canada), 283
- *Franks v. Sinclair* — 2006 (England), 298
- *Fuller v. Strum* — 2002 (England), 297
- *Fulton v. Andrews* — 1875 (England), 278
- *Hayward v. Thompson* — 1960 (Supreme Court of Canada), 286
- *Johnson v. Pelkey* — 1997 (British Columbia), 296
- *Kostyniuk v. Brychun* — 2002 (Saskatchewan), 294
- *Loftus v. Harris* — 1914 (Ontario), 284
- *MacGregor v. Ryan* — 1965 (Supreme Court of Canada), 288
- *Melendy v. Drodge* — 2016 (Newfoundland & Labrador), 300
- other modern examples, 301
- *Paske v. Ollat* — 1815 (England), 275
- *Re Griffin's Estate* — 1979 (Prince Edward Island), 289
- *Re McWilliams Estate* — 1930 (Supreme Court of Canada), 284

- *Re Timlick Estate* — 1965 (British Columbia), 287
- *Riach v. Ferris* — 1935 (Supreme Court of Canada), 285
- *Russell v. Fraser* — 1980 (British Columbia), 290
- *Tyrell v. Painton (No. 1)* — 1893 (England), 279
- *Wintle v. Nye* — 1959 (England), 285

trust, settlement of property into

- capacity to make, 437
- intention, 465, 491

U**unconscionable bargains — exploitation of special disadvantage**

- compound transactions, 706
- culpable conduct requirement, 625
- doctrine
 - best expression of, 617
 - evolution, 607
- English case law, 606
- generally, 604
- impact, 627
- onus and presumption, 615
- relational inequality vs special disadvantage, 625
- remedy, 627
- special disadvantage
 - relational inequality vs, 625
 - requirement for, 620
- undervalue, requirement for, 621

unconscionable procurement

- compound transactions
 - framework for addressing, 704
 - multiple-day transactions, 705
 - same-day transactions, 705
- culpable conduct requirement, 661
- defending the transfer, 645
- doctrine
 - best expression, 633
 - compared to common law doctrine of righteousness, 663

- current status, 655
 - freestanding, whether, 652
 - situations where applicable, 639
 - generally, 627
 - impact, 664
 - onus and presumption, 630
 - remedy, 664
 - requirement that gift be significant, 659
- undue influence, *see also inter vivos wealth transfers, undue influence***
- causation requirement, 366
 - compound transactions
 - framework for addressing, 700
 - multiple-day transactions, 701
 - same-day transactions, 701
 - conduct amount to undue influence
 - coercion, 342
 - fraud, 355
 - permitted persuasion, 353
 - controlling for
 - ask blunt questions, 801
 - express concern to client, 800
 - fee considerations, 807
 - generally, 800
 - “grey area” course of conduct, 806
 - interview alone, 801
 - medical opinions, 809
 - offer confidential replacement will, 803
 - protocol, checklist, 809
 - distinct from knowledge and approval, as, 394
 - donatio mortis causa*, 390
 - generally, 337
 - no presumption
 - other testamentary dispositions, 388
 - wills, 368
 - proof
 - onus, 340
 - standard of, 341
 - severance, 393

- void or voidable, 391

V

void or voidable

- capacity, and, 137
- impact of finding of incapacity on gift, 444
- knowledge and approval, 312
- undue influence rendering gifts voidable, 391

Vout v. Hay

- onus of proof, 227, 230, 234
- presumption of capacity, 5, 11, 12, 21, 23, 24, 25, 26, 202, 239, 243, 247, 368, 474
- presumption of knowledge and approval, 239, 240, 243, 246, 247, 368, 474
- shifting onus, 4, 5, 24, 38, 40, 202, 228, 248, 404, 412
- standard of proof, 6, 8
- suspicious circumstances, 9, 251, 387
- three-element test, 23, 24, 25, 26, 28, 29, 37, 39, 40
- undue influence, 340, 373

W

wards of court, *inter vivos* wealth transfers, 456

wealth transfers other than gifts, capacity test applicable

- settlements of property into trust, 437
- transfers into joint tenancy, 431

