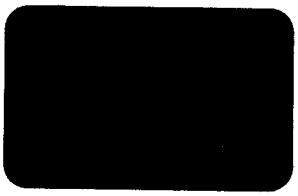

Baker Hostetler

Baker&Hostetler LLP

SunTrust Center, Suite 2300
200 South Orange Avenue
Post Office Box 112
Orlando, FL 32802-0112

T 407.649.4000
F 407.841.0168
www.bakerlaw.com

Joel H. Sharp, Jr.
direct dial: 407.649.4019
jsharp@bakerlaw.com

Note: Sent in e-mail format

June 5, 2006

William F. Belcher, Esq.
P. O. Drawer T
Saint Petersburg, FL 33731-0000
wfbelcher@aol.com

Re: *May 31 E-Mail – Definition of Testamentary Capacity*

Dear Fletch:

I have always held you in the highest regard and hope to continue working positively with you in the Section, at ACTEC and elsewhere. But I was very disappointed to receive your e-mail of May 31st addressed to me and David Garten for the following reasons:

(1) No one has contacted me since the Orlando meeting about a special meeting of the Probate Law Committee. I consider this to be a legislative issue on which there is ample time to make a decision and present it to the legislature in 2007 or, if necessary, to delay it into later years.

Someone has managed to schedule this meeting in direct conflict with the Florida Bar Annual Meeting in southeast Florida. I usually attend parts of this and Winnie always does since she continues to be Chair of one of the Rules committees. Winnie cannot attend on the 22nd although she would like to be heard. I may be able to attend on the 22nd but need to attend a state advertising committee meeting by phone that day. Mike Stafford out of New York who is opposed probably will not be able to attend. I suspect you have not sent notice to all the other members of the Probate Division, many of whom might like to be involved in this process.

It seems to me that this issue and proposed Legislation should more appropriately be considered by the Fiduciary Litigation Committee rather than the Probate Law Committee, or at least the Fiduciary Litigation Committee should be allowed equal input. The issue will show up in litigation. Further, there may be others who ought to be involved before this is brought before the Executive Council.

Clearly you do have and will continue to have opposition to Part (2) of your definition. Some even question the need for this legislation. Why should Florida attempt to codify a definition of incapacity where no other major body in the United States has dared to tread? For example, to the best of my present knowledge, it does not exist in the Uniform Probate Code; does not exist in the Uniform or new Florida Trust Code; did not exist in the Florida Probate Code drafted by Bill Belcher and others when they adapted the Uniform Probate Code to our Code; was not part of the Rohan Kelly Probate Code extensive update; and I suspect if you checked around the United States, you will find little or no similar legislation.

I bet no lawyer in our section at execution asks the maker or grantor to expand on the terms of the documents at several time intervals.

(2) Why am I a named recipient of your e-mail? I did not attend and have not attended the Probate Law Committee where this matter has been debated for several meetings. I knew nothing of the proposal until our Professionalism meeting last weekend.

The matter was brought up at our Professionalism Committee meeting by several persons who attend your meeting, one of which was not yours truly. It was fully discussed in a relatively well attended meeting of our professionalism Committee. No one supported your position although some were neutral. One member put forth a motion to oppose the proposed legislation. I suggested no motion be made so as not to pit one committee against another when I thought behind-the-scenes discussions could probably resolve this. However, the committee was insistent; the motion was called and it was overwhelmingly supported. At least three members who attended your meeting supported the motion to oppose, as I did, once I realized it was going to come to a vote.

I did not plan David's presentation although I do think he needed to be heard. Winnie and I sat at his table because we were late and there were no other places to sit. There was no organized plan of opposition. Committee members from our committee, for the most part, did speak, but not on a preplanned and organized basis.

(3) I am bothered by the fact that you say that David and I have to come up with case law and ethics and malpractice citations. There was no white paper provided by the proposing Committee to justify this statutory presentation. Before our Probate Law Roundtable, I had no chance to read the case law but David did. Whether he presented it in a way that was offensive to you (if it was, I am sorry), the reality is that I have since read the cases cited by Rohan Kelly in his chapter on Probate Litigation in the Florida Bar's Practice Under Florida Probate Code and by George Wilsey in his chapter on Wills and Trusts Contests in the Florida Bar's Litigation Under Florida Probate Code, and I conclude that there is clearly not unanimity with the language that you are proposing as legislation. Wilsey does not even mention the (2) language. Several of the cases mouth the lingo regarding memory, etc., from an old New York case but a number do not and as I read the cases, not a single one in-depth applied any part of the three-prong test let alone this add-on portion which you want to add to the statute.

(4) I have a clerk this summer from the University of Florida who is a certificating in trusts and estates. She has already had five courses and has just completed part of her third year. I have asked her to research nationwide the incapacity test, particularly focusing on the usage of what Rohan called the fourth part of the test although you set it out as a major independent second, seeing how often it is listed on a regular basis and where it is really analyzed. I do have the feeling that we are into a test very much like the reasonable man which is mouthed by the courts but supported primarily on the basis of factual findings. It would not be proper for me to point fingers at any elements in our Section, seeking legislation because it might help them in litigation. It does seem to me, however, that this will help plaintiff lawyers and cause risks to not only those beneficiaries who would be on the other side, but lawyers as well.

(5) Concerning ethics and malpractice: I do believe there is a risk for attorneys when statutes set out tests to which they will have to adhere at various times in their practice. Where the case law is, as this is almost on a case by case basis, the lawyers can always take the position that they did the best they could. Where there is a statute that precisely defines incapacity then to the extent that the lawyer is required to make decisions in this area, I cannot imagine why that definition would not be applicable not only in litigation to determine the validity of the document but also in litigation concerning the lawyer's civil responsibilities and ethical responsibilities, despite any attempted drafting lingo such as suggested by Ed Koren.

For several years I have been trying to make the point that what we do in legislation can have ethical implications. Probably and hopefully most of you have never had grievances filed so this may not have ever been a special concern of yours. However, since I served on the Board of Governors where I heard a number of cases that were on their way to the Supreme Court, and since I advise our office attorneys on ethical compliance, (and I am in constant contact with the Ethics Hotline), I do see the inter-relationship quite frequently.

Every time I raise this in the Section, major Section leaders leap up and interrupt me. I have never understood this. Perhaps there ought to be some ethical presentations made to this Section which could explain this relationship.

Under 4-1.14 regarding diminished capacity as it presently exists in the Rules of Professional Conduct, a lawyer is entitled to do certain things if there is, in his mind, diminished capacity, which impliedly means he has to make that determination. It does clearly say in the comments that he has obligation to a diminished capacity client, meaning he has to make that determination. The new changes that are proposed by the ABA model rules and presently before us and to which our Professionalism Committee is going to propose a reply from the Section, do not impact on this aspect.

If we have a statute which mandatorily describes incapacity binding on the validity of documents and therefore on the courts making determinations and therefore on the lawyers who are preparing the documents, it is clear to me that the issue will come up in ethical and malpractice considerations.

I am sure that if we talk to our P. I. attorney malpractice "friends" that they will tell us that they will quickly adapt to anything which possibly increases the burden on an attorney in will and trust drafting cases.

Courts develop their own ethics rules. They do use ethics rules against attorneys. In my need to get this out in a hurry, I do not have the present citation but I will send you a cite from the Pennsylvania Supreme Court that held against a major law firm – Pepper, Hamilton in Philadelphia – in a labor conflicts case, that the attempt of the Rules of Professional Conduct to protect attorneys against civil responsibility for ethical violations will not be respected.

(6) Bottom line, I believe you should postpone the June 22nd meeting, take this up in the August meeting in some forum – a special meeting of both committees, perhaps; and send out notices and information to all of our Probate Division members in case they want to be involved. Those of us who do not think you should have Part (2) of the definition, if you even need the definition, could also send out information.

(7) I would like to make one forlorn final request. Winnie and I for some time have felt that as earnest, honest and hard-working as all of you are in this Section, that there is way too much attempt to legislate whenever there is the slightest doubt what a rule is in the probate or trust law area. Codification of a test like this could make "the law" even more unclear, or change it for the worse in this instance. Winnie would like to expand on this. We wish the Section would just let the case law decide.

Sincerely,

Joel H. Sharp, Jr.

JHS/clc

09900, 00028, 101326397.1, Belcher - letter re: definition

TESTAMENTARY CAPACITY DEFINED

Newman v. Smith, 77 Fla. 667, 82 So. 236 (Fla. 1919)
The rule for testing testamentary capacity is thus stated by the great jurist, Lord Erskine: "But their Lordships are of the opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share of it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

"If he had not the capacity required, the propriety of the disposition made by the Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the questions as to his capacity." Harwood v. Baker, 3 Moore 282, 13 Eng. rep. (Full Reprint) 117.

A like rule governs the courts of this country. "We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the Statute of Wills, a person of sound mind and memory, and is competent to dispose of his estate by will." Delafield v. Parish, 25 N.Y. 9.

Smith v. Clements, 114 Fla. 614, 154 So. 520 (Fla. 1934)
In Newman v. Smith, 77 Fla. 667, 82 So. Rep. 236, it was held that in order to constitute a sound, disposing mind, a testator must not only be able to understand that he by his will is giving his property to the designated object of his regard, but he must have sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been, objects of his bounty, and the scope and bearing of his will, accompanied by sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relation to each other, and to be able to form some rational judgment in relation to them.

Tonnelier v. Tonnelier, 132 Fla. 194, 181 So. 150 (Fla. 1938)
The questions for our determination are, (1) whether or not the testator possessed testamentary capacity when the codicil was added to the will, supra, and (2) whether or not the testator possessed testamentary capacity when the will was destroyed as an alleged act of revocation.

In Newman v. Smith, 77 Fla. 633, 82 So. 236, this Court defined testamentary capacity, saying:

"The rule for testing testamentary capacity is thus stated by the great jurist, Lord Erskine, 'But their Lordships are of the opinion, that in order to constitute a sound disposing mind a Testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too must enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share of it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. 'If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the questions as to his capacity.' Harwood v. Baker, 3 Moore 282, 13 Eng. Rep. (Full reprint) 117.

"A like rule governs the courts of this country. 'We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to from some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the Statute of Wills, a person of sound mind and memory, and is competent to dispose of his estate by will.' Delafield v. Parish, 25 N.Y. 9".

In re Baldridge's Estate, 74 So. 2d 658 (Fla. 1954)
It is well recognized that one normally competent may be incapacitated by alcohol, drugs, fever, disease or shock. The facts in the case at bar have as much in common with the leading case of Newman v. Smith, 77 Fla. 633. 667, 82 So. 236, 241, that we feel justified in quoting as follows:

> In the making of a will a 'sound mind' comprehends ability of the testator to mentally understand in a general way the nature and extent of the property to be disposed of,

and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed. The free use and exercise of a 'sound mind' in making a will may be prevented in many ways; but if a testator has a 'sound mind' when he makes a will, its free use and exercise will be assumed until the contrary clearly appears. In proceedings seeking a revocation of the probate of a will under the statute the court is required to decree 'according to the law and justice of the case.' This has reference to ascertaining whether the will duly expresses the free and lawful intent of a competent testator. While findings of fact by a trial judge upon conflicting evidence should ordinarily not be disturbed on appeal where there is ample evidence to sustain the finding, yet where the trial judge misapprehended the legal effect of the evidence as an entirely, and, in a case of this character if the finding is not 'according to the law and justice of the case,' as required by the statute as well as by the general principles of law, the finding of the trial judge should not be sustained merely because there is evidence that is contradicted, on which the finding may be predicated. * * *

In re Estate of Edwards, 433 So. 2d 1349 (Fla. 1953)

The making of a will does not depend upon a sound body but upon a sound mind. By "sound mind" is meant the ability of the testator "to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of practical effect of the will as executed." Newman v. Smith, 77 Fla. 633, 82 So. 236, 241; Hamilton v. Morgan, 93 Fla. 311, 112 So. 80; Marston v. Churchill, 137 Fla. 154, 187 So. 762; Miller v. Flowers, 158 Fla. 51, 27 So. 2d 667; Neal v. Harrington, 159 Fla. 381, 31 So.2d 391. A sick person may make a valid will in his last illness or even when in a dying condition. "And, unless the surrounding circumstances are such as to show that not only was the testator afflicted with an impairment of his senses, such as would ordinarily be occasioned by diseases * * * but is, by reason of the effect of disease on his mind, also unable to comprehend and understand the nature of the undertaking in which he is engaged when he attempts to make his will, it cannot be said as a matter of law that testamentary capacity is shown to be so lacking as to render a will made during one's affliction and last illness invalid for want of sufficient testamentary capacity. If the testamentary requisites are found, the will may be valid, although executed by one of great age, whose mind is enfeebled, whose body is debilitated, whose memory is failing or whose judgment is vacillating, especially where the will appears to have been fairly made, is not an unnatural one, and apparently was made under conditions not inconsistent with the inference that it emanated from a free mind." Smith v. Clements, 114 Fla. 614, 154 So. 520.

The appellant attaches great significance to the evidence which establishes the fact that during the course of his illness narcotics were administered to the decedent and that on the day of the execution of the will an inordinate quantity was delivered to his home. We have given due consideration to this in the light of the whole evidence and are not shaken in our conclusion that the circuit court ruled correctly in affirming that portion of the county judge's order dealing with the question of testamentary capacity. For the law is plain that the fact that one is a user of narcotics does not necessarily deprive him of testamentary capacity. Fernstrom v. Taylor, 107 Fla. 490, 145 So. 208.

He may be an addict and yet have the capacity which the law requires for making a will, if, in spite of the use of narcotics, he has sufficient mind and memory to understand the nature and extent of his property, the proper objects of his bounty and the nature of his testamentary act. Indeed, it is possible that a testator may have testamentary capacity even though it is proven that he was somewhat under the influence of drugs at the time he executes a will. The same is true where the ravages of disease combine with the effects of drugs. In such situations, as in all others, the question to be determined is solely that of the mental capacity of the testator at the time he executes the instrument. Page on Wills, 2nd ed., Vol. 1, section 159.

In re Estate of Bailey, 122 So. 2d 243 (Fla. 2nd DCA 1960)
Whether one has testamentary capacity is a question determinable only by mental capacity of the testator at the time he executed his will. The making of a will does not depend upon a sound body but upon a sound mind. The term, "sound mind", means the ability of the testator "to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed." In re Wilmott's Estate, Fla.1953, 66 So.2d 465, 467, 40 A.L.R.2d 1399; Newman v. Smith, 1919, 77 Fla. 633, 82 So. 236, 241; Hamilton v. Morgan, 1927, 93 Fla. 311, 112 So. 80; and Neal v. Harrington, 1947, 159 Fla. 381, 31 So.2d 391.

In re Estate of Edwards, 433 So. 2d 1349 (Fla. 5th DCA 1983)
It is well settled that a testator is determined to be of "sound mind" when he has the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will and, (3) a general understanding of the practical effect of the will as executed. In re Wilmott's Estate, 66 So.2d 465, 467 (Fla. 1953); In re Estate of Dunson, 141 So.2d 601 (Fla. 2d DCA 1962).

Coppock v. Carlson, 547 So. 2d 946 (Fla. 3rd DCA 1989)
Whether a testator had the requisite testamentary capacity is determined solely by his mental state at the time he executed the instrument. See In re Wilmott's Estate, 66 So.2d 465 (Fla. 1953); T. Atkinson, Wills § 51 (2d ed. 1953). Notwithstanding testimony that Mr. Hawkins was afflicted with the normal physical debilities attendant to advanced age, and delusions about his physical prowess, there was undisputed evidence, more relevant to the question of capacity, that on January 10, 1985, he went alone to keep an appointment with his attorney, appeared of strong mind, and properly executed a new will. There is no showing that he lacked the ability to understand the nature and extent of his property, the natural objects of his bounty, or the general process of will-making. See In re Wilmott's Estate, 66 So.2d at 468; In re Estate of Edwards, 433 So.2d 1349 (Fla. 5th DCA 1983); McGovern, Kurtz and Rein, Wills, Trusts and Estates § 7.2 (1988). At another time, when asked why his sister was not named as beneficiary of his estate, Mr. Hawkins explained that he expected to outlive her and that she was financially better off than he.

Raimi v. Furlong, 702 So. 2d 1273 (Fla. 3rd DCA 1997)
It has long been emphasized that the right to dispose of one's property by will is highly valuable and it is the policy of the law to hold a last will and testament good wherever possible. See In re Weihe's

Estate, 268 So. 2d 446, 451 (Fla. 4th DCA 1972), quashed on existing facts, 275 So. 2d 244 (Fla. 1973); Dunson, 141 So. 2d at 604. To execute a valid will, the testator need only have testamentary capacity (i.e. be of "sound mind") which has been described as having the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed. See In re Wilmott's Estate, 66 So. 2d 465, 467 (Fla. 1953); Weihe, 268 So. 2d at 448; Dunson, 141 So. 2d at 604. "A testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, [or] vacillating judgment." Weihe, 268 So. 2d at 448. Moreover, an insane individual or one who exhibits "queer conduct" may execute a valid will as long as it is done during a lucid interval. See Id. Indeed, it is only critical that the testator possess testamentary capacity at the time of the execution of the will. See Id.; see also Coppock v. Carlson, 547 So. 2d 946, 947 (Fla. 3d DCA 1989) (whether testator had the required testamentary capacity is determined solely by his mental state at the time he executed the instrument), rev. denied, 558 So. 2d 17 (Fla. 1990).

An appellate court will not interfere with a probate court's finding of testamentary capacity unless there is an absence of substantial competent evidence to support the finding or unless it appears that the probate court has misapprehended the effect of the evidence as a whole. See Weihe, 268 So. 2d at 449.

American Red Cross v. Estate of Haynsworth, 708 So. 2d 602 (Fla. 3rd DCA 1998)
See also: Smith v. Clements, 114 Fla. 614 (Fla. 1934); Newman v. Smith, 77 Fla. 667, 674, 82 So. 246, 248 (1918); Tonnelier v. Tonnelier, 132 Fla. 194, 181 So. 150 (Fla. 1938).

OVERVIEW: Following the trial court's decision admitting into probate decedent's later written will and declaring earlier, competing wills invalid, appellant beneficiaries sought review. The court held that niece, as proponent for the later written will, had the burden of coming forward with evidence to demonstrate the testamentary capacity of the decedent at the time the later written will was executed. The court held that niece failed to meet her burden of doing so. Niece could point to no qualified, substantive evidence to overcome the presumption of decedent's incompetency to execute a will that followed from the earlier adjudication of the decedent's incompetency. The court held the evidence was sufficient to support a finding that only a single provision of the challenged will was subject to undue influence. Therefore, having made such a finding, under Fla. Stat. ch. 732.5165 (1995), only that single provision should be struck and only the amount of money controlled by that provision should revert to the residuary clause.

REASONING:

I. Testamentary Capacity

Long ago, a definition of testamentary capacity was set forth by the Supreme Court of Florida:

The rule for testing testamentary capacity is thus stated by the great jurist Lord Erskine:

But their lordships are of the opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property...

* * * *

Harwood v. Baker, 3 Moore 282, 13 Eng. Rep. (Full Reprint) 117.

A like rule governs the courts of this country:

We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will. Delafield v. Parish, 25 N.Y. 9.

Newman v. Smith, 77 Fla. 667, 674, 82 So. 246, 248 (1918). It is recognized that testamentary capacity, or "sound mind", is the "ability of the testator to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed." Id. [77 Fla. 633] at 649, 82 So. [236] at 241; see also In re Dunson's Estate, 141 So. 2d 601, 604 (Fla. 1962); In re Wilmott's Estate, 66 So. 2d 465, 467 (Fla. 1953); Coppock v. Carlson, 547 So. 2d 946, 947 (Fla. 3d DCA 1989)("...the ability to understand the nature and extent of his property, the natural objects of his bounty, or the general process of will-making."); In re Estate of Weihe, 268 So. 2d 446 (Fla. 4th DCA 1972), quashed on existing facts, 275 So. 2d 244 (Fla. 1973).

Where the subject will is executed after the testator has been declared legally incompetent, it must be proved that the testator returned to a state of testamentary capacity by demonstrating that the will was executed during a lucid moment. See In re Estate of Supplee, 247 So. 2d 488, 490 (Fla. 2d DCA 1971)("Florida law is likewise well settled to the effect that although an incompetency adjudication creates a presumption of lack of testamentary capacity as to any will thereafter executed during the continuance of such adjudication, that such presumption may be overcome on proof that the will was executed by the adjudged incompetent during a lucid interval."). The terms "lucid moment" or "lucid interval" do not describe a moment when the testator was not patently delusional. A "lucid moment" is a period of time during which the testator returned to a state of comprehension and possessed actual testamentary capacity.

II. Evidentiary Burden

The Supreme Court of Florida has stated that "an adjudication of incompetency shifts the burden of going forward with the evidence on testamentary capacity to the proponent of the will." In re Estate of Ziy, 223 So. 2d 42, 43 (Fla. 1969); see also Grimes v. Estate of Stewart, 506 So. 2d 465, 467 (Fla. 5th DCA 1987)("Although a declared incompetent may have sufficient lucid moments during which to execute a valid will, nevertheless, adjudication of incompetency of a testator creates a prima facia case against the proponent of such a will.")(footnotes omitted). In the instant case, Mr. Haynsworth was declared legally incompetent on May 18, 1993. Therefore, the burden of going forward with evidence as to the capacity of Mr. Haynsworth rested with the Niece.

Now that we have identified the appropriate test for testamentary capacity and determined that the burden to prove a return to capacity rested with the Niece, we turn to the question of whether the Niece adequately met that burden. The Niece presented two expert witnesses who opined that Mr. Haynsworth had testamentary capacity to execute the July Will. However, one of these experts had never examined Mr. Haynsworth, and the other had not examined Mr. Haynsworth near the time of the signing of the July Will. The Niece presented lay testimony to the effect that Mr. Haynsworth appeared lucid and was able to exchange pleasantries during the relevant time. **However, none of the expert or lay testimony offered at trial provided any evidence relating to Mr. Haynsworth's testamentary capacity as it is legally defined, to-wit: Whether he had an understanding of the nature and extent of his holdings and assets, understood his relation to those who would naturally claim a substantial benefit from his will, and whether he possessed a general understanding of the practical effect of the will as executed.** Accordingly, there was no competent substantial evidence that can be pointed to by the Niece/Appellee as even addressing, let alone overcoming, the presumption of incompetency that legally follows the adjudication of incompetency rendered by the court as of May 18, 1993. As a result, the trial court was in error in admitting the July Will to Probate. For the same reasons, the subsequent November Will is not capable of being probated either.

III. Partial Invalidity

Without expressing any view concerning agreement or disagreement with the trial court's finding that attorney Blum subjected Mr. Haynsworth to undue influence in connection with his fee for drafting the February Will, we note that the record contains sufficient evidence to support that finding and we will not disturb it. However, having made such a finding, the proper result under section 732.5165, Florida Statutes (1995), would be to strike only that provision awarding Blum five percent of the estate and admit the rest of the February Will to probate. n1 Accordingly, the amount of money that would have gone to Blum reverts to the residuary clause of the February Will.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1That statute provides: "A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

For all of the above reasons, this case must be remanded to the trial court with directions to vacate the order that admitted the July Will to probate and, instead, probate the February Will.

Reversed and remanded with directions.

Hendershaw v. Estate of Hendershaw, 763 So. 2d 482 (Fla. 4th DCA 2000)
The burden of invalidating a will because of lack of testamentary capacity is a heavy one and must be sustained by a preponderance of the evidence. Estate of Bailey, 122 So. 2d 243, 245 (Fla. 2d DCA 1960); see also In re Donnelly's Estate, 137 Fla. 459, 188 So. 108 (1938)(It is well established that a last will and testament shall be held valid whenever possible). Testamentary capacity is determined only by the testator's mental capacity at the time he executed his will. Estate of Bailey, 122 So. 2d at 245. "'Sound mind' means the ability of the testator 'to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed.'" Id. (citations omitted). The probate court's findings in a will contest shall not be overturned where there is substantial competent evidence to support those findings, unless the probate judge has misapprehended the evidence as a whole. Id. at 247; see also Estate of Parson, 416 So. 2d 513 (Fla. 4th DCA 1982)(The findings of the trial court are to be presumed correct and are to be given the same weight as a jury verdict).

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NAME: Daniel C. Marson +, Justin S. Huthwaite ++ and Katina Hebert +++

BIO:

+ J.D., Ph.D., Department of Neurology, Alzheimer's Disease Research Center, The University of Alabama at Birmingham, Birmingham, Alabama. Address correspondence to Dr. Marson, Department of Neurology, JT1216, The University of Alabama at Birmingham, Birmingham, AL 35233-7340. Tel: (205) 934-2334. Fax: (205) 975-3094.

++ Psy.D., Department of Neurology, The University of Alabama at Birmingham, Birmingham, Alabama.

+++ M.S., Department of Psychology, The University of Alabama, Tuscaloosa, Alabama.

SUMMARY:
... A key requirement of the law of testation is that a testator (person making the will) have testamentary capacity or competency(TC): "that measure of mental ability recognized in law as sufficient for the making of a will." ... Current mental health practice in legal cases of testamentary capacity can be divided into two major areas: (1) clinical interviews of living testators and family members contemporaneous with a will execution; and (2) retrospective analyses of TC and undue influence in cases involving a now deceased or incompetent testator. ... Cognitive Functions Related to Knowing the Nature and Extent of Property: The second legal element of TC requires that the testator remember the nature and extent of his or her property to be disposed. ... If the lawyer questions the client's testamentary capacity, he or she may wish to seek an assessment of the client's mental status and capacity by an appropriate mental health professional such as a neuropsychologist. ... Testamentary capacity and undue influence are legal issues whose resolution frequently requires the expertise, assessment skills, and testimony of mental health professionals. ...

TEXT:
[*71] INTRODUCTION

The freedom to choose how one's property and other possessions will be disposed of following death--known as the right of testation--is a fundamental right under Anglo-American law. 1 A key requirement of the law of testation is that a testator (person making the will) have testamentary capacity or competency 2 (TC): "that measure of mental ability recognized in law as sufficient for the making of a will." 3 If TC is lacking at the time of execution of the will, it is invalid and void in effect. 4 The legal requirement of TC exists across all state jurisdictions. 5 In order to make a valid will, the law also requires that the testator be free from undue influence by another individual who may profit from a new will or a legal amendment of an existing will (codicil). 6 Thus a validly executed will may be voided by the court if it deems that the volition of the testator was in effect supplanted by an individual exercising undue influence over him/her. The doctrine of undue influence, which also exists across state jurisdictions, is analytically distinct from TC insofar as it applies in cases in which the testator possesses TC. 7 Nonetheless, in the case of a will contest, these two legal issues very often co-occur and intertwine.

[*72] Anglo-American law has strongly supported testation over intestacy. 8 Public policy and legal precedent have clearly favored allowing individuals to choose how their property will be distributed after death, rather than leaving such decisions to state laws governing intestacy. However, despite the legal system's tendency to favor the rights of the testator, cases challenging the validity of wills and specifically the TC and/or independent volition of testators are common and, in fact, appear to be increasing in number. 9 This increase in will contest litigation reflects a number of factors, in particular our aging society and increasing numbers of older adults with organic, psychiatric, and medical impairments that adversely affect their mental capacities. 10 Other factors include the breakdown of the nuclear family and increase in blended families with conflicting agendas, and the enormous transfer of wealth currently ongoing between the World War II and baby boomer generations. 11

Legal cases involving issues of TC and undue influence very frequently involve mental health professionals (MHPs) such as psychiatrists, neuro-psychologists, and clinical psychologists. The meaning and application by judges of legal constructs such as TC, undue influence, and "lucid interval" can be substantially informed in particular cases by the clinical expertise and testimony of such professionals. The roles of these MHPs can vary widely, from consulting with attorneys about clients with questionable capacity, to clinically evaluating testators for TC prior to will execution, to conducting post-mortem retrospective evaluations of TC and the validity of a previously executed will (sometimes called the "neuropsychological autopsy"). 12 At the same time, almost no research has been conducted and relatively little is known empirically about mental health practices in the legal arena of testamentary capacity.

In recent years legal scholars have developed a theoretical framework known as therapeutic jurisprudence. 13 In this framework, "legal rules, legal procedures, and legal roles are analyzed in terms of their therapeutic, neutral, or anti-therapeutic effects." 14 More specifically, therapeutic jurisprudence seeks to sensitize and increase the social awareness of legal policy makers to understand and factor therapeutic legal rules and procedures into legal decision-making. 15 The perspective of jurisprudent therapy (JT) is an extension of therapeutic jurisprudence and serves as a means for assessing mental health science, practices, and roles with the goal of promoting principles [*73] of justice and human freedom while minimizing anti-jurisprudent outcomes for the client. 16 Thus, JT provides an interdisciplinary approach aimed at developing and improving mental health science and forensic practice for individuals, as well as the general public. 17

This Article seeks to examine mental health practice in the area of testamentary capacity using a jurisprudent therapy approach. The Article is divided into three sections. The first section addresses the legal requirements of TC particularly as it relates to older adults. We begin the section by briefly describing the historical development of the law relating to wills and TC. We then outline the current legal requirements related to TC and undue influence. A case example is provided to illustrate how legal issues of TC and undue influence can play out in cases involving older adults with dementia. In the second section, the focus shifts to current mental health practice, science, and roles as they apply to legal matters of TC and undue influence in the elderly. In the third section, we apply a jurisprudent therapy analysis and examine how well mental health science and practice currently address the needs of the legal system in resolving matters of TC and undue influence. We also make recommendations for future developments in this interesting and increasingly important intersection of law, mental health, and aging.

SECTION I: THE LAW OF TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

Legal Background to Testamentary Capacity

The history of wills and the right of testation in Anglo-American law developed out of discontent with the eleventh century feudal principle of primogeniture. 18 Instituted in England after the Norman conquest, this legal principle recognized the right of the eldest son to inherit the family estate to the exclusion of all female and junior male descendents of equal degree of relationship. 19 As feudalism declined and tax payments were substituted for military service, primogeniture began to disappear. 20 By the thirteenth century, leaseholds were reportedly passing by will. 21 In 1540, the adoption of the Statute of Wills formally allowed the landed gentry to avoid primogeniture completely by passing their lands on by wills. 22 Thereafter, primogeniture only applied in cases in which the deceased left no will. 23 The Statute of Frauds, enacted in 1677, required "a writing to pass personalty at death." 24 [*74] As a result of these social and legal developments, the requirement of a written legal will providing for the distribution of real and personal property postmortem became an established part of Anglo-American law. 25

The requirement that a testator have "a sound disposing mind"--testamentary capacity--was discussed in the early English case of Harwood v. Baker in 1840. 26 In this case, the issue of competency was not related to Mr. Baker's awareness that he was giving all of his property to his wife and excluding other relations from their share in it, but whether or not Mr. Baker was at the time of signing of the will capable of recalling who those relations were, understanding their claims to his bounty, and forming an intelligent decision in excluding those relations. 27 Specifically, Lord Erskine stated: "in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others whom, by his will, he is excluding from all participation in that property." 28

The doctrine of TC established in English case law was adopted in early United States cases such as Delafield v Parish. 29 Delafield set forth the principles outlined in Harwood by requiring that the testator comprehend the condition of his property, his relations to persons who were, should, or might have been objects of his bounty, and the scope and provisions of the will itself. 30 However, the court also placed additional emphasis on the importance of memory functioning, stating that the testator must have: "sufficient active memory to collect in his mind, without prompting, the particulars or elements of business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their

obvious relations to each other, and be able to form some rational judgment in relation to them." 31 Individuals meeting these standards during the Nineteenth Century were considered to be of sound mind and memory and competent to dispose of their estates by will.

[*75] Current Legal Requirements for Testamentary Capacity

The current legal requirements for TC in the United States vary to some degree from state to state, but in many states (although not all) four specific criteria or elements are recognized. 32 A testator must:
(1) understand the nature of the testamentary act;

(2) understand and recollect the nature and situation of his or her property;

(3) have knowledge of the persons who are the natural objects of his or her bounty; and

(4) know the manner in which the disposition of the property is to occur. 33

These four legal elements are discussed below in greater detail. In addition, as discussed below, some states require that the testator also be free of delusions or hallucinations that impact TC. 34

Element 1: Understanding the Nature of the Testamentary Act

The first element of TC requires that the testator understand the nature of the testamentary act. Some jurisdictions restate this as "understanding the business and consequences of making a will." 35 As part of such understanding, a testator should know that he will die, that a will is a written document that legally transfers selected property to his/her chosen heirs, and that a will comes into effect after his/her death and not before. 36

Element 2: Knowing the Nature and Extent of One's Property

The second element of TC requires that the testator know and recall the nature and extent of his or her property to be disposed. 37 The level and duration of knowledge/recall for the testator's property is not well defined legally and variations in this requirement appear to exist across states. However, knowledge by the testator of key assets owned, such as real estate, [*76] dwellings, and other property such as bank accounts and vehicles, appears to be necessary. Some courts in England appear to encourage a testator's ability to differentiate solely versus jointly owned assets, and to identify assets which do not pass by will (e.g., pensions, insurance, and other benefits). 38

Element 3: Knowing the Objects of One's Bounty

The third element of TC requires that the testator know the persons who are the natural objects of his or her bounty. 39 These are predominantly family members and other individuals related to the testator by blood or marriage, although the law permits testators to leave possessions to non-family members, such as friends, caretakers, and corporations. English courts may encourage differentiation of such individuals and claims according to need, and the degree of emotional connection. 40 Some states like Minnesota do not recognize a requirement of knowing the objects of one's bounty, and focus instead on knowledge of assets and property. 41

It is important to recognize that a testator who is of sound mind is free to disregard and disinherit his/her natural heirs. 42 At the same time, as noted by Frolik, the right of freedom of testation is not absolute. 43 The prime examples of limits on testation are "forced share" statutes, which permit surviving spouses the right to elect against the will (and whatever portion was provided them, if any) and take instead a statutorily mandated provided share of the estate. 44

Element 4: Plan for Distribution of Assets

A fourth element of TC requires that the testator demonstrate knowledge of a plan for disposition of property to the heirs. 45 This element has alternatively been expressed as understanding the "manner in which the disposition of the property is to occur." 46 Jurisdictions requiring this element appear to be seeking some basic knowledge on the part of the testator as to his/her plan for distributing the property to selected heirs. This element arguably also comprises the testator's knowledge of the will executor--the individual appointed by the testator to ensure that the will provisions are carried out as planned.

[*77] Additional Psychiatric Element: Absence of Delusions and Hallucinations

In addition to the four legal elements of TC described above, many states require that the testator be free of "delusions or hallucinations [which] result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done." 47 Walsh and colleagues reference a Kansas case 48 which elaborates the concept of "insane delusion" in the context of TC as "belief in things impossible, or a belief in things possible but so improbable under the surrounding circumstances that no man of sound mind would give them credence. It is a belief which has no basis in fact or reason." 49

It is critical that the psychotic symptoms specifically affect issues related to the testator's testamentary capacity. 50 Put differently, the will must be the product of the insane delusion. 51 A will may be ruled valid if delusions and hallucinations are discrete, unassociated with the testator's property and potential heirs, and/or have seemingly little or no impact on the testator's plan for the disposition of assets. 52

Other Legal Aspects of Testamentary Capacity

Presumption of Testamentary Capacity: The law presumes that individuals reaching the age of legal majority (usually 18 years in most jurisdictions) possess TC, and places the burden of proof on those parties challenging such a testator's competency. 53

Minimal Threshold for Testamentary Capacity: It is generally accepted that the level of mental capacity needed to legally execute a will is low. 54 As noted above, public policy strongly favors testacy and courts have pursued only a minimal standard. 55

Testamentary Capacity Can Survive General Incompetency: It is important to note that in certain situations TC is a specific competency that can survive general incompetency. "General competency" is defined as the ability to handle the totality of one's financial and personal affairs. Thus, for example, an individual may be incompetent to manage his/her financial and/or personal affairs, but in some jurisdictions may still be able legally to make a will. Therefore, as long as the testator is found to possess the specific [*78] competency of TC, he or she may not necessarily be competent in other areas.

Doctrine of Lucid Interval: For a will to be valid, it is only necessary that the testator

possess sufficient mental capacity at the time that the will is executed. 56 Thus, even in the face of undisputed evidence of the testator's impaired mental incapacity (e.g., as a result of a progressive dementia), a will can be determined to be valid under the "lucid interval" doctrine. 57 A lucid interval is a transient period of apparent mental clarity (or at least capacity) during which an otherwise incompetent adult can validly execute legal documents. 58 Under this doctrine, courts have sometimes found testamentary capacity if there are witnesses and sufficient evidence to support lucidity at the time of will execution. 59 However, from a clinical standpoint, the lucid interval may be more a legal fiction used by attorneys and judges in difficult cases, than it is an actual clinical reality.

The Legal Issue of Undue Influence

An analytically separate but important issue related to TC is that of undue influence. Undue influence has been defined as "any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely," and also as "influence which deprives a person influenced of free agency or destroys freedom of his will and renders it more the will of another than his own." 60 In the context of probate law, undue influence refers to excessive influence on a testator by another individual (for example, a family member, caregiver, or professional). In cases of undue influence, the dispositive contents of the will reflect the wishes of the influencer rather than those of the testator. 61 Undue influence is analytically distinct from TC insofar as the testator has some level of preserved TC but his/her own wishes and intent are subverted by the influencer. 62

Undue influence as a legal principle has been resistant to ready definition and the case law on this issue appears to be highly fact intensive. Despite the absence of an agreed upon definition, efforts have been made by courts to establish some criteria. 63 The following four criteria have received some general acceptance (variable across state jurisdictions), 64 and each is discussed further below:
[*79] (1) a confidential relationship existed between the testator and influencer (such as a close relative or advisor);

(2) the influencer used the relationship to secure a change in how the testator distributed his or her estate;

(3) the change in the estate plan was unconscionable or did not reflect the true wishes of the testator;

(4) the testator was susceptible to being influenced.

Confidential Relationship Between Testator and Influencer: Review of case law supports almost any relationship as "confidential" where an accusation of undue influence is made. A confidential relationship exists when there is a special trust and confidence between the parties or when "one comes to rely upon and trust the other in important affairs." 65

Testator's Distribution of Estate Affected by the Influencer: A second criteria requires that the testator's distribution of his or her estate be altered through misuse of the confidential relationship by the influencer. Alteration in estate distribution occasioned by kindness or good deeds, without fraud or deception, is usually not enough to constitute undue influence. 66 The influence involved can range from more subtle influences, such as encouraging the testator to write a new will, accompanying the testator to the lawyer, or being present at the signing of the will, to explicit threats and coercion. 67 Whatever the level of influence,

there must be "undue" activity on the part of the influencer in procuring the execution of the will. 68

Change in Estate Not Reflective of Desires of Testator: In cases of undue influence, there is usually a claim of "unnatural gift:" a significant change in the testator's will beneficial to the influencer that represents a notable deviation from the testator's previously expressed wishes. While undue influence can occur in the writing of an original will, it is more commonly seen in the preparation of succeeding wills and codicils and represents the influencer's dissatisfaction with the original will or its most recent revision. Whatever the situation, the influencer has, in some way, knowingly manipulated the testator to change the provisions of the will in ways that are not consonant with the testator's own wishes.

Testator's Susceptibility to Undue Influence: This final element to undue influence most directly links to the issue of testamentary capacity itself. In order to show susceptibility to undue influence, the challenger will usually claim that an elderly testator had diminished or marginal capacity due to some form of organic, psychiatric, or medical condition. 69 For example, courts have recognized that persons with Alzheimer's dementia are highly [*80] vulnerable to the suggestion and influence of others, even when they may possess some residual level of capacity. 70 In a 1995 Alabama case the court noted that the testator had died of advanced Alzheimer's disease and had been diagnosed three years earlier. 71 The court continued: "The record is laden with evidence indicating a deterioration of [the testator's] mental processes, which would make her especially susceptible to undue influence." 72

Case Law Example: Testamentary Capacity in an Elderly Testatrix with Dementia

To illustrate how issues of TC and undue influence arise in the context of dementia, we present a case law example. In Allen v. Sconyers, 73 the Supreme Court of Alabama reviewed a lower court ruling of summary judgment that had found the testatrix, Ms. Nell Allen, to possess TC and to have executed a valid will.

The facts are as follows: Ms. Allen had first executed a will in 1971 leaving her estate to her husband, Joe Allen, and substantial residual portions to her two stepsons Martin Allen and Doug Allen. 74 During the middle to late 1980s, Ms. Allen began to demonstrate progressive cognitive decline including symptoms of disorientation, confusion, and forgetfulness. 75 Her husband was also dying of cancer during this time. 76 In 1990 Ms. Allen executed a new will leaving the most substantial portions to Martin and Doug Allen, and to a daughter-in-law, Dorothy Allen. 77 Between 1990 and 1992, Ms. Allen's mental status continued to decline such that she could not carry out hobbies or basic activities of daily life, nor identify close relatives by name. 78 A diagnosis of Alzheimer's disease was made and her family was referred to a dementia support group. 79 In November 1991 her husband Joe died. 80 Two weeks later a sister, Ms. Sconyers, moved Ms. Allen from Texas to Ms. Sconyers' home in Clio, Alabama. 81 Ms. Sconyers quickly obtained a power of attorney and within a month's time Ms. Allen reportedly had contacted a local attorney in order to make a new will. 82 The new will was executed in January 1992 and left the bulk of the estate to Ms. Sconyers, with nothing devised to Martin Allen, Doug Allen, or Dorothy Allen, the primary heirs under the 1990 will. 83 Ms. Allen died in December 1993 in a nursing [*81] home. 84 The death certificate indicated "advanced Alzheimer's disease" and a disease-duration of three years. 85

The Alabama Supreme Court reversed the trial court ruling of summary judgment, finding that there were genuine issues of material fact concerning (1) undue influence on the part of Ms. Sconyers, and (2) the testamentary capacity of Ms. Allen. 86 The court noted that

there was substantial evidence of mental impairment in the record that could "support an inference that [Ms. Allen] was without the ability to know and understand the consequences of the will at the time of its execution." 87 In addition, the court noted the substantial distribution changes effected by the 1992 will: "the reasonableness of Nell's distribution of her estate, which differed so strongly from the distribution provided for in her prior wills, could also be called into question by a jury." 88

Underlying the court's reasoning appeared to be concerns with the abrupt involvement and control over Ms. Allen exercised by Ms. Sconyers following Mr. Allen's death, the rapid issuance of a new power of attorney and execution of a new will, and the new will's significant departure from the provisions and heirs of the first two wills. 89 Although the court simply remanded for further proceedings in accord with its findings, it is apparent that the Alabama Supreme Court felt that the instant facts could support petitioner's dual claims of testamentary incapacity and undue influence. 90

SECTION II: MENTAL HEALTH PRACTICE, SCIENCE, AND ROLES IN LEGAL MATTERS OF TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

Mental health professionals and the psychological sciences have important roles to play in legal matters of testamentary capacity and undue influence. As discussed above, testamentary capacity, undue influence, lucid interval, and delusions/hallucinations affecting TC are psycholegal constructs and require clinical and scientific expertise and testimony as part of their judicial interpretation and application in particular cases. In Section II, we discuss existing mental health practices, scientific knowledge, and professional roles in the area of testamentary capacity and its related issues. In Section III, we view these existing practices and corpus of knowledge through a jurisprudent therapy lens, evaluating how well mental health practice and psychological science currently support the structure and the goals of the law in this area.

[*82] Current Mental Health Practices in Testamentary Capacity and Undue Influence

Current mental health practice in legal cases of testamentary capacity can be divided into two major areas: (1) clinical interviews of living testators and family members contemporaneous with a will execution; 91 and (2) retrospective analyses of TC and undue influence in cases involving a now deceased or incompetent testator. 92 In each of these areas, current practice patterns vary quite widely in approach and quality, in large part due to uneven conceptual understanding among many practitioners of capacity assessment generally, and of the legal requirements of TC and undue influence specifically. 93

Conceptual Issues in Assessing Testamentary and other Capacities:

A number of conceptual misunderstandings can occur in civil capacity assessments of the elderly. Four of these "pitfalls" are enumerated below:

1. Multiple Capacities: Capacity To Do What? The term "capacity" is sometimes used by practitioners in a unitary and undifferentiated way. 94 Capacity, however, is not a unitary concept or construct: there is not simply "one" capacity. The normal adult has distinct and multiple competencies, including the capacity to make a will; to drive; to consent to medical treatment; to manage financial affairs; and ultimately, to manage all of his or her personal affairs. Each capacity involves a distinct combination of functional abilities and skills that sets it apart from other competencies. 95 For example, the cognitive and physical capacities requisite for driving are arguably quite distinct from those described above for making a will. In addition, each competency tends to operate in a context specific to itself. 96 For

example, the capacity to consent to treatment almost always arises in a medical setting. The reality of multiple competencies indicates that the operative question should not be "Is he/she capable?," but rather, "Is he/she capable to do X in Y context?" 97

2. Limited Capacity: Because capacity determination by its nature results in a categorical assignment (e.g., competent vs. incompetent), practitioners sometimes view outcomes as dichotomous, "all or nothing" propositions. 98 Limited capacity refers to the fact that, within a general or specific [*83] capacity, an individual may have the capacity to perform some actions but not others. For example, a mildly demented AD patient may no longer be able to handle more complex investment and financial decisions, but might still be able to write checks and handle small daily sums of money. 99 Similarly, such an individual may satisfy some but not all elements of testamentary capacity. Such an individual could be characterized, therefore, as having limited capacity to manage his/her financial affairs, or to make a will. The legal system has recognized the importance of limited capacity through increasing use of limited guardianships and conservatorships. 100

3. Diagnosis Does Not Constitute Incapacity: Practitioners can sometimes view a diagnosis of an organic or psychiatric disease as synonymous with incapacity. 101 This is a significant conceptual and clinical error. A patient who meets criteria for probable AD may, nonetheless, still be capable to consent to medical treatment or research, or carry out other activities such as driving, managing financial affairs, or making a will. A determination of capacity should always involve a "functional" analysis: does the person possess the skills and abilities integral to the capacity in its context? 102 An organic or psychiatric diagnosis is certainly a relevant factor in evaluating capacity. However, because diagnosis conveys no specific functional information, it cannot by itself be dispositive of the capacity question.

4. Cognitive/Psychiatric Impairment Does Not Constitute Incapacity: For similar reasons, neuropsychological and mental status test measures cannot themselves decide issues of capacity. 103 Such test results are important for establishing diagnosis and for measuring levels of cognitive and emotional impairment, and they certainly are relevant to a capacity evaluation. However, again, they cannot by themselves be dispositive of the capacity issue. As noted by Grisso, decision-makers must go further and "present the logic that links these clinical observations [and test results] to the capacities with which the law is concerned." 104 For example, neuropsychological impairments in attention, auditory verbal comprehension, and abstractive capacity become relevant to a capacity determination only when they are meaningfully related to capacity-specific functional impairments--for example, the inability to understand the nature and purpose of a will.

Contemporaneous Clinical Interview Assessment:

In certain circumstances an attorney, judge, or a family member, may request that a mental health professional assess the capacity of a living testator prior to his/her execution of a will. Two common scenarios underlie [*84] such a referral. The attorney or judge may have concerns about the testamentary capacity of the proposed testator, and therefore will seek clinical expertise and input on the issue before proceeding further. Alternatively, in cases of ongoing or anticipated family conflict, the foresighted attorney may seek to preempt a future will contest by having his client undergo a capacity assessment prior to will execution.

Spar and Garb have written cogently on the topic of contemporaneous clinical assessment of TC and undue influence. 105 Their clinical interview guidelines published in 1992 continue to represent a key contribution to forensic practice in this area. The key aspects of the interview are to "assess the legal elements of TC, identify any features of the testator's

personality and mental status that could affect susceptibility to undue influence, and determine the nature, extent, and general functional consequences of mental illness, if any." 106 The authors highlight the importance of conducting the clinical interview in close proximity to the moment the testamentary document is executed. 107 Interviews conducted in close proximity to the time of testamentary document execution are more likely to be influential in court than those conducted at more distant time periods. 108 This consideration is important as courts generally place great emphasis on the testator's mental functioning at the time in question and recognize that individuals' mental functioning can vary at different time points. 109

A second, and perhaps more difficult, challenge for the clinical examiner is to obtain as much information as possible about the testator's possessions and names and relationships of potential heirs to the testators. This can be a difficult task when the testator's informants are limited to family members who serve to profit from the examiner's testimony. An objective source of information regarding a testator's potential heirs and possessions is strongly recommended but may not always be practical. A private interview with only the testator is recommended to limit outside influences. A videotape recording of the interview with the testator may prove beneficial for illustrating the lack of outside influences; however, this should first be discussed with the testator's attorneys.

Clinical interview assessment of undue influence is somewhat more elusive but focuses on the legal indicia of undue influence (see above) in conjunction with the testator's physical and social circumstances. 110 Spar and Garb usefully note the literature on religious cults in referencing behaviors that are associated with control and manipulation of a testator. 111 These include "secluding, providing attention, affection, and approval; encouraging behavioral regression and dependency; depriving mental and physical privacy . . . indoctrination . . . and discouraging independent thought by [*85] negative characterization." 112 In addition, the evaluation should focus on areas of apparent uncertainty and inconsistency for the testator (e.g., leaving the entire estate to a new religious organization) that might reflect the covert effects of undue influence.

Retrospective Assessment:

Although direct, contemporaneous evaluations of testamentary capacity are desirable and useful, they probably do not represent the majority of forensic evaluations in this area. More often as not, mental health professionals are called upon by attorneys for or against the will/estate, by the probate court, or by interested family members, to examine indirect evidence and render retrospective opinions regarding testamentary capacity and if applicable, regarding undue influence. Retrospective evaluations of testamentary capacity arise after the death (or sometimes the incompetency) of a testator, when heirs and/or other interested parties contest a will on grounds that the decedent lacked testamentary capacity at the time of will execution. Although recognized by courts, no clear rules for conducting such evaluations have been established. 113

The process of retrospective evaluation has sometimes been described as a "neuropsychological autopsy," 114 and neuropsychological methods and knowledge can be particularly useful for these purposes. 115 Greiffenstein has proposed several steps for determining testamentary capacity retrospectively. 116 First, the clinician should consider whether the legal issue at hand pertains to testamentary capacity or undue influence, or both. Next, the date of the legal transaction should be identified, as this date will help determine the relevance of contemporaneous mental status, medical, and lay testimony evidence. This is typically the date in which the will was signed. The clinician must also identify the type of organic or psychiatric disorder that the testator had and determine

which, if any, cognitive abilities were impacted. This is done by gathering evidence of normal and abnormal cognitive and emotional behavior occurring as close as possible to the date of will execution.

There are a number of information sources that can assist a clinician in making an indirect assessment of testamentary capacity. 117 These include the testator's business records, checkbook and other financial documents, and personal documents such as family films, videos, notebooks, and diaries. 118 Medical records yield particularly useful information including mental status and neuropsychological testing, diagnosis, level of impairment, and [*86] behavioral observations. 119 Clinicians may also find it beneficial to interview the testator's family, friends, business associates, and other involved professionals (i.e., physician, attorney, accountant, notary public, etc.) regarding the testator's cognitive and functional abilities during the time that the will was executed. 120

Mental health professionals may also seek to rely on information collected from dementia staging instruments, such as the Clinical Dementia Rating Scale and the Global Deterioration Scale. 121 In cases of Alzheimer's type dementia, these scales permit the clinician to retrospectively assess dementia stage based on the contemporaneous mental status and behavioral evidence in the record. Dementia stage, in turn, becomes an evidentiary source that clinicians and probate courts can both use in making retrospective capacity determinations.

Ultimately, the clinician must assemble all of the information described above, and make judgments and offer testimony as to whether or not the testator had testamentary capacity and/or was subject to undue influence at the prior relevant time points. In some cases it may not be possible to render such judgments, if there is insufficient evidence of the testator's cognitive, emotional, and functional abilities contemporaneous with the prior will execution.

Psychological Science and Testamentary Capacity and Undue Influence

At the present time, there is only a very slender body of psychological science that informs the clinical forensic practice patterns described above for TC and undue influence. In part this reflects the early developmental stage of the field of capacity assessment generally. With the exception of treatment consent capacity, for which there is now a reasonable body of research, 122 relatively little conceptual and empirical research has been conducted regarding other important civil competencies such as financial capacity 123 or driving. 124 However, this point notwithstanding, the area of testamentary capacity has been neglected. Although (as discussed above) there are several extant articles presenting clinical guidelines and tips for assessment [*87] of TC, there is currently no body of harder research which can inform and advance the field. Specifically, the present authors have identified no cognitive or neuropsychological models, direct assessment instruments, or published empirical research regarding either TC or undue influence in the psychological literature. Given the prevalence and importance of inheritance by will, this represents a key knowledge gap in forensic science as it relates to civil competencies and the elderly.

Absence of Psychological Models of Testamentary Capacity:

Concepts such as testamentary capacity, susceptibility to undue influence, lucid interval, and hallucinations/delusions impacting TC are psycholegal terms that "do not have immediately discernable scientific counterparts . . . (and it) is therefore necessary for clinicians operationally to define or translate legal concepts into observable, definable, and measurable scientific terms." 125 Currently, however, there is an absence of psychological

models of testamentary capacity and related concepts that mental health professionals can draw upon. The absence of a sound scientific and theoretical base in turn adversely affects clinicians' conceptual knowledge and related capacity assessment practice patterns, as discussed above.

A starting point for addressing this theoretical gap would be to develop a cognitive (neuro)psychological model for the legal elements of testamentary capacity. Our capacity research group has begun work in this area and offers the following preliminary thoughts concerning the cognitive components for each the four legal elements of TC. These are outlined below:

1. Cognitive Functions Related to Understanding the Nature of a Will: This element requires a testator to understand the purposes and consequences of a will, and to express these verbally or in some other adequate form to an attorney or judge. Possible cognitive functions involved may include semantic memory regarding terms such as death, property and inheritance, verbal abstraction and comprehension abilities, and sufficient language abilities to express the testator's understanding. Recognition items may assist a testator with expressive language problems. A reply of "yes" or "no" to an attorney's queries regarding the nature of a will is unlikely to be satisfactory in this regard, as such responses do not clearly support the testator's independent understanding of the element. Similarly, a testator's signature on a legal document by itself does not demonstrate understanding, as a signature is an automatic procedural behavior not dependent upon higher level cognition. 126

2. Cognitive Functions Related to Knowing the Nature and Extent of Property: The second legal element of TC requires that the testator remember the nature and extent of his or her property to be disposed. As reported earlier, some states differ in their interpretation of this. 127 Possible cognitive [*88] functions involved here would include semantic memory concerning assets and ownership, historical memory and short-term memory enabling recall of long-term and more recently acquired assets and property, and comprehension of the value attached to different assets and property. If the testator has recently purchased new possessions prior to his or her execution of a will, then impairment in short-term memory (the hallmark sign of early AD) can significantly impact his or her recall of these items. Testators also must be able to form working estimates of value for key pieces of property that reasonably approximate their true value; it is likely that executive function abilities play a role here.

3. Cognitive Functions Related to Knowing the Objects of One's Bounty: This legal element requires that the testator be cognizant of those individuals who represent his natural heirs, or other heirs who can place a reasonable claim on the estate. Historical and also short term episodic personal memory of these individuals, and of the nature of their relationships with the testator, would appear to be prominent cognitive abilities associated with this element. As dementias like AD progress, testators may be increasingly unable to recall family members and acquaintances, leading ultimately to failure to recognize these individuals in photographs or even when presenting in person.

4. Cognitive Functions Related to a Plan for Distribution of Assets: This final legal element of TC requires that the testator be able to express a basic plan for distributing his assets to his intended heirs. Insofar as this element integrates the first three elements in a supraordinate fashion, the proposed cognitive basis for this element arguably represents an integration of the cognitive abilities underlying the other three elements. Accordingly, higher order executive function abilities are implied as the testator must demonstrate a projective understanding of how future dispositions of specific property to specific heirs will occur.

The preliminary cognitive psychological model of TC proposed above represents a first step towards model building in this area. Such a model would require empirical verification in an older adult sample through use of a relevant TC instrument and neuropsychological test measures. The availability of psychometric and other assessment instruments for TC is discussed below.

Instruments for Assessing Testamentary Capacity and Undue Influence:

The current lack of conceptual psychological models for TC is reflected in the corresponding absence of assessment instruments specific to this domain of forensic practice. Well-grounded theoretical models are the foundation for standardized, objective measurement of capacity constructs. 128 For example, conceptual models and related instrument development and objective measurement have emerged in other areas of civil competency, in particular [*89] treatment consent capacity 129 and, more recently, financial capacity. 130 As testamentary capacity matures as an area of civil competency practice and research, one can anticipate the emergence of conceptually based instruments. We discuss below two initial efforts in this area.

1. The Legal Capacity Questionnaire: It is not always recognized that, as part of their everyday practice, attorneys have a responsibility to informally assess their client's capacity to carry out legal transactions and execute legal documents such as a will. 131 (Indeed, strictly speaking, clients must possess contractual capacity in order to retain an attorney as their representative, as an attorney-client relationship is founded upon contract). Such preliminary capacity assessments help the attorney plan what course of action needs to be taken. Obviously if the lawyer believes the client possesses a "sound mind" and testamentary capacity, he/she will support and facilitate the client's execution of the will. If the lawyer questions the client's testamentary capacity, he or she may wish to seek an assessment of the client's mental status and capacity by an appropriate mental health professional such as a neuropsychologist. In some situations, the proposed client's incapacity may be so apparent to an attorney that a professional referral is unnecessary. In these circumstances, the attorney will probably need to notify family members of his/her inability to represent the client, and of the likelihood of testamentary incapacity. In these cases it is sometimes possible to make appropriate alternative arrangements and represent the interests of family members in the same matter.

The Legal Capacity Questionnaire (LCQ) was created by and for attorneys to help address issues of client testamentary capacity prior to the execution of a will. 132 The LCQ provides for the testing of three of the four legal elements of TC as outlined previously. The instrument is divided into three sections (general information, a client information section, and the questionnaire itself). The questionnaire taps the elements of TC using true/false questions, multiple-choice questions, and other questions requiring the client to make a more open-ended decision. Baird Brown, an attorney and the author of the LCQ, also collected empirical data on the instrument which is reported within the larger volume he co-authors. 133 Limited normative data is provided for older adults in three residential settings: community residences, retirement homes, and skilled nursing facilities. Using correlational analyses with mental status and behavioral instruments, cut scores are set for three screening outcomes (high capacity, borderline capacity, low capacity) to provide guidance for attorneys. In situations where clients are judged to have high capacity, the attorney may proceed forward "with confidence" [*90] in the estate planning process. Borderline capacity outcomes require attorneys to proceed with caution and/or investigate capacity further and consider professional referral. In situations of low capacity, attorneys are advised to exercise "extreme caution" and to not proceed further without expert

consultation. 134 Case studies are included to illustrate use of the instrument.

The LCQ is currently the only available instrument the present authors found that was specifically designed to assess TC. It is perhaps best described as a capacity screening tool for attorneys engaged in probate law practice with older clients and clients with cognitive disabilities. Strengths include its conceptual linkage to three legal elements of TC, its open-ended interview format, relatively standardized administration, and the fact that scores can be quantified and normatively referenced to different older adult groups. Limitations from a psychological science standpoint include the lack of an underlying conceptual psychological model, the absence of reliability and validity data, and the failure of the LCQ to address the element of understanding a will, and to address issues of psychotic symptomatology and undue influence. 135 However, given the legal origin and informal screening purposes of the LCQ, it represents a significant accomplishment in an area of forensic practice that has received virtually no attention from psychology.

2. The Testamentary Capacity Instrument: As discussed above, no standardized clinical measure of testamentary capacity currently exists. A psychometric instrument currently in development by the author and his research group is the Testamentary Capacity Instrument (TCI). 136 The TCI is a structured, psychometric measure for assessing and differentiating the testamentary capacity of cognitively-intact versus cognitively-impaired older adults.

The TCI measures capacity according to the four legal elements of TC discussed in Section I. Performance on each element is based on the individual's ability to recall or recollect information pertinent to the execution of a will. The degree to which memory for relevant information is required by law varies. 137 For this reason, each of the four elements is measured using free recall, multiple-choice and also forced-choice items. An individual who may not be able to freely recall information pertinent to a legal element may still be able to accurately identify this information in a recognition or forced-choice (Yes-No/True-False) format. All items are administered verbally and in writing and are scored according to a quantitated scoring system. The scoring system, in turn, supports three judgment outcomes for TC: capable, marginally capable, and incapable. In this regard, the TCI outcomes are similar (although not identical) to those for the LCQ.

[*91] The TCI also has separate sections which support guided questioning regarding the potential occurrence of lucid intervals, the presence of delusions/hallucinations impacting TC, and the testator's susceptibility to undue influence.

Although if necessary the TCI can be a stand-alone assessment, its administration to an older adult testator should ideally co-occur with a comprehensive neuropsychological evaluation. The latter cognitive and emotional test data will provide an important overall context for the evaluation, and can help inform specific TCI findings as well as the clinician's overall judgment of capacity.

Standardized assessment of TC involves certain methodological challenges that require attention. Unlike knowledge of a will, information concerning a testator's assets/property, his/her natural heirs, and his/her plan of distribution is individual specific and not as readily amenable to standardized inquiry. Accordingly, it is very important to obtain accurate information regarding the testator's property and heirs from reliable collateral sources, in order to evaluate and verify the testator's own responses to questions tapping these three legal elements. Thus, the TCI explicitly seeks collateral information for all four legal elements. However, collateral sources sometimes have limited or inaccurate information regarding the testator's assets and/or relationships with potential heirs. In addition, collateral sources may have potential conflicts of interest insofar they are often also

prospective heirs of the testator. Such conflicts of interest may thus bias responses of collateral sources to inquiries regarding the testator's assets and heirs, as well as regarding the testator's general cognitive function, psychiatric health, and quality of relationships with other prospective heirs. These issues obviously require application of clinical judgment by the examiner in selecting collateral sources and using the TCI and related instruments.

The following is a brief description of the current version of the TCI:

a. Understanding the Purpose and Consequence of a Will: In the TCI, the testator is asked to define in his/her own words what a will is and what it does. The testator needs to demonstrate that a will is a written legal document that takes effect after the testator's death and distributes designated property to selected heirs. A testator is also asked to acknowledge and describe any prior wills. Finally, the TCI tests the testator's understanding of the purpose and consequences of a codicil (will amendment).

b. Understanding the Nature and Extent of Assets: In the TCI, the testator is asked to recount in as much detail as possible the nature and extent of his/her property and possessions. Such information should include currently owned real estate, financial holdings (cash and securities), and personal properties and special possessions. The testator's knowledge of the condition and value of his/her property and possessions is also assessed. Finally, the testator is asked to indicate any financial matters and debts that could influence the way the will is executed after his/her death.

c. Knowledge of Natural and Other Heirs (Objects of Bounty): In the TCI, the testator is asked to name his/her potential heirs and descendants [*92] and to describe in as much detail their relationship to the testator. The testator should demonstrate memory for relatives, particularly those who may have a legal right to his/her property or possessions regardless of their status within the will, as well as friends, associates, and other acquaintances he or she wishes to include within the will. Particular interest is given to those individuals that the testator has indicated would be excluded from the will.

d. Plan for Distribution of Assets by Will: Finally, the TCI evaluates the testator's ability to formulate an overall plan for distribution of property identified to his/her natural heirs. The testator is asked to describe the will's future consequences for potential heirs. In addition, the testator is asked to describe why he/she chose to bequeath a specific asset to a given heir, and why certain heirs are excluded. This line of inquiry may be useful in determining whether any aspects of the testator's will are the product of delusions and hallucinations, or undue influence. At the same time, a clinician must also exercise caution as to how such information is used in forming a judgment regarding the testator's mental capacity in executing a will. Decisions which differ significantly from those made by the average person in like circumstances may still be the result of intact thought processes. 138

Empirical Studies of Testamentary Capacity and Undue Influence:

There have been only a handful of empirical studies that have addressed TC and undue influence. The study of Baird Brown which developed pilot normative data for the LCQ has been described above. 139 In 1995, Dr. Spar and colleagues conducted an empirical study of mental status and susceptibility to undue influence using survey data obtained from 119 probate judges across the United States. 140 The authors found that the probate judges demonstrated a "broad conception of undue influence and its antecedents" and that there was a striking lack of agreement among judges as to a time-line for loss of different legal capacities. 141 An earlier study by Silberfeld and his group addressed the same issue with rather different results. 142

These three empirical studies represent an initial base but in themselves do not yet represent a sufficient corpus of scientific knowledge to inform and advance forensic practice. Conceptually grounded, empirical study of TC and related issues is currently a significant need for this area of clinical forensic practice.

[*93] Professional Roles and Assessment of Testamentary Capacity and Undue Influence

As discussed above, mental health professionals primarily serve as consultants and in some instances expert witnesses in cases involving questions of TC and undue influence in older adults. The consulting role sometimes involves direct evaluation of the testator contemporaneous with will execution, but more frequently involves a decedent testator and a retrospective evaluation of capacity at the time of prior will execution.

Neuropsychologists, geropsychologists, and forensic psychologists practicing in this area are provided ethical guidance through the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (APA). 143 Ethical principles that apply to forensic practitioners in this area include:

Professionalism: Psychologists must possess knowledge and competence in areas underlying assessment of TC and undue influence in the elderly. These include, but are not limited to: (1) appreciation of conceptual issues related to civil competency assessment, (2) knowledge of clinical interview and other practice techniques for assessing TC, (3) specialized knowledge concerning older adult populations and in particular organic and psychiatric disorders incident to this population; and (4) knowledge of relevant neuropsychological and other mental status measures used with this population.

Appropriate Forensic Assessments: Assessments and reports related to TC and undue influence need to have a sufficient evidentiary basis to support the findings made. Such capacity assessments again must have the appropriate underlying conceptual basis and linkage to the key legal elements of TC and undue influence. As discussed, there is currently a very limited scientific literature and instrument armamentarium for practitioners to use, and to be held accountable to, but knowledge in this and other areas of civil competency are expected to grow significantly in the next decade. 144 Questions of the sufficiency of the evidentiary base may become more of an issue in some retrospective analyses where the contemporaneous record may be limited.

Clarification of Role: As in other forensic matters, psychologists performing assessments of TC and undue influence must take care to avoid multiple and conflicting relationships. It is common and appropriate for a consulting psychologist, after reviewing relevant records to a testator and will contest, and after formulating his/her professional opinion, to become an expert witness in a probate matter. However, it may be more problematic if the psychologist or other health care professional was a treating professional [*94] with the testator prior to being asked to consult. In the latter situation, it is important that the psychologist clarify his/her respective roles and duty of confidentiality, in order to maintain objectivity and to avoid misleading other parties. 145

SECTION III: A JURISPRUDENT THERAPY ANALYSIS OF MENTAL HEALTH PRACTICE, SCIENCE AND ROLES IN RELATION TO TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

As discussed in the Introduction, the perspective of jurisprudent therapy (JT) is an extension of the legal theory of therapeutic jurisprudence and serves as a means for assessing mental health science, practices, and roles with the goal of promoting principles

of justice and human freedom and maximizing jurisprudent outcomes for the client. 146 JT provides an analytic and interdisciplinary approach aimed at developing and improving "mental health science, practice and roles in the service of justice for litigants and for the broader public." 147 More specifically, the goal of JT is to assess the jurisprudent impact (positive, neutral, or negative) of the mental health field in terms of its science, practice, and roles. 148

JT analyses have previously been applied to a variety of mental health areas, including those relating to health care fraud and abuse, 149 malingering, 150 and cognitive assessment. 151 In the present volume the perspective is being usefully applied for the first time to issues of civil and criminal competency. Thus, until now, JT has not been utilized to investigate the jurisprudent effects of mental health science, practice, and roles as they currently impact legal issues of TC and undue influence.

Jurisprudent Effects of Current Mental Health Practice in Testamentary Capacity and Undue Influence

From a JT perspective, current mental health practice in the area of probate law is probably inconsistently meeting the needs of the legal system. As discussed in Section II, conceptual knowledge of capacity assessment generally, and of the specific legal and clinical issues inherent to TC and undue influence, is possessed unevenly among existing forensic practitioners. As a result, capacity assessments and recommendations in this area vary widely and may not always be fully responsive to the needs of the legal [*95] system. This may be particularly true in the area of retrospective assessment, where a thorough examination and weighing of prior mental status, medical and other evidence must be conducted in relation to the requirements of the law. In the area of contemporaneous assessment, practitioners are also limited by the current absence of available capacity instruments and normative data specific to TC and undue influence. A positive development in the past ten years has been the publication of useful clinical guidelines to practice in these areas.

Jurisprudent Effects of Current Mental Health Science in Testamentary Capacity and Undue Influence

As indicated above, the current variability in practice patterns must be ascribed primarily to the very limited empirical clinical research and science in this area. There is a significant need for validated cognitive (neuro)psychological models for the legal elements of testamentary capacity, and regarding undue influence, for adaptation to the probate context of behavioral models for loss of volition through various forms of coercion and manipulation. We have argued above that the lack of scientific and theoretical foundations reflects the early developmental stage of the field of testamentary capacity assessment. That being acknowledged, it is now time for forensic clinicians and researchers to move forward and remedy this need. Until this occurs, mental health science will fall short of its potential to make important contributions to clinical practice and to the legal system's efforts at dispute resolution in the increasingly crucial arena of probate practice and the elderly.

Jurisprudent Effects of Current Mental Health Roles in Testamentary Capacity and Undue Influence

With respect to the jurisprudent effects of mental health roles regarding TC and undue influence, the key issues currently relate to professionalism and to appropriate assessments. These issues are intertwined, as again, they both relate to the limited conceptual and legal knowledge that underpin current professional practice. Practitioners

need to possess appropriate conceptual knowledge, clinical procedures, specialized knowledge of the elderly and disorders of aging, and knowledge of appropriate neuropsychological and clinical test measures, before embarking on forensic assessments of TC and undue influence. Similarly, with respect to assessment, practitioners need to be aware of when they have, and when they do not have, a sufficient evidentiary basis for drawing clinical and forensic conclusions regarding TC and undue influence.

CONCLUSION

Testamentary capacity and undue influence are legal issues whose resolution frequently requires the expertise, assessment skills, and testimony of [*96] mental health professionals. This Article has addressed the mental health aspects of these probate issues from a jurisprudent therapy perspective. Our overall impression is that mental health practice, science, and roles have much to contribute to this increasingly important area of forensics. However, considerable work must be done in areas of theory and model building, instrument development and validation, clinical education, and targeted empirical studies. Such work will be of vital importance to the baby boomers and succeeding generations of the twenty-first century. The successful resolution of legal disputes concerning inheritance and property disposition among our elderly population will be a sentinel forensic issue over the next 50 years, as our society continues to age and to grapple with the overwhelming reality of widespread dementing illnesses. Mental health science and practice can make crucial contributions to this process, through informed and sophisticated understanding and assessment of capacity function and its loss.

FOOTNOTES:

n1 Lawrence A. Frolik, The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences? 24 INT'L J.L. & PSYCHIATRY 253, 254 (2001).

n2 Id. at 256.

n3 BLACK'S LAW DICTIONARY 1644 (4th ed. 1968).

n4 Irwin N. Perr, Wills, Testamentary Capacity and Undue Influence, 1 BULL. AM. ACAD. PSYCHIATRY & L. 15 (1981).

n5 Frolik, supra note 1, at 254.

n6 James Spar et al., Assessing Mental Capacity and Susceptibility to Undue Influence, 13 BEHAV. SCI. & L. 391, 392 (1995).

n7 Frolik, supra note 1, at 258.

n8 Id. at 255.

n9 Harold T. Nedd, Fighting Over the Care of Aging Parents: More Siblings Clashing Over Money and Control, USA TODAY, July 30, 1998, at 1A.

n10 Daniel Marson & Laurie Zebley, The Other Side of the Retirement Years: Cognitive Decline, Dementia, and Loss of Financial Capacity, 4 J. RET. PLAN. 30 (2001); Nedd, supra note 9.

n11 Nedd, supra note 9.

n12 M. Frank Greiffenstein, The Neuropsychological Autopsy, 75 MICH. B.J. 424, 425 (1996).

n13 Susan Daicoff & David B. Wexler, Therapeutic Jurisprudence, 11 HANDBOOK OF PSYCHOL. 561 (2003).

n14 Id.

n15 Eric Y. Drogin, From Therapeutic Jurisprudence . . . To Jurisprudent Therapy, 18 BEHAV. SCI. & L. 489 (2000).

n16 Id. at 491-94.

n17 Id.

n18 Frolik, supra note 1, at 253.

n19 Id.

n20 Id.

n21 Id.

n22 Id.

n23 Id.

n24 Id.

n25 Id.

n26 Harwood v. Baker, 3 MOO PCC 282 (1840).

n27 See id.

n28 Harwood, 3 MOO PCC at 282. The subsequent English case of Banks v. Goodfellow, 5 L.R.Q.B. 549 (1870), further refined the law of TC by establishing four specific tests: the testator must understand the (1) testamentary act and (2) its effect, (3) the extent of the property disposed of, and (4) the claims other persons may have on the estate.

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n29 See Delafield v. Parish, 25 N.Y. 9 (1862).

n30 Id.

n31 Id. This early legal formulation continues on in some jurisdictions today and is reminiscent of the modern day cognitive psychological construct of "working memory." See A. BADDELEY, WORKING MEMORY (1986).

n32 James E. Spar & Andrew S. Garb, Assessing Competency to Make a Will, 149 AM. J. PSYCHIATRY 169 (1992).

n33 Spar & Garb, supra note 32, at 169-74; Barnes v. Willis, 497 So. 2d 90 (1986); ALA. PROB. CODE § 43-8-130 (1975); Arthur C. Walsh et al., Mental Capacity: Legal and Medical Aspects of Assessment and Treatment, TAX & ESTATE PLANNING SERIES (1994).

n34 Spar & Garb, supra note 32, at 169.

n35 Barnes, 497 So. 2d at 91.

n36 See generally Trevor Lyttleton, Testamentary Capacity Issues In Advising the Elderly Client, 2003 NEW L.J. 1 (2003).

n37 Spar & Garb, supra note 32, at 169.

n38 Lyttleton, supra note 36.

n39 Spar & Garb, supra note 32, at 169-71.

n40 Lyttleton, supra note 36, at 987-88.

n41 Walsh, supra note 33, at 2-13.

n42 Id. at 2-11.

n43 Frolik, supra note 1, at 254.

n44 Id. at 254.

n45 Lyttleton, supra note 36, at 988.

n46 Barnes, 497 So. 2d at 91.

n47 See, e.g., CA. PROB. CODE § 6100.5(a)(2) (1995).

n48 See Walsh, supra note 33, at 2-17.

n49 In re Estate of Raney, 799 P.2d 986, 993 (Kan. 1990).

n50 Id.

n51 Id.

n52 Walsh, supra note 33, at 2-19, 2-20; Karl Kirkland et al., Assessment of Testamentary Capacity, ALA. LAWYER (forthcoming 2004).

n53 O'Donnell v. Rodiger, 76 Ala. 222, 224 (1884); Bolan v. Bolan, 611 So. 2d 1051, 1057 (Ala. 1993); Perr, supra note 4, at 17.

n54 Frolik, supra note 1, at 257.

n55 Id. at 255; see, e.g., Frolick, supra note 1, at n.39 "It is hornbook law that less mental capacity is required to execute a will than any other legal instrument." (quoting In re Will of Goldberg 582 N.Y.S.2d 617, 620 (1992)).

n56 Frolick, supra note 1, at 257.

n57 Id. at 257-258.

n58 Id.

n59 Id. at 257; see also Succession of Mack, 535 So. 2d 461 (La. Ct. App. 1989); Spar, supra note 6, at 391.

n60 BLACK'S LAW DICTIONARY 1697-98 (4th ed. 1968).

n61 Frolick, supra note 1, at 258.

n62 Id. (discussing In re Estate of Aageson, 702 P.2d 338 (Mont. 1985) which analyzed TC and undue influence as separate issues).

n63 Id.

n64 Id. at 258-59.

n65 Bolan, 611 So. 2d at 1054; Raney v. Raney, 112 So. 313 (Ala. 1927).

n66 Walsh, supra note 33, 2-14; but see Perr, supra note 4, at 15.

n67 See Blades v. Ward, 475 So. 2d 935, 938 (Fla. Dist. Ct. App. 1985).

n68 Pruitt v. Pruitt, 343 So. 2d 495, 499 (Ala. 1976).

n69 Frolick, supra note 1, at 259.

n70 See Allen v. Sconyers, 669 So. 2d 113 (Ala. 1995).

n71 See id.

n72 See id. at 116-17.

n73 Id. at 117.

n74 Id. at 115.

n75 Id.

n76 Id.

n77 Id.

n78 Id. at 116.

n79 Id.

n80 Id.

n81 Id.

n82 Id.

n83 Id.

n84 Id.

n85 Id. at 116-17.

n86 Id. at 113.

n87 Id. at 118.

n88 Id.

n89 Id.

n90 Id.

n91 Spar & Garb, supra note 32, at 171.

n92 Greiffenstein, supra note 12, at 424-25.

n93 Dan Marson & S. Briggs, Assessing Competency in Alzheimer's Disease: Treatment Consent Capacity and Financial Capacity, in ALZHEIMER'S DISEASE AND RELATED DISORDERS ANNUAL 2001 166 (S. Gauthier & J. Cummings eds.).

n94 Id.

n95 THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2002).

n96 Id.

n97 Marson & Briggs, supra note 93, at 167.

n98 Paul S. Appelbaum & T.G. Gutheil, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW (1991).

n99 Daniel Marson et al., Assessing Financial Capacity in Patients with Alzheimer's Disease: A Conceptual Model and Prototype Instrument, 57 ARCH. NEUROL. 878 (2000).

n100 Appelbaum & Gutheil, supra note 98, at 227-28.

n101 Marson & Briggs, supra note 93, at 168.

n102 Grisso, supra note 95, at 8.

n103 Daniel C. Marson et al., Determining the Competency of Alzheimer's Patients to Consent to Treatment and Research, 8 ALZHEIMER'S DISEASE & ASSOCIATED DISORDERS 5 (1994).

n104 Grisso, supra note 95, at 8.

n105 See, e.g., Spar & Garb, supra note 32, at 162; Spar, supra note 6, at 392.

n106 Spar & Garb, supra note 32, at 171-72.

n107 Id.

n108 Id.

n109 Allen, 669 So. 2d at 118.

n110 Spar & Garb, supra note 32, at 172.

n111 Id.

n112 Id.

n113 Greiffenstein, supra note 12, at 424-25.

n114 Id.

n115 Daniel C. Marson, Assessment of Civil Competencies in the Elderly: Theory, Research, and Clinical Case Studies (2000) (CME workshop presentation at 22nd Annual Conference of the National Academy of Neuropsychology) (transcript on file with author).

n116 See Greiffenstein, supra note 12.

n117 Spar & Garb, supra note 32, at 172.

n118 Id.

n119 Id.

n120 Id. at 171-72.

n121 J. Morris, The Clinical Dementia Rating (CDR): Current Version and Scoring Rules, 43 NEUROLOGY 2412, 2414 (1993); Barry Reisberg et al., The Global Deterioration Scale for Assessment of Primary Degenerative Dementia, 139 AM. J. PSYCHIATRY 1136, 1136-39 (1982).

n122 Paul S. Appelbaum & Thomas Grisso, The MacArthur Treatment Competence Study I: Mental Illness and Competence To Consent To Treatment, 19 LAW & HUM. BEHAV. 105, 105-26 (1995); Thomas Grisso et al., The MacArthur Treatment Competence Study II: Measures of Abilities Related to Competence to Consent to Treatment, 19 LAW & HUM. BEHAV. 127, 127-48 (1995); Thomas Grisso & Paul S. Appelbaum, The MacArthur Treatment Competence Study III: Abilities of Patients to Consent to Psychiatric and Medical Treatments, 19 LAW & HUM. BEHAV. 149, 149-69 (1995); Daniel C. Marson & Kellie K. Ingram, Competency to Consent to Treatment: A Growing Field of Research, 2 J. ETHICS L. & AGING 59 (1996).

n123 Marson, supra note 115, at 878-84; Daniel C. Marson, Loss of Financial Capacity in Dementia: Conceptual and Empirical Approaches, 8 AGING NEUROPSYCHOL. & COGNITION

164 (2001).

n124 See Linda A. Hunt et al., Reliability of the Washington University Road Test: A Performance Based Assessment for Drivers with Dementia of The Alzheimer Type, 54 ARCH. NEUROL. 707 (1997).

n125 Spar, supra note 6, at 391.

n126 Greiffenstein, supra note 12, at 424-25.

n127 Walsh, supra note 33, at 2-13 § 2.04.

n128 Grisso, supra note 95, at 12-13, 15.

n129 See generally Grisso, supra note 95, at 127-48; Daniel C. Marson et al., Assessing the Competency of Patients with Alzheimer's Disease Under Different Legal Standards: A Prototype Instrument, 52 ARCH. NEUROL. 949 (1995); Daniel C. Marson et al., Consistency of Physician Judgments of Capacity to Consent in Mild Alzheimer's Disease, 45 J. AM. GERIATRICS SOC'Y 453 (1997).

n130 See generally Marson, supra, note 115, at 878; Marson, supra note 123, at 164.

n131 Walsh, supra note 33, at 1-22 § 1.10.

n132 Walsh, supra note 33, at 5-42 § 5.03.

n133 Id. at 5-34.

n134 Id. at 5-36.

n135 Id.

n136 Daniel C. Marson & Katina Hebert, Assessment of Testamentary Capacity in Older Adults: A Conceptual Model and Prototype Instrument (2004) (unpublished manuscript, on file with author).

n137 See Walsh, supra note 33.

n138 Grisso, supra note 95, at 149-74.

n139 Walsh, supra note 33.

n140 Spar, supra note 6.

n141 Id. at 399.

n142 Michel Silberfeld et al., Legal Standards and The Threshold of Competence, 14 ADVOCS. Q. 482, 482-87 (1993).

n143 Ethical Principles of Psychologists & Code of Conduct, 47 AM. J. PSYCHOLOGY 1597, 1597-1611 (1992); Eric Y. Drogin, Jurisprudent Therapy, Scientific Evidence, and the Role of the Forensic Psychologist, 5 SCI. EVID. REV. 129, 129-54.

n144 Daniel C. Marson, Competency Assessment and Research in an Aging Society, 26 GENERATIONS 99 (2002).

n145 Eric Y. Drogin, Jurisprudent Therapy and Competency, 28 LAW & PSYCHOL. REV. 40, 41 (2004).

n146 Id.

n147 Id. at 3.

n148 Id.

n149 Eric Y. Drogin, Health Care Fraud and Abuse: A Jurisprudent Therapy Perspective, FED. HEALTH LAW., Spring 2000, at 3.

n150 See Eric Y. Drogin, Malingering and Behavioral Science: A Jurisprudent Therapy Perspective, BULL. L., SCI. & TECH., Jan. 2002.

n151 Eric Y. Drogin, "WAIS" Not, Want Not? A Jurisprudent Therapy Approach to Innovations in Forensic Assessment of Intellectual Functioning, 21 ADVOC. 5 (1999).

These three empirical studies represent an initial base but in themselves do not yet represent a sufficient corpus of scientific knowledge to inform and advance forensic practice. Conceptually grounded, empirical study of TC and related issues is currently a significant need for this area of clinical forensic practice.

[*93] Professional Roles and Assessment of Testamentary Capacity and Undue Influence

As discussed above, mental health professionals primarily serve as consultants and in some instances expert witnesses in cases involving questions of TC and undue influence in older adults. The consulting role sometimes involves direct evaluation of the testator contemporaneous with will execution, but more frequently involves a decedent testator and a retrospective evaluation of capacity at the time of prior will execution.

Neuropsychologists, geropsychologists, and forensic psychologists practicing in this area are provided ethical guidance through the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (APA). 143 Ethical principles that apply to forensic practitioners in this area include:

Professionalism: Psychologists must possess knowledge and competence in areas underlying assessment of TC and undue influence in the elderly. These include, but are not limited to: (1) appreciation of conceptual issues related to civil competency assessment, (2) knowledge of clinical interview and other practice techniques for assessing TC, (3) specialized knowledge concerning older adult populations and in particular organic and psychiatric disorders incident to this population; and (4) knowledge of relevant neuropsychological and other mental status measures used with this population.

Appropriate Forensic Assessments: Assessments and reports related to TC and undue influence need to have a sufficient evidentiary basis to support the findings made. Such capacity assessments again must have the appropriate underlying conceptual basis and linkage to the key legal elements of TC and undue influence. As discussed, there is currently a very limited scientific literature and instrument armamentarium for practitioners to use, and to be held accountable to, but knowledge in this and other areas of civil competency are expected to grow significantly in the next decade. 144 Questions of the sufficiency of the evidentiary base may become more of an issue in some retrospective analyses where the contemporaneous record may be limited.

Clarification of Role: As in other forensic matters, psychologists performing assessments of TC and undue influence must take care to avoid multiple and conflicting relationships. It is common and appropriate for a consulting psychologist, after reviewing relevant records to a testator and will contest, and after formulating his/her professional opinion, to become an expert witness in a probate matter. However, it may be more problematic if the psychologist or other health care professional was a treating professional [*94] with the testator prior to being asked to consult. In the latter situation, it is important that the psychologist clarify his/her respective roles and duty of confidentiality, in order to maintain objectivity and to avoid misleading other parties. 145

SECTION III: A JURISPRUDENT THERAPY ANALYSIS OF MENTAL HEALTH PRACTICE, SCIENCE AND ROLES IN RELATION TO TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

As discussed in the Introduction, the perspective of jurisprudent therapy (JT) is an extension of the legal theory of therapeutic jurisprudence and serves as a means for assessing mental health science, practices, and roles with the goal of promoting principles

of justice and human freedom and maximizing jurisprudent outcomes for the client. 146 JT provides an analytic and interdisciplinary approach aimed at developing and improving "mental health science, practice and roles in the service of justice for litigants and for the broader public." 147 More specifically, the goal of JT is to assess the jurisprudent impact (positive, neutral, or negative) of the mental health field in terms of its science, practice, and roles. 148

JT analyses have previously been applied to a variety of mental health areas, including those relating to health care fraud and abuse, 149 malingering, 150 and cognitive assessment. 151 In the present volume the perspective is being usefully applied for the first time to issues of civil and criminal competency. Thus, until now, JT has not been utilized to investigate the jurisprudent effects of mental health science, practice, and roles as they currently impact legal issues of TC and undue influence.

Jurisprudent Effects of Current Mental Health Practice in Testamentary Capacity and Undue Influence

From a JT perspective, current mental health practice in the area of probate law is probably inconsistently meeting the needs of the legal system. As discussed in Section II, conceptual knowledge of capacity assessment generally, and of the specific legal and clinical issues inherent to TC and undue influence, is possessed unevenly among existing forensic practitioners. As a result, capacity assessments and recommendations in this area vary widely and may not always be fully responsive to the needs of the legal [*95] system. This may be particularly true in the area of retrospective assessment, where a thorough examination and weighing of prior mental status, medical and other evidence must be conducted in relation to the requirements of the law. In the area of contemporaneous assessment, practitioners are also limited by the current absence of available capacity instruments and normative data specific to TC and undue influence. A positive development in the past ten years has been the publication of useful clinical guidelines to practice in these areas.

Jurisprudent Effects of Current Mental Health Science in Testamentary Capacity and Undue Influence

As indicated above, the current variability in practice patterns must be ascribed primarily to the very limited empirical clinical research and science in this area. There is a significant need for validated cognitive (neuro)psychological models for the legal elements of testamentary capacity, and regarding undue influence, for adaptation to the probate context of behavioral models for loss of volition through various forms of coercion and manipulation. We have argued above that the lack of scientific and theoretical foundations reflects the early developmental stage of the field of testamentary capacity assessment. That being acknowledged, it is now time for forensic clinicians and researchers to move forward and remedy this need. Until this occurs, mental health science will fall short of its potential to make important contributions to clinical practice and to the legal system's efforts at dispute resolution in the increasingly crucial arena of probate practice and the elderly.

Jurisprudent Effects of Current Mental Health Roles in Testamentary Capacity and Undue Influence

With respect to the jurisprudent effects of mental health roles regarding TC and undue influence, the key issues currently relate to professionalism and to appropriate assessments. These issues are intertwined, as again, they both relate to the limited conceptual and legal knowledge that underpin current professional practice. Practitioners

need to possess appropriate conceptual knowledge, clinical procedures, specialized knowledge of the elderly and disorders of aging, and knowledge of appropriate neuropsychological and clinical test measures, before embarking on forensic assessments of TC and undue influence. Similarly, with respect to assessment, practitioners need to be aware of when they have, and when they do not have, a sufficient evidentiary basis for drawing clinical and forensic conclusions regarding TC and undue influence.

CONCLUSION

Testamentary capacity and undue influence are legal issues whose resolution frequently requires the expertise, assessment skills, and testimony of [*96] mental health professionals. This Article has addressed the mental health aspects of these probate issues from a jurisprudent therapy perspective. Our overall impression is that mental health practice, science, and roles have much to contribute to this increasingly important area of forensics. However, considerable work must be done in areas of theory and model building, instrument development and validation, clinical education, and targeted empirical studies. Such work will be of vital importance to the baby boomers and succeeding generations of the twenty-first century. The successful resolution of legal disputes concerning inheritance and property disposition among our elderly population will be a sentinel forensic issue over the next 50 years, as our society continues to age and to grapple with the overwhelming reality of widespread dementing illnesses. Mental health science and practice can make crucial contributions to this process, through informed and sophisticated understanding and assessment of capacity function and its loss.

FOOTNOTES:

n1 Lawrence A. Frolik, The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences? 24 INT'L J.L. & PSYCHIATRY 253, 254 (2001).

n2 Id. at 256.

n3 BLACK'S LAW DICTIONARY 1644 (4th ed. 1968).

n4 Irwin N. Perr, Wills, Testamentary Capacity and Undue Influence, 1 BULL. AM. ACAD. PSYCHIATRY & L. 15 (1981).

n5 Frolik, supra note 1, at 254.

n6 James Spar et al., Assessing Mental Capacity and Susceptibility to Undue Influence, 13 BEHAV. SCI. & L. 391, 392 (1995).

n7 Frolik, supra note 1, at 258.

n8 Id. at 255.

n9 Harold T. Nedd, Fighting Over the Care of Aging Parents: More Siblings Clashing Over Money and Control, USA TODAY, July 30, 1998, at 1A.

n10 Daniel Marson & Laurie Zebley, The Other Side of the Retirement Years: Cognitive Decline, Dementia, and Loss of Financial Capacity, 4 J. RET. PLAN. 30 (2001); Nedd, supra note 9.