MEMO IN RESPONSE TO PROPOSED REVISION TO SEC. 732.501, FLA. STAT.

The proposed statute reads:

> 732.501 Who may make a will
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> Any person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a will. A testator is of sound mind to make a will if the testator has:
>
> (1) the ability to understand the testator's relation to those who would naturally expect to benefit substantially from the will, and the ability to understand, in a general way, the nature and extent of the property to be disposed of and the practical effect of the will as executed; and
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> (2) sufficient memory, without prompting, to collect the foregoing elements in the testator's mind and to hold them for a sufficient length of time to perceive their relations to each other, and the ability to make a judgment regarding the disposition of the property.

The wording in paragraph (2) is derived from *Newman v. Smith*, 77 Fla. 667, 82 So. 236 (Fla. 1919)[1], which cites to *Delafield v. Parish*, 25 N.Y. 9 (1862).[2] Based on holding in *Newman* and the Third DCA's historical analysis of the definition of testamentary capacity in *American Red Cross v. Estate of Haynsworth,* 708 So. 2d 602 (Fla. 3rd DCA 1998), the proponents of this new legislation argue that the proposed new statute is nothing more than the existing test for testamentary capacity in our State.

I disagree. The current (post 1938) test for testamentary capacity in Florida is as follows:

> A testator is of "sound mind" if the testator generally understands the nature and extent of the property to be disposed of, the relation between the testator and those who would naturally claim a benefit from the will, and the nature and effect of the testamentary act.

All of the Florida Supreme Court cases after 1938 use this test.[3] Additionally, all of the District Court of Appeal cases, exclusive of possibly *American Red Cross v. Estate of Haynsworth*, use this test.[4]

Additionally, there are no New York cases citing to *Delafield v. Parish* after 1956. The current definition of testamentary capacity in the State of New York is basically the same as in Florida: "To possess testamentary capacity, the testator must have understood the nature and consequences of executing her will; the nature and extent of the property of which she was disposing; and the natural objects of her bounty and her relations with them." *See: Estate of Long*, 176 A.D.2d 1059; 575 N.Y.S.2d 205 (N.Y. App. 1991); *Estate of Wimpfheimer*, 8 Misc. 3d 538; 797 N.Y.S.2d 878; 2005

(N.Y. Surr. 2005).

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1. The court in *Newman* defined the rule for testing testamentary capacity as follows:

> 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.
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> "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.
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> 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.

2. *Delafield v. Parish* is also cited in the following cases: *Smith v. Clements*, 114 Fla. 614, 154 So. 520 (Fla. 1934); *Tonnelier v. Tonnelier*, 132 Fla. 194, 181 So. 150 (Fla. 1938); *American Red Cross v. Estate of Haynsworth,* 708 So. 2d 602 (Fla. 3rd DCA 1998).

3. *Marston v. Churchill*, 187 So. 762 (Fla. 1939); *Miller v. Flowers*, 27 So.2d 667 (1946); *Neal v. Harrington*, 31 So. 2d 391(Fla. 1947)*; In re Wilmott's Estate,66* So. 2d 465 (Fla. 1953); and *In re Baldridge's Estate*, 74 So. 2d 658 (Fla. 1954).

4. *In re Estate of Coles*, 205 So. 2d 554 (Fla. 2nd DCA 1968)
In re Estate of Dunson, 141 So. 2d 601 (Fla. 2nd DCA 1962)
In re Estate of Witt, 139 So. 2d 904 (Fla. 2nd DCA 1962)
In re Estate of Bailey, 122 So. 2d 243 (Fla. 2nd DCA 1960)
In re Estate of Dunson, 141 So. 2d 601 (Fla. 2nd DCA 1962)

American Red Cross v. Estate of Haynsworth, 708 So. 2d 602 (Fla. 3rd DCA 1998)
Raimi v. Furlong, 702 So. 2d 1273 (Fla. 3rd DCA 1997)
In re Estate of Joiner, 147 So. 2d 563 (Fla. 3rd DCA 1962)
Skelton v. Davis, 133 So. 2d 432 (Fla. 3rd DCA 1961)
Coppock v. Carlson, 547 So. 2d 946, 947 (Fla. 3rd DCA 1989)

Hendershaw v. Estate of Hendershaw, 763 So. 2d 482 (Fla. 4th DCA 2000)
In re Estate of Weihe, 268 So. 2d 446 (Fla. 4th DCA 1972), quashed on existing facts, 275 So. 2d 244 (Fla. 1973)

In re Estate of Edwards, 433 So. 2d 1349 (Fla. 5th DCA 1983)