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# Webinar with Fraser and Fraser

*Presented by*

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*Hosted by*

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# Fraser and Fraser

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# Testamentary capacity and related matters

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Advocate, TEP

# Introduction

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- Legal issues concerning testamentary capacity and related matters (property affairs)
  - Underlying principles
  - Interplay with other issues
  - Capacity for testamentary matters versus other grants
  - The Adults with Incapacity (S) Act 2000
  - Cases and examples





# Introduction

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- Context
  - My experiences and practice
  - Some Caveats
- In practice
  - Considering post death challenges



# Capacity, generally:

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- Key propositions

- Capacity is task specific: [Ward, Appellant 2014 SLT \(Sh Ct\) 15](#)

- it seems to be appreciated **even by the lawyers** that people can have differing degrees of capacity for different purposes at the same time. Thus a person may have testamentary capacity while no longer having the capacity to manage his financial and property affairs or vice versa.*

# Capacity, generally:

- Key propositions
  - Presumption in favour of capacity, at common law and under the Adults with Incapacity (S) Act 2000
  - Capacity may be transient: [Ward, Appellant 2014 SLT \(Sh Ct\) 15](#)
  - Capacity at the material time: [Laidlaw v Laidlaw 1870 8 M 882](#)



# Testamentary capacity

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- The underlying legal principle:
- [Banks v Goodfellow \(1869-70\) LR 5 QB 549](#)
  - [1] understand the nature of the act and its effect;
  - [2] understand the extent of the property;
  - [3] comprehend and appreciate the claims to which he ought to give effect;
  - [4] no disorder of the mind shall pervert his sense of right



# Testamentary capacity

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- In practice:
- [Smyth v Romanes' Executors \[2014\] CSOH 150](#)
  - Onus of proof on the person upholding
  - Reliance on solicitors (though no golden rule)
  - Issue of testamentary capacity is a legal issue, but the court will look at all evidence
  - Suspicion of the court
  - Medical evidence (and explanation) is important

# Capacity and other issues

- Facility and circumvention

- Mackay v Campbell 1967 SC (HL) 53:

*“(1) weakness and facility, (2) circumvention, and (3) lesion. These three factors are all interrelated and they must be looked at as a whole and not in separate compartments.*

*The strength of averments on one matter may compensate for the weakness of averments upon other matters”*



# Capacity and other issues

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- Undue influence

- Gray v Binny 1879 7 R 332:

*“a relation... which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance”*

# Capacity and other issues

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- Adults with Incapacity (Scotland) Act 2000
  - Imposes a different regime
  - Capacity is task specific
  - Certification by grantor not specified
  - No automatic read across for testamentary affairs

# Challenge to incapacity

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- Cases are limited
  - [Hanton v Downie \[2019\] SC EDIN 84](#)
  - [Stewart v Franks 2013 CSOH 63](#)
  - [Boyle v Boyle's Executor 1999 SC 479](#)
  - [Muirden v Garden's Executors 1981 SLT Notes 9](#)
  - [West's Trustee v West 1980 SLT 6](#)
  - [Smith v Smith's Trustees 1972 SLT Notes 80](#)
  - [McNaughton v Smith 1949 SLT Notes 53](#)



## Case study (1)

- Homemade Will
  - Person suffering from paranoid schizophrenia
  - Religious background
  - Discursive handwritten letter
  - References to his deceased twin brother
  - Apparent legacy to a saint... (or was it)



## Case study (2)

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- [Somerville v Allan \[2023\] SC EDIN 38](#)
  - Regular will framed by solicitor
  - Supervening illness (terminal)
  - Defender becomes involved; frames new will
  - Involvement of solicitor post subscription
  - Evidence of the effect of the illnesses
  - Other evidence to demonstrate testamentary capacity / undue influence / circumvention

# Practical issues: evidence

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- Contemporaneous notes
- Second opinions
- Independent evidence



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# Questions?







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