



Webinar with Fraser and Fraser

Presented by

Roddy MacLeod

Advocate, TEP

Hosted by

John Martin

Business Development Manager, Fraser and Fraser





Fraser and Fraser

Our Services

- Location of Missing Beneficiaries
- Missing Beneficiary Insurance
- Free Family Tree Check
- Risk-free Administrator Search Service
- Overseas Bankruptcy Searches
- Medallion Signature Guarantee
- Flexible Fee Options (including time spent and fixed fee)







Testamentary capacity and related matters

25 June 2024

Roddy MacLeod

Advocate, **TEP**





Introduction

- 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

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





Capacity, generally:

- Key propositions
 - Capacity is task specific: Ward, Appellant 2014 SLT (Sh Ct) 15

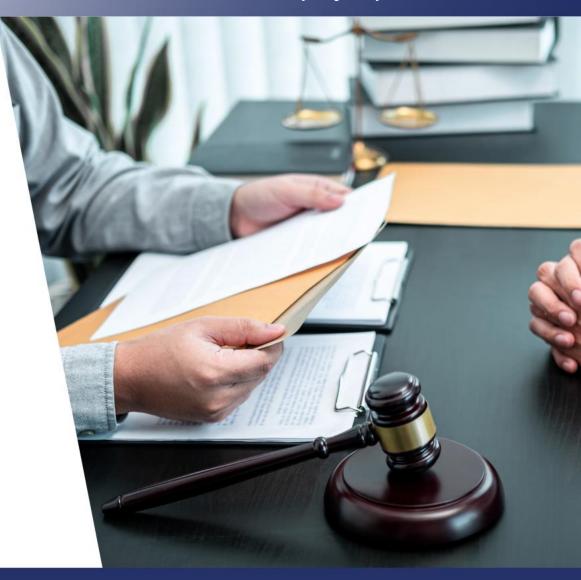
it seems to be appreciated **even by the lawyers** that people can have differing degrees of capacity for different purposes at the same time. Thus a person may have testamentary capacity while no longer having the capacity to manage his financial and property affairs or vice versa.





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

- 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

- 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

- Undue influence
- Gray v Binny 1879 7 R 332:

"a <u>relation</u>... which creates a <u>dominant or ascendant influence</u>, the fact that confidence and trust arose from that relation, the fact that a material and <u>gratuitous benefit</u> 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

- 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

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)

- 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
 - Fyidence of the effect of the illnesses.
 - Other evidence to demonstrate testamentary capacity / undue influence / circumvention





Practical issues: evidence

- Contemporaneous notes
- Second opinions
- Independent evidence







Questions?





Roddy MacLeod

Advocate, TEP
Practice Manager | 01312605830
emma.potter@terrafirmachambers.com

John Martin Fraser and Fraser johnmartin@fraserandfraser.co.uk 020 7832 1400

