

Insane Delusions –Has the Test Been Expanded?

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Insane Delusions – Has the Test Been Expanded? ¹

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ABSTRACT

The purpose of this article is to review the law of insane delusions and capacity. The authors used an amalgamation of cases involving Will challenges where testators suffered from Parkinson's disease as a vehicle to review the law of insane delusions and capacity.

INTRODUCTION

The aging population in Ontario² likely contributes to the fact that there is an ever increasing number of Will challenges in the Province. As the court in *Coleman v. Coleman*³ stated, *“As the life expectancy in our society has increased, there has come an increase in the occasions when increasingly elderly and vulnerable persons are making wills in circumstances which require attention and vigilance to the issues of testamentary capacity, knowledge and appreciation of the will's contents and undue influence. The general principles are not difficult to enunciate; the difficulty is in their application.”*

As people age their physical and mental health regularly becomes compromised. Often medical conditions or their treatment contribute to capacity problems because both the disease and the treatments produce delusions. While hallucinations themselves do not necessarily constitute insane delusions they raise red flags. The scenario set out below is loosely based on an amalgamation of several cases where the testator's medical condition and treatment suggested that their decisions to disinherit the plaintiffs in the cases were rooted in insane delusions.

In the fact situation before us a 95-year-old husband was the caregiver for his 88-year-old wife. It was a second marriage for both, and 15 years prior to her death, they signed a

¹ This paper is an adaptation of an article that appeared in the March 2008 B'nai Brith Law Journal.

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² Life expectancy in Canada has increased for males to 77 and for females to 81. For an analysis of the aging of Canada's population we refer the reader to the article, "Ontario's Aging Population by Ontario's Trillium Foundation found at http://www.trilliumfoundation.org/en/knowledgeSharingCentre/resources/aging_population.pdf.

³ *Coleman v. Coleman* (2008), 2008 CarswellNS 740 (N.S. S.C.)

prenuptial agreement where they each waived any entitlement to elect for an equalization payment under the *Family Law Act*, R.S.O. 1990, c. F.3, or to seek support under the *Succession Law Reform Act* R.S.O. 1990, c. S.26. The wife's Will left nothing to the husband.

Prior to providing instructions to her lawyer and the execution of her last will and testament, the wife was diagnosed with Parkinson's disease. In the first few years her symptoms were mild, but they became much worse over time. She was treated with various drugs for the disease, which were prescribed by a neurologist. Her specific symptoms included tremors, muscular rigidity, stiffness, slowness of movement, loss of balance, incontinence, uncontrollable saliva, and garbled speech. She became severely depressed and at times believed that her husband was out to harm her. She also suffered from visual delusions, unwarranted fear of persecution and agitation.

She disinherited her husband based on the belief that he was out to hurt her and was having an affair with their 15-year-old granddaughter residing in England, despite the fact that her husband had not left Canada for over 20 years and her granddaughter had never left England.

A quick review of some⁴ cases in which Plaintiffs have succeeded and in which they have failed, demonstrates the difficulty in proving the case.

Nature of Delusion	Facts and Cases
Delusion incidental to disinheritance	Testator wanted her gun back from the plaintiff, who declined to return it because the testator did not have a gun permit. The unwarranted anger was only one of a number of reasons leading to the disinheritance of the plaintiff. The will was not set aside, because the disinheritance was based on other reasons. Had it been the only reason, the Court might have allowed the appeal. ⁵
Discussions with the dead	In <i>Banks v. Goodfellow</i> ⁶ , the testator believed that he was molested by evil spirits, but the will was upheld because there was no connection between the delusions and the dispositions made by the testator.

⁴ For a more expansive review on the case law involving delusions I refer the reader to paragraph 2.4 of Schnurr, *Estate Litigation*, 2nd Ed.

⁵ *Chalmers v. Uzelac* 2004 BCCA 533, 11 E.T.R. (3d) 85, [2005] 2 W.W.R. 39, 204 B.C.A.C. 291, 333 W.A.C. 291, 35 B.C.L.R. (4th) 252, Donald, J.A., Hall, J.A., Southin, J.A. (B.C. C.A.); affirming (2003), 2 E.T.R. (3rd) 22, 2003 CarswellBC 2100, 2003 BCSC 1320, Wilson, J. (B.C. S.C.).

⁶ *Supra Banks v. Goodfellow*.

Nature of Delusion	Facts and Cases
Theft — will set aside	In one case, a woman was cut out of the Will because the testatrix believed the woman was a thief. ⁷ In another case, a mother mistakenly believed that her daughters had stolen a previous will, which was impossible. The court characterized this as an insane delusion and set aside the last Will, because the delusion impacted upon her appreciation of her disinherited daughter. ⁸
Poison — mixed law.	Whether this delusion sets aside the Will depends on the facts specific to the case. For example, in the <i>Tarling Estate Case</i> ⁹ the Will was not set aside because despite the Testator's belief that he was being poisoned, that belief did not impact on his testamentary decisions. In contrast, the court in the <i>Onofrichuk Estate</i> case set aside the will because the decision to disinherit was based on the delusion of the testator that his wife was trying to poison him. ¹⁰
Incest — will not set aside	The Supreme Court of Canada refused to set aside a will, because it was highly unlikely that the testator would have given his wife and son such generous amounts if a delusion about incest had indeed perverted his mind. They concluded that if there was a delusion, it did not affect him at the time he made his will. If the delusion was influencing his decision, the testator "would not have given a cent to his wife and to his son". ¹¹
Illegitimacy — case law divided	In one case, a man disinherited his son based on the belief that King George IV fathered the boy. The Court set aside the will. ¹² In another case the court refused to set aside a will when the decision by the testator to disinherit his son was based on a mistaken belief that he was not the natural father of his son. This case is very important because it stands for the proposition that the mistaken belief of an untruth does necessarily qualify as a psychotic delusion. ¹³

⁷ *Wilson v. Chuchmack Estate* (1998), CarswellOnt 3531, O.J. No. 3733. Also see *Fischer v Fischer Estate*, [1992] O.J. No. 910, 109 D.L.R. (4th) 189 (Gen. Div.) and *Brammall v. United Kingdom of Great Britain and Northern Ireland*, [1977] B.C.J. No. 1453.

⁸ *Thorsnes v. Ortigoza* (2003), 174 Man. R. (2d) 274, 2003 CarswellMan 224, 2003 MBQB 127, [2004] 2 W.W.R. 176, Beard, J. (Man. Q.B.).

⁹ *Tarling Estate, Re* 2008 CarswellOnt 4544.

¹⁰ *Onofrichuk Estate, Re*, [1974] 2 W.W.R. 468 (Sask. Surr. Ct.).

¹¹ *Skinner v. Farquharson* (1902), 32 S.C.R. 58, 1902 CarswellNS 54 (S.C.C.).

¹² *Smee v. Smee* (1879), 5 P.D. 84.

¹³ *Royal Trust Co. v. Ford*, [1971] S.C.R. 831, CarswellBC 284.

Nature of Delusion	Facts and Cases
Bigotry is not a delusion	The Court ruled that a mother's disinheritance of her son based on her disapproval of his marrying a Norwegian did not constitute an insane delusion. Her hatred was not a belief in a state of facts that no rational person would believe. It was considered an eccentricity—not a delusion. ¹⁴
Torture — will set aside	The Court set aside a Will because the decision to disinherit was rooted in the delusion that the daughter had wired her father's chair to give him electric shocks. ¹⁵
Disenchantment with family — case law split	The Court set aside a Will where the decision to disinherit certain family members was based on a delusion that they were alcoholics who did not care for him. ¹⁶ In other cases the courts refused to set aside wills when: <ul style="list-style-type: none"> • The disenchantment was easily explained by the testator's displeasure with that son for engaging in business disputes with his brothers;¹⁷ • The fear that the son was to put the testator in a home was found not to constitute a delusion;¹⁸ • A Will was set aside based on delusions that daughters mocked and disowned the testator.¹⁹
False Belief as to ownership in spouse's Business	When the Will was made, the husband had a false belief that he owned an interest in a business which in fact was owned solely by his wife. ²⁰

¹⁴ *Dynna v. Grant* (1980), CarswellSask 70, 6 E.T.R. 175, 3 Sask. R. 135. For public policy issues raised by disinheritance rooted in bigotry, separate and apart from the issue of delusions query whether this type of provision should be set aside on public policy grounds. Please see When Do Will Provisions Contravene Public Policy? <http://www.wagnersidlofsky.com/articles/publicpolicy.php> and "Will Your Child Marry a Jew?" at <http://www.estatelawcanada.ca/tag/public-policy/> and is disinheritance because of sexual orientation legal? At <http://www.wagnersidlofsky.com/articles/disinheritance-sexual-orientation.php>.

¹⁵ *Corbett v. Wall* (1938), [1939] 2 D.L.R. 201, 13 M.P.R. 359 (N.B. C.A.); Re *Barter* [1939] 2 D.L.R. 201, 13 p.m. 359 (S.C.C.)

¹⁶ *MacLeod Estate*, Re (1989), 94 N.S.R. (2d) 148 (N.S. Prov. Ct.); affd (1990), 95 N.S.R. (2d) 61 (N.S. C.A.)

¹⁷ *Schwartz v. Schwartz*, [1970] 2 O.R. 61 (Ont. C.A.). Also see *Fuller Estate v. Fuller*; 2004 CarswellBC 812; 2004 BCCA 218, 7 E.T.R. (3d) 1, 197 B.C.A.C. 245, 323 W.A.C. 245; British Columbia Court of Appeal; April 20, 2004; Docket: Vancouver CA030367

¹⁸ *Burge v. Burge* (1989), 77 Nfld. & P.E.I.R. 58 (Nfld. T.D.). Also see *Royal Trust Corp. of Canada v. Saunders* 2006 CarswellOnt 3478.

¹⁹ *Toth v. Vass* (1977), 1 A.C.W.S. 774;

²⁰ *Beal v. Henri* 1950 CarswellOnt 81. At paragraph 34 of *Banton v Banton*, Justice Cullity understood that this case as well as *Skinner v Farquharson* (1902), 32 S.C.R. 58 (S.C.C.) stood for the proposition that the existence of a testator's insane delusions will, by itself, not invalidate a will. To have this effect, the delusions must have affected the dispositions in the will.

Nature of Delusion	Facts and Cases
Infidelity	Testator thought his 70 year old wife was unfaithful. He left her \$5 a year. Court found testator was suffering under delusions which impacted on the disposition of his property. ²¹

The first step in preparing any file for litigation is to know the law so that when examining the facts of the case one can focus on the relevant factors.

What are the constituent elements necessary to succeed in setting aside a will because the testator suffered from an insane delusion?

DEFINITION OF “INSANE DELUSIONS”

In the seminal case of *Banks v. Goodfellow*,²² the court held that the threshold of testamentary capacity is met when:

- the testator understands the nature of making a will and its effects;
- the testator understands the extent of the property being disposed of;
- the testator understands the nature of the act and its effects;
- the testator appreciates the claims to which he or she ought to give effect; and
- **Finally, no insane delusion influences his or her will in disposing of the property and brings about a disposal of it which, if the mind had been sound, would not have been made.**

The facts of this case underscore that it is not enough that the testator was suffering from delusions. In *Banks v. Goodfellow* the testator was in an insane asylum convinced that evil spirits were molesting him. Nonetheless, the testator managed his personal affairs without difficulty. Given that there was no connection between the delusion and the testamentary disposition, the will was upheld. As Justice Sanderson’s decision in *Wilson v Churchmack*²³ held, “*It is essential to a finding of testamentary capacity that no delusion has influenced the testatrix's will in disposing of her property or has brought about a disposal that would not have been made absent the delusion. For a delusion to affect testamentary capacity it must so take over a testatrix's mind that it governs the making of her will.*”

²¹ *Ouderkirk v. Ouderkirk*, [1936] S.C.R. 619, [1936] 2 D.L.R. 417, 1936 CarswellOnt 103

²² *Banks v. Goodfellow* (1870), All E.R. Rep. 47 (Q.B.) is the seminal case. See page 565, which sets out the test. It has been adopted by Canadian courts. See *Popke v. Bolt* (2005), ABQB 214 (Alta. Q.B.), and *Larocque v. Landry* (1922), 52 O.L.R. 479 (Ont. C.A.). I would also refer the reader to Justice Laskins’ summary of the elements of capacity in *Schwartz v. Schwartz*, [1970] 2 O.R. 61 (Ont. C.A.). The testator must be sufficiently clear in his understanding and memory, to know on his own and in a general way, (a) the nature and extent of his property, (b) the persons who are the natural objects of his bounty, and (c) the testamentary provisions he is making; And he must be capable of (d) appreciating these factors in relation to each other, and (e) forming an orderly desire as to the disposition of his property.

²³ [1998] O.J. No. 3733 (Gen. Div.), at paragraph 136.

TWO-PRONGED TEST

Even if decisions to disinherit are rooted in a totally false premise (for example, a wife suspecting a 95-year-old housebound husband of infidelity), the falsity of the belief does not necessarily invalidate the will. For the mistaken belief to qualify as an insane delusion, it must be a conclusion or a belief in a state of facts that no rational person would believe and that affected the rational disposition of the property.²⁴ There is some disagreement about the precise application of this test.

Reviewing Justice Cullity's decision in *Banton v. Banton*²⁵ is quite helpful in understanding the law on insane delusions:

Paragraph ²⁶	Justice Cullity's comments
61	<p>The reported decisions contain many attempts at definition of which the following have often been cited with approval:</p> <p>A delusion is insanity where one persistently believes supposed facts (which have no real existence except in his perverted imagination) against all evidence and probability and conducts himself however logically upon the assumption of their existence. (Am. & Eng. Cycl., Vol. 9, p. 195, cited by Sedgewick J. in <i>Skinner v. Farquharson</i> (1902), 32 S.C.R. 58 at p. 26)</p> <p>... insane delusions are of two kinds; the belief in things impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sound mind would give them credit; to which we may add, the carrying to an insane extent impressions not in their nature irrational. (<i>Prinsep & East India Co. v. Dyce Sombre</i> (1856), 10 Moo. P.C. 232 (England P.C.) at p. 247)</p>
62	<p>In all cases where delusions of this kind are alleged to exist there will be a question whether the belief should be characterized merely as quite unreasonable, on the one hand, or as something that, in the particular circumstances, no one "in their senses" could believe: Macdonell, Sheard and Hull, <i>Probate Practice</i> (4th ed., by Rodney Hull Q.C. and Ian Hull, 1996) at pp. 33-34. Cases on either side of the line include <i>Royal Trust Co. v. Ford</i> (1971), 20 D.L.R. (3d) 348 (S.C.C.), where the will was upheld, and <i>Harward v. Baker</i> (1840), 3 Moo. P.C. 282 (England P.C.) and <i>Zabudny, Re</i>, [1958] O.W.N. 68 (Ont. H.C.) in which wills were set aside. The correct approach to the question is, I believe, accurately stated in <i>Atkinson on Wills</i> (2nd ed. 1953):</p> <p>The nature of the belief is not necessarily the turning point, or even the apparent lack of a basis for such belief. Rather the question is whether, considering all the facts and circumstances, it is fairly shown that the will proceeded from and on account of</p>

²⁴ In Feeney's supra paragraph 2.9 the learned author presents the proposition that a delusion is a belief in a state of facts which no rational person would believe. Irrational beliefs, falling short of producing general insanity, and which have no relation to the property or beneficiary in question have no bearing on testamentary capacity.

²⁵ 1998 CarswellOnt 3423, 164 D.L.R. (4th) 176, 66 O.T.C. 161.

²⁶ Note the paragraph numbers referred to are from the Canlii case report. The Westlaw version of the case seems to have misnumbered the paragraphs.

Paragraph ²⁶	Justice Cullity's comments
	a deranged mind. at p. 246
63	By itself the existence of a testator's insane delusions will not invalidate a will. To have this effect, the delusions must have affected the dispositions in the will. This is implicit in the passages quoted above from <i>Park Estate, Re</i> and <i>Atkinson on Wills</i> , and it has been affirmed in numerous other cases including <i>Skinner v. Farquharson (1902)</i> , 32 S.C.R. 58 (S.C.C.) and <i>Beal v. Henri</i> , [1950] O.R. 780 (Ont. C.A.).
76	It is well established that an unreasonable conclusion drawn from facts is not by itself sufficient to amount to a delusion that will give rise to testamentary incapacity. It is not the law that anyone who entertains wrong-headed notions, capricious whims, or absurd idiosyncracies, cannot make a will. (<i>Skinner v. Farquharson (1901)</i> , 32 S.C.R. 58, at p. 59 per Taschereau J.)
77	Some of the authorities even suggest that, if there is any evidence that could support an erroneous belief, it cannot be regarded as an insane delusion. The logic of this is that, in such a case, it cannot be said that no person "in his senses" could have the belief if there is any evidence that could support it. I believe that such a proposition is an overstatement. The question whether an erroneous belief crosses the line between an unreasonable and capricious conclusion with some very tenuous, illogical or illusory basis in facts, and a delusion due to mental weakness or disorder will often be one of degree and will depend upon the particular circumstances.

The common thread in the case law seems to be that in order to vitiate a will, the delusion must have two elements:

- a) a belief in a state of facts that no rational person would believe; and
- b) an effect on the rational disposition of the property.

So when analyzing this case it is of fundamental importance to establish the timeline of events. In order to establish the casual connection between the delusion and the decision to disinherit, the Plaintiff will want to prove (and the Defendant disprove) that at the relevant time in question the testator was suffering from the delusion. But when is the relevant time? Is it the moment in time that the testator gives instructions to the solicitor, or is it upon execution of the will? The issue of capacity centres around the time that the testator gives instructions, not the time that the will is executed. When the will is executed, the testator is considered to have capacity as long as the testator understands what he or she is doing and that the testator is following through on his or her previous instructions to the person drafting the will.²⁷

²⁷ See Feeney, Thomas G. & Jim Mackenzie. *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: Butterworths, 2000, Issue 17 12/07 paragraph 2.16; *Armstrong estate administration special instruction 6 – testamentary capacity mental impairment (Feeney's)* [*Parker v. Felgate* (1883), 8 P.D. 171; *Seabrook, Re* (1978), 4 E.T.R. 135, 1978 CarswellOnt 526 (Ont. Surr. Ct.); *Bradshaw Estate, Re* (1988), 30 E.T.R. 276, 90 N.B.R. (2d) 194, 228 A.P.R. 194, 1988 CarswellNB 63 (N.B. Prob. Ct.); *Hall v. Bennett Estate* (2001), 2001 CarswellOnt 3783, 40 E.T.R. (2d) 65 (Ont. S.C.J.); *Milsom v. Holién* (2001), CarswellBC 1545, 2001 BCSC 868, 40 E.T.R. (2d) 77 (B.C. S.C.); *Bourne Estate v. Bourne* (2000), 32 E.T.R. (2d) 164, 2000 CarswellOnt 793 (Ont. S.C.J.); additional reasons at (2000), 32 E.T.R. (2d) 173, 2000 CarswellOnt 798 (Ont. S.C.J.).

With the above criteria in mind, is it arguable that those who suffer from Parkinson's may experience insane delusions sufficient to set aside a will?

Expert's Report - Parkinson's Disease (PD): The Medical Perspective

It is beyond the scope of this paper to canvass the admissibility of expert evidence in general. Suffice to say that when challenging a will such evidence is generally accepted and, in my view, essential.²⁸ You will be asking your expert to review the medical reports, the drugs and cross reference changes in opinions resulting from same.

Parkinson's disease, also known as *Paralysis Agitans* or "shaking palsy", is a common progressive neurodegenerative disorder characterized by several neurological motor symptoms, and is often accompanied by neuropsychiatric features. The illness typically begins in more than 50% of affected individuals with a "pill-rolling" tremor occurring at rest, which often begins unilaterally. The other characteristic motor symptoms are stiffness/rigidity, slowed and/or minimal body movements (bradykinesia/akinesia), and postural instability. Decreased movements of the face lead to "mask-like" features, an open mouth with drooling, and decreased blinking. Posture stoops, and gait is notable for arm-swinging, shuffling, and decreased stride length, often leading to an increased risk of falls. Speech becomes increasingly soft (hypophonia) and garbled (dysarthria). PD is the fourth most common neurodegenerative disease in the elderly, affecting about 1% of people over 65, with up to 300 cases per 100,000 of the population.²⁹

While the cause of PD is still unclear, the pathology and pathophysiology of the illness is well described and has led to important progress in its treatment. Loss of brain cells (neurons) in certain brain areas, such as the substantia nigra, results in markedly decreased amounts of dopamine, a brain chemical, or neurotransmitter. Many of the currently available treatments focus on increasing the amount and function of dopamine in areas of the brain that affect motor function. There are also many other conditions that present with the symptoms of PD but differ from PD in their cause, presence of associated symptoms, and prognosis. PD symptoms, for instance, can be caused by drugs (e.g., antipsychotics) or infections (e.g., post-encephalitis), tumours, and poisoning (e.g., carbon monoxide). Parkinsonian symptoms also occur in the context of a number of other neurodegenerative disorders, such as dementia (e.g., dementia with Lewy Bodies and frontotemporal dementias).

As noted previously, PD is also frequently associated with a variety of neuropsychiatric symptoms, such as cognitive impairment, dementia, depression, anxiety, apathy,

²⁸ Schnurr, Estate Litigation, 2nd Edition, 27.8 Specific Expert Evidence in Estate litigation (a) Medical Experts.

²⁹ Parkinson's Disease, in Beers, M.H., Porter, R.S., Jones, T.V., Kaplan, J.L., Berkwits, M. (eds): Merck Manual of Diagnosis and Therapy, 18th Edition. Merck Research Laboratories, Whitehouse Station, New Jersey, USA, 2006.

psychosis, and sexual and sleep disturbances, features that likely occur in over 80% of affected individuals at some point in the illness.³⁰ The psychotic symptoms of PD are hallucinations and delusions. The importance of psychosis in PD has recently been recognized by the National Institutes of Health, in the United States, which has proposed specific diagnostic criteria for this condition.³¹ Hallucinations are sensory perceptions, experienced as reality, in the absence of external stimulation. In PD, hallucinations are commonly visual — seeing people (strangers or familiar people), animals, or objects. Hallucinations can also be auditory — hearing voices or other noises — tactile, and more rarely, olfactory or gustatory. Delusions are false fixed beliefs that cannot be explained by the person’s cultural or religious background. Defined by the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM-IV), they are false beliefs “based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary”.³² This psychiatric definition might not be totally consistent with the legal definition described above. In PD, the delusions are often paranoid in nature, with themes of jealousy and persecution being most common. The caregiver (spouse, child, or professional) is often the focus of the delusion, leading to a marked caregiver burden.

The frequency of psychotic symptoms in PD varies from study to study, with prevalence figures ranging from 18% to 80%.³³ Visual hallucinations appear to be the most common, with about 30% of PD patients experiencing these. The cause of psychotic symptoms is unclear. While hallucinations and delusions are clearly associated with the initiation and dose increases of the anti-Parkinsonian drug treatments (especially those affecting dopamine), they were described in the pre-drug era as well. Psychotic symptoms are also associated with cognitive impairment and dementia, older age, and increased disease duration and severity.³⁴ The treatment of psychotic symptoms is exquisitely complex. While dopaminergic anti-Parkinsonian therapies precipitate and exacerbate psychosis, decreasing these medications is often impossible, because of the need to treat the motor symptoms. In contrast, the drugs typically used to treat psychosis in conditions such as schizophrenia can be useful in treating psychosis with PD, but they can significantly exacerbate PD’s motor symptoms. Treatment will therefore often involve manipulating the anti-Parkinsonian medications (using lowest dosages and medications least likely to cause psychosis) and using low doses of the antipsychotics least likely to worsen motor

³⁰ Lauterbach, E.C.: The neuropsychiatry of Parkinson’s disease and related disorders. *Psychiatr Clin N Am* 27:801-825, 2004.

³¹ Ravina, B. et al.: Diagnostic criteria for psychosis in Parkinson’s disease: report of an NINDS, NIMH work group. *Movement Dis* 22:1061-1068, 2007.

³² American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (text revision). Washington: American Psychiatric Association Press, 2001.

³³ Papapetropoulos, S., Mash, D.C.. Psychotic symptoms in Parkinson’s disease: from description to etiology. *J Neurol* 252: 753-764, 2005.

³⁴ Fenelon, G.: Psychosis in Parkinson’s disease: phenomenology, frequency, risk factors and current understanding of pathophysiological mechanisms. *CNS Spectr* 13 (3 suppl 4): 18-25, 2008.

symptoms.³⁵ Treatment is often sub-optimal, and psychoeducation and support of the caregiver is essential.

The delusions described in the patient above are highly consistent with the psychotic symptoms of PD. The woman was elderly, she had PD for a lengthy period of time, her motor symptoms were severe, and she was being treated with anti-Parkinsonian medication, all features that increase the likelihood of psychosis, as noted above. The nature of the delusions — paranoia and fear of being persecuted by her husband, as well as delusional jealousy of him having an affair with the granddaughter, and her visual hallucinations — are classic symptoms of psychosis in PD. Given this scenario, it is highly likely that the psychosis was a direct result of the PD and/or its treatment, and her testamentary capacity — with respect to decisions about excluding her husband, the focus of her delusions, from her will — should be considered impaired.

While not the focus of this article, other important neuropsychiatric features of PD that might be relevant to testamentary capacity are cognitive impairment and dementia. Studies suggest that about 30%-40% of patients with PD will develop dementia. Dementia is more likely to be diagnosed in older patients, in those with more severe motor symptoms, and later in the illness. On the other hand, cognitive impairment in patients without dementia occurs in about 50% of PD patients, with recent population-based studies suggesting that 8%-17% of newly diagnosed PD patients will already have significant cognitive impairment. Diagnostic criteria for dementia associated with PD have recently been published that include impairment of attention, memory, and executive and visuospatial function.³⁶ Studies suggest that PD patients with dementia benefit from the medications currently marketed for the treatment of Alzheimer's disease (the "cholinesterase inhibitors"). While some patients with PD dementia might still maintain their testamentary capacity, the prevalence and significance of cognitive impairment and dementia suggest that the assessment of testamentary capacity in all individuals with PD must include consideration of how such impairment, if present, might affect capacity. As noted previously, there is also a significant correlation between the presence of psychosis and cognitive impairment in PD, raising another "red flag" for the assessor.

In spite of the significant issues raised in this review, there have been surprisingly few studies of competence in PD patients documented in the medical literature, in stark contrast to the relatively voluminous data on the subject in dementia and Alzheimer's disease. Only two studies could be found that deal with competence in PD patients, and both, not surprisingly, focus on competence for medical decision-making. Patients with PD and cognitive impairment were shown to demonstrate greater deficits in medical decision-making across a range of legal standards. Depending on the criteria, 25%-80% of PD patients were found to be either marginally competent or incompetent to provide

³⁵ Ferreri, F., Agbokou, C., Gauthier, S.: Recognition and management of neuropsychiatric complications in Parkinson's disease. *CMAJ* 175:1545-1552, 2006.

³⁶ Emre, M. et al.: Clinical diagnostic criteria for dementia associated with Parkinson's disease. *Movement Dis* 22:1689-1707, 2007.

medical consent.³⁷ Compared to equally impaired mild Alzheimer's disease patients, patients with PD demonstrated similarly frequent deficits of competence, though patients with PD were more frequently impaired regarding the ability to elect a treatment choice.³⁸ Whether these findings have any possible bearing on testamentary capacity is unknown.

CONCLUSION

Parkinson's disease should raise a red flag for lawyers at both the estate planning and litigation stages of a file. It is not necessarily the case that those with Parkinson's disease suffer from delusions, but they occur with sufficient regularity that best practice dictates that questions regarding same must be addressed. For the estate planner, that means drilling down and asking on what basis parties normally expected to inherit are being disinherited. For the litigator, interviews with witnesses familiar with the deceased's behaviour and illness, as well as medical reports containing documentation of symptoms and medications, are paramount. However, for the litigator, the key factor to remember is that, regardless of the cause of delusions, the case law is clear that to qualify as an insane delusion that will set aside a will, the disinheritance must be directly, and possibly primarily/solely, caused by a mistaken belief that no rational person could have believed based on the information before him or her.

When assessing the strength of these issues, questions to be addressed should include:

1. **Meeting with client to obtain narrative, diaries, witness statements that may shed light on when the disease first reared its head.** The testator may not have revealed to the lawyer the reasons for the disinheritance, but that information may come to light from your investigation. Ask the open-ended questions that are key to the case based on the law. For example, here are some of the questions you might in the scenario presented above:
 - a. Do you have any idea why the testator thought her spouse might be having an affair?
 - b. Did anyone ask the testator why she thought the spouse was having an affair?
 - c. Were there other reasons the testator was upset with her spouse?
 - d. When did the spouse start making these comments regarding her spouse?
 - e. Was there any other friction between the spouses, kindly provide the full details;
 - f. Who are the other beneficiaries under the new will?
 - g. Why did the testator choose to favour them?

³⁷ Dymek, M.P. et al.: Competency to consent to medical treatment in cognitively impaired patients with Parkinson's disease. *Neurology* 56: 17-24, 2001.

³⁸ Griffith, H.R. et al: Medical decision-making in neurodegenerative disease: mild AD and Parkinson's Disease with cognitive impairment. *Neurology* 65:483-485, 2005.

2. **Productions of Medical Reports and Medications.** Recognizing that delusions may be a result of the disease or the medications used to treat the disease it is very important to obtain a full record of the medications so that your expert report can address whether those medications have an impact. To get the information about the medications, ensure that the order for directions includes a provision to obtain the OHIP records with respect to the Deceased from the maximum retroactive time period that those records are available
3. **Address Whether Decision To Disinherit Is Rooted In Delusion.** As explained above, the courts are loath to set aside a will where there may be other reasons to explain the reason for the disinheritance. The Plaintiff will want to find evidence to support the proposition that the only reason for the disinheritance was the delusion. The Defendant will want to show that there were other reasons for the disinheritance.
4. **Address the Defence that there was evidence to support the belief – the expanded test.** Those parties propounding the will might argue that there were grounds upon which, even if mistaken, the testator came to the conclusions she did and therefore the testamentary decision was not rooted in a delusion. For example, in our case scenario if the testator witnessed her husband hugging a young girl who looked like her granddaughter she might have mistaken what happened. It might have been a mistake that any normal person could make. There are authorities that suggest that since there was some evidence relied upon by the testator that mistake would not set aside the will and does not constitute an insane delusion.³⁹ Let's focus on paragraph 77 of Justice Cullity's decision in *Banton* which seems to expand the test of what might be considered an insane delusion:

His Honour states, “*Some of the authorities even suggest that, if there is any evidence that could support an erroneous belief, it cannot be regarded as an insane delusion. The logic of this is that, in such a case, it cannot be said that no person “in his senses” could have the belief if there is any evidence that could support it (emphasis added).*” These authorities are very important to those propounding the Will. Arguably, the will cannot be set aside if there is any evidence that might support the testator's erroneous conclusions. Please see paragraph 2.9 in Feeney's for the case law he relies for the position that a misinterpretation of facts does not constitute an insane delusion.⁴⁰

³⁹ At paragraph 2.9 of Feeney's *Supra* the learned author states, “... a delusion which affects testamentary capacity must be one of “insanity”. It cannot be attributed to misinterpretation...” The author relies on Granger, J., in *Thorandycraft v. McCully*, [1995] OJ. No. 2098, 12 E.T.R. (2d) 125 (Gen.Div.). See also *Thorsnes v. Ortigoza*, [2003] MJ. No. 178 (Q.B.) and *Drummond v. Skinner Estate*, [2003] N.S.J. No. 228 (S.C.)

⁴⁰ *Thorandycraft v. McCully*, [1995] OJ. No. 2098, 12 E.T.R. (2d) 125 (Gen.Div.). See also *Thorsnes v. Ortigoza*, [2003] MJ. No. 178 (Q.B.) and *Drummond v. Skinner Estate*, [2003] N.S.J. No. 228 (S.C.)

In paragraph 77 Cullity J. continues and says, “*The logic of this is that, in such a case, it cannot be said that no person “in his senses” could have the belief if there is any evidence that could support it. I believe that such a proposition is an overstatement. The question whether an erroneous belief crosses the line between an unreasonable and capricious conclusion with some very tenuous, illogical or illusory basis in facts, and a delusion due to mental weakness or disorder will often be one of degree and will depend upon the particular circumstances (emphasis added).*” In the *Banton* case, the elder Mr. Banton was missing from the nursing home. Unbeknownst to his family, a financial predator, Muna, took him out to get married and make a new will. George Banton’s family was concerned. When George and Muna entered the nursing home an altercation occurred. George believed that his son Victor pushed him into a door causing bruises to one of his arms. Cullity J. believed Victor evidence that he put his hand on George’s wrist or his arm and guided him through the door into his room. George believed that his children assaulted him, only wanted his money and unduly interfered with his relationship with Muna. Cullity J., found, as a matter of fact that there was no bruising and, if any occurred, it was accidental. He also found that George’s children loved their father and only had his best interests in mind. George’s beliefs about his children were factually incorrect, but his conclusions were based on a misinterpretation of facts. Cullity J. found that George’s beliefs were an insane delusion despite the fact that there was some evidence upon which George relied to come to that conclusion. Those who seek to set aside a testamentary document can rely on the expanded definition of the *Banton* case. Apparently, when Cullity J. reviewed the facts of this case he concluded that George’s conclusion was unreasonable or capricious and based on some tenuous, illogical or illusory basis. That expands the test from those cases which suggest that if there was any evidence supporting George’s erroneous belief those beliefs could not have been regarded as an insane delusion.