

The Advocate and the Expert in a Testamentary Capacity Claim

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Where blind faith is placed in the relevance, cogency, scientific integrity, and probative value of an expert's: conclusions; underlying theory; data; and assumptions, there is a risk that the advocate will surrender his judgment, lose his bearings in the case, and that the legal and evidential foundations upon which the case is predicated, will be exposed by his opponent at trial as amounting to nothing more than wishful thinking, rather than blocks of granite. The advocate should always remember that, *'It is not the fact of the presence of a mental disorder, or even its severity, that determines testamentary capacity. It is the particular way in which the illness affects a specific testator that decides the issue. These might appear to be statements of the obvious, but sometimes they seem to be ignored... In contentious probate the parties tend to grab at cognitive test results like ship-wrecked passengers from the Titanic scrambling to get into a lifeboat. Lawyers, medical experts, and, dare one say it, judges may also seek refuge there... [However] not all cognitive tests are seaworthy enough for the particular conditions, and some are little better than flotsam...'* (**'Testamentary Capacity'**, by Martyn Frost, Stephen Lawson, and Robin Jacoby, paragraphs 13.01 and 14.01).

In **The Vegetarian Society & anr v Scott** [2013], HHJ Simon Barker QC stated that a key factor in preferring the evidence of the claimant's expert was that he was *'familiar with the elements of capacity necessary for a testator to make a will'* whereas the other party's expert was not. Consequently the evidence of the preferred expert, *'was the more focused and helpful of the two.'* As Professor Robin Jacoby and Peter Steer remark in their article, **'How to assess capacity to make a will'** [2007] **British Medical Journal** 335; 155-7,

‘Much litigation could be avoided... if, doctors, when asked by solicitors, assessed testamentary capacity correctly.’

‘Don’t conduct your case like Christopher Columbus, who on his voyage of discovery, didn’t know:

1. *where he was going;*
2. *when he arrived, where he was; and*
3. *and after he had been there, where he had been!*

Know where you are going, and when you have got there sit down. Set out what you want in paragraph 1 of your skeleton argument, “the Claimant’s case is...” Set out your stall, what you are asking for and want the judge to do. Say to yourself – “what am I doing here? What is my case?” Your opening is the route-map for your case containing the clearest sign-posts to point the judge in the right direction.’ [The author’s note of remarks made by the late **Mr Justice Hunt** in a lecture to the South Eastern Circuit Bar Mess entitled, **‘The Art of Advocacy’**].

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The task of the court

'Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to

accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.’ Lord Neuberger in **Gill v Woodall** [2011].

‘The common law judge...is not concerned with establishing the truth of what did or did not happen on a given occasion in the past but merely with deciding, as between adversaries, whether or not the party upon whom the burden of proof lies has discharged it to the required degree of probability... The Court of Appeal has none the less defined the English judge’s object as being, “at the end to make up his mind where the truth lies”... While the burden of proof always exists, few substantial cases turn upon it and in making his factual findings the judge is usually expressing his considered judgment as to what in truth occurred.’ (Tom Bingham).

In a testamentary capacity claim, ‘Where the will is rational upon its face...the burden [of proof] shifts to the opposing party to raise a real doubt as to capacity. If that occurs the burden then reverts to the propounder of the will.’ **The Vegetarian Society & anr v Scott** [2013]. To remove the presumption of validity, the burden is then on those who challenge the will, to show sufficient doubt about the deceased testator’s (‘T’s’) capacity. The showing of ‘sufficient doubt’ does not require proof that T actually lacked testamentary capacity, merely that the evidence produced shows sufficient grounds for the court to accept there is ‘a real doubt’ as to capacity, **Turner v Turner** [2011]. In most circumstances, failure by the propounder to produce evidence, results in a finding against the will, **Ledger v Wootton** [2008] (where the invalidity of the will was decided not on sufficient proof of incapacity but on the defendant’s failure to discharge the burden of proof after real doubt had been raised).

The weight to be attached to expert evidence is entirely a matter for the trial judge, and expert evidence is neither automatically admissible in a testamentary capacity claim, nor necessarily a decisive factor. The duty of the court is to consider the expert evidence in the light of the facts, not in isolation from them, and where a case involves substantial elements of both opinion and factual evidence the court may accord as much weight to each as it sees fit. As Lord Justice Mummery stated in **Hawes v Burgess** [2013] (Court of Appeal), in a testamentary capacity claim ‘... the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities...I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law: the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.’

In **Loveday v Renton and Welcome Foundation Ltd** [1990] Lord Justice Stuart-Smith stated, ‘In reaching [a] decision a number of processes have to be undertaken. The mere expression of opinion or belief by [an expert] witness, however eminent...[in this case about whether a vaccine could or could not cause brain damage] does not suffice. The court has to evaluate the witness and the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness’s opinion by examining the internal consistency and logic of his evidence; the

care with which he has considered the subject and presented his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence. There is one further aspect of a witness's evidence that is often important; that is his demeanour in the witness box. As in most cases where the court is evaluating expert evidence, I have placed less weight on this factor in reaching my assessment. But it is not wholly unimportant; and particularly in those instances where criticisms have been made of a witness, on the grounds of bias or lack of independence, which in my view are not justified, the witness's demeanour has been a factor that I have taken into account.'

I would add the following observations made by the late Lord Bingham in his article, 'The Judge as Juror: The Judicial Determination of Factual Issues' published in his book '**The Business of Judging**' (which are direct quotations):

- Expert witnesses may be and often are partisan, argumentative, and lacking in objectivity, but they are not dishonest.
- The problem remains: how is a judge faced with conflicting opinions of two or more experts, to choose between them?
- Manner and demeanor give no assistance here, and it is surely that the more truly learned a man is the more ready he is likely to be to admit ignorance and acknowledge inability to provide a perfect solution.
- It is often the superficial expert or charlatan who offers the most confident answer.

- Nor can the choice be based on comparison of the expert's respective qualifications – frequently the experts' qualifications are broadly comparable.
- Where they are not, the choice usually lies between one expert whose career has been devoted to the amassing of postgraduate degrees to the virtual exclusion of practical experience in the field, and another with no formal qualifications but a lifetime of experience in handling the commodity or operation in question.
- There is in truth no easy way out, no short cut.
- The only safe way in which a judge can choose between the opinions of experts is on the basis of what they have submitted and in the course of forensic questioning.
- This is as it should be, but it does I think raise a problem. For a judge to prefer the opinion of one expert to another he must understand what they have both said and form a reasoned basis for his preference.
- Usually this gives rise to no problem.
- The conflict of expert opinion may relate to an issue which is not particularly complex, or it may arise in a field of which the judge has previous experience or which he has studied at a level which at least enables him to understand the concepts to which the experts refer and the language they use. But this is by no means always so. The more advanced and experimental a technology the more risk there is of mishap.
- There are in my view times when the ability of judges to understand the effect of evidence given sufficiently to make an informed judgment is taxed to the very utmost, and I can imagine it being exceeded.

The analytical starting point in a testamentary capacity claim is the English law principle of testamentary freedom, which as explained in **Banks v Goodfellow** [1870], is that, 'English law leaves everything to the unfettered discretion of the

testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.’

An eccentric disposition of property is not in itself evidence of incapacity, and it is the whole picture that needs to be looked at. Whilst **T** may make a valid will disinheriting his children out of capriciousness, frivolous, mean or even bad motives, and it is not the function of the court to substitute its own view of what **T** should have done, it does not follow that the court should not look for a justification for a change in **T**’s will or inquire why **T** disinherited a child. ‘An irrational, unjust and unfair will must be upheld if [**T**] had the capacity to make a rational, just and fair one, but it could not be upheld if he did not. It followed that the court must inquire why [**T**] has disinherited his children [i.e. what **T**’s reasons were] where there is a possibility that it is due to disease of the mind... the justice or otherwise of [**T**] excluding his daughters must as a matter of common sense have a bearing and cannot be excluded from consideration... provided that the inquiry is directed to [**T**’s] soundness of mind, and not to general questions of perceived morality.’ **Re Ritchie** [2009].

Where a will has been drafted by an experienced independent lawyer who formed the opinion from a meeting or meetings with the testator that the testator understood what he was doing, a court will only set the will aside on the clearest evidence of lack of mental capacity. The Court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the

event, particularly when that expert has neither met nor medically examined the testator, and particularly in circumstances when that expert accepts that the testator understood:

- (i) that he was making a will; and
- (ii) the extent of his property.

Expert medical evidence will not necessarily outweigh the factual evidence of lay witnesses who had opportunities for observation and knowledge of the testator.

Preliminary claim analysis

‘Effective trial advocacy relies on preparation which begins as soon as you are instructed as the trial advocate. Your aim should be to read the papers a minimum of three times before the trial. [1st] to identify the legal framework i.e. who bears the burden of proving what and what is the standard of proof which the decision maker will apply. In addition identify the issues which are in dispute. The 2nd read through of the papers should be used to analyze the facts, dividing them into good facts (i.e. those that help your client or argument), bad facts (i.e. those that harm your client/argument), fixed facts (i.e. those which are incapable of being altered) and changeable facts (i.e. those which as a result of further evidence or cross-examination, may be capable of being altered). Once you have carried out the fact analysis you ought then to go on to create a case theory, this being the essence of the closing speech you would wish to give if all goes according to plan in your trial. Finally for the 2nd read through you ought to then reduce your case theory down into a case theme. This is a short headline, similar to the headline you’d find in a newspaper, that summarizes your overall case strategy in one sentence... Finally the 3rd read through should be done just before the trial, after any further evidence has arrived. This should be used

specifically to plan how you intend to cross-examine each witness to change bad facts to good facts and to have sufficient facts for your closing speech.’
(Cuthbert).

To find your legal and evidential bearings in a testamentary capacity case ask yourself 4 questions: what, when, who, and how?

- **What** has to be proved? (which hinges upon application of the **legal test of testamentary capacity**).
- **When** was **T** required to have testamentary capacity? (i.e. the ‘**relevant time**’).
- **Who** shoulders the **burden of proof** ? (and as a corollary, what is the **standard of proof**).
- **How** am I going to prove my case? i.e. what **evidence** is there: documents and witnesses, and whether **expert evidence is of any probative value** - which as McCabe v McCabe [2015] demonstrates, may carry little weight at the end of a trial because:
 - (i) a person who carried out a capacity assessment during **T**’s lifetime had not been provided with her previous medical history or condition; was unaware of the relevant legal tests; had not been provided with a summary of those tests; and therefore failed to properly investigate/evaluate whether **T** had the requisite testamentary capacity when carrying out the assessment; or
 - (ii) an expert never met **T** because he was appointed to provide an opinion after her death.

What? – The legal test of testamentary capacity

‘To make a valid will the law requires what is always referred to as testamentary capacity and, as a separate requirement, knowledge and approval.

The latter requires proof of actual knowledge and approval of the contents of the will. The two requirements should not be conflated. The former requires proof of the capacity to understand certain important matters relating to the will.’ **Hoff v Atherton** [2005].

To execute a valid will the testator must be over 18 and have testamentary capacity. Capacity is determined solely by the testator’s state of mind. The criterion of testamentary capacity is that the testator understands, ‘the nature of the act and its effects; [and] understands the extent of the property of which he is disposing; [and can] comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or pervert the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.’ **Banks v Goodfellow** [1870]. The testator must have, ‘a memory to recall the several persons who may be fitting objects of [his] bounty, and an understanding to comprehend their relationship to himself and their claims upon him.’ **Broughton v Knight** [1873].

‘More recent cases have modernized these formulations so as to be clear that a competent testator must be able to understand the effect of his wishes being carried out at his death, the extent of the property of which he is disposing, and the nature of the claims upon him.’ **Jeffrey & anr v Jeffrey** [2013]. Capacity depends on the potential to understand. It is not to be equated with a test of memory, **Simon v Byford** [2014].

s.2(1) of The Mental Capacity Act 2005 introduces a new statutory test of capacity, and provides,

- ‘(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to:
 - (a) a person’s age or appearance, or
 - (b) a condition of his, or an aspect of his behavior, which might lead others to make unjustified assumptions about his capacity.’

Note that the definition does not replace the common law test expounded in **Banks v Goodfellow** (see also **Key v Key** [2010]). However, Judges may use it to develop new common law rules.

The **Banks v Goodfellow** test comprises four limbs, each of which must be satisfied separately:

- (i) did the testator understand the nature of the act and its effect?
- (ii) did the testator understand the extent of the property of which he was disposing?
- (iii) was the testator able to comprehend and appreciate the claims to which he ought to give effect?
- (iv) was the testator’s mind affected by any disorder or delusion which was active in bringing about a disposal which the testator would not otherwise have made?

Mental capacity is both time and task specific, and should not be assessed in relation to the deceased testator’s ability to make decisions in general. For a

mental capacity claim to succeed it must be shown that the deceased lacked capacity for each particular decision, or type of decision at the time it was made. The relevant time at which capacity will be required for the will to be valid, is the time of execution of the will.

‘The test in *Banks v Goodfellow* is not a medical test. It is a formulation by judges, to be applied by judges, of the necessary level of a testator’s understanding for his will to be valid. The question of testamentary capacity is a legal question that is to be resolved by the court: “... the issue as to testamentary capacity is from first to last for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insights into the workings of the mind otherwise beyond the grasp of laymen, including, for that purpose, lawyers and in particular judges.” *Key v Key* [2010]. It is for this reason that the test was set out in layman’s terms and not medical terms...it is helpful to remember that, as *Banks v Goodfellow* is a common law test, the original test is capable of being developed by the court as modern needs and circumstances require... [The courts do not apply] the test in a rigid way, but in a way that takes into account changes in Society and psychiatric knowledge... There is no reason why factors from ss 2 and 3 MCA 2005 cannot be applied to develop the application of *Banks v Goodfellow*, within the existing framework of the test, where to do so the development would fit more closely with modern circumstances and knowledge...Ultimately it is open to the court to add or subtract elements from the common law test, but it is unlikely that major, as opposed incremental, changes would be made without legislative provision.’ (TC, paragraphs 2.11, 2.81, and 2.84). The approach of the court will depend in part upon the complexity of the terms of **T**’s will.

Capacity may be lacking because of mental illness or because **T** is under the influence of drugs or alcohol, and it is the whole picture that needs to be looked at. **T** suffers from a delusion if he holds a belief on any subject which no rational person of full capacity could possibly have believed, and which cannot be permanently eradicated from his mind by reasoning with him. A delusion in **T**'s mind deprives him of testamentary capacity if it influences, or is capable of influencing, the provisions of his will. The mere fact that **T** was subject to a delusion, false belief or confabulation, is not sufficient to demonstrate a lack of capacity. As the Judge put it, 'the delusion, false belief or confabulation must be calculated to have an influence upon the testamentary disposition, and [be] operative in the sense of being an influence connected to the disposition.'

A testamentary capacity challenge will fail where the judge finds that the reasons underlying **T**'s beliefs were soundly based, i.e. that **T** was not irrational or deluded in holding a belief, e.g. because it was justified by actual events, as in **McCabe v McCabe** [2015], where the judge concluded that **T** 'decided to disinherit [her son Timothy] because she believed that he had initiated, without her agreement or authority, a police investigation into her affairs and finances which brought [her son Stephen] within its reach, and made allegations in respect of him which suggested that he had misappropriated her money. This was not a delusion or confabulation. Her belief was justified by what had happened...[the initiation of the investigation] was something [**T**] could not forgive.'

Knowledge and approval

In many cases knowledge and approval are considered with the issue of capacity. Once a court is satisfied that the testator had the capacity to understand what he was doing, it is readily accepted that he did understand. 'When we move on to knowledge and approval what we are looking for is

actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed. The reason for this requirement is the need for evidence to rebut suspicious circumstances: *Perrins v Holland* [2010]... Normally proof of instructions and reading over the will suffice ... The correct approach for the trial judge is clearly set out in *Gill v Woodall* [2010]... It is a holistic exercise based on the evaluation of all the evidence both factual and expert.’ Lord Justice Lewinson in **Simon v Byford** [2014] (Court of Appeal).

‘In *Fulton v Andrew* (1875) Lord Hatherley stated,

“When you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it...those circumstances afford a very grave and strong presumption that the will has been duly and properly executed by the testator.”

This view was effectively repeated and followed by Hill J in *Gregson v Taylor* [1917]..., whose approach was referred to with approval by Latey J in *In re Morris deceased* [1971]... Hill J said that “when it is proved that a will has been read over to or by a capable testator, and he then executes it”, the “grave and strong presumption” of knowledge and approval “can be rebutted by only the clearest evidence”. This approach was adopted in this court in *Fuller* [2002]... and in *Perrins v Holland* [2010]... There is also a policy argument..., which reinforces the position that a court should be very cautious about accepting a contention that the will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of

relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.’ **Gill v Woodall** [2011].

A testator need not have a full understanding of the legal terminology used by the will/trust draftsman to give effect to his wishes. ‘In some cases where the testator employs an expert draftsman to provide the appropriate wording to give effect in law to the testator’s intentions, the testator has to accept the phraseology selected by the draftsman without himself really understanding its esoteric meaning and in such a case he adopts it and knowledge and approval is imputed to him.’ **Williams on Wills** (9th ed), paragraph 5.1, cited in **Re Stolkin: Greaves v Stalkin** [2013].

In **McCabe v McCabe** [2015] the judge noted that, ‘It was common ground between counsel that the modern approach to determining the issue of knowledge and approval is for the court to consider as a single question whether the testatrix understood what she was doing and its effect so that the will concerned represents her testamentary intentions; *Gill v Woodhall*... and *Hawes v Burgess* [2013]... Of course, on the modern approach, all the relevant evidence must be considered, and the court must draw such inferences as it can from the totality of the material in reaching its decision as to whether or not the propounder of the will has proved that the testatrix knew and approved its

contents... whether by way of the more traditional two stage approach, or whether it is approached as a single question, the answer should be the same... A further, and important feature of the case, when considering knowledge and approval, is that the will appears never to have been read over to Mrs McCabe, and there is no evidence that she read it herself... The significance of the reading over of a Will, by a third party to a testatrix, or by a testatrix herself, is that it is evidence that the content of the will has been brought home to her. In *Barry v Butlin* (1848)...Parke B, expressing the opinion of the privy Counsel said at page 485:

“Nor can it be necessary, that in all such cases, even if the Testator’s capacity is doubtful, the precise species of evidence of the deceased’s knowledge of the Will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof, by which the cognizance of the contents of the Will, may be brought home to the deceased.”

This passage neatly demonstrates that the reading over of a will, rather like observance of the golden rule, as Briggs J explained in *Key v Key*, is not a touchstone of validity; in the same way, the absence of reading over does not establish invalidity...The focus of the court’s enquiry is upon whether there has been satisfactory proof that the contents of the will have been brought home to the testatrix. Absence of reading over is a significant factor to be weighed with the other material as a whole when considering whether knowledge and approval has been established.’

When? - The relevant time

T must have testamentary capacity at the time when he **executes** the will. Alternatively, under what is known as the rule in **Parker v Felgate**, it suffices if

T had testamentary capacity at the time when he gave instructions to a solicitor for the preparation of the will provided:

- the will was prepared in accordance with his instructions; and
- at the time of execution he was capable of understanding, and did understand, that he was executing a will for which he had given instructions.

Who? - The burden and standard of proof

The burden of proof is on the propounder of the Will to establish capacity. This remains the case even if the propounder has already obtained a grant in common form. Where a Will is duly executed and appears rational on its face, then the Court will presume capacity. To remove the presumption of capacity, the burden is then on those who challenge the will, to show sufficient doubt about the testator's capacity. The showing of 'sufficient doubt' does not require proof that T actually lacked testamentary capacity, merely that the evidence produced shows sufficient grounds for the court to accept there is 'a real doubt' as to capacity. Once a real doubt arises there is a positive burden on the propounder to establish capacity. In most circumstances, failure by the propounder to produce evidence, results in a finding against the will.

Having decided what the facts are, and having applied the law to those facts, a trial judge must then decide whether on balance T is more likely to have had testamentary capacity at the relevant time, or more likely to have lacked it. Whether or not the burden of proof is discharged depends on the weight and value which the judge attaches to the various strands of evidence. This involves weighing up the credibility or reliability of the evidence, and ultimately comes down to deciding which version of the relevant matters is more likely to be

correct. At trial the judge is concerned with the balance of probabilities rather than certainty. As Judge Dight stated in **Fischer v Diffley** [2013],

‘...the standard of proof is the usual civil standard of proof, namely, the balance of probabilities, but that the more serious the allegation which it is sought to prove, the better the quality of the evidence needed to tip the balance in favour of the person seeking to prove it. I also remind myself that I may not speculate as to what happened. That is particularly important in a case such as this, which concerns the thought processes, state of health and decision making of someone who has passed away. I am entitled to draw reasonable inferences from primary facts which I accept, but not to speculate.’

How? - The probative value of expert evidence

Paragraph 17.46 of the **Chancery Guide 2016** states, ‘Part 35 contains particular provisions designed to limit the amount of expert evidence to be placed before the court and to reinforce the obligation of impartiality which is imposed upon an expert witness. The key issue in relation to expert evidence is the question “what added value will such evidence provide to the court in its determination of a given case?”. Part 35 states that expert evidence must be restricted to what is reasonably required to resolve the proceedings.’

There is a difference between the facts which form the basis of the expert’s opinion, and his opinion. All opinions must be based on facts. Those facts might be the result of a test carried out by the expert, or by another expert. They might be facts observed by the expert, by another expert, or a witness of fact. If the facts which form the basis of the opinion are not proved, then the opinion is essentially worthless. The expert’s opinion is not only based on the facts specific to the case; it must also be based on the facts of general application

which form part of the expert's specialised expertise or knowledge. (Palmer, page 148).

Theory

‘Just as a lawyer cannot succeed without developing a comprehensive theory of the case, neither will an expert be effective without a viable, articulated theory. An expert's theory is an overview or summary of the expert's entire position. The theory must not only state a conclusion, but must also explain, in common sense terms, why the expert is correct. Why did she settle upon a certain methodology? Why did she review particular data? Why is her approach reliable? Why is the opposing expert wrong? In other words, the expert witness must present a coherent narrative that provides the trier of fact with reasons for accepting, and it is hoped, internalizing, the expert's point of view... In cases involving dueling experts there will be competing theories. Properly prepared and presented, each expert will attempt to explain to the trier of fact why her theory ought to be accepted. It can be particularly effective, therefore, to ask your expert to comment on the opposing expert's work. This technique can be called theory differentiation because it is most convincing when your expert discusses the shortcomings of the opposition theory’ (**Lubet**).

An advocate who can state the opposing expert's case theory, opinions, assumptions, inferences, chain of reasoning, and conclusions better than the opponent's expert witness can, is standing on the mountain top and looking down, for the purposes of:

- (i) distinguishing his own expert's case theory, opinions, assumptions, inferences, chain of reasoning, and conclusions; and
- (ii) conducting a devastating ‘top down’ forensic critique of the opposing expert's evidence, in order to: cast doubt; demonstrate falsity; tarnish;

ridicule; and comprehensively devalue the weight to be attached to that evidence.

‘Research, as much as technique, lies at the heart of expert witness cross-examination. Counsel cannot conduct an adequate cross examination without first thoroughly investigating all of the technical aspects of the expected testimony. It is often said that you cannot cross-examine an expert without first becoming an expert yourself. Moreover, your research should extend beyond the expert’s subject matter area and into the witness’s own professional background ... There is nothing so effective as impeaching an expert with his own prior assertions.’ (Lubet).

Proof

The medical evidence presented to the court will usually include:

- (i) evidence provided by T’s GP and any other medical practitioner, including any nurse, who treated him in the period leading up to execution of the will; and
- (ii) evidence from a specialist practitioner (i.e. an adult psychiatrist or a psychogeriatrician) who may not have met the deceased testator, who has been instructed to provide an opinion for the court based upon;
 - (a) GP’s and hospital medical records; and
 - (b) any mental tests the deceased may have performed.

‘In a disputed capacity case expert evidence will usually be obtained from a Psychiatrist. If the testator was elderly at the time instructions for the will were given then it is usual to obtain expert evidence from a Psychiatrist who specializes in later-life patients... The expert will need to have regard to the witness statements and documents but his role should be to pick out the relevant

points and discuss and consider how they might fit in with a given medical diagnosis - in other words the expert should be concentrating on bringing medical insight to bear on matters which would not be apparent to the lay person. Further examples of this would be commenting on the effect of any medication known to have been taken by the deceased at the time of making of the will, commenting on the relevance of notes in hospital records, and translating any relevant medical terminology.’ (TC, paragraphs 11.50 and 11.56).

A recent illustration is **Cowderoy v Cranfield** [2011], in which Mr Justice Morgan observed, ‘Neither [of the parties’ expert witness] psychiatrists ever saw [T]. Each was provided with written material including medical records and each prepared a report for the court. Each was then provided with further material including each other's reports and each provided a second report for the court. The two psychiatrists met... and prepared a memorandum of their discussion. As neither psychiatrist had ever had the opportunity of seeing [T], neither was in a position to give me a direct psychiatric appraisal at any point in time, let alone on the day [T] executed the disputed will. In principle, psychiatric evidence could assist a court dealing with an issue as to testamentary capacity. For example the evidence could refer to such medical evidence as is available as to an individual's physical condition from time to time and could explain the likely impact on the mind of that physical condition. Similarly, the evidence could refer to medication being taken by an individual and comment on the likely effect on the mind of such medication being taken. Both psychiatrists did to some extent offer views on how likely it was that [T] had testamentary capacity at different points in time. Of course, the views expressed by the psychiatrists depend very much on what they understood the facts of this case to be. Each psychiatrist was given a version of the facts which was probably not complete. Further, understandably, neither psychiatrist sat through

the whole trial and neither psychiatrist knew the findings of fact which I would make in this judgment... I will obviously bear in mind this psychiatric evidence when I come to my ultimate conclusions. This psychiatric evidence allows me to be better informed as to the possibility of there being an impact on [T's] mental functions of her medical condition and, similarly, the effect on her mind of the medication she was taking with or without the addition of alcohol.'

'Any retrospective assessment [by a GP] will have to be based upon medical notes made at the time, as well as on other non-medical information which may help to suggest the nature of the person's mental functioning at the time...

Clearly the doctor will have to indicate that the assessment was retrospective and may therefore be unreliable... Any medical opinion should take full account of relevant information from other disciplines. An assessment by a clinical psychologist may already be available, or could be sought, and this may assist in giving a detailed validated and systematic assessment of cognitive functioning. An occupational therapist has special skills in assessing disabilities which may interfere with activities in everyday tasks. A report from a nurse or social worker may be helpful where information about daily activities or social functioning is of importance. What is important is not the diagnosis per se, but the specific disabilities and how they may affect the person's ability to make particular decisions... It is important for the assessing doctor to have access to all relevant medical and psychiatric records. These give an historical picture of a known current disorder, as well as giving diagnostic clues to what might be a so far undiagnosed disorder.' (AMC, paragraphs 16.9, 17.2, and 17.4).

Factual evidence may also be provided by lay witnesses who had opportunities for observation and knowledge of T, including her children, other family members, and friends. In assessing the credibility of the witnesses of fact in McCabe v McCabe [2015] the judge made the following observations which indicate what makes a good witness:

- ‘Despite [Counsel’s] very careful and thorough attack on Stephen’s character and credibility, I find that he was a truthful witness, in that he tried to recall events as accurately as he could... On material matters I am satisfied that his evidence was accurate.’ [**Paragraph 22** of the **Approved Judgment of Jeremy Cousins QC** sitting as a Deputy Judge of the Chancery Division].
- ‘...there are several instances where I have been unable to accept Timothy’s evidence on important, and crucial matters... I consider that the explanation for the unreliability of Timothy’s evidence on matters at the heart of this case is that over the years since the rift with his brother which had its origins in 2009, and became total in 2010, he has convinced himself of another version of events.’ [**Paragraph 32**].
- ‘My impression of Dr Pearson [T’s GP from August 2001], based upon the records that she maintained, and the manner of her giving evidence, was that she was a careful, caring, and thoughtful practitioner. She was also shrewd in her assessment of the difficult family situation in which her patient found her herself, observing in cross-examination that she believed that Mrs McCabe had tired of many years of mediating between her sons, and that she “had to ignore it”. I am entirely satisfied that Dr Pearson was not biased in favour of, or against, either Stephen or Timothy. Her concern was to put her patient’s interest first. She was a reliable and accurate witness.’ [**Paragraph 37**].
- ‘I had no doubt about Mr Maddams’ [the will draftsman] integrity as a solicitor, or as a witness. I was entirely satisfied that he did his best to remember the matters relevant to his evidence, and to recount them as best he could. I was impressed by the manner in which he conceded that he might well not have wished to proceed with his instructions relating to the 2011 Will had he appreciated more about T’s medical history, and by his willingness to acknowledge any gaps in his knowledge of the law, or

familiarity of publications relating to wills and probate practice. Such concessions, whilst they may detract from his expertise, demonstrated that he took very seriously his task of assisting the court to establish the truth of matters of great importance. I found him to be an accurate and reliable witness.’ [Paragraph 41].

Part 7 Probate claims are inherently fact sensitive, often culminating in a decision being made about which of the parties’ conflicting accounts is more probable than not. Where a witness is called to give evidence at trial, he may be cross-examined on his witness statement whether or not the statement or any part of it was referred to during the witness’s evidence in chief, **CPR r.**

32.1. The credibility of the witnesses of fact and consequently the weight attached by the Judge to their evidence, will often be a determinative factor in reaching an overall conclusion prior to judgment. I set out below a number of observations made by the late Lord Bingham in his article, ‘The Judge as Juror: The Judicial Determination of Factual Issues’ published in his book ‘**The Business of Judging**’, about how a judge should set about the task of resolving a conflict of evidence on an issue substantially effecting the outcome of an action (these are direct quotations):

- The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible.
- It is worth bearing in mind [that] when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.
- The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in

the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis*:

“‘Credibility’ involves wider problems than mere ‘demeanor’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing up the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a judge assesses the credibility of a witness: they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.”

- The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:
 - (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
 - (2) the internal consistency of the witness's evidence;
 - (3) consistency with what the witness has said or deposed on other occasions;
 - (4) the credit of the witness in relation to matters not germane to the litigation;
 - (5) the demeanor of the witness.
- The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case, may effectively rule out that possibility.
- The fourth test is perhaps more arguable. Much time is spent, particularly in criminal but also in civil cases where the honesty of witnesses is in issue, cross-examining as to credit, that is, in cross-examining witnesses on matters not germane to the action in order to show that they are dishonest witnesses whose evidence on matters which are germane to the action should be rejected. The underlying theory is that if a witness is willing to lie or can be shown to have acted dishonestly in one matter, he will be willing to lie or act dishonestly in another.
- Cross-examination as to credit is often no doubt, a valuable and revealing exercise, but the fruits of even a successful cross-examination need to be applied with some care.

- And so to demeanor, an important subject because it is the trial judge's opportunity to observe the demeanor of the witness and from that to judge his or her credibility, which is traditionally relied on to give the judge's findings of fact their rare degree of inviolability.
- What then is meant by the demeanor of the Witness in this context? The answer is: his conduct, manner, bearing, behavior, delivery, inflexion; in short, anything which characterizes his mode of giving evidence but does not appear in a transcript of what he actually said.
- The current tendency is (I think) on the whole to distrust the demeanor of a witness as a credible pointer to his honesty.
- The cases which vex a judge are not those in which he is profoundly convinced of a witness's honesty or dishonesty. In those cases whether his conclusion is right or wrong, the decision for him is easy. The anxious cases are those which arise not infrequently, where two crucial witnesses are in direct conflict in such a way that one must be lying, but both appear equally plausible or implausible. In this situation I share the misgivings of those who question the value of demeanor – even of inflexion, or the turn of an eyelid – as a guide. I would add:
 - (i) The ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial details and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hall-mark of the confidence trickster down the ages.
 - (ii) There is (I think) a tendency for professional lawyers, seeing themselves as the lead players in the forensic drama, to overlook how unnerving an experience the giving of evidence is for a witness who has never testified before. It would rarely, in my view, be safe to draw any inference from the fact that a witness seemed nervous and ill at ease.

(iii) However little insight a judge may gain from the demeanor of a witness of his own nationality when giving evidence, he must gain even less when the witness belongs to some other nationality and is giving evidence in English as his second language, or through an interpreter. Such matters as inflexion become wholly irrelevant: delivery and hesitancy scarcely less so. Lord Justice Scrutton once observed: “I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not.”

- The enigma usually remains. To rely on demeanor is in most cases to attach importance to deviations from a norm when there is in truth no norm.
- In choosing between the witnesses on the basis of probability, a judge must of course bear in mind that the improbable account may be the true one. The improbable is, by definition, as I think Lord Devlin once observed, that which may happen, and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented.
- The tests used by judges to determine whether witnesses although honest are reliable or unreliable are, I think, essentially those used to determine whether they are honest or dishonest: inconsistency, self-contradiction, demeanor, probability and so on. But so long as there is any realistic chance of a witness being honestly mistaken rather than deliberately dishonest a judge will no doubt hold him to be so, not so much out of charity as out of a cautious reluctance to brand anyone a liar (and perjurer) unless he is plainly shown to be such. There are three sources of unreliability commonly referred to by judges when rejecting the evidence of honest witnesses.

- (i) The first source of unreliability, arising principally when the evidence relates to an accident or incident occurring over a very short space of time, is where the witness although present at the scene and in a position to see what happened does not in truth see, or in any event register mentally, exactly what did happen. Work done by psychologists on the operation of the human memory throws a very interesting sidelight on this point. There is good reason to accept that with a significant number of witnesses, exposure to later misinformation gives rise to an inaccurate recollection as a result of supplementation or alteration.
- (ii) The second source of unreliability is loss of recollection. It is almost axiomatic that a witness cannot recall an event which happened several years ago as clearly and accurately as one that happened the day before. As it is often put, recollections fade with the passage of time. Psychological investigations appear to show a very high rate of loss immediately following the event and then no more than a minimal loss. I strongly suspect that recollection fades in a selective and not in a uniform way: in other words, that the circumstantial detail falls away or becomes blurred while recollection of the crucial and striking features of the event (as perceived by the witness) survive. This is suggesting no more than what is perhaps obvious, that the dominant impression lasts longest.
- (iii) The third source of unreliability which I would mention is wishful thinking. There can be few trial judges who have not at some time said something to this effect: 'X testified that so and so happened. I am not sure that X was being entirely truthful in giving this evidence. I am also sure that so and so did not happen. In my judgment X has over the years, erroneously but quite genuinely

persuaded himself that so and so happened as he described.’ This approach has philosophical support Nietzsche observed, ‘I did this, says my memory. I cannot have done this says my pride, and remains inexorable. In the end memory yields.’ I certainly do not challenge that such wishful thinking, usually a process of unconscious self-exoneration occurs. But I do a little question how often, in normal (unhallucinated) people.

Civil Procedure

A claim for a decree pronouncing for or against the validity of an alleged will is a probate claim (**CPR r.57.1(2)(iii)**). All probate claims are allocated to the multi-track (**CPR r.57.2(4)**). Probate claims in the High Court are assigned to the Chancery Division (**CPR r.57.2(2)**).

The **Chancery Guide 2016** states,

‘17.48 Standard case management provisions regarding experts may be found in the draft Case Management Directions (CH 1) at <http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do> and should be used as appropriate. An oral case management conference will be necessary in the great majority of cases involving expert evidence, given the cost such evidence usually involves and its importance in the proceedings. In order to assist the court in determining what order should be made in relation to expert evidence, the parties should attach a list of issues, preferably agreed, to their draft case management directions. In addition to identifying the discipline in which the experts are qualified, the Master may also specify the issues to which expert evidence may be addressed.

17.49 The parties should note that the unavailability of their chosen experts at a fixed trial date or trial window, or the late introduction of new expert evidence, will rarely be sufficient grounds for varying the trial date or window.

More than one expert – exchange of reports

17.54 The most common order is for reports to be exchanged. In an appropriate case the court will direct that experts' reports are delivered sequentially. Sequential reports may, for example, be appropriate if the service of the first expert's report would help to define and limit the issues on which such evidence may be relevant.

Discussion between experts

17.55 The court will normally direct discussion between experts before reports are delivered and in addition, if necessary, after reports are delivered and before trial. An initial discussion between experts before reports are prepared enables them to ensure that they will be addressing the same issues. Such discussions may be quite brief and telephone contact may suffice. Sometimes it may be useful for there to be further discussions during the trial itself. The purpose of discussions after reports have been served and exchanged is to give the experts the opportunity:

- to discuss and to narrow the expert issues; and
- to identify the expert issues on which they share the same opinion and those on which there remains a difference of opinion between them (and what that difference is).

- 17.56 Unless the court otherwise directs, the procedure to be adopted at these discussions is a matter for the experts.
- 17.57 Parties must not seek to restrict their expert's participation in any discussion directed by the court, but they are not bound by any agreement on any issue reached by their expert unless they expressly so agree.

Written questions to experts

- 17.58 It is emphasised that this procedure is only for the purpose (generally) of seeking clarification of an expert's report where the other party is unable to understand it. Written questions going beyond this can only be put with the agreement of the parties or with the permission of the court. The procedure of putting written questions to experts is not intended to interfere with the procedure for an exchange of professional opinion in discussions between experts or to inhibit that exchange of professional opinion. If questions that are oppressive in number or content are put or questions are put without permission for any purpose other than clarification of an expert's report, the court will not hesitate to disallow the questions and to make an appropriate order for costs against the party putting them.

Request by an expert to the court for directions

- 17.59 An expert may file with the court a written request for directions to assist them in carrying out their function as expert: CPR rule 35.14. Copies of any such request must be provided to the parties in accordance with rule 35.14(2) save where the court orders otherwise. The expert should guard against accidentally informing the court about, or about matters connected with, communications

or potential communications between the parties that are without prejudice or privileged. The expert may properly be privy to the content of these communications because the expert has been asked to assist the party instructing him or her to evaluate them.

17.60 The trial judge may disallow expert evidence which either is not relevant for any reason, or which the judge regards as excessive and disproportionate in all the circumstances, even though permission for the evidence has been given.

17.61 The evidence of experts (or of the experts on a particular topic) is commonly taken together at the same time and after the factual evidence has been given. If this is to be done it should be agreed by the parties before the trial and should be raised with the judge at the PTR, if there is one, or otherwise at the start of the trial. The court may also direct that experts give their evidence at the same time (so called “hot tubbing”). See PD 35 paragraph 11. If this is contemplated as a possibility it should be raised with the judge at the PTR.

Assessors

17.62 Under CPR rule 35.15 the court may appoint an assessor to assist it in relation to any matter in which the assessor has skill and experience. The report of the assessor is made available to the parties. The remuneration of the assessor is determined by the court and forms part of the costs of the proceedings.’

CPR r.35.6 provides,

‘(1) A party may put written questions about an expert's report (which must be proportionate) to

- (a) an expert instructed by another party; or
 - (b) a single joint expert appointed under rule 35.7.
- (2) Written questions under paragraph (1) –
- (a) may be put once only;
 - (b) must be put within 28 days of service of the expert’s report; and
 - (c) must be for the purpose only of clarification of the report, unless in any case –
 - (i) the court gives permission; or
 - (ii) the other party agrees.
- (3) An expert’s answers to questions put in accordance with paragraph (1) shall be treated as part of the expert’s report.
- (4) Where –
- (a) a party has put a written question to an expert instructed by another party; and
 - (b) the expert does not answer that question, the court may make one or both of the following orders in relation to the party who instructed the expert –
 - (i) that the party may not rely on the evidence of that expert; or
 - (ii) that the party may not recover the fees and expenses of that expert from any other party.’

‘It can be useful to put questions to an expert in contentious probate cases. The nature of the questions put can often be fact specific but the following generic question may be considered. CPR PD 3.3(6) requires an expert to state in

his/her report where there is a range of opinion on the matters dealt with in the report; the expert must summarize the range of opinions and give reasons for their own opinion. Sometimes an expert may not deal with that requirement in a report. A useful question may be to ask the expert if there is a range of opinion in relation to specific conclusions reached – particularly if the expert has not complied with the requirements of the Practice Direction. This can be a useful tactic to ‘set up’ the expert. If the expert states that there is no such range of opinion but is subsequently met by a different opinion from the expert on the opposing side, this may show the expert’s view to be too narrow – or that the expert has not been willing to consider the merits of other opinions. If the expert concedes that there is indeed a range of opinion with regard to the conclusions reached then this may be seen to dilute the certainty of the expert’s own opinion.’ (TC, paragraph 11.58).

The Expert

The value of standardised cognitive tests

‘In contentious probate the value of the MMSE is far less clear-cut and, because so often there are few ‘hard’ data for courts to consider, there is a risk of it being overvalued... MMSE scores may be used as an approximate estimate of the severity in individual patients for whom there is enough other clinical evidence to confirm a diagnosis of dementia, especially Alzheimer’s disease... The Montreal Cognitive Assessment (MoCA) is currently well on the way to replacing the MMSE in clinical practice... it has advantages over the MMSE in testing a wider variety of abilities, including executive function... there have now been several research papers which have shown the superiority of the MoCA over the MMSE as a screening test for MCI and dementia in a variety of clinical situations... The Addenbrooke’s Cognitive Examination Revised (ACE-R) developed by] Professor John Hodges [has been revised] to

ACE-III because ACE-R contains within it the MMSE and PAR have insisted on exerting their copyright. The ACE sets out systematically to test a series of functions: attention, memory, fluency, language, and visuospatial ability. Within these areas executive function is tested... Of all the tests mentioned... the ACE yields the most valid results for the assessment of dementia in contentious probate cases.’ (TC, 14.01 to 14.22)

In McCabe v McCabe [2015] the judge, noted the following about the limitations inherent in MMSE tests:

‘I found Professor Jacoby to be an impressive witness. He had clearly given much thought to the problems associated with how best to assess capacity. He was able to speak authoritatively on the subject of the limitations inherent in the MMSE tests.’ [**Paragraph 47**]. ‘In cross-examination... Professor Jacoby... said that MMSE tests were designed as a screening test, and that they have grave disadvantages in assessing the severity of dementia, so that a score of 27 in a highly intelligent person could conceal that she was suffering from dementia. The tests were, he said, heavily weighted in favour of memory, and hardly at all to the executive function. He described the need when assessing capacity, to take a full history and to conduct a mental state examination, including an MMSE. He preferred to make use of the Addenbrooke’s Cognitive Examination (“ACE”) which was marked out of 100. He said that he had, on many occasions, seen MMSE scores that were normal, where the ACE score was well below that level for the same patient. He said that the ACE test was more sensitive and specific, so that they were more accurate in identifying true positives and negatives, whereas the MMSE tests were more vulnerable to suggesting false positives. A score on the MMSE test of 24-20 was consistent with mild dementia, 20-15 with mild to moderate, 15-10 with moderate to severe, and below 10 with severe dementia. In his view the MMSE test did not equate to capacity at all. He said that the pattern of errors made by a patient

could be important, because it could reveal a degree of dementia greater than was otherwise apparent. To make an assessment, he said, that he would wish to see a patient and an independent informant.’ [Paragraph 195].

Appointment

The **Chancery Guide 2016** states,

- ‘17.50 The introduction to PD 35 states that, where possible, matters requiring expert evidence should be dealt with by a single expert.
- 17.51 The factors which the court will take into account in deciding whether there should be a single expert include those listed in PD35 paragraph 7. Single experts are, for example, often appropriate to deal with questions of quantum or valuation in cases where the primary issues are as to liability. Likewise, where expert evidence is required in order to acquaint the court with matters of expert fact, as opposed to opinion, a single expert will usually be appropriate. There remains, however, a substantial body of cases where liability will turn upon expert opinion evidence or where quantum is a primary issue and where it will be appropriate for the parties to instruct their own experts. For example, in cases where the issue for determination is whether a party acted in accordance with proper professional standards, it will be of value to the court to hear the opinions of more than one expert as to the proper standard in order that the court becomes acquainted with the range of views existing upon the question and in order that the evidence can be tested in cross-examination.
- 17.52 It is not necessarily a sufficient objection to the making by the court of an order for a single joint expert that the parties have

already appointed their own experts. An order for a single joint expert does not prevent a party from having their own expert to advise them, but they may well be unable to recover the cost of employing their own expert from the other party. The duty of an expert who is called to give evidence is to help the court.

17.53 When the use of a single joint expert is contemplated the court will expect the parties to co-operate in developing, and agreeing to the greatest possible extent, terms of reference for the expert. In most cases the terms of reference will (in particular) detail what the expert is asked to do, identify any documentary material they are asked to consider and specify any assumptions they are asked to make.’

To evaluate the merits of a testamentary capacity claim, it is proper and sensible for each party to appoint their own expert before proceedings are issued. An expert medical opinion can then be appended to the claim form.

An expert can only give evidence that is within his personal expertise. The judge is most likely to be influenced by the best qualified and experienced expert, especially if the expert has carried out relevant research and has written on the subject. It is therefore important to find an expert who has the right specific expertise, and not just a knowledge of the area. The choice of which type of specialist to instruct will depend upon the nature of the suspected incapacity. The prominence of the expert chosen is partly a matter of keeping the costs of the case at a reasonable level. A general medical practitioner (‘GP’) will not, in most cases, be suitably qualified to act as a medical expert in a contentious probate claim, although very often the deceased testator’s GP will be a witness of fact, and as such will give evidence of the opinion (if any) he formed of the deceased’s capacity around the time the disputed will was made.

‘The court has a broad discretion to decide whether or not a person is capable of giving evidence on the issues before the court... it is the issue which determines the admissibility of the particular field. If the issue requires a sophisticated level of inferential reasoning in the expression of an opinion on a central question in the proceedings, a witness will not be heard, or if he is heard little weight will be attached to his evidence, if his field is one which does not itself require, in its regular study or practice, a similar level and type of inferential reasoning... It is a matter in the discretion of the court to decide, not only whether a witness is an expert, but also whether his expertise is appropriate to the needs of the case... the only clear guiding principle is that the witness must bring to the case a relevant expertise which the court requires and lacks. It is the issue or issues on which the expert is to give evidence which is relevant, not the general subject-matter of the case.’ (**Expert Evidence**, paragraphs 1-028 and 2-008).

New ‘**Guidance for the instruction of experts in civil claims**’ came into effect on 1 December 2014, and replaced the former ‘Protocol for the Instruction of Experts to give Evidence in Civil Claims’, and is available to download on the website of the Academy of Experts at www.academyofexperts.org/guidance.

Paragraph 16 of the **Guidance** states,

‘Before experts are instructed or the court’s permission to appoint named experts is sought, it should be established whether the experts:

- a. have the appropriate expertise and experience for the particular instruction;
- b. are familiar with the general duties of an expert;
- c. can produce a report, deal with questions and have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;

- d. are available to attend the trial, if attendance is required; and
- e. have no potential conflict of interest.’

McCabe v McCabe [2015] also highlighted the importance of record keeping by experts. ‘Professor Jacoby expressed his opinion that it was unwise practice to discard paper records of any sentence written, or shapes drawn, something which Dr Ardron concedes is the likely explanation for his inability to produce them. Good practice, in my judgment, certainly requires that reasonable efforts are made to retain records of this kind. It is clearly foreseeable that for some considerable time after a capacity assessment is undertaken, access to the records that might be relied upon to support its result might be required in proceedings of this kind. One of the purposes of having a capacity assessment is to reduce the risk of later challenge; the loss, or destruction of records, does not serve that end. Any failure to adhere to good practice is clearly something which I have to take into account in my assessment of Dr Ardron, and in respect of the weight that I can attach to his evidence, but the fact that good practice has not always been followed does not in itself prove that the conclusions reached by the practitioner whose assessment is challenged are wrong. [**Paragraph 200**]. I accept that it would have been preferable if Dr Ardron had kept a fuller record of his contemporaneous notes, and the documents produced in connection with the tests he carried out on the day that the 2011 Will was executed. It would have been preferable if Dr Ardron had made his report sooner than he did in 2011. However, I do not consider that his general methodology (for which he gave cogent reasons) which did not involve the use of printed score sheets, and his practice of keeping notes made in front of a patient to a minimum, can be criticised. Different specialists will develop their own techniques, and provided they are based upon sensible reasons (which Dr Ardron’s were), they can be justified even if they are not universally adopted.’ [**Paragraph 281**].

Duty

Paragraph 17.47 of the **Chancery Guide 2016** states, ‘It is the duty of an expert to help the court on the matters within their expertise; this duty overrides any obligation to the person from whom the expert has received instructions or by whom they are paid (CPR rule 35.3). Attention is drawn to PD 35 and to the Guidance for instruction of experts which sets out the duties of an expert and the form and contents of an expert’s report. See in particular PD 35 paragraph 2.1 which provides that expert evidence should be the independent product of the expert, uninfluenced by the pressures of litigation.’

CPR r.35.3 states,

- ‘(1) It is the duty of experts to help the court on matters within their expertise.
- (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.’

Paragraph 2.4 of PD 35 further provides,

- ‘2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
- 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
- 2.3 Experts should consider all material facts, including those which might detract from their opinions.
- 2.4 Experts should make it clear –
 - (a) when a question or issue falls outside their expertise; and

- (b) when they are not able to reach a definite opinion, for example because they have insufficient information.

2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.’

Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation **Whitehouse v. Jordan** [1981]. ‘An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. An expert witness should make it clear when a particular question or issue falls outside his expertise. If an expert’s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one ... In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.’ Mr Justice Cresswell in **The Ikarian Reefer** [1993]. ‘What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert’s report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.’ **Technip France SA’s Patent** [2004].

Report

Paragraph 3 of PD 35 stipulates,

‘3.1 An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.

3.2 An expert's report must:

- (1) give details of the expert's qualifications;
- (2) give details of any literature or other material which has been relied on in making the report;
- (3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;
- (4) make clear which of the facts stated in the report are within the expert's own knowledge;
- (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
- (6) where there is a range of opinion on the matters dealt with in the report –
 - (a) summarize the range of opinions; and
 - (b) give reasons for the expert's own opinion;
- (7) contain a summary of the conclusions reached;
- (8) if the expert is not able to give an opinion without qualification, state the qualification; and
- (9) contain a statement that the expert –

- (a) understands their duty to the court, and has complied with that duty; and
- (b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

3.3 An expert's report must be verified by a statement of truth in the following form –

‘I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.’

The Advocate and the expert

Objectives

The aim of the advocate is to win at trial within the rules of law, evidence, and professional ethics. ‘The means of winning is by being persuasive... Rightly or wrongly, adversarial advocacy is not really an enquiry into the truth. Perhaps the adversarial system should be about finding out what really happened. But it isn’t. Instead it creates a polite contest. The contest is this: while a judge will seek out the truth as best they can, the advocates use their skill to test the evidence, and to control the way the evidence emerges, and then comment in closing on whether a case has been proved to the necessary standard of proof.’ (Morley).

‘A trial is not an exercise designed to discover the truth. The rules of evidence are mainly designed to exclude. They often operate to prevent the evidence actually presented from showing the truth of the matter at all ... The

Judge is not an investigator but more like an umpire ... What we are doing as advocates is trying to get the fact finder to arrive at an opinion, an opinion in our favour ... our objective at trial is not the ultimate truth but an opinion in our favour.’ [Evans].

‘The task of the advocate is to be argumentative, inquisitive, indignant or apologetic – as the occasion demands – and always persuasive on behalf of the person who pays for his voice ... when making submissions to a judge ... or cross-examining hostile witnesses, the advocate is required to entice, to flatter, [and within the boundaries of what is ethically permissible to ridicule and] to insult, all in order to advance the cause for which he is instructed The professional function of the advocate is, essentially, one of supreme, even sublime indifference to much of what matters in life. He must advance one point of view irrespective of its inadequacies. He must belittle other interests, whatever their merits ... It is not for counsel appearing in court to express equivocation, to recognize ambiguity or to doubt instructions. His client is right and his opponent is wrong. The wider consequences can be left to the judge. The fundamental role of the advocate is not to enlarge the intellectual horizon. His task is to seduce, to seize the mind for a predetermined end, not to explore paths to truth.’ [Advocates]. At trial, the strategic objectives of the advocate therefore include:

- (i) persuading the judge to rule in favour of the lay client through the admission and convincing presentation of expert evidence (which includes anticipating attacks upon the credibility of the expert and the value of his evidence);
- (ii) the exclusion of expert evidence relied upon by the other party; and

(iii) undermining the credibility of the opponent's expert, and the value of his evidence, to minimize the weight that the judge will attach to that expert's opinions and conclusions.

'But the Barrister knows that there are limits to acceptable advocacy, problems concerning the extent to which he can and should act as a mouthpiece of his client. He appreciates that there is a fine line between, on the one hand, brilliant advocacy which focuses on the strength of his case and, on the other hand, sharp practice and sham theatricals which mislead the court.' [**Advocates**].

'Although it is typically the position in an adversarial system that the parties decide what evidence to present to the court, the advocate cannot knowingly present false evidence nor withhold material evidence (at least it would have to be disclosed to the opponent before the hearing)... Rule rC3 makes it clear that the advocate must not mislead the court, knowingly or recklessly, or attempt to do so... Also, the advocate must not make submissions to the court or any other sort of statement which he knows are untrue or misleading. If his client instructs him to do this, he must refuse. This could cover both legal and factual points. More plainly fact-based is the requirement not to ask a witness questions which suggest facts that the advocate knows, or is instructed by his client, to be false or misleading (rC6.1). This is most obviously demonstrated in cross-examination, where the client is putting his client's case to an opposing witness ... It is important not to confuse knowledge with belief. The guidance under these rules (gC6) makes it clear that the advocate does not need to turn detective or pretend to be omniscient; you do not have to believe that what your client tells you in his instructions is factually true ...

[Furthermore] the advocate must not abuse his role. This requirement is specifically stated in rC3.2 and expanded upon in rC7.1-4. It would be an abuse of one's role to make a statement or ask a question merely with the aim of

insulting, humiliating, or annoying a witness (or any other person). If you have a different aim but your question or statement may have the incidental effect of insulting, etc, you will not be prohibited from asking it.

[Barristers] must maintain the standards of honesty, integrity, and independence which run throughout [the provisions of the Bar Standards Board Code of Conduct for Barristers. Specifically] ‘In order to act with honesty and integrity, the advocate must not:

- knowingly or recklessly mislead anyone or attempt to do so
- draft a statement of case, witness statement, affidavit or any other document which contains;
 - any statement of fact which is unsupported by his client or by his instructions
 - any contention which he does not consider to be properly arguable
 - any allegation of fraud, unless the advocate has
 - (i) clear instructions from the client to make this allegation and
 - (ii) reasonably credible material to establish an arguable case of fraud
 - any statement of fact which is not what he reasonably believes the witness would say if giving evidence orally (when drafting witness statements and affidavits)
- encourage a witness to give evidence which is misleading or untruthful
- rehearse, practice, or coach a witness on the evidence that they will give

- communicate about the case with any witness (including the client) whilst they are giving their evidence, unless the opponent or court gives permission to do so
- make or offer any payment to any witness which is contingent on the evidence they will give or the outcome of the case
- propose or accept any fee arrangement which is illegal.’ **[Ethics]**.

Case preparation

Case Theory

‘[The] case theory is a clear, simple story of “what really happened” from your point of view [which puts all the evidence together into a coherent whole]. It must be consistent with the undisputed evidence as well as your version of the disputed evidence and the applicable substantive law. It must not only show what happened, but also explain why the people in the story acted the way they did. It should be consistent with the [fact finder’s] beliefs and attitudes about life and how the world works. It must be a persuasive story that will be the basis of your evidence and arguments throughout the trial. If you cannot state your theory of the case in a minute or two, it needs more work. The theory of the case obviously needs to be developed as the facts of the case become known, and well before trial’ **[Mauet]**.

Preparation for the hearing

‘Know the documents. Agree a core bundle. Remember documents win cases... [Prepare] your trial bundles as soon as possible. Know your way around the bundles. Flag and list the key documents.

Ask yourself “What do I want to say in my closing speech, if all goes according to plan.” (And it rarely does!). Make a list – what has to be established – and how do I intend to do this? Which witness/document will establish this?

With the other sides’ witnesses, ask yourself “once the witness has left the box what do I want to have established?”

List the points you need and use it as a check-list, as you conduct the xx.

Conduct a refining exercise – bring out the real essence of the case and get rid of the surplus. Focus on the main issues and paint in primary colours.

Know your tribunal – what are the idiosyncrasies of a particular judge?

Know your opponent’s case better than he/she does. That way you should never be taken by surprise.’ (**Hochhauser**).

Preparation of witness statements

‘Avoid reams – it simply provides ammunition for XX. Identify the issues which the witness can address and deal with them. Make sure the author is familiar with the documents.

Consider the preparation of a tailor-made bundle. Ensure consistency with the documents or if the statement is inconsistent, it should explain why.’

(**Hochhauser**).

Conference

Counsel can talk to the lay client’s expert about the issues to be addressed, the form of the expert report, relevant rules of court, and to familiarize the expert with the trial process, offering guidance to the expert on giving comprehensive and comprehensible evidence in technical areas. The conference is also an opportunity to:

- (i) check the expert’s education and expertise;

- (ii) assess whether the expert will make a good witness;
- (iii) assess how the expert is likely to withstand cross-examination;
- (iv) ask about anything counsel does not understand;
- (v) ask the expert to put the case against the lay client and explain how it can be answered; and
- (vi) identify and probe weaknesses in the opinion of the opposing expert, e.g. any objective limitations in his methodology and expertise.

Opening

The **Chancery Guide 2016** states,

‘21.90 In general, and subject to any direction to the contrary by the trial judge, there should be a short opening statement on behalf of the claimant, at the conclusion of which the judge may invite short opening statements on behalf of the other parties.

21.91 Unless notified otherwise, advocates should assume that the judge will have read their skeleton arguments and the principal documents referred to in the reading list lodged in advance of the hearing. The judge will state at an early stage how much he or she has read and what arrangements are to be made about reading any documents not already read, for which an adjournment of the trial after opening speeches may be appropriate. If the judge needs to read any documents additional to those mentioned in the reading list lodged in advance of the hearing, a list should be provided during the opening.

21.92 It is normally convenient for any outstanding procedural matters to be dealt with in the course of, or immediately after, the opening statements.

21.93 After the evidence is concluded, and subject to any direction to the contrary by the trial judge, oral closing submissions will be made on behalf of the claimant first, followed by the defendant(s) in the order in which they appear on the claim form, followed by a reply on behalf of the claimant. In a lengthy and complex case each party should provide written summaries of their closing submissions.

21.94 The court may require the written summaries to set out the principal findings of fact for which a party contends.’

‘[The purpose of a written opening is] to educate the Judge. Remember at the outset, set out a reading list in a helpful order. Do not overload.

Skeletons/statements of case/principal witness statements/key documents. Give a realistic time estimate as to how long the pre-reading will take. Attach a chronology (agreed if possible) plus cast of characters.

The Facts – identify the issues, summarise your case, and your opponent’s.

Remember the evidence has yet to be tested, so avoid putting your case too high – otherwise you may live to regret it.

The Law – again identify the relevant principles and authorities. Where you are aware that there is an area of controversy, flag it up. The opening should be accompanied by a bundle of authorities. These should be agreed if possible.

The oral opening is another opportunity to bring the judge up to speed, and draw his attention to the principal issues in the case. Establish what he has read. Identify the principal areas of controversy and bring out the main points of your

case. Draw attention to the most important documents. Keep it concise.’
(Hochhauser).

The calling of expert witnesses

The evidence of experts (or of the experts on a particular topic) is commonly taken together at the same time and after the factual evidence has been given. If this is to be done it should be agreed by the parties before the trial and should be raised with the judge at the pre-trial review (‘PTR’).

Paragraph 20.1 of the **Chancery Guide 2016** states, ‘The current practice in the Chancery Division is to hold pre-trial reviews (“PTR’s”) in all cases estimated to last five days or more (including pre-reading). Whenever a case with an estimate of at least five days is fixed to come on for final hearing, a pre-trial review before a judge will be arranged by the Chancery Judges’ Listing Office (“Judges’ Listing”) at the same time, to take place about four weeks before the trial. A PTR will usually be listed for half a day.’

Paragraph 20.6 further states, ‘At the PTR the court will review the state of preparation of the case, and deal with outstanding procedural matters, not limited to those apparent from the lists of matters lodged by the parties. The extent to which information technology may be used may be considered at this stage if it has not already been discussed at an earlier stage. The court may give directions as to how the case is to be tried, including directions as to the order in which witnesses are to be called (for example all witnesses of fact before all expert witnesses) or as to the time to be allowed for particular stages in the trial. The judge conducting the PTR will be particularly concerned to ensure that the time estimate for the trial is appropriate and that the parties have agreed a realistic trial timetable.’

Since April 1, 2013 the court has had the power to order at any stage that experts of like discipline give their evidence at trial concurrently, not

sequentially, a procedure known as ‘hot-tubbing’. The experts will then be questioned together first by the judge and then by the parties’ advocates.

Examination-in-chief

The purpose of examination-in-chief is to get into evidence the facts necessary to prove your case. To achieve this purpose it is necessary to elicit each witness’s evidence in a clear and concise manner, and to anticipate, so far as is necessary and possible, any attack on that evidence likely to be made in cross-examination. When examining his own expert witness the advocate’s aims include:

- ensuring that the judge understand the expert’s evidence;
- persuading the judge of points essential to the case; and
- anticipating the other side’s cross-examination and fortifying against that assault.

The expert is obliged to state his qualifications in his report (**PD 35, paragraph 3.2(1)**). The usual practice at trial is for the judge to be referred to the relevant page in the report and for the advocate to then move on to the substance of the expert’s evidence. ‘In almost every civil case the expert will have written a report before the trial which will have been disclosed to the other parties pursuant to a direction of the court. This report should have been pre-read by the judge and examination-in-chief is usually relatively brief consisting of the advocate highlighting the important sections of the report and asking the expert to amplify or clarify ambiguities in the report and, sometimes, to comment on issues raised by the other side’s expert (albeit that this has usually been done in the expert’s joint statement) and/or issues that have arisen since he wrote the report. The bulk of the expert’s time in the witness box is usually taken up with cross-examination. In many civil cases (in particular those involving a single

joint expert all of the expert evidence is given by report alone and, thus examination-in-chief does not arise.’ [**Expert Evidence**, paragraph 8-012].

The opinion of an expert, however correct, is of no use to the court unless it is clearly formed by inference from facts which have been or are to be proved in evidence. The expert must always, in expressing an opinion, indicate which facts he relies upon. Counsel calling an expert should therefore in examination-in-chief, ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination. ‘Unless a witness states in his evidence in chief the grounds and reasoning that have led to the opinion, the opinion is valueless.’ **Cadbury Schweppes v Durrell Lea** [2007].

Once the expert’s opinion has been stated, immediately provide the underlying theory. The theory should furnish the nexus between the expert’s conclusion and the data used to support the conclusion. In other words the examination should follow this pattern: (i) here is my opinion; (ii) here are the principles that support my opinion; and (iii) here is what I did to reach my final conclusion. Having stated and supported his theory choice, the expert can then specify the nature of his investigations and tests. It is not necessary to explain or outline every hypothesis used by your expert, but the more important assumptions should be noted and supported. The examination in chief of an expert should conclude with a powerful restatement of his most important conclusions. Many complex ideas can be made understandable with examples, analogies, or metaphors. Expert witnesses should be encouraged to clarify their testimony through the use of such imagery. (**Lubet** pages 224 to 232).

Cross-examination

Just as a party must in cross-examination challenge evidence of fact given in chief by a lay witness which is not accepted, so the opinions of an expert must be challenged if they are to be disputed. The purpose of cross-examination is to:

- (i) elicit support for your own case, and to weaken your opponent's case;
and
- (ii) put your client's case (including as to the fact or content of documents) to the witness to afford the witness the opportunity to respond to it.

'Effective cross-examination of an expert is no different than of any other witness: you must have a sound analytical approach to the witness so that you can determine whether to cross-examine and, if so, how to organize and execute the cross-examination to carry out realistically attainable goals. This approach involves the following basic considerations.

- a. Should you cross-examine? Not every witness needs to be cross-examined. If the expert has not hurt you, or if you have no effective points to make, or your own experts have been more persuasive, consider not cross-examining.
- b. How should the cross-examination be organized? All cross-examinations have two possible basic purposes: eliciting favorable testimony, and conducting a destructive cross. Eliciting favorable testimony ordinarily comes before a destructive cross. If the expert has substantially helped you by agreeing to helpful facts, consider not attempting a destructive cross at all, although you have destructive ammunition.
- c. Effective cross-examinations have a structure that starts strong, and keeps it simple. They maintain control over the witness by asking simple, leading questions and stop when the point is made.

- d. What favorable information can you elicit? Did the witness say things on direct that you can have her repeat on cross? Can the witness admit facts not yet mentioned that support your case? What must the witness admit that helps?
- e. What discrediting or destructive cross-examination can you do? Are the witness's perception, memory, or communication skills vulnerable? Can the witness be impeached? Can you expose the witness's bias, interest, or motive? Has she made prior inconsistent statements? Can the witness be impeached by a treatise?

A good approach to any cross-examination is to ask yourself: what will I say about this witness in closing arguments? Planning the cross-examination is then a matter of determining what facts you can realistically make the witness admit during cross-examination that support your planned closing argument.' (Mauet, page 365).

'In general, if wishing to contest the opinion of an expert being called by our opponent, we can either contest the factual basis of the opinion, or we can contest the opinion itself. If the factual basis of the opinion is disputed, then we should be able to get the witness to agree in cross-examination that if the facts were as we contend, then his or her opinion would be different. If it is the opinion which we are contesting, on the other hand, then we will probably need to call our own expert witness...

There are six critical questions we can ask about experts:

1. Expertise questions: How credible is E as an expert source?
2. Field question: Is E an expert in the field that A is in?
3. Opinion question: What did E assert that implies A?

4. Trustworthiness question: Is E personally reliable as a source?
5. Consistency question: Is A consistent with what other experts assert?
6. Backup evidence question: Is E's assertion based on evidence?

... The expert's possession of special expertise or knowledge is obviously the main foundational fact for expert opinion evidence; but it is not sufficient to prove some expertise at large. The expert witness must also be shown to be an expert in the field to which the issue about which they have been called to give evidence belongs.' [Palmer, page 148].

An expert may be:

- (i) challenged as to credit in relation to his opinion as he may in respect of facts;
- (ii) asked to justify or deny particular opinions expressed on other occasions (including evidence given in similar cases) to cast doubt upon the opinions he has expressed in the present case;
- (iii) asked about his attitude to the parties, i.e. if it is suggested that he is biased; and
- (iv) questioned about whether he is or was not in a physical or mental state to express a proper opinion.

When cross-examining an expert witness the advocate's aims specifically include:

- '(a) limiting the witness's apparent expertise. Narrow the extent of his or her expertise/experience by showing that it is not directly applicable to the case in question or, perhaps, by contrasting it to the experience of your expert;

- (b) showing that the witness has had less involvement/contact with the case than your expert;
- (c) showing your knowledge of the expert's subject. Using your knowledge of the technical terms involved or the way in which any tests were carried out, the expert will be less inclined to avoid your questions. Contrast this approach with the way you may deal with an ordinary witness of fact by simplifying technical terms;
- (d) inviting the witness to define technical terms and sometimes in highly complex matters it may be necessary to invite the expert to use common language;
- (e) challenging his or her methods, for example showing that there were other tests that the expert could/should have carried out that might have produced a different result. Remember to check that the expert's facts, calculations and methods do actually produce the results set out in his or her report and, if they do not, challenge the expert as this may undermine the confidence and credibility of the expert's evidence;
- (f) inviting the witness to agree with the propositions that form the basis of your expert's opinion – he or she is unlikely to disagree with everything your expert says, and you should know from your own expert those areas that are in dispute. Remember to 'put your case' to the expert by inviting him or her to deal with your expert's methods/opinions/conclusions;
- (g) inviting the witness to agree that, in his or her field, legitimate differences of opinion frequently occur between qualified experts. This shows that the witness is not infallible and that his or her evidence is 'opinion' only; and

- (h) using hypothetical facts to test the strength of the expert's opinion. Testing whether a different interpretation of the same facts or a slight change in those facts would affect the expert's opinion.' [**Advocacy**, paragraph 22.7.1].

Paragraph 5 of PD 35 provides,

‘Cross-examination of experts on the contents of their instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice.’

Cross-examination of an expert witness is a hazardous undertaking. ‘A witness under cross-examination does not want to agree with you. He will fight tooth and nail to confound you. He will misunderstand your questions. He will provide evasive answers. He will try to use your questions as an excuse to repeat the deadly features in his testimony which destroy your case. Unlike TV, a witness has no script which must be followed. He will try everything to wriggle out from under your questions. Every question in cross-examination is an invitation to disaster. It is an opportunity for the witness to hammer you and your case. So your first thought is don't do it. Always start from the point of view: if I can avoid it, I will.’ [**Morley**].

‘The advantage of a cross-examiner over even the most prepared witness is that only the cross-examiner knows which questions are going to be put next...

10 cardinal rules:

- (i) Always put your case to a witness in so far as it is relevant to that person's evidence. Failure to do so may damage your case and may result in the witness being recalled.
- (ii) Keep your xx to what is absolutely necessary.
- (iii) Leading questions are permissible and should be used. Put propositions to a witness. Don't give them a chance to give equivocal answers. Listen carefully to what they have to say. If a witness avoids answering the question put it again until he/she does.
- (iv) Do not ask multiple questions. Keep them short and keep a tight rein on the witness. You should be in charge.
- (v) Permissible – forceful/insistent. Impermissible – hectoring/bullying. XX does not mean being cross. Never lose your temper with a witness.
- (vi) Let the witness finish his/her answer, before proceeding to the next question. If a damaging answer has been given, pause before proceeding. Silence is golden. Let it sink in.
- (vii) Watch the Judge's pen. No matter how good the XX is, if the Judge cannot record it, it may be lost. On a long trial, try to get a daily transcript if possible, it is very helpful for closing speeches.
- (viii) Never put questions on a false premise. It denudes the XX of its force and makes you look bad/ incompetent/unprepared.
- (ix) Never misrepresent a witness's earlier answer.
- (x) Put questions, don't make speeches/submissions. Don't clutter the questions with comment – save that for closing.' (**Hochhauser**).

Re-examination

The purpose of re-examination is to correct, clarify or expand matters arising out of cross-examination. No question may be asked in re-examination which does not arise out of cross-examination. The basic rule about re-examination is do not do it, i.e. ‘break glass in the event of emergency’.

The closing argument

‘The written closing argument:

- (i) Address each of the identified issues.
- (ii) Support your submissions by reference to the evidence – refer to/quote from the document, cite the testimony.
- (iii) Authorities – be selective. Give page citation. Highlight the passage in the authorities.

The oral closing argument:

- (i) Listen to the clues.
- (ii) Respond clearly to the questions asked. Don’t evade. Don’t postpone.
- (iii) Fearless but polite.’ (**Hochhauser**).

The psychology of advocacy

The trial advocate should remember at all times that ‘Human beings are far more video than audio. The way we collect most of our information is through our eyesight...Intent listening is something we do with surprisingly rarity...What most lawyers ask the fact finders to do in court is to use their second best device for gathering understanding. And the fact finders do it: on the whole they do it well. But since we don’t tie blindfolds on them, they don’t switch off their best information gathering device... People who have studied

the psychology of communications have some terrifying statistics for us lawyers. Examples:

- 60% of a message is conveyed by body language and visual appearance generally.
- 30% of the message is conveyed by tone of voice.
- Only 10% of a message comes through the words used.
- Only 10% of what people hear gets remembered. If, on the other hand they see something connected with what they are hearing, as they are hearing it, they remember 50%.

Lawyers tend not to know these statistics, just as they don't seem to realise that they are operating all the time in the Video dimension.' (**Common Sense Rules of Advocacy for Lawyers**).

In his book the **Golden Rules of Advocacy**, Keith Evans adds,

'[At trial what the judge normally has to do] is decide which parts of the evidence [he] prefers. An advocate's job is to lead his or her fact finder to a preference and thus to an opinion...Your fact finders may arrive at their preference and their opinion entirely as a result of thinking. But that's not very likely, is it? Even trained thinkers like us, in choosing between two conflicting witnesses, often ask ourselves what our gut reaction is...The process of getting to a preference and an opinion involves both – thinking and feeling. In a trial by judge alone you are before a trained thinker: here there may be more thinking than feeling involved in the search for preference or opinion. I say "may be" because that isn't by any means certain. Judges are human too...You see lawyers behaving as if their fact finders had no feelings at all, whereas it is their feelings you should be reaching out to all the time. Your job is to make them feel, as well as think, that they prefer your version. It is your task, in total

honesty, to lead them to this. And if you take this as your starting- point all sorts of guidelines present themselves.’ (Evans).

Keith Evans’ guidelines include:

- **‘Be likeable** – Leave the macho advocate where he belongs, on the television screen. The nice approach is infinitely more effective. If you are likeable, affable and kindly you will evoke all your fact finders nicest feelings. They will want to believe you. Coming across as utterly real and genuinely nice works wonders in court.
- **The sympathy rule** – Try to imagine what it must be like sitting where your judge is sitting, seeing what she is seeing, hearing what she is hearing. Try and put yourself as completely as you can in her position. Do it as they come into court at the outset and do it now and again right through the trial. Imagine yourself into the individual’s skin: get behind his or her eyes. This simple exercise puts you in far greater sympathy with them and, somehow or other, they are subconsciously aware of it. The result is that they give sympathy back to you.
 - They will listen willingly.
 - They will put the kindest interpretation on what you say.
 - They will feel reluctant to deny you what you ask.
 - They will feel inclined to overlook your mistakes.
- **The rule of equals and opposites** – If you pay attention to the sympathy rule you won’t get into a confrontation with your fact finder. Most advocates go barging into confrontation with the fact finder as a matter of course. The rule is simple. You push and they’ll push back. You pull and they’ll resist. You demand and they’ll refuse you. You insist and they’ll turn you down. An action almost invariably produces its equal and

opposite reaction, and it's one of the most important Golden Rules of Advocacy.

- **Include the fact finder** – Think ‘we’, never ‘they’. The witnesses tell us not you. The fact finders must always feel included rather than dispassionate umpires sitting on the sidelines.
- **Prepare them** – If you have weaknesses in your case, and all cases have weaknesses, make sure that you are the first to mention them. Get to your difficulties before anybody else does. You will handle them so much more sympathetically than your opponent.
- **Always aim to be the honest guide** – By the time the fact finder has spent 20 minutes in your company they should be beginning to feel, not only that you are honest, but that they can trust you. More than that, they should already have started to get the feeling that they can trust you completely, that you are not going to dupe them in any way. There's no substitute for real sincerity and real honesty and real niceness.
- **Don't ask them to believe the unbelievable** – If you press them to accept something that is beyond them, your credibility will vanish in a puff of smoke. Any good you may have accomplished so far will be undone.
- **When there is a weak point in your case don't pretend that it isn't a weak point.** Admit it and show them how you still ought to succeed despite that weakness.
- **Don't misquote the evidence in any way at all and don't put a slick interpretation on any part of it.**
- **Make sure that you always come across as being absolutely fair.**
- **Practice listening intently.**

- **Stop dead in your tracks** – As soon as you realise your sentence is a failure, stop. Say something like: "I'm not putting this clearly. Let me start again."
- **Use repetition very sparingly.**
- **The coffin nail exception** – If, in cross-examination you get a witness on the run and you have a list of things which you know he is going to have to admit, then you can use one form of repeating question over and over again, driving the nails into the lid of the coffin.
- **The Mark Anthony exception** – In your final speech (and in the rarest of cases in your opening) you might be able to find a short form of words that you can repeat like a theme. "For Brutus is an honourable man, so are they all, all honourable men." If you can find such a theme, use it. But make sure it's worth hearing again and again.
- **Sit down and write your final speech** – As soon as you have an approximate idea of what a new case is about, sit down and write your closing speech. Then read it. See how well the available evidence supports it. At once you will see the gaps, the missing bits. Trying to close those gaps is the preparation of your case. When you think you are getting close **sit down and write your opponent's final speech**. This will concentrate your focus more sharply on what you still need to do by way of preparation and on the weak points you will have to reach and deal with before anybody else does.
- **Perfect your final speech** – This is the blueprint of your trial. It becomes a record of your progress through the case, a shopping list of all you have to do, a foolproof checklist. The evidence you need and the way you need to present it stares straight at you from this final plan.
- **Show them the way home** – Home is the goal we are aiming at, the objective, the only reason we are in court. Everything we have done has

been done for this. Your fact finder usually starts out as a complete stranger to your case. They come like travellers in a new land. Somewhere in this country is the city you want to take them to, the city called verdict. You know their journey to that city could be a difficult one. If this weren't so you wouldn't be in court. And you have an opponent who wants to take them somewhere else altogether. Both of you are there, as the travellers arrive like tourists wondering what lies ahead of them, and from the outset you are like two tour operators in competition for those tourists. The brilliant advocate grabs them all, there and then. He paints them a picture of an easy, enjoyable journey, through interesting countryside, over smooth, paved roads. He sells them his city as a place where they'll feel content to be, a place worth having arrived at, a place where they'll be so welcome, a place where they'll be more than just tourists, a place where they'll experience a new and exciting sensation: the pleasure of being right where before there was wrong. And off they'll all go, with the other tour guide chasing along behind, desperately trying to catch up and never even coming close. Unless there is a catastrophe in the evidence they never swerve. They choose the guided tour they prefer and stick with it.'

Costs

The costs of a contentious probate claim are within the discretion of the court, and **CPR Parts 43** and **44** apply. The general rule, enshrined in **CPR, r 44.3(2)(a)**, is that the unsuccessful party will be ordered to pay the costs of the successful party, or in other words that costs follow the event. **Kostic v Chaplin** [2008].

This is subject to two exceptions. In **Re McKeen; Viva! Campaigns & anr v Scott** [2014], Judge Simon Barker QC stated,

‘The starting point is the general rule under the CPR that costs follow the event. In general terms, such an order is to be viewed as the just reflection in costs of what has been decided substantively. Nevertheless, (1) where a testator has brought about the litigation, the court may order that the losing party's costs are paid out of the estate, and (2) where the circumstances are such that investigation of a propounded will was reasonable, the court may order the parties to bear their own costs. In a case such as the present, just determination of the costs may require a hybrid order drawing on these further well recognised principles.’

CPR r.46.3 (Limitations on court’s power to award costs in favour of trustee or personal representative) also provides,

- ‘(1) This rule applies where –
- (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
 - (b) rule 44.5 does not apply.
- (2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.
- (3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis.’

Paragraphs 1.1 and 1.2 of the Practice Direction supplementing **r.46** state,

- ‘1.1 A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative (‘the trustee’) –

- (a) obtained directions from the court before bringing or defending the proceedings;
- (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and
- (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.

1.2 The trustee is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee personally.'

Recently in **McCabe v McCabe** [2015], 'The court explored in great detail (with a trial lasting 11 days and the judgment amounting to 171 pages) the issues surrounding testamentary capacity and it serves as a reminder that each case is to be decided on its individual facts and detailed investigations need to be undertaken to establish whether a testator had the requisite capacity to make a valid will.' 'Facing the facts' by **Simrun Garcha, Trusts and Estates Law & Tax Journal**, March 2016.

'Stephen [McCabe, the Claimant] won the case and so the usual rule about the costs of the action applied: Timothy [the first defendant] had to pay Stephen's costs. However, there was a dispute about the solicitor/executor's costs.

Timothy alleged that it had been unnecessary for Stephen to join the solicitor/executor; that the solicitor had not stayed entirely neutral because he had acted briefly for Stephen before Anthony Gold took over; and Timothy alleged that the solicitor had caused the costs to increase because he had not properly complied with the 'golden rule'. Timothy submitted that the executor's costs should be paid by the estate (which would in effect have meant Stephen) or that he should not have his costs at all.

The general rule is that where a person has been a party to probate proceedings in the capacity of trustee or personal representative, that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.; see CPR 46.3.

There is a prima facie right of a personal representative to recover his costs from the estate unless he is deprived of them by order of the court; see, for example, *Re Plant's Estate* [1926] P 139, CA, and *Re Cole's Estate* (1962) 106 Sol Jo 837 (Karminski J).

The conclusion of Jeremy Cousins QC, taking into account the above, and dismissing Timothy's allegations was with reference to Norris J's reasoning (with modifications appropriate to this case) in *Wharton v Bancroft* at para 27 – "There is no reason in justice why [the executor's] costs of attending to hear and to respond to the personal criticisms of him and to address the court as to the circumstances in which the [2011] Will was produced ... should be borne by [Stephen]." The solicitor's costs were incurred as a direct result of Timothy's sustained attacks on the validity of the Will, and the part which Mr Madams had played in the making of that Will. Timothy was unsuccessful. He should be responsible for the costs.

Pausing for thought, it is nevertheless prudent for a claimant to consider whether to join an executor to contentious probate proceedings. Does your case rely on information from the executor such as a will file or evidence about the circumstances the will was made? A solicitor/executor would normally charge the estate for carrying out work in relation to a claim. So if you are likely to succeed, do you want that executor's costs paid for by the estate or the losing party personally? If it is the latter it is probably worth joining the executor, though consider carefully your own client's costs exposure if the executor does not stay neutral.' **'Cost lessons for executors from McCabe v McCabe'** by

Beth Holden (who acted for Stephen

McCabe): <https://anthonygold.co.uk/latest/blog/cost-lessons-for-executors-from-mccabe-v-mccabe>

ADR

- Carrot and stick
- Psychology
- Principled negotiation
- Mediation
- Early Neutral Evaluation ('ENE')
- Chancery FDR
- Guided Settlement (a method of ADR I innovated in 2015 and outlined in my article 'The Advocate and The Expert in a Testamentary Capacity Claim', published by the **Expert Witness Journal** which can be downloaded on the publications page at www.ihbar.com)

Carrot and stick

Most cases issued in the Chancery Division settle.

'...[Trial] is, and probably always has been, the method of resolution of only a tiny minority of chancery disputes. The settlement rate of cases issued in the Chancery Division in London during the last 5 years ranged between 92.3% and 94.4%, and that excludes settlements taking place after the start of the trial.

Traditionally, most disputes have been resolved by unstructured negotiations between the parties or their lawyers, a process involving no management or intervention by the court, save acceding to the last minute request to delay the commencement of a trial while the parties frantically conclude settlement negotiations at the court door..' Lord Justice Briggs in the **Chancery**

Modernisation Review: Final Report, December 2013.

The **Chancery Guide 2016** states,

- ‘18.1 The settlement of disputes without a trial, by means of Alternative Dispute Resolution (“ADR”) can help litigants (a) to save costs, (b) to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation and provide litigants with a wider range of solutions than those offered by the determination of the issues in the claim. Legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by ADR and they should ensure that their clients are fully informed about the most cost effective means of resolving the dispute.
- 18.2 Where appropriate the court will, as part of the overriding objective, encourage the parties to use ADR or otherwise help them settle the case or resolve particular issues. There should normally be discussion at the case management conference about what steps have already been taken (if any), and those which ought to be considered in future, to try to resolve the claim.
- 18.3 The court will readily grant a stay at an early stage of the claim to accommodate mediation or any other form of ADR if the parties are agreed that there should be a stay. A consent order may be lodged to stay the claim. The court will not, however, normally grant an open-ended stay for such purposes and if, for any reason, a lengthy stay is granted it will usually be on terms that the parties report to the court on a regular basis about their negotiations.
- 18.4 Any order for a stay will normally include a provision that the parties may agree to extend the stay for periods not exceeding a total of 3 months from the date of this order without reference to the Court, provided they

notify the Court in writing of the expiry date of any such extension. Any request for a further extension after 3 months must be referred to the Court. The order will include permission to apply in relation to the extension. At the end of the stay the parties should be in a position to tell the court what steps have been taken or are proposed to be taken.

- 18.5 Once the claim has reached the stage of trial directions being given, a stay for ADR may not be appropriate if a stay will interfere with the timetable of directions or there is no agreement about the optimum time for the stay to take place. The parties may need to be flexible about finding the best time for settlement discussions or mediation and to do so without a stay of the claim.
- 18.6 The court will not make an order directing the parties to undertake a form of ADR. However, if the court considers that one or both parties are unreasonably refusing to attempt ADR, the court may order a stay with a direction for the parties to take reasonable steps to consider ADR.’

CPR, r 26.4 states,

- ‘(1) A party may, when filing the completed directions questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.
- (2) If all parties request a stay the proceedings will be stayed for one month and the court will notify the parties accordingly.
- (2A) If the court otherwise considers that such a stay would be appropriate, the court will direct that the proceedings, either in whole or in part, be stayed for one month, or for such other period as it considers appropriate.
- (3) The court may extend the stay until such date or for such specified period as it considers appropriate.

- (4) Where the court stays the proceedings under this rule, the claimant must tell the court if a settlement is reached.
- (5) If the claimant does not tell the court by the end of the period of the stay that a settlement has been reached, the court will give such directions as to the management of the case as it considers appropriate.’

PD 26 Paragraph 31 (Procedure for the parties to apply to extend the stay)

states,

- ‘(1)(a) The court will generally accept a letter from any party or from the solicitor for any party as an application to extend the stay under rule 26.4.
- (b) The letter should –
- (i) confirm that the application is made with the agreement of all parties, and
 - (ii) explain the steps being taken and identify any mediator or expert assisting with the process.
- (2) (a) An order extending the stay must be made by a judge.
- (b) The extension will generally be for no more than 4 weeks unless clear reasons are given to justify a longer time.
- (3) More than one extension of the stay may be granted.’

A **Part 7 Directions Questionnaire** requires a party to specify reasons why it is not appropriate to attempt settlement at that stage.

In **Garritt and Others v Ronnan and Solarpower PV Limited** [2014], Judge Waksman QC stated,

‘The allocation questionnaire gave as the reason that "the parties are too far apart at this stage". [The case which was about breach of contract] was a very fact intensive and evidence intensive exercise where the court would have to judge the credibility of their witnesses and look at the importance or otherwise of contemporaneous documents... That is classically a case where both parties needed to engage in a risk analysis as to whether their side of the coin would be accepted or not... To consider that mediation is not worth it because the sides are opposed on a binary issue, I’m afraid seems to me to be misconceived. The points on the nature of the dispute raised in Halsey indicate that the sort of case where exceptionally its nature might rule out mediation will be where the party wishes to resolve a point of law, considers a binding precedent would be useful... But paragraph 17 concludes, "In our view most cases are not by their very nature unsuitable for ADR." In my judgment, this case by its very nature was eminently suitable for ADR as the claimants appreciated in their first letter... Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience... The point is that you compare the costs of a mediation with the costs of a trial. And the costs of a mediation, on any view, would have been far less than the costs of the trial, as both parties costs figures demonstrate.’

In **Lynn v Borneos LLP t/a Borneo Linnels** [2014] (unreported) Judge Cooke stated,

‘The defendants simply did not respond or made fairly bland refusal to all the invitations to mediate. The effect of authority now, in my view, that the court should regard a refusal or a failure to engage in a mediation in those circumstances as unreasonable. It is something which is, in principle, unreasonable no matter what the strength of a party’s case is felt to be. There is

an advantage, which is recognised in policy terms by the court, in encouraging the parties to explore the possibility of settlement at mediation.’

In **Halsey v Milton Keynes NHS Trust and Steel [2004] EWCA Civ 576**,

Lord Justice Dyson made it clear that the court can impose a costs sanction on a party who unreasonably refuses to mediate. More recently Lord Justice Briggs stated at paragraphs 30 and 56 of his judgment in **PGF II SA v OMFS**

Company 1 Ltd [2013] EWCA Civ 1288:

‘30. The ADR Handbook, first published in 2013, after the period relevant to these proceedings, sets out at length at paragraph 11.56 the steps which a party faced with a request to engage in ADR, but which believes that it has reasonable grounds for refusing to participate at that stage, should consider in order to avoid a costs sanction. The advice includes:

- a) Not ignoring an offer to engage in ADR;
- b) Responding promptly in writing, giving clear and full reasons why ADR is not appropriate at the stage, based if possible on the Halsey guidelines;
- c) Raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome;
- d) Not closing off ADR of any kind, and for all time, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing.

That advice may fairly be summarised as calling for constructive engagement in ADR rather than flat rejection, or silence. It is apparent

from the footnotes that the authors drew heavily on the first instance decision in the present case, to which I now turn.

56. Finally, as is recognised by the weight placed on the judge's decision in the passage in the ADR Handbook to which I have referred, this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates *pour encourager les autres*.'

As any settlement agreed between the parties to a probate claim will require the approval of the court (**CPR, r 57.11** and **paragraph 6.1 of Practice Direction 57**), in order to save costs and thereby preserve the capital value of the estate in the interests of all of beneficiaries, the optimum time for entering into ADR is before service of a claim form.

In a case like **McCabe v McCabe** [2015], ENE may be particularly suitable. The will challenge hinged upon 'the central question [of whether] **T**'s extreme dislike of [her son Timothy], to the point that she disinherited him, was irrational. [Counsel for Timothy] maintained that it was having regard to the years of love, affection and kindness that had flowed between [Timothy] and his mother... **T**'s view of [Timothy], argued [counsel], had clearly gone beyond the limit, when it had ceased to be a question of harsh unreasonable judgment and had become a repulsion which was so irrational as to precede from some

mental defect; she cited **Boughton and Marston v Knight** (1873) 3 P & D 64 at 69.' [Paragraph 233]. At the end of the day the expert evidence presented in this case was of limited value because as the judge noted:

- whilst the will draftsman, Mr Madams, was aware of the 'Golden Rule' in the sense of knowing that it was prudent to retain a medical practitioner as a witness of a will in the case of an elderly or infirm person if in any doubt as to capacity, he was not familiar with the requirements described by Briggs J in **Key v Key** [2010], or with the **Assessment of Mental Capacity. A Practical Guide for Doctors and Lawyers** published by the British Medical Association and the Law Society, [and now in its 4th edition (2015)] [Paragraph 40];
- Dr Mark Ardron, '[had] not received specific clinical training in capacity assessment.' [Paragraph 42], 'had not been provided with any information as to [T's] medical history, ...had not been provided with a summary of the common law test for testamentary capacity, and ... was unaware of the Banks v Goodfellow requirement that a testatrix should understand the extent of the property of which she is disposing by will. [Dr Ardron] similarly acknowledged that this was, therefore, not a topic about which he asked Mrs McCabe' [Paragraph 43]; and
- Professor Jacoby, whilst being an impressive witness, was 'at a considerable disadvantage as against Dr Ardron in that he had not met T when she was alive unlike Dr Ardron who had within a period of a little more than 18 months tested her capacity on two separate occasions.' [Paragraph 48]. Professor Jacoby 'had clearly given much thought to the problems associated with how best to assess capacity. He was able to speak authoritatively on the subject of the limitations inherent in the MMSE tests... He displayed not only a technical mastery of the matters on which he had been asked to express his opinions, but he was also very

realistic in his approach to assisting the court with relevant evidence.

Thus, whilst conscious of the separate functions of an expert witness and a trial judge, and appreciating that it was for the court to determine what were the issues in the case, he correctly in my view, conceded in his report that **T**'s dementia was insufficiently severe to have prevented [her] from understanding the nature and consequences of the act of making a will in general, or of the 2011 Will specifically. Similarly, whilst not feeling himself able to express an opinion on whether **T** appreciated the extent of her estate, he acknowledged that had she been reminded of it at the time that she gave instructions, she would probably have been able to retain that information for a sufficient length of time to make her testamentary decision' [**Paragraph 47**].

The Judge agreed 'with counsel, and the medical expert witnesses, that the case on capacity ... turns upon whether the decision to disinherit [Timothy] was, or was not, based on false beliefs or confabulations. Upon that critical question, Mr Madams, Dr Ardron and Professor Jacoby are not able definitively to assist because, in the words of Erskine J in *Harwood v Baker* at page 306, "all the other circumstances of the case [were] not known" to any of those professional men. The factual underpinnings for [**T**'s] beliefs was not known or investigated by Mr Madams or Dr Ardron, and Professor Jacoby never met [**T**] and had no opportunity to make any investigations at all concerning her or his beliefs during her lifetime. In this respect, I accept [counsel's] submission as to the limitations upon the value of their evidence...' [**Paragraph 266**].

The judge decided, 'Considering all of the relevant evidence in the case, I reach the conclusion, quite firmly, that [**T**] was not irrational or deluded in her belief that [Timothy] had initiated an investigation by the police and other agencies into her finances, without her authority. She most definitely had not done so in relation to anything that might suggest that [Stephen] had been implicated in

any impropriety ... I accept [Stephen's] evidence that his mother was distraught when he told her that the police wished to interview him.' [Paragraph 277]. In all the circumstances, I conclude that [T] decided to disinherit [Timothy] because she believed that he had initiated, without her agreement or authority, a police investigation into her affairs and finances which brought [Stephen] within its reach, and made allegations in respect of him which suggested that he had misappropriated her money. This was not a delusion or confabulation. Her belief was justified by what had happened.' [Paragraph 278].

Where the pivotal issue (upon proof of which success at trial hinges and depends), is agreed between the parties during ADR, then the probative worth of expert evidence, or the lack of it, should become readily. The fog then lifts, permitting sunlight to appear. If the parties see the light of day, i.e. if common sense and reason prevail, then there will be increased pressure on them to settle, in order to prevent the erosion of the capital value of the estate through the further incurrence legal costs and experts' fees.

Psychology

Whilst technical mastery of the facts, law, and procedure in a case, obtained through granular forensic analysis and thorough case preparation are essential to success in either a negotiation or at trial, in the author's opinion, the art of applying human psychology in order to persuade is equally important.

'People often think that establishing objective facts will resolve the dispute... yet in each situation, the key to the dispute is not objective truth but what is going on in the heads of the parties. Objective reality is unlikely either to be the cause of the problem or the source of a solution. Experience suggests that the two most helpful qualities in dealing well with differences are an ability to be persuasive and an ability to revise our own thinking in the light of fresh insights. More data – more facts and figures – merely contribute to our ability to

be persuasive or to see a problem in a new way. They are not ends in themselves. To be persuasive, we need to understand how others see the world, their motivations, emotions, and aspirations. To see a problem in a new light, we need to analyze it from perspectives other than our own. In each case, our power depends on our ability to put ourselves in other people's shoes and to see the world from their point of view. We often handle conflict poorly because we are each prisoners of our own thinking. We tend to judge differences, particularly when we think we know best. Understanding differences is hard work. Frequently we do not know how to go about it... Coping with conflict means coping with the way people think and feel. In any conflict people think and feel differently from one another, and the issue is not whose perceptions are 'true' and whose are 'false'... The better we understand the way people see things, the better we will be able to change them. There is no magic formula for acquiring understanding. It takes a little time and effort.' (**Beyond Machiavelli**).

Principled negotiation

'The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears... which are interests. Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide... for every interest there usually exist several possible positions that could satisfy it. All too often people simply adopt the most obvious position... When you do look behind opposed positions for the motivating interests, you can often find an alternative position which meets not only your interests but theirs as well. Reconciling interests rather than compromising between positions also works because behind opposed positions lie many more interests than conflicting ones... a close examination of the underlying interests will reveal the existence of many more interests that are

shared or compatible than ones that are opposed... How do you go about understanding the interests involved in a negotiation, remembering that figuring out their interests will be at least as important as figuring out yours. One basic technique is to put yourself in their shoes and ask yourself ‘Why?’ If you do, make clear that you are asking not for justification of this position, but for an understanding of the needs, hopes, fears, or desires that it serves... Ask ‘Why not?’ Think about their choice. One of the most useful ways to uncover interests is first to identify the basic decision that those on the other side probably see you asking them for, and then to ask yourself why they have not made that decision. What interests of theirs stand in the way? If you are trying to change their minds, the starting point is to figure out where their minds are now.’
(Fisher & Ury).

‘Even if you disagree with the other person’s stance on an issue, you can acknowledge their reasons for seeing the world as they do. They might be motivated by strong feelings, a passionate belief, or a persuasive argument... Finding merit in another’s reasoning requires that you actually do see merit in it. Sincerity is crucial. It is your honest valuing of another’s perspective that makes them feel appreciated. You want to express that you understand the basis for why they feel, think, or act the way they do. While you may struggle to find value in what they say or do, look hard and imagine what their emotional experience is like, considering what concerns may be motivating their emotions. When you strongly disagree with others, try acting like a mediator. The hardest time to find merit in another’s point of view is when you are arguing about an issue that may be personally important. Listening for merit in another’s point of view can transform the way you listen... The third element of expressing appreciation is to demonstrate your understanding of the merit you have found. Once you understand their perspective and find merit, let them know... What is important is that the person’s thoughts, feelings, or actions are recognised and

acknowledged... Reflect back what you hear... Others are likely to feel unheard unless you demonstrate to them that you do in fact understand what it is that they believe is important.’ (**Building Agreement**).

Mediation

The keys to success in mediation are not what lawyers argue, but identification by each party of their BATNA (best alternative to a negotiated agreement), which is a practical tool for risk management, and doing a deal measured against it. This requires preparation and planning by each party’s mediation advocate. Strategy is the outcome. ‘A collaborative strategy assumes that the parties can work together to reach an agreement that meets the needs of both and is objectively fair. The process involves exploring the parties’ underlying interests, sharing information and being creative in the options considered. The agreement will not necessarily focus on the original issues between the parties but will try to identify options for mutual gain. The strategy involves more than co-operation – it is based on mutual effort and requires advance analysis and planning.

Within the term ‘collaborative’ different strands may be identified:

- a ‘principled’ strategy tries to achieve an outcome that is objectively fair against some external authoritative norm; and
- a ‘problem-solving’ strategy focuses on both parties’ real needs and interests, and tries to get a practical solution without building costs.’ (**A Practical Approach to Alternative Dispute**).

The characteristic approach is:

1. working together is stressed at the start of the negotiation, and this approach is sustained throughout. A mediation advocate may for example

open by saying:

‘Thank you for meeting with us today.

I will be corrected if I am wrong, but what I think you say about the facts and the law is ...

It is not my job to persuade you that your arguments will not succeed at trial.

As you know we say that we will succeed.

I am not interested in having an argument with you about whose view is right.

I suggest that litigation is not going to be a great outcome for either you or my client. The risks are...

I am here because I believe that we can reach a principled and fair deal that is not only good for my client but also better for you.

I hope that you will work with me to achieve this today’;

2. each issue is approached constructively, focussing on the best possible outcome for both parties;
3. issues are likely to be approached from the point of view of needs, interests and options, rather than fault and blame;
4. both sides work to maintain an open and reasonable atmosphere; and
5. the mediation advocates are likely to emphasise objectivity, and a potential settlement is often judged against agreed criteria to test fairness.

‘In addition to planning potential demands and concessions in relation to individual issues, it is vital to be able to put any personal settlement into an overall context, so that you will be in a position to judge whether a particular overall set of terms should or should not be accepted. This requires comparing whatever overall deal you are able to achieve in a negotiation with the best realistic alternative there would be if no settlement were reached. This involves identifying the best alternative to a negotiated agreement (‘BATNA’). If the

deal you have negotiated is at least as good as your BATNA then it should potentially be accepted. If it is worse then you should probably walk away.’ (**A Practical Approach to Alternative Dispute Resolution**).

For a legal negotiation the alternative to settlement will be going to court, so the BATNA is what the client is realistically likely to get if he were to go to court.

Early neutral Evaluation (‘ENE’)

In relation to judicial ENE, the **Chancery Guide 2016** confirms that in appropriate cases and with the agreement of all parties the court will provide a non-binding, early neutral evaluation (ENE) of a dispute or of particular issues (see **CPR rule 3.1(2)(m)**).

18.7 ENE is a simple concept which involves an independent party, with relevant expertise, expressing an opinion about a dispute or an element of it. It is unlike mediation because a mediator acts primarily as a facilitator. Although the mediator may undertake some ‘reality testing’, there is no requirement to do so. The person undertaking ENE provides an opinion based on the information provided by the parties and may do so without receiving oral submissions if that is what they wish.

18.8 An essential feature of ENE, apart from being consensual, is that unless the parties agree otherwise, the opinion is non-binding and the process is without prejudice (it being treated as part of a negotiation between the parties).

18.9 ENE is offered in the Chancery Division by all judges. The judge providing the ENE may be a full time Chancery judge, a section 9 judge, Chancery Master or Registrar. The ENE may be conducted by a judge of

the same level as would be allocated to hear the trial, but need not be if the parties agree otherwise.

18.10 There is no one case type which is suitable for ENE. In many cases mediation will remain the preferred form of ADR. Although ENE may be unsuitable for multi-faceted complex claims, if a particular issue lies at the heart of the claim an opinion could help unlock the dispute in a way which a mediator cannot. It is particularly suitable where the claim turns on an issue of construction, [or on] an issue of law where there are conflicting authorities.

18.11 The Chancery Division does not have set procedures for ENE. The judge who is to conduct the ENE will give such directions for its preparation and conduct as he considers appropriate. The parties may consider that the judge will be in a position to provide an opinion about the claim or an issue based solely upon written position papers provided by the parties and a bundle of core documents. In many cases, however, it will be preferable for there to be, in addition, a short hearing of up to half a day. The opinion of the judge will be delivered informally.

18.12 Two important points which need to be addressed are as follows:

(a) The norm is that the ENE procedure and the documents, submissions or evidence produced in relation to the ENE are to be without prejudice. However the parties can agree that the whole or part of those items are not without prejudice and can be referred to at any subsequent trial or hearing.

(b) The norm is that the judge's evaluation after the ENE process will not be binding on the parties. However the parties can agree that it will be binding in certain circumstances (e.g. if not disputed within a period) or

temporarily binding subject to a final decision in arbitration, litigation or final agreement.

18.13 Assuming the ENE is without prejudice and not binding, the court will not retain on the court file any of the papers lodged for the ENE or a record of the judge's opinion.

18.14 In any event the judge will have no further involvement with the claim, either for the purpose of the hearing of applications or as the judge at trial, unless both parties agree otherwise.'

A specimen draft order directing ENE is set out in **paragraph 18.15**.

Chancery FDR

Paragraphs 18.16 to 18.18 of the **Chancery Guide 2016** outline 'Chancery FDR' which is, 'a form of ADR in which the judge facilitates negotiations and may provide the parties with an opinion about the claim or elements of it.'

Paragraph 18.17 states that the key elements of Chancery FDR are:

- It is consensual. The court will not direct Ch FDR unless all the parties agree to it.
- There will be a Ch FDR 'hearing', although it is quite unlike any other type of hearing. It is better described as a meeting in which the judge plays the role of both facilitator and evaluator.
- Ch FDR is non-binding and without-prejudice. The court will try to lead the parties to agree terms but cannot make a determination.
- It is essential for the parties, or senior representatives in the case of corporate parties, to be present.

- The court will carefully set up the Ch FDR meeting by giving directions which will help it be a success. This may include directing the parties to exchange and file without prejudice position papers (and direct what is to be addressed) and to lodge a bundle. If there is an issue which can only be resolved with expert evidence a way may be found to obtain that evidence without commissioning CPR compliant reports.
- When the meeting takes place the parties are directed to attend before the meeting starts so they may hold initial discussions. The parties are then called in before the judge. The Ch FDR meeting is a dynamic process which has some similarities with an initial mediation meeting. If the parties request it the judge may express an opinion about the issue or the claim as a whole.
- The court will not retain any papers produced for the meeting or any notes of it.
- The judge who conducts the Ch FDR meeting has no further involvement with the case if an agreement is not reached.

There is no one type of case which is suitable for Ch FDR. The origins of FDR lie in money claims in Family cases. It has been widely used in claims under the **Trusts of Land and Appointment of Trustees Act 1996**, inheritance and partnership claims. It is likely to have most application to claims in which there is strong animosity and/or a breakdown of personal or business relationships and trust disputes. In principle Chancery FDR is now available in any contentious probate claim. It can also be bolted on to the method of '**Guided Settlement**' outlined below.

A specimen draft order directing Chancery FDR is set out in **paragraph 18.18** of the **Chancery Guide 2016**.

An application in the Chancery Division for the carrying out of an early neutral evaluation ('ENE') or for Chancery FDR, can be made by filing an application notice (**Form N244**) with the Claim Form and issue fee.

As the court fee for applying for ENE or Chancery FDR is £155, and current room hire rates in the Rolls Building are:

£100 for a small room (i.e. to accommodate 6 people);

£150 for a medium sized room (i.e. to accommodate 12 people); and

£200 for a large room (i.e. for a plenary session),

ENE and Chancery FDR appear to offer a cost-effective alternative to conventional mediation, and enable ADR to take place involving a judge, either at the Rolls Building, or outside London in a Chancery District Registry.

If ENE or Chancery FDR result in settlement and discontinuance, then subject to notification within the prescribed time period, the hearing fee should be refundable under **The Civil Proceedings Fees (Amendment) Order 2014**, which provides:

'2 General Fees (High Court and County Court)

On the claimant filing a pre-trial check list (listing questionnaire); or where the court fixes the trial date or trial week without the need for a pre-trial check list; or where the claim is on the small claims track, within 14 days of the date of despatch of the notice (or the date when oral notice is given if no written notice is given) of the trial week or the trial date if no trial week is fixed a fee payable for the hearing of:

(a) a case on the multi-track;

£1,090...

Where a case is on the multi-track or fast track and, after a hearing date has been fixed, the court receives notice in writing from the party who paid the hearing fee that the case has been settled or discontinued then the following percentages of the hearing fee will be refunded:

- (i) 100% if the court is notified more than 28 days before the hearing’.

Guided Settlement

Guided Settlement is a method of ADR that occurred to the author in 2015 and has its roots in both ENE and mediation, but is neither because the settlement ‘Guide’ (e.g. a neutral Barrister TEP jointly appointed by the parties in a contentious probate, trust, or Inheritance Act claim) neither:

- (i) determines any issues; nor
- (ii) acts as an evaluative mediator.

The role of the Guide (as a technically proficient specialist practitioner and creative commercial problem solver) is to:

- (i) analyze the legal merits of the claim and inherent litigation risks;
- (ii) design a commercial settlement methodology; and
- (iii) help the parties to communicate, so that they can use the methodology (with crunched figures based upon independent asset valuations) as a framework to explore and construct overall terms of settlement.

Throughout the process the Guide thinks freely (including outside the box) and generates creative solutions, i.e. acts as a neutral creative problem solver who has no partisan loyalties or personal stake in the dispute.

In e.g. a probate dispute, the basic procedural steps are as follows:

- (i) the parties (through their solicitors) obtain and jointly pay for an inventory and valuation of the estate assets, i.e. to determine the size of the estate pie ('Valuations');
- (ii) the solicitors acting for each party take instructions from their respective clients about their own commercial needs preferences and priorities (a 'Commercial analysis');
- (iii) instead of appointing a mediator the parties jointly appoint a Barrister TEP to act as a settlement 'Guide', who:
 - (a) undertakes a fixed fee preliminary evaluation of the legal merits of the claim, litigation risks, and costs, and sets out his conclusions in the form of a grid/schedule, i.e. a legal risk analysis ('LRA'); and
 - (b) develops a commercial / arithmetical (i.e. number crunched) methodology for settling the dispute based upon the:
 - Valuations;
 - Commercial Analysis provided by each party's solicitor; and
 - LRA, (the 'Settlement Framework'), which is circulated by e-mail amongst the parties before they meet to settle the claim.
- (iv) In a fixed-fee meeting (e.g. of up to one day), the parties' solicitors, with or without their clients in attendance, and with full authority to settle or access to instructions over the telephone, meet with the Guide to explore and construct overall terms of settlement. The meetings take place in separate rooms in a neutral venue, e.g. at the Barrister's Chambers.
- (v) Using the Settlement Framework, the Guide works with each party to jointly generate settlement proposals to:

- (a) reduce the issues in dispute (i.e. remove them from the claim equation); and
- (b) create momentum, leading to an overall deal.

Like mediation this may require more than one meeting.

- (vi) Unlike a mediator, the Guide uses his technical knowledge of the legal issues in dispute and problem-solving skills to create inventive settlement proposals for which neither side will lose face if rejected, i.e. because they are the Barrister's ideas, and if agreed, can be claimed and owned as the product of a joint commercial collaboration between the parties.

Where Guided Settlement is entered into following the instruction of experts, the steps would need to be modified to enable the Guide to receive experts' reports before developing a methodology. If experts have not been appointed, the parties could agree upon the appointment of a single joint-expert to assist the Guide.

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