The role of knowledge and approval in retrospective assessments of capacity

The Role of Knowledge and Approval in Retrospective Assessments of Capacity

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I. INTRODUCTION

For a testator to make a valid will in England and Wales, s/he must have testamentary capacity, comply with the formalities set out in s 9 of the Wills Act 1837, and have knowledge and approval of the contents of the will. This requirement was explained in *Gill v Woodall* as follows: 'it covers the propositions both that the testator knows what is in the document and that he approves of it in the sense of accepting it as setting out the testamentary intentions to which he wishes to give effect by execution.'[1] In the majority of cases there is no express consideration of whether the testator knew and approved the contents of their will. However, if the testator is blind or illiterate, the court will require evidence that the testator knew and approved the contents.[2] The use of a standard enhanced execution clause (reciting that the will was read to the testator prior to execution) will provide this, but in the absence of such a clause, express evidence would need to be provided.[3] Aside from specific factors such as these, proof of knowledge and approval will be required when there is 'any other reason [which] raises doubt as to the testator having had knowledge of the contents of the will at the time of its execution'.[4]

The effect of this in practice is that, if a testator had capacity, and the will is duly executed after the testator has read it (or had it read to him/her), then knowledge and approval is presumed.[5] Historically, this presumption has been held to apply unless there are circumstances that 'excite the suspicion of the court';[6] only then is the propounder of the will required to adduce affirmative evidence of knowledge and approval.[7] Although the efficacy of

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[1] *Gill v Woodall* [2010] EWCA Civ 1430, [2011] Ch 380 [71] (Lloyd LJ).
[2] Non-Contentious Probate Rules 1987, r 13.
[3] Williams, Mortimer & Sunnucks, *Executors, Administrators and Probate*, 21st edn (London, Sweet & Maxwell, 2018) 10-33.
[4] Non-Contentious Probate Rules 1987, r 13.
[5] *Sherrington v Sherrington* [2005] [68]; *Gill v Woodall* (n 1) at [14]-[15].
[6] *Barry v Butlin* (1838) 2 Moo PC 480, 482 (Parke B).
[7] *Tyrrell v Painton* [1894] P 151, 157.

this two-stage approach has been doubted in recent years,[8] to the extent that the Law Commission of England and Wales has stated that presumptions of knowledge and approval now appear to have less relevance,[9] there remains a pragmatic recognition that a professionally prepared will, that has been duly executed, will be difficult to challenge.[10]

Identification of 'suspicious circumstances' is therefore pivotal to the role that knowledge and approval plays. Circumstances in which the will-writer is also a beneficiary will generally arouse suspicion,[11] but suspicious circumstances can include other aspects of the will making process.[12] In *Gill v Woodall*, Neuberger MR expressed it as 'really amount[ing] to establishing a prima facie case that [the testator] did not in fact know of and approve the contents of the Will.'[13] Unfortunately, the use of the word 'suspicion' indicates that the majority, if not all, of the cases in which the courts actively consider whether the testator knew and approved of the terms of the will are those in which there may have been fraud or undue influence, even if it was not expressly pleaded. It has been argued that a finding of lack of knowledge and approval can only mean one of three things has occurred. The first is that there was an error in the drafting of the will, the second is that the testator lacked capacity, and the third is that the testator was either unduly influenced or fraudulently deceived into making a will in those terms.[14]

It is currently extremely difficult to prove testamentary undue influence, so the plea of lack of knowledge and approval has been used as a 'cloak' for allegations of fraud or undue influence. This has resulted in suspicious wills being set aside for the wrong reasons.[15] In their 2017 Consultation Paper 'Making a Will', the Law Commission proposed reforming the law of both knowledge and approval and testamentary undue influence,[16] and believes that this reform will define much more clearly the distinction between knowledge and approval

[8] *Gill v Woodall* (n 1) at [22].
[9] Law Commission, *Making a Will* (Law Com No 231, 2017) [7.147]
[10] *Hawes v Burgess* [2013] EWCA Civ 94 [13].
[11] *Barry v Butlin* (1838) 2 Moo PC 480, 482 (Parke B).
[12] B Rich, 'What Does "Want of Knowledge and Approval" Mean in the 21st Century?' (2008) 5 *Private Client Business* 303, 305; M Frost, S Lawson and R Jacoby, *Testamentary Capacity: Law, Practice and Medicine*,1st edn (Oxford, Oxford University Press, 2015) 5.21.
[13] *Gill v Woodall* (n 1) at [21].
[14] R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession*, 13th edn (London, Sweet & Maxwell, 2016) 98.
[15] Law Commission (n 9) at [7.80]; R Kerridge (n 14) at 93-95.
[16] Law Commission (n 9) ch 7.

and undue influence, thus reducing the overlap between the two.[17] The vision is that, once a new statutory doctrine of testamentary undue influence is introduced, knowledge and approval could be reformulated.[18] The Law Commission's proposal is to confine knowledge and approval to operating in a much narrower sense, namely determining that the testator:

(1) knows that he or she is making a will;

(2) knows the terms of the will; and

(3) intends those terms to be incorporated and given effect in the will.[19]

This proposal closely matches the definition used in *Ark v Kaur*,[20] and the Law Commission accepts that this would not entail any consideration as to whether the 'terms of the will have been freely decided by the testator in an exercise of testamentary freedom.'[21] Nevertheless, the Law Commission's aspiration is that such issues would be adequately dealt with by a reformed law of testamentary undue influence, and state that they 'consider that this approach improves the protection available to vulnerable testators because it focuses the court's mind separately on issues of process and substance.'[22]

However, consideration of whether the testator knows the terms of the will, and intended each of them to be incorporated into the will, seems to amount to little more than requiring that there has been no mistake in creating the will. If this is the case, then there is arguably little call for a separate plea of lack of knowledge and approval, because rectification of mistakes has been possible since 1983.[23] A clerical error in the creation of a will should be resolved by bringing a claim for rectification, so the plea of lack of want of knowledge and approval has been largely superseded for cases of mistake in instructions or transcription.[24] What role, therefore, would be left for knowledge and approval?

This chapter argues that there is an additional role that is played by knowledge and approval that transcends the correcting of mistakes but is distinct from either undue influence or lack of capacity. It will argue that there are other factors that can prevent a testator from

[17] ibid [7.148].
[18] ibid [7.144] onwards.
[19] ibid, Consultation Question 40.
[20] *Ark v Kaur* [2010] EWHC 2314 [45] (HHJ David Cooke).
[21] Law Commission (n 9) at [7.145].
[22] ibid.
[23] Administration of Justice Act 1982, s 20.
[24] B Rich (n 12) at 304.

knowing and approving of the terms of the will, but these have been obscured by the reference to 'suspicious circumstances'. Whilst allied to issues of capacity, they form a distinct category, namely where someone has capacity to make a will, but that capacity is dependent on certain conditions being met. For example, someone with a learning disorder would need the provisions of the will to be explained in an appropriate manner to enable their comprehension, or someone with extreme anxiety may need to be in comfortable surroundings. It will be shown that a failure to meet such conditions would not result in a finding that the testator lacked capacity. Furthermore, consideration of the external circumstances at the time of execution, and their potential impact on the testator, is not exclusively an issue of undue influence. This chapter will demonstrate that the knowledge and approval requirement enables a retrospective analysis of the circumstances surrounding the execution of the will, and in so doing, it can provide an invaluable additional safeguard of the autonomy of vulnerable testators.

This chapter will start by examining what knowledge and approval entails and highlight the difficulties with its definition, before moving on to explore the legal treatment of vulnerable testators who have testamentary capacity but have a mental impairment and so need supporting in their exercise of this capacity. Consideration will then be given to the protections provided to vulnerable donors in the inter vivos context, by examining the equitable doctrine of undue influence. A comparison will be made with the proposed reforms to testamentary undue influence, before examining how the plea of want of knowledge and approval can reduce the potential lacuna between capacity and a reformed doctrine of testamentary undue influence.

II. WHAT IS KNOWLEDGE AND APPROVAL?

There is no single definition of knowledge and approval of the terms of a will. Whilst the 'knowledge' element would appear to be relatively clear-cut (aside from epistemological debates), 'approval' is far more ambiguous. The exposition in *Ark v Kaur* (on which the Law Commission has based its proposal) is that approval entails intention that those terms be incorporated into, and given effect by, the will,[25] which appears to limit 'approval' to a functional, knowledge-based agreement. The use of the word 'intention' seems to equate

[25] *Ark v Kaur* (n 20) [45] (HHJ David Cooke).

approval with the requirement for the testator to have *animus testandi*, ie intends that the wishes set out in the document should take effect at his/her death. However, a testator might intend certain terms to be incorporated into the will, yet not understand their dispositive effect.

In addition, a wider definition of approval exists, that incorporates consideration of the testator's understanding.[26] Although there is no need for the testator to understand the legal terminology used,[27] s/he must 'understand what [s/he] was doing and its effect.'[28] Knowledge and approval 'requires decision, not mere assent',[29] and comprehension of the terms of the will must be necessary for such decisions to be made.[30] Of course, it would be extremely difficult to prove, retrospectively, the testator's understanding of even the general purport of the terms of the will; in *Atter v Atkinson,*[31] Lord Penzance suggested that to require proof of understanding would 'upset half the wills in the country.'[32] Consideration of the testator's actual understanding is therefore subsumed into a broad examination of the circumstances of execution, in particular whether the will was read to, or by, the testator. If a testator has capacity, and has either read the will, or had it read to him/her prior to execution, then an inference of comprehension can be made.[33] The oft-quoted statement from *Guardhouse v Blackburn*[34] is that 'the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way'[35] is 'conclusive evidence' that he knew and approved the contents.

For many testators this inference will, no doubt, be correct; where there are no concerns about the testator's capacity, and the will-writer has used language with which the testator is familiar, it is hard to conclude that reading the will would *not* impart both knowledge and comprehension. Therefore in *Sherrington*, the status of the testator as an experienced solicitor and businessman, who had had opportunity to read a will drafted in simple terms prior to

[26] Law Commission (n 9) at [7.6]; *Wharton v Bancroft* [2011] EWHC 3250 (Ch) [28] (Norris J); *Gill v Woodall* (n 1) at [71] (Lloyd LJ).
[27] *Greaves v Stolkin* [2013] EWHC 1140 (Ch).
[28] *Hoff v Atherton* [2004] EWCA Civ 1554 [64].
[29] *Key v Key* [2010] EWHC 408 (Ch), [2010] 1 WLR 2020, [116].
[30] *Hoff v Atherton* (n 28) at [62].
[31] *Atter v Atkinson* (1865-69) LR 1 P&D 665.
[32] ibid 670.
[33] *Hoff v Atherton* (n 28) at [62].
[34] *Guardhouse v Blackburn* (1865-69) LR 1 P&D 109.
[35] ibid 116 (Sir J P Wilde).

signing every page, supported the finding that 'it was nothing short of fanciful to conclude that the deceased did not know or approve of the contents of the Will.'[36] The testator's retention of the will, and consequent ability to re-read it, has also been used to support the inference of both awareness and understanding of the terms of the will.[37]

Yet there are many circumstances that weaken this inference so that further examination of the testator's understanding must occur. For example, in *Kassim v Saeed*[38] the testator was illiterate in all languages and had a very little knowledge of spoken English. It was therefore necessary to consider the extent to which this reading had facilitated his comprehension of the terms of the will. Judge Hodge QC consequently suggested that it would be 'good practice' for a will draftsman who is acting for someone who has apparent difficulties in understanding English to ask the client to paraphrase the will before execution to ensure they have adequate understanding.[39] Similarly, the use of complex legal language may prompt greater consideration of the testator's understanding. In *Franks v Sinclair*, the testator had capacity but was physically frail and suffering from short term memory loss.[40] On the facts, the act of simply reading out the will to her verbatim was held insufficient to establish knowledge and approval, because the residuary clause was written in 'the customary technical language of wills, which most lay people will find impenetrable and many may consider to be gobbledegook.'[41]

In fact, the use of the word 'duly' in the quotation from *Guardhouse v Blackburn* cited above demonstrates that this inference is dependent on the testator being given sufficient opportunity to comprehend the terms of the will. As was stated in *Re Morris,*[42] the testator must 'take in the contents of the clause, not merely read it over … The word "duly" has an element of properness in it which might mean not merely in due time but also in a due or

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[36] *Sherrington v Sherrington* [2005] EWCA Civ 326 [98] (Gibson LJ).
[37] See, eg *Fuller v Strum* [2001] EWCA Civ 1879 [41] (Gibson LJ): 'Moreover, he took away the executed Will and had ample opportunities to read the Will then or when making a copy of the Will or before placing the Will in the deed box or when going back to the room where the deed box was kept on subsequent visits. It is simply incredible that the Testator did not at any time read the contents of the Will, and, if he read them, it is impossible to believe that he did not understand the contents.'
[38] *Kassim v Saeed* [2019] EWHC 2763 (ChD).
[39] ibid [13].
[40] *Franks v Sinclair* [2006] EWHC 3365 (Ch) [10].
[41] ibid [65] (Richards J).
[42] *Re Morris* [1971] P 62, [1970] 2 WLR 986.

proper manner.'[43] Similarly, in *Fulton v Andrew*[44] the Lord Chancellor, Lord Cairns, suggested that a will reading to a 'habitual' drunkard may not have 'taken place in such a way as to convey to the mind of the testator a *due appreciation* of the contents and effect of the residuary clause'.[45] The testator's understanding could therefore only be inferred if he was furnished with an *appropriate* explanation to facilitate his understanding. So despite Lord Penzance's assertions that the fact that a testator with capacity had read the will before signing was 'conclusive' of knowledge and approval,[46] it is now generally accepted that this is just one piece of evidence that should be given the appropriate weight in all of the circumstances.[47]

Proof of knowledge and approval is therefore extremely fact sensitive. Although potential problems with comprehension can arise in a variety of situations, those in which the testator has declining capacity are the most numerous. A testator may have capacity (ie the ability) to make a will but that capacity may be dependent on other conditions being fulfilled. In these borderline cases, the particular circumstances at the time of execution may impede the testator's comprehension of the contents of the will placed before them. As Chadwick LJ stated in *Hoff v Atherton*, when there is evidence of a failing mind:

> If the court is to be satisfied that the testator did know and approve the contents of his will — that is to say, that he did understand what he was doing and its effect — it may require evidence that the *effect of the document was explained.*[48]

Chadwick LJ recognised that the testator's impaired capacity weakens the inference of comprehension, rendering it essential that the testator's actual understanding of the terms of their will is considered. Any retrospective assessment of understanding will rely on inferences, but requiring specific evidence, in such circumstances, that an appropriate explanation was given provides an additional layer of protection for vulnerable testators.

Unfortunately, references in *Hoff v Atherton* to the testator needing to understand not only the effect of the document but also the claims of the various potential beneficiaries,[49] appears

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[43] ibid, 64 (Latey J).
[44] *Fulton v Andrew* (1874-75) LR 7 HL 448.
[45] ibid 463 (emphasis added).
[46] *Atter v Atkinson* (n 31) at 670; *Guardhouse v Blackburn* (n 34) at 116.
[47] *Gill v Woodall* (n 1) at [22].
[48] *Hoff v Atherton* (n 28) at [64] (emphasis added).
[49] ibid.

to conflate issues of knowledge and approval with capacity,[50] even though Chadwick LJ was clear that they are conceptually distinct.[51] The Law Commission's proposal to confine knowledge and approval to the 'narrower understanding of the concept' described in *Ark v Kaur*[52] would clarify the definition, so reducing the potential for this confusion. The aspiration is that this simplification would also reduce the overlap with undue influence,[53] thus providing a more distinct role for knowledge and approval. Whilst clarity and simplicity are to be applauded, it raises the question whether there would be other opportunities for the courts to assess the testator's comprehension? The next section will examine the relationship between testamentary capacity and understanding and consider the duties to persons with disabilities set out in the United Nations Convention on the Rights of Persons with Disabilities. It will demonstrate that although testamentary capacity does not require actual understanding, there are circumstances in which consideration of comprehension is essential in order to provide adequate support and protection for vulnerable testators.

III. THE RELATIONSHIP BETWEEN CAPACITY AND UNDERSTANDING: SUPPORTING VULNERABLE TESTATORS

The test for testamentary capacity, set out in *Banks v Goodfellow*,[54] is well known:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to 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 prevent the exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made.[55]

The use of the phrase 'shall understand' in this passage appears to require not just the ability to understand but actual understanding. This would be at odds with the Mental Capacity Act

[50] Law Commission (n 9) at [7.10].
[51] *Hoff v Atherton* (n 28) at [62].
[52] Law Commission (n 9) at [7.144].
[53] ibid [7.148].
[54] *Banks v Goodfellow* (1870) LR 5 QB 549.
[55] ibid 565 (Cockburn CJ).

2005 (MCA), however, which stipulates only *the ability* to understand.[56] Although the capacity test set out in the MCA was not intended to replace the *Banks* test,[57] in recent years it has been affirmed that the *Banks v Goodfellow* test similarly requires *ability* to understand.[58] This analysis must be correct, especially if the differences between the MCA definition of capacity and that given in *Banks* are to be minimised; to require actual understanding in one particular sphere would go against the ethos of the MCA. The clarification of this point is one of the reasons suggested by the Law Commission for reforming the *Banks v Goodfellow* test,[59] and this has been welcomed because '[t]he very word "capacity" suggests an ability'.[60]

However, for vulnerable testators who have cognitive disorders or borderline capacity for any other reason, their ability to understand may be conditional on various factors. Private client practitioners are all too aware that time of day, location, and the presence (or absence) of certain people can have significant impacts on their client's cognition. For these testators, it is imperative to ensure that the external circumstances at the time of execution of the will were such that that their capacity was effectuated. This principle is clearly encapsulated in the MCA, which states that a person does not lack capacity to make a decision 'unless all practicable steps to help him to do so have been taken without success.'[61] The principle of supported decision-making requires the testator to be informed of the provisions of the will in an appropriate manner, to enable them to come to their own decision and create a will that reflects their wishes. Therefore, whenever a capacity assessment is made contemporaneously with the decision, any steps necessary to enable the person to make that decision should be both identified and implemented.

Furthermore, the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) imposes a duty on member states to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal

[56] Mental Capacity Act 2005, ss 2 and 3.
[57] Mental Capacity Act 2005 Code of Practice, [4.32]-[4.33]; *Walker v Badmin* [2014] All ER (D) 258 [27]-[28].
[58] Law Commission (n 9) at [2.22].
[59] ibid [2.81].
[60] B Sloan, 'Burdens, Presumptions and Confusion in the Law on Want of Knowledge and Approval' (2017) 6 *Conveyancer and Property Lawyer* 440, 446.
[61] Mental Capacity Act 2005, s 1(3).

capacity'[62] and to provide 'appropriate and effective safeguards to prevent abuse'.[63] Subsequently, the Committee on the Rights of Persons with Disabilities issued a general comment[64] that emphasises that Article 12 requires states to 'provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect'.[65] The General Comment further explains that '[t]he primary purpose of these safeguards must be to ensure the respect of the person's rights, will and preferences.'[66]

The duty to provide the necessary support for those with impaired capacity at the time of making a will is clear, but when a challenge to a will is made post-mortem, this must translate into consideration of the state of affairs at the time of execution. Was an appropriate explanation given to the testator, in terms s/he could understand, at a time and in a location that was conducive to their comprehension? If a testator had capacity, but it was dependent on specific conditions being met, then these questions are of fundamental importance to the exercise of the testator's autonomy. Whilst the UNCRPD is not directly enforceable in the United Kingdom, it would be seem to be in contravention of our obligations if a person who needed assistance in order to understand the provisions of their will, but was not given that assistance, were to be told that they had, nonetheless, entered into a valid will. However, by limiting the definition of testamentary capacity to ability, there is insufficient scope within the examination of capacity to engage in this retrospective analysis. It is therefore necessary to consider whether the other grounds on which a will can be challenged are able to accommodate these considerations.

When knowledge and approval has been interpreted more broadly, it has provided the means by which such issues can be considered retrospectively. In *Hoff v Atherton*, Chadwick LJ recognised that evidence of a failing mind required the court to be satisfied that the testator actually comprehended what he was doing:

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[62] United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS Art 12(3). Art 1 defines 'disability' to include long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder a person's full and effective participation in society on an equal basis with others.
[63] ibid Art 12(4).
[64] Committee on the Rights of People with Disabilities (2014) General Comment No 1 on Art 12: Equal recognition before the law CRPD/C/GC/1.
[65] ibid [16].
[66] ibid [20].

> But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents — in the wider sense to which I have referred.[67]

Similar analysis can be seen in *Gill v Woodall.* Mrs Gill suffered from severe agoraphobia and had extreme anxiety in the company of strangers, which would have limited her ability to absorb information in such circumstances.[68] Expert evidence concluded that Mrs Gill had capacity, in principle, on the date of execution of the will,[69] although the circumstances at the time of execution would have impacted on her concentration.[70] Lloyd LJ separated out the two questions of whether Mrs Gill had the necessary ability to understand (and so had testamentary capacity) and whether, 'in particular circumstances, she did *in fact understand* what was said to her at a given meeting and what was in the document'.[71] The assessment of her actual understanding formed part of the examination of her knowledge and approval of the terms of the will; the knowledge and approval requirement therefore provided the requisite opportunity for a retrospective assessment of the circumstances at the time of execution of the will, and was able to fill the lacuna that would otherwise have arisen.

It has been argued that *Gill* should have been pleaded as a lack of capacity case,[72] but if the capacity test is, rightly, limited to the ability to understand it is doubtful whether Mrs Gill could be said to have lacked capacity. Her agoraphobia meant that she would be anxious and unable to concentrate *in certain situations*, but she therefore always had the ability to understand; her understanding was merely conditional on the external circumstances. There were none of the temporal fluctuations that are inherent in an illness such as dementia, that can give rise to lucid intervals. The better analysis is that she had capacity at all times, but

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[67] *Hoff v Atherton* (n 28) [62]-[64]. See also *Brown v Deacy* [2004] EWHC 177 (Ch) [16] in which it was accepted that those with borderline capacity would need 'special help' when the provisions of a will were being explained, and the more complex the will, the greater the need for such explanations.
[68] *Gill v Woodall* (n 1) at [24].
[69] ibid [69].
[70] ibid [41]-[42].
[71] ibid [70] (emphasis added).
[72] R Kerridge, *Parry and Kerridge: The Law of Succession*, 13th edn (London, Sweet & Maxwell, 2016) 98.

needed an appropriate environment – this view would echo the provisions of the MCA and reflect better the ethos of the UN CRPD.

It has been noted that inter vivos capacity assessments are extremely difficult for those who have the ability to understand, but lack understanding.[73] Whilst the testator is alive, appropriate adjustments can be made to facilitate that understanding; best practice for professional will-writers is therefore to record both the giving of advice, and any evidence to support the testator's understanding of it.[74] However, not all testators will have such professional advice and, as noted above, there is no scope within a retrospective assessment of capacity to examine the testator's actual understanding. It is therefore argued that testators with a variety of cognitive disorders and other vulnerabilities can only be properly protected in the exercise of their testamentary capacity if the court is able to consider, retrospectively, not just their capacity to understand, but also their actual understanding. For testators like Mrs Gill, these questions can yield different answers.

The knowledge and approval requirement can provide this necessary additional safeguard and operate hand-in-hand with capacity to provide a complete retrospective assessment. To achieve this, the testator's knowledge and approval of the terms of the will should be open to further investigation and analysis whenever the testator had particular needs in order to activate their capacity. The Non-Contentious Probate Rules already direct this for blind or illiterate testators;[75] this is simply acknowledging that cognitive disorders also require consideration of the state of affairs at the time of execution.

This section has shown that the test for testamentary capacity does not encompass consideration of the testator's actual understanding, yet the ability of the courts to carry out a retrospective assessment of the circumstances in which the will was executed is essential, for some vulnerable testators, in order to verify that their capacity was actuated. When knowledge and approval is used in the wider sense (as espoused by Chadwick LJ in *Hoff v Atherton*) there is scope for an examination of whether the testator was provided with an appropriate explanation of the terms of the will, in a sufficiently conducive environment, to support the inference of understanding. This provides an important additional layer of protection for

[73] M Frost, S Lawson and R Jacoby, *Testamentary Capacity: Law, Practice and Medicine*, 1st edn (Oxford, Oxford University Press, 2015) 2.30.
[74] ibid 2.25.
[75] Non-Contentious Probate Rules 1987, r 13.

vulnerable testators and prevents them falling into a lacuna. It is feared that this would be lost if the narrow interpretation of knowledge and approval laid out in *Ark v Kaur* was adopted.

However, if knowledge and approval has such an important role to play, this begs the question as to why there is no equivalent to the knowledge and approval requirement for voluntary property dispositions inter vivos? If knowledge and approval is necessary to assess actual understanding, and bridges the gap between capacity and undue influence, then why is it limited to the testamentary dispositions? The next section will examine how vulnerable donors are protected inter vivos, with a brief exploration of the doctrine of equitable undue influence. This will then enable consideration of how equivalent protection can be provided in the testamentary sphere, which will demonstrate why knowledge and approval plays such an essential role.

IV. IN THE INTER VIVOS SPHERE

The assessment of capacity for inter vivos gifts set out in *Re Beaney*[76] expressly recognises that, although capacity concerns the ability to understand, there is an inextricable link to the need for an appropriate explanation. The test is therefore 'whether the person concerned is capable of understanding what he does by executing the deed in question *when its general purport has been fully explained to him*'.[77] Subsequent pre-MCA cases also considered the quality of the explanation within the assessment of the donor's capacity. Whenever the donor had borderline capacity, the court required evidence that an appropriate explanation was provided before inferring that the donor had sufficient comprehension, and therefore had capacity. For example, in *Pesticcio v Huet*[78] the donor had a low IQ, having suffered from childhood meningitis and epilepsy. The central issue to establish the donor's capacity was identified as being whether the donor *would* have understood the 'general purport' of the transaction, if it had been 'fully explained' to him or her.[79] In this case, Neuberger J considered both capacity to understand the effect of the gift and the donor's actual

[76] *Re Beaney* [1978] 1 WLR 770.
[77] ibid 773 (Martin Nourse QC) (emphasis added).
[78] *Pesticcio v Huet* [2003] EWHC 2293 (Ch).
[79] ibid [56].

understanding of the consequences of the gift, before concluding that the donor did have capacity to make the gift.[80]

In *Williams v Williams*[81] the donor applied to court to have a transfer of property into joint names set aside. Again, the donor had a low IQ and a particularly poor understanding of quantity. The court applied *Re Beaney,* yet focused on the requirement not just that the donor must have the potential to understand, but 'must understand the general purport of the deed'.[82] Kevin Garrett QC's conclusion made clear that capacity to understand was not, in itself, sufficient in the absence of an appropriate explanation:

> The central issue remains whether John was provided with the kind of explanation which would have enabled him properly to understand the transaction … [O]n the balance of probabilities in my judgment John was not given an adequate explanation and so did not have a proper understanding.[83]

These dicta demonstrate that, prior to the introduction of the MCA, the inter vivos capacity test for gratuitous property transactions considered both potential to understand, and the actualising of that potential, in one holistic assessment. For donors with borderline capacity, the inference of understanding is conditional on there being evidence that an appropriate explanation was provided.

However, under the MCA, capacity is limited to ability; a person only lacks capacity if they are *unable* to make a decision because of an impairment of, or a disturbance in the functioning of, the mind or brain.[84] The MCA primarily applies to decisions made by a person about their care and treatment so does not replace the various common law capacity tests, but it is said to be 'in line' with them, and judges are able to adopt the new definition if they think it is appropriate.[85] Consequently, in the post-MCA case of *Kicks v Leigh,*[86] the *Re Beaney* inter vivos capacity test was described as being:

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[80] ibid [72]-[74].
[81] *Williams v Williams* [2003] EWHC 742 (Ch).
[82] ibid [42].
[83] ibid [48].
[84] Mental Capacity Act 2005, s 2.
[85] Department for Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* (TSO, 2007) [4.33].
[86] *Kicks v Leigh* [2014] EWHC 3926 (Ch).

> one of *ability* to understand, rather than actual understanding. If the maker of the gift does not in fact understand the transaction, in circumstances, where its general purport has not been fully explained, that does not establish lack of capacity. The test is whether he or she would have understood it, if the consequences had been fully explained.[87]

It can therefore be seen that, similar to the testamentary capacity test, post-MCA caselaw has clarified that capacity is merely the ability to understand. The assessment of whether the donor was provided with a full explanation, appropriate to his/her needs, has been carved out. So how do the courts now deal with the situation in which there has been a lack of suitable explanation, that prevents the donor's capacity from being actualised? It was stated in *Kicks v Leigh* that '[t]he fact that [the donor] may have been kept in the dark about the nature and effect of the gift is not sufficient to establish incapacity; such matters might well be relevant to the issue of undue influence, but that is a distinct matter'.[88] This distinction will be effective if, and only if, the vulnerable donor is adequately protected by the doctrine of equitable undue influence. Under this doctrine, a presumption of undue influence arises as soon as there is a relationship of 'trust and confidence in the [donee] in relation to the management of the [donor's] financial affairs,' and there is a transaction that 'calls for explanation'.[89] Classic examples of such relationships of trust and confidence are those of parent to child,[90] and religious adviser to follower.[91] The presumption of undue influence can then be rebutted by proof that the donor had independent advice from a third party advisor, but although such advice 'can be expected to bring home to a complainant a proper understanding of what he or she is about to do', it is not conclusive evidence that there is no undue influence.[92] The court must be satisfied 'that the donor really did understand and intend what he was doing.'[93]

Embedded within the presumption of undue influence is an acceptance that someone who is in a relationship of trust and confidence may not be acting of their own volition and in their

[87] ibid [27] (Stephen Morris QC) (emphasis in original).
[88] ibid [195].
[89] *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 [14] (Lord Nicholls).
[90] *Bainbrigge v Browne* (1881) 18 Ch D 188.
[91] *Allcard v Skinner* (1887) 36 Ch D 145.
[92] *Royal Bank of Scotland v Etridge (No 2)* (n 89) [20].
[93] *Goodchild v Bradbury & Anor* [2006] EWCA Civ 1868 [27] (Chadwick LJ).

own interest, even if they knew what they were doing.[94] The position of the vulnerable donor has been particularly noted in the inter vivos sphere; any inter vivos gift of a substantial sum would call for explanation, and it has been recognised that the presumption of undue influence that results from the relationship of trust and confidence is a matter of public policy.[95] The inference is that the donor may have entered into the transaction to please the other party, or because they accepted without question that the person in whom they placed trust and confidence had their best interests at heart. Public policy therefore 'requires it to be affirmatively established that the donor's trust and confidence in the donee has not been betrayed or abused.'[96] The result of this is that whenever undue influence is one of the possible explanations behind the events, insufficient evidence to rebut the presumption will result in a finding of undue influence being the only remaining conclusion open to the court.[97] A finding of undue influence may arise simply because the court cannot be convinced that the donor acted according to their true intentions, even though it is possible that no unlawful pressure may have been exerted, the conduct of the donee/influencer was without malevolent intent, or even 'unimpeachable'.[98]

The presumption of undue influence under the equitable doctrine becomes, in effect, one of lack of autonomy, so requires more than proof of actual understanding to be displaced. As a result, any gifts by vulnerable donors that are not readily explicable will only be allowed to stand if it can be shown that the donor both understood what s/he was doing *and* freely intended to do it of their own volition.[99] The strength and breadth of the presumption of undue influence results in the court's attention being directed towards whether the donor actually intended the transaction, to ensure that their actions were fully autonomous. To prove that the donor gave their full, free and informed consent to the transaction, it must be shown that the effect of the transaction was explained to the donor, by suitable means, and in appropriate circumstances, to enable the donor's comprehension. Although an explanation by an independent professional will often be adequate, even this may not be sufficient to displace

[94] *Leeder v Stevens* [2005] EWCA Civ 50 [19].
[95] *Goodchild v Bradbury* (n 93) at [27].
[96] *Hammond v Osborn* [2002] EWCA Civ 885 [32] (Sir Martin Nourse).
[97] *Royal Bank of Scotland v Etridge (No 2)* (n 89) at [14]-[16] (Lord Nicholls). See also *Gorjat v Gorjat* [2010] EWHC 1537 (Ch) [146]-[147] (Sarah Asplin QC).
[98] *Hammond v Osborn* (n 96) at [32]; *Jennings v Cairns* [2003] EWCA Civ 1935 [40].
[99] *Hammond v Osborn* (n 96) at [59]-[60].

the presumption if there is insufficient evidence that the donor was acting of his/her own free will.[100]

Thus in the inter vivos sphere, the scope of the equitable doctrine of undue influence ensures that there is no gap between lack of capacity and undue influence, thereby providing the necessary protection for vulnerable donors. Whilst capacity is now, properly, limited to the donor's ability to understand, whenever the presumption of undue influence arises, it triggers a retrospective analysis of the quality and nature of the explanation provided to the donor. Depending on the donor's vulnerability, this can extend to detailed consideration of the donor's comprehension of the transaction. There is therefore no need for an additional, separate test of knowledge and approval. However, if the retrospective analysis of the donor's understanding is sufficiently incorporated within the examination of undue influence inter vivos, should the same not occur in the testamentary sphere? If this could be achieved, then it would be wholly appropriate to repurpose knowledge and approval in the narrow way envisaged by the Law Commission. The next section will consider whether a reformed doctrine of testamentary undue influence could provide equivalent protections to vulnerable testators and will demonstrate that the Law Commission's proposals leave a potential lacuna between capacity and undue influence, that could be filled by a wider definition of knowledge and approval.

V. TESTAMENTARY UNDUE INFLUENCE

The equitable doctrine of undue influence does not apply to challenges to the validity of wills and, under the current doctrine of testamentary undue influence, there are no circumstances in which undue influence is presumed.[101] It is therefore up to the challenger to prove undue influence on the facts of each case, which requires evidence of coercion or fraud, not just persuasion.[102] Unsurprisingly, the lack of any presumptions means that claims of testamentary undue influence often fail for lack of evidence.[103]

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[100] *Pesticcio v Huet* (n 78) at [23].
[101] Law Commission (n 9) at [7.51].
[102] ibid [7.52]; *Re Edwards* [2007] EWHC 1119 (Ch), [2007] WTLR 1387 [47]. The often-quoted phrase from *Hall v Hall* (1865-69) LR 1 P&D 481, 482 is that a testator can be 'led but not driven' (Sir JP Wilde).
[103] Law Commission (n 9) at [7.59].

The Law Commission's project to reform the law of wills incorporates reform of testamentary undue influence, with the aim of protecting vulnerable testators.[104] There is not scope within this chapter for a full analysis of their proposals, especially as the consultation paper sets out two different possibilities for reform – a structured approach and a discretionary approach.[105] Both proposals would introduce a presumption of undue influence in certain circumstances, and there is a compelling argument that this is long overdue.[106] However, these circumstances would not be the same as those in the equitable doctrine: the Law Commission has stated that it is neither 'appropriate nor workable' to adopt the general doctrine of undue influence in the testamentary sphere.[107] One justification for this approach is the fact that making a will is the only time when a person will be trying to identify appropriate recipients for all of their property and will not intend to retain anything. So although there are people who are disadvantaged if a will is made under undue influence (such as the other beneficiaries and potential beneficiaries[108]), fewer transactions are as ostensibly disadvantageous to a testator as significant gratuitous inter vivos dispositions.[109]

Of far more significance, though, is the fact that the relationships which give rise to a presumption of trust and confidence inter vivos do not easily translate into the testamentary sphere.[110] Those presumptions that are a fundamental component of equitable undue influence could result in an unwarranted focus on social and cultural norms, instead of appropriate consideration of individual family and personal circumstances.[111] To simply import equitable undue influence into the testamentary sphere may restrict, instead of enhance, testamentary freedom: Kerridge stated that transposing equitable rules to probate 'would be wrong.'[112] The Law Commission's conclusion, that '[t]he operation of the [inter vivos] presumptions would

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[104] ibid [7.91].
[105] ibid [7.111]-[7.129].
[106] See, eg R Kerridge, 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59 *CLJ* 310, 330-331 citing a 1971 report proposing a rebuttable presumption of undue influence where a will is made in favour of someone providing residential care under contract.
[107] Law Commission (n 9) at [7.97].
[108] P Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *LQR* 617, 627.
[109] *Royal Bank of Scotland v Etridge (No 2)* (n 89) at [12]. Note that the Law Commission identifies the deprivation of testamentary freedom as being a harm in itself: Law Commission (n 9) at [7.99].
[110] Law Commission (n 9) at [7.100].
[111] Ridge (n 108) at 633.
[112] R Kerridge, 'Undue Influence and Testamentary Dispositions: A Response' (2012) 2 *Conveyancer and Property Lawyer* 129, 143.

cast the web of suspicion too widely in circumstances in which it may be difficult for the beneficiary to rebut a presumption once raised'[113] shows that it, too, has decided that this approach is not appropriate. The Law Commission's proposed reform of the doctrine of testamentary undue influence therefore takes a more cautionary approach to the scope of the presumptions. Given the strength of the presumption in the equitable doctrine of undue influence, the Law Commission's desire to retain the distinct nature of testamentary undue influence can be understood.

Yet despite this approach, the Law Commission states that mental impairments that make someone vulnerable are issues of undue influence, not capacity,[114] suggesting that it anticipates that a new doctrine of testamentary undue influence would achieve similar breadth as is currently achieved through the equitable doctrine. Unfortunately, this is hard to believe: it is the wide web of suspicion in the equitable doctrine, supported by the public policy considerations noted above, that enables equitable undue influence to capture all of those transactions where there is insufficient evidence that the donor is acting freely of his/her own volition. If the relationships and situations that give rise to a presumption of undue influence are narrowed or limited in any way, or the strength of that presumption is diluted, it is extremely doubtful that the same result would be achieved. In particular, it seems unlikely, under either of the Law Commission's proposals for reform, that a presumption of undue influence would arise where a vulnerable testator is simply more susceptible to the suggestions of others, and has made a will in particular terms because they trust that a friend or family member is acting in their best interest.

Gill v Woodall is a good example of such a difficult case. Instructions for the will that Mrs Gill executed appear to have been initiated by her husband (who entered into a mirror will at the same time). Mrs Gill reposed trust and confidence in her husband, but their relationship was not one that would lead to a presumed relationship of influence under the Law Commission's proposed structured approach.[115] Proof of this type of relationship would therefore need to be adduced: from the facts of the case, it would seem that this could have

[113] Law Commission (n 9) at [7.105].
[114] ibid [2.51].
[115] Law Commission (n 9) at [7.111]-[7.112].

been demonstrated, as it was noted that Mr Gill made all of the decisions concerning their financial affairs.[116]

Once it has been shown that a relationship of influence exists, a presumption of undue influence would then arise only if the transaction calls for explanation, which is in line with the inter vivos doctrine. The Law Commission is of the opinion that this additional requirement is essential; the Consultation Paper is critical of the statutory presumption of testamentary undue influence that has been introduced in British Columbia (which lacks this element) for 'cast[ing] the scope of undue influence too widely.'[117] However, in the testamentary context the Law Commission has stated that the circumstances that indicate that the transaction calls for explanation should be 'carefully circumscribed'.[118] Their recommendation was that only two factors should be considered to determine whether a transaction calls for explanation, namely:

(1) the conduct of the beneficiary in relation to the making of the will; and

(2) the circumstances in which the will was made.[119]

As the requirement that the transaction calls for explanation is a prerequisite to a presumption of undue influence, it is important to see how these would operate in cases like *Gill.* As the beneficiary in *Gill* (the RSPCA) had no involvement in the making of the will, there would need to be something about the circumstances in which the will was made to raise the presumption of undue influence. Mrs Gill signed her will, which was not unduly complex, in her solicitor's office, having had it read out to her by her solicitor. Note that the vulnerability of the testator, or their susceptibility to influence, is not suggested as a factor to be considered. The general process that Mrs Gill underwent would therefore almost certainly be held adequate; to suggest otherwise would risk undermining the validity of large numbers of wills each year.[120] Furthermore, even if the circumstances prior to the execution of the will were sufficient to make the transaction call for explanation and thus raise a presumption of

[116] *Gill v Woodall* (n 1) at [48] (James H Allen QC).
[117] Law Commission (n 9) at [7.109].
[118] ibid [7.118].
[119] ibid [7.119].
[120] Note the suggestion by Kerridge that execution of a will in such circumstances should lead to a presumption that the testator had capacity and that there had been no undue influence or fraud: Kerridge, 'Wills Made in Suspicious Circumstances' (n 106) at 334.

undue influence, the legal advice obtained at the point of execution would almost certainly be sufficient to rebut it.[121]

So although Neuberger MR stated that Mr Gill's influence could 'fairly be said to explain the motivation for, and origin of, the terms of the Will',[122] it is unlikely that circumstances like those in which Mrs Gill found herself would be sufficient to raise a presumption of undue influence under the Law Commission's structured approach. At best, any presumption would be readily rebutted. The alternative, discretionary, approach might be better suited to the nuances of individual situations; under this approach, the court would be able to presume undue influence:

> where it is satisfied that it is just to do so in all the circumstances of the case, taking into account in particular the extent to which there was a relationship of influence between the deceased and another person and whether the nature of the gift is such as to call for explanation.[123]

However, despite the greater flexibility within this approach, there remains immense potential for the court to err on the side of caution in order to preserve testamentary autonomy, and confine those transactions that call for explanation to the ones where there is a significant suspicion of wrongdoing. The Law Commission's emphasis that care must be taken when examining the circumstances, especially when many could have both an innocent and suspicious interpretation[124] would lend support to this argument. Furthermore, the ethos of testamentary undue influence is to search for wrongdoing, so although references to the 'circumstances of the case' could encapsulate the testator's vulnerability it is more likely that the focus would remain on the acts of the influencer, instead of the circumstances and condition of the testator at the time of execution.[125]

It is therefore argued that it is unlikely that either of the proposed reforms to testamentary undue influence would create a presumption of undue influence in a sufficiently wide variety of circumstances to encompass the relationship between Mr and Mrs Gill (an assessment with

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[121] Law Commission (n 9) at [7.126].
[122] *Gill v Woodall* (n 1) at [35].
[123] Law Commission (n 9) at [7.129].
[124] Law Commission (n 9) at [7.125].
[125] F Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *University of New South Wales Law Journal* 145, 176.

which the Law Commission seems to agree).[126] This conclusion is not surprising, given that the Law Commission states that 'by ensuring that the circumstances in which a presumption of undue influence arises are carefully drawn, it is only in cases in which there is a real suspicion of abuse that the assessment will need to be made.'[127] Furthermore, in the absence of any reform to the costs rules,[128] the various caveats surrounding the raising of a presumption of undue influence would still leave anyone challenging a will potentially liable for all of the costs of litigation, instead of these being met from the testator's estate.[129] The Law Commission's aspiration of upholding testamentary freedom may therefore have unintended consequences of continuing to deter claims of undue influence.

By way of contrast, had the transaction been an inter vivos gift, the trust and confidence that Mrs Gill placed in her husband, coupled with fact that the transaction called for explanation (simply because the beneficiary was a charity with which she had no connection), would have given rise to a presumption of undue influence. In the absence of clear evidence that Mrs Gill intended to enter into that transaction of her own volition, the public policy considerations in this context would probably have resulted in a finding of undue influence, even if the actions of Mr Gill had been beyond reproach. The equitable doctrine of undue influence recognises that a vulnerable donor can intend something because of the trust they place in someone close to them, yet they will not have acted of their own volition; attention is therefore directed towards the evidence of the donor's genuine consent. By considering whether the transaction was 'the product of full, free and independent volition or … the result of the free exercise of [his/her] independent will',[130] personal and environmental factors such as the donor's susceptibility to suggestion can be considered. The result is that only those transactions where there is evidence that the donor understood and freely intended his/her actions will be allowed to stand; it is extremely unlikely that such evidence could have been adduced in Mrs Gill's case.

Many of the inter vivos dispositions discussed above concern transfers of a sizeable proportion of the donor's estate so, although there are differences in context, there is often a similar net effect. This is especially so when the lifetime disposition is of the donor's main

[126] Law Commission (n 9) at [7.146].
[127] ibid [7.127].
[128] ibid [7.130]-[7.136].
[129] ibid [7.132].
[130] *Hammond v Osborn* (n 96) at [60] (Ward LJ).

asset (eg their house) and it effectively thwarts their testamentary wishes by considerably reducing the value of the estate that will pass under their will. Any variations in the treatment of vulnerable testators between the inter vivos and testamentary contexts are difficult to justify and must be minimised. However, if we accept that testamentary undue influence must be different, and that it is inappropriate to import all of the presumptions from equitable undue influence, then we should also acknowledge that testamentary undue influence will not, by itself, provide all of the necessary safeguards for vulnerable testators.

Whilst the Law Commission's reluctance to extend the presumption of testamentary undue influence in a way that might capture innocuous acts by family members is understandable, it is also important to ensure that testators such as Mrs Gill, who are particularly susceptible to the suggestions of others, would have adequate protection. The Law Commission has asserted that situations like these, in which there are no 'suspicious circumstances' (a categorisation that has been described as problematic[131]) would continue to be cases of lack of capacity or knowledge and approval.[132] However, it has already been explained why Mrs Gill did not lack capacity, and the concern is that a narrower knowledge and approval test may be too limited in scope. This is because the Law Commission's proposed new version of knowledge and approval would appear to be more of a test of knowledge and *intention,* and it would seem that Mrs Gill intended to make a will in the terms that her husband proposed. The problem was not a lack of intention, but that the terms of the will were not the terms that she herself would have chosen; there was insufficient evidence that she understood their dispositive effect and approved them as setting out her genuine testamentary intentions. The final section will consider how knowledge and approval can be re-purposed to bridge the gap between a reformed doctrine of testamentary undue influence and lack of capacity, and in doing so offer the required additional protections.

VI. A CLEARER ROLE FOR KNOWLEDGE AND APPROVAL

In contrast to the narrow definition used in *Ark v Kaur*, it has been shown that knowledge and approval has a wider sense that considers the testator's understanding, both of the terms of the will and of their dispositive effect. Instead of marginalising this aspect, it is argued that knowledge and approval can serve a clearer function if it is specified that 'approval' requires

[131] B Sloan, 'Burdens, Presumptions and Confusion' (n 60) at 460.
[132] Law Commission (n 9) at [7.146].

this understanding. Only a testator who understands the terms can reflect on them prior to execution and make their adoption of them known to the witnesses. Following execution, the testator's understanding provides him/her with further opportunities to review, revoke or alter the will as necessary. A testator who merely accepts that the will is written in terms with which they assume they agree, without understanding of the same, cannot undertake such a process.

When faced with the task of a retrospective assessment of a will's validity, it is imperative that the courts have the potential to examine both the testator's capacity to understand and whether that understanding was achieved. If testamentary undue influence is focused on the acts of the influencer, and testamentary capacity is limited to consideration of the testator's cognitive abilities, knowledge and approval becomes the only means by which the testator's comprehension can be considered. Whilst it is acknowledged that an assessment of actual understanding is extremely difficult, analysis of the circumstances at the time of execution can provide sufficient evidence from which to infer (or not), on a balance of probabilities, that the necessary understanding existed. Any perceived difficulties in making such inferences are not sufficiently strong reasons for avoiding this task.

In addition, we must better identify when further enquiries of the testator's comprehension should be made. Although it will usually be possible to infer understanding when the terms of the will have been read to, or by, the testator, this is not necessarily the case. The problems arose in *Gill* because Mrs Gill's agoraphobia meant that a standardised procedure for execution of a will was insufficient, on the facts, to enable Mrs Gill's comprehension. It is argued that it is circumstances such as this, where a testator is vulnerable, or has impaired mental capacity, that should trigger additional examination of the quality and suitability of explanation of the terms of the will with which the testator was provided. If the testator's comprehension is conditional, for example, on being in an appropriate setting, or with appropriate additional support, then in the absence of such support, there will be insufficient grounds from which to infer the testator's understanding, and therefore their knowledge and approval, of the will.

Unfortunately, we are saddled with a historical problem with nomenclature: instead of examining whether the testator's ability to understand has been enabled, the search has been for 'suspicious circumstances'. This phrase brings with it a clear inference of wrongdoing, which has led Kerridge to criticise it for failing to make clear what it is that is being

suspected.[133] Whilst it is agreed that many of the circumstances that have raised a suspicion have been ones in which there is some form of misbehaviour by another during the course of the will-making,[134] this is not necessarily the case. A myriad of well-intentioned acts by those in the testator's close circle of friends and relatives can have as much influence on a vulnerable testator as acts carried out with malign intent.[135] The inherent danger of such a phrase is that it focuses attention on the acts of the other parties, instead of considering the testator and his/her surrounding circumstances at the time of execution. Not only does this increase the overlap with allegations of undue influence (a notion that is strengthened by the Law Commission's assertion that cases involving suspicious circumstances should be dealt with under the proposed reformed doctrine of testamentary undue influence[136]), but it also fails to respond to the relative vulnerability of a testator who is elderly, frail, or has impaired capacity. Sloan's suggestion that the suspicion might simply be that the testator did not know and approve of the contents of the will[137] re-focuses the attention appropriately, and reflects the phraseology used in *Hawes v Burgess.*[138] However, the negative connotations arising from the word 'suspicion' remain.[139]

It is argued that a better solution would be to avoid all reference to suspicion, and instead the search should be for circumstances that are insufficient to support the inference of knowledge and approval (in the wider sense); Neuberger MR's requirement for 'a prima facie case' that the testator did not know and approve the contents of the will[140] better encapsulates the variety of possibilities behind lack of approval of the terms of the will than references to 'suspicious circumstances'. If either this phrase, or 'circumstances that call for further

[133] R Kerridge (n 112) at 139; R Kerridge, '*Hastilow v Stobie* (1865): Lack of Knowledge and Approval' in Brian Sloan (ed) *Landmark Cases in Succession Law* (London, Hart Publishing, 2019) 102.
[134] See, eg *Poole v Everall* [2016] EWHC 2126 (Ch) in which a vulnerable testator executed a will, prepared by his carer, which left 95% of his estate to his carer. The carer had isolated the testator from others, and had not provided an appropriate explanation of the terms of the will.
[135] Whilst it is not clear what precipitated the making of the mirror wills in *Gill v Woodall*, it is undeniable that the substitute residuary legacy to the RSPCA did not benefit Mr Gill financially.
[136] Law Commission (n 9) at [7.146].
[137] Sloan, 'Burdens, Presumptions and Confusion' (n 60) at 451.
[138] *Hawes v Burgess* [2013] EWCA Civ 94 [12].
[139] Kerridge, '*Hastilow v Stobie* (1865)' (n 133) at 102.
[140] *Gill v Woodall* (n 1) at [21].

enquiry' had been the phrase used for the past 180 years, the confusion between undue influence and knowledge and approval may never have become so great.

VII. CONCLUSIONS

This chapter has shown that there must be the potential for the courts to conduct a retrospective analysis not just of the testator's capacity to understand the terms of their will, but also of their actual understanding, in order to provide adequate protection to vulnerable testators. Such an analysis is not possible within the assessment of capacity and it would prove extremely difficult to introduce sufficiently broad presumptions of testamentary undue influence without impinging on testamentary autonomy. Knowledge and approval, in its wider sense of requiring that the testator understands the terms of their will and their effect, therefore forms a crucial, and potentially over-looked, role in a triumvirate of protections for vulnerable testators. Whilst the introduction of a narrower concept of knowledge and approval may have its attractions, it would create a lacuna between undue influence and capacity. By clarifying the broader scope and purpose of the knowledge and approval requirement, this gap between capacity and undue influence is bridged more effectively.

Furthermore, clearer exposition of the factors that prevent the presumption of knowledge and approval from arising would differentiate it better from both undue influence and lack of capacity. Instead of searching for 'suspicious circumstances', further enquiries should be raised whenever the testator is vulnerable and has impaired mental capacity or other disorders that affect their ability to comprehend the terms of the will. More specifically, this chapter has argued that a presumption of knowledge and approval should not arise if a testator has the capacity to understand the transaction, but that capacity was dependant on receiving an appropriate explanation, either in terms that the testator could comprehend, or in an environment that was most conducive to their understanding. Whenever such factors exist, it is important for evidence to be adduced that demonstrates that the testator's potential to understand was activated. Without consideration of such evidence we cannot be satisfied that any will truly sets out their autonomous testamentary intentions.