

ESTATE LITIGATION—2011 UPDATE
PAPER 7.1

Delusions and Impact on Capacity

These materials were prepared by Stanley T. Rule of Sabey Rule LLP, Kelowna, BC, for the Continuing Legal Education Society of British Columbia, November 2011.

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DELUSIONS AND IMPACT ON CAPACITY

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I. Introduction

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 in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not been made.

Per Cockburn C.J. in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (Eng. Q.B.) at 565

Banks v. Goodfellow, and the above quoted passage in particular, is frequently cited as the authoritative test for testamentary capacity. Westlaw shows 261 Canadian cases that have cited *Banks v. Goodfellow*. The case is cited for all manner of disputes over testamentary capacity, but the judgment was really about one aspect of capacity: delusions.

This paper is also about delusions and incapacity. We will start with a closer look at the *Banks v. Goodfellow* decision (which is well worth a careful read), in which Chief Justice Cockburn deduced the principles that are so often applied in cases about testamentary capacity in general, and delusions in particular. Next, this article will set out some of the definitions of delusions, and how the courts have dealt with allegations that the will-maker was delusional in various contexts. We will look at how the courts have distinguished delusions from other dysfunctions, and the difference between mere mistakes of fact and those mistakes that are found to be delusional. Then, we will return to the question of whether the will-maker is influenced by delusions. To what extent have the courts looked at the rationality of the will provisions themselves? Are there other explanations for what the will-maker has done?

II. **Banks v. Goodfellow: The Relationship between Testamentary Autonomy and Delusions**

In *Banks v. Goodfellow*, Chief Justice Cockburn's judgment focused on the question of whether a man could have legal capacity to make a will if he suffered from delusions that were unrelated to his will. John Banks made a will in which he left his estate to a niece, who died intestate after Mr. Banks's death. Her heir would, therefore, receive his estate. Mr. Banks had for some time both before and after he made his will, believed that he was pursued and molested by devils and evil spirits. He also believed that a man named Featherstone Alexander pursued and molested him, and he held this belief even after Mr. Alexander died. There was a medical opinion that he was insane and incapable of managing his affairs, but there was also evidence that he did manage his own funds and financial interests.

Did John Banks's disorder of the mind vitiate his capacity to make the will he made?

Chief Justice Cockburn, considered and rejected the doctrine that "the mind, though it has various faculties, is one and indivisible; if it is disordered in any one of these faculties, if it labours under any delusion arising from such disorder, though its other faculties may remain undisturbed, it cannot be said to be sound; such a mind is unsound, and testamentary incapacity is the necessary consequence."

In arriving at a more nuanced approach to the question of when delusions vitiate capacity to make a will, Chief Justice Cockburn considered the question in the context of testamentary autonomy. The rationale for testamentary freedom is that "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."

But as a condition to the exercise of the power to make testamentary dispositions, the maker must possess sufficient intellectual faculties to enable the will-maker to secure such a better disposition of property. It is in that context, that Chief Justice Cockburn set out the above-quoted test for testamentary capacity.

Chief Justice Cockburn reasoned that if the delusions did not have an impact on Mr. Banks' decisions about his will, he should not be deprived of his testamentary autonomy.

But where a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have no effect on the testator's will, we can see no sufficient reason why the testator should have lost his right to make a will, or why a will made under such circumstances should not be upheld.

The Court upheld the jury's finding that Mr. Banks's will was valid. The delusions could not have had any influence on Mr. Banks's decisions in disposing of his property.

III. **What are Delusions?**

A useful point to begin are the reasons for judgment written by Mr. Justice Cullity of the Ontario Court of Justice (General Division) in *Banton v. Banton*, 1998 CarswellOnt 3423, 164 D.L.R. (4th) 176. The case concerned the will of George Banton, who until a couple years before his death had a loving, trusting relationship with his five children. He had made a will in 1991, in which he left the residue of his estate to be divided equally among his children. In 1990, he was diagnosed with prostate cancer, and then had several operations, after which his mental functioning deteriorated. In 1994, while in a retirement home he met a waitress, somewhat younger than he (she was 31, and he, 88), Muna Yassin, whom he married on December 17, 1994. He left his new wife his estate by will dated December 21, 1994, and then he made an identical will on May 4, 1995. When he made the 1994 will, in reply to his solicitor's question about why he was not leaving anything to his children, Mr. Banton said that they were not interested in him, were only interested in his money, and only paid attention to him after he

became involved with Muna Yassin. He made similar statements to others, and later in a guardianship proceeding he made unspecified allegations of abuse against his sons.

In finding that Mr. Banton's allegations about his children were delusions, Mr. Justice Cullity set out some of the definitions from earlier authorities.

32 I have already held that virtually all of these allegations of George Banton about his children's motives and behaviour were unfounded. The additional statement to Muna about his poor relationship with his children prior to the marriage was quite extraordinary but, given his other allegations and despite my findings with respect to Muna's credibility which I will refer to later in these reasons, I cannot exclude the possibility that it was made. The question is whether his allegations about his children should be characterized as "insane delusions" in the sense in which that term has been used traditionally in this area of the law. The reported decisions contain many attempts at definition of which the following have often been cited with approval:

A delusion is insanity where one persistently believes supposed facts (which have no real existence except in his perverted imagination) against all evidence and probability and conducts himself however logically upon the assumption of their existence. (Am. & Eng. Cycl., Vol. 9, at 195, cited by Sedgewick J. in *Skinner v. Farquharson* (1902), 32 S.C.R. 58 at 26)

... insane delusions are of two kinds; the belief in things impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sound mind would give them credit; to which we may add, the carrying to an insane extent impressions not in their nature irrational. (*Prinsep & East India Co. v. Dyce Sombre* (1856), 10 Moo. P.C. 232 (England P.C.) at 247)

33 As the second of these passages indicates, "insane" delusions are not limited to beliefs that are so bizarre that their content, by itself, evidences mental disorder. The precise connotations of the language employed in 19th Century cases—many of them involving instructions to juries—may not be entirely consistent with modern linguistic usage. Such delusions include beliefs whose extreme improbability is apparent only when the surrounding facts are known. These are obviously the more difficult cases. Delusions with respect to the behaviour and attitudes of the deceased's relatives are relatively common in the reported cases and they often fall into this category. Dr. Silberfeld acknowledged that George Banton's allegations about his children could be delusions. In all cases where delusions of this kind are alleged to exist there will be a question whether the belief should be characterized merely as quite unreasonable, on the one hand, or as something that, in the particular circumstances, no one "in their senses" could believe: Macdonell, Sheard and Hull, *Probate Practice* (4th ed., by Rodney Hull Q.C. and Ian Hull, 1996) at 33-34. Cases on either side of the line include *Royal Trust Co. v. Ford* (1971), 20 D.L.R. (3d) 348 (S.C.C.), where the will was upheld, and *Harward v. Baker* (1840), 3 Moo. P.C. 282 (England P.C.) and *Zabudny, Re*, [1958] O.W.N. 68 (Ont. H.C.) in which wills were set aside. The correct approach to the question is, I believe, accurately stated in *Atkinson on Wills* (2nd ed. 1953):

The nature of the belief is not necessarily the turning point, or even the apparent lack of a basis for such belief. Rather the question is whether, considering all the facts and circumstances, it is fairly shown that the will proceeded from and on account of a deranged mind. (at 246)

Mr. Justice Cullity also found that Muna Banton exercised undue influence over her husband. And her husband he was, for George Banton did have the capacity to marry and Mr. Justice Cullity held that the marriage was valid.

A. Delusions about Behaviour and Attitudes

As in *Banton*, in many of the cases in which the courts have found that the will-maker did not have capacity, the will-maker held false beliefs about the behaviour or attitudes of family members whose moral claims the will-maker ought to have considered.

The Supreme Court of Canada in *Ouderkirk v. Ouderkirk*, 1936 CarswellOnt 103, [1936] S.C.R. 619, [1936] 2 D.L.R. 417, upheld the trial judge's decision that the will, in which the will-maker left his wife \$5 per year, was invalid. The trial judge found that the will-maker "was labouring under delusions. These delusions were to the effect that his wife was an immoral character, and that she was entertaining men for immoral purposes." Kerwin J. concluded "that the delusions were present on October 18th, 1932, the date of the making of the will, and that they did affect the testator's mind so that he could not rationally take into consideration the interest of his wife."

There are three BC cases within the last decade that also concerned delusions the will-maker had about the behaviour or attitudes of family members.

Fuller Estate v. Fuller, 2004 CarswellBC 812, 2004 BCCA 218, illustrates that delusions may not be readily apparent to the lawyer who takes instructions and drafts a will, or to the will-maker's family physician. On April 7, 1997, Stanley Fuller signed a will in which he left each of his children \$1,000 and the residue to his church. In his previous will, he had left 20% to his church and 80% to his children. In 1995, he had sold property for \$ 2.5 million, from which he gave each of his children \$200,000, and the church \$270,000. When he gave his lawyer will instructions, he did not appear to be delusional, and his family doctor after administering tests to determine Mr. Fuller's capacity, opined to his lawyer that he had capacity. But near the time he made his will, Mr. Fuller made unfounded accusations that his children and his son-in-law were out to rob him. About a year-and-a-half after he made his will, a geriatric specialist diagnosed Mr. Fuller with Alzheimer's. The specialist gave evidence at trial, which the trial judge accepted, that Mr. Fuller was delusional, and given the progression of the disease, more likely than not was suffering from Alzheimer's when he made his will. The specialist also gave evidence that Mr. Fuller had good social skills that masked his mental condition. The specialist's evidence dovetailed with the evidence of the accusations Mr. Fuller was making about his children. The Court of Appeal upheld the trial judge's decision that Mr. Fuller was delusional and that these delusions affected his will. The will was invalid.

In *Brydon v. Malamas*, 2008 CarswellBC 1293, 2008 BCSC 749, Mr. Justice Halfyard found that the will-maker, Stella Sirgianidis, was influenced by a delusion concerning her grandniece Pam Brydon when she made her will dated October 19, 2004, and when in that same month she transferred three bank accounts and her residence into a joint tenancy with other family members, and named them as beneficiaries of her Registered Retirement Savings Plans. The Court held that the will, the transfers and the beneficiary designation were invalid.

Ms. Sirgianidis had been very close to Ms. Brydon. In addition to her own residence, Ms. Sirgianidis had owned a house on Vine Street, in Vancouver, together with one of her sisters, Ms. Brydon's grandmother, Margaret Baxevanidis. Ms. Sirgianidis and Ms. Baxevanidis gave the house to Ms. Brydon in 1995. Ms. Sirgianidis also made a will in 1995, in which she left her residence and half of the residue of her estate to Ms. Brydon.

Stella Sirgianidis was diagnosed with schizophrenia in the 1970s, but was treated with anti-psychotic medication, and functioned well, living independently and working as a nurse.

In March 2004, Ms. Sirgianidis began having hallucinations and was suffering from depression. She had stopped taking anti-psychotic medication. Ms. Sirgianidis's health deteriorated, and her sister Mary Malamas moved in with her to care for her.

In October 2004, Ms. Sirgianidis was diagnosed with leukemia. She denied she had leukemia, and refused treatment. She said she was hearing voices, and that spirits inhabited her body.

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In that same month, she transferred three bank accounts into joint accounts with her sister Mary Malamas, and Mary's son Jimmy Malamas. She also designated them as the beneficiaries of her Registered Retirement Savings Plans. She also transferred her house into a joint tenancy with Mary Malamas. She made a new will leaving most of the estate to her sister, Mary Malamas, and excluding Ms. Brydon a few days later.

There was evidence that Ms. Sirgianidis was upset that Ms. Brydon was planning to sell the Vine Street house she and her sister had given Ms. Brydon. Ms. Sirgianidis told some witnesses that Ms. Brydon had agreed when she received the house that she would never sell the Vine Street house to someone outside of the family.

Ms. Brydon was in fact planning to sell the Vine Street house, but denied that she ever promised never to sell it. Mr. Justice Halfyard found that no promise had been made.

Mary Malamas and Jimmy Malamas argued that even if Ms. Sirgianidis was in error in believing that Ms. Brydon had promised never to sell the Vine Street house, this was not in the nature of an insane delusion.

Mr. Justice Halfyard, in finding that Ms. Sirgianidis's belief that her grandniece had promised not to sell the house was an insane delusion, considered her belief in the context of her acknowledged mental difficulties and other delusions. He wrote at paras. 220-22:

220 In my opinion, Stella's false belief as to the plaintiff breaking a promise not to sell the Vine Street house, meets the definition of "a delusion which is calculated to influence" her dispositions of money and property. There would appear to be an obvious potential for a connection in Stella's mind between the delusion and her dispositions excluding the plaintiff, which the defendants must negative.

221 I conclude that Stella's false belief amounts to an insane (psychotic) delusion within the definition of that term established in the authorities. In this regard, I would also note that Dr. MacEwan testified to the effect that, if Stella held the false belief which I have described, then that could constitute a psychotic delusion.

222 The final question is whether the defendants have proved on the balance of probabilities that Stella was not influenced by this (or any other) delusion when she gave instructions for her will on October 13, and executed her will on October 19, 2004. I consider the context of her other psychotic delusions from October 8 onward, and her worsening leukemia, to be important. These delusions included the false beliefs that a man was stalking her, that spirits were inhabiting her body and that she did not have leukemia. As to Stella's denial of having leukemia, it is apparent that her beliefs in this regard vacillated back and forth. In the circumstances of this case, and having regard to the degree of proof required by the suspicious circumstances, it would be difficult for the defendants to show that even Stella's other historical delusions did not influence the dispositions of her property that she made. Arguably, those delusions alone could create doubt as to whether she was mentally capable of objectively assessing and appreciating the moral claims of the plaintiff. Stella's false and irrational belief that the plaintiff had promised not to sell the Vine Street property, was superimposed on these pre-existing delusions and her terminal disease.

In *Canada Trust Co. v. Ringrose*, 2009 CarswellBC 3436, 2009 BCSC 1723, Mr. Justice Savage held that Elsie Jones's delusions about one of her son's vitiated her capacity to transfer her home to herself and her daughter Maureen Ringrose. Ms. Jones had vascular dementia, and was declared incapable of managing her affairs two years after the transfer. Before the transfer, Elsie Jones had made several calls to the police, saying her house had been broken into. She also accused one of her sons of stealing from her, and taking large amounts of money from her investments, and of having cheated her late husband in business and property transactions. The court found that there was no basis for Elsie Jones's allegations, and that she was influenced by these delusions when she transferred the home into a joint tenancy, and when she made a will disinheriting her sons.

In setting aside the transfer, Mr. Justice Savage applied the *Banks v. Goodfellow* criteria for testamentary capacity to the *inter vivos* transfer. He wrote at para. 99:

In my opinion, in a case such as this, it makes no sense to say that an *inter vivos* transfer is valid if the donor “understands” the nature and the effect of the transaction but is under an unfounded or insane delusion that influenced or precipitated the transfer. In other words, in a case where there are unfounded or insane delusions, it is not sufficient for a court to find merely that the donor understands the nature and the effect of the transaction in some abstract sense.

B. Delusions and Irrationality

Delusions are irrational, but not all irrationality is delusional.

The will-maker may act irrationally in relation to events that have occurred, be bigoted, suffer from a personality disorder, or treat his family unjustly, but still be found to have capacity to make a will.

The courts have distinguished an unjustified opinion or reaction to a fact from a delusion. In *Crabbe v. S.*, 1925 CarswellBC 55, [1925] 2 W.W.R. 701 (CA), the will-maker, J.C.S., blamed his estranged wife for the death of their daughter, whom the wife had taken on a trip to Europe, where their daughter died. He disinherited his wife, who had started proceedings for a judicial separation. Mr. S. was an alcoholic, and at times suffered from delusions caused by delirium as a result of his alcoholism. He ultimately died of suicide. But when sober, he was able to carry on his business without any indications of insanity. In his concurring judgment that the will was valid, Mr. Justice Macdonald wrote at para. 9:

9 Dr. Manchester [who was a witness at trial] properly describes a delusion as a false belief. Applying that definition to the alleged delusion that the wife of the deceased was responsible for the death of their daughter, who died in France while there with her mother, what do we find? The wife testified: “I know my husband had some feeling in the back of his mind possibly if he had been there it would not have happened.” If they did not have a daughter, or having one, she did not die in France while there with her mother, the delusion, or false belief, would be complete. But the incident did occur. She says he “didn’t object” to the trip abroad. That conveys the suggestion that he was not particularly anxious that they should go. One can understand a delusion where a man conjures up an incident or state of facts which has no basis in fact, and exists only in his own disordered mind. But where coloured views or unjustified opinions in reference to proven incidents are entertained, doubly so when these views are expressed only when under the influence of alcohol, they cannot be regarded as conclusive evidence of an insane delusion. Further, it is common knowledge that a man suffering from delirium tremens may have delusions of the most grotesque character which pass away with the cause.

In *Brammall v. Brammall Estate* (1990), 40 E.T.R. 169 (B.C.S.C.), Harcourt Brammall suffered from both depression and a narcissistic personality disorder. His psychiatrist’s evidence was that he had an exaggerated opinion of his own worth that affected his personal relationships, and that his judgment was impaired. In his will and a codicil, he left his estate to his youngest son, disinheriting his two eldest sons. He had become estranged from his eldest son, Robin Brammall, because he believed Robin Brammall was the cause of his long-term live-in companion leaving him, and that his eldest son had assisted her in the subsequent litigation. Mr. Justice Paris found that Harcourt’s beliefs about Robin Brammall’s role were wrong, and due in part to his impaired judgment. But Mr. Justice Paris found that the impairment and “misconception” were “a far cry from the type of insane, groundless delusion discussed in *Banks v. Goodfellow* that would deprive him of testamentary capacity for legal purposes.”

In *Dynna v. Grant*, 1980 CarswellSask 70, 6 E.T.R. 175, the Saskatchewan Court of Appeal upheld Sarah Ann Grant’s will, in which she left two of her sons \$1,500 each, and nothing to one of her sons. The residual beneficiaries were two charities. There was evidence that she disliked the wife of the son

she disinherited because she was Norwegian. In holding that Ms. Grant had testamentary capacity, Chief Justice Culliton wrote at para. 13:

Her aversion to her sons was not based upon any delusion and her dislike for her daughter-in-law because she was a Norwegian was not founded on a delusion. The mere dislike of people of a particular ethnic group per se does not constitute an insane delusion. The deceased's dislike was not founded on the belief in a state of facts which no rational person would believe. It was simply an eccentricity of character and not a delusion.

In *Royal Trust Corp of Canada v. Saunders*, 2006 CarswellOnt 3478 (Superior Ct. of Justice), Madam Justice Blishen found that the will-maker, Tait Saunders, was not suffering from delusions that vitiated his capacity when he made a will on July 19, 2000 leaving \$20,000 to each of his children, and to a niece. He left the residue, which was valued at the time the will was drafted at approximately \$550,000, to the Ottawa Hospital Foundation. In his previous will, and codicil, he had left his estate to his two children. When he made the new will, he was in his 90s, and “was a cranky, garrulous, crotchety, somewhat eccentric old man who was suffering from mild cognitive impairment and a slight deterioration in mental acuity.” When he gave his will instructions to a solicitor and estate consultant at Royal Trust, he made some statements about his children that were incorrect, including that his daughter had gone bankrupt the previous year, and that his son's common law spouse was a problem. Although the significant change in his will was a suspicious circumstance, the will-maker had expressed frustration with his children over the preceding 20 years. In finding that Mr. Tait Saunders had capacity, Madam Justice Blishen found that while the statements he made were unreasonable, unfair and irrational, he was not delusional:

[99] The statements made by Mr. Saunders Sr. to Mr. Power on July 4, 2000, regarding his children, although inaccurate were made in the context of similar concerns expressed to Dr. Power and Carolyn Forgues in the 1980s, by a man who had been concerned about and frustrated by, his children for over 20 years. They were statements made by an intensely private, fiercely independent old man who had become increasingly crotchety and somewhat mean spirited, especially when his independence was threatened by the recommendations of a geriatric assessment supported by his family.

[100] Although unreasonable, unfair and somewhat irrational, I do not find the statements made by Mr. Saunders Sr. regarding his children to be “insane delusions.” He did not believe his children were wiring his chair to give him electric shocks as in *Re Barter, supra* [[1939] 2 D.L.R. 201, 13 M.P.R. 359 (S.C.C.)] nor that they were alcoholics who never cared for him as in *re Macleod's Estate, supra* [(1989), 94 N.S.R. (2d) 148 (Prob.Ct); affd 95 N.S.R. (2d) 61 (C.A.)]. He was angry with his children who had caused him stress and anxiety for many years. He made a conscious decision to significantly reduce their inheritance to \$20,000 each. In addition, he chose to add his niece, Barbara Stinson who he found capable and helpful, as a beneficiary. He left the residue of his estate to the Ottawa Hospital Foundation, having made donations to the Ottawa General Hospital since 1989. Although unkind, unfair and mean spirited, these were not the decisions of a man without testamentary capacity, suffering from insane delusions about his children.

C. Delusions and Mistakes About Facts

Delusions that vitiate capacity may be about facts, but not all mistakes about facts are delusions. Delusions imply some type of mental illness undermining the ability to comprehend the true facts, as opposed to simply having the facts wrong.

In a Manitoba case, *Pare v. Cusson*, 1921 CarswellMan22, [1921] 2 W.W.R. 31, the Court of Appeal held that the will-maker's claim that he had advanced \$25,000 to her daughter Anna Cusson may have been an exaggeration of the benefits he gave her, but was not a delusion. In his last will, Joseph Azarie

Senecal reduced the share of his estate he left to his three children from his earlier will in favour of charities. For several years before his death at the age of 76, he was ill, and there was medical evidence that he was addicted to morphine. But, otherwise, there was no evidence of mental incapacity, and the gifts to charities were consistent with his beliefs, his history and affiliations. With respect to his claim that he had advanced \$25,000 to one of his daughters and her family, there was some evidence of advances. Cameron J. A. wrote:

In any event the \$25,000 was at most an exaggerated estimate. It is unreasonable to speak of it as an insane delusion, and such a mistake of that kind does not invalidate a will: *Box v. Barrett*, L.R. 3 Eq. 244 at 249, 15 W.R. 217. It is to be noted also that the amount is used in the will merely as a basis on which to adjust the respective bequests to Mrs. Cusson and his son Georges.

Fisher J. applied *Pare* in *Young v. Toronto General Trusts Corp*, 1939 CarswellBC 60, [1939] 3 W.W.R. 117, in upholding an *inter vivos* trusts settled by Esther Ann Young, who died intestate. Her brother as administrator of her estate challenged the validity of the trust, the main beneficiary of which was her brother's son. There was evidence that Esther Young thought that she had given some shares of a company to her brother, when she had not. The Court found that the trust contained rational provisions for her relatives, taking into account that Esther Young and her brother were not on good terms, and one-eighth of the trust funds went to his wife on Esther Young's death. With respect to the settlor's belief that she had previously given her brother shares, Fisher J. wrote at para. 6:

6. It is clearly established by the evidence of David B. Wodlinger that the deceased had carefully considered the claims of the plaintiff and rejected them. If she made a mistake in thinking that she had transferred to him certain shares in the Lever Brothers Soap Company that might indicate some lapse of memory but would not be sufficient ground for setting the deed aside.

The Court then cited *Pare* for the proposition that such a mistake was not an insane delusion.

In *Trust Co. v. Ford*, 1971 CarswellBC 284, [1971] S.C.R. 831, the Supreme Court of Canada held that the will-maker's doubts that his son was really his son were not delusions. Allan Douglas Ford and his wife had separated when their son was five. The will-maker's wife and son moved to Australia, and Allan Ford did not see his son in person again, although there was some correspondence by letter. Mr. Ford's wife had admitted to having an affair during the marriage. In his last will, made in 1958, Mr. Ford left his son \$50,000 which was a reduction from the amount the son would have received under previous wills. In the few years prior to the will, the will-maker had expressed doubts about his son's legitimacy. The trial court found that before 1965, there was no evidence of mental weakness, and that Mr. Ford had excellent memory and made astute business decisions after he made the will. The Supreme Court of Canada held that the evidence showed indifference to his son, or at most doubts about his legitimacy, but was insufficient to establish a delusion.

D. Rational Basis for Belief

If there is a rational basis for the will-maker's belief, it is not an insane delusion. In *re Estate of Watts*, 1933 CarswellNB 9, the New Brunswick Supreme Court, Appellate Division upheld a will in which the will-maker left to her husband the sum of \$1 "as memento of the manner in which my husband treated me during our married life." Her husband argued that she was under an insane delusion that he had been unfaithful to her. There was evidence that she did indeed believe that her husband was unfaithful. But the Court had some trouble with the argument that this was a delusion, notably the evidence of the family physician that he had treated the husband for gonorrhoea, and then treated the will-maker for the same disease. The husband also argued that the amount of the gift was itself an indication of incapacity. In rejecting that argument, Gimmer J. for the Court wrote at para. 12:

12 It has been held that mere estrangement, distrust, unfounded jealousy and unjust resentment of fancied wrongs will not necessarily constitute delusions. They must be shown to be due to some erroneous belief for which there is no foundation in

evidence. Mere peculiarities of mind and eccentricities of conduct in the testator are not in themselves sufficient to render him incompetent.

E. Medical Diagnosis

Although in most of the cases in which the court has found that a will-maker's capacity was vitiated by delusions, there are medical diagnoses of mental illnesses, it is not always necessary to prove a diagnosed mental illness.

In *Timlick v. Crawford*, 1965 CarswellBC 86, 53 W.W.R.87 (S.C.), Rutton J. held that the executor named in William James Timlick's will dated August 30, 1963, had failed to prove the will-maker's capacity. The Court also held that one of the owners of the nursing home where the will-maker lived, Pearl Halliwell, and the executor, Kenneth Timlick (who was apparently no relation to William Timlick, and who was introduced to him by Mrs. Halliwell) had unduly influenced him. One of the key factors in the decision was the Court's finding that the will-maker had delusions concerning his sister-in-law, Miss Crawford who had been the beneficiary of his previous will. In the August 30, 1963 will there was no gift to Miss Crawford, the beneficiaries being Kenneth Timlick's children, Mrs. Halliwell's nursing home, and two charities. Miss Crawford had lived with the will-maker and his wife for over 20 years, and had assisted them. After he went into a nursing home, Mrs. Halliwell and Kenneth Timlick discouraged and tried to prevent Miss Crawford from visiting. The will-maker's family physician had last seen him a few months before the will, and gave evidence that he was getting senile. But a psychiatrist who examined him a couple of weeks before he signed the will concluded that there was slight memory loss, and suspicion and distrust of younger people commensurate with his age, but no gross dementia. Rutton J. found that Mrs. Halliwell and Kenneth Timlick, isolated William Timlick and had poisoned his mind to the point where he became obsessed with delusions that Miss Crawford was trying to put him in an insane asylum, was robbing him and that the only person he could trust was Kenneth Timlick.

IV. Did Delusions Influence the Will-Maker?

Canadian courts have followed the principle articulated in *Banks v. Goodfellow* that delusions do not vitiate a will if they were unlikely to have affected the provisions the will-maker made. In some cases, like *Banks*, the delusions did not appear to have any connection to those the will-maker ought to consider when making a will. In others, the courts found that even if there was some evidence of delusions related to the will-maker's family, there were rational explanations for the provisions that the will-maker made, and the will-maker was not in fact influenced by the alleged delusions.

A. Officious Wills

One of the factors that the courts have considered is whether the will-maker made rational provisions for the will-maker's family, or, to use the language of an earlier time, was the will an officious one? If so, the court may find that the delusions did not exert an influence on the will.

In *Skinner v. Farquharson*, 1902 CarswellNS 54, 32 S.C.R. 58, the majority of the Supreme Court of Canada inferred from the provisions of the will that if the will-maker had delusions about his wife and son, those delusions did not affect provisions he made for them.

In January 1897, three years after a stroke, John Farquharson began behaving abusively towards his wife and son. His wife called his doctor. Mr. Farquharson told his doctor that his wife and son had "too intimate relations." He said he knew this because he had heard noises outside of his son's room. He made these allegations of incest to others. He made his son, who was 19, leave the home. A few months later, Mr. Farquharson would spend time in an insane asylum, where he repeated the story, and complained about noises that no one else heard.

In February 1897, before he went into the asylum, he instructed his solicitor to draft a new will. In his will, he appointed his wife as executor and guardian of his children (he had a daughter as well as a son). He left his brother and sister, and children of a deceased brother a total of \$15,000, the effect of which was to decrease the amount he left his immediate family from his previous will. He told his solicitor that he wanted to do more for his siblings and his deceased's brother's family. He said his son did not take life seriously enough, and that he was concerned that too much money would not be good for him. He said when he remonstrated with his son, his wife would take his son's side. He did not mention the allegation of incest to his solicitor when instructing him or executing the will. He did make this allegation to his solicitor a couple of days after the will was signed.

A majority of the Court, Sedgewick J. dissenting, held that the will was valid. The majority inferred from the terms of the will itself, as well as the rational instructions the will-maker gave to his solicitor that the will was not a product of delusion. Mr. Justice Davies wrote at para. 50:

While I agree that the evidence, taken by itself alone, apart altogether from the will, might justify the presumption that at the time it was made the insane delusion had dominated his mind, I am of opinion that the will itself, with its manifestly fair dispositions recognising fully the claims upon him of both his wife and son and vesting in her the powers and responsibilities of an executor and guardian over this very son, is a complete rebuttal of such presumption. It was not only a rational will, that would not be enough, but going below the surface and considering the circumstances and conditions under which it was made, the amount and nature of the property he had to dispose of, the interest of those who by personal relationship had claims upon him, I cannot find anything in it to show me that any disorder of his mind had poisoned his affections, perverted his sense of right, or prevented the exercise of his natural faculties, much less that any insane delusion had brought about a disposal of his property which he otherwise would not have made.

As noted above, in upholding the will in *Young v. Toronto General Trusts Corp.*, the Supreme Court of BC found the will to be an officious one.

The court may uphold a will if the provisions appear rational, but unusual dispositions do not in themselves vitiate a will, if the court is satisfied that the will-maker's delusions did not influence his or her will.

In *Brammall v. United Kingdom of Great Britain & Northern Ireland*, 1997 CarswellBC 1489, the will-maker, Harold Frost, after leaving a life-estate to his common-law spouse, left the remainder of his estate to the UK. His explanation to his lawyer and executor, Mr. Brammall, for the gift to the UK was that the UK had a terrible time in the last war, and could benefit from the gift. He was adamant that he did not want anything to go to his brother, Leonard Taylor Frost. His brother challenged the will. The evidence was that Harold Frost was depressed, paranoid and had delusional beliefs. He believed that he and his common law wife were being poisoned. Mr. Justice Skipp found that Harold Frost and Leonard Frost had little or no relationship. Although the will was an inofficious one, Mr. Justice Skip found that Harold Frost's delusions had not affected his dispositions in his will. The will was valid.

B. Rational Explanations

When allegations are made that the will-maker was influenced by delusions in making her will, the courts have considered whether there are rational explanations for any changes the will-maker made. The courts have considered whether the will makes sense in the context of other circumstances. The court is less likely to find that the will-maker was delusional, or that the delusions were the cause of any changes, if there are rational explanations for the will.

In *O'Neil v. Royal Trust Co.*, 1946 CarswellBC 127, [1946] S.C.R. 622, [1946] 4 D.L.R. 545, the Supreme Court of Canada considered the will of Elizabeth Amelia Brown, who had experienced

hallucinations that she could taste poison in her food and could smell gas being forced into her room. These were not connected to her last will, but there was other evidence of statements she made near the time she made her will, which it was argued were delusions that did affect her will. Her husband had predeceased her, and in his will had given her a monthly income and the power to appoint his remainder beneficiaries. He had requested that she leave a life estate for his sister Miss Brown, and the remainder to his grand-nieces Ellen and Eva McClure. She had at first honoured her husband's request. But in 1927, after Miss Brown's death, she changed her will to appoint the remainder of her husband's estate to her own niece and nephew. Two years later, she changed her will to leave the remainder of her husband's estate to his nieces. There was evidence of a conversation she had near the time she made the disputed 1929 will:

She said she got very depressed at times; had a pain in the top of her head; that the day seemed to be the night sometimes, and the night the day; felt sometimes she was going out of her mind; that voices spoke to her at night, as if from the grave; and she was at times in great torment. She felt she would never see Mr. Brown or Miss Brown; that she had done wrong; that she hadn't been fair to them; that there was no hope for her in the next world; that if she could only be sure the McClure's would get the whole estate, she might feel better.

The Supreme Court of Canada held that the 1929 will was valid. It was not brought about by delusions. In four reasons for judgments, the Court found that Mrs. Brown was influenced by her conscience rather than by any delusions. Mr. Justice Hudson wrote at para. 35, "What she heard would appear after all to have been the 'voice of conscience' under the circumstances."

In *Chalmers v. Uzelac*, 2004 CarswellBC 2284, 2004 BCCA 533, Sonnett Chalmers argued that her aunt, Jeannie Marie Morgan, was affected by delusions when she made a new will disinheriting Ms. Chalmers in favour of Ms. Chalmer's son, Roy Uzelac. Ms. Morgan did not have children of her own, and had a close relationship with her niece and grand-nephew. In 1984, she had made a will in which Mr. Uzelac was the main remainder beneficiary (subject to a life estate in favour of Ms. Chalmer's husband). In 1992, after her husband's death, Ms. Morgan moved in with her niece. She changed her will to leave the residue of her estate equally between her niece and grand-nephew. When she made her 1992 will, she had concerns about Mr. Uzelac's new wife and the stability of their marriage. In 1993, after having moved out of her niece's residence, Ms. Morgan changed her will again, leaving the residue to Mr. Uzelac.

The alleged delusions concerned a gun. Ms. Morgan had given the gun to Ms. Chalmers's husband. After it was registered in the husband's name, she asked for it back. She said that her deceased mother had come to her in a dream and told her to take the gun back. After checking with the RCMP, Ms. Chalmers and her husband advised Ms. Morgan that they could not register it in her name, and it would not be legal for them to return. As a result, there was an estrangement between Ms. Morgan and her niece.

Ms. Chalmers argued that the new will was influenced by Ms. Morgan's delusions concerning the gun. Both the trial judge and the Court of Appeal rejected this argument, finding that Ms. Morgan had testamentary capacity.

The Court of Appeal considered the evidence of the delusion in the context of other evidence that Ms. Morgan functioned well, and that there was a rational explanation for her to change the will to leave her estate to her nephew. Madam Justice Southin in her concurring judgment wrote:

45 Thus, a delusion affecting the subject matter of a will and operating at the time of its making may be a foundation for a determination that the deceased lacked testamentary capacity even if the deceased is perfectly competent to conduct all other business.

46 Here, the events which are said to have constituted a morbid delusion of the sort which would determine a testatrix was incapable of making the will which she did make took place in August 1993, a mere two months before the making of the will in

issue. She took umbrage against the appellant for not doing what the *Criminal Code* forbade, namely, transferring the gun to someone not lawfully entitled to possess it.

47 If that was the only explanation for the change in the will, it might be right to allow this appeal.

48 But there is, in both the 1984 will and in the instructions for the 1992 will, a rational explanation for the will in issue. The appellant was not a beneficiary under the 1984 will; the respondent was. The appellant was a beneficiary of the 1992 will because the testatrix was chary of the respondent's new wife. By the fall of 1993, however, she no longer was.

49 A testatrix cannot be found not of testamentary capacity simply because she chooses to leave her estate in a manner that may be thought unkind.

C. Subsequent Conduct

The courts may consider evidence that the will-maker continued to benefit a person in respect of whom the will-maker had made comments that were the basis of the allegations that the will-maker was influenced by delusions.

In *Kournosoff Estate v. Chapman*, 2000 CarswellBC 1624, 2000 BCSC 1195, Oxfam-Canada argued that the will-maker, Mikhail Kournosoff, did not have capacity when he made a will on November 10, 1994 and a codicil dated March 28, 1995. Mr. Kournosoff had no immediate family, and had made several wills and codicils in which he named Oxfam-Canada and CUSO as the residual beneficiaries. In the disputed will and codicil he did not include Oxfam-Canada, and CUSO was the beneficiary of most of his \$6 million estate. There was evidence of memory problems, cognitive decline, and caregivers having taken advantage of Mr. Kournosoff. One of Oxfam-Canada's fundraisers testified that Mr. Kournosoff spoke to him about an article in *Time Magazine* from June of 1993, about prostitution, in which there was a reference to Russian prostitutes in Israel. The fundraiser testified that his sense was that Mr. Kournosoff thought not only that Oxfam-Canada should do something about Russian prostitution in Israel, but that Oxfam-Canada was responsible for it. Mr. Kournosoff brought up this topic several times with fundraisers from both Oxfam-Canada and CUSO. Mr. Justice Ralph considered Mr. Kournosoff's fixation with Russian prostitutes in Israel to be a suspicious circumstance, but concluded that Mr. Kournosoff was not delusional. Significantly, Mr. Kournosoff had made a \$10,000 donation to Oxfam-Canada, after he had first raised this topic. Mr. Kournosoff had also complained that Oxfam-Canada's administrative costs were high and that the charity was not promoting the sale of books he had written enough. Irrespective of whether Mr. Kournosoff's complaints were accurate, Mr. Justice Ralph inferred his decision to exclude Oxfam-Canada as a beneficiary was not brought about by delusions.

D. Unrelated Delusions as Indicia of Incapacity

Even if delusions are not directed at those who have a moral claim, delusions may still be relevant as suspicious circumstances when assessing whether the person propounding the will has met the burden of satisfying the court that the will had capacity. In *Peters Estate v. Ewert*, 2002 CarswellBC 2686, 2002 BCSC 1540, Mr. Justice Hunter, while acknowledging that the will-maker's delusions that she was mistreated by staff in her care facility did not vitiate her testamentary capacity, considered the delusions together with other evidence of mental decline after a stroke as suspicious circumstances that she did not have testamentary capacity. Mr. Justice Hunter was not satisfied that the named executor of the disputed will had met his burden of satisfying the court that the will was valid in light of the suspicious circumstances relating to capacity.

V. Conclusion

The exercise of testamentary autonomy presupposes a certain level of mental functioning, but it is not mental functioning in the abstract. The question is whether the incapacity perverts the will-maker's decision in making his or her will. Unconnected delusions do not vitiate capacity. This is the main point in *Banks v. Goodfellow*. A will-maker who is influenced by insane delusions about those whose claims the will-maker ought to consider is unable to exercise testamentary autonomy in a meaningful way. This is so, even though the will-maker may function well in other tasks including business.

Delusions may be defined as follows:

A delusion is insanity where one persistently believes supposed facts (which have no real existence except in his perverted imagination) against all evidence and probability and conducts himself however logically upon the assumption of their existence ...

... insane delusions are of two kinds; the belief in things impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sound mind would give them credit; to which we may add, the carrying to an insane extent impressions not in their nature irrational.

(from *Banton*, citations omitted)

When considering whether the will-maker's capacity was vitiated by delusions, it will be helpful to consider the allegations in the context of multiple factors, including:

1. Are the alleged delusions about the behaviour or attitudes of those whose claims the will maker ought to consider? Most of the cases in which the courts have found that the will-maker did not have capacity fall into this category.
2. Was the will-maker delusional, or was the will-maker simply irrational, without delusions?
3. Is there medical evidence that the will-maker is suffering from a mental illness? In most of the cases in which the courts have found that the will-maker did not have capacity, there has been evidence of underlying mental illness. The test may be a legal one, but medical evidence will often inform its application. Medical evidence may be especially important for the court to distinguish a delusion from a mere mistake about the facts.
4. Are the delusions about persons who may have a moral claim? If not, the will-maker may still have capacity to make the will.
5. Is the will an officious one? Did the will-maker provide for his near relatives in a rational manner? If so, it is less likely that the court will find that the will-maker was influenced by any delusions.
6. Are there rational explanations for the provisions in the will? If the will-maker had rational reasons, the court may find either that the alleged delusions were not delusions, or if they were delusions, that the delusions did not influence the will-maker's decisions.
7. How did the will-maker conduct himself or herself towards the person in respect of whom the will-maker was allegedly delusional? Did the will-maker continue to benefit that person subsequent to exhibiting the alleged delusions? If so, this supports the view that the will-maker was not influenced by delusions.

The principles articulated by Chief Justice Cockburn in *Banks v. Goodfellow* are as relevant today as they were 140 years ago. This is not to say that a court today might not decide a case differently now than a century ago. The evidence available to a court should reflect advances in medicine and psychiatry, at least in those cases where the will-maker was examined by a physician near the time the will was made.