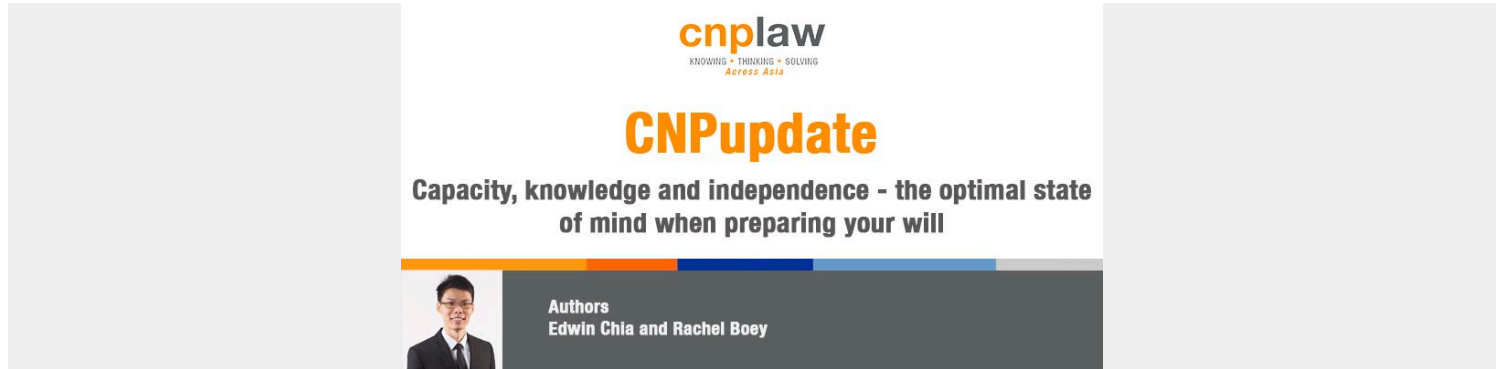


CAPACITY, KNOWLEDGE AND INDEPENDENCE - THE OPTIMAL STATE OF MIND WHEN PREPARING YOUR WILL

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A banner graphic for CNPUpdate. At the top center is the 'cnplaw' logo in orange and black, with the tagline 'KNOWING • THINKING • SOLVING Across Asia' in smaller text below it. Below the logo is the word 'CNPupdate' in a large, bold, orange font. Underneath that is the title 'Capacity, knowledge and independence - the optimal state of mind when preparing your will' in a black, sans-serif font. At the bottom left of the banner is a small portrait of a man in a suit and glasses. To the right of the portrait, the text 'Authors Edwin Chia and Rachel Boey' is displayed in a white, sans-serif font on a dark grey background. The banner is flanked by two light grey rectangular areas.

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Capacity, knowledge and independence - the optimal state of mind when preparing your will

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Authors: Edwin

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The 'mental elements' of a valid Will

Generally, three elements must be satisfied before the testator can be said to possess the requisite testamentary capacity when making a Will. In this regard, the testator must

- have the mental capacity to make a Will;
- have knowledge and approval of the contents of the Will; and
- be free from undue influence or the effects of fraud.

This article will highlight the practical issues one should consider when making a Will, by extrapolating the best practices found in several seminal decisions, to prevent any challenges to your Will after your demise.

How do you prove mental capacity?

Testamentary capacity will generally be presumed when the testator is not suffering from any kind of mental disability. Challenges to a testator's mental capacity usually arise in situations where the testator is / was suffering from mental illnesses.

In the recent High Court decision of *UWF*, the testator had a long history of bipolar disorder which varied in severity and fluctuated over time for some 20 years between her diagnosis and the execution of her will. Similarly, in the case of *Muriel Chee*, the testator was suffering from an early onset of dementia and loss of memory at the time of the execution of her will. The key question in both cases was whether, despite the existence of a medical condition, the testator nonetheless had the mental capacity to execute a Will.

In other words, even if the testator had a medical condition that impairs the mind, this does not mean that

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the testator will always not have the requisite mental capacity to execute the Will. Instead, it is necessary to go one step further and examine if the medical condition has the effect of preventing the testator from making a decision. For example, where the testator suffers from dementia, the condition might not have affected his mental faculties to the extent that he lacked testamentary capacity at an early stage of his illness. He could have had moments of lucidity during which he would have possessed testamentary capacity to execute a Will. Similarly, a testator's condition of bipolar disorder could be in remission at the time of making and executing the Will.

To ascertain the answer, the Courts in both cases had to conduct detailed analyses of the conflicting medical evidence presented by the opponent and propounder of the Will. To avoid such complications, it is especially crucial for a person who is / was suffering from a mental condition to first obtain a medical report from a doctor certifying his mental capacity to make a Will, before executing one. The report should ideally specify that the person:

- Understands the nature of the act and what its consequences are; and
- Is free from an abnormal state of mind (e.g. delusions) that might distort feelings or judgments relevant to making the Will.

What is an 'independent mind'?

The purpose of a Will is to ensure that the testator's intentions with regard to the matters which he wishes to take effect upon his death are well documented and carried out accordingly. The Will must thus be made of the testator's own volition and accurately reflect his desires – not anyone else's. A testator who has executed a Will under the dominant "undue influence" of another party (such that he is coerced into making a Will (or part thereof) which he does not want to make) is said to not have had an independent mind. A Will executed under such circumstances may be invalidated.

As a matter of practicality, a testator can militate against a possible challenge to his independence, by adopting the following measures:

- Conveying his instructions to the drafter of his Will alone, without the proposed beneficiaries in the room; and
- Explaining his rationale behind each of the specific bequests made by him in his Will clearly, systematically and methodically to the drafter of the Will.

What constitutes 'knowledge and approval'?

Assuming that the above elements of "mental capacity" and "independence" are met, the mental element of "knowledge and approval" will also generally be satisfied. The reading of a Will to a testator not suffering any mental infirmity would be sufficient evidence of his understanding or knowledge of the contents.

On the part of the testator, he should ensure that before making a Will, he knows:

- The extent of his property of which he is disposing; and
- Who his beneficiaries are and can appreciate their claims to his property.

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In this regard, while it is not a requirement that a Will has to be drafted by a solicitor to be valid, the testator should ideally seek a solicitor's advice in understanding the nuances of the terms and contents of his proposed Will.

Conclusion

The Court in *Muriel Chee* declared the Will to be invalid as the propounder of the Will failed to show that the testatrix had mental capacity, or that the testatrix understood what was read to her. It bears emphasising the importance of ensuring that all three 'mental elements' are satisfied: it is only where a testator possesses testamentary capacity that he has the freedom to do as he wishes with his estate. If any of the elements above are not met, the testator runs the risk of his Will being invalidated.

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