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## Probate Attorneys' Understanding of the Inclusion of the Lucid Interval in Testamentary Capacity Proceedings

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*Walden University*

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# Walden University

College of Social and Behavioral Sciences

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Jeremy Cassius

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2020

Abstract

Probate Attorneys' Understanding of the Inclusion of the Lucid Interval in Testamentary

Capacity Proceedings

By

Jeremy Cassius

MEd, Kent State University, 2004

BA, University of Missouri, 1996

Dissertation Submitted in Partial Fulfillment

of the Requirements for the Degree of

Doctor of Philosophy

Forensic Psychology

Walden University

January 2020

## Abstract

This study focused on the experience of probate attorneys with the lucid interval in contested will cases. There is a gap in the research for understanding the lucid interval for people who live with dementia. Dementia can affect the testamentary capacity (TC) of a testator who is signing a will because the testator may not understand all the property that is in their possession. This causes difficulties and conflict for families when a loved one dies. It can also cause the testator to be susceptible to undue influence. The present study analyzed data from interviews with 6 probate attorneys about their experience with the lucid interval and its significance in contested will cases. These attorneys were selected based on their experience with contested will cases. Through interpretative phenomenological analysis, the study found that the lucid interval can be used as part of an overall argument, but it is usually not the entire argument for an attorney who is advocating either for or against the TC of a testator. There were 4 themes identified from the study: Probate attorneys must have a basic understanding of dementia for contested will cases; lucid intervals do not affect the validity of a will; dementia affects a testator's ability to sign a will; and forensic psychological reports are useful in contested will cases. The disease of dementia is one the main reasons for contested will cases. The present study is important because it addresses issues pertaining to contested wills that can cause family discord. The study addresses these issues and ways that new knowledge can help prevent family problems.

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## Dedication

This dissertation study is dedicated to my father, the late Dr. Joseph Cassius. He was a psychologist for 40 years before his untimely death in 1997. He taught me through his strength and his ability to help others. I miss my father every day, and I hope that my study will add to his significant contributions in the field of psychology. I am looking forward to attaining a doctorate, just as my father did, and speaking his professional language. While it would have been a pleasure to share this paper and this moment with him, I know that he is always with me and will always be a major part of my life and accomplishments.

## Table of Contents

List of Tables .....	v
Chapter 1: Introduction to the Study.....	1
Introduction.....	1
Background.....	2
Problem Statement.....	3
Purpose.....	4
Research Questions.....	5
Conceptual Framework.....	5
Nature of the Study.....	6
Definitions.....	6
Assumptions.....	8
Scope and Delimitations .....	8
Limitations .....	9
Significance.....	9
Summary .....	10
Chapter 2: Literature Review.....	11
Introduction.....	11
Literature Search Strategy.....	12
Theoretical Framework.....	12
Review of Research Literature.....	14
History of Dementia.....	14

Subtypes of Dementia .....	16
Probate .....	22
Testamentary Capacity.....	24
Lucid Interval.....	27
Testamentary Capacity and the Lucid Interval .....	30
Summary .....	33
Chapter 3: Methodology .....	34
Introduction.....	34
Research Design and Rationale .....	35
Role of the Researcher .....	36
Methodology .....	38
Participant Selection .....	38
Instrumentation .....	40
Questions for Participants.....	40
Procedures for Recruitment, Participation, and Data Collection.....	41
Data Analysis Plan.....	42
Issues of Trustworthiness.....	42
Credibility .....	43
Transferability.....	44
Dependability .....	44
Confirmability.....	45
Ethical Procedures .....	45



Summary .....	47
Chapter 4: Results .....	49
Introduction .....	49
Study Setting .....	49
Demographics .....	50
Biographical Sketches.....	50
Biographical Summary .....	52
Data Collection .....	52
Data Analysis .....	53
Coding.....	54
Themes .....	54
Theme 1 .....	54
Theme 2 .....	56
Theme 3 .....	57
Theme 4 .....	58
Evidence of Trustworthiness.....	59
Credibility .....	59
Transferability.....	59
Dependability.....	60
Summary.....	60
Chapter 5: Discussion, Conclusions, and Recommendations .....	61
Introduction.....	61

Interpretation and Findings .....	62
Theme 1 .....	62
Theme 2 .....	64
Theme 3 .....	64
Theme 4 .....	65
Therapeutic Jurisprudence Theory.....	66
Limitations to the Study.....	67
Recommendations.....	68
Implications.....	69
Summary.....	70
References.....	71
Appendix A: Interview Questions .....	86

List of Tables

Table 1. Demographics .....55

## Chapter 1: Introduction to the Study

### Introduction

The validity of a will and who benefits from an inheritance have been issues that society has been dealing with for centuries. Probate courts are designed to handle these situations and to accurately determine who the testator wanted to benefit from their estate. However, when a testator has dementia, this becomes a more complex issue that usually involves a legal battle because dementia has affected the testamentary capacity (TC) of the testator. This battle is based on the case of *Banks v. Goodfellow* (1870), which determined that testators must have a “sound mind” when they sign a will. The argument most widely used by probate attorneys to prove that a person with dementia had the TC to sign a will is the lucid interval argument (Van Dyk et al, 2016).

Bequeathing an estate has been a controversial topic for generations, and often, there are questions about who justifiably inherits the assets. Freedom of testation—the absolute right to dispose one’s property as one wishes after death—is important for people to exercise their right to bequeath their property (Noffsinger, 2008). These rights are often contested in probate courts through contested will disputes. A will can be contested if it is suspected that the testator did not have the capacity to sign the will and/or the testator was subject to undue influence when making the will (Noffsinger, 2008). The responsibility of proving TC is on the person who propounds the will (Shulman et al., 2015). The most widely accepted case decision on TC was *Banks v. Goodfellow* (1870) in which the judge determined that a testator must be able to understand what it means to make a will and the effects it has, understand the property

that the testator is disposing, comprehend how the process works, and have a “sound mind” with no mental issues (delusions, illnesses) obstructing the process. The *Banks v. Goodfellow* (1870) decision has endured over time and has set the standard for decisions in contested will cases.

In the present study I explored how probate attorneys who work in contested will matters determine and understand the way a testator is affected by dementia and how it impacts the testator’s capacity to sign a will. I explored the probate attorneys’ experiences with the lucid interval argument in TC cases with dementia. Further, I examined the challenges that dementia pose to TC.

### **Background**

Dementia is the most common medical issue associated with TC (Shulman, Cohen, & Hull, 2005). While a delirious, dying patient can have TC, there have been no empirical investigations on this topic and few discussions related to deathbed wills in scientific literature (Peisah et al, 2014). Nevertheless, it is important for attorneys to understand the relationship between dementia and TC to properly represent their clients and argue the determinations on TC. Though the testator must have a sound mind at the time of executing a will, fluctuating periods of mental soundness may exist (Liptzin, Peisah, Shulman, & Finkel, 2010). These types of cognitive fluctuations are legally known as the lucid interval. The lucid interval is a legal concept that is best understood by the medical construct of cognitive fluctuations or spontaneous alterations in cognition, attention, and arousal (Liptzin et. al, 2010).

For the purpose of TC, the lucid interval has been defined as the idea that an individual who suffers from mental illness or a neurological condition may have periods in which their ability to reason and make thoughtful choices is preserved (Mart, 2016). The lucid interval is an important concept for determining a decision in contested will cases. In lucid intervals, a testator can lack mental capacity at one moment and retain it at another. The burden of proving TC rests on the testator's side, and it is sufficient to demonstrate that testators understands that they are making a testamentary disposition in the absence of delusions or delirium, which would affect their "sound mind" (Shulman et al., 2015). Because the testator can make an argument that a lucid interval was present while the will was signed though the testator suffers from dementia, it is important to fully understand lucid intervals. This includes the validity of the lucid interval as it applies to TC, the way the lucid interval is evaluated, and the way attorneys understand it.

### **Problem Statement**

Families often have conflicts over inheritance money; thus, drafting a will can help to avoid conflict and preserve boundaries (de Witt, Campbell, Ploeg, Kemp, & Rosenthal, 2013). Lack of communication regarding inheritance money can create serious family conflicts and destroy relationships (de Witt et al, 2013). This lack of communication and understanding may lead to a contested will situation, which involves understanding the initial wishes of a testator.

The lucid interval is important for determining TC and resolving family disputes. However, there is a lack of agreement, empirical evidence, and understanding about the lucid interval, which makes it difficult to integrate the opinions of mental health

professionals, attorneys, and medical professionals on the TC of a testator. Recently, questions have been raised about the validity of the cognitive fluctuations and the lucid interval because it may extend to understanding TC with only certain types of dementia (Shulman et al., 2015). Also, the time period of the fluctuations may not be long enough to give the testator the lucidity needed for the capacity to sign a will, which is especially the case in deathbed wills (Peisah et al., 2014).

### **Purpose**

The purpose of this qualitative study was to understand the attorneys' perspectives about the importance of the legal concept of "lucid interval" for determining TC in contested will cases. In order to gain a better understanding of the attorneys' understanding of the lucid interval concept, I employed an interpretive psychological analysis of data from interviews with attorneys on their experiences of dealing with lucid intervals in TC proceedings. Further research is needed into the ways in which attorneys understand the extent to which cognitive fluctuations can inform lucid intervals for the purpose of TC so that attorneys can develop their arguments and courts can make accurate determinations of a valid will. Without conducting research and understanding the lucid interval, attorneys may be at risk of influencing courts in the wrong way with inaccurate assessments and interpretations of the lucid interval's effect on TC. I explored this concept by conducting interviews with probate attorneys who had worked with testators in contested will cases. Gaining an understanding of the viewpoint of the attorney on the importance of cognitive fluctuations and the way they inform the lucid

interval could benefit forensic psychologists as they structure a methodology for conducting their assessment on testators, living or postmortem.

### **Research Questions**

The following research questions were addressed in this study, and they were based on the lived experiences of probate attorneys and their understanding of lucid intervals and dementia in TC in contested will matters:

RQ1: How do attorneys understand the lucid interval and the cognitive fluctuations in a testator's capacity to sign a will?

RQ1a: How is this experience useful for them in contested will cases?

RQ2: What is the attorney's experience in using forensic reports in contested will cases?

### **Conceptual Framework**

The theory of therapeutic jurisprudence (TJ) was founded in the 1990s as a new intersection of mental health and the law (Wexler, Perlin, Vols, Spencer, & Stobbs, 2016). TJ puts forth that the law has unintended consequences caused by judges, attorneys, mental health professionals, and others, which can be "therapeutic" or "antitherapeutic" (Wexler, 2018). TJ is a way to enable the medical profession to work with the legal profession for ethical decision-making that can impact the legal process. It is a method to sensitize lawmakers and create awareness to understand therapeutic rules and factor them into legal decision making (Marson, Huthwaite, & Herbert, 2004).

For this study, I used TJ to analyze the attorneys' understanding of lucid interval and the legal processes around it. I used TJ theory as a basis to understand how medical



professionals, mental health professionals, legal professionals, and judges understand the lucid interval as it applies to TC in legal proceedings and forensic psychological reports.

### **Nature of the Study**

The study was a qualitative study that used an interpretative phenomenological analysis (IPA; Pietkiewicz & Smith, 2012; Smith, 2009). This type of qualitative analysis is an exploration of the lived experiences of the participants (Smith, 2017). For this study, I interviewed probate attorneys on their experiences with and exposure to TC legal proceedings and the outcomes that they experienced in those cases. The study was based on their experience as probate attorneys, their interpretations of the lucid interval, and the ways in which it affected TC as determined in forensic psychological reports.

I developed my semistructured interview questions based on my literature review and case analysis. The questions were relevant to understanding the experiences of probate attorneys in contested will cases. The questions were semistructured and allowed flexibility for responses, which I analyzed with the NVivo qualitative data analysis software. In order to conduct a successful analysis with NVivo, I separated the categories and themes of this study into nodes and analyzed (Leech, & Onwuegbuzie, 2011). I made categorizations based on the data from the literature review and the attorney interviews. This analysis may assist the legal and psychological communities in understanding the ways in which attorneys perceive the lucid interval argument in contested will proceedings and what their experiences are in using forensic psychological reports.

### **Definitions**

The following definitions are relevant to this study:

*Alzheimer's disease dementia:* A type of dementia based on a history of decline in cognitive functioning and memory and with deficits in at least one other area of cognitive functioning, such as apraxia, agnosia, or executive dysfunction (Seitz, 2018).

*Dementia:* A syndrome due to brain disease, usually of a chronic or progressive nature, in which there is a disturbance of multiple higher cortical functions including memory, thinking, orientation, comprehension, calculation, learning capacity, language, and judgement (World Health Organization, 2012).

*Dementia with Lewy bodies* A neurocognitive disorder that includes progressive cognitive impairment with early changes in complex attention and executive function rather than learning and memory (American Psychiatric Association [APA], 2013).

*Frontotemporal dementia:* A subtype of dementia caused by frontotemporal lobar degeneration and characterized by continual changes in social behavior, conduct, executive functioning, apathy, movement, dietary changes, speech, and language (Garn, Coronel, Waser, Caravias, & Ransmayr, 2017).

*Lucid interval:* A legal concept for the medical phenomenon of cognitive fluctuations, which is characterized by alternating periods of cognitive impairment and normal or near-normal performance and pronounced variations in attention and alertness (Van Dyk et al., 2016).

*Parkinson's disease dementia:* A progressive neurological disorder of the central nervous system caused by degeneration of neurons within the basal ganglia (Carranza, 2013).

*Probate*: A type of administrative law that oversees estates to ensure that proper and timely payments are made to heirs and creditors (O’Flaherty, 2019).

*Testator*: The person who signs a will (Averill & Radford, 2010).

*Testamentary capacity*: The legal term used to describe the capacity that surrounds the understanding of making a valid will (Brenkel et al., 2018).

### **Assumptions**

I made certain assumptions before undertaking this study. For this study I assumed that the participant attorneys were honest, candid, and forthright about their experiences with contested will cases in probate court and their experiences in working with cases that involved lucid interval and dementia. I further expected that they would provide insights into their own understanding, knowledge, and experience of these topics. A third assumption was that the attorney interviews provided sufficient and accurate information that was relevant to the research questions.

### **Scope and Delimitations**

In this study, I examined probate attorneys’ understanding of lucid interval and dementia in contested will proceedings. The participants of this study were only probate attorneys who had participated in contested will cases involved with the issue of dementia. While more research could be done on other aspects of probate law and “sound mind,” such as people who live with mental illnesses such as schizophrenia, this sample was limited to the issue of dementia.

I used a qualitative methodology to gather participants for semistructured interviews to understand the attorneys’ experiences. I conducted attorney interviews for

this study, including interviews with attorneys who had represented the estates of clients who may have lived with dementia when they signed the will. A limitation of this study was that I was unable to interview the testators who lived with dementia and experienced lucid intervals.

### **Limitations**

A delimitation of this study was that the sample size selected for the study was small compared to the approximate number of probate attorneys who practice law in Texas. I had specifically selected this research methodology to create an opportunity to hear the stories and experiences of probate attorneys in order to interpret the meaning of the experiences of this selected sample. I discuss the data that supports the need for a broader study in the future in Chapter 5.

Another limitation was the inability to select the appropriate participants for the study. It was important to select attorneys who would be honest and forthcoming with their answers. It was also important that these attorneys had experience in contested will cases but not all probate attorneys work in this capacity. The sample for finding the appropriate attorneys for the study was limited.

### **Significance**

It is important for attorneys to understand the concept of lucid intervals because it is the basis of an important argument that could determine the decision made in a contested will litigation. This study provided new ideas on lucid intervals and how they apply to TC cases. The information gained from this study has contributed to the research literature by addressing an important discussion on deathbed wills and the lucid interval,

which was previously insufficient in research (Peisah et al., 2015). This study also had social implications and has benefitted society. Unfortunately, people take advantage of others to inherit their money (Massachusetts Family Business, pp.22–23). However, forensic reports for TC can uphold an individual's rights by preventing others from taking advantage of a testator and helping to ensure that a will is distributed as the testator had requested. However, if courts and attorneys do not understand the lucid interval, it may have a significant impact on the TC proceedings.

### **Summary**

Through semistructured interviews of probate attorneys who work in contested will cases, I explored the hypothesis that probate attorneys do not really have a good understanding of the lucid interval and dementia while composing their legal arguments. I also explored the experiences of attorneys while using forensic psychological reports for contested will cases involving lucid intervals and dementia.

The discussion in Chapter 1 focused on the study's conceptual framework based on TJ and listed the operational definitions to provide clarity. Additionally, I discussed the study's assumptions, limitations, and delimitations. Chapter 1 is followed by a review of pertinent literature related to the lucid interval, dementia, and TC in probate court/contested will proceedings. Chapter 2 focuses on the different types of dementia that testators may have suffered from. Chapter 3 includes information about the research methodology of this study and how a qualitative IPA helped me examine the lived experiences of probate attorneys who have worked on contested will cases involved with arguments on lucid interval and dementia.

## Chapter 2: Literature Review

### **Introduction**

This qualitative study was designed to explore probate attorneys' understanding of the relationship between lucid interval and dementia and how this affects the capacity of a testator. To understand this relationship, it is important to know the different types of dementia, cognitive fluctuations, legal definitions of TC, various case laws surrounding the topic, and the basic functions of the probate court. The presence of lucid interval is often used as an argument by probate attorneys to prove TC in contested will court proceedings. As current research has merely touched the surface on the understanding of lucid intervals, it is unclear whether the concept is well understood by probate attorneys, who use it to enhance their arguments in contested will cases. In fact, little research is available on the understanding of probate attorneys on the lucid interval and its role in aiding dementia patients in contested will cases.

In this chapter I examine the literature related to the relationship between dementia and TC and the role of a lucid interval in court decisions regarding TC. Furthermore, I review probate case laws for information on TC. The research has identified the need to better understand the role of lucid intervals in dementia patients while making important financial/life decisions that involve TC (Moye & Marson, 2007). Moreover, a historical relationship between lucid intervals and dementia in decisions about TC has been identified (Shulman et al., 2015). In this chapter I review the current literature on dementia, lucid intervals, and TC and the way it affects contested will

proceedings. Additionally, I explore the case laws used by probate attorneys in contested will proceedings.

### **Literature Search Strategy**

I conducted the literature search based on peer-reviewed journals, case laws, books, and personal communication. The databases used included PsycInfo with Full Text, Google Scholar, and Lexis/Nexis with Full Text. The keywords and phrases used included *dementia*, *lucid interval*, *testamentary capacity*, *contested will*, *probate court*, *probate attorney*, *dementia with Lewy bodies*, *stages of dementia*, *Alzheimer's disease*, *Parkinson's dementia*, *cognitive fluctuation*, and *sound mind*. The studies that presented sound investigation on dementia and lucid interval and their effect on TC were selected for review. The collected data were analyzed by understanding the articles' research questions, methodologies, research designs, samples, analyses, findings, and recommendations for future research. The selected papers were primarily from the past 5 years. However, at times, it was necessary to use older research articles, especially in case law reviews, to develop the present topic.

### **Theoretical Framework**

The TJ theory formed the framework for this study. This was founded in the 1990s as a new intersection of mental health and the law (Wexler et al., 2013). Historically, ideas of TJ have been used for “people-related” fields such as family law, juvenile law, trusts and estates, problem-solving courts, and criminal law (Zeiner, 2015). The TJ theory is of the view that the law has unintended consequences caused by judges, attorneys, mental health professionals, and others that can be either “therapeutic” or

“antitherapeutic” (Wexler, 2018). TJ is a way to get medical professionals to work with legal professionals for ethical decision-making that can impact the legal process. It is a method to sensitize lawmakers and create the awareness to understand therapeutic rules and factor them into legal decision making (Marson et al., 2004). A powerful example can be found in the Israeli family court, where judges and staff social workers work together for the best interests of families and children (Marcus, 2018). In fact, judges and social workers often participate in special mental health/law training sessions together in the Israeli family court (Marcus, 2018). This process creates a framework that focuses on the wellbeing of the family, and it creates a foundation to improve the court process and enhance individuals’ wellbeing, such as the practice of mental health courts or solution-focused courts (Richardson, Spencer, & Wexler, 2016).

TJ is concerned with how courts and actors achieve therapeutic outcomes (Kaplan, Miller, & Wood, 2018). Many problem-centered courts have been created due to TJ, including mental health courts, domestic violence courts, and family courts, which have a theoretical orientation to justice as compared to the traditional adversarial system used in courtrooms (Fay-Ramirez, 2015). Due to the complex nature of TC and the family battles that may ensue due to it, TJ may be used to decide such issues. It can also be useful when dealing with mental health issues, such as dementia.

Despite the connection between TJ and the law of succession, legal scholars have failed to broadly apply this framework to estate planning and probate contexts (Glover, 2011). Glover (2011) argued that preparing a formal testamentary estate plan can enhance positive psychological outcomes. This type of plan can prevent future problems of



probate and issues of TC, thus minimizing stress on families. In the TJ framework, probate courts might consider the Israeli family court model for contested will cases. Probate courts could leverage resources with judges, social workers, and attorneys to limit family conflict in contested will situations and have a greater understanding of mental capacity as it relates to dementia in contested will cases.

## **Review of Research Literature**

### **History of Dementia**

Dementia had only been considered to be a product of cognitive decline since the early 20th century; however, researchers have always had a difficult time categorizing it (Ballenger, 2017). Two pioneers in the study of dementia were E. Kraepelin and A. Alzheimer. Kraepelin first identified dementia praecox (premature) in 1896 when it was viewed as a type of adolescent insanity (Kraepelin, 1919). In his initial research, Kraepelin (1919) recognized that people with dementia praecox became emotionally weaker, had a more difficult time engaging mentally, and experienced the loss of independence. Furthermore, Kraepelin recognized that patients lost connections between their thoughts and feelings, and they would laugh or cry without explanation. Kraepelin discussed physical symptoms such as seizures, tremors, and delusions. Moreover, he noted that the physical symptoms seemed to coincide with emotional symptoms. These symptoms are still found in present-day dementia cases.

Alzheimer's original publication had been translated for academic literature (Stelzmann, Schnitzlein, & Murtagh, 1995). It focused on a case study of a 51-year-old woman with presenile dementia (Stelzmann et al., 1995). Alzheimer noticed that the

woman had poor memory, where she would name an object and completely forget it afterward (Stelzmann et al., 1995). While the symptoms became progressively worse, they were never severe (Stelzmann et al., 1995). When she died, he studied her brain and noticed significant atrophy and entanglement of fibrils where neurons were once located (Stelzmann et al., 1995). Alzheimer's research was the beginning of the scientific realization that the brain progressively atrophies in people with dementia.

Both Kraepelin and Alzheimer found dementia to be associated with age, but they were reluctant to call it a disease (Ballenger, 2017). At the time, the condition was thought to be rare, and researchers were unsure whether aging or other disease processes caused the deterioration (Ballenger, 2017). Rothschild (1947) stood by Kraepelin's and Alzheimer's statement that dementia was not a disease. Early researchers noticed that people with dementia had different ways of compensating for their brain damage based on their environment or social context (Ballenger, 2017); it was more than a correlation between physical age and disease. Instead, this correlation demonstrated that dementia was not only a disease but a psychosocial issue. It was believed that aging caused issues between the interaction of the brain and the psychosocial context of the person (Ballenger, 2017). This framing of dementia as a psychosocial issue led to the creation of entitlement for the elderly, such as Medicare, and to the creation of the Older Americans Act of 1965 (Ballenger, 2017). By the end of the 1960s, people viewed dementia only as a psychosocial aging issue. At the time, necessary resources and support had begun to be provided for aging related issues.

In the 1970s, scientists began viewing dementia through the lens of the disease model and began referring to presenile dementia as Alzheimer's disease (Ballenger, 2017). In the 1980s and 1990s, Alzheimer's became a known name; federal research funds were allocated toward biomedical research for the treatment and prevention of the disease (Ballenger, 2017). Currently, dementia is considered an "acquired persistent impairment of intellectual function with compromise in at least three of the following mental aspects: language, memory, visuospatial skills, executive function, personality, and cognition" (Buckingham & Van Gorp, 1988). For the past 40 years, society has dealt with the impact of dementia in the United States to make decisions about policies, treatment, and supportive care during a time of cognitive decline (Bynum, 2014).

### **Subtypes of Dementia**

Research has demonstrated that 20% of people over 65 are diagnosed with a type of dementia (Dufner, 2013). The DSM-5 describes these subtypes of dementia under the category of neurocognitive disorders (NCD; APA, 2013), which are relevant to this dissertation: Alzheimer's disease, NCD with Lewy bodies, NCD due to Parkinson's disease, and frontotemporal NCD. The DSM-5 criteria for these subtypes are discussed in the corresponding section.

**Alzheimer's dementia.** Alzheimer's dementia (AD) is the most well-known form of dementia. It is important to understand how to diagnose AD from a psychological and a physiological standpoint so that appropriate treatment can be provided and for family planning. A definitive diagnosis of AD can only be determined by an autopsy (Seitz, 2018). A diagnosis requires the examination of tissue remains of the brain; however, it

can be conducted with a clinical assessment and modern radiologic methods with approximately 80–90% accuracy (Alzate, 2018). Currently, the diagnosis of AD is based on a progressive decline in cognition, which affects memory and at least one other area of cognitive functioning, such as apraxia, agnosia, or executive dysfunction (Seitz, 2018). A decline from a previous level of functioning is evident, resulting in significant social or occupational impairment (APA 2013). A person with AD may have depression, apathy, and difficulty remembering names, conversations, and events in early stages (Alzheimer's Association, 2016). In later stages, AD patients may have difficulty when communicating, swallowing and walking; may be confused; or may have poor judgement and behavioral changes (Alzheimer's Association, 2016).

The DSM-5 criteria for Alzheimer's are as follows: "1) criteria met for major or mild NCD; 2) insidious onset or gradual progression of impairment in one or more cognitive domains; 3) criteria must be met for probable or possible AD which includes evidence of AD genetic mutation from family history or genetic testing, clear evidence of decline in memory or learning from one other cognitive domain, steadily progressive, gradual decline in cognition, and no evidence of mixed etiology which could attribute the AD to some other type of neurodegenerative, cerebrovascular, neurological, mental, or systemic disease or condition" (APA, 2013). Based on these criteria, AD is a neurocognitive disease that gets progressively worse and affects memory, learning, and cognition.

From a physiological standpoint, AD is characterized by the growth of amyloid peptides and tau proteins, which ultimately lead to the loss of neuronal cells

(Magalingam, Radhakrishnan, Ping, & Haleagrahara, 2018). It is normally associated with the dysfunction of the temporal, parietal, and occipital lobes and the atrophy of the hippocampus (Garn et al., 2017). Behaviorally, AD is a progressive, degenerative brain disorder with an accumulation of various cognitive deficits that result in intellectual and behavioral deterioration (Kaiser, Kuhlmann, & Bosnjak, 2018). Karr, Graham, Hofer, and Muniz-Terrera (2018) found that there is a slow cognitive decline before the onset of AD. This early decline can be attributed to semantic impairment or the impairment of general knowledge acquired over a lifetime (Pineault et al., 2018). Furthermore, a decline in literacy and cognition can predict the onset of mild cognitive impairment and AD (Stewart, Wilson, Bennett, & Boyle, 2018). AD is, thus, often characterized by clinical impairments with episodic memory (Garn et al., 2017); it is found in 6% of patients over 65 years of age and in 15–20% of patients over 80 (Alzate, 2018).

The National Institute of Aging has demonstrated through statistical research that over half of the people with AD are undiagnosed (Ithara, 2016). Montgomery, Goren, Kahle-Wroblewski, Nakamura, and Ueda (2018) conducted a study among a group of Japanese caregivers to determine the common characteristics and experiences of patients with AD. The findings pointed toward the importance of caregivers in diagnosing AD, since caregivers seemed to recognize the early stages of memory decline in patients more than family members, which can help in diagnosis (Montgomery et al., 2018). Moreover, the findings showed that 73% of patients were on some type of medication to reduce AD symptoms such as memory loss (Montgomery et al., 2018). Since so many people have

undiagnosed AD, it can be challenging for legal professionals to represent clients in contested will cases based on when the testator was initially allowed to sign a will.

**Frontotemporal dementia.** Frontotemporal Dementia (FTD) and AD are the two most common types of pre-senile dementia (Stketee et al., 2016). The DSM-5 criteria for FTD are as follows: “1) criteria met for major or mild NCD; 2) insidious onset or gradual progression; 3) must have [three] of the following behavior variants: behavioral disinhibition, apathy or inertia; loss of sympathy or empathy; compulsive/ritualistic behavior; and/or hyper orality and dietary changes; and prominent decline in social cognition and/or executive abilities. If a person does not display behavior variants, they can meet the criteria for FTD through language variants like a prominent decline in language ability in the form of speech production, word finding, object naming, grammar, or word comprehension. Also included in the criteria are relative sparing of learning and memory and perceptual motor function. The neurocognitive disturbance cannot be better explained by other neurological, cerebrovascular, substance abuse, mental, or systemic conditions” (APA, 2013). Based on these criteria, FTD is a neurocognitive disease that gradually becomes worse and affects the behavior, language skills, and social cognition.

FTD is caused by frontotemporal lobar degeneration (Garn et al., 2017).

According to the DSM-5 criteria, it is characterized by continual changes in social behavior, conduct, executive functioning, apathy, movement, dietary changes, speech, and language (Garn et al., 2017). These behavioral symptoms are associated with the early degeneration of the medial area of the prefrontal cortex (Poletti et al., 2013). FTD occurs in people between the ages of 35 and 75 (Barnes, 2006). Researchers have found a

strong genetic component of 20–40% in those diagnosed with FTD (Rainero, Rubino, Michelerio, D'Agata, Gentile, & Pinessi, 2017).

There are some differences in the symptoms of AD and FTD that can be used for differential diagnosis. FTD usually occurs between ages 40–65, while AD occurs mostly after 65 (Barnes, 2006). Furthermore, there may be differences between AD and FTD in terms of creativity. People with an FTD diagnosis may show the emergence of new creative abilities despite their cognitive decline (Barnes, 2016). AD seems to affect memory decline more than FTD. Even in the later stages of FTD, there is evidence of time and place orientation and recall (Barnes, 2006), but this is not evident in patients with AD.

**Parkinson's disease dementia and dementia with Lewy bodies.** Parkinson's is a progressive neurological disorder of the central nervous system, which is caused by the degeneration of neurons within the basal ganglia (Carranza, 2013). When dopamine depletes, it causes deficits in the motor neuron circuits, which leads to symptoms such as tremors, slowing, rigidity, and postural instability (Carranza, 2013). 85% of those diagnosed with Parkinson's disease are affected by Parkinson's disease dementia, which is characterized by a combination of psychotic features, depression, and marked impairment of axial motor functions (Garn et al., 2017).

Dementia with Lewy Bodies (DLB) is a neurocognitive disorder, which includes progressive cognitive impairment with early changes in complex attention and executive function rather than learning and memory (APA, 2013). It is common for patients with

DLB to have recurrent visual hallucinations and rapid eye movements, and they may also experience, depression and delusions (APA, 2013).

Parkinson's disease dementia (PDD) and (DLB) are similar. These types of dementia are the second most common after AD worldwide (Georgina, Allison, Natalie & Nandakumar, 2018). However, PDD and DLB also have diagnostic differences. DLB includes the features of Parkinson's but also visual hallucinations, fluctuations, and rapid eye movement sleep (Georgina et al., 2018). A diagnostic distinction is that DLB is initially involved with the deterioration of cognitive and motor skills, while PDD has motor deterioration (Georgina, 2018).

There is much debate on whether PDD and DLB are different since they affect similar cortical circuits and have similar neuropsychological profiles (Fields, 2017). Jellinger and Korczyn (2018) demonstrated that the rate of decline is faster in DLB than in PDD. Sleep issues and hallucinations are common distinguishing symptoms for DLB, and it is common for patients to have autonomic and sleep wakefulness issues, which can affect both the patients and their families (McKeith, et al., 2017). Hallucinations are usually present with Parkinson's tremors early in DLB (McKeith et al., 2017). Alongside hallucinations, delusions are a common symptom (Tzeng, Tsai, Wang, Wang, & Chiu, 2018). Despite these clinical similarities, the diagnosis of PDD and DLB is based on an arbitrary decision of the time of onset –DLB usually has an early onset of symptoms while PDD has a later one (Jellinger & Korczyn, 2018). While dementia screening instruments such as the Mini-Mental State Examination (MMSE) and Montreal Cognitive Assessment are useful for DLB, the diagnosis assessments should include tests that cover



the full range of cognitive domains that may be potentially affected (McKeith et al., 2017). The focus on cognitive domains includes tests that focus on memory and executive functioning (McKeith et al., 2017).

It is important to distinguish between the four types of dementia mentioned above. In all the cases, there is a change in brain function which causes specific symptoms that help the evaluator to determine the best diagnosis and course of care. The MMSE has been a successful behavioral test to differentiate between behavioral symptoms and make a diagnosis. It is important for probate attorneys to understand these types of dementia, particularly when working on contested will cases where these topics present themselves. With an understanding of dementia, they will have a better scientific background and understanding about dementia and its possible effects on the testator's legal capacity to sign a will, and they will be able to give their clients better advice and formulate better arguments in the courtroom.

### **Probate**

When a person is deceased, their assets usually go to their closest survivors, unless instructed differently in a will. This process is called probate (Read & Bailey, 2015). Probate courts oversee the administration of estates to ensure proper and timely payments are made to heirs and creditors (O'Flaherty, 2016). During the probate process, the court is responsible for collecting all the taxes from the deceased and/or the inheritors of the estate. Non-probate assets such as life insurance and retirement plans also exist. Most people do not create a will before they die, which leads to probate conflict and contested will situations (Read & Bailey, 2015). Probate lawyers and administrators are

responsible for facilitating the collection of the deceased's assets and protecting the beneficiaries' rights as designated by the testator or whomever the state assumes to have been chosen for the estate (Cahn, 2014).

A probate attorney represents an executor's estate by filing several documents through the probate court (O'Flaherty, 2016). These may include the following: petitions to admit a will, affidavits of heirship, an executor's oath of office, surety or non-surety bonds, notice to heirs or legatees, and publication notices (O'Flaherty, 2016). Probate attorneys may have different roles in different states owing to different laws (O'Flaherty, 2016). Many attorneys involved in probate law are also involved in general estate planning, special needs planning, long-term care planning, end of life planning, helping to appoint fiduciaries, planning distribution of assets, and planning to avoid the pitfalls that the probate process may cause (O'Flaherty, 2016). For this study, my focus will be on probate attorneys who deal specifically with wills contested in probate courts.

The Uniform Probate Code (UPC) was revised in 1990. Although only 18 states in the United States have adopted the UPC, nearly all use some part of the same (Averill & Radford, 2010). This code helped to build a uniform procedure for transfers from within a deceased's estate (Langbein & Waggoner, 1991). It standardized the procedures used in probate court and made the system easier to navigate (Martin, 2009). Thus, the UPC is important since there was "clumsiness" in the system before its passage as many states had their own probate laws, and there was a lack of uniformity in the code (Langbein & Waggoner, 1991). According to the UPC, a testator must have TC and must be at least 18 years old to sign a will (Averill & Radford, 2010). The UPC states that a

testator must be of “sound mind,” but does not define what a “sound mind” is (Averill & Radford, 2010).

### **Testamentary Capacity**

The legal term used to describe the capacity surrounding a decision of making a valid will and understanding it is TC (Brenkel et al., 2018). The first evidence of a legal matter involving TC was *Banks v. Goodfellow* (1870) in England, which is the benchmark case for providing a test for the TC of a testator. In this case, the testator suffered from delusions, but it was unknown whether these delusions affected his capacity to sign a will. The judge decided that the testator must have free will, be the master of his intentions, and be free from delusions to act on his own property. If the mind “labors 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” (Banks v. Goodfellow, 1870, p. 816.). This was the first decision that set a limit on the mental faculties of the testator; with this decision, the testator had to understand with a clear mind the ramifications of the extent of his property.

Mr. Banks was delusional. He believed he was being persecuted and abused by a man named Featherstone Alexander (Banks v. Goodfellow, 1870). The medical opinion in *Banks v. Goodfellow* (1870) was that he did not have a sound state of mind and the capacity to manage his financial affairs. The judge, Lord Cockburn, thus summarized the widely held belief of probate courts today on TC: “(a) the Testator must understand their actions and be aware of their significance; the Testator must have the ability to instruct

and inform about others and sign a document (i.e., a Will) which will bequeath what he/she owns at their death; (b) the Testator must be aware in general terms, of the nature, extent and value of the estate which he/she is giving away by the will” (Zuscack, 2016, pp.4-5).

Although still the most widely known, *Banks v. Goodfellow* (1870), was not the first case law on TC matters. In *Harwood v. Baker* (1840), Lord Erskine ruled that the testator must have the mental capacity to rationally evaluate and discriminate between people who make a claim against his estate. Moreover, the United States case of *Delafield v. Parish* (1862) required that the testator should be able to recall property conditions, likely beneficiaries, and the nature of a will without having to contemplate for a long period of time; in other words, it must be clear to the testator. Unlike *Banks v. Goodfellow* (1870), *Harwood v. Baker* (1840) and *Delafield v. Parish* (1862) do not address whether a history of delusions can preclude a testator from having the capacity to sign and understand a will.

While *Banks v. Goodfellow* (1870) was a decision based on a testator with psychosis, dementia is a much more common challenge to a will and a person’s TC in the present time (Pesiah, 2005). *Jones v. LaFargue* (1988) is an example of a Texas case, where it was decided at the trial that the testator, Pinckney Fowley, who died in 1983, had dementia and lacked the TC to sign the will. The initial jury decision was based on evidence demonstrating that Mr. Fowler did not recognize family members or understand his estate on the day he had signed his will (*Jones v. LaFargue*, 1988). Furthermore, testimonies were given by Mr. Pinckney’s family members and five doctors that he had

memory loss and that his understanding and functioning were becoming progressively worse as seen in dementia patients (Jones v. LaFargue, 1988). This decision was appealed in 1988 on the grounds that Mr. Fowler had TC when he signed his will (Jones v. LaFargue, 1988). Appellants brought testimonies stating that Mr. Fowler drove a car on a regular basis, played gin rummy, and read the newspaper (Jones v. LaFargue, 1988). However, this new evidence on appeal was not enough to overturn the original trial jury decision; the judge upheld the decision that Mr. Fowler lacked TC because of the evidence of dementia presented at the initial jury trial (Jones v. LaFargue, 1988). Dementia has thus become a more likely and common challenge to wills since the extent of a person's estates is different in the present time as compares to 1870 – the time of *Banks v. Goodfellow* (Peisah, 2005). Decision-making can be a problem for people with dementia. In fact, the mental health guidelines recommend the inclusion of patients in decision-making, unless they have a subtype of dementia (Jiménez, Jaén, García, & Barahona-Alvarez, 2013). However, many medical decisions and other decisions can be made in the early stages of AD (Jiménez et. al, 2013). Patients with dementia can often answer questions about their preferences, life decisions, and socio-demographics (Voskou, Douzenis, Economou, & Papageorgiou, 2018).

Dementia and TC can be a problem for legal professionals when there is an increased need for the subtle interpretations of brain function, such as with mild or moderate impairment (Voskou et al., 2018). Otherwise, a legal professional can assess whether a client has severe cognitive decline and whether they have the capacity to

understand the will (Voskou et al., 2018). The extreme levels of dementia are noticeable to legal professionals; they have more trouble interpreting the gray areas.

Shulman, Himel, Hull, Peisah, Amodeo, and Barnes (2017) argue that it is time to update the test of TC based on *Banks v. Goodfellow* (1870). This proposal is based on the complexities of modern science, terminology, and dementia being more prominent than psychosis, which was the original basis of *Banks v. Goodfellow* (1870) (Shulman et al., 2017). This proposal aims to update the test of TC to help attorneys to make better legal arguments that are more relevant to the current medical/legal contexts (Shulman et al., 2017). Furthermore, the Shulman et al. (2017) study demonstrates an issue with the way TC is addressed by courts. The current study also wishes to study how attorneys understand such issues and concepts.

### **Lucid Interval**

Historically, the most common argument for undermining a testamentary challenge is the concept of lucid interval (Shulman et al., 2015) as lack of mental capacity is the second most common reason for setting aside a will (Keeton, 2015). Shulman et al. (2015) explained that the lucid interval is a legal concept for the medical phenomenon of cognitive fluctuations (CFs). These are characterized by alternating periods of cognitive impairment and “normal or near-normal performance” and “pronounced variations in attention and alertness” (Van Dyk et al., 2016). These fluctuations occur in all types of dementia, but their presence varies based on the type (Lee, Taylor, & Thomas, 2012). 90% of people diagnosed with DLB experience cognitive fluctuations, particularly in the area of attention (Lee et al., 2012). This makes

CF an important factor for diagnosing DLB (Van Dyk et al., 2016). Although these fluctuations occur with AD, FTD, and PDD, they occur with a higher frequency and severity in DLB.

The effect of CFs on a dementia patient can be a severe barrier to their functioning with dementia. In a study that investigated the nature of CFs in dementia patients in a long-term care facility by using the Severe Impairment Battery (SIB) to assess cognitive function and the Dementia Cognitive Fluctuation Scale (DCFS), Mainland et al. (2017) determined that CFs have a significant effect on patients' cognitive abilities and cause deficiencies in terms of orientation, language, and praxis and should thus be considered a source of disability in patients. Based on this research, CFs seem to be an impairment or a disability. It is, thus, important to understand the role they play and whether they are an advantage or disadvantage to a testator with a "sound mind." If CFs themselves are a source of disability, this may weaken the argument that a lucid interval would help a testator think more clearly when signing a will.

While there are tests to understand CF in dementia, it is difficult to find tests that can differentiate between the types of CFs found in DLB and AD (Lee et al, 2012). The Clinical Assessment of Functioning (CAF) was designed to determine CFs in DLB through a structured interview process (Van Dyk et al., 2016). It demonstrated strong inter-rater reliability between CF and DLB and showed a strong association. Another measure, The Mayo Fluctuations Scale (MFS), a 19-item questionnaire, has demonstrated a high degree of validity in assessing the CF symptoms of DLB (Thaipisuttikul, Chittaropas, Wisajun, & Jullagate, 2018). Based on the data, dementia patients have

symptoms of CFs, which is legally known as lucid intervals; however, they are difficult to differentiate and distinguish, and the CF symptoms may be considered a severe source of cognitive disability on their own. While some view this as a positive sign for a testator who had a “lucid” moment while signing a will, research seems to demonstrate that CFs are actually more disabling for a person with dementia.

While it is important to understand the medical concept of CFs, it is also important to understand how it is used legally as the lucid interval. Shulman et al. (2015) argued that the understanding of lucid intervals in TC proceedings should be updated to reflect recent scientific knowledge, which appears to alter the impact of the lucid interval argument. This knowledge is based on findings that “good” days and “bad” days, which refer to cognitive ability, are not very different for people with dementia (Rockwood, Fay, Hamilton, Ross, & Moorhouse, 2014). Based on this, Shulman et al. (2015) believed that the application of the lucid interval to TC may not be valid since fluctuations are not distinguishable enough in terms of “good” and “bad” and are themselves negatively affected by TC, thus preventing the testator from understanding the facts and consequences of signing a will (Shulman et al., 2015). However, according to the CAF test study results cognitive fluctuations did not occur in the cognitive domains that affected TC (Van Dyk et al., 2016). Still, many researchers agree with Shulman et al. (2015) that the lucid interval may only be a legal loophole for TC without valid science to back it (Zuscak, 2016). There is no consensus about how the lucid interval and dementia disrupt the mental capacity of a testator. However, it is still used as the main legal challenge by attorneys in contested will cases.



### **Testamentary Capacity and the Lucid Interval**

While the information on TC, the lucid interval, and dementia is sparse, there are several contested will cases such as *Gholson v. Peters* (1937) and *Greenwood v. Wilson* (1979) that demonstrate the inclusion of the lucid interval argument and other mental health symptoms to make a decision for or against the capacity of a testator to sign a will. Furthermore, only 1% of will challenges succeed (Merikangas, 2015), which demonstrates the difficulty of the argument to pose a challenge to a testator's capacity.

These decisions are, at times, made in the initial trial court or on appeal. *Scally v. Wardlaw* (1920) was a Mississippi case won on appeal because the contestants failed to demonstrate that the testator lacked TC in the initial trial. The court determined that the testator had a "sound mind" when she signed the will and that the trial court made several errors in their initial instructions to the jury. Witnesses testified at the initial trial that Leslie (testator) was flighty and not always of "sound mind." However, this was not consistent enough for the court to determine that she did not have the capacity to sign the will or that she was not lucid when she signed the will; the initial decision was overturned because of the errors made and because the testator was determined to be of "sound mind."

Based on another Mississippi case, *Gholson v. Peters* (1937), the court ruled that a person with general insanity can sign a valid will during a lucid period. Ms. Crawford, despite her general insanity, had normal, lucid periods with good demeanor at times (*Gholson v. Peters*, 1937). She bequeathed her estate to her granddaughter instead of her daughters. After her death, her daughters contested this based on her mental incapacity.

While they were able to have many witnesses testify to her irrational, delusional, and insane behavior, other witnesses demonstrated that she was lucid when she signed the will (*Gholson v. Peters*, 1937). This case is important because it demonstrates a case where it was noted that Ms. Crawford had hatred to the point of mental incapacity toward her daughters. However, upon challenging the will, her daughters lost the challenge because they were unable to prove that Ms. Crawford did not have a “sound mind.” Instead, it was determined that Ms. Crawford had a lucid interval while signing her will over to her granddaughters.

An opposite judgement was made in *Greenwood v. Wilson* (1979), where it was initially decided to uphold the testator’s ability to sign the will. This case was based on the will signed by John T. Wilson while in St. Mary’s hospital in Russellville, Arkansas (*Greenwood v. Wilson*, 1979). A month after signing the will, he died in the hospital (*Greenwood v. Wilson*, 1979). The will was challenged by his first wife on behalf of their adopted child and lost because the will was determined to be valid (*Greenwood v. Wilson*, 1979). However, on appeal, new psychiatric evidence from Dr. Steven Finch was introduced, which concluded that Mr. Watson suffered from organic psychosis that affected his logical decision-making (*Greenwood v. Wilson*, 1979). Thus, the validity was overturned because he lacked TC. This is an example of how it was determined on appeal that the testator lacked the presence of a lucid interval during his organic psychosis and did not have the TC to sign a will.

Furthermore, more recent cases uphold a ruling of testamentary despite mental health evidence to the contrary. Simmons (2015) discussed this in *The Matter of the*

*Estate of Fred Berg*. In this three-day trial, a psychiatrist testified that he believed Mr. Berg was psychotic and disorderly on the day the will was made. However, the judge believed that Mr. Berg had TC and that he was free of undue influence when he had signed the will even though Mr. Berg had a history of schizophrenia. He was declared to be incompetent by the VA hospital in 1967, and he signed his last will and testament in 1998 (Simmons, 2015). However, shortly before his death, Mr. Berg obtained high scores on the Mini Mental Status Exam – an exam often used to test cognitive functioning (Simmons, 2015). This case is an example of how difficult it can be to prove that a person did not have the capacity to sign a will. Although Mr. Berg had been previously diagnosed with a mental illness, the court still did not determine him mentally incapable of signing the will.

In *re Estate of Powers*, 375 Mich. 150 (1965), the supreme court of Michigan found that the testator did not have TC at the time of signing the will. In this case, the testator was admitted to a mental unit for psychosis just after signing the will. Furthermore, the court found errors in an expert's testimony regarding the testator's mental capacity prior to signing the will. This demonstrates that even with expert opinions on a testator's mental health, the evidence can be subjective and must be analyzed and scrutinized to understand the impact mental issues have on the testator's mental capacity.

An important role of probate attorneys is to assess the TC of a client. This is demonstrated in *Charfoos V. Schultz* (2009). In this Michigan case, the disinherited children of a decedent accused the lawyer of malpractice since his prior knowledge of the

testator's mental incompetence caused him to bequeath his estate to his surviving spouse rather than his children. Many probate attorneys have been disciplined for these types of actions. In *Nebraska State Bar Association v. Neumeister* (1989), an attorney was disciplined for failing to withdraw the representation of a client who was in a nursing home due to mental incompetence and who was scheduled to appear as a material witness concerning the client's mental capacity. While it is important for probate attorneys to understand the lucid interval, dementia, and TC, it is also important for them to understand the framework, boundaries, and ethics they work within. If they know about the mental incompetence of a testator, they are required to reveal the incompetence as a client lacking mental capacity according to the law would not be able to sign a will.

### **Summary**

While there is an abundance of research on dementia, this is not so for lucid intervals and cognitive fluctuations since these apply to TC for contested will cases in probate courts. The predominant challenge to a will is the mental capacity of the testator, and this challenge should be defined and understood. While the judgement in *Banks v. Goodfellow* makes it clear that the testator had a "sound mind," it is unclear as to how that "sound mind" was accurately determined. However, probate attorneys are on the frontlines and can be the first to determine whether or not to allow a client to sign a document. It is, thus, vital for them to understand what it means to have mental capacity. The next chapter discusses the methodology, sample, setting, instrumentation, and analyses for this study.

## Chapter 3: Methodology

### **Introduction**

The *Banks v. Goodfellow* (1870) decision has endured over time and has set the standard for decisions in contested will cases. This case determined that a testator must have a “sound mind” to be able to sign a will. However, over the past few years, challenges have been posed to the use of “lucid intervals” as a legal argument in contested will cases that involve dementia (Shulman et al., 2015). The purpose of this qualitative study was to understand the way in which probate attorneys understand the legal concept of “lucid intervals” for determining TC in contested will cases that involve testators who are diagnosed with dementia.

In this chapter, I discuss the methodology of the study. First, I discuss the research design and the rationale, which are followed by a description of the role of the researcher. Next is a description of the study methodology, which is followed by the issues of trustworthiness and the plan for addressing them in the study. Finally, I discuss any ethical considerations pertinent to this study. The purpose of this study was to further understand the ways that probate attorneys process and understand the relationship between the lucid interval and dementia and how that affects the capacity of a testator and their legal arguments. In this study I aimed to gain a better understanding of attorneys’ thought processes and comprehension of the lucid interval and dementia in developing their arguments.

The following chapter includes the research design and the methods used to ensure that the proposed research is ethical and appropriate. I address my role as the

researcher in the overall design and rationale for the study in this chapter. I also discuss the instrumentation used in the collection of data as well as the methods used in defining the participant selection. The potential ethical considerations and trustworthiness of the research are fully developed throughout this chapter.

### **Research Design and Rationale**

This study was based on the following research questions:

RQ1: How do attorneys understand lucid intervals and cognitive fluctuations and how they affect a testator's capacity to sign a will?

RQ1a: How is this experience useful for them in contested will cases?

RQ2: What are the attorneys' experiences like in using forensic reports in contested will cases?

In this study I used a qualitative IPA approach. IPA is a systematic method to explore and understand human experiences (Noon, 2018). IPA utilizes human experiences by “giving voice” and “making sense” to provide researchers with the opportunity to gain an insider perspective of the human experience (Noon, 2018). Based on these phenomena, the researcher can make interpretations by utilizing concepts such as phenomenon, hermeneutics, and idiography, where phenomenon is lived human experience, hermeneutics is the restoration of meaning, and idiography is concern for individuality and commitment (Noon, 2018). With IPA, researchers use these methods to seek the subjective meaning described by the participants and add insights based on the current literature in the field. The researcher then confirms the meanings of these observations and themes with the participants.

The qualitative research approach typically uses small samples rather than the large-scale samples used in quantitative research. This approach is also interpretive, context specific, and centers on the verbal and visual rather than on the statistical-inquiry procedures (Creswell, 2013). Further, qualitative research results in practical, useful theories, rather than ones that are generalizable to the greater population. It is based on life experiences and actual events that occur every day. This study was based on the lived experience of probate attorneys and their perspectives on contested will cases in which dementia is an issue and the lucid interval is a factor for a testator signing a will. This study may help attorneys gain new insights and understandings into better ways to argue for or against TC based on lucid intervals in dementia patients for contested will matters in probate court. Ultimately, the study may assist less experienced probate attorneys to learn from more experienced probate attorneys about the ways that they handled contested will proceedings.

### **Role of the Researcher**

I was the sole researcher in this study. In phenomenological research, the primary instrument for collecting data is the researcher (Pietkiewicz & Smith, 2014). I recognized my biases, values, and background, which potentially could have disrupted my ability and objectivity as the data collector. I am a licensed professional counselor in Texas, and professionally, I work with attorneys, though I rarely work with probate attorneys. However, in order to control for bias that may arise from my professional network or status, I took careful notes and consulted my dissertation committee immediately when any issues arose. I had direct contact with probate attorneys during the collection of data

through interviews either in person or via the telephone. During the interviews, I took careful notes and taped the interviews to ensure that all the information was accurate. After the interviews, all the responses were coded in order to link categories, themes, and concepts. These interviews were semistructured and followed the interpretive phenomenological analysis format. As the researcher, I explained my role to the participants whom I had interviewed before the interview began while informing them about what to expect in the interview process.

Professionally, I work with attorneys in my private forensic assessment practice, and sometimes, I see them at professional networking events and meetings. However, I do not believe that this had any negative effects on the study because I did not work with any participants with whom I had had a previous professional relationship. However, my professional status helped me to find potential participants for the study. I only performed the study on attorneys with whom I did not have a previous personal or professional relationship so that potential experimenter bias did not affect the study.

In order to protect against researcher bias and to protect the validity of the study, the interviews were semistructured. In a qualitative analysis, the structure is important from the beginning of the study. This structure can be achieved through prolonged engagement with participants, which includes developing trust with the participants before the interview (Roulston & Shelton, 2015). Getting to know the participants from the beginning through the selection process and maintaining the rigor of a structured interview with observations that were noted in the same way for all participants helped to reduce my researcher bias in the study.



## **Methodology**

### **Participant Selection**

For this study, I selected participants through a homogeneous sample, which is the recommended method for IPA because of the detailed case analysis involved (Smith & Shinebourne, 2012). Homogeneous sampling is a sampling method in which the participants have similar characteristics or traits (Etikan, Musa, & Alkassim, 2016). This study focused on probate attorneys who represented and advocated for clients in contested will matters. More specifically, this study targeted issues of TC in which dementia played a larger role in affecting the capacity of the testator in comparison to any other mental illness such as psychosis.

The goal of the study was to have six participants in order to reach data saturation. It is best for IPA to have a smaller sample size due to the fine analysis that is involved (Brannen, 2012). The sample size in a phenomenological study is typically 1–10 participants to get to the core experiences of the participants (Starks & Trinidad, 2007). Therefore, I chose to have six participants in my study.

The participants for this study were identified through the local bar associations in the Dallas/Fort Worth metroplex and the probate law firms in the Dallas/Fort Worth metroplex. Each of these bar associations have probate sections that hold social and educational events for probate attorneys. Once granted permissions by the local bar associations, they sent e-mails to the members of these associations announcing the study and my involvement with the study. I also placed advertisements on bar association web pages and Facebook sites. The study was not limited to participants who were probate

attorneys in the Dallas/Fort Worth area. If a probate attorney in another area saw the advertisement on Facebook and met the requirements for participation, they would be invited to participate too. The announcements for the study were also made at chapter meetings. Phone calls were made to local probate law firms to speak to the office managers regarding the study and to get permission to e-mail an announcement to the attorneys who had worked on contested will cases in the law firms regarding their potential interest in the study.

Once prospective participants had acknowledged their interest in participating in the study, I determined whether they met the inclusion criteria of working as a probate attorney with clients in contested will matters where dementia had been an issue. Once they had met the inclusion criteria, a packet of information was e-mailed to them, which included the informed consent form that explained the study and the reasons for the study. The packet mailed to the potential participants also included the time frame and parameters of participation, which explained more details of the study. The packet also included information concerning participant confidentiality and anonymity and my contact information

Their role and purpose in the study was explained to them. They were given a copy of the questions that they would be asked if they decided to participate in the study. Once the participants had agreed to participate in the study, they were sent another e-mail, which scheduled their interview along with another informed consent/confidentiality form.

## **Instrumentation**

Data was collected through a six-item structured interview. The interview questions were based on my own knowledge of the topic from the literature review. The questions asked were open ended, which allowed the researcher to gain a better understanding of the issues in an authentic capacity and allowed further elaboration when necessary. The questions provided the participants with an opportunity to describe their experiences with contested will probate matters. These matters were particularly related to their understanding of the lucid interval and dementia and how they relate to TC in contested will cases. The questions were part of a structured interview format to ascertain the attorney's knowledge and experience with lucid interval and dementia in contested will legal cases.

The interviews were conducted face to face in a quiet, previously agreed upon location or via the telephone, and it was recorded. They were handled in a professional manner and each participant knew the questions before the interview had begun. The data were collected and coded through NVivo upon completion of the recorded interviews.

Following this, I reviewed a summary of my notes before concluding the interview with each participant to ensure that the information was accurate. There was no further contact between me and the participants after this unless there was a follow up question to the study.

## **Questions for Participants**

Basic demographic information was collected from all the attorneys who participated in the study, including age, gender, race, years practicing law, years

practicing probate law and working with contested will litigation, and law school attended.

The participants were asked the following open-ended interview questions:

1. What do you know about the disease of Dementia, and what is your experience with it? Please tell me everything that you know about it.
2. What do you know about the lucid interval, and what is your experience with it?
3. Please recount some experiences of cases that you had won using the argument of the lucid interval.
4. Please recount some experiences of cases that you had lost using the argument of lucid interval.
5. What challenges have you faced in cases that involved the lucid interval and dementia?
6. Please explain how dementia can affect a testator's ability to sign a will.
7. How are forensic psychological reports useful for contested will cases?

### **Procedures for Recruitment, Participation, and Data Collection**

As the researcher, I collected the data through a structured interview using the afore-mentioned questions. Once the interviews were completed, the participants were debriefed on the process and reminded about the purpose of the study and the intended use of the data. The debriefing was also an opportunity for the participants to include any questions that they may have had concerning the process or what took place in the interview. At this time, the participants were also informed that they could contact me at

any time regarding concerns for or more information on the study, analysis of the data, or publication procedure. I also informed them that I may contact them with further questions if there was anything unclear in the data.

### **Data Analysis Plan**

Data was collected through an open-ended question process, transcription, and recorded interviews. Following the completion of data collection and coding of categories and themes, the data was uploaded into the NVivo program for coding analysis. I chose the NVivo software over other qualitative data analysis tools because of the reliability of its data mining capabilities. NVivo 11 allowed me to upload the recorded interviews and upload the transcribed interviews to code the data based on the themes and units of observation. These features are important for qualitative data analysis because it relies on the thematic approach, which also follows the structure of my overall IPA.

### **Issues of Trustworthiness**

Unlike quantitative research, qualitative research is not generalizable to the population (Diane, 2014). Rather, it is more focused on human experiences and phenomenon (Diane, 2014). Therefore, trustworthiness is valuable in qualitative studies. Credibility, transferability, confirmability, dependability, and authenticity are helpful for a study to develop trustworthiness (Diane, 2014). In this study, I hoped that the multiple methods of contact before the study and during the study enabled it to be a more trustworthy study.

## **Credibility**

Credibility in qualitative research refers to the truth of the data and how it was presented (Diane, 2014). In this study, the data collection was done through a face to face interview or phone interview, and the interviews were recorded. When a phone interview was conducted, a recording application was used to record the phone call. In order to ensure credibility, the interview questions were discussed with a probate attorney and a psychology researcher before being formed to make sure that the questions were relevant to the profession and the study. The feedback received was that the questions were relevant to their fields and would be helpful for gaining a better understanding of the research topic. The purpose of the study and the questions were outlined and explained to the participants prior to their participation to ensure the credibility of the study. The role of the researcher as an observer/participant in the study was also addressed before the commencement of the study, and the researcher's credentials were given to the participants so that they would be informed of the researcher's role and purpose in the study. Since the interviews were conducted in person or over the phone, the interviewer made sure that the participants understood their role and that the directions for the interview were clear so that there would be no confusion before the meeting.

Credibility can also be increased through prolonged engagement and triangulation. Prolonged engagement is spending enough time with each participant in the study and developing a rapport and trust (Diane, 2014). In order to have prolonged engagement, I developed a rapport through the pre-interview selection procedures as well

as through the interview itself. This helped to foster more trust in the participants in the study.

Triangulation is the ability to collect data through multiple methods and sources (Diane, 2014). A qualitative study is more credible through the triangulation process because many sources of information can be utilized, such as transcription notes, interview recording, and phone calls.

### **Transferability**

Transferability is related to whether the findings can be applied to other groups or settings that did not participate in the research (Diane, 2014). Transferability invites readers to make connections between the study and their own experiences (Shenton, 2004). While this is not to be confused with the generalizability observed in quantitative studies, it is based on groups that can gain from the meanings and phenomenon of the study and can demonstrate that the findings can be useful in other contexts (Hagood & Skinner, 2015). In order to enhance transferability, I tried to include as much details as possible in the interview answers. With these details, I was able to find the most appropriate and transferrable themes for probate attorneys. In order to ensure confidentiality, I asked the attorneys not to mention the names of any of the clients that they have worked with. This study is likely to be transferable to other groups of probate attorneys who work on contested will legal matters.

### **Dependability**

Dependability refers to the constancy of data in certain conditions (Diane, 2014). If the study is dependable, the methods of the study should be similar if the study is

conducted a second time. In order to ensure dependability, I looked at other qualitative studies that interviewed attorneys before forming the interview questions to gain insight into how to form them. Although I did not find studies of probate attorneys, I found other interpretive phenomenological studies that interviewed attorneys based on their experiences. For example, Baten (2016) interviewed attorneys to study their lived experiences and perceptions of the ethical dilemma of using technology in the courtroom. Further, I had probate attorneys review the interview questions before finalizing them.

### **Confirmability**

Confirmability – the extent to which the participants’ results affect the study in comparison to the researcher, bias, or motivation – was also established in this study. In order to ensure the confirmability of this study, I used detailed evidence and kept a record of all my methods and procedures in the study. By doing this, others are able trace my findings and replicate my study.

### **Ethical Procedures**

Prior to the study, I obtained approval from the Institutional Review Board (IRB, approval number 06-28-19-0355403), which is a requirement of Walden University. In addition, I received permission to advertise from the local bar association probate sections for permission to advertise my research via email. Before sending e-mails to any attorneys at law firms, I received signed permission from the office managers of those firms. There was no pressure to respond to any of the e-mails or phone calls. I had planned to carry out this process in such a manner that if I was not able to find enough



participants in the first round of advertising, I would continue the same process again until I got enough participants to launch the study.

The attorneys who responded to the initial announcement and were qualified to participate in the study received a packet before the study began, which contained a consent form that they had to sign and additional information on the confidentiality of the study, purpose of the study, role of the researcher, and their role. In order to ensure confidentiality and anonymity, each participant was given an identification number with their packet, which was used throughout the process.

Since there is a possibility of psychological distress during any interview, the participants were made aware of this possibility, and they were informed that they had the right to discontinue their participation in the study at any time. Some participants may experience distress on disclosing personal details about experiences that may have been negative ones; while this was unlikely; mental health resources were made available to them.

The participants had complete control over when, where, and how they wanted to respond to the interview questions. In order to minimize privacy concerns, the researcher prompted the participants to choose the location where they would like to be interviewed either in person or via phone interview.

The interviews were recorded in audio files, and the recorded files did not contain any names referring to the participants but used identification numbers. When not in use, the recordings were encrypted and saved on an external drive.

All e-mail communications were copied to a word processing file and all identifying information were removed. Additionally, the e-mails were password protected and identified solely through the participant identification number. Additionally, all word processing and electronic files were password protected and saved on an encrypted removable storage device. When not in use, the drive was locked up in a file cabinet in the researcher's office. The computer was also backed up by Carbonite back up system. Other potential ethical issues were considered for this study but seemed unlikely to occur as the researcher had no conflicts of interest and no incentives were used.

All the participants were required to sign an informed consent form to act as evidence for their consent to participate in the study. As outlined by university protocol, the recorded information was collected, coded, organized, and then kept in a secure location in a locked file cabinet for a period of five years. All the documents and recordings related to the study, including notes and communications, will be shredded at the end of the five-year time frame. Additionally, all the data that was stored in the drive will be reformatted, thereby safely destroying it.

### **Summary**

This chapter provided an overview of the methodological approach that was used in the study. All the required information about the study that the participants received, such as the research questions, the consent form, and the interview question document, were discussed. Additionally, explanations have been provided on the type of study to be conducted as well as the rationale and procedure for sample selection, instruments for data

collection, and any potential ethical concerns. Further, information on the credibility, transferability, dependability, and confirmability of the study were identified.

## Chapter 4: Results

### **Introduction**

The purpose of this phenomenological study was to explore and understand the lived experiences of probate attorneys and their perspectives on the importance of the legal concept of lucid interval for determining TC in contested will cases. The implications of positive social change include an in-depth understanding of the experiences that probate attorneys have in their proceedings and helping people to resolve family disputes. This may limit the practice of family members taking advantage of those with less of a “sound mind” for inheritance money.

The following research questions guided this study:

RQ1: How do attorneys understand lucid intervals and cognitive fluctuations in a testator’s capacity to sign a will?

RQ1a: How is this experience useful for them in contested will cases?

RQ2: What is the attorney’s experience in using forensic psychological reports in contested will cases?

In this chapter, I describe the study setting, population sample, methods used for data collection, and the common themes in the interview responses of the participants in the study.

### **Study Setting**

The study setting was different for each participant: Participant 1 was interviewed in her apartment, P5 was interviewed in a quiet hotel lobby, and P6 was interviewed at his office. Participants 2, 3, and 4 were interviewed telephonically, and they were each at

their offices in Dallas, Texas, during their interviews. All the interviews were recorded, and each participant chose the venue of their interview. There were no distractions in either the telephone calls or the live interviews.

### **Demographics**

The study sample included six probate attorneys: three Caucasian males, two Caucasian females, and one African American female. Three out of the six attorneys who were interviewed had more than 20 years of experience with probate law, and one attorney had less than 10 years of experience. Four attorneys were around forty-five years old, and two attorneys were below forty years of age. Two of the attorneys practiced in Georgia and four of them practiced in Texas. All attorneys who participated were working as full-time probate attorneys and had had experience in contested will cases with dementia and the concept of lucid intervals.

Table 1

#### *Participant Demographics*

Participants	Age	Gender	Ethnicity	Legal experience (in years)
P1	50	Female	Caucasian	25
P2	60	Male	Caucasian	35
P3	33	Female	African American	8
P4	48	Female	Caucasian	20
P5	36	Male	Caucasian	4
P6	49	Male	Caucasian	16

### **Biographical Sketches**

The biographical sketches of the participants were provided in numerical order from 1 to 6. This section contains the participants' backgrounds as probate attorneys.

**P1.** P1 is a 50-year-old Caucasian female. She has been a probate attorney with a prestigious law firm for 20 years. She is an experienced litigator and has conducted many contested will and guardianship cases that have involved dementia. She wanted to become a probate attorney because she wanted to protect the vulnerability of the “little guys.”

**P2.** P2 is a 60-year-old Caucasian male. Before becoming a probate lawyer, he had earned a business degree. He stated that this has helped him become well versed in individual financial disputes that present themselves in probate law. He enjoys being a probate lawyer because it gives him an opportunity to help clients resolve stressful emotional business situations.

**P3.** P3 is a 33-year-old African American female. She has focused her career on helping children and families. While her primary focus was not been probate law, she has participated in many contested will cases that have involved dementia in probate courts.

**P4.** P4 is a 48-year-old Caucasian female. Although she has been practicing law for twenty years, she has been focusing on the probate specialty for the past thirteen years. She enjoys working in probate because it important for her to keep family relationships intact.

**P5.** P5 is a 36-year-old Caucasian male. He is an Iraq War veteran, and he has been a practicing lawyer for 3 years. He is in a private probate practice and has done many guardianship and contested will cases.

**P6.** P6 is a 49-year-old Caucasian male who has been a practicing law for 15 years. He went into probate law because he had a desire to help people, and he did not

want the drama that came with family law. He enjoyed the strategies and problem solving involved in helping families settle their issues. He has primarily worked with guardianship and contested wills.

### **Biographical Summary**

The participants were of different ages and had different experiences as probate attorneys. All participants had a common interest of helping others, which led them into the field of probate law. They all had knowledge of dementia and experience with dementia in guardianship proceedings and contested will proceedings. Some participants had more experience with guardianship than contested will proceedings, but they understood the nature of contested wills enough to participate in the study.

### **Data Collection**

The recruitment of the participants took about 1 month after the approval was obtained from the Walden University IRB. After IRB approval, I immediately placed Facebook ads to advertise about this study on attorney networking groups. I also sent out an announcement e-mail regarding this study to attorneys I knew in Dallas and in Atlanta, Georgia, and I asked them to send a mass e-mail to attorneys they knew who would be interested in participating in the study. I explained that I could not solicit participants myself. Soon, participants contacted me regarding their interest in the study, and I sent them a follow up e-mail with more information on the study. When they expressed more interest, I called or e-mailed the participants and scheduled a time for the interview. Three participants were interviewed on the telephone and three were interviewed in

person. Before the interview, each person completed a consent form and were given a copy of it. Further, each participant agreed to have their interview recorded.

Each interview lasted for 25–30 minutes, which was disappointing for me as I believed that the interviews would last longer. However, I realized that the attorneys did not have a lot of time, and they wanted to keep it short owing to their busy schedules. I do not believe that my questions had caused them to give short replies; instead, I believe that their answers were precise and brief because they are busy people who are accustomed to quick responses in litigation. Further, I believe that I was able to gather the data that I needed from their responses for the purposes of my study.

### **Data Analysis**

Following the completion of the interviews, I analyzed the data through Colaizzi's method of phenomenological enquiry (Edward & Welch, 2011). This is a seven-step method created by Colaizzi to derive humanistic meaning and themes from the interviews (Edward & Welch, 2011). These steps include transcribing recorded interviews, extracting significant statements that are directly related to phenomenon (coding and nodes), creating formulated meanings (themes), creating theme clusters, synthesizing theme clusters to describe them, finding symbolism, and following up with the participants for validation of the findings. The interviews were self-transcribed, and I spent many hours reading through participants' responses. Their responses were eventually broken down into four themes.



## **Coding**

After reading through the interview transcripts, I began the coding process. This process involved looking for patterns and connections related to the relevant research questions and responses from the participants. I analyzed the transcripts for keywords, phrases, paragraphs, and sentences that added to the experiences of the participants. Based on the interview questions, I found 10 nodes, which I used in NVivo to explore the transcriptions and find significant statements (see below). I broke the NODES down to four themes that are directly related to the research questions.

## **Themes**

### **Theme 1**

Theme 1 was: Probate attorneys must have a basic understanding of dementia for contested will cases. The consensus among the participant attorneys I interviewed was that dementia involves some type of slow, progressive brain deterioration by which people become unable to care for themselves, and they rely on others to take care of them. All the participants who I interviewed equated dementia with Alzheimer's disease, which is the most well-known form of dementia.

P1 explained that dementia is based on a person's ability to understand the environment around them: "They can have great recall from things in the past, but they have terrible short-term recall, and they forget family members names; they can't do what we call the activities of daily living." P1 focused on the person affected with dementia and the sadness involved when someone is incapacitated and cannot make decisions.

P2 explained that dementia is easy to determine: “Dementia is a fairly predictable, progressive disease, and lots of dementia may come on quickly and less predictively.” Similar to P1, P2 agreed that dementia clients are unable to take care of themselves and handle their daily affairs.

P3 agreed with P1 and P2 that dementia affects decision making but it depends on the severity of the illness about the potential for a client to maintain power of attorney.

P4 explained the different types of dementia and their severity: “My understanding of Lewy body is that it’s worse...It progresses faster, and it also causes hallucinations and some other unpleasant side effects.” P4 acknowledged that people with early dementia can still make financial decisions.

P5 explained that the biggest problem with dementia is proving that a person was competent at the time that they signed the will. P5 acknowledged that probate cases become more expensive when there are allegations of testator incapacity due to dementia.

P6 explained the importance of relying on experience when working with a client with dementia to be able to make a capacity determination before signing a will. This response is consistent with other participants who rely on their experience to avoid a problem with a client signing a will.

All of the responses from the participants demonstrated their knowledge of dementia. While their responses varied based on their experience, basic understanding was necessary for all of them.

**Theme 2**

Theme 2 was: Lucid intervals do not affect the validity of a will. The consensus among the participants that were interviewed is that they had never used a lucid interval argument in their probate proceedings. In fact, P6 stated that he would question the credibility of an attorney who would use a lucid interval argument.

P1 explained that the lucid interval is like being “drunk” and everything becomes vague. P1 also acknowledged that a person can have a lucid interval and execute a will because there is no uncertainty. P1 agreed with other participants that the lucid interval is part of a greater argument to demonstrate that a client had the capacity to sign a will.

Unlike P1, P2 termed the lucid interval “mythical.” P2 disagreed with P1 that a will could be executed during a lucid interval because it would be invalid based on a person’s overall capacity. P2 acknowledged that other attorneys use the lucid interval argument but is skeptical about the validity of the argument enduring in court.

Contrasting to P1 and P2, P3 never used the term lucid interval or saw it argued in court.

Similar to P3, P6 did not experience many cases involving the lucid interval. P6 also agreed with P2 that the most important aspect of serving clients with dementia is determining if they have the ability to sign a will.

Based on the responses of the participants, the lucid interval is not a factor that should contribute to a testator having a legal ability to sign a will. Rather, it is part of a greater argument of overall testator capacity.

### **Theme 3**

Theme 3 was: Dementia would affect a testator's ability to sign a will. The consensus of the interview responses concluded that dementia would affect a testator's ability to sign a will because they may not understand everything that they own or have in their possession. Therefore, they may be vulnerable to undue influence from others, and they may not have the capacity to sign a will and determine who they would like to have their inheritance. The consensus among the participants in the study was that it depended on what level of dementia the person had and how much their disease had progressed. Therefore, it is important for the attorney to pre-screen their clients and possibly conduct a contemporaneous psychological assessment to determine the level of understanding the testator had of their property before they signed the will.

P1 emphasized that the most important aspect of having capacity for signing a will is knowing the bounds of your property and this can be achieved for a person with dementia. P2 agreed with P1 about the standard of capacity to sign a will knowing one's property: P2 stated that the dementia has to be severe for a testator to be incapacitated and that the "bar is low for capacity." P4 agreed with P2 that it is difficult to overturn a will based on dementia: "You really need strong evidence to overcome the testator's right to give property away and to overcome the witnesses."

Based on the responses of the participants, it is difficult to prove testator incapacity. However, if a person has dementia and lacks understanding of their overall property, this would be a problem for executing a will.

#### **Theme 4**

Theme 4 was: Forensic psychological reports are useful for a contested will case. Based on interview responses, these forensic reports are useful if they are contemporaneous to the signing of a will rather than postmortem. However, they are helpful postmortem if the psychologist is an expert and understands dementia enough to convince a jury about his methods of study.

P1 acknowledged that psychological reports are useful when they are based on a broad study that is specific to the topic. P1 appreciates when an expert can convince a jury regarding an argument in a contested will case. P2 and P6 also recognized the importance of the assistance of a psychological report for an argument: “Well, if you have them, it’s like the Holy Grail because even from a psychiatric standpoint, like I could have a gain,” stated P6.

P2 found psychological reports to be useful especially if they are contemporaneous with the signing of a will.

In contrast P3 and P4 found psychological reports less helpful. P3 mentioned that it is difficult to get a psychological expert to acknowledge a lucid period for someone with dementia. P5 found psychological reports less helpful because they do not report on brain functioning. Rather, P5 gets reports that come from state hospitals that do not address the dementia issue that is part of the contested will argument.

Based on the responses of participants, psychological reports and expert witnesses are helpful when their arguments are convincing regarding testamentary capacity. They

are more helpful before a will is signed and when they include a neurological functioning component.

### **Evidence of Trustworthiness**

#### **Credibility**

There was trustworthiness in this study through the relationship between the researcher and the subjects. In this phenomenological qualitative inquiry, trustworthiness began with developing a respectful, trusting, and honest relationship between the researcher and the participants. The development of this relationship began from the time of recruitment. It is the responsibility of the researcher to protect the research participant from harm (Bromley, Mikesell, Jones, & Khodyakov, 2015). I treated participants with respect and dignity throughout the process, and all of their questions were answered prior to commencing the interview and during data collection as required. The participants provided thick, context-rich responses to the interview questions. To increase credibility, member checks were performed throughout the interview process. Following the completion of the interview process, the collected data was recounted to the participant to confirm accuracy of information.

#### **Transferability**

To establish transferability, this study provided a table with the demographic characteristics of the participants and details of the settings and processes used to carry out this study. The findings provided rich descriptions that will allow other researchers to assess the potential transferability of the study to a setting of their own (Miles et al., 2014).

## **Dependability**

Dependability was achieved by employing consistency in this research inquiry. I developed six interview questions, which were assessed and approved by subject matter experts in the field, to answer two research questions and one sub question. An interview protocol guide was used during the interview to ensure that the interview questions were asked in the same order. In addition, the role of the researcher was described explicitly (Miles et.al.).

## **Summary**

The purpose of this phenomenological research study was to explore how probate attorneys understand lucid intervals and dementia in contested will proceedings. Six probate attorneys participated in the study, and interview questions were designed to elicit responses that pertained directly to the research questions to gain a better understanding of how the participants understood and used dementia, lucid intervals, contested wills, and psychological reports in their professional work. The responses to the interview questions demonstrated the participants' understanding of dementia and its importance while working with contested will cases. However, their responses demonstrated that lucid intervals had a minor role in their decision making. Further, psychological reports can be beneficial for helping attorneys with their contested will cases.

Chapter 5 summarizes the findings and discusses the limitations of the study, recommendations for future research, implications for social change, and the conclusion.

## Chapter 5: Discussion, Conclusions, and Recommendations

### **Introduction**

The purpose of this study was to explore and understand the experiences of probate attorneys and their perspectives on the importance of the legal concept of lucid intervals for determining TC in contested will cases. According to the concept of lucid intervals, a person has a period of clarity in which their ability to make thoughtful choices is preserved (Mart, 2016). This is an important concept for TC cases in probate because a major challenge to TC is the common medical disease of dementia (Shulman et al, 2005). For the purpose of TC, a lucid interval has been defined as the idea that an individual who suffers from mental illness or a neurological condition may have periods in which his or her ability to reason and make thoughtful choices is preserved (Mart, 2016). However, there is a gap in the research on the effect that dementia has on TC (Peisah et al, 2014). Furthermore, there have been questions in research about the validity of a lucid interval as a legal argument and the way that it applies to certain types of dementia (Shulman et al, 2015). In this study, I used an IPA approach to explore the experiences of six probate attorneys and to gain an understanding of their experiences with lucid interval, dementia, and TC cases. I conducted semistructured interviews with the participants to answer the following research questions:

RQ1: How do attorneys understand lucid intervals and the cognitive fluctuations in a testator's capacity to sign a will?

RQ1a: How is this experience useful for them in contested will cases?



RQ2: What is the attorney's experience in using forensic psychological reports in contested will cases?

The results yielded four themes: Probate attorneys must have a basic understanding of dementia for contested will cases, a lucid interval does not affect the validity of a will, dementia would affect a testator's ability to sign a will, and forensic psychological reports are useful for contested will cases. In this chapter, I interpret my findings and results and apply them toward future research and positive social change.

### **Interpretation and Findings**

In this study, I identified four themes to provide more clarity to the understanding of probate attorneys and their experience regarding lucid intervals and dementia in TC cases. In the following subsections, I discuss these themes in relation to literature to analyze and extrapolate potential meanings from the results of the study. These themes fill the gaps in literature on the effect of dementia on TC.

#### **Theme 1**

Theme 1 was: Probate attorneys must have a basic understanding of dementia for contested will cases. In England, dementia is the second leading cause of death and in 2013 it was the leading cause of death among females (Jones, 2015). In the United States, AD is the sixth leading cause of death (Makary & Daniel, 2016). Because probate attorneys deal with end of life issues, it is important for them to understand dementia. This is an important concept for attorneys working with dementia clients (Pietsch, 2015).

*Charfoos V. Schultz* (2009) and *Nebraska State Bar Association v. Neumeister* (1989) are two legal cases where the attorneys found themselves in trouble for having

knowledge of mental issues or lacking knowledge of mental issues. In *Charfoos V. Shultz* (2009), the attorney was sued for malpractice because he felt his client was incompetent and bequeathed the estate to another family member. In this case, the attorney had knowledge of his client's dementia, and he still helped the client bequeath their estate to another family member. The attorney most likely had knowledge of dementia and disregarded that knowledge. In *Nebraska State Bar Association v. Neumeister (1989)*, the lawyer did not withdraw the legal representation of a mentally incompetent client. In this case, the lawyer may not have had enough knowledge of dementia, and he allowed his mentally incompetent client to go through contested will proceedings. Both cases demonstrate that knowledge of dementia itself is not enough. However, acting on that knowledge can make a difference in outcome.

In my study, I found that participants felt obligated to learn as much as they could about dementia because their clients must have a basic understanding of the will. The participants had different kinds of knowledge about dementia, but they were all able to understand that dementia is a progressive illness that has a profound effect on a person's decision making. The participants understood that there are different levels of dementia, and all of them mentioned AD as a common type of dementia. None of the participants mentioned DLB or FTD. Dementia research is evolving, and this can have a direct impact on probate law. It is vital for probate attorneys to understand the different types of dementia and to keep updated on scientific research so they can give the best service to their clients.

**Theme 2**

Theme 2 was: Lucid intervals do not affect the validity of a will. The lucid interval argument is commonly made to demonstrate that people who live with dementia have the TC to sign a will (Van Dyk et al, 2016). Still, there are questions in the research about the validity of lucid intervals in certain types of dementia (Shulman et al, 2015). In my study, the participants recognized lucid intervals as a concept, but they did not believe it had an impact on the outcome of decisions in TC cases. In fact, one participant referred to lucid intervals as “mythical.” Some of the participants were able to recognize the importance of lucid intervals as part of a greater legal argument, but all of them agreed that it could not be the main argument in a TC case. Based on the interviews, the lucid interval was not an integral part of a contested will case. Rather, it was considered part of a greater argument.

**Theme 3**

Theme 3 was: Dementia would affect a testator’s ability to sign a will. Dementia and its subtypes are considered neurocognitive disorders by the DSM-V (APA, 2013). Kraepelin and Alzheimer noticed the disease many years ago and were struck by the effect that it had on memory and physical and psychosocial functioning (Ballenger, 2017). In the present study, there was a thematic consensus amongst the participants that dementia can have a direct effect on TC. The participants agreed that dementia is a progressive disease and it affects people in a variety of different ways. The participants agreed that they would not allow a client who has severe dementia to sign a will. This would present a liability for them and be problematic if it goes to court. However, there

was a clear consensus in the study that dementia would affect the testator's ability to sign a will. Wills begin with the statement "the person must be of sound mind" (Merikangas, 2015, p. 294). The participants of the present study agreed that people can have varying degrees of dementia that can affect the testator's ability to have "sound mind."

#### **Theme 4**

Theme 4 was: Forensic psychological reports are useful for contested will cases. The consensus among the participants was that forensic psychological reports are useful to contested will cases if they add new and important information that can support their case. P1 explained the importance of psychological experts in convincing a jury. P5 was skeptical about hiring someone because of the possibility that the expert would be subjective. P4 discussed how important a neuropsychologist's report could be for discussing a testator's brain functioning and dementia level. All agreed that useful, scientific information regarding a testator's capacity could play an important role in the outcome of their proceedings. The participants believed that contemporaneous psychological assessments are stronger than postmortem assessment because they can prevent a person from signing a will who does not have "sound mind."

Based on the responses of participants in the study, contemporaneous assessment for TC is the preferred exam used by psychologists while the testator is still alive (Brenkel et al., 2018). By assessing the client before they sign a will, the attorneys can preempt a potential contested will case due to level of dementia. The attorneys who were interviewed in the study unanimously agreed that they disallow a testator from signing a will if they knowingly lacked capacity. A contemporaneous assessment by a

psychological expert involves a semistructured interview and a brief psychological exam like the MMSE that Brenkel et al (2018) calls the contemporaneous assessment instrument. Based on the study, these types of psychological assessments are preferable to postmortem psychological assessments because they can preempt the process.

### **Therapeutic Jurisprudence Theory**

The themes of (a) probate attorneys must have a clear understanding of dementia for contested will cases, (b) dementia can affect the signing of a will, and (c) forensic psychological reports are useful for contested will cases, can be viewed through the theory of TJ, which is based on the legal system and the medical (mental health) system interacting for ethical decision making that can impact the legal process. For probate attorneys, it is practicing good ethics to have a clear understanding of the dementia clients they are serving. With the growing number of clients who have dementia, attorneys must be responsible for complex legal, ethical, and practical issues in doing their work to represent the best interest of their clients and fulfill their legal obligations (Frost & Beck, 2016). For this reason, it is important for attorneys to consult with mental health professionals and medical doctors when they have a client who may have dementia.

Dementia affecting capacity to sign a will is a theme that can also be viewed through the lenses of TJ. This is similar to the theme of probate attorneys understanding dementia. If attorneys do not understand their clients, they may put their clients in a compromised position. However, if they are working together with the mental health community for the best ethical decision making, this can be prevented.

The usefulness of forensic psychological reports for contested will cases is another theme from the study that can be viewed with TJ. Just as there is important ethical issues in a legal context, there are ethical decisions in a forensic psychology context. In a contested will case, a forensic practitioner must uphold ethics by understanding the limits of neuroscience methods as it applies to dementia and translating this information into a form that is understood by probate attorneys (Morse, 2018).

Another aspect of TJ is sensitizing the legal system and creating awareness of mental issues and how they may intersect with the law for legal decision making (Marson et al, 2004). In this study, there was a consensus among the participants that dementia was a factor in their decision making for their legal cases. If a person had severe dementia, all agreed that they could not let them sign a will. Although the lucid interval was not a major fact that changed a decision in their legal arguments, most participants said that the lucid interval was part of a greater argument.

### **Limitations to the Study**

As with any study, the current study had limitations. Qualitative studies are usually less generalizable than quantitative studies (Creswell, 2014). The present study only had six participants who are not necessarily representatives of the entire population of probate attorneys. The participants were selected based on their experience with dementia, lucid intervals, and contested will cases. However, their levels of experience were different. Some participants had worked as probate attorneys for many years and some for just a few years. The sample was limited because it may not be representative of a larger group of probate attorneys.

Time was a crucial limitation in this study. Attorneys charge a large amount of money per hour of their time. I asked each attorney for an hour of their time, and I found that the interviews averaged only thirty minutes. Attorneys are known to have less accessibility because there are many demands on their time (Moore, Plano, Foote, L. A., & Dariotis, 2019). The attorneys that participated in the present study made it clear that they did not have much time, which caused me to rush and ask less follow up questions because I was sensitive to the time and the needs of the participants.

Although the interview questions were formulated with the assistance of a probate attorney, I believe that the study was limited due to the number of questions. Asking more general questions about the participants' experiences in probate court would have helped to expand the study. For example, asking each participant about their most memorable experience with a dementia client in probate court may have added to the results of the study and indirectly provided an answer to the research questions.

My own experience with probate attorneys may have caused a bias in this study. I have worked as a forensic expert in probate court before. My knowledge of forensic assessment and probate attorneys may have been a limitation for me in this study. While asking the interview questions, I may have had a certain intonation that could have led the participants to answer the questions a particular way. However, I believe that my questions were general enough to offset this bias.

### **Recommendations**

I believe that this study would be enhanced by a quantitative study that is more generalizable. Surveying a random sample of probate attorneys would give beneficial

results to the field about the impact of dementia and lucid intervals on TC in contested will court. This type of study would make these issues more relevant on a larger scale.

As scientists learn more about dementia, it is important to conduct new studies using this new knowledge that we are discovering every day. More research is needed in the field of forensic psychology to understand the brain and its decision-making capacities. Ultimately, the ability to make a decision is the most important phenomenon for a testator.

Further research on ways that forensic psychologist and neurologist can be helpful to attorneys is recommended. Based on TJ, these professionals can work together to better serve the clients and their families. Further research on this interplay is recommended.

### **Implications**

Family conflict over inheritance money has been a problem for centuries (de Witt et al, 2013). This can destroy family relationships (de Witt et al, 2013). This lack of communication and understanding may lead to a contested will situation, which involves understanding the initial wishes of a testator.

This study was successful in providing information that can affect social change because it provided important insight from legal professionals that are involved with assisting families on a daily basis. These professionals can help families by pre-empting issues that lead to family conflict because of contested wills. With TJ, the study has implications for attorneys and the forensic mental health field because it demonstrated that it is important for attorneys and clinicians to understand the effects that dementia has



on decision making. Working together toward a common goal of resolving family conflict can affect social change. This resolution will benefit families and people as they prepare to sign a will to bequeath their estates. This general understanding of the ramifications of dementia can help attorneys be more sensitive to the needs of their clients and create a more peaceful atmosphere in probate courts.

The study also benefits the field of forensic psychology. As these reports and expert opinions are important for court decisions, it is important for probate attorneys to work closely with forensic psychologists to make the best decisions on behalf of their clients.

### **Summary**

The findings in this study helped to close the gap in research on TC. The themes of this study were as follows: lucid intervals do not affect the validity of a will, dementia would affect a testator's ability to sign a will, and forensic psychological reports are useful for contested will cases. These themes could drive future research and, possibly, a quantitative study that would be more relevant to a larger population of attorneys and psychologists. Acquiring a better understanding of dementia is important for being an effective attorney and psychologist in probate court. This study will help attorneys and psychologists work together more and make the best cases for their clients in probate court.

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## Appendix A: Interview Questions

1. What do you know about the disease of Dementia, and what is your experience with it? Please tell me everything you know about it.
2. What do you know about the lucid interval, and what are your experiences with it?
3. Please recount some experiences of cases that you have won using the argument of lucid interval.
4. Please recount some experiences of cases that you have lost using the argument of lucid interval.
5. What challenges have you faced in cases that involved lucid interval and dementia?
6. Please explain how dementia can affect a testator's ability to sign a will.
7. How are forensic psychological reports useful for contested will cases?