

How to read these pages

Two petitions: annul Eli's marriage to Paula (clear and convincing evidence) and set aside his will (preponderance). Every operative phrase is highlighted in the color of the rule it serves, and the red arrow says what the fact does and which way it cuts. Dr. Bush's unrebutted testimony proves BOTH claims; a prior incompetence finding alone is not enough (Tarr).

-  Marriage standard (Green): understand nature, effect, consequences; clear & convincing
-  Will standard (Dade / Tarr): know act, property, natural objects of bounty; preponderance
-  Dr. Bush's cognitive evidence (MMSE, dementia, permanent + progressive)
-  Timing: capacity is measured at each date (marriage Jan 15; will Oct 7)
-  Eli's own confusion (thought Janet/Vera were his wives; 'she takes care of me')
-  Suspicious circumstances (secrecy; online-kit will, interested drafter + witnesses)
-  Case comparison (like Simon; unlike Green and Dade)
-  Concessions + rebuttals of Paula's points

Bottom line: Eli could not understand marriage in January 2019, and could not comprehend his estate in October 2019, so the marriage is annulled and the will is set aside.

COOK AND STONE LLC
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MEMORANDUM

To: Examinee
From: Robert Cook
Date: February 25, 2020
Re: Eli Doran matter

We represent Carol Richards, the legal guardian of Eli Doran, her elderly uncle. Carol has regularly visited Eli since his wife, Janet, died four years ago. Eli is now 86 years old. Carol has observed Eli’s gradual decline in cognitive abilities and, about two years ago, helped him move into an assisted living facility operated by Paula Daws.

Three months ago, Carol was shocked to learn that Eli and Paula Daws had married in January 2019 and that Eli had signed a new will on October 7, 2019, leaving his entire estate to Paula. Carol asked for our help. On her behalf, we instituted guardianship proceedings, and two months ago, the court found Eli incompetent as of that date and appointed Carol as his legal guardian. However, that determination **does not resolve the issues of** Eli’s capacity to consent to marriage to Paula Daws more than a year ago or his testamentary capacity to execute a will four months ago.

We have filed, on Carol’s behalf as Eli’s guardian, two petitions: first, **to annul the January 2019 marriage** of Paula and Eli, and second, **to set aside the October 2019 will**. Yesterday the court held a hearing on both petitions. I attach excerpts of the hearing testimony. Instead of oral closing arguments, the court ordered the parties to submit written closing arguments.

Please prepare the written closing argument to be submitted to the court. Follow our office guidelines in drafting your argument. We will not have a chance for rebuttal arguments, so **anticipate the arguments that Paula Daws will present** and rebut them. Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your argument.

-  **KEY:**
the incompetence finding does NOT settle capacity at the marriage or the will (Tarr).
-  **Claim 1:**
annul the marriage.
-  **Claim 2:**
set aside the will.
-  **Work product:**
a persuasive closing argument to the judge.
-  **No rebuttal round:**
raise and answer Paula's points yourself.
-  **Weave the facts into the argument instead.**

COOK AND STONE LLC

OFFICE MEMORANDUM

To: All lawyers
From: Robert Cook
Date: September 5, 2017
Re: Guidelines for drafting written closing arguments

Written closing arguments are delivered to a judge. They need to address the applicable law as well as the facts. Be convincing and persuasive but avoid theatrics or overly emotional arguments. Judges respond negatively to exaggerated or unsubstantiated arguments. Convince the judge, as the trier of fact, that we have satisfied all the elements or requirements for each of our claims and have done so by meeting the required burden of proof. Organize the closing argument one claim or issue at a time.

For each claim or issue:

- Draft carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the judge should take the position we are advocating and should be a specific application of a rule of law to the facts of the case. For example, improper: Petitioner Is Entitled to Receive Spousal Support. Proper: Because Petitioner Is Unable to Work Due to a Permanent Disability, She Is Entitled to Receive Spousal Support.
- State the legal standards at issue.
- Marshal all the relevant evidence that has been admitted and show how the evidence satisfies the proof requirements for each claim.
- Demonstrate how the witnesses are credible and how those challenging our case are not credible.
- Do not summarize each witness’s testimony but refer to the testimony and other evidence to show how they support your argument.

Be clear as to the relief requested. Finally, convince the judge that the relief requested is fair and just.

-  ← Full-sentence point headings that apply a rule to the facts.
-  ← State each standard + burden before the evidence.
-  ← Marshal the record; show it meets each element.
-  ← Sell your witnesses (Bush, Carol); undercut theirs (Simms, Paula).

Excerpts from Hearing on February 24, 2020

Judge: This is a hearing on two matters I consolidated for the purpose of judicial economy. The petitions before me are first, to annul the January 15, 2019, marriage of Paula Daws and Eli Doran, and second, to set aside the will signed by Eli Doran on October 7, 2019.

In a previous ruling, I concluded that Eli Doran was incompetent as a matter of law and entered an order making his niece, Carol Richards, his legal guardian. A determination of incompetence is a legal finding that a person lacks the mental ability to understand problems and make decisions. Competence is similar to but not the same as capacity. The degree of capacity required for a legal transaction varies with the task at hand. Today I will hear evidence on whether Mr. Doran had the capacity to consent to marriage when he married Paula Daws in early 2019 and whether he had testamentary capacity when he signed the October 7, 2019 will.

Representing petitioner Carol Richards as guardian for Mr. Doran is Attorney Robert Cook. Representing respondent Paula Daws is Attorney Dee Andrews. The parties have stipulated that these items may be admitted into evidence: the January 15, 2019 marriage certificate, the October 7, 2019 will, and the will executed by Mr. Doran in 2016. As is the court’s practice, I will require counsel to file written closing arguments. Proceed.

EXCERPTS OF TESTIMONY

DIRECT EXAMINATION OF CAROL RICHARDS BY ATTORNEY ROBERT COOK

Q: How do you know Eli Doran?
A: I am Eli’s niece. Eli was married to my Aunt Janet, who died about four years ago.
Q: How often did you have contact with Eli?
A: After my aunt died, I regularly took Uncle Eli to the bank, to the barbershop, and on any other errands. We also went out for barbecue, his favorite, usually once a month. And about once a month, I took him to his church and then to dinner at my home. I also took him to his family doctor.
Q: What did you notice about Eli over time?
A: A bit over two years ago, I noticed that he asked questions that he should know the answers to—like where I worked, even though he knew I was retired, and whether I was married, even though he knew I was. He was not dressing well. He was forgetting to pay bills. I saw

- One hearing, two petitions: marriage + will.
- The judge's own words: incompetence is not the same as capacity (Tarr).
- Issue 1, as the judge framed it.
- Issue 2, as the judge framed it.

them stacked up on the table. I suggested to Uncle Eli that I help him with his finances and that we find someone to help out in his home. He agreed.

Q: Did you find someone who could help?

A: Yes, I hired Vera Wilson, a friend from his church, to cook and clean for him. That worked well. But his **checkbook was a mess**. Some entries missing, some entered twice or three times. In January of 2018, I asked Dr. Ricci, his family doctor, about Eli.

Q: What did you learn from the doctor?

A: Dr. Ricci said that I should **place Uncle Eli in an assisted living facility**. I had heard that Paula Daws had a home that might work out, so I called her.

Q: Did you meet with Paula Daws?

A: Uncle Eli and I went to Paula’s home. Two men lived there, and they seemed happy. Eli’s monthly pension could pay the monthly fee for the facility. Eli moved in almost two years ago. We were able to sell his home quickly. He had paid off the mortgage years ago and put the proceeds of the sale into his savings account. His pension went directly into his checking account. We arranged for monthly direct payments from his checking account to Paula so that he did not have to worry about his finances.

Q: At the time Eli moved into Paula’s home, were you his legal guardian?

A: No. I asked Uncle Eli if he wanted to live in a place where someone could help him, and he said yes. There was no court involved.

Q: After Eli moved in, did you continue to see him?

A: Yes. After he moved into Paula’s, I brought him to my home for dinner almost every Sunday. He was becoming ever more forgetful. He frequently asked me what day it was, when I had gotten the new car, when I had bought the house. A few minutes later, he would ask the same questions all over again, numerous times during the visit. He often did not recognize my husband or children, though he had known them for years.

Q: When did you learn of the marriage between Eli Doran and Paula Daws?

A: One Sunday, about three months ago, I called Paula to say that I would take Uncle Eli to my home for Sunday dinner. She told me they had married.

Q: Did she say when they had married?

A: Yes, she said some time ago. In fact, I later found out it was a year ago, in January 2019.

Q: Did you discuss this matter with Paula?

•  ← **Carol saw the decline first-hand:**
checkbook errors.

•  ← **The family doctor recommended supervised care:**
decline predates the marriage.

A: Not for a while. I was shocked and worried. Eli had once asked Vera, his cleaning lady and cook, to marry him. So I wasn't sure what it meant that Eli and Paula were married. But I became quite worried when Paula told me that Eli had signed a will giving her everything.

Q: Why did that concern you?

A: For one thing, I knew that Eli had had a serious decline in his cognitive abilities and did not know what he was doing. Plus, I had seen Eli's will from 2016. After my aunt died, Eli saw his attorney and executed a will leaving his estate to his church. He loved that church. And I knew that now, having sold his house, he had some savings that could benefit the church. That is when I called you.

Q: Did Eli ever tell you that he and Paula were married?

A: Not at all.

CROSS-EXAMINATION OF CAROL RICHARDS BY ATTORNEY ANDREWS

Q: Since Eli moved into Paula's home, she has become more important to him than you, and you are jealous of Paula, aren't you?

A: No. I wanted him to be safe and cared for and was glad to find a place for him until I learned how Paula was taking advantage of him.

* * *

DIRECT EXAMINATION OF DR. ANITA BUSH BY ATTORNEY COOK

Q: Dr. Bush, what is your specialty?

A: I have a Ph.D. in clinical psychology and practice as a forensic clinical psychologist. I work with patients who have cognitive or mental disorders.

Q: How do you know Eli Doran?

A: Eli Doran was referred to me by his family doctor, who asked me to assess Eli for cognitive functioning. I first saw Eli on May 3, 2018. I interviewed Eli, who was then 85 years old. He did not understand why he was seeing me. He said he was healthy and needed no medicine, though I knew that he took several medications to address some chronic conditions. Eli was not oriented to time. He did not know what day it was or what year it was. He said he lived in his home with his wife, Janet, though I knew she had died two years earlier. Later in the interview, he said he was married to Vera Wilson. I asked who Vera was, and he said she took care of him. I later learned that Ms. Wilson cleaned and cooked for him and that they had never been married. It appeared he equated marriage with

← Eli had proposed to his cook Vera too: he equates marriage with caretakers.

← Carol: Eli did not know what he was doing.

← The 2016 will (with counsel) left everything to his church; the 2019 will reversed it.

being cared for. His niece Carol Richards came to the appointment with him. I asked who she was, and he replied that **she was family and drove him places**. I also relied on the medical records from Eli's family doctor, Dr. Leon Ricci.

Q: What did you learn from the medical records that you relied on?

A: Dr. Ricci was Eli's physician and had seen him regularly over 15 years. Dr. Ricci described Eli as a retired federal meat inspector, attentive to his medical conditions and usually accompanied by his wife until she died. Soon after her death, Dr. Ricci noticed that Eli was forgetting his medications. Then, about three years ago, Dr. Ricci had conducted the Mini-Mental State Exam, MMSE as we call it. The MMSE score for someone of Eli's age, education, and health **should be at least 23**, but Eli's score was 21, showing some cognitive deficiencies. About two years ago, Dr. Ricci learned from Carol Richards that Eli was becoming even more forgetful. Dr. Ricci **diagnosed Eli as having dementia**, type unspecified. Dr. Ricci recommended that Carol find a place where Eli could receive daily care and supervision of his medications.

Q: Did you conduct any assessments when you saw Eli on May 3, 2018?

A: I conducted several assessments that are recommended for testing intellectual capacity. I conducted the MMSE, and Eli's score had declined to 19, a significant drop from when Dr. Ricci tested him. I also evaluated him on the Independent Living Scale. I found that Eli could not pay a bill or verbalize a reasonable understanding of a will. He did not know what it meant to call 911 in an emergency or what a fire alarm was.

Q: What did you conclude from these assessments?

A: Eli suffered from multiple cognitive dysfunctions. These included memory impairment that was severe. He had a significant disturbance in executive functioning, including no ability to plan, problem-solve, reason, or think abstractly.

Q: Doctor, can you explain what that means in terms of Eli's ability to live and function?

A: Eli was incapable of any abstract thinking and incapable of ordinary judgment or reasoning. He lacked the ability to meet his most basic needs and provide for his safety and health. He could not live alone, drive, or manage his medicine or his money. Eli was significantly impaired in his ability to care for himself. He needed 24-hour supervision. I learned that he had moved into an assisted living home where he was cared for. That was a good idea.

Q: Did you continue to see him and assess him?

•  ← **Eli could barely place his own niece:** cognitive confusion.

•  ← Normal MMSE is 23; Eli scored only 21 even three years ago.

•  ← Dr. Ricci's dementia diagnosis, relied on by Dr. Bush.

A: Yes, I saw Eli again on June 21, 2019. I continued to assess his mental state, asking where he lived. He again said that he lived with his wife, Janet. He said that his parents lived in Ohio and that he might visit them sometime, but in fact his parents had been deceased for many years. I asked who had brought him to the appointment, knowing that it was Carol. Eli said that she was his driver. He denied that he was related to her.

Q: How did his performance compare with the first visit?

A: His memory was worse. His cognitive abilities had declined. I repeated the MMSE and his score had dropped to 17, another significant drop.

Q: Did your conclusion about Eli change from the first visit?

A: The only change was that Eli’s cognitive deficiencies were far worse. Eli has a permanent, progressive condition. It only gets worse.

Q: Does Eli have periods of being lucid?

A: I doubt that he has moments of lucidity but if he does, that is not the same as having the ability to exercise judgment.

Q: Doctor, considering Eli’s condition in January 2019, do you have a professional opinion as to whether Eli possessed the mental capacity to consent to marriage?

A: I have an opinion. He did not possess the mental capacity to consent to marriage. He cannot think abstractly about anything or make any rational judgments. Eli equates marriage with being cared for.

Q: Do you have a professional opinion, considering Eli’s condition on October 7, 2019, whether Eli had the capacity to execute a will?

A: He did not.

Q: In October 2019, did Eli know who his relatives were or who might have a claim on his estate?

A: No. He did not know who his niece was. He thought he lived with Janet, his deceased wife.

Q: Doctor, in October 2019, did Eli know the nature and extent of his property, his estate?

A: No.

CROSS-EXAMINATION OF DR. BUSH BY ATTORNEY ANDREWS

Q: Doctor, you did not see Eli on January 15, 2019, did you?

A: No. I saw him twice: May 3, 2018, and June 21, 2019.

Q: And you did not see him on October 7, 2019, did you?

A: No.

← Eli thought his late wife was alive:
no grip on reality.

← Eli thought his long-dead parents were alive.

← MMSE fell to 17 (normal 23):
a significant further decline.

← Bush:
permanent + progressive, it only worsens
(bridges the two dates).

← Any lucid moment is not the ability to exercise judgment.

Q: You are not a medical doctor, are you?

A: No, I am not. His medical doctor sought my expertise to evaluate Eli’s cognitive status.

Q: Doctor, under Franklin law, if an elderly person is in danger of being abused or exploited, you are required to call Franklin Elder Protective Services, are you not?

A: Yes.

Q: You did not make that call, you did not report Eli as in need, did you?

A: No. He was getting the care he needed.

* * *

DIRECT EXAMINATION OF PAULA DAWS BY ATTORNEY ANDREWS

Q: When did you meet Eli Doran?

A: Almost two years ago, Carol Richards and Eli Doran came to my home to see if Eli could live there. I had two other men living there; they needed assistance in their daily living.

Q: Other than providing a room, what other services do you offer?

A: I provide a very clean home, three meals a day, and laundry service, and I supervise their medications. Each man has a bedroom, and there is a TV room where they eat, watch TV, and socialize.

Q: What did Eli and Carol tell you when you met with them?

A: Carol did most of the talking and said that Eli’s doctor wanted him to live somewhere where he would be sure to take his medicine. We discussed the fee, and Carol said he could afford that. Carol and Eli arranged for direct payment to me each month, and he moved in.

Q: Tell us about the marriage.

A: Eli was always very pleasant and kind to me. One night as I brought his laundry to him, he said, “You take good care of me. We should get married.” I laughed it off. But a few days later, he took my hand and said, “We should get married.” I asked if he was serious, and he said, “You are nice. I love you.” The next day, I called my minister and got a license, and we were married on January 15, 2019.

Q: And tell us about the will.

A: One day, I said, “Eli, you have a lot of stuff in your room,” and he said, “When I am gone, I want you to have it all.” Again, I laughed it off, but for several days, he said, “I want you to have what I have.” I asked him, “Do you want to make a will?” and he said, “Yes.” I went online and found a will kit for him, but he said, “You do it,” so I filled it in. My daughter and son-in-law witnessed Eli signing it—two witnesses as required!

•  ← **Bush is disinterested:**
retained by the family doctor, not for litigation.

•  ← **Paula's point:**
Bush said Eli was cared for. Answer: care is not capacity, and Bush did not know of the marriage.

Q: Did you force Eli to make this new will?

A: Of course not. I have had several men living in my home, and none of them ever signed a will while they lived with me. Eli kept saying, “I want you to have what I have—you are so kind.”

CROSS-EXAMINATION OF PAULA DAWS BY ATTORNEY COOK

Q: Ms. Daws, isn’t it true that when Carol Richards first met with you, she told you that Eli had had serious memory loss and could no longer make his own decisions?

A: Well, I don’t remember that she said he could not make his own decisions, but she did say that he could not live on his own.

Q: You did not go to Eli’s minister for the wedding, did you?

A: I did not know who his minister was.

Q: You did not invite his niece, Carol Richards, to the wedding, did you?

A: No.

Q: In fact, you did not tell Carol or anyone about the marriage until very recently, correct?

A: Yes, that is correct. Eli is a private man and doesn’t like a lot of fuss about things.

Q: The will that you filled out for Eli on October 7, 2019, provided that all of Eli’s estate was to go to you, isn’t that right?

A: Yes. Like I said, Eli said he wanted me to have everything.

Q: You did not take Eli to his lawyer to have a new will drafted, did you?

A: I did not know he had a lawyer.

Q: Ms. Daws, you have quite a bit of credit card debt, don’t you? About \$15,000 or so?

A: Yes, but so does everyone.

* * *

DIRECT EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY ANDREWS

Q: Rev. Simms, how did you meet Eli Doran?

A: Paula Daws, a longtime member of my congregation, told me that she had met a gentleman who brought her much happiness and that she was in love. She said that she and Eli, the gentleman, wanted to marry. I met them on Wednesday in the church parlor. Eli seemed to be very pleasant and very much in love. I told them I would marry them.

Q: Explain what you mean.

•  ← **Eli's reason for the gift:** gratitude for care, not testamentary understanding.

•  ← Paula admits Carol warned her Eli could not live on his own.

•  ← **Paula concealed the marriage for months:** suspicious.

A: After a few pleasantries, I asked Eli how they met, and he said that he was living at Paula’s and that she was taking good care of him and he loved her. I asked why they wanted to marry. He said that he loved her and the way she cared for him. Later that week I married them with my wife and my secretary as witnesses.

Q: Would you have married them if you questioned Eli’s mental capacity?

A: Of course not. Eli seemed to be very aware that he was getting married. Older people need companionship, and marriage can provide that.

CROSS-EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY COOK

Q: Rev. Simms, you have not been trained to diagnose cognitive functioning, have you?

A: No, but I have counseled many folks and am aware of conditions associated with aging. Eli seemed to know what he was doing as well as many others I have married.

Q: You did not conduct any assessments to determine Eli’s cognitive abilities, did you?

A: No. I am not a doctor.

Q: The extent of your contact with Eli was these two visits in January of 2019, correct?

A: Yes.

* * *

DIRECT EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY ANDREWS

Q: Were you present when Eli Doran signed his will?

A: Yes, I was.

Q: Was he aware of what he was doing?

A: I said, “Eli, do you want my mother to have your stuff when you die?” and he said, “Yes, she takes good care of me.”

Q: What, if anything, have you observed about your mother since her marriage to Eli?

A: She is very happy. She loves taking care of him.

CROSS-EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY COOK

Q: If this will is valid and something were to happen to your mother after Eli’s death, you would inherit what your mother inherited from Eli, right?

A: I guess so. I don’t really understand this legal stuff.

* * *

← Eli's stated reason to marry: she cares for him, not marital love.

← Only Paula's people present; no minister Eli knew, no family.

← Simms is unqualified to assess capacity.

← Simms saw Eli only twice: a thin basis for his opinion.

In re the Estate of Carla Mason Green
Franklin Court of Appeal (2014)

Leslie Beck, the personal representative of the estate of Carla Mason Green (Mason), appeals from a trial court order denying her petition to annul the marriage of her sister Carla Mason and Michael Green.

On October 10, 2012, Carla Mason, age 50, was in the hospital with stage-IV cancer. That evening Mason married Michael Green. The only issue raised by Beck is whether Mason lacked the capacity to consent to the marriage because of the medications she was taking and their effect on her ability to make decisions.

A marriage that complies with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is **presumptively valid**. This presumption comports with strong public policy favoring the validity of marriage. It can be **overcome only with clear and convincing evidence**. This is a more demanding standard than the standard for a preponderance of the evidence because the **right to marry is constitutionally protected**. Evidence is clear and convincing in a case such as this if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage.

The capacity to consent to marriage, a requirement of a valid marriage, is defined as the **ability to understand the nature, effect, and consequences of marriage** and its duties and responsibilities. Each party to the marriage must freely intend to enter the marital relationship and understand what marriage is. Capacity to consent is **measured at the time of the marriage**.

The trial court appropriately ruled that the petitioner was required to present clear and convincing evidence. After a hearing, the trial court concluded that petitioner Beck had failed to present clear and convincing evidence that Mason did not possess the capacity to consent to the marriage. The reviewing court will overturn the trial court’s conclusions only if they are clearly erroneous. A summary of the testimony follows.

For several weeks, Mason, who had terminal cancer, had taken medications to control the pain from the cancer. On the morning of October 10, Mason and Leslie Beck met with Mason’s oncologist in Mason’s hospital room to discuss terminating treatment and beginning hospice care in her home. Mason was alert; she participated in the discussion and made the decision to terminate treatment.

-  ← A FUMDA marriage is presumed valid.
-  ← Rebut the presumption only by clear and convincing evidence.
-  ← Why the burden is higher than a preponderance.

-  ← The capacity definition you apply to Eli.
-  ← Capacity is judged at the wedding date.

On the evening of October 10, respondent Michael Green arrived at the hospital, along with a minister, who had a marriage license. Mason signed the license application, and the minister married Mason and Green, witnessed by a nurse and a medical assistant. These steps met the requirements of FUMDA. On October 11, Mason went home under hospice care. On October 12, Mason executed a Power of Attorney (POA) giving her sister, Leslie Beck, authority to make medical decisions for her. Green regularly visited Mason while she was in the hospital and while she was at home under hospice care. On November 1, Mason died.

Mason’s oncologist testified that the prescribed pain medication had a high probability of creating mental changes in any patient. These changes could interfere with the patient’s thought processes, including the decision to marry. On cross-examination, he admitted that while confusion can arise in patients receiving these medications, patients can and do have periods of lucidity and alertness. The oncologist also testified that on the morning of October 10, when he met with Mason and her sister to discuss transfer to hospice, he believed that Mason had the capacity to make decisions about her medical care and treatment.

The nurse on duty at the hospital on the evening of October 10 testified that Mason was “oriented to person, place, and time and that her mood was appropriate to the situation.” The nurse testified that Mason’s mood brightened when Green arrived and that Mason asked the nurse to witness the marriage.

The hospice nurse present when Mason executed the POA on October 12, two days after the wedding, testified that Mason was “alert and oriented.” Mason told the hospice nurse, “I want Leslie to make decisions so that I can die in peace.” Mason then signed the POA without any objection from Beck as to Mason’s capacity to consent to the POA.

To support her petition, Beck relies on *In re Marriage of Simon* (Fr. Ct. App. 2005), in which the court annulled the marriage of Henry and Nancy Simon after Henry married Nancy while she lived in a residential facility. Beck reads the *Simon* case as concluding that Nancy’s medication made her unable to consent to marriage. However, critical to the court’s decision in the *Simon* case was not the medication but the fact that three weeks prior to the marriage, Nancy suffered the fourth of a series of strokes. Her doctors determined that the strokes were disabling and that she was incapable of receiving or evaluating information and should not make any decisions for herself or others. The doctors testified to this at trial.

← **Contrast:**
Green's patient had lucid periods; Bush says Eli did not.

← **Simon:**
the annulled spouse could not process information, like Eli.
← Simon's disabling strokes parallel Eli's dementia.

Unlike in *Simon*, the evidence here supported the trial court’s finding that Mason had the capacity to make decisions such as to consent to marriage. Mason’s oncologist believed she had the capacity to consent to stopping medical treatment and going home. Her sister, the petitioner here, apparently believed that Mason had the capacity to make decisions when Mason signed the POA. The trial court’s findings were not erroneous.

Also, in the *Simon* case, Nancy and Henry knew each other for only a few weeks prior to Nancy’s fourth stroke. Henry was a medical technician employed at the facility where Nancy lived; he administered a few treatments to Nancy before her final stroke when the doctors ceased these treatments. Nancy and Henry had no prior romantic or other relationship. Henry arranged for them to marry after Nancy’s fourth stroke and just two weeks before Nancy’s death. The court found that not only was Nancy incapable of consenting to marriage but at the time of the marriage, she had no understanding of what marriage is.

In contrast, Mason and Green had been engaged to be married for two years. They had planned for marriage and a life together. They had discussed where they would live in retirement. Mason broke off the engagement when Green was transferred to another town, but they stayed in contact. Later, Mason contacted Green for support when she learned of the cancer. The evidence supported the court’s finding that Mason understood what marriage was and what it involved.

Petitioner failed to present clear and convincing evidence that Mason lacked the capacity to consent to marriage. Therefore, the presumption that the marriage is valid is not rebutted.

Affirmed.

- Green distinguishes *Simon*; argue Eli is on the *Simon* side.
- Simon:**
an aide married a patient with no relationship, like Paula and Eli.
- Green found capacity partly from a two-year engagement; Eli had none.
- Green's couple understood marriage; Eli did not.
- In Green the burden was not met; here it is.

In re the Estate of Dade
Franklin Court of Appeal (2015)

Petitioners Jill and Samuel Dade appeal from the trial court’s decision denying their petition to set aside the 2010 codicil to Matthew Dade’s will. As claimants, the Dades had the burden of proving that Matthew lacked testamentary capacity when he executed the codicil.

In 1999, Matthew executed a will leaving his estate to his adult children, the petitioners. In 2010, he drafted a codicil to his will in which he provided bequests of \$100,000 each to his nephew William Speck, his niece Ann Murphy, and his housekeeper Tanya Hall. The codicil did not disturb the gift in the will of the “rest and residue of the estate” to Samuel and Jill. Matthew died in 2012. The estate has been valued at \$1,000,000; the three gifts created in the codicil were the only specific bequests. The Dades contended that Matthew lacked testamentary capacity when he executed the 2010 codicil due to a long history of alcoholism. They asked the court to set the codicil aside and probate only the 1999 will.

The law requires that the testator have testamentary capacity. That means that the testator must, at the time of executing the will, be capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. A will executed by a testator who lacks testamentary capacity is void. The time for measuring testamentary capacity is the time when the instrument, in this case the codicil, is executed. A party who seeks to prove the lack of testamentary capacity must do so by a preponderance of the evidence.

Jill and Samuel each testified at trial that Matthew had a history of alcoholism, beginning in 2000, two years after his wife (their mother) died. They testified that Matthew had a noticeable decline in cognitive ability, a loss of short-term memory exhibited by the inability to recall names, places, or events during periods of inebriation as well as abstinence from alcohol; that during the last 10 years their father often spoke to their mother as though she was present in the home, even long after she had died; and that their father forgot to pay bills and sometimes forgot to keep appointments such as for the doctor or oil changes for the car.

Dr. Rosemary Cooper testified that in 2005, she had diagnosed Matthew with alcoholism, primarily based on his report that for weeks at a time he would drink from noon until he fell asleep. She testified that Matthew reported that he had these drinking periods around holidays and his wedding anniversary. At other times, he did not drink at all. On cross-examination, Dr. Cooper

- ← **The contestant's burden:**
prove lack of testamentary capacity.
- ← **Dade elements:**
the act, the property, the natural objects of his bounty.
- ← **The bounty element:**
Eli could not identify his estate or his church.
- ← Capacity is measured at execution (Oct 7).
- ← The will burden is a preponderance, lower than the marriage burden.

stated that she was Matthew’s family doctor and was not an expert in cognitive decline. Dr. Cooper also testified that she did not question Matthew’s report of his long periods of sobriety.

Murphy and Speck did not dispute that Matthew was an alcoholic, but each testified to visits with their uncle when he was quite lucid. They each testified that they often visited with him, separately, between 1999 and 2012. During those visits, Matthew discussed his finances and correctly stated his worth, identifying the extent and value of his investments. Murphy testified that Matthew regularly provided updates about Jill and Samuel, and their spouses and children. Speck testified that on several occasions between 2005 and 2012, Matthew expressed the need to reward Hall, his housekeeper, for her years of service.

Matthew’s lawyer, who drafted both the 1999 will and the 2010 codicil, is deceased.

The Dades argued that the diagnosis of alcoholism was sufficient proof of Matthew’s legal incompetence and inability to execute the codicil. This argument is unpersuasive. In *In re the Estate of Tarr* (Fr. Sup. Ct. 2011), the court held that a determination of legal incompetence alone was not sufficient to find that the testator lacked testamentary capacity. A determination of incompetence is a legal finding that a person lacks the mental ability to understand problems and make decisions. Competence is similar to but not the same as capacity. The degree of capacity required for a legal transaction varies with the task at hand. Thus, even if the testator was legally incompetent, the petitioner still had to prove that the testator lacked testamentary capacity.

Assessments of credibility are critical to determinations of testamentary capacity; we will defer to trial court determinations of credibility. The trial court made a credibility determination that because Samuel and Jill Dade were interested in protecting the original gift to them, their testimony about their father’s ability when he drafted the codicil was colored by their interest.

Here, the trial court did not err in finding that the Dades failed to show that Matthew did not know the natural objects of his bounty, that is, those individuals likely to receive a portion of his estate based on their relationship to him. While adding the new bequests, Matthew did not disturb the provision giving the majority of the estate to his children. The evidence also showed that Matthew was informed about his children and their families and aware of the value of his estate. The court found that even if Matthew was periodically disabled due to alcoholism, Matthew told his physician that he had long periods of sobriety between 1999 and 2010, and the physician’s testimony was credible. The trial court properly found that the Dades failed to meet their burden of proof.

Affirmed.

- ← Dade's testator had lucid visits and knew his affairs; Eli did not.
- ← **Dade knew his net worth and his family:** the opposite of Eli.

- ← **Tarr:** incompetence alone is not incapacity. Meet it with real proof.

- ← Capacity is task-specific (Tarr).