19-P-1378 Appeals Court

JOSEPH A. HADDAD & another[1] vs. MARCEL A. HADDAD, individually and as trustee.[2]

No. 19-P-1378.

Middlesex. September 14, 2020. - January 12, 2021.

Present: Rubin, Wolohojian, & Sacks, JJ.

Will, Undue influence, Testamentary capacity, Execution. Undue Influence. Trust, Amendment and modification.

Civil action commenced in the Superior Court Department on June 2, 2017.

The case was heard by Hélène Kazanjian, J.

Jordan L. Shapiro for the defendant.
Catherine M. Giordano (Richard C. Woods, Jr. also present) for the plaintiffs.

WOLOHOJIAN, J. After their father, Antoine Y. Haddad, died, the plaintiffs, Joseph A. Haddad and Alain A. Haddad,

[1] Alain A. Haddad.

[2] Of the Haddad Real Estate Trust.

discovered that Antoine had changed his estate planning documents to leave everything to their brother Marcel A. Haddad.[3] This suit followed, in which Joseph and Alain asserted claims against Marcel for fraud, deceit, conversion, unjust enrichment, lack of testamentary capacity, and undue influence, and sought an accounting, a constructive trust, and injunctive relief.[4] A Superior Court judge, after a bench trial, concluded that Joseph and Alain had failed to establish that the changed estate plan was the product of undue influence by Marcel. The judge concluded, however, that Antoine lacked testamentary capacity when he executed the documents six years before his death in 2017 from dementia. The practical effect of the judge's ruling was to return the sons to their positions as equal beneficiaries under an earlier estate plan Antoine had established in 2004.

Although Antoine suffered a long period of cognitive decline dating from at least 2010 and culminating in profound Alzheimer's disease by the time he died in 2017, we conclude

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[3] Because the father and the parties, who are brothers, all share the same last name, we refer to them by their first names for clarity and ease, without intending any disrespect to the parties.

[4] The original complaint asserted claims for fraud, deceit, and conversion (count I), unjust enrichment (count II), and seeking an accounting, a constructive trust, and injunctive relief (counts III, IV, and V). By the time of trial, count II had been amended to add a claim of lack of testamentary capacity, and count IV had been amended to add a claim of undue influence.

that the evidence was insufficient to rebut the presumption of testamentary capacity on July 12, 2011, when he executed the new documents and, thus, the critical date for purposes of assessing his capacity to dispose of his assets. In addition, although Antoine, a native speaker of Arabic, had limited proficiency in English that may have affected his understanding of the estate documents, it did not affect his testamentary capacity, which is the only issue on appeal. Although such a fact may well, depending on the circumstances, bear on the validity of the execution of testamentary documents, it does not ordinarily bear on testamentary capacity.

Background. As we have noted, the case was tried on two theories: first, that Antoine lacked testamentary capacity and, second, that the 2011 documents were the result of undue influence by Marcel. The judge ruled in favor of Marcel on the undue influence claim, concluding that there was insufficient evidence of an unnatural disposition, that Marcel actually exercised undue influence over Antoine, or that Marcel used improper means to get Antoine to designate Marcel as the sole beneficiary of his estate.[5] Joseph and Alain do not appeal from

[5] "Four considerations are usually present in a case of undue influence: 'that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means.'"

this aspect of the judgment. As a result, we focus here on the facts bearing on the issues before us on Marcel's appeal from the judgment regarding testamentary capacity. In doing so, "[i]t is our obligation to review the evidence and reach a decision in accordance with our own reasoning and understanding, giving due weight to the findings of the trial judge, which we will not reverse unless they are plainly wrong, and finding for ourselves any additional facts we believe to be justified by the evidence." Palmer v. Palmer, 23 Mass. App. Ct. 245, 249-250 (1986), quoting Olsson v. Waite, 373 Mass. 517, 520 (1977).

Antoine was born in Beirut, Lebanon on February 1, 1929, and he married Juliette in 1966. They had three sons: Joseph, Marcel, and Alain. In 1978, the family immigrated to the United States, where they were sponsored by Juliette's brother, John Shami, who lived in Wakefield. After a short period living with Shami's family, Antoine and Juliette bought their own home nearby, also in Wakefield. Antoine lived in that house for over thirty years until 2013, when he was transferred to an Alzheimer's unit at Woodbriar Health Center (Woodbriar).

Juliette died in 1982 when the boys were still young and living at home. By all accounts, the family was extremely close-knit; the brothers loved their father and each other, and

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O'Rourke v. Hunter, 446 Mass. 814, 828 (2006), quoting Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 464 (1997).

Antoine taught them to share the high value he placed on family. Antoine's closest friend was his brother-in-law Shami, with whom he spoke or visited almost daily, and the boys too were constantly at their uncle Shami's house and with their cousins. There was never a period when the brothers were estranged from each other, their father, or their family. Indeed, Marcel never moved out of the family home, and Joseph and Alain continued to live there until they got married and bought their own homes. Marcel remained single, and eventually became Antoine's primary caretaker, looking in on him daily, taking care of the house, and taking Antoine to medical appointments. Joseph and Alain recognized that it was Marcel who bore the primary responsibility for taking care of their father as he aged.[6]

Despite the many years he spent in the United States, Antoine's primary language remained Arabic,[7] the language of his birth. He spoke Arabic with his family, and watched primarily Arabic-language programming on television. His facility in English was limited. That said, he had enough proficiency to permit him to function to the degree he needed for his daily

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[6] In 2012, after briefly looking after Antoine, Joseph wrote to Marcel: "If anything, this was a good experience to see what you, Marcel, go through with him at home . . . . I don't ever think I ever thanked you for taking care of dad, so thank you, Marcel."

[7] Shami testified that Antoine also spoke French.

activities, such as commuting to work,[8] his work as a watch repairman, and paying household bills. Whatever the precise contours of his facility in English may have been, it was insufficient for more complicated things such as medical appointments and legal matters. For those, his sons would translate for him.

In 2004, Antoine, accompanied by his three sons, went to an attorney and established an estate plan that included a will and a trust that held Antoine's house. Antoine was the sole trustee and held a one hundred percent beneficial interest in the trust assets during his lifetime. Upon his death, the three sons were to be equal beneficiaries under the trust and Antoine's will.

In February 2007, while coming home from work, Antoine (who was then seventy-eight years old) slipped on ice and broke his left shoulder. After a period of recuperation, Antoine returned home and eventually returned to work. But he began to slow down mentally and physically, including falling asleep at work. The brothers felt that Antoine should retire, which he did in 2009.

During the following year, Antoine began having vision problems that were eventually discovered to be caused by a tumor

[8] Antoine was a watch repairman by trade, and worked in the Jewelers Building in downtown Boston for many years. To get to work, Antoine would walk one quarter mile to a bus stop in Wakefield, take the bus to Oak Grove, and then take the Orange Line train to Boston. He followed this same routine until 2009 when he retired.

in his brain putting pressure on his optic nerve. All three brothers went with Antoine to meet with Dr. Brooke Swearingen, a neurological surgeon at Massachusetts General Hospital, who recommended surgery to remove the tumor. Dr. Swearingen noted that the "sons translated this discussion to their father and he appeared to understand, but I asked them to discuss it with him again [and] offered to obtain an interpreter if they so desired." Dr. Swearingen performed the recommended surgery in April 2010, which resulted in the removal of most -- but not all -- of the tumor.

None of Antoine's treating physicians in 2010 contemporaneously indicated that he was suffering from cognitive impairment, whether dementia, Alzheimer's disease, or of some other sort. Consistent with this, the radiology report of a magnetic resonance imaging (MRI) of Antoine's brain taken on March 10, 2010, noted nothing other than findings relating to the tumor.

Antoine's vision improved as a result of the surgery, and he again returned home to live. But although his vision improved, other aspects of Antoine's health declined. Joseph and Alain testified that Antoine became weaker, slept a lot, became forgetful, and began to lose his communication skills in English. He also started becoming confused and losing his short-term memory. Joseph and Alain's observations were

consistent with Marcel's views in an e-mail he sent on July 21, 2010, a few months after the brain surgery. Among other matters concerning Antoine, Marcel wrote:

> "Current problems:
> Short-term memory:
> 1) When I asked him the other day why did he not take his morning meds with breakfast that he had 10 min prior, he told me with absolute confidence that he did take them. I showed him the pillbox with the pills still there. He responded 'O I forgot'
> 2) He will ask a question about something and forget my answer or even forget that he already asked the question a few minutes later[]
> 3) Forgetting phone numbers
> 4) Forgetting to turn on the light when it[']s dark
> 5) Forgetting to turn on the AC when it[']s 90 Deg. and humid in the house
> 6) Forgetting what time to take meds that he has been taking for years at the same time
> 7) Forgetting his own thoughts as he talks about a subject
> 8) Forget to take his blood pressure as recommended by his doctor."

In that same e-mail, Marcel said that Antoine had told him that Alain had asked him (Antoine) to take care of his (Alain's) pet birds while he (Alain) was away. Marcel advised against this arrangement because he thought that Antoine would forget to feed and give water to the birds.

In light of their concerns for Antoine, the brothers arranged for a companion to spend time with him to keep him engaged. They also decided that Antoine should stop driving.

In February 2011, Antoine forgot a pot on the stove and fell asleep, only to discover when he awoke that the water had

boiled away and the pot had begun to melt. Marcel brought this situation to his brothers' attention in an e-mail that also noted: "Dad is in need of more attention from us. I call him every day still and see him at night, from what he tells me he doesn't get many other phone calls during the week from family. It would be great if this can be rectified (he sometimes forget[s] so if he is getting the attention, I wouldn't know)."

On March 26, 2011, Antoine fell while at home and could not get up. Although he was wearing a life alert device, he called Shami instead for help. When Shami arrived, he called 911 and Antoine was taken by ambulance to the hospital, where he had surgery on his hip and leg. After a period of recuperation at a rehabilitation facility and at Joseph's house, Antoine again returned home to live. He became, though, more sedentary, lethargic, confused, and unengaged. According to Joseph and Alain, Antoine's English was at this point minimal.

Sometime in April or May of 2011, Marcel asked Shami if he could recommend an attorney to assist Antoine with revisions to his estate plan. Marcel testified that Antoine asked him to set up the appointment because Antoine wanted to make Marcel the sole beneficiary of his estate. Marcel testified that Antoine said he wanted to change his estate plan because Marcel had always been there for him, the other two brothers had their own homes and were "all set," and Antoine wanted Marcel to have a

place to live after Antoine died. Antoine told Marcel that he would let Joseph and Alain know of the change later, and that he did not want Marcel to tell them.

Shami arranged for Antoine and Marcel to meet with his lawyer, Arthur J. Carakatsane. That meeting occurred on June 14, 2011, with Shami and Marcel translating between English and Arabic for Antoine and Carakatsane. As Shami explained it, he and Marcel "both kind of cooperated and translat[ed] what the lawyer was telling him or asking him." Shami testified that Antoine could not communicate directly in English with Carakatsane, but that "he understood, but he couldn't communicate in English very well." Shami understood that the estate planning documents were to be changed to make Marcel the "sole executor of the estate, the house and all that."

The trial judge discredited attorney Carakatsane's testimony about the details of this meeting because it was inconsistent and vague. For example, Carakatsane testified that he was able to communicate directly with Antoine in English, he did not recall Shami being present, and he was otherwise vague about the specifics of the meeting. Having reviewed attorney Carakatsane's testimony ourselves, we see no clear error in the judge's credibility determination and we, therefore, do not rely on his testimony concerning the initial meeting.

After this meeting, Carakatsane drafted an amendment to the trust, an amended schedule of beneficiaries to the trust, and a will for Antoine. As a result, Marcel replaced Antoine as trustee of the trust, with Joseph becoming successor trustee. Antoine remained the beneficiary of the trust during his lifetime, but upon Antoine's death Marcel alone (rather than all three sons) would become the sole beneficiary if he were alive. If Marcel were dead, then Joseph and Alain were to be equal beneficiaries of the trust. The revised will appointed Marcel executor, with Joseph as successor, and made Marcel sole heir. In addition to the trust amendment and the will, Carakatsane also drafted a durable power of attorney and a health care proxy -- both naming Marcel.

Antoine and Marcel returned to Carakatsane's office on July 12, 2011, when Antoine executed the new documents.[9] Carakatsane was the only witness who testified concerning the execution, and he said that he again assessed Antoine's testamentary capacity by asking a series of questions in English and was satisfied that Antoine had the requisite mental state. The judge made no findings specific to Carakatsane's testimony regarding the date of execution, nor did she explicitly discredit it. But given the bases for her rejection of Carakatsane's testimony regarding

[9] Marcel also executed a document accepting his appointment as trustee.

the initial meeting with Antoine, Shami, and Marcel, we have no doubt that the judge would have discredited Carakatsane's testimony that he was able to communicate adequately with Antoine in English on the date of execution.

In March 2013, almost two years later, Antoine's primary care physician wrote progress notes indicating that Antoine (likely as reported through one of his sons, but the progress notes are not clear) was having memory issues, that he was not understanding some commonsense things, that he was starting to become childlike to his sons, and that he would leave the water running or the stove on. Upon general examination, the doctor observed "N[o] A[bnormality] D[etected], alert but less oriented, somewhat confused." Her assessment was "Dementia N[ot] O[therwise] S[pecified]." She ordered a computerized tomography (CT) scan, which was performed on May 14, 2013, and which revealed "MODERATE DIFFUSE ATROPHY WITH SOME PROMINENCE CENTRALLY." She also referred Antoine to Dr. Paul Chervin, a neurologist.

On June 14, 2013, Dr. Chervin met with Antoine, who was accompanied by Marcel acting as his interpreter. Dr. Chervin's contemporaneous progress notes indicate that he reviewed the records of Antoine's March 2011 hospital admission and that "[t]here was no evidence of a dementing process or

encephalopathy during that hospitalization."[10] In addition to reviewing Antoine's previous records, Dr. Chervin also conducted his own assessment of Antoine, communicating through Marcel. Antoine was able to understand and follow Dr. Chervin's instructions, but he often gave the wrong answers to Dr. Chervin's questions. Dr. Chervin observed Antoine to be a "pleasant, well nourished, cooperative, alert, elderly gentleman." However, Antoine performed poorly on a "mini mental status examination:"

> "He thought it was Saturday, and he could not give the year or the month. I provided the clock drawing task and asked him to read aloud, which he did, but he was unable to proceed. His son instructed him in Arabic and he was able to draw a circle, and was then instructed to place the numerals on the clock, but he said that he was 'forgetting.' His son [Marcel] instructed him to put in the hands at 10 minutes after 11, and he wrote the numerals 11, 10 on the side of the clock. He does not know the name of the US president or previous president. He could not recall what he had for dinner last night. He is aware of his current address and correctly gave his telephone number. He subtracted 100 - 17 as 87."

By the end of his initial assessment of Antoine, Dr. Chervin concluded that Antoine had "profound dementia" that was

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[10] Dr. Chervin also reviewed every note from the 2011 hospital stay and noted, "Nowhere . . . did anyone say that there was a problem with [Antoine's] comprehension of English or the need to pick up the phone to get the Arabic translator or to have a family member there. It was a striking absence of that information," which Dr. Chervin conceded could well have indicated that Antoine did not need translation at that time.

"probably an Alzheimer's type dementia" requiring "increasing supervision at home." His conclusion was buttressed by the results of an electroencephalogram (EEG) showing severely reduced brain transmission, and by the May 2013 CT scan ordered by Antoine's primary care physician.

The following month, July 2013, Antoine again injured himself in a fall, and he was transferred permanently to the Alzheimer's unit at Woodbriar. Thereafter, Dr. Chervin saw Antoine two more times: once in September 2013, and once in January 2014. By September 2013, Dr. Chervin noted that Antoine, although cooperative and pleasant, was disoriented, confused, and unaware of the month. By January 2014, although Antoine did not have visual or auditory hallucinations, he was subject to intermittent delusions or misperceptions.

As noted above, Dr. Chervin testified at trial as an expert on behalf of Joseph and Alain. In that capacity, over objection,[11] he was permitted to opine as to Antoine's mental

[11] The plaintiffs did not timely disclose Dr. Chervin or the substance of his testimony as required by Rule 30B (a) of the Rules of the Superior Court (2017). At the pretrial conference two weeks before trial, they disclosed their intention to call Dr. Chervin as an expert; they also provided Marcel's counsel with a flash drive containing medical records including the 2010 and 2011 scans, which Dr. Chervin had obtained on his own initiative, using his medical privileges, directly from the hospital. The plaintiffs' disclosure did not specifically say that Dr. Chervin would offer an opinion regarding his interpretation of these scans, nor did it say that Dr. Chervin would offer an opinion about Antoine's cognitive abilities or

status in 2010 and 2011 -- which predated his involvement in Antoine's care. As part of that testimony, Dr. Chervin was permitted to interpret various scans of Antoine's brain from 2010 and 2011 that he reviewed solely in connection with the litigation, and not as part of his treatment of Antoine.

Dr. Chervin concluded that the MRI taken of Antoine's brain in 2010 (in connection with the removal of Antoine's tumor) reflected atrophy in Antoine's frontal lobe far exceeding the anticipated norm for Antoine's age. Dr. Chervin acknowledged that a person's language function or ability to comprehend could not be determined by looking at pictures of the brain. But Dr. Chervin's interpretation of the 2010 MRI nonetheless led him to conclude that Antoine would have displayed "some evidence of cognitive dysfunction in 2010" entailing "immediate recall and recent memory loss." Although Dr. Chervin's view was that Antoine's comprehension, reasoning, and language would have been impaired to some degree in 2010, "the degree of impairment could

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condition before he first examined him in 2013. Ultimately, the trial judge concluded that the plaintiffs' disclosure did not satisfy the requirements of rule 30B but, as a matter of discretion, she allowed the doctor to testify because Marcel had been sufficiently on notice of Dr. Chervin as a treating physician and because he (Marcel) had the ability to obtain Antoine's medical records himself. Marcel challenges all aspects of these rulings on appeal, but we need not consider them given that we decide the case on other grounds.

not be determined without correlative functioning testing," of which there was no evidence.

Turning to 2011, Dr. Chervin conceded that Antoine's hospital records contained no contemporaneous reference to Antoine having a problem with dementia or Alzheimer's disease. With respect to his independent review of Antoine's March 2011 scan, Dr. Chervin testified that it reflected only a minor change from the scan taken in 2010.

Antoine died of dementia on February 5, 2017, and his death certificate listed the period between the onset of dementia and death as five years.

Discussion. Although it is clear that Antoine experienced a period of cognitive decline beginning around 2010, which included a diminishing facility in English, the critical question is whether he had testamentary capacity on July 12, 2011, when he executed his new estate planning documents. See O'Rourke v. Hunter, 446 Mass. 814, 827 (2006), citing S.M. Dunphy, Probate Law and Practice § 23.4, at 437 (2d ed. 1997); Paine v. Sullivan, 79 Mass. App. Ct. 811, 820 (2011) ("It is [the testator's] capacity at the time he executed the will that is at issue").

> "Testamentary capacity requires ability on the part of the testator to understand and carry in mind, in a general way, the nature and situation of his property and his relations to those persons who would naturally have some claim to his remembrance. It requires freedom from delusion which is

> the effect of disease or weakness and which might influence the disposition of his property. And it requires ability at the time of execution of the alleged will to comprehend the nature of the act of making a will."

Goddard v. Dupree, 322 Mass. 247, 250 (1948). See Paine, 79 Mass. App. Ct. at 817; Palmer, 23 Mass. App. Ct. at 250. In other words, "[a]t the time of executing a will, the testat[or] must be free from delusion and understand the purpose of the will, the nature of h[is] property, and the persons who could claim it." O'Rourke, 446 Mass. at 826-827. See Santry v. France, 327 Mass. 174, 175-176 (1951). A person "may possess testamentary capacity at any given time and lack it at all other times." Daly v. Hussey, 275 Mass. 28, 29 (1931). "The fact that the testator disposed of his property 'in a manner that some may think unwise,' does not amount to evidence of incapacity." Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240, 252 (2008), quoting Cushman v. Nichols, 20 Mass. App. Ct. 980, 982 (1985). The proponent of the testamentary document (in this case, Marcel) has the burden of proving testamentary capacity on the date of execution, but he is aided by a presumption of testamentary capacity on that date. See Duchesneau v. Jaskoviak, 360 Mass. 730, 732 (1972); Santry, 327 Mass. at 176. However, once the contestants (here, Joseph and Alain) produce "'some evidence of lack of testamentary capacity, the presumption of [capacity] loses effect' and the burden shifts to

the proponent[] to prove [testamentary capacity] by a preponderance of the evidence." Matter of the Estate of Galatis, 88 Mass. App. Ct. 273, 279 (2015).

There was no direct evidence to rebut the presumption with respect to July 12, 2011, the day Antoine executed his new estate documents. No percipient witness testified that Antoine lacked testamentary capacity on that date. Nor was there any expert testimony that Antoine lacked testamentary capacity on the critical date. See Old Colony Trust Co. v. Di Cola, 233 Mass. 119, 124 (1919) ("In this [C]ommonwealth, only the witnesses to the will, the testator's family physician, and experts of skill and experience in the knowledge and treatment of mental diseases, are competent to give their opinions of the testator's mental condition"). Dr. Chervin did not tie his testimony concerning Antoine's Alzheimer's disease to Antoine's capacity on any date -- let alone on the critical one -- to "understand the purpose of the will, the nature of h[is] property, and the persons who could claim it." O'Rourke, 446 Mass. at 826-827. There was thus no direct evidence rebutting the presumption of testamentary capacity on July 12, 2011.

In these circumstances, the question then becomes whether there was sufficient circumstantial evidence to rebut the presumption that Antoine possessed testamentary capacity on July 12, 2011. Here again, we conclude there was not. To be sure,

the presumption can be rebutted by evidence that a testator was delusional, incompetent, or confused in the days leading up to the making of a will.[12] See, e.g., Duchesneau, 360 Mass. at 733 (evidence from treating physician that, during testator's final illness while in hospital when he executed new will over one month before death, testator's condition was "characterized by 'senility, with confusion'"); Goddard, 322 Mass. at 249 (evidence from physician that, on day before executing will in hospital four days before death, testatrix was "decidedly confused and did not know where she had been or what had happened to her[] and that he felt she was not capable of conducting her business affairs"); Matter of the Estate of Galatis, 88 Mass. App. Ct. at 276 (evidence from treating physician that, day before executing will while in hospital, testator suffered from encephalopathy, impairing his ability to think clearly, orient himself, speak and communicate, think logically, solve problems, and remember information). But we have no such constellation of evidence here -- let alone during the relevant period. See Paine, 79 Mass. App. Ct. at 814, 818 (presumption rebutted where, by time of execution, testator had already been diagnosed with dementia, was unable to live on his

[12] It is also possible that a progressive disease could result in a permanent loss of testamentary capacity prior to the date of execution of testamentary documents.

own, and expert opinion was that he lacked testamentary capacity at time of executing will).

Not only was there no evidence concerning Antoine's mental capacity in the immediate period surrounding his execution of the new documents in July 2011, the evidence about Antoine's meeting with Shami, Marcel, and Carakatsane in June 2011 (the month before) did not suggest that Antoine was "senile or delusional or that he did not recognize his family and friends" then. Maimonides Sch., 71 Mass. App. Ct. at 253. Indeed, according to Shami, Antoine appeared to understand what was being translated for him, where he was, and that he was there to change his estate planning documents.

Similarly, looking at the year leading up to July 12, 2011, although Antoine was prone to falling, had short-term memory loss, was becoming lethargic, no longer drove, and had diminishing facility in English, he continued to live at home fairly independently. He remained conversant in his native language of Arabic, which he continued to understand. Although Marcel looked in on Antoine daily and helped him with the bathroom at night, and Joseph and Alain also checked in and visited, there was no evidence to suggest that the brothers believed Antoine was unable to live in his own home, even though they were concerned about his forgetfulness and occasional confusion. When Antoine fell in March 2011, he knew enough to

call his brother-in-law Shami for help, and also knew how to reach him.

Although brain scans from 2010 and 2011 showed frontal lobe atrophy, leading Dr. Chervin to conclude that Antoine's comprehension, reasoning, and language would have been impaired to some degree in 2010 and 2011, Dr. Chervin conceded that there was no way to know the degree of such impairment or how it would manifest itself, and he did not tie any impairment to the components of testamentary capacity. Moreover, Dr. Chervin's observations concerning Antoine in 2013 -- two years after he executed his estate plan -- are of minimal, if any, significance to Antoine's testamentary capacity on July 12, 2011.

The trial judge did not focus her analysis on the date Antoine executed his new estate planning documents, but instead looked to the evidence showing that -- over time -- Antoine's mental faculties declined. We have found no case endorsing such an approach; the relevant focus always remains on the moment of execution, even where the testator executes a will in the midst of periods of confusion, delusion, or incapacity. See O'Rourke, 446 Mass. at 823 (periods of "'flu delirium,' including hallucinations, confusion, and the inability to follow commands," weeks before execution of will, not enough to rebut presumption); Matter of the Estate of Rosen, 86 Mass. App. Ct. 793, 799 (2014) (presumption not rebutted by evidence that

testator suffered from "sporadic periods of confusion and hallucinations"); Maimonides Sch., 71 Mass. App. Ct. at 253-254 (presumption not rebutted by evidence of testator's earlier severe depression and suicidal thoughts). Indeed, our cases have often affirmed findings of testamentary capacity in the face of significant evidence of mental infirmity close in time to the date of execution. See Tarricone v. Cummings, 340 Mass. 758, 762 (1960) (evidence of disorientation four to six hours before death did not require conclusion of lack of testamentary capacity five hours before death); Rempelakis v. Russell, 65 Mass. App. Ct. 557, 560, 568 (2006) (affirming finding of testamentary capacity although testator, within two weeks before executing estate documents, diagnosed with mixed aphasia [both expressive and receptive], Wernickes aphasia, and disorientation resulting from stroke); Palmer, 23 Mass. App. Ct. at 250 (upholding finding of testamentary capacity where testator was recovering from stroke and other grave illnesses, generally unable to communicate other than by saying "yes" and "no" and shaking head, in weak physical condition, and easily agitated). Thus, although it is clear that Antoine was in a period of cognitive and physical decline from at least 2010, in the absence of evidence that would permit a reasonable nonspeculative inference that he lacked testamentary capacity on the only date that matters, the presumption was not rebutted.

Woven throughout the judge's detailed and thoughtful decision were references to Antoine's facility with the English language. Although a lack of facility in a particular language may well bear on a testator's understanding of the provisions of estate documents in that language (and thus the validity of their execution), it does not prevent a testator from having the capacity to execute such documents, which is the issue in this appeal. See Dobija v. Hopey, 353 Mass. 600, 603 (1968) ("We are of opinion that this evidence does not sustain the judge's finding that a language barrier or lack of communication renders ineffective an otherwise valid will"); Barounis v. Barounis, 87 Mass. App. Ct. 667, 669, 673-674 (2015) (testamentary capacity upheld where testator "had minimal ability to read English, could not write it, and spoke only basic conversational English" but finding presumption of proper execution rebutted where drafting attorney did not speak testator's native language and did not communicate with testator before execution of will). A testator may have the capacity to execute estate documents in a language he neither speaks, reads, nor writes. See, e.g., Matter of the Estate of Pohndorf v. Valley Nat'l Bank of Arizona, 11 Ariz. App. 29 (1969); Camperi v. Chiechi, 134 Cal. App. 2d 485 (1955); Tanner v. Bioust, 221 Ga. 632, 632 (1966) ("Proof of illiteracy standing alone is no evidence of . . . mental weakness"); In re Calo's Estate, 1 Ill. 2d 376 (1953); In

re Sprenger's Estate, 337 Mich. 514, 521 (1953) ("Illiteracy or lack of education has little, if any, bearing upon mental capacity to make a will"); In re Carter's Will, 60 N.J. Eq. 338 (1900); In re Voorhis' Will, 27 N.Y. St. Rep. 368 (1889); In re Rawlings' Will, 170 N.C. 58 (1915) (recognizing rule, but holding that testatrix lacked mental capacity on other evidence); Barlion v. Connor, 9 Ohio App. 72 (1917); Jones v. Denton, 192 Okla. 234 (1942); In re Sixkiller, 168 Okla. 302 (1934); Franke v. Shipley, 22 Or. 104 (1892); Lees's Estate, 5 Pa.C.C. 396 (1888); Quaratiello v. Di Biasi, 43 R.I. 325 (1921); In re Rowlands' Estate, 70 S.D. 419 (1945); Oliver v. Williams, 381 S.W.2d 703 (Tex. Civ. App. 1964); Salinas v. Garcia, 135 S.W. 588 (Tex. Civ. App. 1911); In re Estate of Burt, 122 Vt. 260 (1961); Wood's Ex'r v. Wood, 109 Va. 470 (1909).

That said, in order for execution to be valid, the meaning and effect of the documents must be understood by the testator before he executes them -- a fact that is normally achieved through independent translation. Here, to the extent that the validity of the execution of Antoine's estate documents was challenged by Joseph and Alain, it was only under the rubric of undue influence. Although Antoine's limited skill in English could certainly fall within that framework, especially given that Carakatsane did not speak Arabic and Marcel was not an

independent translator,[13] Joseph and Alain have not appealed the judge's conclusion that they failed to prove undue influence which, in any event, rested on her conclusion that there was insufficient evidence of an unnatural disposition, or that Marcel actually exercised undue influence over Antoine, or that Marcel employed improper means to get Antoine to designate Marcel as his sole heir. We, therefore, do not consider the question.

For these reasons, so much of the judgment entered on July 24, 2019, in favor of Joseph and Alain on counts II and V of the amended complaint is reversed.[14]

So ordered.

[13] There is no suggestion, however, that Shami (who testified on behalf of Joseph and Alain) was not an independent translator.

[14] The plaintiffs' request for attorney's fees and costs on appeal is denied.