Testamentary capacity - Wednesday 26th September

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Introduction

- Will-making potentially affects everyone:
  - Testators
  - Beneficiaries
  - Will-writing professionals, including deputies who need to make statutory wills

- Law is derived from:
  - The Wills Act 1837
  - Case law of which there is an abundance
  - The Mental Capacity Act 2005
  - There are also codes for solicitors, see Wills and Inheritance Quality Scheme (WIQS) and for those who are members STEP Code for Will Preparation in England and Wales.

TWO possible tests for testamentary capacity

It is appropriate to consider the question of testamentary capacity as comprising of TWO tests.

1. The statutory test set out in the Mental Capacity Act 2005
2. The common law test in Banks and Goodfellow (1870) R 5 QB 549.

The Mental Capacity Act 2005

- The MCA, sections 1 to 4, were brought into force on 1 April 2007 and they introduce a framework for assessing mental capacity in order that the court may assist those who lack capacity to manage their affairs by taking decisions for them or by appointing decision-makers to act of their behalf - deputies.

- Under the MCA 2005 there is a presumption of capacity, thus the default position is that a person is presumed to have the requisite capacity, in this case to make a will unless it is established that that he is unable to do so. The relevant test can be found

in s3 of the MCA, which provides that a person is unable to make a decision for himself if he is unable to:

a) Understand the information relevant to the decision,
   - Nature and effect of will
   - Extent of assets being disposed of (broad)
   - Claims to which P ought to give effect, which necessitates some moral judgment
   - The consequences of deciding one way or another including what would happen if no will was made.

b) Retain that information,

c) Use or weigh that information as part of the process of making a decision, or

d) Communicate his decision (whether by talking, using sign language or any other means).

Banks v Goodfellow

At common law, sound testamentary capacity means that four things must exist at one and the same time:

1. The testator must understand that he is giving his property to one or more objects of his regard;
2. He must understand and recollect the extent of the property of which he is disposing[1]
3. He must also understand the nature and extent of the claims upon him both those he is including in his will and those he is excluding from his will;
4. That no insane delusion is influencing his will in disposing of his property and bringing about a disposal of it which, if the mind had been sound, would not have been made.

James v James [2018] EWHC 43 (Ch)

BACKGROUND:

- Case looks at BOTH tests.
- Testator, Charles James who died in August 2012, aged 81
- Self-made man who built up farming and haulage business in Dorset
- Farm comprised of five parcels of land.
- Testator was married. He had two daughters and one son, referred to as Sam. The will left his substantial property portfolio to his wife and daughters and nothing to his son.

[1] But precise knowledge of the value of property is not necessary, Blackman v Man [2008] WTLR 389

- His son, Sam, who had farmed the testator's land in a farming partnership with the testator for a number of years, brought a claim that he was entitled to land which had formed part of the estate under the doctrine of estoppel.
- In the alternative, he argued that his father had been prone to memory loss and confusion, and the will was invalid for lack of testamentary capacity.
- Mr James was described as an autonomous man who liked to make decisions but was reluctant to talk about how he intended to transfer property and delayed making testamentary decisions until the end of his life.
- By this time his mental health had been in decline.
- One year after he made his will he was diagnosed with dementia from Alzheimer's.
- It fell on the court to consider the relevant test for testamentary capacity and this element of the proceedings gave rise to some interesting commentary about the interface between the common law test and the statutory test under the MCA 2005.

KEY FINDINGS:

- Since the MCA came into force in 2007, there was a tension between the two tests. Some cases expounded the idea that the 2005 Act had superseded the common law test, for example HHJ Dight in Fischer v Diffley [2014] referred to the 2005 Act as providing a 'modern statement of the principles relating to the assessment of capacity in a court of law.'
- Whereas other cases such as Walker v Badmin [2015] upheld the long-established common law test.
- So there was seemingly contradictory case law the Judge was required to navigate, which he did.
- James v James now finally provides very significant support that the Banks and Goodfellow test holds good and is the SOLE test for the court to apply when judging testamentary capacity post mortem.
- In the view of HHJ Matthews, *"The individual provisions of the [MCA] are concerned with assessing mental capacity of living persons, and the manner of making decisions thereafter on their behalf when, judged by the terms of the Act, they lack such capacity. It is solely in pursuing that purpose that it deals with (amongst other things) the arising of the power of the court to make a will for living person who has been found not to possess capacity. It does not follow from this that the test for judging capacity retrospectively in relation to a will must also be governed by the same principles."* (para 85)
- HHJ Matthews found the authorities to the opposite effect (Fischer v Diffley) were not decisions but obiter dicta.

- The test set out in the Mental Capacity Act 2005 governs issues of capacity for a *living* testator (the person who is making the will). This is a prospective test, so when considering at the time whether someone has testamentary capacity, MCA applies.
- Where the testator has died and the will is being challenged, the test contained in Banks and Goodfellow is applied. This is the relevant test if you are determining testamentary capacity retrospectively.

- HHJ Matthews preferred and applied the reasoning in Walker that:
    - The test under the 2005 Act is not the same test as the Banks v Goodfellow test. In fact there are significant differences between them.
    - The 2005 Act does not expressly or impliedly provide a test where a testator's capacity at the time of making a will is challenged AFTER his death. In line with long established principles of statutory interpretation, the 2005 Act cannot be construed as intended to overrule well-established rules of common law without clear words or necessary implication, the judge was sure that no renunciation or supersession of the Banks v Goodfellow test had taken place.
    - He said there was no difficulty with having two tests - one prospective and one retrospective test - each applies at a different time and for decisions different in nature.
    - The requirement in Banks v Goodfellow that *"no insane delusion shall influence his will in disposing of his property"* is not reproduced in any provision in the MCA 2005.
    - The burden of proof is different. Under the MCA 2005 s1 (2) a person is presumed to have capacity whereas the person propounding a will must show that the deceased had testamentary capacity.

The Golden Rule

- The Golden Rule was set out in Kenward v Adams [1975] and Re Simpson [1977] and it is this that where the testator is aged or has suffered a serious illness, the will should be witnessed or approved by a medical practitioner who has satisfied themselves of the testator's capacity to make the will. The medical practitioner should make a record of their examination and findings.
- The case of Key v Key [2010] strongly criticised the solicitor for not involving a medical practitioner - *"Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non compliance demonstrate its*

invalidity. Its purpose as has repeatedly been emphasised, is to assist the avoidance of disputes, or at least in the minimisation of their scope."

- Judge then goes on to say how those with impaired or failing mental faculties may for perfectly understandable reasons try and conceal their short comings from their friend or a solicitor but are likely to be picked up by a trained and experienced medical examiner.
- It is advisory not mandatory BUT there are serious consequences.
- In James v James, the Golden Rule was not followed which the judge described as '*obviously regrettable*' but still the will was propounded. The judge held (echoing Briggs J in Key v Key [2010]): "[The Golden Rule] is not a rule of law such that (i) if it is not followed then the will is valid. Instead it is a rule of practice, the following of which generally has a prophylactic effect, in that it is then much less likely that there will be a (long and expensive) dispute as to testamentary capacity."
- Solicitors' attendance notes have also proven to be an invaluable source of contemporaneous evidence of a testator's presentation and capacity at the time s/he made the will.
- For example, in Hawes v Burgess [2013] the Golden Rule was not observed but the CoA found very persuasive the evidence of an experienced and independent solicitor who had met the testator, and had the opportunity to observe him over several meetings.
- In James v James, despite the failure to observe the Golden Rule, the judge said he was 'particularly struck' by the evidence of the testator's solicitor, who he found to be a 'highly competent, intelligent solicitor, experienced in dealing with (among other things) farmers and wills."

MCA CODE OF PRACTICE

MCA 2005, Code of Practice echoes the Golden Rule. At para 4.53 it provides when a professional should be involved in the assessment. There is a long list of circumstances, which include:

1. When a decision needs to be made which is complicated or has serious consequences
    - Will
    - Value of the estate is particularly substantial
    - There are obvious beneficiaries which are not provided for
2. Where you think somebody might challenge the person's capacity to make the decision.

COSTS

- There is a special rule on costs relating to probate claims that *"where the opponents of the will have been led reasonably to the bona fide belief that there was good grounds*

for impeaching the will, there will be no order as to costs." (referred to as the second principle in Spiers v English [1907], as formulated in Kostic v Chaplin [2007])

- In James, although the Claimant lost, he did not have to pay the other side's costs because he successfully argued the second principle in Spiers v English [1907]: the judge found there was good ground to impeach the will so the Claimant was not ordered to pay the other side's costs.
- No doubt the MAJOR reason for making no order as to costs was because the testator did not follow the golden rule, the judge said, *"The fact that the so-called 'golden rule' was not followed was also significant. There being no contemporary medical evidence, all that was left was for the court to decide."* The fact that testator's health had been declining and both experts confirmed that his capacity was very much on the border there can be no doubt that this was the overarching reason.
- Arguably made the second principle in Spiers more available
- Challengers will look to non-observers of the Golden Rule as a solid basis on which to bring a challenge, which once again underscores the importance of the Golden Rule. Also, if a Spiers costs order is available, displacing the general rule that the losing party pays, the costs consequences of an unsuccessful will challenge are seriously curtailed. Thus, failing to adhere to the Golden Rule may actually actively encourage someone to challenge a will.

Fluctuating capacity and lucid intervals - A, B, and C v X and Z [2012] EWHC 2400 (COP) (which again reinforces the Golden Rule)

- This was a case involving borderline and fluctuating capacity
- The COP was required to make various determinations as to his capacity in different areas.
- He was found to lack capacity to manage his property and affairs but he did not find that he lacked capacity to make a will. The court concluded there were different thresholds at stake. The general concept of managing one's affairs is an ongoing act and therefore unlike a specific act of making a will, management relates to a continuous state of affairs, including dealing with the unexpected and in that context the judge found X lacked capacity.

In weighing up the evidence on X's understanding and ability to retain the information relevant to X's capacity to make a will, Hedley J concluded, *"that I cannot make a general declaration that that X lacks testamentary capacity, but that needs to be strongly qualified. There will undoubtedly be times when he does lack testamentary capacity. There will be many times when he does not do so. The times when he does lack such capacity are likely to become more frequent. It follows that, in my judgment, any will now made by X, if unaccompanied by contemporary medical evidence asserting capacity, may be seriously open to challenge."*

Statutory wills

A statutory will is a will made on behalf of a person who lacks capacity to make a will pursuant to an order of the Court of Protection under MCA 2005, s.18(1).

- It cannot be delegated to a deputy
- Expressly reserved to the court - there needs to be a formal application and it needs to be considered by a judge
- Recommended where:
    - There is a major change in a person's status or circumstances or an inheritance or personal injury award which alters the nature of the estate
    - In short, where the consequences of intestacy would be unjust or even harmful (P in an RTA, estranged from parents, evidence from those closest to him is that he did not have a relationship with his parents, problems historically, made new life for himself, partner who is dedicated to him who visits daily, he has a niece with who he enjoyed a good relationship with prior to accident - a statutory will must be indicated, otherwise, his parents would inherit, which is unjust and unlikely to be consistent with his wishes).
    - Ditto re. consequences of an existing will if there has been a major change in circumstances.
    - Interests of a beneficiary under an existing will are prejudiced, for example, the beneficiary is a minor and their interests might be better protected within a trust.
    - Concerns about the validity of a will.
    - Tax planning advantage
    - Financial abuse

MUSTS

1. Must be 18 or over
2. Lacks capacity to make a will in accordance with section 2 of the MCA - "a person lacks capacity in relation to a matter [the making of a will] if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."
3. Property in England and Wales capable of being disposed

4. The court requires up-to-date primary medical evidence confirming P lacks capacity to make a will in the form of a COP3.
5. REMEMBER:
    a. If complex, file COP3 with a full medical report.
    b. Choose the right professional, especially if capacity is borderline.
    c. Professional instructed to carry out assessment will need background information as to the property and affairs of P.

MECHANICS

- Need to complete COP1 application and provide all of the supporting evidence as listed in **Practice 9F** which sets out what evidence is required.
- Application needs to set out why it is in P's best interests.
- If you need court to take unilateral action complete COP9.
- Respondents will need to be named and they will include anyone who reasonably has an interest which means they ought to be heard in relation to the application. PD9E sets out a list of other types of people who are likely to be *'materially or adversely affected."* Classically, someone who stands to gain less under the new will than under an existing will or intestacy.

Intervivos gifts

In James, the judge also touches on intervivos gifts which suggests that Re Beaney [2014] is still good law.

FACTS

- A mother suffering from advanced dementia
- Executed transfer to her eldest daughter
- After her death this was challenged by her other two younger daughters

Nourse LJ held that the test for a lifetime gift should be the same as that applied in the case of a will. Under the Banks v Goodfellow test it was not sufficient that the mother understood what legal effect the transfer had; she also had to be 'able to comprehend and appreciate the claims' which her other children had on her. This requirement is not expressly reproduced in the MCA test for capacity and was not satisfied because it had not been brought to the mother's attention that she was affectively disinheriting her two younger children. Thus, the analysis is should A make a lifetime gift to B, A's capacity to make this gift will be assessed under the MCA, yet on his death will fall to be assessed under the test in Re Beaney. This means A can effectively make a gift which is both valid and invalid. There is a good chance

that this oddity will be ironed out in due course, given the Law Commission's comments in their report last year.

Law Commission's Review

"If it ain't broke, why fix it."

Many argue the law on wills has served us well, indeed since 1837 so does it really need to be changed. The Law Commission certainly thinks otherwise.

SINGLE TEST

1. People who argue in favour of Banks say that it is helpful in its focus on assessing capacity opposed being of more general application like the MCA 2005.
2. MCA 2005 supporters say it is a more familiar and accessible to non-lawyers, including doctors who need to understand what testamentary capacity requires. It is modern opposed to expressed in Victorian language - *'insane delusion.'*
3. The LC's leading proposal is that the mental capacity test for making a will, currently set out in Banks v Goodfellow should be brought under the umbrella of the MCA 2005.
4. This would mean testators would be presumed to have capacity unless the contrary is established.
5. That said the specific elements of capacity necessary to make a will - the ones set out in Banks - would be reflected in the MCA Code of Practice.
6. The Code of Practice should also provide guidance on when, by whom, and how a testator's capacity should be assessed. It would not create a new duty though non-adherence would be relevant when looking at the testator's capacity.

DISPENSING POWERS

One of the hotly debated topics to emerge from the consultation was the proposal to introduce a dispensing power - a power for a court to recognise an informal document as a will where it represents the deceased testamentary intentions. Again, there are those who are keen and those who are less keen. Some say it will lead to great uncertainty and potentially a flood of litigation. Others regard it as pragmatic, allowing testators to have their true wishes acted on and a welcome move away from strict formalism.

To illustrate this point, I would refer you to an Australian case Re Nichol [2017] QSC 220

- Testator Mark Nichol wrote a text message containing his testamentary intentions to leave his estate to his brother and nephew Jack, including his burial wishes

- It was unsent and addressed to his brother David Nichol.
- It was titled 'my will'
- It expressly provided that he did not want to leave his wife anything and his son and left his estate to his brother and nephew.
- The court concluded that it was unsent not because it was tentative but because sending the message would have alerted his brother of the fact that he was about to commit suicide
- Court used its dispensing power and recognised the unsent text message as his will. It shows how the courts treats a testator's intention of utmost importance, opposed the medium in which they are conveyed.

The Law Commission has started to gather empirical evidence from law reform organisations in several common law jurisdictions where dispensing powers have been enacted for their assessments of the consequences. Once that evidence is in, we shall be better informed on whether the concerns are borne out and we should also enact dispensing powers.

ELECTRONIC WILLS

The idea is they would be brought in via secondary legislation. There are various pros and cons.

- Those who have grown up in digital age might be more likely to make electronic will.
- This is in keeping with the Law Commissions mandate to do more to encourage and facilitate people to make wills, and to produce a more modern improved approach to will-making.
- Greater potential for fraud
- Some question whether if it does happen it is appropriate to bring them in through secondary legislation. Some consultees argue that such a significant change requires primary legislation and all the supervision and oversight which go with that. Weighed against that is the scarcity of parliamentary time.
- Need to address the technical challenges.