Chapter 2: The Mind of the Testator

Outline

Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the CILEx syllabus:

2 Understand the rules relating to capacity to make a valid will or codicil

2.1 Introduction

Owners of Chinese restaurant can inherit £10 m left in will

The High Court today upheld the final will of a millionaire property magnate who bequeathed £10 m to the owners of her favourite Chinese restaurant.

Judge Sir Donald Rattee QC dismissed a challenge to Golda "Goldie" Bechal's will brought by her surviving relatives, five nephews and nieces, who claimed they were entitled to inherit her fortune.

When Bechal died in 2004, aged 88, she left a property fortune based on commercial premises to her long-standing "best friends", Kim Sing Man and his wife, Bee Lian Man, the owners of the Lian restaurant in Witham, Essex.

The judge held that Bechal, despite her failing memory, appreciated the effect of her will, made in August 1994, in which she left almost her entire fortune to the couple.

He rejected the claim by Bechal's five nephews and nieces, Sandra Blackman, Barbara Green, Laurence Lebor, Louise Barnard and Mervyn Lebor, that she did not know what she was doing when she made the will.

> Rattee said: "In my judgment, on the balance of probabilities, Mrs Bechal had testamentary capacity. The will executed by Mrs Bechal in August 1994 was valid."
>
> *The Guardian*, December 2007

An inevitable result of the freedom that English law gives to testators to distribute their assets as they wish in their wills is that, sometimes, they will make decisions that seem to others to be perverse or even mad. Golda Bechal's nephews and nieces clearly disagreed with her decision but were unsuccessful in their attempt to show that their aunt did not have the required mental capacity.

Assessing whether a person has the required level of mental capacity is one of the most difficult parts of a private client lawyer's work. In most cases, of course, the client very clearly has mental capacity. Other elderly or disabled people quite clearly do not have the mental ability to respond to questions or to give clear instructions. The practical difficulties lie in assessing those whose mental state is marginal.

This chapter describes how English law assesses a person's mental capacity to make a will. It also describes the requirements that the testator had knowledge of, and approved the contents of, the will and that there was no fraud or undue influence.

NB Many of the cases dealing with mental capacity date from the 19th century or earlier. The language used in them to describe mental illness would make doctors and consultants in geriatric medicine today wince. In particular, the word "insanity" was commonly used to describe what would nowadays be considered a range of mental illnesses of varying severity.

2.2 Capacity to make a will

There are two aspects to the capacity to make a will. One is physical and simply relates to the age of the testator. The other concerns the testator's mental competence, which is not so straightforward to assess and, needless to say, is often the source of litigation when the validity of a will is disputed.

2.2.1 Age

The testator must be at least 18 years old (**s7 Wills Act 1837** (**WA 1837**)) unless they are entitled to make a privileged will (see **Chapter 4**). So, on the death of a minor, their estate passes in accordance with the rules of intestacy. A person aged 16 years and over, however, can make a valid statutory nomination of certain types of property (see **1.3.4**).

Law Commission Consultation Paper 231 – *Making a will*

The Law Commission proposes that the minimum age for writing a will be lowered to 16 years. It argues that this will tie in better with the **Mental Capacity Act 2005** and other legislation which treats 16-year-olds as being capable of making valid decisions in certain circumstances.

2.2.2 Mental competence

The courts have traditionally applied established case law to determine whether a person has testamentary capacity, that is, the necessary mental capacity to make a will. They still do so, despite the coming into force of the **Mental Capacity Act 2005** (**MCA 2005**) on 1 October 2007.

MCA 2005 deals with general aspects of a person's mental capacity to carry out acts, as well as dealing with a range of issues about the mental capacity of vulnerable people in a wide range of situations involving their medical treatment, finances, accommodation and other important aspects of their care. The legislation was not aimed specifically at those making wills. We should first consider what **MCA 2005** says about mental capacity generally.

s1 MCA 2005 sets out the following core principles which are relevant to someone making a will.

(1) A person must be assumed to have capacity unless it is established that they lack it.

(2) A person is not to be treated as unable to make a decision merely because they have made an unwise decision.

s2(1) MCA 2005 provides that a person lacks capacity in relation to a matter *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*. **s2(3)** provides that lack of capacity cannot be established just by reference to a person's age, condition or aspect of behaviour which might lead others to make unjustified assumptions about their capacity.

s3(1) 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;

(b) retain that information;

(c) use or weigh that information as part of the process of making the decision; or

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

s3(3) states that *the fact that a person is able to retain the information relevant to a decision for a short time only does not prevent him from being regarded as able to make the decision*.

Of most importance in looking at these principles is **s2(1)**, which refers to a person's ability to make a decision at the *material time* about a *matter,* and **s3(1)** which talks about understanding *information relevant to the decision*. Taken together, they mean that a person's capacity must be assessed with reference to the particular decision or act in question – and in our case, this means making their will.

The courts have looked at the provisions of **MCA 2005** in the context of the established test for mental capacity set out in ***Banks v Goodfellow [1870]***. This test requires that the testator must have understood:

- that they were making a will which would come into effect on their death and not some other document;
- the extent of their property;
- the moral claims on their generosity.

In ***Scammell v Farmer [2008]*** the judge held that the test in ***Banks v Goodfellow*** should be followed because the testatrix had died before **MCA 2005** had come into force. It was held that ***Banks v Goodfellow*** should be followed in any case since **MCA 2005** was not intended to supersede this test. In ***Re Walker [2014]*** the court directly addressed the question of the extent to which (if at all) **MCA 2005** replaced or superseded the test for mental capacity set out in ***Banks v Goodfellow***. The judge said that the outcome of the case *"may depend on whether the common law as to testamentary capacity* [i.e. ***Banks v Goodfellow*** and similar cases] *has been replaced by the provisions of the* ***Mental Capacity Act 2005*** *. . . My first impression of this issue . . . was that* ***Banks v Goodfellow [1870]*** *had indeed been replaced by the provisions of the Act, but* [counsel] *has now persuaded me that this is wrong".* (Emphasis added.)

It is interesting to note that the judge himself was initially unclear as to what impact **MCA 2005** and ***Banks v Goodfellow*** had on each other, and that he changed his view in the light of comments provided by counsel during the hearing. In doing so, he seems to have followed ***Scammell v Farmer [2008]***.

Despite the fact that the main points dealt with in ***Elliott v Simmonds [2016]*** were mental capacity and the allocation of legal fees, the case made it all the way to the national press, with headlines featuring terms like "multi-millionaire", "mistress" and "secret daughter".

The facts were that the deceased (who, having left an estate of £2 m was technically a "multimillionaire", but only just) had made a will in 2010, leaving £100,000 to his daughter, Ruth, from a relationship which dated back long before his marriage. The rest of the estate passed to his wife and his children from the marriage.

In 2012, having fallen out with his wife and children (and having, by then, entered into a relationship with his "mistress", Bernice), the deceased made a new will in which the entire estate passed to Bernice.

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