Chapter 2: Ensuring the Validity of a Will

Outline

Aims of this Chapter

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

4 Understand the requirements in English law for the creation of a valid will/codicil
8 Understand the elements of will drafting

2.1 Introduction

Just because a document is headed "My last will and testament" does not mean that it is a valid will!

In this chapter we look at the rules which determine if a document that purports to be a will is going to be treated as such. We need to consider the **capacity** and the **intention** required on the part of the testator to make it, as well as the **formalities** laid down by statute concerning the form of the will and its execution. These issues are important:

- for the lawyer instructed to prepare a will for a client, since they must ensure that the will they make is recognised as a valid will. This involves a consideration of steps that might be taken to lessen the risk of any challenge to the will's validity; and
- for the lawyer instructed after a death, who must know the rules on validity in order to advise on the admissibility of a will to probate and the extent to which effect will be given to its provisions.

An alleged testamentary document can only be proved as a will (i.e. admitted to probate) if it deals with real or personal property in England and Wales, or appoints an executor. So, a document which merely appoints guardians and neither deals with property here nor appoints an executor cannot be proved in England and Wales. A document that does deal with property or appoint an executor must still be proved if a grant of representation to the deceased's estate is required, even if its terms no longer have any relevance, for example, because the beneficiaries are all dead.

Important: make sure that you relate what is said in this chapter to the duty of care imposed on those instructed to make a will. In particular, you must be aware of the precautions that may need to be taken in certain situations, both at the time of taking instructions for the will and also its execution. This is considered fully in **Chapter 12**.

2.2 Capacity of the testator

There are two requirements – one relates to physical capacity and the other to the mental state of the testator. Also relevant are the questions of who has to prove capacity and the practical steps a solicitor should take to avoid a will being challenged for lack of capacity.

2.2.1 Physical capacity

The testator must be **at least 18** years of age at the date when they execute their will. So, a person who dies a minor (i.e. under 18) will die intestate (even if married).

There is an exception to this rule which relates to privileged wills. These can be made in certain circumstances by members of the armed forces if on actual military service and also by mariners. A minor who enjoys such privileged status can make such a will. They are called privileged wills because they are not subject to the same formalities and can be made in an informal way, even orally.

2.2.2 Mental capacity

The courts have traditionally applied the established common law test in ***Banks v Goodfellow [1870]*** to determine if a person has testamentary capacity, that is, the necessary mental capacity to make a will.

The ***Banks v Goodfellow*** test requires the following.

(1) The testator understands the nature of the act and its effects. In other words, the testator must be able to appreciate that they are making a will which disposes of their property when they die, and until then it is still theirs.

(2) The testator understands the extent of their property. They do not have to know the exact value of everything they own but they must be able to appreciate the general extent of their wealth.

(3) The testator understands the claims to which they ought to have regard. The testator must be able to appreciate those around them who, morally speaking, might have first claim on their property. Many capacity cases have been litigated on this aspect of the rule, where the allegation is that the testator was unaware of their immediate family when they made their will.

In addition, the testator must not be suffering from an insane delusion which affects the terms of the will; for example, an unfounded belief that a close relative was trying to kill them. We will return to this point later.

When the **Mental Capacity Act 2005** (**MCA 2005**) came into force on 1 October 2007 it raised the question of whether the common law test was still the correct one to apply. **MCA 2005** deals with general aspects of a person's mental capacity to carry out acts and make decisions. The new legislation was not aimed specifically at those making wills but it is helpful to consider what **MCA 2005** says.

s1(2) MCA 2005 says that a person is assumed to have capacity unless it is established that they lack capacity. **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.

s2(1) elaborates on the meaning of lack of capacity by saying that a person lacks capacity in relation to a **matter** if, at **the material time**, they are unable to make a **decision** for themselves because of an impairment of, or a disturbance in the functioning of, the mind or brain.

s3(1) states that a person is unable to make a decision for themselves if they are unable to understand the **information relevant to the decision** and to retain, use or weigh that information to communicate their decision. This provision makes it clear that capacity must be assessed with reference to the particular decision or act in question – a person may have capacity for one type of transaction but not for another.

Since **MCA 2005** deals with mental capacity generally and was not specifically aimed at making a will, does it have any relevance when determining if a person has testamentary capacity?

In ***Scammell and Another v Farmer [2008]*** the court favoured the ***Banks v Goodfellow*** test, saying that **s3 MCA 2005** was just a modern restatement of the common law test (although that case concerned a will made before **MCA 2005** was in force). Since that case, the courts have not just confirmed that ***Banks v Goodfellow*** is still the test to apply but have developed the test further. A recent decision, and one acknowledged as offering the clearest judicial opinion, is ***Walker v Badmin [2014]*** where the judge was not only of the view that ***Banks v Goodfellow*** still applies but that the common law test was less onerous than that under **MCA 2005**.

In ***Simon v Byford [2014]*** the Court of Appeal said that satisfying the test depended on the **potential to understand** and was not to be equated with a test of memory. The testatrix suffered from mild dementia, so her capacity was in doubt but the evidence showed she had been capable of understanding (and had understood) the nature of a will, and the effect of the will in question, which was a simple one. It was sufficient that she had understood that her late son's share would go to his family trust without further details. She had been capable of asking, if she had wanted to know who the beneficiaries would be, but had not done so. She had been capable of understanding (and had understood) that her property included her house, a flat and some shares and was capable of understanding (and had understood) that she had owned other money and investments, although she probably was not capable, without being told, of remembering the details. Since the testatrix, for the most part, had been leaving everything to her children in equal shares, she had not needed precise knowledge as to the extent of her estate, and the knowledge she had was ample.

Simon v Byford also establishes that ***Banks v Goodfellow*** does not require a testator to understand the collateral consequences of their will, for example, that the making of a particular disposition may later cause ill feeling in the family. This is in contrast to **s3(4) MCA 2005** which expressly refers to the need to appreciate the reasonably foreseeable consequences of making (or not making) a decision. In ***Walker v Badmin***, the judge picked up on this

and suggested that the common law test was therefore narrower, so less demanding than the statutory test, even though **MCA 2005** contains an express presumption of capacity.

In practice, the outcome in all but a very few cases is likely to be the same regardless of whether ***Banks v Goodfellow*** or the **MCA 2005** test is applied.

As regards not suffering from any form of delusion which affects the terms of their will, in ***Kostic v Chaplin [2007]*** the court found that the testator lacked capacity because he was suffering from a delusion that his son and other members of his family were implicated in an international conspiracy in which he (the testator) was the victim. The testator had left his substantial estate to a political party.

Of course, a testator might suffer from a delusion which has no effect on the will they make. Suppose Charlie, who has a wife and two children, makes a will in which they are the only beneficiaries but at the time he is in poor mental health and suffers from a delusion that he is manager of the England football team. The will is likely to be valid because, notwithstanding his obvious illness, he still passes the ***Banks v Goodfellow*** test.

However, what if in the same circumstances, Charlie's will also leaves a legacy of £10,000 to the first England player to score a goal within 12 months of his death? In this case, his delusion might be held to have affected his testamentary capacity but only to the extent of the legacy. ***In the Estate of Bohrmann [1938]*** illustrates that the court can omit from probate part of a will which is affected by a delusion while allowing the rest of the will to stand. So, the legacy to the goal scorer would fail but the rest of the will would take effect.

In ***Key v Key [2010]*** the court said the effects of bereavement may impair testamentary capacity. A will was executed by a very elderly testator within a few days of his wife's death. He had been married to her for 65 years. In his judgment, Briggs J said:

"Without in any way detracting from the continuing authority of Banks v Goodfellow, it must be recognised that psychiatric medicine has come a long way since 1870 in recognising an ever widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision making . . . The mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example recognised by psychiatrists."

Generally, testamentary capacity must have existed at the date of execution. However, under the rule in ***Parker v Felgate [1883]***, it is sufficient to show the following.

(1) The testator had the required capacity at the date they instructed their solicitor to prepare a will.

(2) The will was prepared in accordance with those instructions.

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