Chapter 2: Ensuring the Validity of a Will

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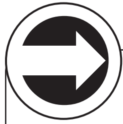

Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the ILEX 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", it does not mean that it is!

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 solicitor instructed to prepare a will for his client, since he must ensure that the will he makes 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 solicitor instructed after a death, who must know the rules on validity so that he can 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 named executor and beneficiaries are all dead.

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 question of who has to prove capacity and the practical steps a solicitor should take to avoid a will being challenged for lack of capacity.

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2.2.1 Physical capacity

The testator must be **at least 18** years of age at the date when he executes his will. So, a person who dies a minor 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

We need first to consider the relevant provisions of the **Mental Capacity Act 2005** (**MCA 2005**), which came into force on 1 October 2007.

s1(2) MCA 2005 says that a person is assumed to have capacity unless it is established that he lacks 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 his 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** he is unable to make a **decision** for himself 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 himself if he is unable to understand the **information relevant to the decision** and to retain, use or weigh that information to communicate his decision. This provision makes it clear that capacity must be assessed with reference to the particular decision or act in question – in our case, the testator's ability to carry out the particular task of making a will.

So, what is the "material time" and the "information relevant to the decision" in the context of capacity to make a will (i.e. "the matter") and who has to prove capacity?

In trying to answer these questions, it is important to remember that **MCA 2005** deals with mental capacity generally and is not specifically aimed at making a will. However, there is an abundance of existing case law on testamentary capacity which was important before the Act took effect and it is likely to remain so.

In ***Scammell and Another v Farmer [2008]***, the court said that if a will was made before **MCA 2005** came into force, then the issue of capacity must be decided under the previous case law (otherwise, the new Act would be given retrospective effect). In the same case, the judge said that **s3 MCA 2005** is a modern restatement of the classic test for testamentary capacity set out in ***Banks v Goodfellow [1870]***. Indeed, the ***Banks v Goodfellow*** test was also applied recently in ***Kostic v Chaplin [2007]***. Consequently, the courts will still apply the ***Banks v Goodfellow*** test, even if the will was made after the **MCA 2005** came into force.

The ***Banks v Goodfellow*** test requires that the testator understands three things:

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(1) the nature of the act and its effects. In other words, the testator must be able to appreciate that he is making a will which disposes of his property when he dies, and until then it is still his;

(2) the extent of his property. He does not have to know the exact value of everything he owns but he must be able to appreciate the general extent of his wealth;

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

A further requirement of ***Banks v Goodfellow*** is that the testator must not have been suffering from any form of delusion which affected the terms of his will. In ***Kostic v Chaplin***, the court found 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.

In ***Re Ritchie [2009]*** the deceased had made a will leaving her £2.5m estate to charity, disinheriting her four children. She was a difficult woman with some elements of obsessive compulsive disorder. The solicitor draftsman of the will, when giving evidence at the trial, said the deceased had told him her sons were stealing from her and taking advantage; one of her sons was violent to her and had tried to throttle her and her daughters never came to see her and gave her no help. These allegations were strenuously denied by the children. The judge accepted the allegations were delusions and, pronouncing against the will, accepted the deceased would not have disinherited her children if she had not suffered from these delusions.

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Of course, a testator might suffer from a delusion which has no effect on the will he makes. 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 gives 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.

Recently, the court has confirmed ***Banks v Goodfellow*** as the test for testamentary capacity and apparently extended it. In ***Key v Key [2010]*** a will was executed by a 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, quite distinctly from old age and infirmity. 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. The symptomatic effect of bereavement as capable of being almost identical to that associated with severe depression. Accordingly, although neither I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the Banks v Goodfellow *test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the l9th century."*

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 that:

(1) the testator had the required capacity at the date he instructed his solicitor to prepare a will;

(2) the will was prepared in accordance with those instructions;

(3) at the time of execution he was able to (and did) understand that he was signing a will for which he had given instructions. It does not matter that he could not then remember his instructions or could not have understood the will if it was read over to him.

The rule in ***Parker and Felgate*** was applied in ***Clancy v Clancy [2003]*** where the testatrix had capacity at the time of giving instructions but probably did not at the time of execution, when she was in hospital and heavily sedated. The rule was recently confirmed as good law when applied by the Court of Appeal in ***Perrins v Holland [2010]***.

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2.2.3 Burden of proving lack of capacity

Traditionally, the propounder of the will (i.e. the person seeking to have it admitted to probate) must prove the existence of capacity. In this context, two rebuttable presumptions were applied.

(1) **Rational will**

If a duly executed will appears rational, capacity is presumed. If evidence is produced to rebut the presumption, the propounder then has to prove capacity.

(2) **Continuing mental state**

If the testator generally lacked capacity (e.g. as a mental patient) it had been presumed that this state of affairs continued to the time when he made the will. The propounder, therefore, had to rebut the presumption by showing that the testator had recovered, or that he made the will during a lucid interval.

A decision of the Court of Appeal in 2002 cast doubt on the continued existence of this second presumption. Whether it did or not, does not matter now, because **s1(2) MCA 2005** says that a person is **presumed to have capacity** unless it is established that he does not. So, the onus of proving lack of capacity is now firmly on the person who alleges it in all cases, although evidence of lack of capacity in other areas may make it easier to prove in some cases than in others.

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