

Chapter 2: Wills and Validity

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Aims of this Chapter

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

- 2 Understand how to determine testamentary capacity and intention
- 5 Know how a will must be executed

2.1 Introduction

Unlike most legal documents, the validity of a will is only exposed when the client is dead. If the lawyer has made a mistake in drafting the will or arranging the signatures of the **testator** (person making the will) and witnesses (a procedure known as “execution”), the client cannot be asked to try again! A previous will may still apply or even the intestacy rules and the lawyer may risk a claim for negligence from the intended beneficiaries. Again, the lawyer must ensure that the client has sufficient understanding of what he is doing (**capacity**). The client must have sufficient **intention** to make the will and not be acting under the influence of greedy relatives or friends.

The first task the lawyer will have, especially if the client has instructed the firm on another matter, for example, a divorce, is to show why a will is needed at all.

2.2 Reasons for making a will

There are many important reasons for making a will, although some will be more relevant to a particular client than others.

- (1) A will enables a person to control what happens to his property after he dies (in the absence of a will, the law applies the **intestacy rules** which distribute the assets of the deceased to the relatives (see **Chapter 11**). For all sorts of reasons, a client may not want these relatives to inherit.
- (2) A will can specify who the deceased wishes to deal with his estate after death. These people are called **executors** and may be professional (e.g. a solicitor) or non-professional (e.g. a spouse or friend).
- (3) A will can include other wishes such as burial arrangements or organ donation (although these wishes are not binding on the executors and it is practical to tell the executors of these wishes prior to death because, often, a will is not located and read until after the funeral).
- (4) Gifts of specific items can be included (e.g. a piece of furniture, a family heirloom).

- (5) Guardians for children can be specified.
- (6) A will can include tax planning schemes (IHT aspects are considered at **3.2.6**).
- (7) Administrative clauses in the will can relax strict statutory rules which cause practical difficulties in relation to administration of estates. This is particularly relevant where there are children or a business.

2.3 Capacity

There are **two** aspects to this requirement. First, the testator must normally be over 18. Second, the testator must have sufficient **mental** capacity.

The test of mental capacity was laid down in ***Banks v Goodfellow [1870]***; it requires that the testator must understand three things:

- the **nature** of his act and its **effects** (i.e. what he is doing and the result);
- the **extent** of his property (i.e. what he owns);
- any **moral claims** he ought to consider.

Also, the testator must be free from any delusion which might affect the terms of his will.

The testator does not have to know precisely how much he owns; a general awareness of the value of the assets he is leaving in his will is sufficient. It should also be borne in mind that the testator simply needs to be aware of any moral claims there might be on his estate (such as people who are financially dependent upon him and for whom he might reasonably be expected to make some provision in his will). He does **not** have to honour these claims; a will is not rendered invalid just because the testator has been vindictive or mean, or has simply behaved inexplicably, and nor would these things necessarily prove that he lacked capacity. Nonetheless, from the practical point of view, it would be very useful to have a clear written record of why a testator has made a will in these terms, since this would obviously help defend the will against attack on the grounds of lack of capacity.

The test for mental capacity is set out by **s2(1) Mental Capacity Act 2005 (MCA 2005)**, which came into force in October 2007. It states that a person lacks capacity if:

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.

Under **s3(1)**, a person is unable to make a decision for himself:

if he is unable –

- (a) *to understand the information relevant to the decision;*
- (b) *to retain that information;*
- (c) *to use or weigh that information as part of the process of making the decision; or*

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

Usually, of course, capacity will be presumed. When an ordinary client comes into the office to make a “normal” will, there will usually be no doubt about that person’s capacity.

There might be a problem, however, if, for example, the client is very old and possibly suffering from dementia. It may be difficult to prove existence of the necessary capacity once the will has been executed and particularly after the client’s death. Proper precautions must therefore be taken when the will is prepared if there is any doubt about the capacity of the testator client, or a suspicion that this might be challenged in the future.

In *Ritchie and Others v Joslin and Others [2009]*, the testatrix had four children, but in 1998 she made her first and only will, leaving her entire estate (over £2 m) to charity. The solicitor who prepared the will pointed out that, because she was cutting out her children (who would have inherited the whole estate if she died intestate), the will ought to be witnessed by her doctor. This was done and, when she signed the will, she explained that she was cutting out her children because they had not treated her well and did not deserve the money. The court found that “*Those beliefs did so poison her mind as to cause her to cut her children out of her will . . . It follows in my view that she did not have testamentary capacity.*” The estate therefore passed to the children on intestacy. This case shows that, sometimes at least, relying on a doctor’s opinion is not enough. Where a client is making a will out of the ordinary, which might possibly suggest irrational thinking or which is likely to be challenged in the future, an up-to-date opinion from a specialist psychiatrist should be obtained.

The usual method of obtaining evidence regarding capacity is to write to the testator’s doctor and ask for his written opinion on the matter. The courts have made it clear in a number of cases that a simple letter from the doctor, saying that the patient has mental capacity, is not sufficient. When asking for the doctor’s opinion, it is therefore important to be very clear on exactly what your client wishes to do (make a will) and what criteria the doctor should apply in assessing capacity. (This is particularly important in the light of **MCA 2005**, which makes it clear that capacity is “function-specific” – a person may have capacity to do some things, but not others.) The criteria set out in *Banks v Goodfellow [1870]* still form a useful basis for a letter to a doctor.

Obtaining evidence of mental capacity can be a sensitive issue. A client may sometimes take exception to the implication that you think he does not have capacity; if the terms of the will are unusual or very complex, it may be helpful to point this out to the doctor, so he can take account of this when assessing capacity, but this can raise issues of client confidentiality. Finally, doctors may be unwilling to give you any information without the permission of his patient (your client). Nonetheless, failure to obtain such evidence at the time the will was made can result in costly disputes over validity, the will being found invalid, and the firm which prepared it being sued for negligence.

Over a number of cases the courts have established the “**Golden Rule**”, which, in essence, is simply – “**if in doubt, get evidence of capacity**”. A clear illustration of what can happen when the Golden Rule is not followed can be found in *Key and Another & Key and Others [2010]*. In this case, the deceased was a farmer, with two sons and two daughters. In 2001, he made a will in which, after providing for his wife, he left his estate to his two sons. In November 2006, his wife (to whom he had been married for 65 years) died,

and his daughters came home to live with him and look after him. A week later, one of the daughters telephoned her father's solicitor to make an appointment to make a new will.

The meeting took place, but the solicitor did not take any notes of what was discussed. However, he prepared a new will, leaving most of the estate to the two daughters. The will was duly signed. The deceased died some two years later.

The sons challenged the will on the grounds of lack of capacity and lack of intention. The court found:

- when the will was made, the deceased was already very elderly, mentally he was somewhat infirm, and he had just suffered the unexpected loss of his wife, to whom he had been married for 65 years and on whom he had been dependent. There was strong psychiatric evidence to show that, at least temporarily, this deprived him of the necessary mental capacity;
- the appointment to give instructions for the new will was arranged by one of the daughters (who stood to benefit substantially by it).

The will was therefore held invalid.

The finding is not surprising, but what make this case worth noting are the scathing comments the court made about the solicitor who drafted the will. The judge said:

"The circumstances of the making of the 2006 will . . . have transformed the formerly close relationship between his sons and daughters into one of mutual suspicion, recrimination and distrust . . ."

. . . a significant element of responsibility for this tragic state of lies with the solicitor. Contrary to the clearest guidance . . . he accepted instructions for the preparation of the 2006 will from an 89 year old testator whose wife of 65 years' standing had been dead for only a week without taking any proper steps to satisfy himself of the testator's testamentary capacity, and without even making an attendance note of his meeting with the testator and his daughter, at which the instructions were given.

His failure to comply with . . . the Golden Rule has greatly increased the difficulties to which this dispute has given rise and aggravated the depths of mistrust into which his client's children have subsequently fallen. . . . The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and his findings."

The judge also commented that *"Compliance with the Golden Rule does not guarantee the validity of a will; its purpose is to assist in the avoidance of disputes . . . the issue of testamentary capacity is, from first to last, for the decision of the court."*

Three basic, easy and obvious steps would have gone a long way towards avoiding the problem.

When there is any doubt about capacity:

- get medical evidence;

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