

On testamentary capacity

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The invalidity of Wills through the lack of testamentary capacity is often at the heart of family disputes following a death. Advances in modern medicine mean that many of us will live longer but many of us will suffer from some sort of deterioration in our mental ability in our old age. Capacity can also be affected by prescription drugs and painkillers. Other factors affecting capacity are mental illness, the influence of alcohol and non-prescription drugs.

The general principle when assessing capacity is that a person has understands the nature and of his act and its effect. The rule must be applied separately to each individual person and each individual act so a person may have the capacity to marry but not to make a Will.

Suffering from a medical condition such as dementia does not in itself mean a person (the testator) does not have capacity to make a Will, it is a question of to what extent the condition affects the individual's ability to understand what they are doing and the effects of that at the time they do it. In a recent case, *In the estate of Constance Rose Simon deceased*,ⁱ the High Court ruled that a mother's estate should be divided as specified in her last Will despite her suffering from mild to moderate dementia when she amended it. Deputy judge Nicholas Strauss QC ruled that, "the law upholds the right of elderly people to leave their property as they choose, even if their mental faculties have declined considerably." The Court heard that Mrs Simon had "good" and "bad" days and that her last Will was drawn up at her 88th birthday part which was one of her "good" days. The judge concluded that when making her last Will Mrs Simon took "a conscious decision consistent with her lifelong philosophy" and that she had know and approved the contents of the Will.

The law requires that a testator understands what they are doing and why but does not require them to be fair or sensible. In *Bird -v- Luckie*,ⁱⁱ the judge observed that "a testator is permitted to be capricious and improvident."

The relevant time for assessing the capacity of a person making a Will is usually the time of the execution of the Will,ⁱⁱⁱ although there is an exception where the person has testamentary capacity when he gives instructions for the preparation of the Will and the Will is prepared in accordance with those instructions and when the Will is signed the person is capable of understanding that he is signing a Will for which he has earlier given instructions.^{iv}

The test of capacity at common law was set out in *Banks -v- Goodfellow* as follows:-

1. The testator must understand the nature of the act and its effects; and
2. The testator must understand the extent of property of which he is disposing; and
3. The testator must be able to comprehend and appreciate the claims to which he ought to give effect; and
4. "No disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

In 2005, the *Mental Capacity Act 2005* ("MCA") came into force. Testamentary capacity is not excluded from the MCA and section 1 states that:-

"(3) a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success..."

(4) a person is not to be treated as unable to make a decision merely because he makes an unwise decision."

While section 2 states that:-

"For the purposes of this Act, 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..."

The Code of Practice which accompanies the Act states that the MCA's definition of capacity is in line with existing common law tests, including that of testamentary capacity, and the Act does not replace such tests and that is for a Judge to decide whether to adopt the new definition (paragraph 4.33).

In *Scammell -v- Farmer*,¹ the Judge (Mr Stephen Smith QC) concluded that assessment of testamentary capacity should proceed under common law principles. *Scammell -v- Farmer* also included a discussion of the "Golden Rule." This rule, which was originally set out by Mr Justice Templeman in *re Simpson*,² states that:

“In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear and however difficult or tactless it may be to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and the understanding of the testator, and records and preserves his examination and finding.

There are other precautions which should be taken. If the testator has made an earlier will this should be considered by the legal and medical advisers of the testator, and if appropriate, discussed with the testator. The instructions of the testator should be taken in the absence of anyone who may stand to benefit, or who may have influence over the testator. These are not counsels of perfection. If proper precautions are not taken injustice may result or be imagined and great expense and misery may be unnecessarily caused.”

The Golden Rule was considered more recently in *Key -v- Key*,^{vi} in which Mr Justice Biggs confirmed compliance with the Golden Rule, saying:

“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 ... is to assist in the avoidance of disputes, or at least in the minimisation of their scope.”

ⁱ (2013) EWHC 1490 Ch

ⁱⁱ (1850) 8 Hare 301

ⁱⁱⁱ *Banks -v- Goodfellow* (1870) LR 5 QB 549

^{iv} *Parker -v- Felgate* (1883) 8 P.D. 171

^v (2008) EWHC 1100

^{vi} (1977) 127 NLJ 487

^{vii} (2010) EWHC 408 Ch