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How the Courts treat capacity

Daniella Gilbert

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Capacity

Common law test set down in *Banks v Goodfellow* (1870) LR 5 QB 549:

- Testator must have capacity at the time they execute their will. They must:
    - Understand the nature of their act (i.e. making a will) and its effects;
    - Understand the extent of the property of which they are disposing ;
    - Comprehend and appreciate the claims to which they ought to give effect
- The testator must not be subject to any disorder of mind or insane delusion as shall "*poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties*"

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

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- Insane delusions and disorders of the mind – a fourth limb?
  - In *Banks* is treated as an aspect of the third limb of the test.
  - More recent authorities treat as a separate limb (*Sharp v Adam* [2006] EWCA Civ 449; [2006] W.T.L.R. 1059; *Kostic v Chaplin* [2007] EWHC 2298 (Ch)), and thus relevant to all of limbs 1 – 3.
  - True test is whether a disorder of the mind has brought about the disposition of the testator's estate which would not otherwise have been made (see Theobold on Wills 19th Edn at 4-106)

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- Potential capacity to understand is not to be equated with memory (*Simon v Byford and others* [2014] EWCA Civ 280).

- The requirement that a testator understands what they were disposing of by way of the will is limited to the extent of their property. It does not extend to understanding the collateral consequences of testamentary dispositions (*Simon v Byford*).

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- Capacity also requires the power of rational decision making:

  Key v Key [2010] EWHC 408 (Ch):

  - Noted an ever widening range of circumstances recognised by psychiatric medicine as giving rise to a risk of mental disorder sufficient to deprive a person of the power of rational decision-making, quite distinct from old age and infirmity

  - Affective disorders such as depression, including that caused by bereavement, are more likely to affect powers of decision-making than comprehension. A person in that condition may have the capacity to understand what his property is, and even who his relatives and dependants are, without having the mental energy to make any decisions of his own about whom to benefit

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- Relevance of Mental Capacity Act 2005?

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Capacity

Section 1

(1) The following principles apply for the purposes of this Act .

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(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.

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Section 2

(1) 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.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

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Section 3

(1) For the purposes of section 2, 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).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

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

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another, or

(b) failing to make the decision.

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- *Walker v Badmin* [2014] EWHC 71 (Ch) identified potential differences between the tests:

1) the burden of proof, with the MCA 2005 containing a presumption of capacity at s 1(2);

2) the requirements in section 3(1) MCA relating to the degree of understanding and retention of relevant information, which could require more than the common law test; and

3) the requirements in section 3(1) read with section 3(4) relating to understanding the consequences of the choices available.

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- *Walker v Badmin* [2014] EWHC 71 (Ch) held MCA 2005 test did not apply:
  - The test in MCA applies “for the purposes of this Act” i.e. to define the circumstances in which living persons are able to take decisions or, where they are not, when and how decisions can be made on their behalf
  - The principle of statutory interpretation that Parliament is assumed not to intend to overrule well-established rules of the common law without clear words

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- Two more recent cases confirmed the common law test applies rather than the MCA 2005:
  - *James v James and others* [2018] EWHC 43 (Ch);
    - The *Banks v Goodfellow* test remains the sole test of capacity for judging will-making capacity in retrospect
    - Individual provisions of the Act were concerned with assessing the mental capacity of living persons and the manner of making decisions thereafter on their behalf
    - The test for judging capacity retrospectively in relation to a will already made was different and did not fall within the scope of the Act

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- *Clitheroe v Bond* [2021] EWHC 1102
  - Affirmed *Walker v Badmin* & *James v James*
  - Under section 42(5) MCA the court must take account of any relevant provision of the Mental Capacity Act 2005 Code of Practice
  - Paragraph 4.32 of the Code explicitly refers to the existence of common law tests of capacity, including the *Banks* test.

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- *Clitheroe v Bond* [2021] EWHC 1102
  - Paragraph 4.33 states: "The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think it is appropriate. The Act will apply to all other cases relating to financial, healthcare or welfare decisions." (Emphasis added)
  - The reference to "*appropriate*", for judges deciding capacity issues outside the Court of Protection, means "*appropriate… having regard to the existing principles of the common law*" (*Local Authority X v MM (adult)* [2007] EWHC 2003 (Fam))

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- Potential problem?
  - Submissions by the Chancery Bar Association in response to Law Commission consultation paper "Making a Will" in 2017:
  - In extreme scenario it might mean that no valid will could be executed if a testator lacked capacity under the *Banks* test but was not demonstrated to lack capacity for MCA 2005 purposes.
- *Clitheroe v Bond:*
  - Without a clearer determination of any substantive differences, it is not possible to say whether the question is a purely theoretical one rather than a practical problem.
  - Any difficulties are a matter for Parliament to resolve, not the court.

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Burden of proof:

- Initial burden on propounder of will

- If a will is rational on its face, and properly executed and attested to, a presumption of capacity arises

However:

- "*if there are circumstances in evidence which counterbalance that presumption, the decree of the Court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it*." (*Symes v Green* (1859) 1 Sw & Tr 401)

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Shifting burden summarised in *Key v Key* [2010] EWHC 408 (Ch):

"The burden of proof in relation to testamentary capacity is subject to the following rules.

(i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.

(ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.

(iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less"

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- Where a will is prepared by an experienced solicitor who read through and explained it to the testator, and who was of the view at the time that the testator had capacity, strong evidence would be required to find that they did not (*Burgess v Hawes* [2013] EWCA Civ 94).

- The evidence will be strong where the solicitor kept detailed attendance notes of meetings with the testator which showed the testator understood the nature of the act and its effects (*Edkins v Hopkins* [2016] EWHC 542 (Ch)).

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- Where an experienced lawyer formed the view from meeting(s) that the testator had capacity, clear evidence to the contrary will be required (*Hawes v Burgess* [2013] EWCA Civ 94).

- BUT "*Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless*" (*Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch))

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- <u>The Golden Rule</u>

  Kenward v Adams, The Times 29 November 1975 & *Re Simpson* [1977] 121 Sol. Jo. 224

- Summarised by Briggs J in *Key v Key:*
  - 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 findings.
- The rule is not a rule of law but rather a guide to avoiding disputes (*Burns v Burns* [2016] EWCA Civ 37).

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Timing of capacity

- General rule: The testator must have testamentary capacity at the time when he executes the will.
- Exception – the rule in *Parker v Felgate* (1883) 8 PD 171

  A testator who lacks testamentary capacity at the time of execution may make a valid will if:

  (i)the testator has testamentary capacity at the time when he gives instructions to a solicitor for the preparation of the will;

  (ii)the will is prepared so as to give effect to the instructions;

  (iii)the will continues to reflect the testator's intentions; and

  (iv)at the time of execution the testator is capable of understanding, and does understand, that he is executing a will for which he has given instructions.

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