TRUSTS & ESTATES

A demented person makes a valid will: part 2

By Anthony Grant

In my previous article (*LawNews* 14 June) I explained how a Mrs D, who had a form of dementia requiring her to be kept in a secure facility, made a will that Justice Simon France held to be valid.

The will was made on 26 January 2010. On 14 January, she had been to see a lawyer to make a will, but the lawyer refused to cooperate, saying she lacked capacity. That afternoon, Mrs D saw a doctor who also said she lacked capacity..

The case raises interesting questions about testamentary capacity and today I give what I understand to be the judge's reasons for saying that when Mrs D saw Mr Strange – the employee of the Public Trust who wrote the will – she had capacity.

First, Mr Strange was an employee of the Public Trust. Although the judge said Mr Strange was an "unreliable witness" [85,115], he also said "he knows what he is doing and what is required"; he was "a very experienced Public Trust officer"; "Public Trust are the experts"; and "the Public Trust interview [with Mrs D] was pivotal." [114]

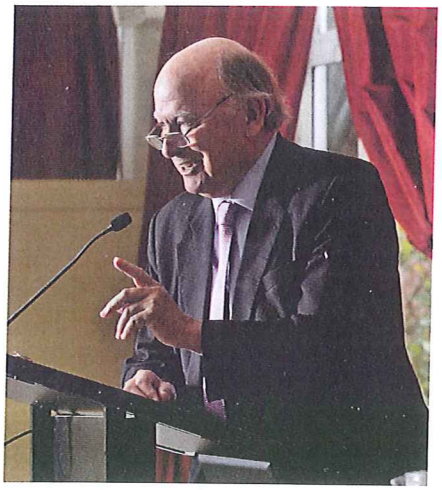
In other words, if the Public Trust says a person has testamentary capacity, that assessment should be given the highest ranking, even though the employee may not be a lawyer, let alone have any medical training.

The notion that lawyers and judges with no training in medicine can be relied upon to determine the state of a person's cognition is almost alarming

Mr Strange did not detect that Mrs D has dementia.

The appearance of capacity can be deceptive. Mrs D had been a university lecturer. It was said she could speak convincingly despite her dementia. Most lawyers will not know that the kind of decision-making needed to make a will is governed by the frontal lobes of the brain while speech is governed by a different area.

A person with diseased frontal lobes may lack



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A scientific study of lawyers revealed most of them had no competency to assess the absence of testamentary capacity

judgment (or "executive function" as doctors call it) but he or she can nevertheless sound convincing, so long as the part of the brain that governs speech remains healthy.

I suspect the Public Trust employee - and possibly the judge – was not aware of this. To speak convincingly does not prove the presence of capacity.

Second, the judge appears to have assumed Mrs D made her will while she was having a "lucid" moment. Two psychiatrists were instructed to review the medical evidence. One, Dr Casey, did not think Mrs D would have had lucid intervals. She said, "cognitive fluctuations do not occur to a significant degree" where there has been a degrading of "frontal executive function."

The second psychiatrist said it was "possible" Mrs D may have had capacity but since "no assessment was done on the day and the Public Trust officer was experienced", the court should presume she had capacity when she made her will. This evidence appears to have prevailed.

Readers may think it strange that the evidence of a leading psychiatrist that a person with Mrs D's form of dementia was not likely to have periods of lucidity should be rejected in favour of evidence from an employee of the Public Trust who I assume has no medical training whatsoever.

The third explanation for the judge's decision appears to be that a court is entitled to rely on an evidential presumption. This is the presumption that the maker of a will which is apparently rational on its face will be presumed to have testamentary capacity in the absence of "some evidence raising lack of capacity as a tenable issue".

In a recent articles (*LawNews* 24 May) I showed that a scientific study of lawyers revealed most of them had no competency to assess the absence of testamentary capacity.

The *Loosley* decisions from the High Court and the Court of Appeal speak of the need for an elderly person to be able to explain why a final will, which makes quite different provision from an earlier will(s), is reasonable.

The medical reasoning for this is simple: it is common for an elderly person with dementia to forget the people who were favoured in an earlier will and the reasons they were favoured. It is also common for such people in a final will to favour those who have shown them care and attention in the weeks or days before they make their final will.

This is what happened with Mrs D. She couldn't remember who was favoured in her previous will. The person who was to receive half her estate in the final will was a person who was looking after her when she made the will and was the same person who took her to the Public Trust's offices.

It looks like a classic case of someone with dementia forgetting what she did in prior wills and favouring the person giving her immediate attention.

The appearance of capacity can be deceptive

One of the lessons of this case is that lawyers preparing wills should obtain capacity assessments for elderly people before they make a will as judges are likely to be more persuaded by such evidence than by a retrospective assessment made after the will-maker's death.

A second, and far more fundamental, lesson is that medical knowledge has advanced a long way since the decision in *Banks v Goodfellow* in 1870.

The notion that lawyers and judges with no training in medicine can be relied upon to determine the state of a person's cognition is almost alarming. So too is the notion that a resident of a secure dementia facility should be presumed at law to

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have testamentary capacity unless the contrary is proven.

But coming back to *Banks v Goodfellow*, Mr Justice Briggs held in *Key v Key* [2010] WTLR 623 that medical knowledge had developed greatly since 1870 and *Banks v Goodfellow* needed to change with it. In that case, he held a recent bereavement was sufficient to deprive a person of testamentary capacity.

A group of international psychiatrists and lawyers is trying to persuade the courts to adapt to the discoveries of contemporary medical science and change the test in *Banks v Goodfellow*. A recent article of theirs' is "*Banks v Goodfellow 1870: Time to update the test for Testamentary Capacity*" published in Vol 95 (2017) "*La Revue du Barreau Canadien*" at page 251. The co-authors include four distinguished psychiatrists and a judge of the Ontario Superior Court of Justice.

I hope the learning reflected in that article, and in other medico-legal articles of recent times, reaches one of our higher courts before too long. The era of asking judges to assess the state of a person's cognition based on the rules and presumptions described 149 years ago in *Banks v Goodfellow* ended long ago.

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