Assessing testamentary capacity – an important new development

By Anthony Grant, Trusts & Estates Litigator

I try to avoid writing articles about cases in which I act as counsel but today is an exception. I write about *Farn v Loosley* [2017] NZHC 317 in which Courtney J has modified the test for assessing testamentary capacity.

In *Banks v Goodfellow* (1870) LR 5 QB 549, Cockburn CJ – an erudite and articulate Judge – set out principles for assessing testamentary capacity and these principles have endured to this day. Few areas of our law have been governed in such a consistent and acceptable way.

Our Court of Appeal in *Woodwood v Smith* [2009] NZCA 215 confirmed the principles in *Banks v Goodfellow* in a little more detail.

The principles are simple. For a person to make a valid will, he/she should:

- know what a will is;
- know what his/her assets are;
- understand and appreciate the claims to which he/she ought to give effect; and
- be free of any disorder of the mind that would poison his/her affections, pervert his/her sense of right, or prevent the exercise of his/her natural faculties and not be subject to any insane delusion that could influence his/her will.

That's essentially it.

In *Farn v Loosley*, a psychiatrist said there is another principle.

It is not one that Parliament has spoken about and so far as I am aware, it is not one that any New Zealand judge has ever said is applicable.

It is a principle that comes from an academic article in an overseas medical journal.

The principle is this:

"If there is a change in the pattern of disposition [from previous wills] then, some rationale for this change should be provided. The vital question to ask the testator is 'Why?' It is not sufficient to simply document that the testator was emphatic or 'clear' in their wishes to disinherit or favour a beneficiary – often assumed to be synonymous with capacity, despite the fact that clarity or emphasis may reflect cognitive impairment or psychotic thinking."

In the *Farn* case, the lawyer who made Mrs Farn's last will had decades of experience in drafting wills

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and the judge accepted his evidence that "[t]here was nothing in [the deceased's] appearance or demeanour or the way in which she gave her instructions that caused [him] to think that there was an issue over her testamentary capacity".

"She did not show any appearance of lethargy or confusion and did not fail to respond to any question he asked." (at para [80])

Despite these positive suggestions of testamentary capacity, Courtney J held that the lawyer's assumption of testamentary capacity was flawed.

She said that no assumption of capacity could be made merely from the way the testator looked and spoke. The lawyer should have asked her "to explain in her own words" the reasons for making a different disposition to the one that she had made in an earlier will (see para [82]). This extended to such modest items as her clothes and items of furniture (see para [83]).

Courtney J concluded that the lawyer's discussion with the deceased was "insufficient to enable him to make an accurate assessment regarding testamentary capacity" (at para [84]).

The decision is being appealed. As I understand her decision, Courtney J says that if a lawyer who prepares a will does not ask a will-maker to explain why a proposed disposition is different from the way the same asset was to be disposed of in a previous will, there can be no assumption of testamentary capacity.

And if the testator explains why the change has been made, the decision does not give guidelines to assist lawyers to know whether the explanation shows the presence or the absence of testamentary capacity.

As with all new developments in the law, the *Farn* decision may be right or it may be wrong. The answer will not be known until the decision has been examined by the Court of Appeal. But, in the meantime, the decision must be regarded as the law of New Zealand.

I suspect this means that many of the wills that are stored in lawyers' offices will be invalid because the will-makers were never asked to explain why each of the provisions in those wills differed from the corresponding provisions in an earlier will and the failure to ask about the reason for the changes would appear to be an invalidating factor of itself.

This is without doubt the most significant new development in assessing the presence or absence of testamentary incapacity since Cockburn CJ's decision in *Banks v Goodfellow* 147 years ago.