Change your will at your peril!

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The test for assessing testamentary capacity was set out almost 150 years ago in *Banks v Goodfellow* (1870) LR 5 QB 549.

By that test, a person is deemed to have testamentary capacity if he/she:

- knows the nature and effect of a will;
- knows the extent of the property of which he/she is disposing;
- can understand the claims to which he/she ought to give effect;
- is free of any disorder of the mind which would poison affections, pervert the sense of right, and is not suffering from any insane delusions.

The Court of Appeal has modified the law in this area in a decision that was released a few days ago: see *Loosley v Powell* [2018] NZCA 3, 2 February 2018.

The case involves the late Allison Slater. She was seen by an experienced Auckland lawyer on 29 April 2014 and gave him instructions for her will. She had asked him to meet with her. When they met, she handed him a copy of the last page of her previous will on which she had written the provisions she wanted to make in her new will. She appeared "chirpy" to the lawyer, and it didn't cross his mind that she might not have capacity.

In terms of the *Banks v Goodfellow* test, it was conceded that she knew what a will was, she knew the size of her estate, she was aware of all of the people who might feature in her will, and she knew the kind of principles that would apply when deciding who should get what.

Two days later, she went into a hospice for what was intended to be a stay of a week's duration. But she began to deteriorate in her health. The lawyer who saw her when she signed her will on 2 May 2014 said it didn't cross his mind that she might have lacked capacity that day and she appeared to follow everything he said during the half hour of their meeting.

Two of the beneficiaries of the new will applied to set the grant of probate aside. They challenged the will by reference to an article in an overseas medical journal, in which it was said that one of the important ways to test for capacity for a "deathbed" will is whether the person can give a satisfactory explanation for making a different provision to one that was made in a prior will.

Because the *Banks v Goodfellow* test does not refer to such a principle, the lawyer who prepared the will had not asked Allison (as she was referred to in the judgment) to explain why she was proposing to make different provision for the two beneficiaries to the provision she had made for them in a previous will. (She had explained the reason to her mother on a separate occasion, but she had not told the lawyer.)

This is how the Court of Appeal has addressed the *Banks v Goodfellow* criteria. It says that the principles that were set out in that case "should be treated as guiding propositions rather than as a formula" (para [19]); the trial Judge did not "add to the *Banks v Goodfellow* criteria or make investigation of the rationale for making a different provision, a requirement for establishing capacity" (para [29]); the Judge's approach "was to consider ... all matters indicative of capacity including the rationale (or lack thereof) behind any significant changes" (para [30]); and "there are numerous authorities where a major change of testamentary disposition has been seen as supporting an inference of incapacity in the absence of an adequate explanation" (para [32]).

Allison's will was therefore set aside because the Judges concluded that there had been no "adequate explanation" for the change between the two wills.

Although the lack of explanation arose from the lawyer's failure to make an appropriate enquiry, "there is no requirement that a *Banks v Goodfellow* assessment [should] involve an enquiry into why a will-maker has made a significant change at the time the will is executed. It would be wrong to deny capacity only because of a failure by a solicitor to so enquire" (para [33]).

Yet that is what the Court has done. It says that there is "a further factor" to take into account when assessing capacity, namely "the reasons for the change" (para [33]).

The Judge "was doing no more than recognising that a change that appeared to have no rational basis by an extremely unwell will-maker was indicative, in terms of the *Banks v Goodfellow* criteria, of a lack of understanding and an inability to comprehend and appreciate the claims which ought to be given effect" (para [36]).

Here are some of the questions which result from this decision.

How do you tell, if the will-maker gives an explanation, that the explanation indicates capacity or incapacity?

A will-maker is entitled to be selfish and capricious when making a will – are the Courts going to interfere with this right?

If the will-maker gives an explanation that can only be resolved by a factual investigation, how is the lawyer to resolve a factual dispute which may require a determination of which factual assertions are to be believed?

And is the decision confined to the wills of "dying" people? Allison gave instructions at a time when her health was good. When, according to the lawyer, she was "chirpy". She had initiated the meeting, she had written out the main terms of her proposed new will, and she spoke readily about herself, her health, and other things. If these are the actions of a "dying person", then lawyers should be aware that they should seek explanations for new provisions from healthy will-makers as well.

Further, if the will-maker had not made a previous will, is the lawyer obliged to ask about the rationale for each disposition? If not, why should that will be valid when, if the same will had been preceded by a prior will, it would be invalid?

Disclaimer: *I acted as Counsel for the Appellant. A detailed discussion of the case and of its significance for lawyers who prepare wills will be given at a Legalwise seminar in Auckland at which I am due to speak on 21 March 2018.*