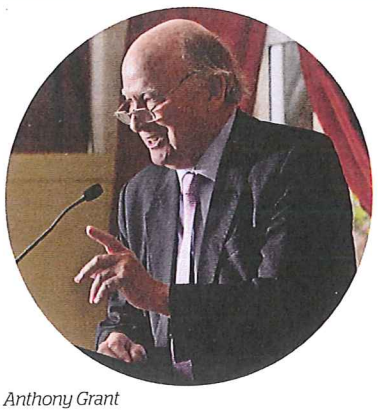
TRUSTS AND ESTATES LAW

Invalidating wills which differ from previous wills

By Anthony Grant, Trusts & Estates Litigator



Anthony Grant

This is my second article for *LawNews* about the Court of Appeal's unanimous decision in *Loosley v Powell* [2018] NZCA 3, a case in which, incidentally, I acted as counsel.

The Court of Appeal invalidated a will that differed from a previous will because the will-maker had not been asked to explain why provisions in it differed from provisions in a previous will.

The Court said that this form of reasoning applies to the wills of people who are on their deathbed, people who are "very ill", people who are "in bed" at the time of giving instructions and people who make "a major change of testamentary disposition". In the case itself, there was uncontroverted evidence that the will-maker – a 64 year-old woman – was "chirpy" at the time she gave instructions for her will, she had organised the meeting with her lawyer, she had given him written instructions for the provision that she wanted to make, she knew the size of her estate, who her relatives were, and had decided what assets she wanted to give to each one of them.

The Court of Appeal has diluted the principles that were laid out for assessing testamentary capacity in *Banks v Goodfellow* (1870) LR 5 QB 549. Whereas for almost 150 years they have been considered a "formula", the Court of Appeal now says they are to be considered as no more than some "guiding principles".

Some people think the case can be side-lined as a one-off or a bit of an oddity, but is this correct? I don't think so.

From now on, when a client comes to you who doesn't like a provision that was made in the will of an elderly person, a person who was in bed at the time of giving instructions, a "chirpy" 64 year-old who happened to be in bed at the time of giving instructions, a person who made "a major change of testamentary disposition", and probably others, the first line of attack will be to obtain copies of earlier wills, see the extent to which the provisions differed from the provisions in a final will and require the favoured beneficiaries to provide a satisfactory explanation for the changes. It will be negligent not to make these enquiries.

In the *Loosley* case, the reason for giving more money to two people rather than to others was the will-maker's subjective assessment that the others might not handle money wisely. The Court of Appeal didn't accept that the will-maker was entitled to hold that belief and her subjective opinion was dismissed as being unreasonable.

What should a lawyer who takes such instructions do? For a start, he couldn't ask the people whether they would handle moneys wisely, since the will-maker had given instructions that she required the terms of her will to be kept confidential.

If he asked the will-maker why she believed that the two relatives wouldn't handle moneys wisely and she answered "because that's my assessment of them and I've known them since the day they were born", the Court of Appeal indicates that such an explanation would not be good enough and some greater justification is required.

A lawyer in those circumstances might try to get an appointment with one of the relatively few medical experts who are competent to make capacity assessments. This may take a few weeks, if not months, and even when the expert sees the will-maker, the Court has given no greater assistance to the expert than it has to lawyers in trying to work out whether the will-maker's explanation is satisfactory.

I have been asked, "What if the previous will had been destroyed and the will-maker told the lawyer she couldn't recall the provisions she had made in an earlier will?" In this scenario, it would appear that the final will would be valid. The same will, but it would be valid – not invalid.

What if she had not made an earlier will because she had been advised that she might never be able to make a binding will if she changed her mind in future, and an earlier will would have made the kind of different provision that was made in the *Loosley* case? Answer: the same will, but it would be valid – not invalid.

Does that mean that people should be encouraged to destroy previous wills and, if they can recall the provision that was in them, lie to the lawyer and say that either they can't recall the provision or say they haven't made a prior will?

In the age of computers, it's likely that copies of all wills that were prepared during the last 30 years or more will be on a computer system somewhere. It's also likely that a court will order the person who owns the computer to divulge it.

Lawyers who want to protect their clients' interests might therefore advise their clients when making a will to destroy all previous wills and all computer records of them. But would such advice be lawful and/or professionally sound?

In this era of judicial uncertainty, I wouldn't put it past a court to say that legal advice to destroy all prior wills, if done to prevent a court from being able to tell whether the final will is valid, is a breach of the lawyer's duties to the court.

A further question that arises from the Court of Appeal's decision is how it impacts on the fundamental principle that a person is entitled to make whatever provision he or she thinks appropriate in a will, no matter how capricious or unfair it may be.

My answer is that a capricious or unfair provision in the will of an elderly person, a person who was very ill, a person who was in bed at the time of giving instructions, and perhaps in the wills of younger and less disadvantaged people, will only be valid where it differs from a provision in an earlier will, to the extent that the courts consider the will-maker was able to give what the courts regard as a satisfactory explanation for making the different provision.

Readers who are not familiar with the unpredictability of courts may be interested in another reason that was given for ruling that the will-maker lacked capacity. The Court of Appeal said that the trial Judge (Courtney J) had made various "errors on the facts" and had failed to "make findings on some of the conflicting evidence relating to capacity". So the Judges in the Court of Appeal (France, Cooper and Asher JJ) decided to read the evidence of all the witnesses and reach their own conclusions. They decided that the evidence of one person (whom they had neither seen nor heard) was to be preferred to the evidence of all the others. That person had said that the will-maker had lacked testamentary capacity for more than a month before she gave instructions for her final will, even though the will-maker was living independently at the time, driving her car, cooking, buying her groceries, and had been given full responsibility for taking her medication. No other witness made such an extreme claim. Not even the challengers' own medical witness.

For readers who would like more on this case, I recently gave a paper on it: "Testamentary capacity – the latest developments all will-drafters need to know." It's on my website: click on "Trusts" and "Latest articles."

Anthony Grant is one of the presenters at this year's ADLS Cradle to Grave Conference, taking place in Christchurch on Monday 7 May and in Auckland on Thursday 10 May 2018. For more information or to register for this event, please visit adls.org.nz/cpd.