TRUST LAW

What does testamentary capacity mean for wills?

By Anthony Grant

The late Sir Robert Chambers and Lord Templeman were judges in the highest courts of their respective countries and had something else in common: their wills were challenged by one of their children. Being a judge of the highest court in the land doesn't spell freedom from testamentary scrutiny.

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In Lord Templeman's case, a son from his first marriage challenged a will that he believed favoured the daughters of his father's second marriage. Michael, a barrister, said his father had lacked testamentary capacity when at the age of 88 he had made his final will.

There was a seven-day trial where Michael lost and, according to a contemporary press report, he was ordered to pay about NZ$700,000 in costs to the daughters – a far greater sum than he received under the will: see *Goss-Custard v Templeman* [2020] EWHC 632 (Ch), a decision of Fancourt J.

In England it is drummed into solicitors who prepare wills that they must comply with the 'golden rule'. Under this rule, an elderly will-maker should always be the subject of a capacity assessment.

The rule was invented by none other than Lord Templeman himself. Had he complied with it he might have saved Michael more than $1 million in legal expenses. The rule was announced in *Kenward v Adams, The Times*, 29 November 1975 and was expressed in these words:

> *"In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding."*

Lord Templeman's will was made when he was suffering from the onset of dementia, a condition which got progressively worse in the following years. The first signs were noticed two years before he made the will that was challenged.

There is a common misconception that a person with dementia will lack testamentary capacity, but this need not be so. It all depends on the degree of dementia. In Lord Templeman's case, Fancourt J held that he had a deficient "episodic memory" but his "working memory" was good. [102]

An episodic memory is a term for a short-term memory. It was held that Lord Templeman was not sufficiently impaired by his short-term memory to have lacked capacity.

I write about his case because our Court of Appeal held in *Loosley v Powell* [2018] 2 NZLR 618 that a woman who drove a car, did her own shopping and cooking, who was trusted by her doctors to be able to self-medicate even with opioids, and who lived independently, was incapable of making a will because she lacked testamentary capacity. Some people have thought this an aberrant decision.

Their doubts will have been reinforced on reading how Fancourt J dealt with Lord Templeman's will.

He held that when Lord Templeman made his will, he "was suffering from a serious problem with his episodic memory, but otherwise suffered no significant mental impairment. He was unable to remember some things (but not everything) that had happened to him in the recent past." [128]

The judge said "a testator does not have to have all the facts with which to make a correct or justifiable decision; he has to have the capacity to decide for himself between competing claims. That means that he must have the ability to inform himself about those claims, to the extent that he wishes to do so, but not that he must remember the relevant facts about each of the potential objects or have correctly understood their financial circumstances." [133]

He said that judges dealing with wills should guard against treating deficiencies with memory as being "the equivalent of incapacity". In principle, "testamentary capacity is not a test of memory". [135]

In the *Loosley* case the High Court and Court of Appeal said a will-maker – particularly in the case of a death-bed will – should be able to give a satisfactory explanation as to why a bequest in the latest will differed from a bequest in an earlier will.

Justice Fancourt said, "I reject the notion that a will cannot be valid unless the testator is aware of the terms of his existing or previous wills or has to mind the reasons underlying the gifts in them. A testator does not have to be able to justify to himself a difference between a previous will and the new will, even if there were particular reasons for the terms of the previous will." [136]

There is good medical evidence that a will-maker with advanced dementia can forget the reasons why a person who is to receive a substantial bequest in the latest will was to receive nothing in an earlier will: see *Deathbed Wills: assessing testamentary capacity in the dying patient* International Psychogeriatrics, February 2014 (print) 5 November 2013 (digital).

In such cases, an inability to explain the reason for a significant change in bequests can be a reasonable sign of testamentary incapacity – but only in such cases.

Fancourt J's general statement that a will-maker does not have to justify the differences between all the bequests in a previous will and a new will is, in my opinion, a more practical approach to this aspect of the assessment of testamentary capacity.

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