Chapter 2: Wills and Validity

Outline

Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

2 Understand how to determine testamentary capacity and intention
5 Know how a will must be executed

2.1 Introduction

Unlike most legal documents, the validity of a will is only exposed when the client is dead. If the lawyer has made a mistake in drafting the will or arranging the signatures of the **testator** (person making the will) and witnesses (a procedure known as "execution"), the client cannot be asked to try again! A previous will may still apply, or even the intestacy rules, and the lawyer may risk a claim for negligence from the intended beneficiaries. Again, the lawyer must ensure that the client has sufficient understanding of what he is doing (**capacity**). The client must have sufficient **intention** to make the will and not be acting under the influence of greedy relatives or friends.

The first task the lawyer will have, especially if the client initially instructed the firm on another matter, for example, a divorce, is to explain why a will is needed at all.

2.2 Reasons for making a will

There are many important reasons for making a will, although some will be more relevant to a particular client than others.

(1) A will enables a person to control what happens to his property after he dies (in the absence of a will, the law applies the **intestacy rules**, which distribute the assets of the deceased to the relatives (see **Chapter 11**). For all sorts of reasons, a client may not want these relatives to inherit).

(2) A will can specify who the deceased wishes to deal with his estate after death. These people are called **executors** and may be professional (e.g. a solicitor) or non-professional (e.g. a spouse or friend).

(3) A will can include other wishes such as burial arrangements or organ donation (although these wishes are not binding on the executors and it is practical to tell the executors of these wishes before death because, often, a will is not found and referred to until after the funeral).

(4) Gifts of specific items can be included (e.g. a piece of furniture, a family heirloom).

(5) Guardians for children can be specified.

(6) A will can include tax-planning schemes (see **3.2.7**).

(7) Administrative clauses in the will can relax strict statutory rules which cause practical difficulties in relation to the administration of estates. This is particularly relevant where there are children or a business.

There are three essential factors which apply when a will is made – **capacity**, **intention** and **formalities**.

2.3 Capacity

2.3.1 Tests for capacity

There are **two** aspects to this requirement:

- first, the testator must normally be over 18;
- second, the testator must have sufficient **mental** capacity.

The test for mental capacity for making a will was first laid down in ***Banks v Goodfellow [1870]***, which requires that the testator must understand three things:

- the **nature** of his act and its **effects** (i.e. what he is doing and the result);

- the **extent** of his property (i.e. what he owns).

  The testator does not have to know precisely how much he owns; a general awareness of the value of the assets he is leaving in his will is sufficient;

- any **moral claims** he ought to consider.

  The testator simply needs to be **aware** of any moral claims there might be on his estate (such as people who are financially dependent upon him and for whom he might reasonably be expected to make some provision in his will). He does **not** have to honour these claims; a will is not rendered invalid just because the testator has been vindictive or mean, or has simply behaved inexplicably, nor would these things necessarily prove that he lacked capacity. Nonetheless, from the practical point of view, it would be very useful to have a clear written record of why a testator has made a will in these terms, since this would obviously help to defend the will against attack on the grounds of lack of capacity;

- also, the testator must be free from any delusion which might affect the terms of his will.

Until a few years ago, ***Banks v Goodfellow*** was the standard authority for determining capacity to make a will. However, the enactment of the **Mental Capacity Act 2005** (**MCA 2005**) introduced a range of statutory provisions which, though not specifically targeted at making wills, had a major impact on the way in which testamentary capacity was assessed.

The first point to note is that **s1(2) MCA 2005** introduces a presumption of mental capacity. In general terms, it is therefore to be assumed that a person has capacity to make a will unless there is evidence to the contrary.

MCA 2005 also states that capacity is "function-specific". A person may have capacity to do some things (e.g. enter into a contract to buy a car) but not others (e.g. make a will). Capacity is not all-or-nothing.

MCA 2005 also sets out rules for determining whether a person does or does not have capacity to carry out a given task.

s2(1) MCA 2005 states that a person lacks capacity to carry out a specific task (not necessarily to make a will) if:

he is unable to make a decision for himself . . . because of an impairment of, or a disturbance in the functioning of, the mind or brain.

Under **s3(1)**, a person is unable to make a decision for himself:

if he is unable –

(a) to understand the information relevant to the decision;

(b) to retain that information;

(c) to use or weigh that information as part of the process of making the decision; or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(Note here the effect of the presumption of capacity raised by **MCA 2005**. Under ***Banks v Goodfellow***, a person could only make a will if they positively complied with the three criteria. Under **MCA 2005**, a person has capacity unless it can be demonstrated that they lack it (by being unable to understand and retain information etc.)

Usually, of course, capacity will be presumed. When an ordinary client comes into the office to make a "normal" will, there will usually be no doubt about that person's capacity.

There might be a problem if, for example, the client is very old and possibly suffering from dementia. It may be difficult to prove the existence of the necessary capacity once the will has been executed and particularly after the client's death. Proper precautions must therefore be taken when the will is prepared if there is any doubt about the capacity of the testator client, or a suspicion that this might be challenged in the future.

In ***Ritchie and Others v Joslin and Others [2009]*** the testatrix had four children, but in 1998 she made her first and only will, leaving her entire estate (over £2 m) to charity. The solicitor who prepared the will pointed out that, because she was cutting out her children (who would have inherited the whole estate if she died intestate), the will ought to be witnessed by her doctor. This was done and, when she signed the will, she explained that she was cutting out her children because they had not treated her well and did not deserve the money. The court found that *"Those beliefs did so poison her mind as to cause her to cut her children out of her will . . . It follows in my view that she did not have testamentary capacity."* The estate therefore passed to the children on intestacy. This case shows that, sometimes at least, relying on a doctor's opinion is not enough. Where a client is making a will out of the ordinary, which might possibly suggest irrational thinking or which is likely to be challenged in the future, an up-to-date opinion from a specialist psychiatrist should be obtained.

In practical terms, the relationship between the case law (especially ***Banks v Goodfellow [1870]***) and **MCA 2005** is not entirely clear. This issue was looked at in ***Re Walker v Badmin [2014]*** (also known as ***Re Walker [2014]***). In this case, the judge said *"my first impression was that* ***Banks v Goodfellow*** [and other similar cases] *had indeed been replaced by* **MCA 2005**, *but counsel has now persuaded me that this is wrong*." (Emphasis added.)

It is interesting to note that the judge himself was initially unclear on the relationship between these two authorities, and that he changed his view in the light of the arguments made by the barristers during the hearing. Ultimately, he decided that the case law should still prevail, supplemented by the further details of **MCA 2005**.

In ***Scammell v Farmer [2008]*** the court had to decide whether a will was invalid due to a lack of testamentary capacity. In doing so, the court was asked to consider both ***Banks v Goodfellow*** and **MCA 2005**. The court decided not to take the provisions of **MCA 2005** into account. This was because:

- the deceased had died in 2003, long before **MCA 2005** came into force; and
- **MCA 2005** was intended to supplement ***Banks v Goodfellow***, not to replace it with a new test for testamentary capacity.

In ***Elliott v Simmonds [2016]*** a testator, who was gravely ill, made a will leaving his entire estate to his new partner, and nothing to his wife and children. The solicitor who prepared the will did not take any medical evidence as to capacity, and did not keep a detailed note of the testator's instructions. In finding the will invalid for lack of capacity, the court stated that the appropriate test for capacity was ***Banks v Goodfellow***.

James v James [2018] was another case in which the testator's testamentary capacity was challenged. Again, the court had to look at both case law and **MCA 2005**. The judge said that, in essence, **MCA 2005** was not relevant in assessing, after death, whether or not a testator had testamentary capacity at the time the will was made, and that ***Banks v Goodfellow*** remains the main authority for assessing testamentary capacity.

Published in 2019 by:
CILEx Law School Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

British Library Cataloguing in Publication Data

A catalogue record for this manual is available from the British Library.
ISBN 978-1-84256-1090-3