Capacity

In this month’s CPD paper we will consider the principles of capacity as they relate to will writing.

The Basics

There are some very basic requirements that a will must comply with in order to be admitted to probate. This concept is formal validity. To be formally valid a will must have been made by a testator who had the requisite testamentary capacity, testamentary intention, and it must have been made and signed in accordance with the requirements of section 9 of the Wills Act 1837. To recap, these requirements are:

- The will is made in writing
- The will is signed by the testator, or by someone else in his presence and at his direction
- It appears that the testator intended to give effect to the will by his signature
- The testator’s signature is made or acknowledged in the simultaneous presence of at least two witnesses
- Each witness signs or acknowledges their signature in the presence of the testator (but not necessarily in the presence of the other witnesses).

There are also physical characteristics of capacity to consider, but these are minor in relation to ability to actually write a will.

Physical Capacity

Capacity can be split into two categories; physical and mental. In terms of physical capacity the testator merely needs to be 18 or over at the date that they execute their will. There’s an exception to this rule in the case of privileged wills, but these are only available to those members of the armed services who are on active military service, and seamen at sea.

Aside from the age requirement there are no other physical requirements a person must meet to make a will. Being bankrupt or imprisoned isn’t a barrier to making a will. It doesn’t matter that the testator is blind or illiterate and therefore incapable of physically writing or reading their own will, though in these cases the drafter must take extra steps to make sure the will is validly signed.

Any physical capacity issues of the testator are to be considered more from the perspective of how, as a will writer, you communicate and make your services accessible to the testator and what reasonable adjustments you need to make.

Mental Capacity

Mental capacity on the other hand is much more in-depth. To write a valid will a testator must have the minimum level of mental capacity required, sometimes referred to as ‘testamentary capacity’. This is the ability to understand some key things about their estate and what it means to write a will.

The test we need to apply to establish testamentary capacity is unique to will writing since the capacity needed to write a will differs from other types of decision. Capacity requirements vary
depending on the decision that needs to be made. Perhaps the best example of this can be seen in the case of Re DMM [2017] EWCOP 33.

This case concerned a question of whether a gentleman suffering from Alzheimer’s had the capacity to enter into a marriage with their long-term partner. It also concerned his capacity to revoke his EPA and enter into a new LPA. The challenge was by his daughters who were concerned that under his current will they were the main beneficiaries of his estate, but if the marriage went ahead this will would be revoked and his wife would become the main beneficiary under intestacy. It was found that he didn’t have the capacity needed to make an LPA, but he did have the capacity to marry. The legal test for whether a person has capacity to marry includes a requirement that the person should be able to understand, retain, use and weigh information as to the reasonably foreseeable financial consequences of a marriage, including that the marriage would automatically revoke the person's will. He understood this.

What he was unable to understand or recall were the provisions of his previous will or the value and nature of his estate. Even after explanations of these points he was unable to retain the information for any length of time. While this was held not to be relevant to his capacity to marry, as he only needed to understand that the act of marrying would revoke his will and not the full impact of how his estate would be distributed instead, but it’s certainly very relevant to his capacity to make a new will after the marriage. The issue of whether he had testamentary capacity wasn’t ruled on but it is clear from the mental capacity assessor providing evidence in the case that they didn’t believe he had testamentary capacity. So there you have it, due to how differing levels of capacity are required for different decisions in one case we have seen a person definitely having capacity to marry but not to make an LPA, and very likely not having capacity to make a will.

The test for testamentary capacity

There are two legal tests for capacity. The common law test and the statutory test. The relationship between the common law and statutory test has been debated for some time. The general view is that the statutory test should be used to *complement* the common law test but does not displace it, although the Courts have recognised that applying either test should produce the same result in most cases. The High Court provided some clarity on the position on the test for capacity in the case of *Walker v Badmin* [2014] All ER (D) 258 where it was confirmed that the correct test for testamentary capacity is the common law test established in *Banks v Goodfellow* [1870].

The Common Law Test

The classic statement of a test of a client’s testamentary capacity is contained in the judgment of Cockburn CJ in *Banks v Goodfellow*:

“It is essential...that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will is disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

The test in *Banks v Goodfellow* requires the testator to understand 3 things:
1. The nature of his act and its effects, (but not necessarily their precise legal effect)
2. The extent of the property of which he is disposing
3. The nature of the claims to which he ought to give effect

Furthermore, the testator should not be suffering from any disorder of the mind that “shall poison his affections” or any other delusions that may influence the provisions of his will.

A ‘delusion’ is a belief in something that no rational person could hold, and that a person maintains despite contradiction by rational argument. A delusion will affect a client’s testamentary capacity if it influences or is capable of influencing the provisions of their Will. If a client holds a delusion that cannot affect the provisions of their Will then they may still have testamentary capacity.

In Re Ritchie [2009] EWHC 709 (Ch) the deceased wrote a will disinheriting her four children and leaving her £2.5m estate to charity. She had told her solicitor that her sons were stealing from her and were violent towards her, and her daughters never visited. After her death the will was challenged on the grounds of lack of capacity and her children denied these claims. It was found that all of the testator’s allegations against the children were delusions, and she wouldn’t have made a will disinheriting them if not for these delusions so the will was invalid for lack of capacity.

The Statutory Test

While we’ve established that the applicable test for capacity to make a will is the common law test, the statutory test remains important as a complement to Banks v Goodfellow, so it is set out below.

The Mental Capacity Act 2005 contains the statutory test of capacity. Section 1 of the MCA 2005 sets out the key principles:

1. A person must be assumed to have capacity unless it is established that he lacks capacity
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action

The statutory test for capacity is set out at section 2 of the MCA 2005:

(1) ...a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain

(2) it does not matter whether the impairment or disturbance is permanent or temporary

The statutory test for capacity is therefore time specific as well as decision specific. There may be certain times of day where a client is more lucid and will have capacity to give instructions. As a will writer you should be aware of this and willing to make adjustments to accommodate a vulnerable client.
It is also important to note that although advanced age is a risk factor when assessing a client’s vulnerability, a lack of capacity cannot be established merely upon a person’s age or appearance, or their condition or an aspect of their behavior (s2(3) MCA 2005).

A person’s inability to make a decision is set out in section 3 of the MCA 2005:

(1) For the purposes of section 2, 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).

An explanation of the information relevant to a decision must be given in a way appropriate to the client’s circumstances, for example in simple language, large print or braille.

Dependent upon the nature and effect of the decision in question the fact that a client is only able to retain the relevant information for a short period does not necessarily mean they should be regarded as unable to make a decision.

Finally, the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make a decision (s3(4)).

Where there are doubts about capacity

It is the will drafter’s duty to satisfy themselves that the testator has capacity to make a will. In many cases there is no cause for concern and it is plainly obvious that the testator is rational and understands everything relevant to the Banks v Goodfellow test. In some cases however there may be some doubt, so it’s important that this is recorded and steps are taken to assuage yourself of doubt.

“The Golden Rule” applies where there is doubt as to a client’s ability to give valid instructions to the will writer. This rule was expressed by Templeman J in Kenward v Adams [1975] ChD 29 and also in Re Simpson [1977] 121 SJ 224 and states that when a professional draftsman is drawing up a will for an aged testator, or a testator who has been seriously ill, the making of the will should be “witnessed or approved by a medical practitioner who is satisfied of the capacity and understanding of the testator, and records and preserves his examination of the testator and findings”.

In modern times you’re unlikely to find a doctor able or willing to act as a witness to the will. But they can still arrange to meet with the client to assess their capacity and prepare a written report of their findings. This report should be kept with your client file as it will be vital evidence if the will is challenged after the testator’s death. This letter, along with the client file, should be retained for at least 6 years after you are aware of the testator’s death. If you are never made aware of the testator’s death then best practice according to the Law Society is to retain the file indefinitely.

When asking a medical professional to prepare a report on the testator’s capacity make sure you clearly set out the Banks v Goodfellow test for them. If this isn’t done and the wrong test is carried
out then any capacity report will be meaningless and do nothing to defend the will against a claim later on.

Initially stated to apply to all aged or ill testators, this golden rule has since been diminished to being a rule of good practice only in cases where there are doubts about capacity or where the drafter is concerned there may be questions as to capacity raised later. Age alone of course is not good reason for assuming lack of capacity, though it’s fine to recognise that advanced age is a risk factor.

Although it may be difficult to bring up concerns about capacity and explain this precautionary measure to a testator, you shouldn’t let that prevent you doing it. The purpose of the golden rule is to protect against any later challenge to the will on the grounds of lack of capacity, so it is in the testator’s best interests to go ahead with a capacity assessment.

There may be times where it’s not possible to get a medical opinion on capacity, often because the testator doesn’t want to subject themselves to an assessment or doesn’t want to pay the fee for it. In these circumstances if the testator’s capacity is maybe borderline, but the drafter considers them more likely to be on the capacitous side of the line, a drafter needs to weigh up the risks and consider whether it is still in the testator’s best interests to go ahead. The ‘Law Society Wills and Inheritance Protocol’ (July 2013) has some useful guidance on this matter and recommends:

“(a) explain to the client that, in the event of a subsequent challenge to the will on the basis of lack of capacity, the lack of a contemporaneous medical opinion may make the challenge more likely to succeed; and

(b) ask the client to confirm that they wish to continue, record the advice given and the client’s decision, and preserve as part of the will file.”

Time for capacity and the burden of proof

The capacity test must be satisfied at the time the will is made, that is the time that the testator signs it. It reasonably follows then that if there are concerns about capacity deteriorating the less time between the instructions being taken and the will being signed the better.

There have been a few notable exceptions to this rule, the first being *Parker v Felgate* [1883] 8 PD 171. In this case the testator provided instructions directly to their solicitor at a time where they were deemed to have capacity. The solicitor returned a couple of weeks later with the final document ready to sign. At this point the testator had to be roused from a coma to sign the will, and was not capable of understanding the terms of their will at the time it was signed. The validity of the will was challenged since the testator clearly lacked capacity at the time the will was signed. Nonetheless, it was held that the will was valid because the following three conditions were fulfilled:

1. The testator had capacity at the time the instructions were given
2. The will was prepared exactly in accordance with those instructions
3. At the time the will was signed the testator remembered giving instructions for the will and understood that it had been prepared in accordance with those instructions.

It didn’t matter then that at the point of signing the will the testator wouldn’t have been capable of giving instructions, and couldn’t understand the will if read over to them at that point.

This rule was finally tested more recently in *Perrins v Holland* [2010] ECWA Civ 840 and confirmed. In this case the drafter had taken instructions at a time where the testator had capacity. He sent the
drafts and had no response. After 18 months with still no response he sent his final bill and closed the case. The testator’s carer contacted him to request a further copy of the will as the testator now wished to execute it. It happened that by this point the testator had deteriorated to a point their capacity was questionable. The principles of *Parker v Felgate* were applied and the will was found to be valid.

When it comes to proving a will the burden of proof lays on the person propounding the will. If a will being admitted to probate is signed correctly and appears rational then there is a presumption of capacity. As with all legal presumptions this can be rebutted if there is evidence to suggest the testator lacked capacity though. The way this presumption works in practice was best described by Briggs J in *Key v Key* [2010] EWCH 408 (Ch):

“While the burden starts with the propounder of the will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.”

**Conclusion**

To recap, the relevant test of a person’s mental capacity to write a will is the common law test established by *Banks v Goodfellow*. While drafters must still be aware of the statutory test, and its key principles and tests can certainly provide some good guidance on capacity, it is not the test for testamentary capacity. When in doubt remember to apply the golden rule wherever possible, as this goes a long way to protect the drafter and the testator themselves. Finally, as with all that we do when taking instructions and advising testators, comprehensive notes on what you have done to assess capacity for your client file are paramount.

**Important Reminder:**

These notes are produced solely for the benefit of SWW members when completing the April 2020 CPD test to gain 1 hour of structured CPD towards their annual quota. The notes do not represent legal advice and no reliance can be made on the content of the notes in any or individual specific client circumstances. Having read the notes members should cement their understanding by considering further reading around the subject – cases details can be found by searching the case references using BAILII or GOOGLE.