



5 Stone Buildings

Capacity evidence: particular difficulties

Mark Baxter

4 March, 2019

www.5sblaw.co.uk

Different Approaches to Capacity

- ‘Outcome’ approach: did P make ‘right’ decision?
- ‘Category’ approach: is P within category of persons who cannot make the decision?
- ‘Functional’ approach: is P capable of undertaking the decision-making process?

The Different Jurisdictions

- Civil courts (usually Business & Property Courts / ChD)
 - Validity of past transactions, especially lifetime gifts & testamentary dispositions
- Court of Protection (“CoP”)
 - Current capacity to make decisions, but also past capacity, especially to make EPAs & LPAs

Banks v Goodfellow (1870) LR 5 QB 549

- To have testamentary capacity, must be 18+ years old ('category') & able to understand:
 - The act and effect of making a Will;
 - The extent of his estate;
 - The claims of those who may expect to be considered for benefit;
- and, in addition, the terms of the Will must not be influenced by any insane delusion.

***Simons v Byford* [2014] EWCA Civ 280**

- *Per* Lewison LJ:
 - [39]: “...it is important to emphasise that at this stage what we are dealing with is *capacity* , in other words with potential.”
 - [40]: “...capacity depends on the potential to understand. It is not to be equated with a test of memory.”

Mental Capacity Act 2005

- No capacity in relation to matter at material time if:
 - s.2(1): impairment of, or disturbance in functioning of, mind or brain ('category?').
 - s.3(1): as result of which unable to
 - (a) understand relevant information,
 - (b) retain that information,
 - (c) use or weigh that information, or
 - (d) communicate his decision.

Similarities

- Under common law tests applied retrospectively civil courts *and* in MCA for all purposes, test for capacity is:
 - ‘time-specific’, and
 - ‘issue-specific’.

Similarities

- ***White v Philips* [2017] EWHC 386 (Ch)**
 - Fact treatment for terminal illness *could* prevent testamentary capacity did not prove lacked
 - Similar to MCA, s.2(3): lack of capacity cannot be established merely by
 - Age or appearance
 - Condition or behaviour leading to presumptions

Differences

- CoP - MCA 2005, s.1(2): capacity assumed unless established lacked
- Wills - *Ledger v Wootton* [2007] EWHC 90 (Ch), [5]:
 - burden is on the propounder to establish capacity;
 - presumed if duly executed & rational on its face;
 - burden then on objector to raise real doubt;
 - once arises, burden on propounder to establish capacity.

Application of MCA outside CoP?

- ***James v James* [2018] EWHC 43 (Ch)**
 - Test for testamentary capacity remains that set out in *Banks v Goodfellow*, not replaced by MCA
 - MCA 2005 concerned with assessing capacity of living persons
 - *B v G* based on common law principles 100s yrs old
 - No clear intention in MCA to overturn common law

Approach to evidence in civil courts

- Tension between:
 - Contemporaneous, direct, inexpert evidence, and
 - Retrospective, indirect, expert evidence

Approach to evidence in civil courts

- ***Burgess v Hawes* [2013] EWCA Civ 94 at [60]:**

“if... an experienced lawyer... has formed the opinion... that the testatrix understands what she is doing, the will... should only be set aside on the clearest evidence of lack of mental capacity.”

“The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix.”

Approach to evidence in civil courts

- ***McCabe v McCabe* [2015] EWHC 1591 (Ch):**

“Whilst arrangements were made for the Deceased to see not merely a medical practitioner, but a senior and experienced specialist in the field of geriatric medicine, [he] was not provided with any guidance as to what was the legal test for capacity, nor was he asked to make a full and contemporaneous record of his examination and findings.”

Approach to evidence in civil courts

- ***Ram v Chauhan, 19/07/17:***

“... I am really not able to derive any conclusions as to capacity from the medical records... it is not desirable to make decisions simply on the basis of the burden of proof unless there is no sensible alternative... but the fact is that I am satisfied that the evidential burden of establishing capacity has ended up in the lap of the First Defendant and that he has not discharged it.”

Approach to evidence in civil courts

- ***Ashman v Thomas* [2017] EWHC 3136 (Ch):**

“Taking account of the various matters set out above, including in particular the contemporaneous assessment carried out... in the period shortly before death, it seems to me that [the challenger] has not discharged the evidential burden on him. In short, therefore, I find that the challenge to the... Will based on lack of testamentary capacity fails.”

Approach to evidence in civil courts

- ***Ball v Ball* [2017 EWHC 1750 (Ch)]**
 - Mere mistake, even serious mistake, does not invalidate Will of itself, but may amount to insane delusion or lack of sound memory
 - Not here, because Cs accepted no mental illness (i.e. no ‘disorder of mind’ of which mistake could be symptom or consequence)

Approach to evidence in civil courts

- ***Nutt v Nutt* [2018] EWHC 851 (Ch):**

“There is no evidence before me showing that a diagnosis of dementia in its early stages is sufficient to raise a real doubt as to testamentary capacity.”

Approach to evidence in civil courts

- ***Goss-Custard & ors v Templeman & ors* [2018]**
EWHC 2476 (Ch)
 - A dispute as to testamentary capacity is unlikely to be suitable for disposal by summary judgment:
 - False belief/recollection not necessary illusory
 - a judge will need to assess all the evidence at trial

Approach to evidence in CoP

- Consideration of current capacity not problematic, as P still alive to be examined (full judicial inquiry)
- LPA regime requires contemporaneous ‘certificate’ of understanding
 - But no requirement for relevant expertise: can be friend or colleague of 2+ years’ standing

Approach to evidence in CoP

- Thus, still scope for retrospective challenge and so same evidential tensions:
 - Lay vs. expert
 - Contemporaneous vs. retrospective

Approach to evidence in CoP

- Contemporaneous evidence for understanding preferred to retrospective expert conclusion lacked:
 - *Re RC*: Master's in special needs dentistry
 - *Re B*: experienced RAF nurse
 - *Re RP*: experienced private client solicitor, acted for P for number of years, attendance note 'exemplary'
 - *Re EA and MB*: old-age psychiatrist

Lessons for transactions

- Quality of certificate provider
- ‘Golden, if tactless, rule’: *Key v Key*
- Contemporaneous expert evidence of capacity will not assist if
 - Expert not directed to proper test
 - Expert does not know true history

Lessons for litigation

- Thoroughly review contemporaneous evidence
 - Medical records
 - Contact with professionals
 - Family & friends
- Identify where burden of proof likely to rest
- Ensure expert has all material & is properly instructed as to applicable test



5 Stone Buildings

Thank you,
any questions?

t 020 7242 6201

w www.5sblaw.co.uk

 @5sblaw