

PROBLEMS WITH CAPACITY EVIDENCE

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A spate of recent cases

Leonard-v-Leonard [2024] EWHC 321 (Ch) 20th Feb 2024 (Joanna Smith J)

Biria-v-Biria [2024] EWHC 121 (Ch) 9th Feb 2024 (Deputy Master Bowles)

Gohil-v-Gohil [2024] EWHC 213 (Ch) 2nd Feb 2024 (Deputy Master Lampert)

Ieropoulos-v-Wilson [2023] EWHC 2814 (Ch) 9th Nov 2023 (HHJ Claire Jackson)

Re Jones deceased [2023] EWHC 1457 (Ch) 16th June 2023 (Cardiff DR) (HHJ Jarman KC)

Wilkinson-v-Hicken [2023] EWHC 1983 (Ch) 18th May 2023 (Birmingham)

Baker-v-Hewston [2023] EWHC 1145 (Ch) 5th May 2023 (Birmingham) (HHJ Tindal)

Copley-v-Winter [2023] EWHC 1712 (Ch) 27th April 2023

Harrison-v-Barrett (No.1) [2023] 2 WLUK 616 (Master McQuail)

Clitheroe-v-Bond [2022] EWHC 2203 (Ch) 28th July 2022 (Falk J)

Hughes-v-Pritchard [2022] EWCA Civ 386 24th March 2022 (Moylan, Asplin, Laing LJJ)

The court's evidential assessment

A determination that a testator lacks testamentary capacity is a finding of fact based on the judge's evaluation of the evidence as a whole.

A statement of the blindingly obvious?

What type of evidence?

- The will file and attendance notes
- Previous will files
- Oral evidence from the legal professional (and sometimes not so professional)
- Oral evidence from the witnesses to the will
- Contemporaneous medical records (various categories)
- Oral evidence from GP / other medical professionals who knew the deceased
- Oral evidence from family, friends, associates, colleagues, financial advisers
- (Single joint) expert evidence from experts who never met the deceased
- Non exhaustive list of other categories of evidence (depending on the circumstances of the individual case, but likely to include emails, financial records and other electronic documents)

Identifying problems

Typically:

- Lapse of time – what can witnesses to the will remember?
- At what points in time can lack of capacity be demonstrated?
- No formal diagnosis of lack of capacity
- Fluctuating capacity
- **Experienced solicitor vs. expert who never met the deceased**
- No impartial witnesses
- The “Golden Rule” for the elderly and infirm– followed or not?
- Cost & expense of collating all relevant evidence
- Which disclosure model?

The common law test: Banks-v-Goodfellow (1869-70) LR 5 QB 549 (Cockburn CJ, 565)

When a person executes their will, they must at that time have the requisite mental capacity to do so. This means that they must:

- Understand what they are doing (i.e. understand the nature of a will and its effects)
- Understand the extent of the property which they are giving away in the will
- Be able to comprehend and appreciate the claims to which they ought to give effect
- There must also be no disorder of the mind poisoning their affections or perverting their sense of right or preventing the exercise of their natural faculties and there can be no insane delusions to influence their will in disposing of their property.

Modern articulation of the test: *Sharp-v-Adam* [2006] WTLR 1059 (CA)

Since Sharp-v-Adam

Since *Sharp-v-Adam*, the CA and the High Court have given detailed consideration to the test on at least the following occasions:

- *Re Key* [2010] 1 WLR 2020 (testator could not exercise decision making powers)
- *Perrins-v-Holland* [2011] Ch 270
- *Burgess-v-Hawes* [2013] WTLR 453
- *Simon-v-Byford* [2014] WTLR 1097 (capacity to understand, not to remember; no need to understand collateral consequences)
- *Burns-v-Burns* [2016] WTLR 755
- *James-v-James* [2018] EWHC 43
- *Hughes-v-Pritchard* [2022] Ch 33
- *Re Templeman* [2020] WTLR 441
- *Re Clitheroe* [2021] EWHC 1102 (Ch)
- *Hughes-v-Pritchard* [2022] EWCA Civ 386
- *Re Clarke* [2023] EWHC 14
- *Baker-v-Hewston* [2023] EWHC 1145
- *Leonard-v-Leonard* [2024] EWHC 321

s.1-3 Mental Capacity Act 2005 (into force 1st April 2007)

The coming into force of these sections explains the extent of the judicial attention on *Banks*.

Section 1: The principles

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) 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.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) 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.....

Section 2, MCA 2005

2 People who lack capacity

(1) For the purposes of this Act, 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 a disturbance in the functioning of, the mind or brain.

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

(3) A lack of capacity cannot be established merely by reference to (a) a person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

Section 3, MCA 2005

3 Inability to make decisions

(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).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language...)

(3) The fact a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make [it]

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

Hasn't the battle of the tests been decided?

2017: Law Commission Report Making A Will: provisionally proposed that testamentary capacity should be governed by the MCA test not the *Banks* test.

BUT:

James-v-James [2018] held *Banks-v-Goodfellow* was the correct test: Parliament must be assumed not to have intended to overrule a well-established common law rule without expressly providing for it in legislation.

James-v-James was applied in *Clitheroe-v-Bond* where Falk J considered (obiter) that there was no sufficiently good reason to depart from well-established case law. In the further hearing the same judge allowed the appeal and remade the decision with the same result, applying the test in *Banks*.

Then along came *Baker-v-Hewston*

A decision in the Birmingham BPC, May 2023, of HHJ Tindall, both a Chancery and Court of Protection judge.

Tindall J has provided a new methodology for assessing capacity to make a will by applying the test in *Banks v Goodfellow* but using the statutory test as a cross-check.

In the context of a probate case, the *Banks v Goodfellow* test would be applied to the facts but the MCA 2005 test for capacity could be used as a cross-check. If the MCA 2005 test suggested a different result, this should lead to further consideration of the testator's capacity. (What does this mean?)

So, what has happened in the case law since May 2023?

Post *Baker-v-Hewston*

- No citations of *Baker-v-Hewston* in the recent cases (why not?)
- Recent paper by STEP: “*We feel that the case is likely to lead to further confusion and reinforces the case for having more clarity as to which rule applies ... It may be appropriate to re-state the rule from Banks in statutory form and make it clear when that test will apply*”.
- Article by Alex Ruck-Keene KC: *Mental Capacity Law and Policy, Hegel and testamentary capacity: a synthesis between the common law and the MCA 2005?*

Back to the experts

- The very recent decision in *Leonard-v-Leonard*; a 10 day trial; a 493 paragraph/124 page judgment; no reference to the *Baker-v-Hewston* case; dementia (mixed Alzheimer's and vascular); a 2015 will; experts Dr Warner and Dr Series; neither examined Jack Leonard in his lifetime; 2015 will set aside in favour of a 2007 will.
- Joanna Smith J on the expert evidence (from para. 138): “Each expert carried out an analysis of the available contemporaneous documents with a view to identifying indicators from those documents as to the cognitive level at which Jack was able to function at the relevant time. In light of that analysis ... they each sought to opine on the requirements for testamentary capacity as identified in the well-known case of [Banks] ... I was initially concerned that the court could derive little, if any, assistance from such an exercise and that concern was not much dispelled when I heard the experts give their oral evidence. ... Furthermore, the criteria in *Banks v Goodfellow* are not matters that are directly medical questions, but are matters for common sense judicial judgment depending, as they do, upon an analysis of the entirety of the evidence, including, importantly, the complexity of the relevant will ... Whilst there is possibly scope for experts in a case of this sort to opine (as they did here) as to the inferences that might be drawn from the evidence ... I consider that the court must be very wary indeed of placing much weight on such opinions. Ultimately it is for the court and not an expert witness to determine what, if any, inferences should be drawn from the documentary and other evidence when seen in its proper context.”

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