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Fluctuating capacity: legal & practical approaches

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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 & 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.”

***Re Beane* [1978] 1 WLR 770**

- Degree of understanding for lifetime transactions required is relative to the particular transaction: varies with the circumstances of the transaction.
 - If trivial disposition, then only low degree of understanding required;
 - If disposition of donor's only asset of value, requires degree of understanding as high as for Will.

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.
 - 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?

- ***Re Clitheroe decd* [2021] WTLR 449**
 - *Banks v Goodfellow* stood test of time, not swept away by MCA
 - MCA 2005 is concerned with determining current capacity, for purpose of making decisions on their behalf
 - MCA 2005 is not concerned with assessing capacity retrospectively (save as expressly provided for)
 - Presumption of capacity contradicts 'golden rule'

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

- ***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

- ***Re Clitheroe decd* [2021] WTLR 449**
 - Not case 'delusion' can only exist if shown was impossible to reason out of it
 - Merely one form of proof: also formed without evidence or despite contrary evidence
 - But, in any case, must be irrational, fixed, and out of keeping with background

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

Intervening / delaying

- Procure or use LPA, procure deputy
 - Register with institutions
 - Declaration of incapacity (risky if goes against)
- Statutory Will
 - 'Trump' doubtful will: **VAC v JAD [2010] EWHC 2159 (COP)**
 - Adjust inheritances to account for (improper) lifetime receipt
- Inherent jurisdiction
 - Capacitous but vulnerable (eg under UI): orders to allow autonomy to be recovered

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

Beyond capacity?

- Reduced capacity likely a 'suspicious' circumstance for knowledge and approval inquiry
- Undue influence likely to be easier to prove if mentally (or physically) weak
- Capacity experts increasingly willing to opine on suggestibility / vulnerability to influence

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Thank you,
any questions?

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