Contentious Probate Proceedings & The Role of the Will Drafting Solicitor

Testamentary Capacity

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Contentious Probate Proceedings & The Role of the Will Drafting Solicitor: *Testamentary Capacity*

1. The authors in the preface to *Contentious Probate Claims*[1] writing in 2003 observed:

> *Contention over wills is perennial.*
> *At present time, there is greater wealth among a larger number of persons in this country than earlier generations and many people are living longer than their ancestors. So expectations held by those who consider themselves entitled to inherit this wealth on the death of parents and other relations, are all the more heightened. The dashing of such expectations leads the disappointed party to seek the assistance of the Court in setting aside the last expression of wishes of the deceased. So the contentious probate claim is born.*

2. Contentious probate proceedings are those concerning the contents and validity of the testamentary document(s) sought to be admitted to probate. Where the validity of a will or codicil is in dispute, the central question for the Court's determination is whether it is satisfied that the instrument propounded is the last will of a free and capable testator: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [44].

3. The usual defences to a grant of probate are:
   a. A want of due execution;
   b. absence of testamentary capacity;
   c. lack of knowledge and approval of the contents of the will; or
   d. the will was obtained by fraud or undue influence.

4. When these probate disputes are brought to Court, the will drafting solicitor will quickly find themselves the key witness in proceedings. This paper aims to equip the will drafting solicitor with the tools required to discharge his or her duty to the testator and the Court in a contest to determine whether the testator had the requisite capacity to make a will.

What is Testamentary Capacity?

5. The law concerning testamentary capacity has been described as "well settled".[2] The principles are set out by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549:

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[1] A Francis & H Marten, *Contentious Probate Claims* (2004)
[2] *Robertson v Barker* [2021] NSWSC 1682 per Hallen J at [455].

> *"It is essential to the exercise of a [testamentary] power that a testator [1] shall understand the nature of the act and its effects; [2] shall understand the extent of the property of which he is disposing; [3] shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, [4] 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 in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."*

6. The test in *Banks v Goodfellow* consists of three affirmative elements, together with negative elements. To satisfy the affirmative element, the testator must be capable of understanding:
    a. the nature of the act of making and will and its effects;
    b. the extent of the property disposed of under the will; and
    c. the moral claims of potential beneficiaries to which he ought to give effect.

7. Leeming JA in *Carr v Homersham* at [6] addresses the negative elements in the following way- *"The negative elements, commonly identified in archaic language, do no more than identify the conditions which might be understood to interfere with full testamentary capacity. They include "disorders of the mind" and "insane delusions". Too much attention should not be paid to the precise language of the negative elements; importantly, although they tend to be expressed in general terms,* ***they are only relevant to the extent that they are shown to interfere with the testator's normal capacity for decision-making****."*

8. Delusions, even if permanent and severe, may still not affect testamentary capacity if the testator is, nevertheless, able to satisfy the tests in *Banks v Goodfellow*.

9. *Banks v Goodfellow* does not require perfect mental balance and clarity in the deceased. In his reasons, Cockburn CJ referred to *Den v Vancleve* (1819) which stated:

> *"By these terms ['a sound and disposing mind and memory'] it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into nature of a rational, fair and just testament..."*

Taking Instructions When Testamentary Capacity is in Question

10. When the capacity of a testator is in question, the act of taking instructions should be approached with particular care and diligence. After all, the will drafter's conduct and file notes may one day be scrutinised by a Court tasked with determining the question of testamentary capacity. What follows are some practical suggestions to be applied at the will preparation stage.

11. It is preferable that a client interview be undertake in person. The observations that can be obtained from an in-person interview cannot be replicated via telephone or even video conferencing. Further, an in-person interview will increase the likelihood of both requested documents (such as earlier wills) and documents the client considers relevant being produced to you. Most homes, I suspect, are not equipped with scanners as convenient as those in solicitor offices and barrister chambers.

12. When undertaking the interview, it is important that the presence of testamentary capacity is *not assumed*. As the cases demonstrate, when capacity is assumed, the will drafting solicitor may be unable to adduce any evidence responsive to the criteria in *Banks v Goodfellow* (such as in *Estate of Ryan* discussed below).

13. The interviewer should set out with the intention of determining or establishing testamentary capacity. To do that, open questions inviting a considered response should be asked. Those questions should ultimately be directed at addressing the elements in *Banks v Goodfellow*.

14. For example:

    What is the purpose of today's interview?

    What is your understanding of making a will?

    What are your assets?

    What is the approximate value of your home?

    Why have you decided to make a will today? Did anything prompt your decision?

    Did anyone ask you to make a will?

Have you had any health problems lately? What are they?

Do you take any medications at the moment? What are they?

Have you recently changed medication?

Have you been in hospital recently? Why?

Do you expect to move to an aged care facility?

How will you fund that?

15. It is incumbent on the solicitor to record the answers provided and any relevant observations regarding capacity (whether they are for or against capacity).

16. The testator should be asked to identify family members, dependents, and the like. Advising the testator on potential family provision claims, and working through potential eligible persons, provides fertile ground for exploring whether the testator has the capacity to understand and comprehend the moral claims on his or her estate. A rational explanation for disinheriting should be sought.

17. Obtaining a copy of the testator's previous wills is recommended. In addition to providing (hopefully) correctly spelt names and addresses, it allows for you to identify changes in testamentary intentions and explore the basis for those changes. For example-

In your last will, you made significant provision for your son. Why you do not wish to include him in this will?

What do you believe your son's financial circumstances to be?

18. Where the testator is particularly elderly, frail, unwell, or you hold a doubt about capacity, it is advisable to obtain a medical opinion. Where capacity is suspected on the basis of age, the treating general practitioner or specialist geriatrician are well placed.

19. In my experience, will drafters are generally prudent in obtaining medical certificates from treating general practitioners. However, a medical certificate that says little more than, *"I confirm that [testator] has capacity"* or *"I confirm that [testator] has capacity to make a will"* are unlikely to have any probative value. Those short summaries will not, on their own, assist the Court in establishing the elements in *Banks v Goodfellow*.

20. In Item 1 I have provided a suggested form of letter to a testator's treating medical practitioner. That letter seeks to encourage the medical practitioner to address the elements in *Banks v Goodfellow* and the reasons for his or her opinion. It should be amended as required.

21. Where a solicitor is retained to prepare a will at a hospital or care home, it is prudent for the solicitor to make contact with the relevant treating medical practitioners to obtain a view on capacity. If there are issues with capacity, it may be worth asking the treating practitioner whether there are periods where the testator may be more lucid or not otherwise affected by medication.

22. The will drafting solicitor should take detailed and intentional file notes surrounding the will drafting process. Those notes should address the elements set out in *Banks v Goodfellow*. The notes must record the "facts" of what was said and what was observed. A file note that records, *"the client appeared to understand the will"* holds little probative value in the context of a dispute. Whether the testator had capacity is a matter for the judge to determine by reference to the facts – facts that the will drafting solicitor is well placed to provide.

23. The file notes ought to accurately set out the testator's instructions, the reasons for those instructions, and the intended effect of those instructions.

24. A failure to diligently interview the client *with the intention of answering the question of capacity* is illustrated in the case of *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007. The defendant, Ms Dalton, propounded the 2013 will which she drafted in her capacity as a solicitor. The Plaintiffs denied that the deceased had the requisite capacity to make the 2013 will and propounded an earlier will.

25. The judge summarised the evidence before him in the following terms:

> *There is a great deal of reliable, contemporaneous evidence (including Frank's treatment notes at the nursing home in which he lived) and uncontradicted retrospective medical evidence that suggest Frank lacked testamentary capacity in January 2013. On the other hand, Ms Dalton's contemporaneous notes and her recollection of her attendances on Frank to take his instructions point in the opposite direction.*

26. Ms Dalton gave evidence in proceedings. She was accepted as an honest witness. Her affidavit evidence is in large parts set out at [61] and the evidence adduced in cross-examination is summarised at [63]. The Court was not satisfied that the threshold for capacity was met. An apparent shortcoming in Ms Dalton's evidence is that capacity was

presumed. Her evidence did not establish an intentional exercise to establish whether the testator had capacity. The criteria identified in *Banks v Goodfellow* could not be readily made out to the requisite standard in light of the competing medical evidence.

27. The outcome in *Estate of Ryan* may be superficially contrasted to that in *Drivas v Jakopovic* [2018] NSWSC 1803. In *Drivas,* the will drafting solicitor had no independent recollection of his conference with the testator and held unimpressive contemporaneous records. In that situation, the drafter deposed of his usual practice at the time as a solicitor with 30 years' experience. The trial judge gave considerable weight to that evidence of usual practice. Whilst accepted in *Drivas,* the outcome should not be taken as good reason to avoid following proper practice.

28. Kunc J in a postscript to his reasons in *Estate of Ryan* set out 5 matters described as a "starting point" for the will drafting solicitor. They are as follows:

    1) The *client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.*

    2) *A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.*

    3) *In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.*

    4) *In case of anyone:*

        a) *over 70;*

        b) *being cared for by someone;*

        c) *who resides in a nursing home or similar facility; or*

        d) *about whom for any other reason the solicitor might have concern about capacity,*

    the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

    5) *Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to*

the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely."

29. On a final note, one should resist the temptation to dispose of the records created in connection with the preparation of a will after the passing of 7 years.

The Solicitor's Evidence at Trial

30. Contested probate proceedings are presently case managed by the Succession List Judge. The Succession List Judge will usually make orders and directions early in contested probate proceedings to the following effect:

    a. *Orders that by 4:00 p.m. on [date], each party in whose possession, custody or control is an original testamentary instrument (a Will, a Codicil or an informal instrument) that is material in these proceedings deliver the instrument to the Probate Registry, marked to the attention of the Senior Deputy Registrar in Probate, to be included in the Court file 2023/……..*

    b. *Orders that [Will Drafting Solicitor], solicitor, file and serve an affidavit, or affidavits, deposing (to the best of his knowledge, information and belief) to the circumstances in which the Will dated 6 May 2019 of [Deceased] was prepared and executed by 4:00 p.m. on [date].*

    c. *Orders subject to further order, that the reasonable costs of compliance with the order in paragraph 2 (in a sum assessed by the Court, if not agreed) be paid initially out of the estate of the deceased, with liberty to any party to seek an order for such costs to be paid otherwise.*

31. A solicitor's affidavit that shows engagement with the criteria in *Banks v Goodfellow* and includes credible evidence of the testator's rationalisation for the contents of the will is critical evidence. That affidavit's contents can have the effect of bringing a prompt

resolution to the litigation. For that reason, it is beneficial that parties endeavour to put the will drafter's evidence before the parties at the earliest opportunity.

32. As Young JA in *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197 at [89] observed:

> *In a probate suit, the vital evidence is very often not given by medical experts, but is given by experienced lay observers. I have said more than once in deciding probate cases at first instance, that the most valuable evidence is usually given by the experienced solicitor who witnessed the will as opposed to a very highly qualified psychiatrist whose evidence is based not on any personal observation of the testator, but who has reasoned his or her opinion from medical and hospital notes.*

33. The statement in *Zorbas* is not to suggest that the will drafter's *opinion* is determinative. Rather, it is that that the experienced solicitor (and lay observers) are in the position to provide contemporaneous evidence of the facts and circumstances surrounding the preparation and execution of the will. It is from those "facts" that a Court will be benefitted. (That is not to say that the opinion of an experienced will drafting solicitor is of no assistance to the Court: *Re Crooks Estate* (Supreme Court (NSW), Young J, 14 December 1994).)

34. The short point is that the emphasis of the solicitor's affidavit should be on accurately deposing of the facts, conversations and circumstances observed at the time. Of particular importance will be evidence of questioning that address the criteria in *Banks v Goodfellow*.

35. In circumstances where the file notes are unremarkable, the affidavit may in large part recount conversations with the testator. An example is at Item 2.

36. Where there are insufficient file notes and no independent recollection of the circumstances, adopting the "usual practice" approach taken in *Drivas v Jakopovic* may be appropriate.

37. In Item 3 I have extracted part an example affidavit prepared in circumstances where the will drafter had process in place for the maintenance of thorough contemporaneous records. That affidavit is context specific.

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