Martelli McKegg lawyers

Assessing testamentary capacity – is there really an important new development?

By Andrew Steele

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Concern has been expressed that the test for assessing testamentary capacity has been modified by Justice Courtney's High Court judgment in *Farn v Loosley*[1]. Any modification of the longstanding test in *Banks v Goodfellow*[2] would be significant to trust and estate lawyers everywhere.

One respected commentator[3] suspects that as a consequence of *Farn v Loosley*:

> … *many of the wills that are stored in lawyers' offices will be invalid because the will-makers were never asked to explain why each of the provisions in those wills differed from the corresponding provisions in an earlier will and the failure to ask about the reason for the changes would appear to be an invalidating factor of itself*.

This would be an alarming state of affairs if it is so. This article considers the nature of the supposed modification and assesses whether the 'suspicion' of invalid wills is well founded.

Courtney J begins her analysis of the relevant principles regarding the assessment of testamentary capacity by quoting *Banks v Goodfellow* and the NZ Court of Appeal decision in *Woodward v Smith*[4] that restated and affirmed the principles in *Banks v Goodfellow*. Courtney J did not purport to modify these principles, so how is it that Her Honour has been charged with doing so?

I suggest that the first thing to note about *Banks* and *Woodward* is that it establishes the principles regarding the need for a will-maker to know what a will is, to comprehend and appreciate the claims to which they ought to give effect and to be free of any disorder of the mind which would poison his affections etc., but what it does not and cannot do is analyse the evidence in any particular case in order to inform the court about whether or not testamentary capacity, as defined in the 'principles', was present at the relevant time.

How does a court assess whether or not a particular will-maker comprehended and appreciated the claims to which they ought to give effect or whether or not they were free of a disorder of the mind that may have affected their testamentary capacity? Obviously, the court must analyse the evidence which bears on the likely state of the will-maker's mind, and that seems to be what Courtney J did.

The implied criticism of *Farn v Loosley* is appears to rest on the court's treatment of an extract from a 2014 report by the International Psychogeriatric Association's Task Force on Testamentary Capacity and Undue Influence entitled "Deathbed wills: assessing

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[1] [2017] NZHC 317

[2] (1870) LR 5 QB 549

[3] "Assessing testamentary capacity – an important new development" by Anthony Grant, Law News Issue 15/19 May 2017 pg 4

[4] [2009] NZCA 215

testamentary capacity in the dying patient" which, in turn, was relied on by the medical expert called by those challenging the capacity of the will-maker[5]. Perhaps the key extract from the report, for present purposes, states[6]:

> *Alternatively, the disposition of a more complex and substantial estate that deviates from previously expressed wishes requires a higher level of sophistication of understanding with consistent rationale. If there is a change in the pattern of disposition, then some rationale for this change should be provided. The vital question to ask the testator is "why?" It is not sufficient to simply document that the testator was emphatic or "clear" in their wishes to disinherit or favour a beneficiary – often assumed to be synonymous with capacity despite the fact that clarity or emphasis may reflect cognitive impairment or psychotic thinking.*

I note this extract was preceded by[7]:

> [W]*e recommend [a] structured methodology of assessing the testator's mental status and ability to meet the tasks for specific aspects of testamentary capacity, guided by the Banks v Goodfellow criteria. This methodology involves an assessment of (i) the testator's understanding of the nature and extent of their property; (ii) awareness of potential beneficiaries and the testator's ability to evaluate and discriminate between the claims of such beneficiaries; (iii) the testator's rationale for deviating from any pattern of disposition identified in previous wills or wishes regarding testamentary intent; (iv) the presence of any disorder of mind such as delusions or hallucinations which might be influencing the testator's disposition and (v) ensuring the will-making is a free and voluntary act*.

It is apparent that the Task Force itself was concerned to apply the principles in *Banks v Goodfellow*, and, rather than substituting those principles, it was endeavouring to supply a '*structured methodology of assessing the testator's mental status*' in order to assess whether the legal principles were or were not met. Remember also, these statements are made in the context of the gravely ill and dying will-maker, hence the report's title: 'Deathbed wills'.

Courtney J noted that the Task Force commented specifically on the reliability of fact witnesses, including medical staff, in a retrospective assessment of testamentary capacity, pointing out that in a palliative or intensive care setting the assessment tools used will not be apt for identifying subtle perturbations of mental state that might be incompatible with testamentary capacity[8].

In the result, Courtney J determined that the evidence fell well short of establishing testamentary capacity at the time the will was signed. Evidence of the advanced ill-health of the will-maker (who died less than a week later) and the powerful drugs she was taking, makes that finding less than surprising.

So the case fell to be decided on whether or not the will-maker had the requisite capacity when she gave her will instructions to her lawyer a few days earlier. The Court detailed the 'significant aspects of the evidence' bearing on this issue as:

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[5] C Peisah and others "Deathbed wills: assessing testamentary capacity in the dying patient" (2014) 26 *International Psychogeriatrics* 209

[6] At 213 – 214

[7] At 213

[8] Judgment [77]

1. The ‘very likely’ side effects (delirium or confusion) of the drug taken by the will-maker.
2. Errors apparent in the will-maker’s diary including spelling mistakes, writing words twice (called perseveration, which is essentially repetition and is significant in terms of cognitive functioning because it can indicate an inability to move on from a particular thought).
3. The lawyer’s discussion with the will-maker being insufficient by itself to establish testamentary capacity.
4. The concern expressed by the will-maker that her money would be frittered away by certain of the residuary beneficiaries, which did not in itself assist in determining the will-maker’s state of mind.
5. The apparent determination expressed by the will-maker as to the course she had taken in respect to her will, which could equally be indicative of delirium.
6. The fact that the will-maker corrected a particular beneficiary’s name to the lawyer which could not be elevated to proof of capacity.

It may be noted that the ‘lawyer’s discussion’ was only one of several pieces of evidence that the Judge considered relevant and each such piece received separate detailed analysis (an analysis which drew on the medical opinions proffered) in the Judgment. The inquiry regarding the ‘lawyer’s discussion’ was to ascertain whether or not it shed light on the will-maker’s testamentary capacity. It was not apparently a decisive factor, but simply a factor.

The lawyer reported that despite her illness the will-maker was ‘chirpy’ on the day she conveyed her will instructions. His evidence included the statement:

> *The question of capacity is always at the forefront of your mind when you’re talking to a client. There was nothing about her, the way she answered questions, the way she looked, her general demeanour, the discussion we had about both her will and powers of attorney. I got the very clear impression that she understood, this was my own personal opinion obviously, that she knew exactly what she was doing and understood what I was explaining to her to the point where the issue of lack of capacity didn’t even raise its head. I didn’t think there was an issue.*

In short, the lawyer ventured his personal opinion as to the will-maker’s testamentary capacity. On reviewing the lawyer’s evidence, the Court observed that he:

- Did not know Allison very well.
- Did not know much of her medical condition, particularly the fact that she was on morphine-based medication.
- Did not engage in any significant discussion with her that was likely to identify subtle signs of cognitive dysfunction. In particular, he disregarded as significant the changes that were proposed in relation to the residuary estate, whereas the Court accepted that this was a fact that warranted discussion.
- Focused on potential Family Protection Act claims, so did not consider the potential moral claims which, for the purposes of testamentary capacity, were wider in scope. The Judge stated that with such wider claims in mind, ideally, the will-maker should have been asked to explain in her own words the reasons for departing from an equal distribution to the niece and nephews to whom she had always been close.
- The will-maker’s instructions ‘differed quite significantly’ in several respects from the earlier will that the lawyer had drafted.

I suggest that the lawyer’s evidence, in terms of how it informed the Court as to the will-maker’s testamentary capacity was carefully examined. The ‘change in the pattern of

disposition' between past and proposed wills was only one of several factors considered by the Court.

I endeavoured to make a rough estimate of the effect of the changes between wills. I note that the pre-existing will's 5 residuary beneficiaries were reduced to 2 in the new proposed will with the effect that the sum each of those 2 would likely receive increased from around $340,000 to around $850,000. 2 of the original residuary beneficiaries went from around $340,000 to receiving specific bequests of $50,000 each. The Judge's view that the changes between wills 'differed quite significantly' seem apt.

Ultimately, the Court found that the lawyer's discussion with the will-maker when he received the will instructions was "…*insufficient to enable him to make an accurate assessment regarding testamentary capacity*"[9]. It follows, I suggest, that it is correspondingly insufficient for the Court to do so, at least, based on the Lawyer's personal assessment.

Weighing the 'significant aspects of the evidence' mentioned above, the Court concluded that there was no clear evidence on which to make a retrospective assessment of testamentary capacity on the day the will instructions were given. Her Honour stated that "*some of the evidence points towards* [the will-maker] *having capacity but other evidence points away from it. Still other evidence could be consistent with either. I am left far from satisfied that* [the will-maker] *had testamentary capacity when she gave Mr McDell instructions*"[10].

It followed that those who had the burden of establishing the will-maker's testamentary capacity at the relevant times were unable to do so.

Returning to article: "Assessing testamentary capacity – an important new development", the author contended that:

> "… *Courtney J says that if a lawyer who prepares a will does not ask a will-maker to explain why a disposition is different from the way the same asset was to be disposed of in a previous will, there can be no assumption of testamentary capacity*".

With respect, I do not agree that this is what Courtney J is saying. My interpretation of the judgment is rather that if a lawyer does not ask the will-maker to explain a significant variance of dispositions between wills, then the variances go unexplained, undermining their value as evidence. On the other hand, if the question had been asked then the answer might have provided 'evidence' one way or the other which might be relevant in the court's assessment of the will-maker's testamentary capacity.

I suggest that Courtney J's judgment is a routine application of the principles in *Banks v Goodfellow* and *Woodward v Smith*.

Lord Cockburn who delivered the judgment in *Banks* referred to the earlier decision in *Cartwright v Cartwright*[11]in which Sir William Wynne, in the context of a will-maker who was undoubtedly insane both before and after the making of the will; that was nevertheless upheld, stated "*I think the strongest and best proof that can arise of a lucid interval is that which arises from the act itself*". In short, a lucid will establishes a lucid mind. Lord

[9] Judgment [84]
[10] Judgment [101]
[11] 1 Phillim 90,100

Cockburn did not adopt Sir William's statement, but he did say such a 'lucid will' has evidential value "as evidence of the sanity of the testator"[12].

If *Banks* supports the view that that the content of a will is relevant evidence as to the testamentary capacity of a will-maker, then it is logical that a significant variance from will to will may also be relevant.

I do not believe *Farn v Loosley* modifies the law relating to the principles of assessing testamentary capacity. Although the judgment is well worth reading to see how a diligent Judge works through the plethora of, often conflicting, evidence to reach a determination on whether or not testamentary capacity existed at the relevant times.

In summary, I do not believe that the many wills stored in lawyer's offices will be invalidated simply because the will-makers were not asked to explain why each of the provisions in those wills differed from corresponding provisions in an earlier will.

On the other hand, I suggest that if the testamentary capacity of a will-maker is challenged, then the reliability or quality of the lawyer's evidence as to the will-maker's capacity will be undermined by the fact that he or she did not ask the will-maker to explain significant deviations between wills. This strikes me as a much less, if at all, alarming or significant proposition. Perhaps, the case is useful as a pointer towards better if not 'best practice'.

[12] Banks pg 558