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A Will witnessed through the car window was valid

Synopsis: In a recent case, the judge declared that witnessing a Will through a car window was perfectly acceptable and he also considered the guidance for determining testator's capacity.

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The recent High Court decision in Baker v Hewston, 2023 EWHC 1145 Ch is interesting for two reasons, firstly, regarding the above-mentioned method of witnessing (the decision was frankly not surprising given that the legal requirements for witnessing were complied with) and, secondly, the question which test should be applied to determine mental capacity of the testator.

The case concerned a Will of a gentleman referred to in the judgment as Stanley (his surname withheld to respect the family's privacy), who died aged 91 in 2020, at the height of the Covid pandemic, leaving some children and grandchildren from more than one relationship.

As the judge pointed out, this was a case which "at a legal level was about the relationship between the common law test of testamentary capacity in Banks v Goodfellow (1870) LR 5 QB 549 and the Mental Capacity Act 2005 ('MCA')." However, at a human level, it was about the impact of a deceased testator leaving his affairs in a sadly messy state and whether that was due to his diagnosis of dementia or – as the judge found – "his capacious, if harsh, decisions".

Over the years, Stanley made six Wills (often disinheriting and re-inheriting various relations), the last one in 2020 and it was that Will which was challenged by the daughter of Stanley's former partner who benefitted under his previous Will and who indeed for many years had supported Stanley and her mother. The challenge was on the grounds that Stanley was diagnosed with dementia in 2014 and therefore had no mental capacity to make a new Will.

Although the parties in the case did in fact reach an agreement to settle the case, the judge felt obliged to make a judgement for a number of reasons, one being that one of the possible beneficiaries did not participate and the other that it was a good opportunity to discuss the tests for capacity, on which there had been conflicting decisions in recent years and, of course, while we have a common law test for capacity to make a Will, the MCA test applies for other matters, e.g. capacity to appoint an attorney.

The two tests are those mentioned above. The common law test has been in use since 1870, but in some recent cases the court held that the test from the MCA is more appropriate. Although in Clitheroe v Bond in 2021 the court confirmed that Banks v Goodfellow had "withstood the test of time" and was still the correct test for testamentary capacity, nevertheless, the situation remains confusing, as we are left with separate tests for capacity applying to the making of a Will as compared to other decisions.

Given that most Will challenges are on the grounds of capacity, and the professionals involved in the preparation and execution of Wills by their clients will be held accountable for ensuring that the testator had capacity at the relevant time, any guidelines are naturally most welcome.

Under the Banks v Goodfellow test the testator must...

- Understand the nature of the act of making a Will and its effects.
- Understand the extent of the property of which they are disposing (i.e. their estate).
- Be able to comprehend and appreciate the claims to which they ought to give effect (i.e. any moral claims upon them).
- Not be suffering from any insane delusion or disorder of the mind that would poison their affections (against particular individuals), pervert their sense of right, or prevent the exercise of their natural faculties.

Whereas under the MCA test the testator must be able to.

- Understand the information relevant to the decision to be made.
- Retain that information.
- Use or weigh that information as part of the decision-making process.
- Communicate their decision.

There is clearly considerable overlap between the two tests and what the judge in the Baker case decided was that the Banks v Goodfellow test remains good law, but the MCA 2005 test should be used as a cross-check. If both tests are met, there is clearly no problem with capacity, but if one test is met and the other is not, then further steps need to be taken to establish capacity. This is therefore something that all practitioners involved in Will making need to be aware of.

Full details of the arguments can be found in the full judgment here.

As for the actual method of execution with witnessing through the car window, there were no arguments about this and there is only one paragraph (out of 75) which confirms that this was a valid execution, the judge having found on the facts that Stanley had capacity at the time of the 2020 Will.

Comment

Stanley executed his last Will in May 2020, which predated the amendment to the Wills Act permitting “remote attestation”. What happened was that his daughter arranged for two friends of hers, who knew Stanley, to come to the driveway of Stanley's house. He stayed in the car and they saw him sign the

Will through the window, which he then passed to them and they each witnessed. The judge called it “an ingenious arrangement”.

The relaxation of the requirement for Will attestation, allowing for remote witnessing, has been extended until 21 December 2024 although it is not at all clear just how popular this method has become, given that the process is far more complicated than simply having to have two witnesses physically present.

In 2017, the Law Commission published its consultation seeking views to inform proposals for reforming the Wills Act 1837. After putting the project on hold in 2021, the Law Commission has now re-started its work and aims to hold an extra consultation in September 2023.

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