benchtv
a benchmark production

Précis Paper

Testamentary Capacity

Marie Bridger on Testamentary Capacity – a consideration of *Briton v Kipritidis* [2015] NSWSC 1499. It deals with burden of proof and mental ill health where there is still capacity.

Discussion Includes

- Who bears the onus of proving that a will is valid and that the testator had capacity?
- When does capacity have to be present for a will to be valid?
- *Banks v Goodfellow* (1870) LR 5 QB 549 – the authority for assessing the capacity of a testator
- Testators suffering from psychotic delusions
- What sort of evidence is best to lead in capacity cases?

Précis Paper

Testamentary Capacity

1. In this edition of BenchTV, Marie Bridger (Barrister) and Ian Benson (Solicitor) present on the NSW Supreme Court's (Ball J) decision in *Briton v Kipritidis* [2015] NSWSC 1499 which involved a plaintiff seeking a grant of probate of the deceased's will which was contested on the basis that the deceased lacked testamentary capacity. Mrs Bridger acted for the successful plaintiff-executor, Mr Briton, in the Supreme Court.

2. The plaintiff was the executor of the estate of Alexander Kipritidis, who died in December 2008. The beneficiary of his will, made in October 1995, was the Communist Party of Australia. Mr Kipritidis had been diagnosed with paranoid schizophrenia in the early 1970's. He suffered delusions about agencies including ASIO taking his house and killing him. A permanent, financial management order was made against him in 1993, which required that his financial affairs be subject to the management of the Protective Commissioner of NSW and then NSW Trustee and Guardian.

3. Following his death, the NSW Trustee and Guardian informed his cousins that he had died intestate (prior to the will having been discovered) with his parents and grandparents having died, and he having been long divorced, without children or siblings. As a result his nearest living relatives surviving him were the 5 cousins. Under the laws of intestacy, had there been no valid will then the estate would pass to the cousins in equal shares.

4. The plaintiff made an application for probate in solemn form which was resisted by the defendant-cousins. The defendants contended the deceased lacked testamentary capacity given his mental illness.

5. The defendants were self-represented with the defence and cross-claim not ostensibly raising an issue in law. The plaintiff did not take the opportunity to strike them out because it was reasonably clear that the issue of testamentary capacity was enlivened. Additionally, in submissions served three days before the hearing, the defendants sought to raise an argument that the will itself was invalid according the decision of the High Court in *Bacon v Pianta* [1966] HCA 44; (1966) 114 CLR 634. In that case, the High Court held that a gift to "the Communist Party of Australia for its sole use and benefit" could not be construed as a gift to the current members of that unincorporated association at the time the gift took effect and was therefore void for uncertainty. As was noted at [4] of Ball J's judgment, "Mrs Bridger, who appeared for Mr Briton, objected to Mr Kipritidis raising that argument on the ground that her client would be prejudiced. Mr Kipritidis could not point to any earlier notice of the argument. It was clear that the argument would have involved an investigation into the membership

and constitution of the Party. In those circumstances, I indicated to Mr Kipritidis that I would not permit him to advance the argument."

Testamentary Capacity and the Validity of the will

6. At [36]-[38], Ball J provided the relevant legal principles to be applied to questions of testamentary capacity:

> [36] The onus of proving the validity of a will lies upon the party who seeks to propound the will: *Bailey v Bailey* (1924) 34 CLR 558 at 570. In the first instance, the person propounding the will must establish a *prima facie* case that "the will propounded is the last will of a free and capable testator": *Bailey* at 570. Generally, "proof that a will was properly executed is prima facie evidence of testamentary capacity": *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179; cited in *Thomas v Nash* [2010] SASC 153; (2010) 107 SASR 309 at 322. The will must also be rational on its face: *Timbury v Coffee* (1941) 66 CLR 277 at 283. However, where a doubt is raised as to the existence of testamentary capacity by an opposing party, it is not sufficient merely to establish a *prima facie* case. Rather, the onus lies on the propounding party to satisfy the court positively of the testator's mental capacity on the balance of probabilities: *Worth v Clasohm* (1952) 86 CLR 439 at 453 per Dixon CJ, Webb and Kitto JJ.
>
> [37] Generally speaking, the relevant time at which mental capacity needs to be proven is the time of the will's execution: *Banks v Goodfellow* (1870) LR 5 QB 549 at 568 per Cockburn CJ. However, where instructions for the drafting of the will were given to a solicitor prior to the day of its execution, as in the present case, it will be sufficient for the party propounding the will to establish that the testator had the requisite mental capacity at the time when he or she gave instructions: *Parker v Felgate* (1883) LR 8 PD 171; *Re Crooks (Estate); Akerman v Brown* (Supreme Court of NSW, Young J, 14 December 1994, unreported).
>
> [38] The applicable test for determining whether a testator had the required mental capacity at the relevant time was set out by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565:
>
> > It is essential to the exercise of such a [testamentary] power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, 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.
>
> This test has been applied frequently in Australia: see, eg, *In the will of Wilson* (1897) 23 VLR 197; *Timbury v Coffee* (1941) 66 CLR 277; *Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR 267.

7. Further, at [45] it was mentioned that "the New South Wales Court of Appeal has made clear, the *Banks v Goodfellow* test poses a legal, rather than a medical question": *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197. That is to say, while medical evidence going to any of the requirements set out in the test may be highly relevant, it is not necessarily determinative. Rather, the question is one to be determined by "commonsense judicial judgment on the basis of the whole of the evidence": *Zorbas* per Hodgson JA at [65]."

Considerations

8. According to Mrs Bridger, there was nothing on the face of the will to suggest the deceased lacked capacity particularly given its short and concise form – it simply appointed an executor and an alternative, with the residue following the discharge of debts etc. being left to the Communist Party. It was in accordance with statutory requirements, complied with the rules from *Banks v Goodfellow* and was rational on its face.

9. Furthermore, the solicitor who assisted the deceased in drafting the will provided evidence that the will was made rationally, with a reference at [49] highlighting that the deceased "appreciated the nature of his estate in general terms. He understood that it consisted of the house in which he lived together with some cash." The solicitor understood that the deceased had no automatic persons to whom his estate would ordinarily be distributed and also perceived that the deceased had reason to leave his estate to the Communist Party as he shared their political views, had many connections therein and it had acted as his "metaphorical" family.

10. However, the crucial factor that allowed Ball J to determine that the deceased had capacity at the relevant time was the evidence of an expert psychiatrist at [47]:

> [47] The fact that a person suffers from schizophrenia does not mean that the person will necessarily be unable to act rationally in all aspects of his or her life. As Dr Phillips, a psychiatrist called by Mr Briton, explained:

> Your Honour, I think there's a quite significant misconception in the community about the extent that schizophrenia deprives people of all reasonable judgment, capacity to think and cognition more generally. This is not so. Most people with schizophrenia will develop delusions, will develop hallucinations, they will develop thought disturbance but more often than not it's in the circumscribed region, or relates to a circumscribed region of their life; they become obsessed with that particular region and develop thoughts that could not be shared by anyone else, yet in other aspects of life they can reason with a reasonable degree of calmness. So it is not a global and total impairment, it would be better seen as a partial and incomplete impairment. …
>
> For instance, a person may decide to - well, he can kill another person while suffering from paranoid schizophrenia, which is a very unfortunate fault in the process of reasoning about the other person, yet that person in other areas of life in relation to friends or families or even work situations may be relatively calm of mind and quite deliberate in the way they think and their ability to make decisions. This is probably more so in paranoid schizophrenia than in so-called undifferentiated schizophrenia. Undifferentiated schizophrenia is more likely to be a greater disruption of thought processes. Paranoid schizophrenia by its definition relates to a more circumscribed disorder where the person holds with incredible firmness a particular set of beliefs that will not be acceptable within his community.

11. Bearing this evidence in mind, and appreciating that the deceased's delusions were almost exclusively contained to the actions of security agencies with no suggestion that they extended to the Communist Party, who he reasonably appreciated, Ball J determined that the will was valid and probate was granted to the plaintiff.

12. It should be noted that the remoteness of the deceased's relationship with the cousins played no part in the resolution of the dispute. Had the will been found not to be a valid testamentary document, then the cousins would have taken on an intestacy.

13. The plaintiff's costs in the matter were borne out of the estate by consent.

Implications

14. This decision serves as an important reminder that mental illness does not always negate a person's capacity to make a will. If in doubt, expert medical and legal advice should be sought for such persons.

BIOGRAPHY

Marie Bridger

Barrister, Seventh Floor Windeyer Chambers, Sydney

Marie Bridger was called to the NSW Bar in 1998. She practises, and has presented for various seminars, in the areas of wills, estates & family provision. She has vast experience in those areas at both first instance and appellate levels.

Ian Benson

Ian Benson is a Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Case

Briton v Kipritidis [2015] NSWSC 1499

Benchmark Link

https://www.caselaw.nsw.gov.au/decision/561c2780e4b0517a9728165a

Judgment Link

https://www.caselaw.nsw.gov.au/decision/55b86b99e4b0f1d031deb2c8

Cases

Bacon v Pianta [1966] HCA 44; (1966) 114 CLR 634
Bailey v Bailey (1924) 34 CLR 558
Banks v Goodfellow (1870) LR5QB 549
Boreham v Prince Henry Hospital (1955) 29 ALJ 179
In the will of Wilson (1897) 23 VLR 197
Parker v Felgate (1883) LR 8 PD 171
Re Crooks (Estate); Akerman v Brown (Supreme Court of NSW, Young J, 14 December 1994, unreported).
Thomas v Nash [2010] SASC 153; (2010) 107 SASR 309
Timbury v Coffee (1941) 66 CLR 277
Woodhead v Perpetual Trustee Co Ltd (1987) 11 NSWLR 267
Worth v Clasohm (1952) 86 CLR 439
Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197