benchtv
a benchmark production

Précis Paper

Testamentary Capacity and Estate Litigation

This presentation discusses important considerations in estate planning and looks at the test for testamentary capacity and evidentiary issues that arose in a recent Supreme Court of NSW case.

Discussion Includes

- The validity of a will
- Onus of proof and evidentiary issues
- Testamentary capacity
- Contemporaneous evidence of capacity
- Costs
- Relevant considerations in family provision claims
- Lessons for practitioners

Précis Paper

Testamentary Capacity and Estate Litigation

1. In this edition of BenchTV, Anthony Cheshire SC (8 Wentworth Chambers, Sydney) and David Steirn (Barrister, 8 Wentworth Chambers, Sydney) discuss the recent decision of the NSW Supreme Court in *Glenda Phillips v James Phillips; John Matthew Phillips by his Tutor NSW Trustee & Guardian v James Phillips* [2017] NSWSC 280.

The Validity of a Will

2. The test for whether a will is valid is whether the testator's mind has gone with his testamentary act. The testamentary act is the due execution of the will. The more complex element of the test is the consideration of the testator's mind.

3. Putting aside considerations of fraud or forgery, which can affect the validity of the will and how the testator's mind was applied, the issues that must be considered in determining the validity of the will are testamentary capacity; knowledge and approval of the contents of the will; and undue influence. Any will executed by someone without testamentary capacity is invalid. If a person does have testamentary capacity but does not have knowledge and approval of the contents of the will, the will will also not be valid. This may arise, for example, where someone has reduced capacity, or fails to read a will before signing it. The final overlapping concept here is undue influence: a will may still fail if the will of the testator has been overborne.

4. Practitioners should be aware that they should not attack the will on multiple bases unless there is an evidentiary basis for doing so. If fraud or forgery are pleaded unsuccessfully, for example, there may be serious costs consequences. Similarly, even an unsuccessful case brought on the other elements may attract adverse costs orders if a plaintiff succeeds in only one aspect of the case. Practitioners should be cautious and closely examine the evidence to determine what arguments can be sustained.

Testamentary Capacity

5. The court places the onus of determining the validity of the will upon the proponent. The starting point is on the person propounding the will to produce the will and argue that it is rational. Once this has been established, the onus shifts to the person challenging the will to put up evidence that supports their argument that the testator did not have capacity. If the evidence reaches a level to raise a doubt about testamentary capacity, then onus shifts back to the person propounding the will to prove it.

6. In *Banks v Goodfellow* (1870) LR 5 QB 549, a four-part test was propounded to determine whether a testator had capacity. The court will consider:

- Whether the testator understood the nature of the act and its effects;
- Whether the testator understood the extent of the property of which they are disposing under the will;
- The claims to which the testator ought to have regard; and
- The absence of a disorder of the mind which affects the testator's ability to judge these factors.

7. This test is often referred to the as the three Rs: to Remember (such as how many children do I have, what property do I have); to Reflect (which children have been nice to me, how did I build up my property); and to Reason (in light of these considerations, how should I apply my property).

8. Mr Cheshire emphasised that capacity refers to capacity of sound judgment, even if sound judgment is not in fact exercised in the writing of the will. So long as a testator has capacity, they can be as irrational or harsh as they like. The test is *not,* in writing this will, did they do what was sensible, but did they have capacity to write the will.

<u>The Facts in *Phillips*</u>

9. The deceased had suffered a major brain injury as a result of an injury suffered in a pedestrian-car collision. At the time, there were no existing wills. The testator wrote three wills between the time of the accident and when he died, one of which was lost. The other two wills were similar and both named the defendant as executor, and left him most of the property. This bequest was understandable as the testator lived with the defendant. However, the testator had four other children, who were left with only small pecuniary legacies.

10. Because of the injury sustained in the car accident, personal injury proceedings had been commenced in the District Court. Because the testator was under a disability and unable to run the proceedings, the proceedings were brought by a tutor, namely the defendant. Once the compensation was awarded in this proceeding, the testator was unable to manage his own affairs and so an application was made for financial management order. In both of these proceedings, medical evidence was before the courts as to the testator's capacity in various respects.

11. The key issues in *Phillips* were therefore (1) whether the wills were duly executed (it was found that they were); (2) whether the wills were rational on their face (again, this was satisfied); and (3) whether the testator had testamentary capacity.

12. The application for financial management orders was dependent upon being able to establish that the testator was incapable of managing his affairs. However capacity does not involve a single test that is applied across all aspects of a person's life – it is specific to the question being asked. In this case, the question of whether the testator had capacity to make a will was different to whether or not he had capacity to manage his affairs, although the two questions may overlap. Moreover, when considering whether a person is capable of bringing proceedings, considerations include whether the person is capable of understanding advice and making rational decisions, which are different considerations to whether the person has testamentary capacity. The issues of whether Mr Phillips was capable of bringing proceedings or required financial management orders was therefore different to whether he had capacity to make a will. The evidence to determine those other two questions was relevant to determining testamentary capacity, but did not raise any presumption that capacity was lacking.

Evidence When Considering Capacity

13. Determining questions of testamentary capacity will come down to questions of fact, and the judge will make a determination after considering all of the evidence. In cases of this nature, judges are more reluctant to simply accept what a medical expert tells them retrospectively than they may be in personal injury cases. Where there is a conflict between experts, courts will be more willing to accept the evidence of people who had first hand knowledge or experience with the testator around the time that he or she was making the will.

14. Practitioners may therefore need to be creative about thinking about sources of contemporaneous evidence. Family members can provide important evidence, however as they may have a vested interest, their evidence could be treated with caution by the judge. Contemporaneous medical evidence will be powerful evidence taken into account by the court, such as evidence from a treating GP. Other independent evidence will also be relevant, including evidence from friends or the witnesses of the will; and evidence of the solicitor who took instructions on the will and can provide some insight into the testator's capacity. The judge will often be influenced by the views of the solicitor who took instructions on and drafted the will: see, for example, *Loupos v Demirgelis* [2008] NSWSC 1207.

15. In the *Phillips* case, because of the other legal proceedings, there was evidence from the testator's treating GP, psychologist and neuro-psychologist which were strongly indicative of a lack of testamentary capacity. There were also affidavits from the defendant from the other proceedings in which he swore that the testator had difficulty with memory and reduced functioning. Overall, the defendant's evidence was not supportive of a presence of testamentary capacity.

16. The defendant had also relied upon a GP's certificate that stated that the testator was capable of making "minor changes" to his will. However ultimately, this evidence did not assist the defendant. This was because the court considered the fact that when a will is made, the first step that a testator takes is to revoke any previous wills. Therefore a certificate indicating that the testator was capable of making minor changes was in fact supportive of a lack of testamentary capacity.

17. The evidence of the solicitor who had prepared the will was also unhelpful to the defendant's case. The solicitor's evidence was to the effect that he did not remember the circumstances of the making of the will or discussions with the testator, and therefore could not positively assist the defendant. Moreover, there was a note on the solicitor's file from another GP indicating that the testator did not have capacity.

18. Finally, the defendant failed to give meaningful evidence about the testator's capacity. For example, although he had accompanied the testator to the solicitor to make the wills, he failed to give evidence about the circumstances surrounding the making of the wills. Given that he lived with the testator, detailed evidence about capacity would have been expected. Kunc J accepted a submission that where a witness does not give evidence on an issue that could have supported his case, and one would have expected him to give evidence, an adverse inference can be drawn that the evidence would not have assisted him: *Commercial Union Insurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389.

19. The court found that there was doubt regarding the testator's testamentary capacity. Because there was a doubt about testamentary capacity, the onus was then on the defendant to establish that the testator did have capacity. Because the defendant failed to put before the court any expert medico-legal evidence prepared for the purpose of this proceeding, the defendant did not satisfy his burden of proof.

Costs

20. The starting point is that costs follow the event. However an additional factor in probate cases is that the person propounding and defending a will is often the executor. Therefore two exceptions to the general rule apply:

- If the testator can be seen as the cause of the litigation, all of the costs will come out of the estate: see, for example, *Gray v Hart* [2012] NSWSC 1435.
- Where a testator was not to blame but an investigation was called for, the usual rule is that the unsuccessful party will be ordered to pay their own costs, but will not be required to pay the costs of the successful party.

21. The court will also look at the reasonableness of the parties throughout the litigation, including the knowledge of an independent party; the state of the evidence; and any offers that have been unreasonably rejected. In this case, another factor was that because this was an application for revocation of probate, the executor could have approached the court for advice as to whether or not to contest the litigation. If he had done so, he would have had protection against a costs order.

22. In this case, the defendant was wholly unsuccessful and had been able to observe the mental state of the testator as he was living with him. In addition, the defendant had access to all of the medical evidence from the other proceedings. Finally, as the proceedings went on, there was no evidence that emerged that supported a finding of testamentary capacity.

23. As a result, the orders of the court were that the defendant executor had to pay his own costs of the probate proceedings. In addition, the executor was ordered to pay all of the costs of the plaintiffs. From the point when further medical evidence was served, the court ordered indemnity costs.

24. The case reiterates the important of warning executors that they must be wary of costs risks in defending or bringing litigation.

<u>Family Provision Claim</u>

25. The result of the lack of testamentary capacity meant that the deceased died intestate and the estate was split five ways. The defendant executor brought a claim for further provision. An interesting question then arose as to the impact of the adverse costs order on the claim for provision, and specifically, whether the requirement to pay those costs orders demonstrated a need on the part of the defendant for further provision.

26. In *Johnson v Smith* [2014] NSWSC 1682, the fact that a person had lost in previous litigation and was the subject of adverse costs orders was a relevant consideration giving rise to an award for provision when they had not engaged in the litigation in bad faith.

27. Ultimately, however, this question was not determined because it was settled outside of the litigation.

Lessons for Practitioners

28. The case indicates that practitioners play an important role in protecting a will against challenge. In *Gray v Taylor & Anor; The Estate of the late Stanislaw Zajac* [2017] NSWSC 497, the court suggested a number of steps that a solicitor should take if they have a doubt about a client's testamentary capacity, namely:

    - Attending on the testator personally;
    - Having a medical practitioner involved;
    - Having detailed written notes about the instructions; and
    - Making sure, in the solicitor's own mind, that the testator had capacity.

29. When litigation occurs, the most important evidence in determining testamentary capacity is contemporaneous evidence, and often a medico-legal report will be necessary.

30. Finally, if there is a grant of probate, it can be useful to approach the court for judicial advice as to whether or not the claim should be defended.

BIOGRAPHY

Anthony Cheshire SC

8 Wentworth Chambers, Sydney

Anthony Cheshire SC graduated in law from the University of Oxford. He was first called to the Bar in the United Kingdom in 1992. He was then called to the NSW Bar in 2004 and appointed silk in 2015. Anthony maintains a wide ranging trial and appellate practice across the civil and equity jurisdictions. Anthony also lectures extensively in the rules of civil litigation and harnessing the rules of the Court to obtain a litigious advantage.

David Steirn

Barrister, 8 Wentworth Chambers, Sydney

David was admitted to the legal profession in 2008 and called to the Bar in 2011. He maintains a diverse practice with a commercial focus as well as insurance (both for insured defendants and their insurers), building and construction, common law and various aspects of employment law. In addition to regularly acting as a judge at the Clayton Utz Intervarsity Negotiation Competition held each year David is looking forward to teaching advocacy at this year's Bar Readers Course.

BIBLIOGRAPHY

Focus Case

Glenda Phillips v James Phillips; John Matthew Phillips by his Tutor NSW Trustee & Guardian v James Phillips [2017] NSWSC 280

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_23-03-2017_banking.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/58d1a3c8e4b0e71e17f57fe0

Cases

Banks v Goodfellow (1870) LR 5 QB 549
Loupos v Demirgelis [2008] NSWSC 1207
Commercial Union Insurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389
Gray v Hart [2012] NSWSC 1435
Gray v Taylor & Anor; The Estate of the late Stanislaw Zajac [2017] NSWSC 497
Johnson v Smith [2014] NSWSC 1682