



# Testamentary Capacity and The Golden Rule

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# The Mental Capacity Act 2005

Section 3 provides that a person is unable to make a decision (a will) for himself if he is unable to:

1. Understand the information relevant to the decision
2. Retain that information
3. Use or weigh that information as part of the process of making a decision
4. Communicate his decision (whether by talking, using sign language or any other means).

## Banks v Goodfellow [1870]

Sound testamentary capacity means:

1. The testator must understand that he is giving his property to one or more objects of his regard;
2. He must understand and recollect the extent of the property of which he is disposing
3. He must also understand the nature and extent of the claims upon him both those he is including in his will and those he is excluding from his will;
4. That no insane delusion is influencing his will in disposing of his property and bringing about a disposal of it which, if the mind had been sound, would not have been made.



## James v James [2018] EWHC 43 (Ch)

- Testator, Charles James who died in August 2012, aged 81
- Self-made man
- Farm comprised of five parcels of land
- Testator was married. He had two daughters and one son, referred to as Sam
- The will left his substantial property portfolio to his wife and daughters
- Nothing to his son
- Delayed making testamentary decisions until the end of his life
- Evidence of decline in his mental health



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## James v James - Key findings

- Banks and Goodfellow test holds good and is the SOLE test for the court to apply when judging testamentary capacity post mortem.
- The test set out in the Mental Capacity Act 2005 governs issues of capacity for a *living* testator
- In the view of HHJ Matthews, *"The individual provisions of the [MCA] are concerned with assessing mental capacity of living persons, and the manner of making decisions thereafter on their behalf when, judged by the terms of the Act, they lack such capacity. It is solely in pursuing that purpose that it deals with (amongst other things) the arising of the power of the court to make a will for a living person who has been found not to possess capacity. It does not follow from this that the test for judging capacity retrospectively in relation to a will must also be governed by the same principles."* (para 85)



# The Golden Rule

First established in Kenward v Adams [1975] and Re Simpson [1977]

- The testator is aged, or
- Has suffered a serious illness
- The will should be witnessed or approved by a medical practitioner who has satisfied themselves of the testator's capacity to make the will.
- Clear record of examination



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# The Golden Rule



The case of Key v Key [2010] strongly criticised the solicitor for not involving a medical practitioner -

*"Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non compliance demonstrate its invalidity. Its purpose as has repeatedly been emphasised, is to assist the avoidance of disputes, or at least in the minimisation of their scope."*





## MCA 2005 Code of Practice

MCA 2005, Code of Practice, para 4.53 provides when a professional should be involved in the assessment (non exhaustive):

- Decision is complicated or has serious consequences
- Assessor concludes a person lacks capacity and the person challenges the finding
- Disagreement over a person's capacity
- Person being assessed has expressed different views to different people
- Somebody might challenge the person's capacity to make the decision - either at the time of the decision or later ~ e.g., a will after someone has dies on the basis that the person lacked capacity when they made the will



## Special rule on costs in probate claims

Spiers v English [1907] (as formulated in Kostic v Chaplin [2007])

*“Where the opponents of the will have been led reasonably to the bona fide belief that there was good grounds for impeaching the will, there will be no order as to costs.”*

In James v James the Claimant was let off having to pay the other side's costs of the capacity dispute using the Spiers v English exception, i.e. his testamentary capacity was sufficiently uncertain to justify the enquiry so each side bore its own costs.





## Fluctuating capacity and lucid intervals

A, B, and C v X and Z [2012] EWHC 2400 (COP)

- Borderline, fluctuating capacity
- Various determinations as to his capacity, including capacity to manage his property and affairs and his to make a will
- LACKED capacity to manage his property and affairs
- Did not make a finding that he lacked the capacity to make a will
- Ongoing act versus specific acts



## A, B, and C v X and Z [2012] EWHC 2400 (COP)

In weighing up the evidence on X's understanding and ability to retain the information relevant to X's capacity to make a will, Hedley J concluded:

*"that I cannot make a general declaration that X lacks testamentary capacity, but that needs to be strongly qualified. There will undoubtedly be times when he does lack testamentary capacity. There will be many times when he does not do so. The times when he does lack such capacity are likely to become more frequent. It follows that, in my judgment, any will now made by X, if unaccompanied by contemporary medical evidence asserting capacity, may be seriously open to challenge."*



## Statutory wills

A statutory will is a will made on behalf of a person who lacks capacity to make a will pursuant to an order of the COP under MCA 2005, s.18(1)

- Cannot be delegated
- Expressly reserved to the court
- Recommended where major change in a person's status, circumstances, or an inheritance personal injury award alters the nature of the estate
- Consequences of intestacy would be unjust or even harmful





## MUSTS for a statutory will

1. Must be 18 or over
2. Lacks capacity to make a will in accordance with section 2 of the MCA - "a person lacks capacity in relation to a matter [the making of a will] if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."
3. Property in England and Wales
4. Up -to-date primary medical evidence confirming P lacks capacity to make a will in the form of a COP3.
5. Be in the person's best interests



## COP 3 for a statutory will

### Practitioners should remember:

- If complex, file the COP3 with a full medical report.
- Choose the right professional, especially if capacity is borderline.
- Professional instructed to carry out assessment will need background information as to the property and affairs of P.



## Statutory wills - Procedure

- Need to complete **COP1** application
- Provide all of the supporting evidence as listed in **Practice 9F** which sets out what evidence is required
- Application needs to set out why it is in P's best interests.
- If you need court to take unilateral action complete COP9
- Respondents will need to be named, i.e., someone who stands to gain less under the new will than under an existing will or intestacy.





## Intervivos gifts

Re Beaney [2014] is still good law

Held that the test for a lifetime gift should be the same as that applied in the case of a will. Under the *Banks v Goodfellow* test it was not sufficient that the mother understood what legal effect the transfer had; she also had to be **'able to comprehend and appreciate the claims'** which her other children had on her. This requirement is not expressly reproduced in the MCA test for capacity and was not satisfied because it had not been brought to the mother's attention that she was affectively disinheriting her two younger children. Thus, the analysis is that that should A make a lifetime gift to B, A's capacity to make this gift will be assessed under the MCA, yet on his death will fall to be assessed under the test in Re Beaney.





## Law Commission's Review - key proposals

- Single test for testamentary capacity - the mental capacity test for making a will, currently set out in *Banks v Goodfellow* should be brought under the umbrella of the MCA 2005
- That said the specific elements of capacity necessary to make a will - the ones set out in *Banks* - would be reflected in the MCA Code of Practice.
- Dispensing powers - a power for a court to recognise an informal document as a will where it represents the deceased testamentary intentions.
- Electronic wills brought in via secondary legislation



## Dispensing powers - Re. Nichol [2017]

- Australian case
- Testator Mark Nichol wrote a text message containing his testamentary intentions to leave his estate to his brother and nephew Jack, including his burial wishes
- It was unsent and addressed to his brother David Nichol.
- It was titled 'my will'
- It expressly provided that he did not want to leave his wife or his son anything and left his estate to his brother and nephew.
- The court concluded that it was unsent not because it was tentative but because sending the message would have alerted his brother of the fact that he was about to commit suicide
- Court used its dispensing power and recognised the unsent text message as his will



Thank you

Any questions?

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