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Challenging a Will based on mental capacity

April Kennedy

Capacity can be an emotionally charged topic, especially in relation to dementia or Alzheimer's disease and other degenerative conditions. This paper discusses how a Will might be challenged on the basis of mental capacity and why this is such an important issue.

What does capacity mean from a legal perspective?

There are different types and tests of capacity, including the capacity to:

- make a Will
- make power of attorney
- enter into legal proceedings
- enter into a marriage.

When discussing Wills, we are referring to 'testamentary capacity'. There is an old English case, *Banks v Goodfellow*, from 1870 which is still good law today. This case sets out what the test for testamentary capacity is. When making a Will, a person must:

1. **understand the nature and effect of a Will**—a person must understand the legal document they are preparing, and that it forms their wishes after they pass away.
2. **understand the nature and extent of their property**—a person must have a good idea as to what they own, whether that be property, shares, or bank accounts (e.g. those who own a bank account must know which financial institution they bank with, and the approximate account value).
3. **comprehend and appreciate the claims to which they ought to give effect**—a person must be able to understand they have a moral obligation to provide for, and the effect of the gifts they are giving, in their Will. They must be able to appreciate that they have a moral obligation to provide for a dependent person, whether that be a spouse or a child, and they must understand how much they ought to provide them and whether that provision is considered 'adequate' for their proper maintenance, support and advancement in life.
4. **not be suffering from any disorder of the mind or insane delusion that would result in an unwanted disposition**—this is old terminology, but a person must not be suffering from any condition that affects their mind and capacity to make decisions while taking into consideration the above factors. This arm of the test refers to conditions such as dementia, Alzheimer's disease, etc.

Sometimes it is a difficult exercise to determine whether someone has the requisite testamentary capacity to provide instructions for a Will when they are suffering from dementia or some other injury-caused condition or illness (for instance, a head injury or stroke). In the 19th century English House of Lords case of *Boyse v Rossborough* (1857) 6 HL Cas 1 at 45, Lord Cranworth, who was also the Lord Chancellor, observed the difficulty in relation to this test:

"There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine."

This case and comment were referred to and accepted by the same court in *Banks v Goodfellow*, some 13 years later and continue to be applied to this day by our state Supreme Courts and the High Court of Australia.

On what grounds can a Will be challenged based on capacity?

There are many ways a person can challenge a Will based on the capacity of the Will-maker (or lack thereof). It is a heated area of law. Sometimes when a person is unhappy with the contents of a person's Will, and the Will-maker exhibits subtle symptoms that resemble dementia, such as forgetfulness, then they will use that as grounds to challenge the Will. It can be difficult to determine whether there are grounds to challenge a Will on this basis, so it is important to seek advice early on.

The most common types of claims when someone is challenging a Will based on capacity, include conditions such as:

- dementia
- Alzheimer's disease
- degenerative conditions or diseases, such as Parkinson's disease or motor neurone disease
- conditions that can affect speech and physical capabilities—these generally are considered when determining capacity in these types of claims.

People may not necessarily lack capacity, but they might display paranoid behaviour where they change their Will after believing things that may not necessarily be true. They may have a certain perspective that is skewed which can impact their decision-making.

Are there other ways a Will can be challenged based on someone's mental state?

Yes. There are grounds to challenge a Will based on emotional or psychological pressure put upon the person writing the Will. For example, the Will-maker might be under duress or being unduly influenced by a third party.

The most common instance of this behaviour is when a family member or carer becomes part of the Will-maker's life in a big way. That person accompanies the Will-maker to their solicitor to have their Will made during those later stages in their life. This can create a pressure environment where the Will-maker feels obligated to change their Will to include this person and cut out other family members who they may have been close to their entire life. The Will-maker may feel obliged to do this as a way of repaying someone for their companionship or friendship.

This is not a medical disorder, but it is a sense of obligation or pressure that otherwise influences the Will-maker. This is prevalent in the elderly and considered elder abuse, especially because elderly people can be vulnerable and susceptible to psychological or emotional pressure. For this reason, it is necessary to determine whether the Will was prepared under 'suspicious circumstances'.

Another challenge may be based on lack of knowledge and approval of the Will. These types of claims usually arise when there is a do-it-yourself (DIY) Will, or a handmade Will, especially if the person making the Will is either:

- deaf
- unable to speak
- paralysed or unable to write
- blind
- illiterate.

In these cases, they may have had someone else sign the Will on their behalf because they were physically unable to do so themselves. A knowledge or approval claim is essentially someone contesting the Will on the basis that that person did not know what they were signing.

What evidence might be used in a Will contest on the grounds that the Will-maker had impaired capacity?

For these types of claims, the main types of evidence used are:

- medical reports and clinical notes
- specialist reports
- witness statements from people who knew the deceased and knew the history of the relationship between the parties involved
- telephone log history and bills
- bank account statements
- Facebook messages
- social media posts and history
- handwritten notes
- photographs to show history of relationships between parties
- digital notes on a person's mobile or tablet device.

It can be very costly to challenge a Will on capacity, and evidence is critical to determining if a claim has merit.

What can people do to ensure there are no questions over the Will-maker's capacity?

It is recommended to have a Will prepared by a solicitor, especially if there are going to be capacity issues or if there are any suspicions someone may make that claim down the track. Memory loss, early stages of dementia or any physical impairment that may leave a Will-maker open to someone making a capacity claim should be handled with care by an experienced solicitor who can mitigate these risks.

We have seen these reasons, and many more, result in Will contests.

Should someone obtain medical reports at the time of making a Will?

Yes—that is the first step we take in these situations, especially if we suspect a capacity issue could arise. Capacity can be a sensitive topic to talk about, especially with

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the elderly. It is a hard topic to broach and it can be difficult to say to someone that we consider you may not have capacity, or we want to ensure that you do have capacity in order to write a Will. These questions can be demeaning to a person, and best handled professionally.

It might not necessarily be the Will-maker's capacity which is a concern. It may be regarding a family member or third party who accompanies that person to their appointment and we can see they are making a dramatic change to their Will. In these instances, having a letter from their doctor will serve them down the track.

There are several cases that suggest the evidence provided by the solicitor who prepared the Will were preferred to medical reports. The reason for this is that testamentary capacity is a legal test, not a medical test. Unfortunately, when it comes to DIY Wills, there is no evidence of this kind if someone was to contest on these grounds. Therefore, those types of documents will often be contested.

What if someone has been diagnosed with early-stage dementia?

A diagnosis like this does not necessarily mean a person cannot make a Will. There are different stages of dementia, or degenerative conditions, and it does not automatically mean someone does not have capacity. There are certain stages even in later-stage dementia where a person can have lucid periods. An experienced estate lawyer will be able to help navigate these issues and concerns, and can help make a Will, ensuring appropriate notes are taken and all the evidence is documented.

The importance of acting early

It is important to seek *immediate* advice if a person has concerns about the validity of a person's Will. After that person passes away, there is usually a brief window of opportunity to take steps to ensure that the Will was properly made. Challenging the validity of a Will can be daunting, so it is important to seek advice from a lawyer who is knowledgeable and has experience in this complicated area of law. **FS**