TRUST LAW

A demented person makes a valid will

By Anthony Grant

Today's article continues the theme of my two most recent pieces in *LawNews*.

The first theme is not to underestimate the unpredictability of the courts. The second is that people with no specialist skills in assessing testamentary capacity ought not to make assumptions about its presence.

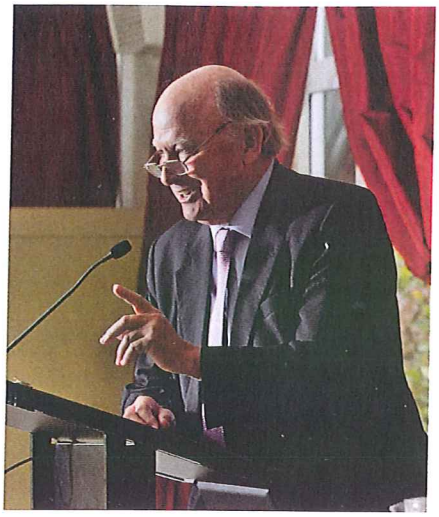
A recent case illustrating these themes is *Public Trust v Dollimore & Another* [2018] NZHC 3316, 14 December 2018, a decision of Justice Simon France. Before you read on, you should know the judge said the will-maker had testamentary capacity and her will was valid.

On 22 January 2010, a Mrs Dollimore (because of space constraints I will call Mrs D) went to an office of the Public Trust where she saw a Mr Strange, an employee of the Public Trust. She was 73 or 74 at the time. He had minimal information about her.

She told him she wanted to give half her assets to her niece, who was looking after her at the time and who had brought her to the Public Trust's offices. Mr Strange assessed Mrs D as having testamentary capacity and prepared a will that she executed.

These are some things that Mr Strange was not aware of:

- At the time Mr Strange met with her, Mrs D was living in a dementia facility.
- Because Mrs D was prone to wandering off by herself and getting lost, she was being kept in what is called "secure care".
- The niece who took her to Mr Strange and who was to get half of Mrs D's estate hadn't featured in any of Mrs D's earlier wills.
- On an earlier occasion, Mrs D had complained that a dress she was carrying didn't fit her anymore. It was another person's wedding dress.
- Mrs D hadn't been able to look after herself before she was institutionalised, and had been malnourished and frail.
- She didn't recognise people.
- She claimed to hear noises when there were none.
- She believed she could smell urine in various rooms when there was none.
- When she had been to a lawyer to make a will a month beforehand, the lawyer refused to write one, saying she lacked testamentary capacity.
- A month beforehand, a doctor said that Mrs D "did not have capacity to sign documents".



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People with no specialist skills in assessing testamentary capacity ought not to make assumptions about its presence

Although the Court of Appeal indicated in *Loosley v Powell* [2018] 2 NZLR 618 that an elderly person who wants to make different provision to the provision that was made in earlier wills ought to be able to give a rational explanation of the reason for the change, Mrs D didn't do this and the court had no idea why Mrs D had changed her dispositions.

The judge said that "nothing in the existing will really explains the seeming insistence on Mrs D's part of wanting to make a change." [41]

When Mrs D had seen a lawyer a month beforehand, wanting to make a new will, the lawyer asked her about the nephews and nieces who had been favoured in the previous will. According to the judge, Mrs D said she "couldn't remember their names and couldn't remember leaving them any legacy".

Two psychiatrists were instructed for the trial. One, Dr Jane Casey, said in her opinion Mrs D had lacked capacity. The other psychiatrist said it was "possible" Mrs D had capacity at the time – but no more than that.

How then did the High Court judge say Mrs D had capacity to make her will?

With a declaration of brand loyalty that must have thrilled the managers of the Public Trust, he said, "Public Trust are the experts." [106] And although its employee's evidence was "riddled with inconsistencies and changed positions" [86] he was nevertheless "an experienced Public Trust officer" who "knows what he is doing and what is required." [93]

Notwithstanding this declaration of confidence in Mr Strange's skills, it was not suggested he had any medical or even legal qualifications.

I gave statistics in a recent article about how lawyers who commonly make wills are generally incapable of detecting the absence of testamentary capacity.

The Public Trust employee appears to have been one of those people since the judge said this employee was "completely oblivious to Mrs D's underlying condition of dementia. He did not detect it." [94] Instead of finding Mr Strange wasn't equipped to detect the absence of capacity, the judge applauded Mr Strange for his talents, saying his inability to detect the dementia "must say something about Mrs D's condition on the day." [93]

Contrast the case with *Loosley v Powell*. In the *Loosley* case the three judges in the Court of Appeal held unanimously that the will of a Ms Slater should be set aside on the grounds that she had lacked capacity for a month before she made it.

In the earlier part of that time Ms Slater shopped, cooked, looked after herself in her flat, drove her car, was entrusted with opioids to self-medicate and was able to live a life of quiet independence. Yet the Court of Appeal said unanimously that on every day of that month she was not fit to make a will.

By contrast Mrs D, living in a secure facility for the demented, could make a will because an employee at the Public Trust with no medical expertise, and no training in how to detect the absence of testamentary capacity, didn't detect any deficiencies with her cognition.

And to the larger point that both the High Court and the Court of Appeal made in the *Loosley* case – that a will should not be upheld where there is no rational basis for the change in provision from the provisions that were made in earlier wills – see 2 NZLR [2018] page 618 para 36.

Mrs D wasn't even asked to give an explanation.

In my next article I will expand on the reasons the High Court judge gave for upholding the will.

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