

**TESTAMENTARY CAPACITY – THE LATEST DEVELOPMENTS ALL
WILL DRAFTERS NEED TO KNOW
BY ANTHONY GRANT, RADCLIFFE CHAMBERS**

1. INTRODUCTION

1.1 The legal test to determine testamentary capacity has been well settled since the decision in *Banks v Goodfellow*.¹ In the words of that judgment a Will-maker:

- (i) “shall understand the nature of the act [ie of making a Will] and its effects.”
- (ii) “shall understand the extent of the property of which he is disposing.”
- (iii) “shall be able to comprehend and appreciate the claims to which he ought to give effect.”
- (iv) “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.”

1.2 In *Woodward v Smith*² the Court of Appeal reaffirmed with more details from the *Banks v Goodfellow* decision on this test but the principles set out above continue to be the primary elements for the test for testamentary capacity.

1.3 In *Farn v Loosley*³, Justice Courtney modified the *Banks v Goodfellow* formulation by stipulating in respect of “Deathbed Wills” – and perhaps in respect of other Wills⁴ – that there is a fifth factor that must be satisfied. The Court of Appeal has agreed with this⁵. It says that Factor 5 is part of factor (iii) of the *Banks v Goodfellow* formulation. Factor (iii) should accordingly be read as requiring the Court must be satisfied with:

*“the testator’s rationale for deviating from any pattern of disposition identified in previous Wills or wishes regarding testamentary intent.”*⁶

1.4 In this Paper it is called “Factor 5” or “the Fifth Factor.” It appears in an article that was published in a medical journal in 2014. It is not a New Zealand journal. None of its authors are New Zealanders. None of the authors are lawyers and the article does not purport to express the law of New Zealand on this subject.

1.5 The Will that Allison Slater (“Allison”) made in 2014 differed in some ways from a Will she had made in 2011. The main difference was that in her 2011 Will, her residuary estate was to be divided co-equally between her three nephews and a niece whereas in her final Will, two nephews received more than the others. The explanation she gave to her mother for this was that she was concerned that her nephew and niece, Ben and Kate, would “fritter” inherited moneys away.

¹ (1870) LR 5 QB 549

² [2009] NZCA 215 at 19

³ [2017] NZHC 317, 2 March 2017

⁴ The respondents’ medical expert, Dr Cheung, did not confine the fifth factor to “Deathbed Wills.” He said that “if someone make a significant change in a Will or any decision, I will want to assess the person and reasoning behind that change.” See Vol 3, page 385 lines 3-4

⁵ [2018] NZCA 3, 2 February 2018

⁶ Vol 6, page 824, column 1, the penultimate paragraph item (iii)

- 1.6 Substantially in reliance on Factor 5, both Justice Courtney and the Court of Appeal held that Allison lacked testamentary capacity. Our laws can be seen to have been modified by an article in a medical journal published overseas and written by people who are neither lawyers nor New Zealanders and who do not profess to say that what they wrote represents the law of New Zealand.
- 1.7 Both the trial Judge and the Court of Appeal held that Allison lacked testamentary capacity when she gave instructions for her new Will to her lawyer on 29 April 2014 and when she signed her Will on 2 May.
2. **THE FACTS**
- 2.1 Allison was born in New Zealand but she lived most of her life in England. Her husband died there in 2010. She developed breast cancer in 2011 and died from the spread of that disease in 2014. She was 64 years old at the time of her death.
- 2.2 She and her husband had no children.
- 2.3 She had two sisters, one of whom lives in Auckland and one of whom lives in Hamilton. The first has two children who I will call A and B and the second has two children who I will call C and D.
- 2.4 This litigation concerns Allison's last Will. There are two relevant dates:
- (a) 29 April 2014 – being the day when she met with her lawyer and gave him instructions concerning the Will that she wanted him to prepare,
 - (b) 2 May 2014, being the day when she signed the Will.
- 2.5 The people who might have been included in her Will were obvious:
- (a) Her mother, who was elderly and not in need of money.
 - (b) Her two sisters. They were both well enough off and did not need substantial sums.
 - (c) Her three nephews and niece: A, B, C and D.
 - (d) A nephew of her late husband: Mark Eleveld.
- 2.6 When, following Allison's death, her mother learned of Allison's decision to divide her residuary estate unevenly she said that Allison must have lacked testamentary capacity since she said that a person in Allison's position could never, in her right mind, have arranged to distribute the bulk of her estate differentially among her nephews and niece.
- 2.7 The mother said that alternatively, Allison's decision to divide her estate differentially must have been the result of undue influence by members of the Loosley family. This allegation was dismissed by Justice Courtney and her decision on this aspect of the case was not appealed.

The Will that Allison made on 2 May 2014

- 2.8 Allison kept notebooks and diaries and it is clear from some of these papers and from the evidence of a number of witnesses that in the months before she died she was giving a lot of thought to the way in which she would distribute her estate. The estate itself consisted of about \$2m in cash; some chattels (a television set, sofas and some furniture that she had bought for an apartment she was renting in St Heliers) and some jewellery.
- 2.9 Between 18-23 April 2014 Allison hosted a holiday in Rarotonga for her sisters and their families.
- 2.10 When Allison got back to Auckland from the Cook Islands on 23 April her health had worsened and she decided to stay in the Loosleys' house in St Heliers. The Loosleys went to Wellington between 25-27 April for a wedding, leaving Allison in their house where a friend visited her from time to time.

Monday 28 April 2014

- 2.11 On Monday 28 April Allison telephoned a lawyer, Terry McDell, and made an arrangement for him to come to the Loosleys' house the following morning where she would give him instructions for her new Will.

Tuesday 29 April 2014

- 2.12 Mr McDell came to the house at about 10am on Tuesday 29 April and Allison gave him instructions for her Will. She had obtained a copy of her 2011 Will and had written in manuscript on the final page of it the provisions that she wanted to have included in her new Will.
- 2.13 Mr McDell had been admitted as a solicitor in 1971. He said that about 25% of his work during the previous 40 years had been focused on "Wills and estates" and that during the course of his practice he had prepared hundreds of Wills.
- 2.14 He said he has always been conscious, when dealing with elderly people, of the need to try to assess whether they have testamentary capacity:

"One of the first matters that I always have in mind when dealing with elderly people who want to make a Will is to consider whether they have adequate testamentary capacity. The Will of the late Allison Slater is the first Will that I have made that has been challenged on the grounds that the Will-maker lacked testamentary capacity."

- 2.15 He described Mrs Slater's condition when he met with her on 29 April.

"Mrs Slater was sitting up in bed and quite "chirpy" despite the illness. She began to explain that she had cancer. I told her that I thought she was looking well. She proceeded to tell me that she had recently come out to New Zealand from England; she had rented an apartment in St Heliers but because her health had taken a turn for the worse she was staying with Mr & Mrs Loosley, Jenny Loosley being one of her sisters. She also told me that she had recently been

on a holiday to the Cook Islands with “all the family” or words to that effect...”

“She told me that she wanted to make a new Will. I had taken with me a copy of the Will that she made in 2011. The executors who were named in that Will were John Brendon and “the partners in the firm of Emmerson Brown & Brown” of the town of Deal in England. She told me she was in the process of transferring her UK assets to New Zealand. I asked her whether, if she was not proposing to go back to the UK, it was appropriate that Mr Brendon and the partners in Emmerson Brown & Brown should continue to be executors or whether she wanted different executors.”

“She said she would (a) like to appoint Mr & Mrs Loosley as her executors and (b) like to change the bequests from the ones that she had made in her 2011 Will. She gave me a page on which she had written her proposed bequests...”

When I asked her about the size of her estate she told me that a substantial amount of money had been sent to New Zealand. She said she had the utmost faith in John Brendon and that he had been responsible for arranging for the moneys to be transferred from England to New Zealand.”

- 2.16 Mr McDell said that he spoke with her for about half an hour. In cross-examination he said Allison didn’t appear to tire at any stage.

“Q: Did you notice confusion in discussion with her, where she might talk about things other than direct responses to your questions?”

A: No. She volunteered information such as she had come from the UK; she had rented an apartment in St Heliers; that she had been on holiday with the family to the Cook Islands.

Q: Did [the fact that she had told you that her health was worse] coupled with your assumption that she had obviously had some treatment for the cancer, make you consider the question of just how well she actually was, to be executing a Will?

A: The question of capacity is always in the forefront of your mind when you are talking to a client. There was nothing about her, the way she answered questions, the way she looked, her general demeanour, the discussion we had about both her Will and powers of attorney. I got the very clear impression that she understood, this is my own personal opinion obviously, that she knew exactly what she was doing and understood what I was explaining to her to the point where the issue of lack of capacity didn’t even raise its head. I didn’t think there was an issue.”

- 2.17 Mr McDell was asked why he didn’t ask Allison about the “tv, sofas, furniture” that she had written on the page she gave him with her proposed bequests, to which he answered:

“... items of furniture etc are not often set out in one’s Will and... I was concentrating more on the main assets, but people often leave a note or tell the executors what they want to do with small items and they are often not part of the Will itself.”

2.18 Mr McDell was asked about differences between Allison’s 2011 Will and the Will she was making in 2014:

“The discussion that I had with Mrs Slater, she had given me this handwritten alterations, I cannot recall her exact words but she said that she had given her new Will a lot of thought ‘and this is what I want you to do’. My brief or duty to her, is to put into effect what she asks me to do and not to question what she is doing. At the end of the meeting I had formed the view that she had – there were no issues about her testamentary capacity and that she was free to leave her estate in any way she wished.”

2.19 Mr McDell says that after he had received instructions for the Will he went on to discuss powers of attorney with her. Allison said *“Yes I would like to do that”* and she nominated Mrs Loosley as her attorney for personal care and welfare and Mr and Mrs Loosley as her attorneys for property. Mr McDell said that when he finished his meeting with Allison on 29 April *“I left with the impression that she was absolutely fine to make a Will.”*

2.20 Mr McDell said that when he saw Allison that day (29 April 2014) she was not tired; she did not slur her speech; she did not display lethargy; and she was not confused.

2.21 Both Mr and Mrs Loosley gave evidence of Allison’s condition that day. Mr Loosley said:

“Allison was bright and alert that day. I did not detect any difficulties with her memory or cognition generally and believe that if her cognition had been impaired, I would have readily detected it.”

2.22 And Mrs Loosley said:

“On the morning of the day when she met with Mr McDell she was fully alert and had ‘dressed to impress’ him. She had kind of a turban on and was fully alert. I spoke with her both before her meeting with Mr McDell and afterwards and she was fully articulate. She was not forgetful in any way and there was no hesitation in her speech. She did not do or say anything that indicated that her mental faculties were impaired in any way.”

2.23 The respondents’ medical expert, Dr Cheung, a psychiatrist who *“had extensive experience in assessing mental capacity”* was asked about Allison’s testamentary capacity that day. In view of the requirement that testamentary capacity is to be assessed by the method set out in *Banks v Goodfellow* he was asked first about Allison’s testamentary capacity on 29 April in questions that were based quite specifically on the wording of the test set out in *Banks v Goodfellow*.

“Q: When Allison saw her lawyer on Tuesday 29 April, first you have agreed that she knew what a Will is haven’t you?”

A: Agree.

Q: Second, if she told her lawyer that she had assets of about \$2 million it showed that she knew the size of her estate didn’t it?”

A: Correct.

Q: Third, it's clear from the names of the people that she wrote on the last page of the old Will that she knew who the potential beneficiaries of her estate might be?

A: Correct.

Q: Fourth, she had given thought to the way in which she thought it most appropriate to divide her estate and allocated specific parts to each of the beneficiaries, hadn't she?

A: Correct.

Q: Then fifth, there's no evidence that she was suffering from any hallucinations or delusions at the time?"

A: Correct."

- 2.24 Dr Cheung's evidence-in-chief on Allison's testamentary capacity on 29 April was this:

"I am not able to comment with confidence on the question of whether or not Mrs Slater had testamentary capacity as at 29 April 2014. In my opinion, there is insufficient contemporaneous medical evidence available to support a definitive conclusion either way and subject to what I have to say below, this question may ultimately have to turn on the Court's impression of the various conflicting witnesses."

- 2.25 As events transpired the question was ultimately determined by the Judges of the Court of Appeal who read the evidence of the witnesses but who never saw them and who were unable to make an assessment of them.
- 2.26 A neurologist who gave evidence for the appellants, Dr Simpson, said that in his opinion Allison *"retained testamentary capacity at the time she made her last Will. I have formed this opinion after a careful review of the documents that I have been given."* So far as the events of 28 and 29 April are concerned he noted that Allison had been able to contact Mr McDell on 28 April; she had recalled his name and found his contact details; she was able to introduce herself and explain to him that she had cancer and that he had helped her prepare her 2011 Will; she was able to tell him that her husband had died and that she did not have any children of her own; she explained that she had two sisters; she explained the sequence of events since her arrival from England, including the recent trip to the Cook Islands; and various other matters. All of these actions he said indicated the *presence* of testamentary capacity.
- 2.27 Later on 29 April 2014 Allison was seen by a member of staff of Dove House. She was due to go there on 1 May for a week of respite care (fluid was accumulating in her stomach and she had to have it drained from time to time. The process was uncomfortable and wearying). It was the House's practice to make a medical assessment of such a person. The representative of Dove House described Allison in her report as being *"alert and orientated"*; *"talks freely"*, is *"able to express herself"*, her mood is *"normal"*, her insight is *"good"*, she has no anxiety, she has *"no noticeable memory deficit"* and no delusions. Dr Cheung was asked about the significance of this assessment;

“Q: This form’s quite important within the facility isn’t it, because the staff rely on it for their decisions on various matters don’t they?”

A: Yes. These are quite, give you a rough idea of that person’s cognition.

Q: And it is likely that the Hospice will rely on this kind of information when determining decisions of materiality to the person while that person is within the Hospice?

A: Yes, they would use that.

Q: For example, the administration of drugs. They would want to know this information which will assist them in determining whether to give particular medications?

A: Yes.”

- 2.28 The fact that the form was completed by a registered nurse rather than by a psychiatrist did not mean it had no value:

“Q: And even though it is made by a registered nurse and not by someone with your qualifications, it is still regarded as an acceptable document to make important decisions about how she should be cared for within the facility, is that right?”

A: Yes.”

- 2.29 The Court of Appeal held that this assessment was not made for the purpose of assessing testamentary capacity and could not be relied upon for that purpose.

Wednesday 30 April 2014

- 2.30 At 8.50am the next day – 30 April – Allison sent Mr McDell an email. In it she corrected Barbara’s surname and asked for the new Will and powers of attorney to be sent to the Loosleys’ home. She wrote:

*“Dear Terry
It was good to meet you again yesterday.
Before you do the draught will, the name on it is Barbara Powell not
Barbara Loosley to receive \$75,000 from the estate,
I am going to Dove tomorrow for about a week, so please deliver
documents to Parkside St.
Kind
Regards
Allison Slater”*

This document shows that on 30 April Allison was able to use her iPad and send emails. She had obviously reviewed the notes that she had given to Mr McDell and the only change she wanted to make was to the spelling of Barbara’s surname.

- 2.31 Although Justice Courtney appears to have held that Allison’s Will was a “Deathbed Will” it should be noted that there was no suggestion on 29 April

that Allison was facing imminent death. Nor was her health particularly bad on the following day. The respite care that had been organised to begin on 1 May was to last for only a week and then Allison would go home. Ms Stadler-Hanekom, the Clinical Nurse Manager at Dove, said of people who go to Dove for respite care that *“they come for one week and then they go home or back to the community or wherever they have been living.”*

- 2.32 Later on 30 April Mrs Farn visited Allison and chatted with her.⁷ She said that Allison was *“tired but lucid.”* She said that during the course of the discussion Allison told her she was not going to give her estate co-equally to A, B, C and D since she thought that C and D might “fritter” the money away.

Although Mrs Farn was apparently surprised by Allison’s decision to leave her residuary estate in differential portions, Allison had spoken in a similar way to A a few weeks before. A said she told him she feared that C’s and D’s parents would take any moneys that C and D might receive *“or that [C] and [D] would not use the inheritance moneys wisely.”*

1 May 2014

- 2.33 Allison was admitted to Dove Hospice on the afternoon of the next day - 1 May. She was assessed on arrival as being *“mentally sound”* by a registered nurse who examined her.

The events of 2 May 2014

- 2.34 Mr McDell said he received a telephone call from Mr Loosley on 2 May *“who told me that Mrs Slater had taken a turn for the worse and he asked if I would take the Will to her at the Hospice at St Andrews.”* The witness to the Will – Ms Stadler-Hanekom said that Mr McDell was at Dove at *“about 11am.”* In paragraph 85 of her decision Justice Courtney says that *“the question of capacity was not at the forefront of”* Mr McDell’s mind when he went to Dove House. Mr McDell had given clear evidence to the contrary, namely

“One of the first matters I always have in mind when dealing with elderly people who want to make a Will is to consider whether they have adequate testamentary capacity”

and again,

“The question of capacity is always in the forefront of your mind when you are talking to a client.” [my emphasis]

- 2.35 Justice Courtney held that Allison lacked testamentary capacity at the time she signed her Will.

- 2.36 This is how Justice Courtney described Mr McDell’s visit to Allison on 2 May:

“Allison was lying down when Mr McDell arrived and the staff raised the head of the bed so that she could talk to him. He stood at the head of the bed, on Allison’s left and directed her attention to the parts of the will that she had wanted to alter, the new bequests, how the residue was to be divided and asked her whether she was happy with

⁷ Mrs Farn said in evidence that this visit was on Sunday 27 but the Judge held that it was on 30 April. See para 29

the will and whether it was what she wanted to do. She gave an affirmative answer.” Mr McDell said:

“She was following what I was saying but, I think the best way to describe my impression of her at that point, was that she wasn’t the chirpy Allison from the two days before and she looked uncomfortable...”

“She certainly appeared tired, and uncomfortable is the best I can describe my impression.”

“Mr McDell was with Allison for about 20 minutes. He stood beside her bed pointing out the features of the new will and asked words to the effect “are you happy with this, are you ok with this?” before explaining that it would need to be signed and witnessed. She gave a non-specific affirmative answer. He could not recall exactly what words she used. He requested a witness and while that was being organised he explained the enduring powers of attorney for personal care and welfare and for property. Mr McDell’s impression was that she was following what he was saying but appeared tired and uncomfortable. Then Ms Stadler-Hanekom came in. Mr McDell introduced himself and told her that he had known Allison for a long time and that she would like to change her will. According to Ms Stadler-Hanekom, Allison looked calm, not in pain and appeared lucid. She said “Yes, this is what I wish.” Mr McDell recalled the three documents being put in front of Allison for signing, one after the other, the will first.”

The evidence of other witnesses who saw Allison on 2 May

- 2.37 **Ms Stadler-Hanekom**, the witness to the Will. She was the Clinical Nurse Manager at Dove and one of the two people there who were authorised to witness Wills.

“I looked at Allison and she looked calm, she looked not in any pain at that given time. She appeared lucid to me at that given moment and she said that “Yes, this is what I wish” and so I signed and I left...”

“Q: At the time you were there, you had no reason to believe that she didn’t understand what was going on, did you?”

A: No, because like I said, the previous nursing notes, on admission the day before, she came to us with being able to do all her own ADLs with the nursing notes saying that she was competent, that she was [of] full mind and that was nothing that flagged to me that she was in any way not able to make her own decisions.”

(Note: The term “ADLs” stands for Activities of Daily Living ie she could dress herself, feed herself, go to the toilet, decide when and how to take medication etc.)

- 2.38 **Jenny Loosley**, this is an extract from her evidence:

“I visited Ali twice on Friday 2 May [both visits were after Mr McDell’s visit in the morning]. The discussion that my mother and I had with Ali that day was on light topics. We talked about the room she was in, the view from it, the flowers in the hospice, and things like that. Although I don’t wear a watch I think the meeting would have lasted about half an hour.”

My mother says that Ali was “in no mental state to understand what she was doing that day.” I was shocked when I read this statement because nothing was said during our time with Ali that indicated she lacked cognition. She was coherent and able to conduct light but happy and caring conversation. The tiredness that began to affect her during our conversation was a quite separate matter.”

“... I have referred to the visit I made to Ali in the afternoon of 2 May. I saw her a few hours after Mr McDell had seen her. Although she was tired she was lucid and able to converse. Her memory was fine.”

2.39 Robert Loosley

“I saw Ali that day and spoke with her. She was tired – I suspect from the medication that she was receiving – but otherwise able to converse. She showed no sign of any memory impairment.”

2.40 Allison was no doubt tired because she had had an unsettled night. The Dove Nursing notes for 1 and 2 May show that:

- (a) At 11.45pm on 1 May she went to the toilet.
- (b) At 2.45am on 2 May she “rang and had severe back pain. Wheat pack applied and took Oxynorm 5mg. Was also nauseated and... vomited a small amount and felt much better. Enjoyed a cup of tea. Displayed a temporary bad temper but apologised afterwards...”
- (c) At 4.30am on 2 May she was “sleeping now has had an unsettled nocte [a medical term for night].”
- (d) At 5.20am “remains sleepy, position altered. Checked her pain level and left her to go back to sleep.”
- (e) At 12.15pm on 2 May – after she had signed her Will – it was recorded that “Allison is poorly. Lethargy+++; poor nights sleep, nausea, uncomfortable, particularly around abdomen which is full and tense... Dr Wardrope will assess+ chart medications today. Allison is overwhelmed re health events – and cannot process too many questions. Julia and I spoke to sister Jenny this morning to discuss our findings. Jenny has power of attorney. Jenny would like Allison to stay in Dove Wing for palliative care.

Comfort measures only. Jenny would like to be informed of any change in condition.”
- (f) At 1.35pm on 2 May it was recorded “bit confused, unable to gather her thoughts as well as before, repeating herself that she’s been looking for the bell to call the nurse. Wants Oxynorm. Had Reiki in the past. Doesn’t seem to wish any Reiki at present. Bit unsettled. Staff informed to give her Oxynorm.”
- (g) At 2.20pm on 2 May “Oxynorm given at 08.10hrs and 13.50hrs. Allison is quite unsettled, drainage bag has some bile in it.”

2.41 Dr Simpson said of Allison’s cognition on the morning of 2 May:

“Mrs Slater’s mother and sister... visited her at Dove on 2 May and I note the difference between them concerning the state of Ms Slater’s

health at the time of their visits. Mrs Loosley says there was light conversation about various matters while her mother says that Ms Slater was extremely tired and not able to take part in conversation. The records at Dove House indicate that Ms Slater had not slept well during the previous evening and it would not surprise me if her medical condition, combined with tiredness and the lack of sleep, made her tired when she was visited by her mother and sister. So far as her cognition is concerned, I have referred to the MRI scan that was made of her brain in 2013 and I do not think it likely that her cognition was affected on 2 May. Her cognition would only have been affected that day if her tiredness had overwhelmed her ability to concentrate and it appears from the evidence of Mr McDell and Carmen Stadler-Hanekom that this was not the case.”

- 2.42 The respondents’ medical expert Dr Cheung was asked in cross-examination about Allison’s testamentary capacity on 2 May 2014.

Q: *[Do] you agree that there’s no evidence that generally Allison had a bad memory?*

A: *Not for bad memory so I agree with that.*

Q: *“Allison’s cognition would only have been affected on the 2nd of May if her tiredness had overwhelmed her ability to concentrate.” Do you agree with that evidence?*

A: *I agree if she wasn’t tired.*

Q: *Is it correct then, Dr Cheung, that in the absence of any general tiredness of Allison Slater you agree that she would not have been likely to have forgotten the size of her assets, the nature of her Will and so forth, unless the tiredness on the day, that being the morning of the 2nd of May, overwhelmed her cognition?*

A: *I agree except there’s also mention of confusion by the nursing staff, that can affect her memory.*

- 2.43 So far as “tiredness” on 2 May is concerned, Mrs Farn gave evidence that Allison was in a very poor state but it should be said that she felt strongly that Allison ought not to have divided her residuary estate in the way she did and she was willing to give untruthful evidence in support of her cause. (She denied having knowledge of a letter that her solicitor sent to Mrs Loosley but she later told Mrs Loosley that she had not spoken truthfully about this.)
- 2.44 So far as “confusion” is concerned the confusion that was noted by the nursing staff was not regarded as being sufficiently serious as to cause them to withdraw Allison’s right to self-medicate, to seek any advice from a doctor, or to take any other action. Allison continued to be able to attend to the “activities of daily living.” Dr Cheung confirmed this: *“I can’t recall any problem with her day-to-day management.”*

3. **THE RATIONALE FOR REQUIRING A WILL-MAKER TO JUSTIFY A CHANGE IN PROPOSED PROVISION**

- 3.1 I am aware from my involvement as Counsel in other cases, of the reasoning that some overseas psychiatrists give for the theory in the “*Deathbed Wills*”

article. It is essentially this: in a case where a Will-maker has made a series of Wills at a time where he or she was in good health, and the provision that was made in each of the Wills was substantially consistent, but that person changes the provision dramatically in the final Will, the change in the Will pattern may reflect a lack of cognition.

3.2 To illustrate this from practical experience, I have been involved in cases where a Will-maker has deliberately excluded some people from provision and has stated in a series of Wills why he/she has done this. Then comes a final Will, made at a time of dementia in which the prohibited beneficiaries are suddenly included. If the Will-maker had been asked by a lawyer why the people who had been excluded for so long had now been included, the Will-maker would say that he/she did not recall having held a grudge against them. The inability to recall will have arisen from a form of dementia.

3.3 Such Wills are commonly marked by an extreme contrast between the provisions that have been made in a series of prior Wills with the provisions that are made in a final Will.

4. THE TRIAL JUDGE'S REASONING

4.1 The Court of Appeal rejected the trial Judge's reasoning for determining that Allison lacked testamentary capacity when she made her final Will. It gave the following reasons for doing this.

(a) Courtney J had made her own analysis of the amount of an opioid form of medication that Allison had been taking and reached a conclusion that she was taking more than 10mg of it each day. The Court of Appeal said "*we do not consider that this was a safe conclusion for the Judge to reach, given that there had not been direct evidence or cross-examination on this issue.*"⁸

(b) The Judge had relied upon a data sheet for the drug concerned when that data sheet "*had not been traversed in evidence.*"⁹ The Court of Appeal said that:

*"The Judge could not carry out her own assessment of extra consumption without evidence and submissions on the topic."*¹⁰

(c) The Judge had said that neither Mr or Mrs Loosley had given evidence about Allison's testamentary capacity when she met with Mr McDell on 29 April. This statement was wrong:

"We note that the Judge was not correct when she said that neither Mr or Mrs Loosley gave evidence concerning Allison's condition on 29 April 2014. In fact, they both did give such evidence, saying in effect that she appeared to be in command of what she was doing and was not confused."

(d) The Judge "*offered little direct comment on the very considerable differences in the evidence adduced by the parties as to what was observed of Allison's condition in the weeks before her death.*"

⁸ Paragraph 39

⁹ Paragraph 39

¹⁰ Paragraph 39

- 4.2 The Court of Appeal therefore decided to ignore the Judge’s reasoning and to embark upon its own form of reasoning:

“Given that there is force in the appellant’s submission that the Judge made some errors on the facts and given that she did not make direct findings on some of the conflicting evidence relating to capacity, we think it necessary to carry out a detailed review of the facts ourselves.”¹¹

5. THE COURT OF APPEAL’S REASONING

- 5.1 The Court of Appeal said that Mr McDell ought to have enquired about “*the reasons for the changes*” between the proposed Will and the prior Will.

“In our view it would have been good practice for him to have done so. When a Will-maker is very ill, in this case giving instructions from a bed, an enquiry into the reasons behind significant changes is a good way of checking whether the Will-maker understands the nature of his or her actions and the effect of those actions.”¹²

Note that this statement is not confined to “Deathbed Wills” but extends to Will-makers who are “*very ill*” and to Will-makers who “*give instructions from a bed.*”

- 5.2 After Mr McDell had left the house on 29 April Allison said to Mr Loosley:

“Have I made the right decision?”

This statement was capable of two interpretations. One was that she didn’t know what she was doing. The other is that she knew her decision was controversial and would give rise to difficulty but she nevertheless believed it was the right decision. In this context, she had asked Mr and Mrs Loosley, as executors, not to disclose the terms of her Will – which suggests that she was aware that its provisions were controversial and she did not wish to create more difficulties than was necessary. She had also recorded in writing that she wanted the terms of the Will to be kept confidential. The Court of Appeal said it preferred the first interpretation.

- 5.3 The Court appeared to dismiss a pre-admission hospice assessment form that was completed on the day when Mr McDell had met with Allison and on which the medical officer (a nurse) had ticked boxes on the form which indicated that Allison was

“alert and oriented, able to express herself and had no noticeable memory deficit or delusions or hallucinations. Her motivation and insight were expressed to be good and no anxiety was recorded.”¹³

The trial Judge said that as she did not know the questions that the nurse had asked, she was not willing to accord the nurse’s observations as having any weight.¹⁴

¹¹ Paragraph 44

¹² Paragraph 51

¹³ Paragraph 56

¹⁴ Paragraph 56

5.4 The Court recorded that Allison had told her mother on the day following her meeting with Mr McDell, that “*she was concerned about her Will because she felt that [C] and [D] would simply ‘fritter’ her money away. Mrs Farn responded briefly, disagreeing and no more was said about the topic.*”¹⁵

This was the explanation that Mr McDell would presumably have been given if he had asked about the change in provision about the prior Will and her proposed Will.

The Court of Appeal said that:

“There has been no evidence adduced that gives any support to [Allison’s] suggestion that [D] and [C] might ‘fritter’ money away.”

5.5 The Court said that when Mr McDell met with Allison to sign her Will he “*does not appear to have discussed the rationale for the changes from the 2011 Will, or made any enquiry about her understanding of what she was doing or its effects.*”¹⁶

The changes related to:

- The differential provision for the two nephews.
- Jewellery.
- Chattels.

In practice, it appears that there was no jewellery of value. The chattels were a few items of furniture that were given to the hospice following Allison’s death and were presumably of minimal value. The Court of Appeal said “*We consider that Allison’s lack of reference to the absence of chattels in the Final Will, and the lack of any discussion about them when she signed her Final Will, are an indication that she was not focussed.*”¹⁷

5.6 The Court of Appeal referred to conflicting evidence from witnesses about the state of Allison’s cognition. It contrasted the evidence of a Mr Howarth with that of a Dr Rowley and said – not having heard the evidence of either witness – that it preferred the evidence of Dr Rowley on whose evidence “*real weight can be placed.*”¹⁸ (It should be noted that Dr Rowley gave evidence as a family friend and not as a doctor.) The nephew and niece who were disadvantaged by the Will had both been born prematurely. Dr Rowley had been the obstetrician who had assisted at their birth, and he had remained a close family friend of the Powells over the years.

5.7 Dr Rowley gave evidence that by 25 March 2014

“I would not have been prepared to accept any gift from Ali other than, perhaps, some small ‘keepsake’ of no commercial value.

Dr Rowley is a paediatrician and not a psychiatrist, a psychologist or a neurologist. According to his non-expert evidence Allison apparently lacked testamentary capacity from almost a month before she met with Mr McDell.

¹⁵ Paragraph 58

¹⁶ Paragraph 61

¹⁷ Paragraph 62

¹⁸ Paragraph 74

Despite not having seen or heard Dr Rowley, and despite his lack of qualifications to give expert evidence about testamentary capacity, the Court of Appeal said that the evidence that I have set out above was to be preferred to the evidence of all the other witnesses who had seen and met with Allison in the weeks following 25 March 2014. No one else suggested that Allison lacked capacity at that time.

- 5.8 Allison kept diaries and notebooks but seldom put dates on her entries. There were some errors in some of the undated entries which the Court of Appeal suggested showed a “*level of confusion*.”¹⁹

6. SOME CONCLUSIONS FROM THE LOOSLEY CASE

Prior case law on major changes of testamentary disposition

- 6.1 The Court of Appeal said that there “*are...numerous authorities where a major change of testamentary disposition has been seen as supporting an inference of incapacity in the absence of an adequate explanation*.”²⁰
- 6.2 In support of that statement the Court of Appeal referred to an unreported decision of Justice Hammond in *Re Rhodes* in 2002²¹; a decision from New South Wales in 1890; a decision from Queensland that was reported in 1941 and a decision that was reported from South Australia in 2017.²²
- 6.3 Note the words “*a major change of testamentary disposition*.” In the present case, the trial Judge said that there had been no explanation for changes in distribution of jewellery, chattels and the differential provision to the nephews and niece. By the trial Judge’s reasoning, a lawyer who takes instructions for a Will would have to study prior Wills and seek explanations for virtually all changes between the prior Wills and a proposed Will.
- 6.4 Although the criteria expressed in *Banks v Goodfellow* do not require this, it appears that the Court of Appeal would sanction this approach since it says “*it is important to treat [the Banks v Goodfellow propositions] as guiding propositions rather than as a formula*.”²³

With this sentence, the significance of *Banks v Goodfellow* as a beacon of light to guide people to determine whether a Will-maker has testamentary capacity has been weakened and practitioners are now in a regime of much less certainty.

- 6.5 Although the Court said that “*there is no ‘requirement’ that a Banks v Goodfellow assessment involve an enquiry into why a Will-maker has made a significant change at the time the Will is executed*” and “*it would be wrong to deny capacity only because of a failure by a solicitor to so inquire*”²⁴ it appears that that is exactly what happened in the *Loosley* case. In this way, the Court said it would have been good practice for [Mr McDell] to “*have enquired about the reasons for the changes but he had not done so*”.²⁵

¹⁹ Paragraph 80

²⁰ Paragraph 32

²¹ HC Wellington CP25/02, 7 March 2002 at [40]

²² See the references in footnote 24 of the Judgment

²³ Paragraph 19

²⁴ Paragraph 33

²⁵ Paragraph 51

6.6 On my reading of the Court of Appeal's decision, a lawyer who prepares a Will for a person who is or who may be near death, who is "very ill", who is in bed at the time of giving instructions for the Will, and perhaps if the person is elderly, ought to make enquiries about any change that might be regarded as significant between the terms of a proposed Will and prior Wills.

7. **HOW IS A LAWYER TO ASSESS WHETHER AN EXPLANATION FOR A CHANGE IN TESTAMENTARY DISPOSITION INDICATES CAPACITY OR INCAPACITY?**

7.1 Although Mr McDell did not ask Allison why she proposed to make different provision for a nephew and niece, Allison gave an explanation to her mother. She said she was concerned that the two children might "fritter" inherited moneys away.

7.2 The Court of Appeal dismissed Allison's explanation and said it was not satisfactory:

"There has been no evidence adduced that gives any support to her suggestion that [D] and [C] might 'fritter' money away."

7.3 There was, in fact, direct evidence from C's and D's parents that C and D had never handled the kind of money that they might otherwise have received. By contrast, there was evidence that A and B were both commercially astute. There was also evidence concerning C and D's premature birth and some disabilities that have resulted from that.

7.4 If Mr McDell had asked Allison why she thought that the two children might fritter money away. Allison might reasonably have said that that was her personal judgment but the Court of Appeal says that such an explanation has no merit and should be disregarded.

7.5 If the law is to be that an explanation has to be verifiable what is a lawyer to do? How can he tell whether the Will-maker's concerns are justified or not? And if a Will-maker has concerns about this what is to stop him/her from giving false explanations which are incapable of verification?

7.6 I have explained the rationale that I believe underlies the "Deathbed Wills" article - how a series of similar dispositions over many years which is radically departed from in the final Will, may indicate that the last Will was made at a time of weakened mental testamentary capacity.

A divergence of that nature is materially different from the kind of circumstance that existed in the *Loosley* case. There, only one prior Will was contrasted with the final Will, and the Will-maker had explained her reason for making the changed disposition.

8. **IS THE NEW LAW CONFINED TO "DEATH-BED WILLS?"**

8.1 At the time Allison gave instructions on 29 April she was described as "chirpy." She had organised to meet with the lawyer. She had prepared in advance of the meeting a paper on which she had recorded the proposed dispositions. She spoke knowledgeably about all of the *Banks v Goodfellow* criteria at the meeting. Although she was due to go into a Hospice in the following week it was only for a week of respite care, when she would go home again. This was not a case of a "Deathbed Will" as that term would commonly be

understood. But, following the Court of Appeal's analysis, such a Will is either to be characterised as a "Deathbed Will" or in the alternative to be treated as one which is subject to a requirement that any material change in disposition must be justified by the Will-maker.

9. **IS THE NEW LAW CONFINED TO "MATERIAL CHANGES" BETWEEN THE PROPOSED WILL AND A PRIOR WILL?**

- 9.1 In the prior Will Allison had left her jewellery to her niece but she had not done this in her final Will. The jewellery was presumably of no value since the executors did not record the estate as having jewellery of any value. Allison was not asked to identify the jewellery she had in mind or its value. The trial Judge considered the absence of an explanation to be significant.

Similarly when Allison met with Mr McDell to discuss her Will she did not know what to do about her chattels. The chattels consisted of a bed, a tv and some modest furniture for an apartment that she was renting in St Heliers. It is my understanding that the furniture itself was of such modest value that it was given to the Hospice following Allison's death. The trial Judge and the Court of Appeal both seem to have considered that an absence of explanation concerning the chattels was significant.

If a Will can be invalidated on the grounds that the Will-maker did not give a satisfactory explanation for such modest divergences in dispositions, it will be necessary for a solicitor to make enquiries about *all* changes in dispositions.

10. **IS IT BETTER TO DEFER MAKING A WILL SO THAT NO PRIOR WILLS CAN BE CONTRASTED WITH THE FINAL WILL?**

- 10.1 The article upon which the Court's reasoning is based presupposes the existence of prior Wills. If there are no such Wills, then the lawyer who prepares the Will has no obligation to enquire about the reasons for each disposition. The dispositions which might have been invalidated in the one scenario would all be valid in the other! How logical and fair is that?
- 10.2 If a Will-maker has concerns that his or her reasons for wishing to make a distribution might be regarded as controversial and difficult to justify to a Judge, a logical outcome would be to defer making the Will until the Will-maker is close to death so that there will be no prior Will to contrast the final Will with. By this means dispositions that may otherwise be invalid will be upheld.

11. **ARE WILLS THAT ARE CURRENTLY IN STORAGE LIKELY TO BE TREATED AS INVALID?**

- 11.1 This is an important question.
- 11.2 Part of the answer relates to the characterisation of the Wills concerned. If they are to be categorised as "Deathbed Wills" then justification for changes between those Wills and prior Wills, will apparently be required. But the Court of Appeal spoke inconsistently on whether the doctrine is confined to Deathbed Wills. In some places it seems that the Court was confining the rule to "Deathbed Wills" and in other places not. The principle appears to be applicable to Will-makers who are in bed at the time of giving instructions, to Will-makers of any age who are "very ill" at the time of giving instructions,

and it may also apply to the Wills of “elderly” people – although in this context it should be noted that Allison was only 64 years old at the time that she gave instructions for her final Will.

A F Grant