TESTAMENTARY CAPACITY

Testamentary capacity: When capacity fluctuates

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Joseph de Lacey and Rowan Cope update practitioners on the High Court's current approach to interpreting testamentary capacity

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'Take care of all your memories… for you cannot relive them,' says Bob Dylan's friend Mick in his (aptly named) 1967 song *Nothing Was Delivered*. It is a stretch to suggest that Mick was concerned about a challenge to his testamentary capacity, but this is a lesson which applies equally to life as to litigation.

It is also the moral of the recent case of *Hughes v Pritchard* [2021] a will dispute which turned on whether the testator, Evan Hughes, was able to understand and, crucially, to remember i) the promises he had made to his son and his family, ii) the extent of his land, and iii) the terms of his previous will. In the end, HHJ Jarman QC decided that Evan did not adequately understand or remember, and that any one of these lapses of memory would be sufficient to undermine his testamentary capacity and thus to vitiate his 2016 will.

The judgment serves as a reminder to practitioners of a number of key considerations in probate claims, and particularly those where an elderly testator ostensibly appears to have capacity at key moments.

The background

Evan was a farmer from north Wales. At his death he owned substantial farmland including 79 acres known as Bwchanan, and 58 acres known as Yr Efail. He had three children: Elfed, Carys and Gareth, and in the late 1980s gave each of them a plot of land on which to build a home (or, in Elfed's case, an already existing farmhouse).

Evan was also an equal shareholder with his cousin, Ian Hughes, in a family building company. Evan supervised the work on site, and his children all worked for the company. Elfed also farmed his father's farmland and looked after his sheep and cattle, together with his own, as well as buying farmland next to that of his father, and jointly renting a farm with him close by.

For many years Evan had made clear his intentions in relation to the distribution of his estate after his death, namely that his shares in the family company would be left to his son Gareth and daughter Carys equally, and the farmland would be left to his son Elfed. He executed broadly similar wills on 18 December 1990 and on 7 August 2005 (the latter following his second divorce), which gave effect to these intentions.

By 2005, following Evan's retirement, Gareth had taken over the supervision of the building sites, and although initially successful, by 2014 the business had begun to decrease, and the company was forced to sell off property to pay its debts. This reduced the value of the shares due to Gareth and Carys by Evan's 2005 will.

Elfed himself had three sons, each of whom found employment away from the farm. Eventually however, Elfed persuaded his son Geraint to give up a well-paid job with the local authority to work on the farm, although for half the pay.

Geraint said that he continually asked his father for a wage rise over the coming years, but his father became annoyed and told him not to ask, as (using a phrase that has become a cliché in this sort of farming case) everything would be his one day.

Signs of fading capacity

In 2014, when Evan was in his late 70s, his family began to notice lapses of memory and behavioural changes. These tell-tale signs of decreasing capacity included losing his keys, forgetting to shut gates between fields, becoming confused as to the time of day, and famously erratic driving. After a while, he did not recognise his cousin, and in a memorable incident in March 2016 referred to lambs as heifers and the field they grazed in as Yr Efail, which was the name of his land some two to three miles away. On 4 March 2015, at the urging of his children, he granted a power of attorney to his daughter Carys.

Preparation of a new will

Later that year Elfed became depressed and in September 2015 took his own life. His death had a devastating impact upon Evan, who was hospitalised a few months later. This led to a capacity assessment, in which he scored 47/100 on an Addenbrooke's test. This indicated a moderately severe degree of impairment as a result of an old stroke and damage to blood vessels.

Despite this, he clearly appreciated the sense in changing his will following Elfed's death, and in March 2016 had a meeting with a local solicitor, Manon Roberts. He was driven to the office by his son Gareth, who also attended the meeting. Ms Roberts had not met Evan before, nor seen a copy of the 2005 will. She described Evan as distant. Instructions for a new will were given, but the solicitor could not recall whether Evan, or Gareth, had given them.

The instructions that were given were to the effect that Yr Efail was to be left to Gareth (as opposed to Elfed) and the remainder of the farmland was to be held on trust for Gwen (Elfed's wife) for life and then for her three sons equally. Derwyddfa was to be left to his daughter Carys, and his grandchildren were to inherit the residuary estate in equal shares.

Quite sensibly, Ms Roberts' colleagues advised her that it was essential to obtain a capacity assessment prior to execution. Ms Roberts requested that Dr Pritchard, Evan's GP, provide such an assessment. While conducting this assessment in June 2016, Dr Pritchard noted that Evan was aware of the purpose of the meeting and was calm, fully orientated and did not appear confused. Dr Pritchard asked Evan to outline what was in the draft will and he did so with very little prompting. Dr Pritchard therefore confirmed he had no issues with Evan's capacity to change his will and would be happy to act as witness.

That said, there was around this time some evidence of mental disturbance – on hearing of the inquest into the death of Elfed (which he did not attend) from his daughter, Evan was disorientated and told her that he had seen his late son at the window. Evan also appeared to lose track of the extent of his landholding, requiring that a plan be brought to him to show him what he owned.

The signing of the new will

In July 2016, a draft will was prepared and read to Evan by Ms Roberts. After each clause, Evan confirmed his agreement. The plan of Evan's land which had been brought to him previously, to remind him of his ownership, was also attached to the will. Gareth had driven his father to the meeting, but remained outside.

The will (the 2016 will) was then signed by Evan and witnessed by Dr Pritchard and Ms Roberts. At the same meeting, Evan signed a lasting power of attorney in favour of Gareth and revoked the power previously granted to Carys (without her knowledge).

Shortly after the signing of the will, Dr Pritchard referred Evan to a community psychiatric nurse, stating that he 'has mixed type dementia which is deteriorating quite rapidly'. His attendance note also records that Gareth explained that his father sometimes 'cannot see anything more than what is straight in front of him' (see para 52). The nurse repeated the Addenbrooke's examination in November 2016 and Evan scored 41/100, slightly lower than the score received previously.

Between August and October 2016 Evan, Gareth and Gareth's wife had meetings with another solicitor, Rhys Cwyfan Hughes. During that meeting, Evan gave instructions to transfer shares in the family company to Gareth. According to Mr Hughes, in September 2016 an issue arose as to Evan's capacity (the judgment does not clarify what this issue was), but that his instructions were clear and that he took an active part in the discussion.

In January 2017, Evan signed a stock transfer form to transfer 25 of his shares to Gareth. Dr Pritchard subsequently told Gareth that he doubted his father's capacity to understand the detail of these transactions and shortly after Carys wrote to the Office of the Public Guardian expressing concerns about her brother taking advantage of their father. Before that referral could be dealt with, Evan died due to dementia-related complications.

The claim

Following Evan's death, a dispute developed as to the validity of the 2016 will. Gareth contended that the will was valid, while Gwen and her son Stephen contended that the

2016 will was invalid on the grounds of lack of testamentary capacity, want of knowledge and approval, and/or undue influence exerted by Gareth on his father, or, alternatively, that Yr Efail was subject to a proprietary estoppel claim by Elfed's estate whereby that land belonged in equity to his estate.

Testamentary capacity

There was no dispute that the relevant test for capacity to make a will was that set out in *Banks v Goodfellow* [1869] (which survives the enactment of the Mental Capacity Act 2005).

By way of reminder, *Banks v Goodfellow* sets out the classic four-part test (per Cockburn CJ), being that:

- the testator shall understand the nature of the will and its effects;
- the testator shall understand the extent of their property of which they are disposing;
- the testator shall be able to comprehend and appreciate the claims to which they ought to give effect; and
- '[n]o disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion shall influence his will and bring about a disposal which, if the mind had been sound, would not have been made.'

The court also confirmed that an assessment by a medical expert at the time of making of the will which concluded that the testator had capacity (as was the case here) was not determinative. While it is referred to as the 'golden rule', it was no more than a rule of practice, not a rule of law giving conclusive status to evidence obtained in compliance with that rule: *Sharp v Adam* [2006]. The issue of testamentary capacity was 'from first to last' for the decision of the court. It was not a decision that was to be delegated to experts: *Key v Key* [2010].

Medical evidence

Inevitably, much time was spent considering the opinions of medical professionals, and in particular a) the contemporary evidence of Dr Pritchard; and b) the retrospective evidence of Dr Series, a psychiatrist jointly instructed by the parties at trial.

In preparation for the trial, Dr Series was provided, among other documents, with Dr Pritchard's and Ms Roberts' statements, and with Evan's medical records. Dr Series told the court that, despite his lack of insight into Evan's impairment, his Addenbrooke's score indicated a moderately severe degree of cognitive impairment, with particular deficits in the areas of attention, memory, and fluency, which pointed to vascular dementia. However, his report was cautious. He explained that there is a relatively poor correlation between cognitive impairment and testamentary capacity, and concluded that where, as in this case, the degree of impairment was moderate, capacity may or may not be retained. The final sentence of his report read:

> *… in my opinion the combined evidence of the solicitor in her attendance notes and the doctor in his records and letter suggests to me that it is more likely than not that [Evan] had testamentary capacity when he gave instructions for and then executed his 2016 will.*

Interestingly, Dr Pritchard – on whose evidence Dr Series (and Ms Roberts) relied – cast some doubt on his own assessment of Evan's capacity prior to the execution of the 2016 will. This was because at the time he was under the (false) apprehension that the proposed new will made only minor changes to the 2005 will. A note made on Evan's attendance at his surgery in May 2016 read (para 54):

> *Needs to change will after Elfed's death – wants to give share to Gwen and the boys – nothing complex. Has full capacity and understands what he needs to do.*

He also said that Gareth had said incorrectly that the purpose of the change was to leave the land to Elfed's sons instead of to their father, although Gareth disputed this recollection. Dr Pritchard explained in oral evidence he was worried that the changes were far more complex than he first thought. As a result, at the time of the assessment he did not question Evan as to the reason why he was proposing to leave 58 acres to his son Gareth rather than to Elfed's family.

The judge acknowledged this significantly impacted upon the weight of Dr Pritchard's assessment and in turn upon Dr Series' conclusion, which were based on that assessment, as well as on Ms Roberts' evidence. It is striking that what appeared to be settled conclusions by respected professionals made contemporaneously with the execution of the disputed will, and by extension the opinion of the joint expert in the trial which was founded on these conclusions, could be partially displaced by a misunderstanding by Dr Pritchard as to the scale of the difference between the old and the new wills.

Capacity to remember his promises

Having qualified the usefulness of these professionals' evidence, the judge turned to focus on what Evan remembered, examining in the context of statements made in Dr Series' (somewhat undermined) report the effect Evan's failing memory had on his testamentary capacity. The judge observed that capacity does not require a testator to remember the terms of a past will they made, or why it provided as it did, as long as they were capable of accessing the information, if needed, and of understanding it once reminded of it.

Worthy of note is the consideration given to promises made by Evan in relation to Yr Efail during his lifetime, and his memory of these. Rather than examining the promises exclusively in relation to the proprietary estoppel claim (as to which see below), the judge recognised that they also impacted on his assessment of the testator's capacity. Dr Series addressed this in his report, concluding that it was more likely than not that Evan would have been able to recall and appreciate that his son Elfed had farmed the land, but was doubtful that he would have had a clear recollection of what he might or might not have promised Elfed about it in the past.

Capacity to appreciate the extent of his land

Further, the judgment examined whether Evan was able to remember, and so to appreciate, the extent of the assets which comprised his estate, and in particular his farmland. Dr Series acknowledged that Evan's visual impairment could have caused him some difficulty in interpreting maps, which placed a higher emphasis on his ability to

remember what land he owned. This was called into doubt by several memory lapses, including his muddling a field in Yr Efail with land he owned three miles away.

Capacity to understand the changes made to the status quo

The judge also considered whether Evan had sufficient capacity to understand that his 2016 will departed from the understanding set out in previous wills in respect of Yr Efail. He placed particular emphasis on Evan's encounter with Dr Pritchard in May, in which – while appearing to Dr Pritchard to have capacity – he said that he was changing his will so that his grandsons would inherit the share of their father but there was 'nothing complex' (para 82). He recognised that there was a period of eight weeks between this meeting and the execution of the 2016 will in July when Evan was deteriorating from week to week.

Held

It was held that Evan did not have the requisite testamentary capacity to execute the 2016 will. The judge explained that, although the 2016 will was rational on its face, there was a real doubt about Evan's capacity and in his judgement that doubt had not been displaced. He noted three reasons in particular, and it is worth setting these out in full (paras 85 to 87 of the judgment):

> *The first is that he did not by then have the capacity to appreciate the understanding that he had had with his son Elfed over many years during which his son had looked after his stock and land for no financial reward, or the promises made to his daughter-in-law and grandsons thereafter. This is not just a case of forgetting a promise made or the provisions of his previous wills.*
>
> *The second is that he lacked capacity to understand the extent of Yr Efail. Although a map showing the 58 acres and his other land was produced during that process, it is likely that his visuospatial impairment was such that he had difficulty in interpreting maps. It is likely that he relied more upon his memory, but that memory by 7 July 2016 was significantly impaired as shown by some of the examples set out above including confusing a field at Bwchanan for Yr Efail. While that episode, taken by itself, might be put down to a slip of the tongue or lapse of memory… there was significant deterioration in his vascular dementia between then and 7 July 2016.*
>
> *The third is that he lacked the capacity to understand that the changes implemented by the 2016 will were more than just those necessary to 'neaten' up (in the words of his cousin Ian Hughes) his testamentary provisions following the death of his son Elfed.*

The judge noted that any one of these was sufficient to vitiate the 2016 will, and if taken together, the likelihood of lack of capacity was strengthened.

Having come to this conclusion, he set it to one side for the remainder of the judgment to consider whether the defendants' case was made out in relation to knowledge and approval

and undue influence (which he did not find), and in relation to proprietary estoppel (which he did).

Knowledge and approval

This was dealt with quickly. The judgment balanced the fact that Ms Roberts had been through each clause of the will with him, and that he had seemed to understand these, against several factors which suggested he had not truly understood and approved its contents. These included Evan's moderately severe dementia, the fact that his son Gareth had been present at his will meetings and had potentially given instructions, that he had not mentioned to Dr Pritchard that he intended to leave a considerable area of land to Gareth instead of to Elfed's family, that Welsh and not English was his first language, and that he struggled to understand the map of his land.

In the end, the judge accepted that these circumstances taken together did give rise to suspicions that Evan may not have known or approved the contents. However, given the very clear evidence that the draft was gone through clause by clause and that he nodded his approval of each one before signing, it meant that it was likely that, if he had the capacity to understand (which as established above he did not), he knew of each clause and approved of it.

Undue influence

Again, there was no dispute as to the legal principles, which the judge set out at length. He said the real question was whether legitimate persuasion had crossed the line into coercion or fraud. He posited an alternative interpretation of the facts that, having until March 2016 stuck to his intentions, Evan then realised with the worsening financial position of the company that in order to achieve a more equal distribution between his children as he had sought to do in the past, some further provision for his son and daughter should be made. As a result of the fact it was not the only plausible hypothesis, he concluded that undue influence was not made out. He explained that it was unlikely, given Evan's strong character and despite his mental and physical frailties, that his own volition was overcome in making the 2016 will.

Proprietary estoppel

The claim for proprietary estoppel was founded on promises made by Evan to his son Elfed (and communicated by Elfed to his own son Geraint) over a number of years. Somewhat unusually, due to Elfed's untimely death, the claim for proprietary estoppel was advanced on behalf of Elfed's estate, and the promises and detriment to both father and son were taken into account.

The judge focused in particular on a meeting Geraint attended at his grandfather's home late in 2015 following his father's death to discuss the future of the farm, in which his grandfather said he wanted Geraint to carry on his father's work on the farm including looking after his sheep and cattle. Geraint raised the issue of payment, to which the latter responded that he would look after him and he should not ask for more as they 'would own everything one day' (para 71).

The judge considered that the detriment to Elfed and Geraint was such that the expectation of Evan in the understanding that he had with his son had been fulfilled. He

held that it was just and proportionate that the corresponding expectation of his son should also be fulfilled. As a result, if the 2016 will was valid (which it was not, due to Evan's lack of capacity), Yr Efail should nevertheless be subject to an equity in favour of Elfed Hughes' estate.

Conclusions for practitioners

The judgment serves as a reminder of a number of key issues common to many probate claims, and particularly those where an elderly testator may appear to have fluctuating capacity:

- A diagnosis of moderately severe dementia is not, in itself, enough to prove that a testator did not have the requisite testamentary capacity to execute a will. Capacity can fluctuate, and must be assessed at the relevant time in relation to the specific decision the individual is making. Such a diagnosis may provide strong evidence, but (even coupled with bereavement after the loss of a beloved son) is not in itself sufficient.
- When drafting a will for an elderly or vulnerable individual, always follow the golden rule, and ensure that the medical professional carrying out the assessment understands the terms of both the proposed **and** the previous wills. Failure to take into account the change between the two could reduce the weight afforded to the assessment itself, and the opinions of other important professional witnesses which are founded on this.
- Especially where the estate comprises a substantial landholding, it is important that the testator is able to **remember** the scope of this land (particularly where they, for example, suffer from a visual impairment which means they are not able to use a map as a reminder). This is crucial to prove the testator understands the extent of the property of which they are disposing, in line with the second limb of *Banks v Goodfellow*.
- It is tempting to look at a case like this in the round, and to assume that if one paints a clear enough picture of failing capacity to the judge then this will be sufficient. Although it is of course important to weave a convincing narrative, it is also key that you specifically link the evidence back to the *Banks v Goodfellow* test, as failure to make out any one limb must inevitably lead to a finding of lack of testamentary capacity.
- Promises made to potential beneficiaries, and the detriment they suffered in reliance on these promises, are relevant not just to an alternative claim for proprietary estoppel, but also in establishing testamentary capacity. Failure by the testator to appreciate the scope of promises made may undermine the terms of any new will which does not take these promises into account.

Cases Referenced

- Banks v Goodfellow (1869-70) LR 5 QB 549
- Hughes v Pritchard & ors [2021] EWHC 1580 (Ch); [2021] WTLR 893 ChD
- Key & anor v Key & ors [2010] EWHC 408 (Ch); [2010] WTLR 623 ChD
- Sharp & anor v Adam & ors [2005] EWCA Civ 449; [2006] WTLR 1059 CA

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