Browne Jacobson

Will challenges in 2024: Key cases on lack of capacity or lack of knowledge and approval

09 December 2024 Daniel Edwards

It has been quite a year for cases of this kind, with at least four notable cases being reported before most of us had even taken our summer holidays.

Leonard v Leonard: Capacity to make a will

Back in February we had the War and Peace-esque Leonard v Leonard judgment, running to nearly 500 paragraphs. The most interesting parts for lawyers may be:

- Paragraphs 149 -164: a very helpful summary of the four limbs in Banks v Goodfellow, including some interesting pointers at paragraph 152;
- A detailed analysis of what “understanding the nature and effect” of the will in question means (paras 447-465); and
- The court’s assessment of how, when, and to what extent expert evidence on the issue of capacity will be helpful to the court in deciding the question at hand:

> *"Whilst there is possibly scope for experts in a case of this sort to opine (as they did here) as to the inferences that might be drawn from the evidence (as to, for example, the levels of executive function required to write particular documents or carry out specific tasks), and whilst I have on occasions found it useful to record the experts' views on some of the documentary evidence, I consider that the court must be very wary indeed of placing much weight on such opinions. Ultimately it is for the court and not an expert witness to determine what, if any, inferences should be drawn from the documentary and other evidence when seen in its proper context" (paragraph 141)*

And non-contentious private client lawyers would do well to read the comments relating to the acts (and omissions!) of the will writer in this case. It is not uncommon in cases of this nature that a failure to follow the 'Golden Rule' is quickly brushed aside by judges. But in this case – no doubt in no small part to various other failings on the part of the will writer – it clearly influenced the judge’s finding that the will was invalid for lack of capacity;

> *“I am unable to attach any weight to Ms Wells' evidence that she was "totally satisfied" that Jack had testamentary capacity. Ms Wells did not think to consult her supervisor, to see Jack alone or to apply the Golden Rule, even when it was clear that Jack was "struggling" to understand the provisions of the Second Draft Will… she did not apparently pick up on the fact that communications from Jack and Margaret now appeared largely to be emanating from Margaret… and she made no suggestion that she should take Jack and Margaret through the… Draft Wills in advance of their signature or that she should attend at the signing of those wills, notwithstanding that by this stage it had been nearly a year since she had last seen Jack… I accept the Claimants' submission that this total lack of awareness on her part of the obvious need for caution in dealing with an elderly testator renders her views as to Jack's capacity worthless.”*

Within a week of the judgment in Leonard landing, we were treated to another case of this nature, albeit this time an unsuccessful challenge.

Gowing v Ward: Undue influence will

In Gowing v Ward the five granddaughters of the deceased (known as Fred) challenged Fred's will from November 2018. At the time Fred made this will, he was approaching his 90th birthday. In his will he left the bulk of his estate to his two children, and in doing so he almost entirely excluded his five granddaughters from receiving any part of his estate.

Not only did Fred's five granddaughters challenge the will, on grounds he did not have capacity, and/or have the requisite knowledge and approval of its contents, they also claimed that Fred only made the will as a result of "undue influence" being placed on him, and/or that the will was only created as a result of Fred's mind being "poisoned" against his granddaughters (i.e. as a result of "fraudulent calumny").

Ultimately, the claimant's case failed. They only needed to make out their case in respect of one of the four types of challenge in order to have the will declared invalid, but the court rejected each in turn.

On the issue of capacity, the contrast with the will writer in Leonard is stark; in Gowing the solicitor recorded observations against each of the four limbs in Banks in an important file note. This, coupled with the expert evidence in the case, seemed to make for an easy finding in favour of Fred having capacity.

Similarly the court seemed to have little hesitation in dismissing the claims based on undue influence and fraudulent calumny, with Master Brightwell stating "the evidence does not come close to persuading me that it is more likely than not that the 2018 Will was procured by the undue influence (or fraud) of the defendants… "

A salutary reminder - a lot of weak claims do not always add up to a strong claim.

Bond v Webster: Probate dispute

And then in August the worlds of horse racing and probate disputes melded together in the form of a bitter feud between four siblings over the fortune of self-made Yorkshire business man, and racehorse owner, Reg Bond (Bond v Webster).

By the time of his passing in March 2021 at the age of 77, Reg had, seemingly at least, left the bulk of his estate to two of his children, Charlie and Greg, by a will of November 2019. That was in stark contrast to various previous wills which treated all of Reg's four children equally (in broad terms).

This case culminated in a 16-day trial spanning three months. As with Leonard, this was a case where the will writer was insistent that the testator did have capacity. But the judgment observes fairly early on;

> *"I am afraid that I cannot say, in general terms, that I will just accept Ms Martin's evidence [because] she is a professional person and was doing her best to assist the court. There are too many unusual features about the will-making process that means it is not so simple as to say that I will accept her evidence in full… it needs to be tested against the reliable evidence."*

Having then assessed all of the evidence, the judgment records:

> *"I do not feel able to place the sort of weight on Ms Martin's assessment of Reg's capacity in relation to the 2019 Will that the Claimants invite me to do. It alone does not satisfy me on the balance of probabilities that Reg had capacity. I do not think that she was acting wholly independently of the side of the family that were substantially benefitting from the 2019 Will and she was prepared to involve them in the process while being told to keep it all from the other side of the family. She was also prepared to receive instructions from people other than Reg as to what was to go into the will and Reg's voice and input is almost undetectable.*
>
> *In that situation, Ms Martin should have been far more cautious about accepting that Reg had capacity and should have complied with the Golden Rule and got an opinion at the time of the execution of the Disputed Documents, which might have avoided this unfortunate litigation."*

Instead the court found itself "not persuaded that Reg was playing any real part in the process" and that instead he was "just agreeing to whatever was being put before him." The court also added that "The fact that he was so disengaged, and actually unable to give instructions to Ms Martin in relation to his will, means that there should have been huge question marks around whether he was capable of understanding what he was doing."

In those circumstances, and given the various other details contained in the judgment it is unsurprising that the court refused to propound the 2019 will.

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