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Disputing Testamentary Capacity in the 21st Century

Presented by:

The Honourable Chris Kourakis, Chief Justice of South Australia

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Disputing Testamentary Capacity in the 21st Century

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In South Australia, section 8 of the *Wills Act 193*6 (SA) outlines the statutory requirements for a valid will. In addition to the statutory requirements, a testator must also be of sound mind, memory and understanding when executing a testamentary document.[1] The test for determining whether a testator is of sound mind, memory and understanding was first established in the case of *Banks v Goodfellow* (1870) LR 5 QB 549 (*Banks*).

With little refinement since the initial decision, the 19th century case of *Banks* is still cited as the leading authority to be referred to when determining testamentary capacity.[2] Even though *Banks* remains authoritative, its application will continue to be informed by our increasing understanding of cognitive functioning.

This paper will review the history of *Banks* in Australian jurisdictions and will touch upon the issues of the application of the test in light of the advancements of medical science in the 21st century. It will then conclude with a discussion of some practical suggestions for when a practitioner suspects that his or her client may lack testamentary capacity when obtaining will instructions.

Testamentary capacity

The test to be considered when determining testamentary capacity was articulated by Cockburn CJ in *Banks* at 565:

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; 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."

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[1] *Marquis of Winchester's Case* (1598) 6 Co Rep 23a; 77 ER 281

[2] G E Dal Pont & K F Mackie, '*Law of Succession'* (LexisNexis Butterworths, 2013) 2.3

In *Thomas v Nash*[3], Doyle CJ cited the above passage and continued:

> This statement has often been cited with approval, although the point has been made that the effect of the concluding part is not altogether clear. The case before the court was one in which the testator had suffered mental illness. As to that, Cockburn CJ said at 565-566:
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> > If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.

Banks was cited in the High Court of Australia in the cases of *Bailey v Bailey* (1924) 34 CLR 558 (*Bailey*), *Timbury v Coffee* (1941) 66 CLR 277 (*Timbury*) and *Bull v Fulton* (1942) 66 CLR 295 (*Bull*).

In *Bailey,* Knox CJ and Starke J said:

> "So far as the principles of law governing this case are concerned, they are well settled, and may be found in the cases of *Banks* v *Goodfellow* and *Boughton* v. *Knight*. A testator is "left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make", but "it is essential to the exercise of such a power that a testator … shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect". "Mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains".[4]

In the later case of *Timbury* the Court was required to consider whether a testator suffered from an *"insane delusion"* at the time of executing his last will.

After the testator's marriage on 31 October 1938, the testator made four wills, they were as follows:

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[3] *Thomas v Nash* [2010] SASC 153; (2010) 107 SASR 309 at 320

[4] 34 CLR 558, 566

1. The first will was dated 4 October 1937 and it appointed his wife as the sole executor and beneficiary.
2. The second will dated 3 February 1938 the testator gave his wife the income of his estate during widowhood and the corpus to his sister.
3. In the third will dated 20 August 1938 he appointed his wife as the sole executor and gave her the residue of his estate.
4. In the fourth will dated 22 October 1938 the deceased gave the income of his estate to the wife during widowhood and the corpus to his sister.

After the testator's death, the widow contested the testator's last will on the ground that the testator was not of sound mind, memory and understanding at the time of making his last will. The jury in the lower Court agreed with the widow and furthermore found that the testator was of sound disposing mind when he executed his early will appointing her as the sole executor and beneficiary of his estate.[5]

The executors of the last will appealed the jury's decision to the Full Court, which dismissed the appeal, but allowed them their costs of the appeal, as between solicitor and client, out of the estate of the testator. The executors then proceed to appeal to the High Court and the widow cross-appealed against the order of the Full Court allowing the executors their costs of the appeal.

The High Court held that the finding of the jury was justified on the evidence and dismissed the appeal. Dixon J described the testator's health and mental condition as follows:

> "It appears from the evidence that the testator was liable to drinking bouts which reduced him to a state of physical exhaustion and mental disturbance. Doubtless the recurring fits of alcoholism eventually brought about his death. The pathological conditions contributing to his death included myocarditis, cirrhosis of the liver, chronic gastric ulcers and toxaemia. He seems to have been a typical dipsomaniac. At some time anterior to his marriage he had gone through a long period of sobriety during which he had not touched alcohol; but this period had probably ended before his marriage. At all events, not long after his marriage a prolonged drinking bout commenced. It took place in December 1936 and January 1937. At intervals afterwards such bouts repeatedly occurred. Usually they resulted in his being taken to hospital, more often than not with delirium tremens and delusions. In the intervals between the end of one bout and the beginning of another he seems to have been active and intelligent and in most respects to have behaved in a perfectly reasonable manner and to have transacted business with every appearance of reason and acumen. He developed, however, an intermittent distrust of and antagonism to his wife, and, even when apparently free from alcoholism, he sometimes recounted incidents bearing every stamp of improbability and, in some cases, inconsistent with proved facts.
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> …
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> Before a will can be upheld it must be shown that at the time of making it the testator had sufficient mental capacity to comprehend the nature of what he was doing, and its effects; that he was able to realize the extent and character of the property he was dealing with, and to weigh the claims which naturally ought to press upon him. In order that a man should

[5] 66 CLR 277, 281

> rightly understand these various matters it is essential that his mind should be free to act in a natural, regular and ordinary manner" (per Hood J., *In the Will of Wilson*)
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> …
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> How far a court should go in treating the consequences of acute alcoholism as common general knowledge it is not easy to say, but in the present case the evidence makes it clear enough that the testator was an alcoholic paranoiac. With the withdrawal of alcohol from such a patient, physical signs of his condition disappear. He may be perfectly normal in his perceptions and sensations, his train of thought may be rational and strong and his memory good. But at the same time his judgment may continue in a state of disorder for a considerable length of time. We are not bound to go on applying views held over a century ago about mental disturbance and insanity and to disregard modern knowledge and understanding of such conditions."[6]

William J applied the *Banks* test as follows at 293:

> "There was ample evidence that on 28th September and 22nd October 1938 he was suffering from an insane disorder of the mind which within the language of Cockburn C.J. in *Banks v Goodfellow* poisoned his affections, perverted his sense of right, and prevented the exercise of his natural faculties."

In the case of *Bull*, the testator died a spinster aged 91 years and was considered to be a prolific will-maker. Pursuant to the terms of the testator's last will she appointed her niece and her solicitor as the executors of her estate and she gave the residue of her estate to her niece. In the event that her niece did not survive her, she left the residue of her estate to be divided equally between her two grandnephews. The niece failed to survive the testator and therefore the giftover to the two grandnephews was to take effect. On the face of it, the will was rational because the niece had been living with the testator for some years before her death and they were on terms of great affection.

The testator had also executed a codicil appointing a third executor.

After the testator's death, a caveat was lodged by the testator's remaining surviving nieces and nephews. Two of the nephews were solicitors who had continually assisted the testator with her legal affairs at least 20 years prior to her death, without charge. The nephews had made many wills for their aunt during her lifetime and had been appointed as her executors and beneficiaries in all the known wills until December 1933 when they were excluded.

The nephews submitted that their original exclusion should be held to have been due to *insane delusions* with respect to them which existed in December 1933 and which continued to exist up to the time of the making of the will and codicil that was being propounded. They said that the testator held a belief that certain documents bearing her name as a signature and used in connection with her business transactions were not signed by her and that her nephews were guilty of deceit or of forgery.

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[6] 66 CLR 277, 281-284

At first instance in the Supreme Court of Victoria, the Court held that the testator was not suffering from any *insane delusions* affecting her testamentary capacity and made an order for a grant of probate in respect of the will and codicil that was seeking to be propounded.

The caveators then appealed to the High Court and by majority (held by Latham C.J and Williams J (McTieran J. dissenting)), the Court held the last will was invalid and the decision of the Supreme Court of Victoria was reserved. Again referring to *Banks*, William J said:

> In *Banks* v. *Goodfellow* the Court said: "We readily concede that where a delusion has had, as in the case of *Dew* v. *Clark*, or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to its validity." Lord *Atkinson* in his speech in *Sivewright's Case*, after agreeing that there was no disorder in the mind of the testator poisoning his affection for his wife, left unanswered the question where the onus of proof lay. He said: "Even if the delusion under which the testator undoubtedly suffered was of a character calculated to affect his testamentary dispositions to his wife's prejudice, of which I have some doubt, there is not only an entire absence of evidence to show that it in fact did so act, *but, in my view, the reasonable inference to be drawn from all the facts proved is that it did not do so*". Usually the evidence is such that the question upon whom the onus of proof lies is immaterial, but it is clear to my mind that, although proof that the will was properly executed is prima facie evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, then the court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it *(Mortimer's Probate Law and Practice,* 2nd ed. (1927), pp. 53-55; *Sutton* v. *Sadler* (2); *Lenders v Landers* (3); *Bailey* v. *Bailey* (4); *Timbury* v. *Coffee* (5); *Derrett* v. *Hall* (6)."[7]

Latham CJ formed the view that the fact that the testator had delusions was not in itself fatal to the will provided that the proponent of that will could establish on the balance of probabilities that the delusion did not affect the disposition. His Honour said:

> "This does not mean that a propounder must absolutely demonstrate this negative proposition. He must establish it according to the standard of proof required in civil cases. It will be sufficient for him to satisfy the Court that it is reasonable inference from the facts that a delusion proved to exist did not affect the disposition in question. That will was made on 24th July, 1940. At that time the delusions with respect to the Sewells were most firmly and incorrigibly held by the testatrix. It is argued for the propounder, however, that there were reasons, perhaps not just or fair reasons, but still not irrational reasons, for excluding the Sewells, which reasons were in existence in December, 1933, so that subsequent delusions would be irrelevant. The evidence shows that there were such reasons which might have so operated and which probably did so operate. But it is not established that the delusions, as well as those reasons, did not also influence both the original and the continued exclusion of the Sewells. If these delusions existed — and, as I have said, in my opinion they did exist in 1933 as well as later — they were of such a character as inevitably to affect the provisions of

[7] (1942) 66 CLR 295, 342-343

the wills made in December, 1933, and in subsequent years, including the will and codicil of 1940, which are propounded."[8]

It is also necessary to be aware of the relatively more recent decision of *Shaw v Crichton* [1995] NSWCA 423 (*Shaw*), were Powell JA restated a more modern definition of the four fundamental concepts established in *Banks*.

The background to the *Shaw* case was as follows.

The testator died leaving a sizable estate. She had executed the following wills during her life time:

- 26 March 1991 (the March will)
    - she appointed Mr George Thomas Shaw and Mrs Leila Shaw (non-relatives) as the executors and beneficiaries of her estate.
- 14 November 1990 (the November will)
    - She appointed Mr George Thomas Shaw as her executor;
    - she gave a property to Mr Galieh (the testator's nephew); and
    - the residue to Mr Shaw.
- 24 August 1988 (the August will)
    - she appointed Mr Galieh (her nephew) as an her executor and she gifted him a property;
    - she gave a property to Mr Crichton (her brother-in-law); and
    - left the residue of her estate to be divided equally between 12 charities and nine relations and other persons.

Mr Shaw became known to the testator late in 1986, when he called at the testator's house with the object of selling her an investment after she had made an inquiry of Manchester Unity. He sold her some investments, and although at one time he ceased to have her confidence, he came to be very highly regarded by the testator, who became very dependent on him and his wife and other members of his family. By the end of 1989 the testator was living at home alone and it seemed to be to some (but not to her) as an unsuitable arrangement. She began to show sign of diminishing competence in her management of daily life, personal care and grooming and to exhibit eccentricities of behavior.

By late 1990 the testator had recognised that she needed somebody to take over and manage her affairs. However, she did not ask Mr Crichton, her brother-in-law, who was readily to hand and in frequent contact with her, instead she asked an officer of Legacy and an officer of the Commonwealth Bank. In the trial Judge's opinion, they were not altogether appropriate persons to take over her affairs and considered that the obvious and most suitable person to give such assistance was her brother-in-law. The trial Judge commented that, *"in the presence of a very pressing need for assistance the testatrix was unable to see the glaringly obvious way to go about things"*.

[8] (1942) 66 CLR 295, 299

In about October or November 1990, not long before executing the will of 14 November 1990 the testator put her business and financial affairs and indeed her whole life and her physical person in the care and control of Mr Shaw. She also appointed Mr Shaw as her general power of attorney.

After the testator's death, Mr and Mrs Shaw sought to propound the March will or in the alternative the November will. However, there was a cross-claim by Mr Crichton seeking to propound the August will. Mr Crichton submitted that the testator did not know and approve of the contents of the later documents and denied that the testator was of sound mind, memory and understanding at the time when she executed them.

The trial Judge found:

> "All in all, the circumstances of the testatrix' life and her relationship with the Shaws from the second half of 1990 onwards represent an astonishing transformation of her way of life, attitudes to other people and confidence in them. She moved rapidly from being an elderly widow living alone in circumstances in which she had lived for many years with the assistance of her relatives in practical affairs, making moderate investments and a modest gift to her nephew, with testamentary dispositions distributing benefits among her relatives and a number of charities, the worst cloud on her horizon being her general practitioner's concern about whether she could still living alone, to living in total physical dependence on the Shaws, receiving visits from them daily and depending on them for acts of daily living, putting all her affairs in their hands through powers of attorney, radically altering her testamentary dispositions so as to benefit only them and expressing hostility towards the relative who had helped her for several years. In the circumstances any gift or disposition of property, including any testamentary disposition, particularly in favour of the Shaws, must come under careful scrutiny and consideration before it could be accepted that it was done by her of her own will and intention and with a real understanding of what it involved.
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> ….
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> All medical witnesses spoke on a different and less ample base of information than that afforded to me by the evidence. None of the medical evidence persuades me to turn aside from the clear conclusion of fact, required by the evidence of persons to whom Mrs Crichton spoke, that she had hostile delusional beliefs about Mr John Crichton when she executed these wills. In these circumstances the plaintiffs have not dispelled the suspicions which the circumstances attach to these wills or proved the element essential for testamentary capacity that at the relevant time Mrs Crichton was able to comprehend and appreciate the claims to which she ought to give effect. Quite to the contrary it is clearly established that she could not appreciate those claims because of her delusional beliefs about Mr Crichton and his behavior. In the circumstances I should in my judgment pronounce against the wills propounded by the plaintiffs and grant probate in solemn form of the 1988 will.
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> In my finding, if the testatrix had been able in November 1990 or later to arrange clearly in her mind what property she had, what the effects of her dispositions were and what persons had claims on her bounty and act of her own uninfluenced will and intention, she would not have made the dispositions which she made in the wills. Indeed she could not possibly have allowed the arrangements which actually had effect to exist for the management of her own life."[9]

[9] *Shaw v Crichton* (unreported, (SC(NSW), No CA 40475/1994, 23 August 1995, BC9505288) at 3 - 8

Accordingly, his Honour at first instance refused probate of the documents dated 26 March 1991 and 14 November 1990 and ordered that probate be granted for the will dated 24 August 1988.

The Shaws' appealed but the Court of Appeal dismissed the case with costs. Powell JA said in his reasons:

> "Although what must be established in order that the Court might find that, at the relevant time, the testator - or testatrix - had testamentary capacity has been expressed in varying forms, and in differing language, over the years, all formulations seem agreed that testamentary capacity encompasses the following concepts:
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> 1. that the testator - or testatrix - is aware, and appreciates the significance, of the act in the law which he - or she - is about to embark upon;
> 2. that the testator - or testatrix - is aware, at least in general terms, of the nature, and extent, and value, of the estate over which he - or she - has a disposing power;
> 3. that the testator - or testatrix - is aware of those who might reasonably be thought to have a claim upon his - or her - testamentary bounty, and the basis for, and nature of, the claims of such persons;
> 4. that the testator - or testatrix - has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons."[10]

Subsequent to the *Shaw* decision, Powell JA then repeated the definition that he had laid down in *Shaw* in in *Read v Carmody* (unreported, SC(NSW), No CA40581/1995, 23 July 1998, BC9803374) at 4 and Meagher and Stein JJA agreed with his Honour.[11]

Last year I handed down my decision in *Roche v Roche* [2017] SASC 8 (*Roche*) where I was required to consider the question of testamentary capacity. On the test established in *Banks*, I observed:

> As with other 19th century common law principles governing the legal effect of mental illness, the statements in *Banks v Goodfellow* no longer reflect modern medical knowledge. It is now recognised that there are a broad range of cognitive, emotional and mental dysfunctions, the effects of which are difficult to identify precisely or delineate from the exercise of ones 'natural faculties' and the reasoning capacity of the 'sound' mind. Moreover, rules as to testamentary capacity must recognise and allow for the natural decline in cognitive functioning and mental state which often attends old age.

In *Re Estate of Griffith* (*Griffith*), Kirby P adverted to this issue of legal policy as follows:

> > (6) In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent — more so than in

[10] *Shaw v Crichton* (unreported, (SC(NSW), No CA 40475/1994, 23 August 1995, BC9505288) at 3

[11] David M Haines, Succession Law in South Australia (LexisNexis Butterworths. 2003) 6.5

> most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will: see *Banks*, above, at 560. Nor will partial unsoundness of mind, which does not operate on the relevant capacities to appreciate the extent of and dispose of the estate, necessarily deprive the testator of testamentary capacity if it is shown that the will was signed during a lucid interval: see *Banks*, above, at 558. Were the rule to be otherwise, so many wills would be liable to be set aside for want of testamentary capacity that the fundamental principle of our law would be undermined and the expectations of testators unreasonably destroyed."[12]

As the author of *Assessing Testamentary Capacity in the 21st Century: Is Banks v Goodfellow still relevant?* rightly said:

> "More relevant, however, to proponents of updating the test is the fact that the case focuses on psychosis which has different markers to, for example, dementia. The relevance of dementia to the test for testamentary capacity is especially significant as dementia is one of the main mentally disabling conditions confronting modern society, with the incidences of dementia expected to increase fourfold by 2050. It is the single leading cause of disability in Australians aged 65 years and over, and it is projected that within the next 20 years, it will become the third largest source of health and residential aged-care spending. Dementia cases also significantly outweigh cases in psychosis is the basis for challenging a will on the grounds of the alleged legal in capacity of the testator."[13]

Furthermore, a journal article titled '*Assessing Testamentary Capacity from medical prospective*' the authors said:

> "The review of judgments over the past 12 months combined with personal experience suggests that the final two limbs of Banks are especially susceptible to the cognitive effects of dementia, forming the crux of the majority of challenged to testamentary cases."[14]

In the case of *Roche* I was required to critically consider the medical evidence before me in regard to the testator's dementia at the time executing his last will. I was satisfied that John suffered from a behavioural variant form of frontotemporal dementia. The symptoms of his dementia included impulsivity, a reduced attention span and increased forgetfulness. Those symptoms diminished his executive functioning capacity. Nonetheless, I was satisfied that his cognitive ability satisfied the *Banks* test. In so finding I placed substantial reliance on the evidence of the legal practitioners who took instruction for and were present at the execution of the will.

The essential delineation drawn by the *Banks* test in its modern formulation is between a capacity for informed deliberation on testamentary dispositions and the motives for those dispositions. If a testator has that capacity the law does not require that the capacity by exercised wisely, reasonably or even rationally. If that line is not maintained, and if allowance is not made for

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[12] *Roche v Roche* [2017] SASC 8

[13] Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is the *Banks v Goodfellow* still relevant?' (2015) 38 *University of New South Wales Law Journal* 854

[14] Jane Lonie and Kelly Purser, 'Assessing testamentary capacity from the medical perspective' (2017) 44 *Australian Bar Review* 297, 302

the frailty of age, reasonableness will replace a capacity to appreciate the basic context in which the will is made and on which it will operate.

Absent undue influences a testator may validly dispose of his or her property as capriciously or arbitrarily by will as he or she may in life.

Practical guidance for practitioners

If a client is capable of providing complete will instructions, the practitioner should draft the will. Otherwise, the practitioner may be left liable to a disappointed beneficiary.[15] If the will has been drafted, it is then for the Court to determine whether the testator retained testamentary capacity at the time of signing it. It is unlikely that a Court will criticise a practitioner for drafting a will in those circumstances. However, it is vitally important that the practitioner keep comprehensive file notes of matters which both support or cast doubt on testamentary capacity. It is also necessary to take steps to obtain a, preferably independent, specialist's, medical opinion to avoid criticism.

The time at which the testator must be shown to have legal capacity is generally the point in time at which the will is executed.[16] However, it is also accepted that if the instructions are given on a day shortly prior to the execution of the document, or the testator loses legal capacity between giving the instructions and the execution of the document, then the relevant time is when the instructions were given.[17]

However, in these circumstances, the practitioner may also consider whether it is necessary to draft and sign an informal document that may be admitted pursuant to section 12(2) of the *Wills Act* (1936) SA. This may be considered if there is a real risk pertaining to the testator's capacity and the instructions reflect the testator's final wishes - *Fischer v Howe*.

However, in any of these circumstances, <u>it is fundamental that the practitioner retains detailed file notes throughout the process</u>. The will file is of great assistance to the Court when needing to determine testamentary capacity.

The type of questions that should be asked to the testator need to be open ended, for example (this is not an exhaustive list but rather is offered as a guideline):

- Have you made a previous will? If so, when and what was the effect of that will?
- Why have you decided to make a new will?
- Do you understand the meaning of making a will?
- Are you changing the executor of your will? If so, why?
- Have you had any health problems lately? Have you been to hospital recently?
- Can you tell me about your family?
- Who do you think may have a claim on your estate after your gone?
- How did you get to your appointment today? Did someone bring you?
- Can you tell me about the nature and extent of your assets?

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[15] *Fischer v Howe* (2013) 85 NSWLR 67

[16] Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is the Banks v Goodfellow still relevant?' (2015) 38 *University of New South Wales Law Journal* 854 p 858

[17] *Parker v Felgate* (1883) 8 PD 171, 173-4 (Hannen P); *Bailey v Bailey* (1924) 34 CLR 558,567 (Knox CJ and Stake J), 572 (Issacs J)

See recent case of *Ryan v Dalton* [2017] NSWSC 1007 in regard to the importance of asking open ended questions and the importance of keeping detailed file notes.

I doubt the value of questions about cultural, political or sporting celebrities.

It is also important to take instructions from the testator in the absence of persons who are in a position to unduly influence the testator. The solicitor should keep good file notes of what is said during the course of the meeting e.g. the questions asked and the answers given.

As an example of judicial criticism of inadequate notes, Jones J said in Bertoldo v Cordenos:

> "The note taking by Mr Anthony falls far short of the standard required of solicitors dealing with the preparation of wills for aged, enfeebled or ill clients. Mr Anthony was obviously relying on the expertise of Dr Panter on the question of the testator's capacity and understanding but this does not relieve him of the obligation of making his own inquiries nor of the obligation to make a record of those inquiries."[18]

If a practitioner determines that a medical opinion should be obtained, the practitioner should proceed by obtaining instructions from the client to engage the services of a medical professional for the purpose of obtaining a report.

I note in passing that there has been some academic commentary on whether an assessment should be covered by Medicare.[19] There is some merit in having the cost reduced by the assistance of the Medicare, you would think that this may encourage a testator to undergo the assessment, which would potentially help to avoid the need for wills to be contested on the basis of lack of testamentary capacity after the testator's death.

In cases where time is of the essence or it is too costly, the testator's general practitioner may be in a position to provide an assessment. Indeed, in some cases the opinion of a treating physician is often preferred to that of a specialist because of their pre-existing relationship with the testator.[20] Furthermore, the Court will also have particular regard to lay witnesses who knew the testator well.[21] This means that even if a medical opinion is obtained, the practitioner should not simply rely on the medical opinion as the final evidence. The medical practitioner should be provided with the statements of lay persons familiar with the testator about his or her apparent cognitive and social functions. All of the evidence should be assessed collectively.

The practitioner's letter seeking a medical opinion should include an outline of the elements of the test established in *Banks*. It fundamental to remember that the test established is *Banks* is a

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[18] *Bertoldo v Cordenos* [2010] QSC 79

[19] Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is the *Banks v Goodfellow* still relevant?' (2015) 38 *University of New South Wales Law Journal* 854 p 865

[20] *Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR 267; Re Price; Spence v Price [1946] OWN 80 at 81-2 Ontario Court of Appeal Per Laidlaw JA

[21] *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 and *Frizzo & Anor v Frizzo & Ors* [2011] QCA 308

legal test, it not a medical test. Therefore, it is necessary that appropriate guidance is offered to the treating doctor on the test is to be applied. This point is well illustrated in Assessing Testamentary Capacity in the 21st Century: is *Banks v Goodfellow* still relevant? where the author states:

> "Interestingly, the medical literature suggests that 'lucid intervals' are actually legal fictions, which enable legal professionals and the courts to resolve complex matters, rather than a medical reality. In fact, the phrases testamentary capacity, lucid interval, undue influence, and insane delusion have all been called legal terms of art. This is indicative of the gulf that can exist between legal and medical professionals, where one profession understands their profession-specific language with little thought as to how that translates to others who also need to engage with foreign terminology, but who lack the necessary understanding."[22]

The reply letter from the treating doctor should address each element of the test and the practitioner should be prepared to provide assistance to the treating doctor if they require guidance on the test to be applied.

Furthermore, it is not sufficient for a medical report to simply say, *'In my opinion, the patient possess testamentary capacity.'* This does not provide any assistance to the Court when needing to determine testamentary capacity. The report should provide a comprehensive review of each element of the *Banks* test. The practitioner should be mindful that in the event that the will is contested on the basis of lack of testamentary capacity, the treating doctor's report that is obtained contemporaneously with executing the will, is going to provide the Court with great assistance. As the author states in *Assessing testamentary capacity from a medical perspective*:[23]

> "Therefore, when seeking out an expert opinion as to a person's testamentary capacity, it is crucial to ensure that the medical expert selected has the appropriate knowledge and skill set to provide an evidence-based assessment and a reasoning base for their opinion which accords with the appropriate legal framework."

As always the reports should clearly identify the facts and assumptions on which the practitioner's opinion is based.

The second element of the *Banks* test which requires a testator to understand the extent of the nature and value of their assets, is increasingly more complicated in modern times. It is far more common for complex estate planning to include discretionary trusts, incorporated companies, self-managed super funds. As a result, clients are often unable to provide an accurate statement of nature and extent of their property. However, in *Frizzo & Anor v Frizzo & Ors* [2011] QCA 308, citing *Banks,* Muir JA said:

> "A testator may not need to know the exact address or precise current value of land he owns or other matters of detail but it is necessary to show that the testator is able to differentiate

[22] Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is the Banks v Goodfellow still relevant?' (2015) 38 *University of New South Wales Law Journal* 854 p 863

[23] Jane Lonie and Kelly Purser, 'Assessing testamentary capacity from the medical perspective' (2017) 44 *Australian Bar Review* 297, 298-299

> between his assets to a sufficient degree to satisfy the court that he is substantially aware of what he "does and doesn't own" and its general value. *Kerr v Badran* does not absolve a party propounding a will from proving that the testator knew the nature and extent of his assets."

Where a testator's assets are complex, a practitioner may consider obtaining instructions by reference to summary, spreadsheets or chart prepared by the testator's accountant.

Conclusion

Based on demographic considerations and the accumulation of wealth by Australian working families in the post-war decades, the testamentary causes jurisdiction will continue to expand at least in the medium term. It is important that lawyers and judges work collaboratively to ensure they are dealt with both expeditiously and cost effectively. There are strong reasons to take care, time and some expense to put the question of testamentary capacity beyond doubt when instructions for a will are first taken. The *Roche* litigation stands out as a warning of the substantial financial personal and reputational risks of subsequent litigation over the issue.

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