



Chapter 8: Capacity to Make a Will



8.1 Introduction



8.2 Testamentary capacity



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8.4 Undertaking mental capacity assessment training



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8.5 Summary

8.1 Introduction

In this chapter we look at the rules which determine **whether a testator has the required capacity and intention** to make a will and if the testator **understands and approved the will**.

In Chapter 3 (see 3.2.3) we looked at assessment of capacity, and in this chapter we will look more closely at the **rules specific to the capacity to make a will**.

We will also look at situations that raise a **presumption** of knowledge and approval and those that do not.



CONTINUE

8.2 Testamentary capacity

8.2.1 Rules relating to capacity

There are two requirements – one relates to **physical capacity** and the other to the **mental state** of the testator.

Also relevant are the questions of **who has to prove capacity** and the **practical steps** a will writer should take to avoid a will being challenged for lack of capacity.

8.2.1.1 Physical capacity

The testator must be **at least 18 years of age** at the date when they execute their will. So, a person who dies a minor (i.e. under 18) will die intestate (even if married).

There is an exception to this rule which relates to privileged wills. These can be made in certain circumstances by members of the armed forces if on actual military service and also by mariners. A minor who enjoys such privileged status can make such a will. They are called privileged wills because they are not subject to the same formalities and can be made in an informal way, even orally.

8.2.1.2 Mental capacity

The courts have traditionally applied the established common law test in ***Banks v Goodfellow [1870]*** to determine if a person has testamentary capacity, that is, the necessary mental capacity to make a will.

When the **Mental Capacity Act 2005 (MCA 2005)** came into force on 1 October 2007, it raised the question of whether the common law test was still the correct one to apply. **MCA 2005** deals with general aspects of a person's mental capacity to carry out acts and make decisions. The new legislation was not aimed specifically at those making wills, but it is helpful to consider what **MCA 2005** says.

s1(2) MCA 2005 says that a person is assumed to have capacity unless it is established that they lack capacity. **s2(3)** provides that lack of capacity cannot be established just by reference to a person's age, condition or aspect of behaviour which might lead others to make unjustified assumptions about their capacity.

s2(1) elaborates on the meaning of lack of capacity by saying that a person lacks capacity in relation to a **matter** if, at **the material time**, they are unable to make a decision for themselves because of an impairment of, or a disturbance in the functioning of, the mind or brain.

s3(1) states that a person is unable to make a decision for themselves if they are unable to understand the **information relevant to the decision** and to retain, use or weigh that information to communicate their decision. This provision makes it clear that capacity must be assessed with reference to the particular decision or act in question – a person may have capacity for one type of transaction but not for another.

Since **MCA 2005** deals with mental capacity generally and was not specifically aimed at making a will, does it have any relevance when determining if a person has testamentary capacity?

In **Scammell and Another v Farmer [2008]** the court favoured the **Banks v Goodfellow** test, saying that **s3 MCA 2005** was just a modern restatement of the common law test (although that case concerned a will made before **MCA 2005** was in force). Since that case, the courts have not just confirmed that **Banks v Goodfellow** is still the test to apply, but have developed the test further. A decision which is acknowledged as offering the clearest judicial opinion is **Walker v Badmin [2014]** where the judge was not only of the view that **Banks v Goodfellow** still applies but that the common law test was less onerous than that under **MCA 2005**.

8.2.2 *Banks v Goodfellow* [1870]

Currently, *Banks v Goodfellow* [1870] is the leading case for establishing testamentary capacity. By way of summary, the deceased in this case certainly suffered from fairly vivid delusions. However, the court found that those delusions did **not** affect his ability to make a will. In the judge's decision the following principles of establishing testamentary capacity were created and are still followed today.

The *Banks v Goodfellow* test requires the following.

1. The testator **understands the nature of the act and its effects**. In other words, the testator must be able to appreciate that they are making a will which disposes of their property when they die, and until then it is still theirs.
2. The testator **understands the extent of their property**. They do not have to know the exact value of everything they own but they must be able to appreciate the general extent of their wealth.
3. The testator **understands the claims to which they ought to have regard**. The testator must be able to appreciate those around them who, morally speaking, might have first claim on their property. Many capacity cases have been litigated on this aspect of the rule, where the allegation is that the testator was unaware of their immediate family when they made their will.

In addition, the testator **must not** be **suffering from an insane delusion** which affects the terms of the will; for example, an unfounded belief that a close relative was trying to kill them.



Link to Practice

While the ***Banks v Goodfellow*** test for testamentary capacity continues to apply, this does not prevent parties from challenging this position from time to time. The most recent challenge to this principle was for permission to appeal to the Court of Appeal in the case of ***Clitheroe v Bond [2022]***. The Court of Appeal refused permission to appeal and ***Banks v Goodfellow*** remains the test for testamentary capacity.



Do you think the test for testamentary capacity should be aligned with **MCA 2005** or remain ***Banks v Goodfellow***?

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8.2.3 Capacity to execute a will

To understand how the courts approach this issue, we need to look at some of the leading cases in which wills have been challenged on the grounds of capacity.

In ***Simon v Byford* [2014]** the Court of Appeal said that satisfying the test depended on the **potential to understand** and was not to be equated with a test of memory. The testatrix suffered from mild dementia, so her capacity was in doubt, but the evidence showed she had been capable of understanding (and had understood) the nature of a will, and the effect of the will in question, which was a simple one. It was sufficient that she had understood that her late son's share would go to his family trust without further details. She had been capable of asking, if she had wanted to know who the beneficiaries would be, but had not done so. She had been capable of understanding (and had understood) that her property included her house, a flat and some shares and was capable of understanding (and had understood) that she had owned other money and investments, although she probably was not capable, without being told, of remembering the details. Since the testatrix, for the most part, had been leaving everything to her children in equal shares, she had not needed precise knowledge as to the extent of her estate, and the knowledge she had was ample.

Simon v Byford also establishes that ***Banks v Goodfellow* [1870]** does **not** require a testator to understand the collateral consequences of their will, for example, that the making of a particular disposition may later cause ill feeling in the family. This is in contrast to **s3(4) MCA 2005** which expressly refers to the need to appreciate the reasonably foreseeable consequences of making (or not making) a decision. In ***Walker v Badmin***, the judge picked up on this and suggested that the common law test was therefore narrower, so less demanding than the statutory test, even though **MCA 2005** contains an express presumption of capacity.

In practice, the outcome in all but a very few cases is likely to be the same regardless of whether ***Banks v Goodfellow*** or the **MCA 2005** test is applied.

As regards not suffering from any form of delusion which affects the terms of their will, in ***Kostic v Chaplin* [2007]** the court found that the testator lacked capacity because he was suffering from a delusion that his son and other members of his family were implicated in an international conspiracy in which he (the testator) was the victim. The testator had left his substantial estate to a political party.

Of course, a testator might suffer from a delusion which **has no effect** on the will they make.

In the Estate of Bohrmann [1938] illustrates that the court can omit from probate part of a will which is affected by a delusion while allowing the rest of the will to stand.

In ***Key v Key [2010]*** the court said the effects of bereavement may impair testamentary capacity. A will was executed by a very elderly testator within a few days of his wife's death. He had been married to her for 65 years. In his judgment, Briggs J said:

"Without in any way detracting from the continuing authority of Banks v Goodfellow, it must be recognised that psychiatric medicine has come a long way since 1870 in recognising an ever-widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision making . . . The mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example recognised by psychiatrists."

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8.2.4 Parker v Felgate [1883]

Generally, testamentary capacity must have existed at the date of execution.

What happens if instructions are taken from an testator who is elderly, unwell or suffering from a mental disorder (e.g. dementia) and the lawyer is satisfied that the testator had

capacity when taking the instructions, but when the lawyer comes back to deal with execution the testator has deteriorated?

There is a saving provision established in ***Parker v Felgate [1883]***, that it is sufficient to show the following.

1. The testator had the required capacity at the date they instructed their solicitor to prepare a will.
2. The will was prepared in accordance with those instructions.
3. At the time of execution, they were able to (and did) understand that they were signing a will for which they had given instructions. It does not matter that they could not then remember their instructions or could not have understood the will if it was read over to them.

The rule in ***Parker v Felgate*** was confirmed as good law when applied by the Court of Appeal in ***Perrins v Holland [2010]*** and again in ***Burns v Burns [2016]***. In the latter case, there was a significant time gap. The testator had approved her will in late 2004 but did not get round to validly executing it until July 2005, by which time her capacity had deteriorated.

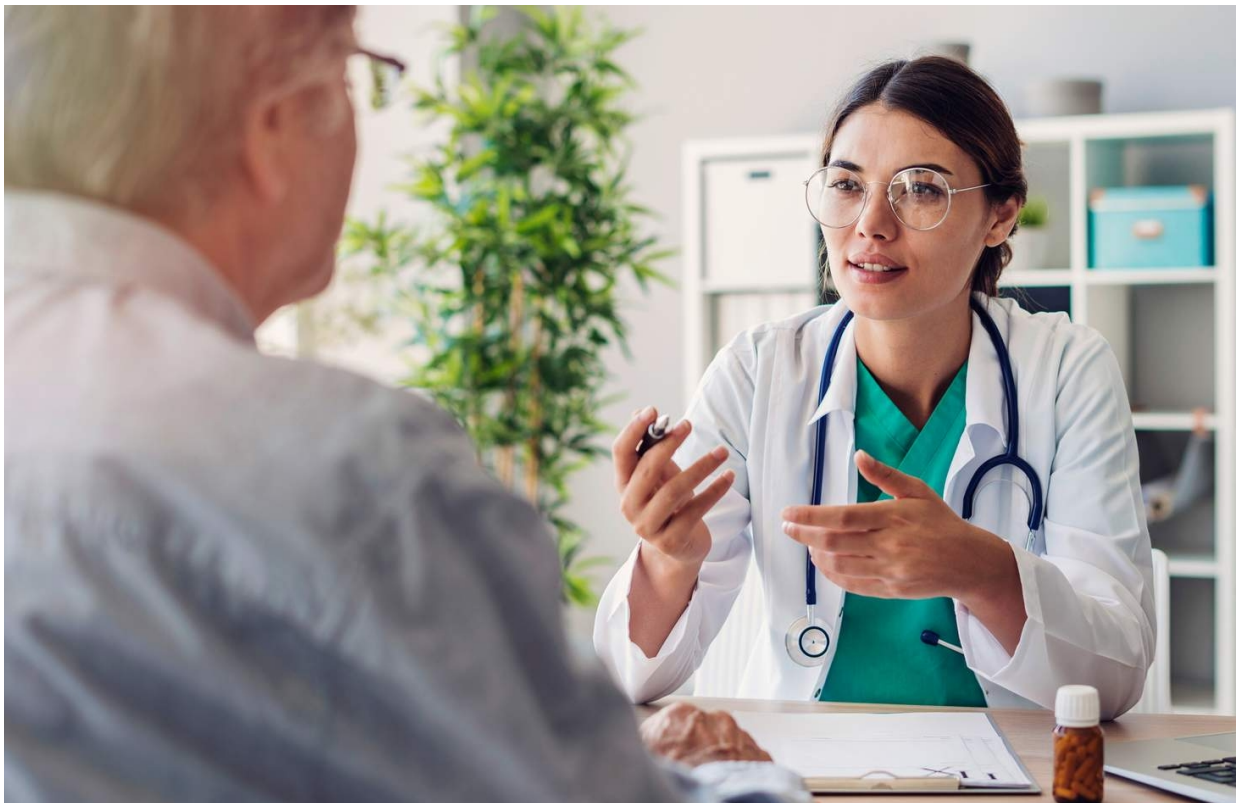


1. Given that it is not uncommon for testators to have varying levels of mental capacity on different days, do you think it right that the saving provisions in ***Parker v Felgate [1883]*** exist?
2. Has the court found the balance between protecting an estate and putting into effect a testator's wishes?

CONTINUE

8.2.5 Obtaining a capacity report

Ideally, an objective written medical opinion should be obtained from a medical practitioner who is qualified to provide it. This could be the client's doctor or someone, such as a consultant psychiatrist, specialising in such matters. What is important is that the expert is given guidance on the **specific criteria which apply to the making of a will**.



You must therefore provide the medical practitioner with a summary of the criteria in ***Banks v Goodfellow [1870]*** and, with the client's consent, a description of the client's assets and

main dispositions intended for the will. Simply asking if they think the client can make a will is not likely to yield a response that will carry much weight if challenged in court.

The report should not only **confirm the medical practitioner's findings** but must also **make clear the basis on which such a finding was made**. Ideally, the expert should be asked to witness the will, although some medical professionals may be reluctant to be involved.

In ***Williams v Wilmot [2012]*** solicitors, who were not the testator's (T's) normal solicitors, commissioned from a doctor, who was not T's usual GP, a medical report that ran to just six lines. The judge said:

"The disturbing aspect of this report, at any rate in arriving at a conclusion on the issue I am now considering, is that whatever mental state examination was carried out is not described, much less is a sheet attached to the report which sets out the results that were obtained. No indication is given of what the examination entailed which enabled this doctor to arrive at an assessment of capacity."

On hearing that T had made a new will, T's normal solicitor had doubts about T's ability, so he commissioned a second report from a consultant psychiatrist. The consultant's examination was very thorough, revealing that T scored 20 out of 30 on the Mini Mental State Examination and he recorded that most of the points that were lost were in relation to *"Orientation, immediate recall, attention/calculation and delayed recall"*. The consultant concluded that T was at that stage suffering from dementia with prominent disturbance in his memory, saying *"His history, current presentation and cognitive profiles are consistent with possible Alzheimer's type dementia."*

The court placed greater reliance on the more detailed and focused report from the consultant psychiatrist and found T lacking in capacity to have made the will. The judge said this view was corroborated by T's normal solicitor, describing him as a *"very experienced solicitor, who had a long term knowledge of, and relationship with, the deceased and therefore was able to reach a judgment concerning his deterioration over time"*.

The case is a reminder of the **following points when preparing a will**.

1. If commissioning a medical report, ensure that the expert is suitably qualified and properly briefed on its purpose and what is required. Also, check that the contents of the report make it absolutely clear what tests were applied here with their results.
2. The court can attach weight to the knowledge and observations made by the solicitor in corroborating medical evidence. The importance of keeping full file notes that not only record instructions and events but which also note the writer's recollections of the lucidity and demeanour of the testator cannot be emphasised enough.



Link to Practice

Obtaining a medical report from a GP on testamentary capacity can prove difficult if not impossible at times. You should be aware that a report from a GP is likely to take a long time and will probably refer to **MCA 2005** and not ***Banks v Goodfellow***. The reality is that GPs are under a great deal of time constraints and preparing reports in support of testamentary capacity may not be seen as urgent given the existing workload and patient issues to deal with on a day-to-day basis.

The alternative may be to obtain a report from a specialist who will if necessary, act as witness in any challenge. The problem you may face is explaining to your client that they have to pay for the cost of this report in addition to the will. Clients may not take kindly to this additional cost or the suggestion that it is necessary.

It will in most circumstances be down to you and your firm to decide whether or not to accept an instruction in those circumstances.



Activity

Draft a letter to a medical professional requesting a capacity report on an elderly client. Ensure you set out the test for testamentary capacity and include a date when the report is to be produced.

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8.3 Intention, knowledge and approval

8.3.1 Intention

A testator must also have the general intention to make a will. The testator must intend that their wishes are to be put into effect after their death.



A person making provision for the disposition of their property on their death can be held to have had testamentary intention, even though they do not appreciate that the document they are making is capable of being admitted to probate in the English courts (*Re Berger [1989]*).

Testamentary intention will not be present if the dispositions contained in the document executed by the testator are not intended to operate immediately, as revocable, ambulatory provisions. In ***Corbett v Newey [1996]*** it was held that the only intention that the testatrix had possessed at the time she executed the purported will was to put her signature to a document that would have no effect unless it came to be dated by the solicitors on the happening of an event that might never occur. This did not even amount to a conditional will.

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8.3.2 Knowledge and approval

As well as having the general intention to make a will, a testator must also have knowledge and approval of the will they actually sign.

Helpful guidance on how a court approached the issues of knowledge and approval is ***Guardhouse v Blackburn [1866]***.

1. The court must be satisfied that the testator knew and approved the contents.
2. *Prima facie*, execution by the testator indicates knowledge and approval unless there is evidence of suspicious circumstances.
3. The testator must intend the document to operate as a will. Even if they knew and approved the contents, the document would be refused probate if it were not intended to take effect on death.
4. Even if there is knowledge and approval, probate would be denied wholly or in part where there is evidence of fraud.

Before admitting the will to probate, the court has power to call for affidavit evidence from the witnesses and others instrumental in the preparation of the will as to the events surrounding its execution.

The court is unlikely to find that a testator knew and approved of only part of a will (***Fuller v Strum [2002]***). This case also illustrates the willingness of the court to find that a testator did have knowledge and approval of the contents of their will despite the fact that a handwriting expert stated that there was strong evidence that the testator's signature was a forgery.

In ***Gupta v Gupta [2018]***, it was suggested that the testator, who was originally from India but had lived in the UK for many years, did not understand the effect of the will and it was therefore invalid. The trial judge, however, concluded that the deceased had visited her solicitors more than once, which suggested full involvement, and that she spoke English with her grandchildren regularly, so she could understand the will. There was no evidence here of lack of knowledge and approval, and the claim failed.



Consider a situation in which a client who neither speaks, nor understands English, attends a will preparation meeting with an interpreter, who it transpires is also a close family member and main beneficiary. How would you deal with the issue of knowledge and approval in these circumstances?

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8.3.3 Presumption

As a general rule, a testator must know and approve the contents of their will at the time of its execution. A will is valid despite lack of knowledge and approval at the time of execution,

however, provided that:

- the testator knew and approved the contents of their will when they gave instructions and the will was prepared in accordance with their instructions; and
- at the time of execution, the testator understood that they were executing a will for which they had given instructions.

In effect, the rule in ***Parker v Felgate [1883]*** also applies in this context, just as it does to the issue of testamentary capacity, as was confirmed by the Court of Appeal in ***Perrins v Holland and Others [2010]***.

A person may have testamentary capacity but at the same time lack testamentary intention, as where the client signs a will that you have written for them without knowing its contents. Similarly, the necessary intention is lacking if a testator knows and understands what the will says but does not genuinely approve of the will in those terms, because, in reality, it reflects the wishes of a third party rather than the testator's own.

In all cases, the burden lies on the propounder of the will to prove intention.

In practice, there is a rebuttable presumption that a testator who had the necessary capacity and who has duly executed the will did so with the necessary knowledge and approval of its contents. In such cases, those wishing to challenge the will must prove either that the testator lacked the necessary knowledge and approval because of a mistake or that they were induced to make the will (or a particular provision in it) by force, fear, fraud or undue influence. Any part of the will of which the testator did not know and approve cannot be admitted to probate.



Link to Practice

A rebuttable presumption will arise in the majority of wills professionally drafted and executed. A

professionally prepared will normally contains the correct attestation clause and at the point of execution is either read out to the testator, or the testator will be given the opportunity to read the will back to themselves and confirmation obtained that the content is understood and reflects their intentions. Naturally, all of this will also be recorded in detailed attendance notes. Consider, however, situations in which the following circumstances are present.

CONTINUE

8.3.4 No presumption arises

There is no presumption of knowledge and approval in the following situations; if one of these is shown to apply by the challenger, the burden of proof is on the propounder.

- The testator is deaf and/or dumb, blind, illiterate, the testator is unable to write or the will is signed by someone other than the testator on their behalf.
- There are circumstances which “*excite the suspicions of the court*” (***Barry v Butlin [1883]***). So, if the will substantially benefits the person who prepared it or a close relative of such a person, the propounder must remove the suspicion if the will is to be admitted. The degree of suspicion varies according to the circumstances of the case.

In ***Wyniczenko v Plucinska-Surowka [2005]*** the testatrix made a new will, differing from her previous one by excluding charitable bequests and a gift to her niece (the claimant), and leaving all her estate to the defendant. It became apparent that the defendant had drafted the will for the testatrix. The court held that if a beneficiary is involved in the making of the

will, the court's suspicions are aroused. The defendant could not satisfy the court that the will reflected the testatrix's true wishes and so the will failed.

A contrasting case is ***Knight v Edonya [2009]***, where the testator made a will two days before he died. The will appointed the claimant as one of the executors and the claimant was given a share of residue. The evidence showed that the claimant initiated the process of drawing up the will but, crucially, she was not present when the testator gave instructions for the will or at the time of its actual execution. The court held that none of the circumstances relied on by the defendants were such as to excite the suspicion and concern of the court as to whether the testator knew and approved of the contents of the will. Furthermore, the court was satisfied that the will truly represented the testator's testamentary intentions, and that he knew and approved its contents.

Sherrington v Sherrington [2005] concerned the will of a solicitor (S) and provisions made for his ex-wife and children as against those made for his current wife. The case deals with several issues. Here, knowledge and approval are considered.

S died in a car accident in October 2001 aged 56, having made a new will in September 2001 leaving all his estate to his second wife and making her the sole executrix of his estate. There was evidence that he still had a very close relationship with his first wife and particularly the three children from his first marriage. There was also evidence that the deceased had been unhappy in his second marriage. The claimants were his three children who claimed it was completely out of character for their father to leave them nothing in his most recent will. They therefore claimed that he lacked knowledge and approval of that will. The defendant was the second wife (D).

D suggested that they both made identical wills in September 2001 as they were due to go on holiday. Despite S being the senior partner of his law firm, there was evidence that the will was prepared by D's daughter. She had no legal qualifications but had worked in a clerical capacity for S.

The 2001 wills were poorly drawn up, with several errors and omissions, and not of the standard expected of an experienced solicitor. The wills were witnessed very shortly before S and D left to go away, so there was an element of urgency.

D bore the burden of proof that S knew and approved the contents of the will. Lightman J did not accept the evidence of D or her daughter. He was not satisfied on the balance of probabilities that S was ever informed of the contents of the will or had even read it. D therefore failed to discharge the burden of proof that S knew and approved of the contents of the will when he signed it. The High Court held that the will was invalid and an intestacy should apply.

D appealed and her appeal was granted. The Court of Appeal allowed the appeal reluctantly as they felt that an intestacy would have been a much fairer outcome for the family. It held that the will was valid because it was inconceivable that an experienced solicitor and businessman would sign his own will without reading it and approving it. The court sincerely hoped that the family would be able to put aside their differences and come to a mutually agreeable outcome.

In ***Schrader v Schrader [2013]*** Bill challenged his mother's will. He alleged that she lacked knowledge and approval when she made the will. The claim was largely based on the fact that Nick, the other son, had lived with his mother in her house and had cared for her after she had a fall. Also, Nick had been the one who arranged for a will-writer to attend his mother to make her last will, which gave him the house outright, unlike a previous will which had treated the two brothers equally. These and other matters were, it was claimed, factors which should excite the vigilance of the court, meaning that the burden of proving knowledge and approval was not to be presumed but should be on Nick and discharged only by cogent evidence of actual knowledge and approval on his mother's part.

The judge said there was sufficient evidence on which to find that knowledge and approval was established:

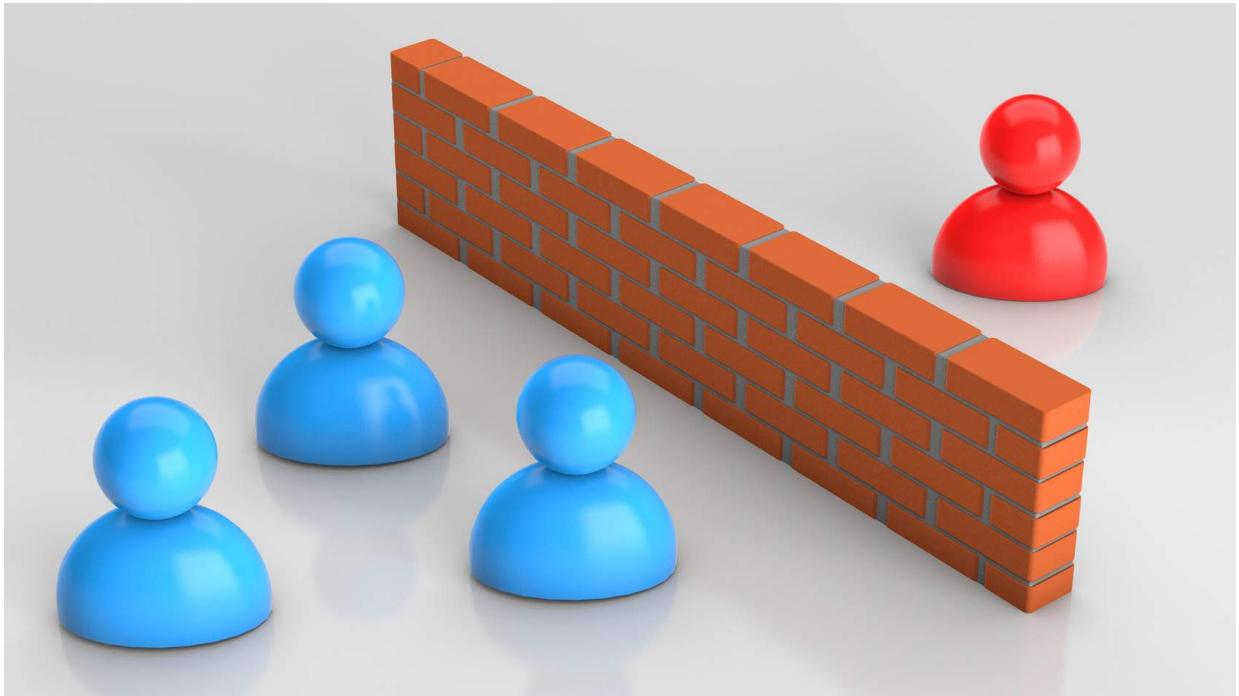
"I find that [the mother] had the relevant knowledge of this will and approved its contents. I have identified the relevant inquiry – did [the mother] understand what she was doing and its effect (that is to say that she was making a will containing certain dispositive provisions) so that the document represented her testamentary intentions? I am quite satisfied that she did. The factors relied on (or at least some of

them) are capable of arousing the court's vigilance, but I am satisfied that, that having been done, there is compelling evidence in favour of want of knowledge and approval . . . She gave coherent and rational instructions to the will-writer. She was apparently able to itemise small chattels as well as her house. She knew who her grandchildren were, and even most of their addresses. Her alterations demonstrated an attention to detail. The will was read to her and apparently understood, and it was not a difficult will to understand. All in all I am quite satisfied that the burden on Nick in this respect is fulfilled, and the will cannot be challenged for want of knowledge and approval."

Poole v Everall [2016] is a further example of the distinction between mental capacity and knowledge and approval. In this case, while the testator was in a mental health hospital (shortly after receiving £1,000,000 damages after being involved in an accident), his carer prepared a will for the testator, in which the carer received 95 per cent of the estate. The will was signed. Unsurprisingly, following the testator's death, the beneficiaries under an earlier will challenged this last will on the grounds of lack of capacity and/or lack of knowledge and approval.

Having looked at the medical evidence, the court held that the testator did have sufficient mental capacity to make the will.

With regard to knowledge and approval, the obvious circumstance giving rise to suspicion is that the will was prepared by the carer, who was the principal beneficiary. Alongside this, the court heard that the carer had deliberately blocked communication between the testator and his solicitor, and between the testator and his family.



The carer was unable to discharge the burden of proof regarding knowledge and approval. He had not read the will over to the testator, or explained its terms. The court found that the will was therefore not valid.

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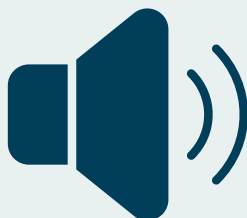
8.4 Undertaking mental capacity assessment training

For anyone interested in learning more about assessing mental capacity or even holding themselves out as qualified to undertake an assessment, courses are available to train individuals on **MCA 2005** with a specific focus on assessing capacity.

Capacity assessment training can be very useful in understanding how capacity is assessed and to follow accepted practices and procedures, especially for those who work with the vulnerable as part of their role as private client lawyer.

If assessing capacity becomes a regular part of a lawyer's role then considering such training can be done as part of Continuing Professional Development and will assist in reducing risk.

If a will is challenged it is likely that the evidence of an attending lawyer who has undertaken formal capacity assessment training is likely to bear more weight when considering whether a testator did in fact have capacity, absent a contemporaneous medical report undertaking at the time the will was executed.



Law Explained: Mental capacity

This recording examines the important requirement of mental capacity, focussing on the key cases of ***Banks v Goodfellow* [1870]** and ***Parker v Felgate* [1883]**.



6:27

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Audio Transcript

Hello. In Chapter 8 we are considering capacity to make a will, and in this recording I would like to concentrate on two important cases. Interestingly, both of these cases date back to the late 19th century but, despite their age, are still considered to be good law.

The first of these is, of course, ***Banks v Goodfellow*** in 1870. Despite discussion in recent years about whether the **Mental Capacity Act 2005** has overtaken the decision in this case, the courts have recently been keen to make it clear that ***Banks v Goodfellow*** remains the test for capacity to make a will.

Let's consider the case in detail.

The case concerned the will of John Banks, who owned a considerable estate in the Lake District. During his lifetime, Mr Banks suffered from delusions and epilepsy and had spent some time in what was then called a lunatic asylum. In particular, Mr Banks believed that he was frequently visited by devils or evil spirits, and believed that he was being pursued and molested by a Mr Alexander, and even the death of Mr Alexander did not stop Mr Banks from believing this.

In 1863, Mr Banks made a new will, leaving his estate to his niece. He died two years later, and his niece died two years after that. As she died intestate and underage, her estate, including her inheritance from Mr Banks, passed to her half-brother who was not a relative of Mr Banks. The son of Mr Banks' own half-brother brought proceedings to have Mr Banks' will set aside on the grounds of lack of capacity.

The proceedings failed, and it was held that Mr Banks was mentally capable of making his will. Whilst it was clear that he suffered from delusions, those delusions had no impact on the gifts he made in his will. The judgment of Chief Justice Cockburn gave what is now the test for testamentary capacity:

"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 on disposing of his property, and bring about a disposal of it which would not have been made otherwise."

This can be broken down into four different elements:

1. The testator understands the nature of making a will and its effects – this being that the testator must know that he is making a will to dispose of his assets **after** he has died. In other words, the testator understands that the gift he is making will not take effect immediately – the will is to come into effect on their death and not before.
2. The testator understands the extent of the property of which they are disposing – they do not need to know the exact value of everything they own but must know the approximate extent of their wealth. Suppose the testator's estate, apart from a modest amount in a bank account, comprised just their house. They knew that they owned the house but had no idea of its value – would the test be satisfied?
3. The testator is able to comprehend and appreciate the claims to which they ought to give effect: the testator must know who might have first claim on their property – for example, that they are married and therefore the spouse would have a claim. There is no requirement under this heading that they actually do benefit those individuals!
4. The testator has no disorder of the mind that "perverts their sense of right or prevents the exercise of their natural faculties in disposing of their property by will". This does not mean that any disorder of the mind will thwart capacity; it will only apply where the disorder has a direct effect on the will. So the testator could genuinely believe he was Napoleon Bonaparte and still have capacity (provided that he was not attempting to leave all his property to his wife Josephine!).

The case of ***Parker v Felgate [1883]*** is of particular interest to wills and probate lawyers. This case provides a framework to be used in situations where instructions have been taken from a testator who, between giving those instructions and executing the will, has become more feeble or less mentally capable. In such a situation the will can be validly executed provided that it is clear that even if the testator was not able to recollect or recite the provisions of the will for which they had given instructions, that, firstly, they had the required capacity at the date they instructed their lawyer; secondly, the will was prepared in accordance with those instructions; and finally at the time of execution, they were able to (and did) understand that they were signing a will for which they had given instructions.

Whilst this case is helpful in ensuring that a testator's wishes are as far as possible carried out, it is, of course, fraught with danger for legal professionals. It is essential to ensure that a detailed attendance note of the initial interview is kept, outlining the full situation, and specifically addressing the issue of the client's capacity and wishes, and a further detailed note made at execution. You should always consider whether it is better, when called to a client who is weak or struggling with capacity, to make the will there and then, even if it has to be handwritten rather than taking the risk of relying on ***Parker v Felgate***.



Law in Context: Reform of the test for mental capacity

The Law Commission's 2017 Consultation Paper (Chapter 2) discussed the ***Banks v Goodfellow [1870]*** test and whether the test in the **Mental Capacity Act 2005** should be used in will-making instead. It highlighted the benefits of using the **Mental Capacity Act 2005** test, but also considered reforming the ***Banks v Goodfellow*** test and putting it into statute.

See: [Law Commission: Wills](#)

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 3 questions in this knowledge check.

Question 1 of 3

The test for mental capacity for making a will is now found in the **Mental Capacity Act 2005**, not ***Banks v Goodfellow [1870]***. True or false?

☐ True

☐ False

SUBMIT



Complete the question above before moving on.

Question 2 of 3

Valerie died recently. Her will leaves everything equally between two of her children, Susan and Carl. Her third child, Jack, receives nothing. Which of these factors, present at the date of execution, is a court most likely to determine indicated a lack of capacity?

- ☐ Valerie was suffering from a mental delusion that she was the famous film star, Audrey Hepburn.
- ☐ Valerie had no conception that excluding Jack could cause family ill feeling at a later date.
- ☐ Whilst Valerie had a broad grasp of the nature and extent of her property, she was not able to say how much money was in her current bank account.
- ☐ Valerie's reason for excluding Jack was that she wrongly believed he was poisoning her tea.
- ☐ Valerie's husband Cyril had died two years before she executed the will and she still missed him from time to time.

SUBMIT



Complete the question above before moving on.

Question 3 of 3

Which of the following statements about the rule in *Parker v Felgate* are **correct**?

(Select 3 correct answers)

☐

The rule only applies if the testator had capacity both when they gave instructions for and when they execute their will.

☐

The rule is most likely to be of use where the testator is elderly, unwell, or suffering from a mental disorder and has fluctuating mental capacity.

☐

The will in question must have been prepared in accordance with instructions given by the testator.

☐

At the time of execution, the testator was able to understand that they were executing a will for which they had previously given instructions.

☐

The testator must be capable of understanding the will if it is read over to them.

SUBMIT



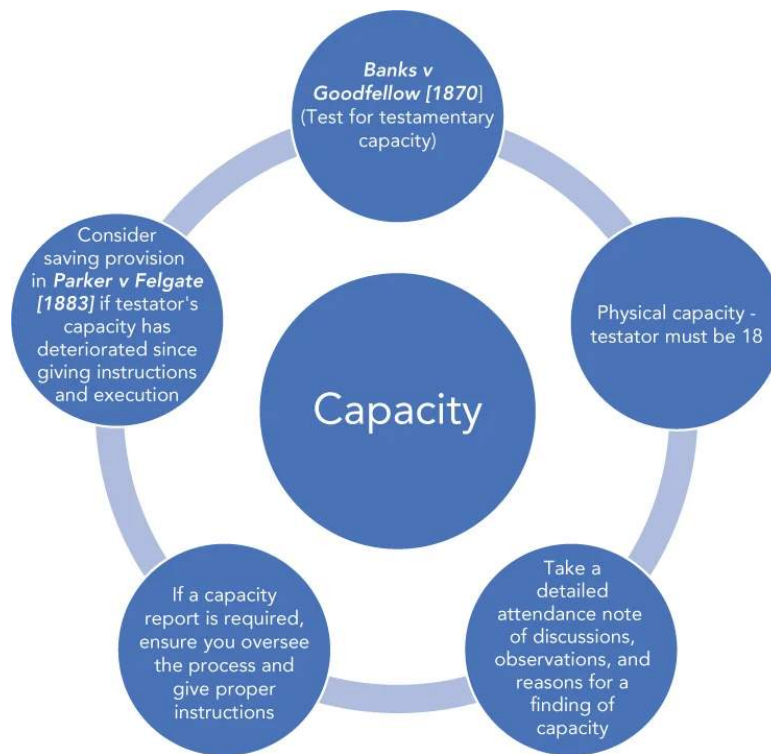
Complete the question above before moving on.

8.5 Summary

Capacity

- *Banks v Goodfellow [1870]* – Test for testamentary capacity
- Physical capacity – testator must be 18
- Take a detailed attendance note of discussions, observations, and reasons for a finding of capacity
- If a capacity report is required, ensure you oversee the process and give proper instructions
- Consider saving provision in *Parker v Felgate [1883]* if testator's capacity has deteriorated since giving instructions and execution

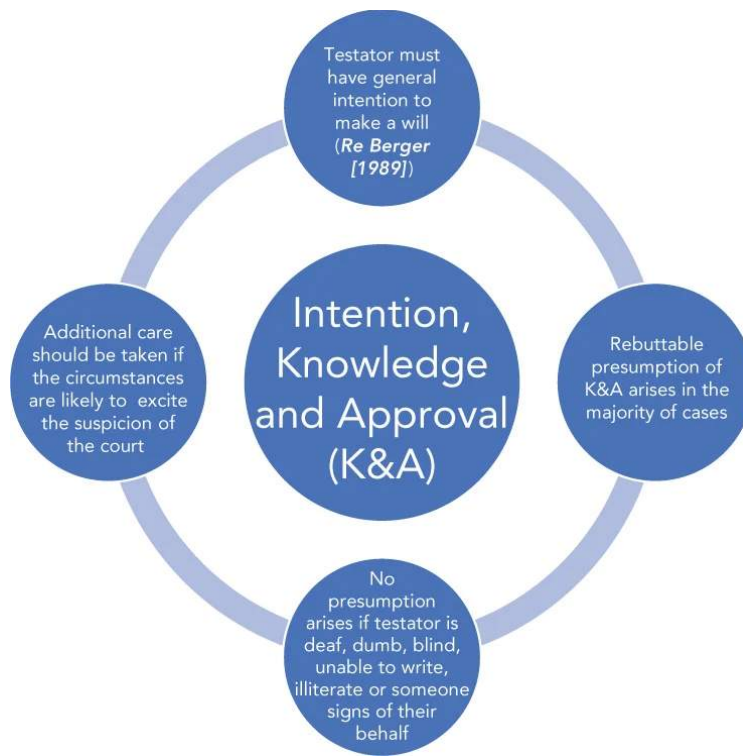
Figure 8.5a



Intention, knowledge and approval (K&A)

- Testator must have general intention to make a will (*Re Berger [1989]*)
- Rebuttable presumption of K&A arises in the majority of cases
- No presumption arises if testator is deaf, dumb, blind, unable to write, illiterate, or someone signs on their behalf
- Additional care should be taken if the circumstances are likely to excite the suspicion of the court

Figure 8.5b



You have completed Chapter 8.

EXIT