MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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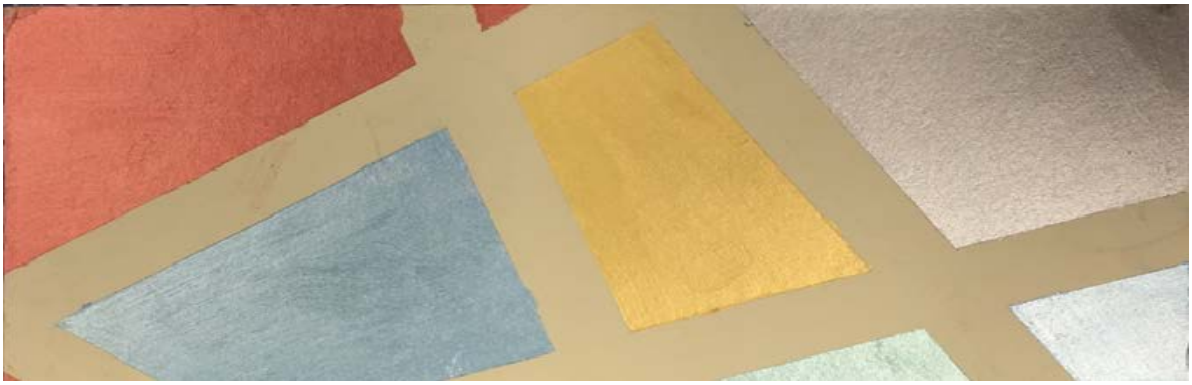

Welcome to the June 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the JCHR has questions for the Government about the delay to the LPS; anorexia and capacity, and Caesarean sections and P-centricity;

(2) In the Property and Affairs Report: Hegel and testamentary capacity, and cross-border management of personal injury settlements;

(3) In the Practice and Procedure Report: a freeze on freezing injunctions, and ss.48 and 49 MCA under the spotlight;

(4) In the Wider Context Report: Mental Health Act reform potential and pitfalls, an update to the Mental Health and Justice Capacity Guide, and food refusal in prison;

(5) In the Scotland Report: Issues with powers of attorney – an unprecedented tangle, the Powers of Attorney Bill and Implementation of the Scott Report.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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Hegel and testamentary capacity

Baker & Anor v Hewston [2023] EWHC 1145 (Ch) (HHJ Tindal, sitting as a Judge of the High Court)

Other proceedings – Chancery

HHJ Tindal in *Baker & Anor v Hewston* [2023] EWHC 1145 (Ch) has ambitiously sought to undertake a Hegelian synthesis between the contrasting positions taken by Chancery and Court of Protection lawyers to the approach to take to testamentary capacity. As a judge who sits in both the Court of Protection and the Chancery Division, HHJ Tindal was eminently well-suited to the task,[1] and his judgment draws carefully and widely upon what are still in some ways two very different legal cultures.[2]

The key question is whether and how the common law test for testamentary capacity set down in 1870 in *Banks v Goodfellow* interacts with the test for capacity set down in ss.2-3 Mental Capacity Act 2005. This is a question which has been considered a number of times at first instance, but not yet by the Court of Appeal. In cases before the Chancery Division concerning whether to admit a will to probate, the weight of judicial opinion has been to the effect that testamentary capacity is governed by the common law. However, as Andrew Strauss QC (sitting as a Deputy High Court Judge) in *Walker v Badmin* [2015] WTLR 493 noted:

> *There has been a tendency in the cases and textbooks…to suggest the provisions Act are simply a modern restatement of Banks [and]…can, optionally, be applied and…will or may gradually….replace the formulation in Banks. It does not seem to me..this compromise solution is an available one. There are clear differences... The tests overlap, and will often produce the same result, but not always.*

As HHJ Tindal noted, this has meant that:

> *20* […] *a polarised debate has developed between Chancery and CoP lawyers:*
> *20.1 'In the red corner', Theobald now takes quite a trenchant view at p.4-004:*
>
> > *"Following the coming into force of the MCA, many judges and lawyers (and indeed the 17th edition of this work) assumed that the common law test for testamentary capacity*

[1] For instance, he was able to draw to the attention of the 'expert and experienced' Chancery practitioners appearing before him the decision of the Supreme Court in *A Local Authority v JB* [2021] UKSC 52, which – to Court of Protection practitioners – is now the starting point when it comes to considering capacity for purposes of the MCA 2005, but which had not apparently crossed the radar of the Chancery practitioners.

[2] Reading the judgment of HHJ Tindal reminded Alex of the article that he wrote with David Rees (now KC) almost a decade ago: *Property and Affairs Lawyers Are from Mars, Health and Welfare Lawyers from Venus* (2014) Elder LJ, 285.

had been replaced by the statutory test for capacity under the Act. However, it has now been established, albeit only at first instance, that the test remains the common law test. This, in the view of the present editors, is clearly correct. The clarity of this position was not helped by a confusing statement [at p.4.33 of] the "Mental Capacity Act Code of Practice" (……with some statutory force, but not binding)….

> *"The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think that it is appropriate."*
>
> *In the light of the [first instance] cases…both sentences are plainly wrong."*

20.2 'In the blue corner', 'Court of Protection Practice 2023' now fumes at p.1.244:

> *"The reluctance of judges of the Chancery Division to mould the common law to assimilate the features of the statutory test is striking, and with respect, somewhat difficult to understand, not least because it means that lawyers and doctors have to consider two different tests in respect of a (live) testator with potentially impaired decision-making capacity."*[3]

This debate was reviewed by the Law Commission in their 2017 Consultation (No.231) 'Making a Will': It proposed replacing Banks with the MCA or alternatively putting it on a statutory footing (pgs.18-48 esp ps.32-8). An update report is due later this year.

HHJ Tindal continued:

21. Speaking as a Judge who sits in both the Court of Protection and (more recently) in the Chancery Division as well, I can see both sides. Caution not to discard the common law which has 'stood the test of time' is entirely understandable. However, I respectfully disagree with Theobald: in my view the MCA Code of Practice was right that ss.2-3 MCA are 'in line with the existing common law tests and the Act does not replace them' Munby J (as he was) in A LA v MM [2007] EWHC 2003 also did consider it 'appropriate' to adopt ss.2-3 MCA on various issues of capacity (not wills) at p.80:

> *"What is being said is that judges sitting elsewhere than in the Court of Protection and deciding cases where what is in issue is, for example, capacity to make a will [or gift]…. can adopt the new definition if it is appropriate….having regard to the existing principles of the common law. Since, as I have said, there is no relevant distinction between the [common law] test…in Re MB and… s.3(1) of the Act, and since the one merely encapsulates in the language of the Parliamentary draftsmen principles expounded by the judges in the other, the*

[3] Alex should declare an interest in that he is responsible for the relevant chapter in the Court of Protection Practice 2023.

> *invitation to the judges by the Code is entirely understandable and..appropriate."*

> *22. I respectfully agree and pending the Law Commission's work, I tentatively propose (with respect to Mr Strauss QC in Walker) a 'compromise solution'. I make five points:*
>
> *22.1 ss.2-3 MCA do not strictly apply to testamentary capacity in Probate cases;*
>
> *22.2 ss.2-3 and general common law on capacity are aligned (and consciously so);*
>
> *22.3 ss.2-3 are broadly consistent with the common law on testamentary capacity;*
>
> *22.4 ss.2-3 and the Banks criteria are consistent and can 'accommodate' each other;*
>
> *22.5 ss.2-3 are 'appropriate', in a similar sense as in MM to be included by analogy within the common law approach to testamentary capacity in Probate cases.*

HHJ Tindal then developed his Hegelian synthesis in relation to each of these five points, before applying them to the facts of the case before him as a 'worked example.'

In relation to the first point, HHJ Tindal emphasised that there is a distinction between the situation where the Court of Protection is applying the MCA – as it undoubtedly is when making a statutory will for a person (at which point it must apply ss.2-3 MCA 2005 to decide whether the person has or lacks the relevant capacity) and the situation where the High or County Court is considering matters from a probate perspective. At that point, the court is not applying the MCA 2005, and hence the definition of capacity within the MCA does not apply, as it only applies for the Act's purposes.

As regards the second point, HHJ Tindal identified that

> *28.* […] ***if*** *the approach to testamentary capacity in common law is substantively different from that in the MCA, as the Law Commission notes in 'Making a Will' at ps.2.57-8, there could be different decisions about the capacity of the same (living) testator for the same will in different Courts. The Chancery Division could find P had capacity for a will at common law so it was valid; whilst the Court of Protection could find that P did not have capacity and so could make a statutory will. I accept those are different contexts (see HHJ Matthews in James p.80), as the Law Commission says at p.2.45, this may cause confusion. Still more seriously, as Falk J accepted in Clitheroe at p.75, if the other way around and the testator lacked capacity at common law but not under the MCA, in theory no valid will could be executed at all. Far from a theoretical risk, if there is a real difference on the presumption of capacity (which I consider below), that risk could be quite common. In my view, this would be an impracticable, illogical or inconvenient result (for these reasons and those of the Law Commission) and as Lord Kerr said at p.24 of R v McCool [2018] 1 WLR 2431 (SC):*
>
> > *"The court seeks to avoid construction producing an [impracticable, illogical, or inconvenient] result, as this is unlikely to have been intended by the legislature"*

HHJ Tindal found that the simple way to avoid such a result would be to interpret the MCA where it applies in the context of testamentary capacity as aligned with the common law test

in *Banks* as clarified and modernised. As he noted, that conclusion could be expressed in different ways, HHJ Tindal preferring the analysis:

> *29.* […] *that the MCA's statutory background and the Law Commission reports which led to it (especially as one proposed a draft Bill in similar terms to the eventual Act) throw light on its interpretation (Black-Clawson) and demonstrate that it was intended to be aligned with the common law and indeed vice-versa.*

Having embarked upon a historical exegesis to make good this point, HHJ Tindal then turned to his third point, to the effect that the differences between the common law and the approach in ss.2-3 MCA 2005 had been overstated by Andrew Strauss QC in *Walker*. Of particular interest is his analysis of the apparent differences in the operation of the presumption of capacity. As HHJ Tindal identified:

> *34. Even with a dearth of evidence, if due execution (analytically distinct from capacity) is proved and 'the will appears rational on its face' there is a presumption of capacity even at common law. In Clarke, Zacaroli J found at ps.93-4 that a will was 'rational' even with unexplained changes of beneficiaries (see also Sharp p.79). Moreover, if the will is 'irrational on its face', that would rebut a 'presumption of capacity' under s.1(2) MCA anyway. So, with almost all validly executed wills, there will be a 'presumption of capacity'. Whilst the evidential burden can then shift back to the propounder of the will if there is 'real doubt', that is not just 'some doubt' (Clarke p.77) and is an evidential burden, not a legal one (see Phipson on Evidence (20th Edition, 2021) p.6.02. This resolves any 'inconsistency' with s.1(2) suggested in Kicks at p.67, as does the test applied of Asplin LJ (as she now is) in Gorjat v Gorjat [2010] 13 ITELR 312 p.139*
>
> > *"At common law, the burden of proving lack of mental capacity lies on the person alleging it. To put the matter another way, every adult is presumed to have mental capacity to make the full range of lifetime decisions until the reverse is proved. s.1(2) MCA….put the presumption of mental capacity on a statutory footing. This evidential burden may shift from a claimant to the defendant if a prima facie case of lack of capacity is established." (My underline)*

There is, HHJ Tindal accepted, an apparent difference between the common law and the MCA as interpreted in *JB* as regards the need to understand the interests of other people:

> *37.* […] *I accept Lewison LJ in Simon said testamentary capacity at common law 'does not require [a testator] to understand the significance of his assets to other people' whereas Lord Stephens in JB said that 'relevant information' under s.3(4) MCA 'can extend to the consequences for others'. However, Lord Stephens stressed this depended on the factual context and that capacity is 'issue-specific' depending on the 'matter' (see JB ps.68-9). It makes complete sense that s.3(4) MCA in the context of the capacity to engage in 'bilateral' sexual relations should encompass understanding of the consequences for one's sexual partner. But that does not mean in the context of capacity to make a 'unilateral' will, that s.3(4) MCA also requires understanding of the consequences for others. As stressed in the authorities (including Hawes at p.14 which was quoted in Simon) freedom of testation means a testator who has*

> *capacity is free to make a will which is 'hurtful, ungrateful or unfair'. It is a totally different decision.*

The third difference identified by Andrew Strauss QC in Walker between the two approaches was that s.3(1) MCA 'requires a person to be able to understand all the information relevant to the making of a decision', whereas Banks does not. As HHJ Tindal noted (at paragraph 38): "[t]*his begs the more fundamental question about what 'information' is 'relevant' to making a will, which I discuss next. But first, I respectfully suggest this is not how s.3(1) MCA works anyway*," a point HHJ Tindal amplified by reference to relevant MCA case-law, including, significantly, that of *Public Guardian v RI* [2022] WTLR 1133 (CoP)), a case which "*not only shows that an individual need not understand 'all relevant information' (which s.3 MCA does not say). It shows even with an LPA where a living individual hands over control of their property to another, 'the bar must not be set too high' and there is a crucial role for explanation, as Peter Gibson LJ also stressed for wills in Hoff*" (paragraph 39). Interestingly, HHJ Tindal observed that "*since the MCA is 'issue-specific' as discussed in JB, understanding of relevant information to make a will would be no higher and probably lower than for an LPA, because there would be few if any 'consequences' for the testator after they die, other than their 'legacy'*" (paragraph 40).

All of this led HHJ Tindal to his fourth point, which is that the straightforward way in which to reconcile the common law and the MCA approaches was for:

> *41.* […] *the first three limbs of the Banks test to be treated as the 'relevant information' under s.3 MCA and for the fourth limb to map onto s.2 MCA*

i.e.

> *43.* […] *given the consistency between testamentary capacity at common law and ss.2-3 MCA, were it assessed under the MCA e.g. by the Court of Protection, the 'relevant information' would be the same as the first three limbs of Banks: [a] to understand 'the nature of making a will and its effects'* […] *[b] to understand and retain ('recollect' for a short period – s.3(3) MCA) 'the extent of his property'* […]*; and [c] to weigh 'the nature and extent of the claims upon him, both those whom he is including in his will and those he is excluding from it'* […]*. I am fortified in this view by its consistency with the view of the Law Commission in' Making a Will' at p.2.55 (which I consider is of significant weight)*

HHJ Tindal sought in equally Hegelian fashion to address an apparent inconsistency identified by the Law Commission in *Making a Will:*

> 44. […] *whilst the Law Commission suggests at p.2.95 that the rule in Parker v Felgate endorsed in Perrins is arguably inconsistent with the MCA, I suggest they can also be reconciled. As Lord Stephens said in JB at p.64, capacity can fluctuate over time and s.2(1) MCA applies 'at the material time' which is 'decision-specific'. In the context of deciding on a will, the 'relevant information' in Banks applies at that 'material time'. But if a testator has capacity but it deteriorates before execution, at that 'material time', the 'relevant information' for executing a will is just that listed in Parker/Perrins. After all, information need only be retained 'for a short period' under s.3(3) MCA. There is no wider 'memory test' under ss.2-3 MCA than at common law (see Hoff and Simon). I would add, as the Explanatory Notes to s.3(1)(d) MCA state (relevant to its meaning: R(O) p.30), the lack of ability to communicate will not commonly arise –*

certainly in relation to a will. It has not been suggested to be a relevant difference with Banks.

And later:

47. […] *Should capacity to make the will be lost once the testator has instructed a solicitor, then the 'matter' under s.2 MCA changes from 'deciding' upon the will to 'executing' it and the 'relevant information' changes from the first three limbs of Banks to the four limbs of Parker as updated in Perrins.*

Finally, in relation to the issue of impairment / disturbance, HHJ Tindal noted that:

45. It has also not been suggested that the fourth element of Banks differs from the MCA in the cases suggesting there are such 'differences' between them such as Walker. However, at first sight, the language is clearly different. Yet the Law Commission in 'Making a Will' summarise the essence of the fourth Banks limb in modern language at p.2.19: 'Understanding must not be impaired by any disorder of the mind or delusions'. Stripped of its more complex language, that was essentially how it was applied in Banks itself, where the testator still had delusions, but the Court held his understanding was not impaired by them when making the will. Moreover, as the Law Commission also says at p.2.21, this element must be applied with a modern understanding of cognitive impairments and psychiatric diagnoses: see Key p.95 and Clitheroe p.106. There is a close correlation between 'disorders of the mind or delusions' in that modern sense and 'an impairment or disturbance of the mind or brain' in s.2(1) MCA influenced by Re MB (adopted by the MCA rather than the draft Bill's 'mental disability'). In both cases, there is a (slightly different) 'causative nexus' (see JB at p.78): in s.2(1) between 'inability to make a decision' and 'impairment/disturbance of the mind'; in the fourth Banks element rephrased by the Law Commission between 'impairment of understanding' and 'disorder of the mind or delusion'. The same is true if one returns to the key language in Banks: "no disorder of the mind….[or] insane delusion shall…bring about a disposal of it which, if his mind had been sound, would not have been made." s.2 MCA does not ask this counterfactual 'but for' causal question because it is general; Banks does because it focusses on a specific past will (even if not framed in exactly the same way as s.2 MCA).

HHJ Tindal was at pains to make clear that he was not suggesting:

46. […] *that ss.2-3 MCA applied to testamentary capacity on one hand and the common law test in Banks on the other are identical, simply that they are broadly consistent and one can 'accommodate' the other, depending on which applies. So, if a will is validly executed and 'rational on its face' there is a presumption of capacity either way (although if the will were irrational on its face, that would be the most powerful evidence to displace the presumption under s.1(2) MCA). 'The Golden Rule' that solicitors should obtain a capacity assessment if in doubt is a rule of practice not of law (Key / Burns) and so unaffected by s.1(2) MCA. s.3 MCA examine inability to make a decision and are expressed disjunctively ('or'), whilst the first three limbs of Banks examine ability to make a decision and are framed conjunctively ('and'). Either way, should a testator lack ability with any of the stated elements, they lack capacity.*

The last of HHJ Tindal's five points was to set out his analysis of whether it was appropriate to apply ss.2-3 MCA by analogy when applying the common law approach. Whilst he was clear that the Court of Protection could use the *Banks* test to put flesh on the bones of the MCA when discharging its functions, conversely:

> *49. Whilst a Probate case would involve 'accommodating' ss.2-3 MCA within the common law not vice-versa, it does not involve applying the MCA and using Banks to put 'flesh on bones', but rather applying Banks but using the MCA as a 'cross-check'. If the MCA suggests a different result, that does not trump the common law but suggests further consideration. This is using the MCA to 'supplement' the common law in HHJ Dight's word in Fischer v Diffley [2013] EWHC 4567 p.25; and indeed, taking a 'flexible approach' as suggested by Mr Rosen QC in Bray v Pearce (2014) (as quoted in James).*
>
> […]
>
> *50.* [Lord Burrows, formerly of the Law Commission, and now of the Supreme Court has given] *an example of applying a statute by analogy which may be reassuring to Chancery lawyers. It goes back to the time of Banks: applying statutes of limitation by analogy with issues of delay on equitable relief in Knox v Gye (1872) LR 5 HL 656, where Lord Westbury said at p.673:*
>
> > *"…[A] court of equity acts by analogy to the Statute of Limitations…where the suit in equity corresponds with an action at law…in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure."*
>
> *It is this sort of familiar exercise I suggest with the MCA. As with the 'convergence' of common law and statute in the lead up to the MCA, this 'analogy' approach would smooth any legislative change to Banks. It may even show Parliament that buttressed by the MCA and with some of its language updated, Banks remains as vital as ever.*

Applying this analysis to the facts of the case before him, HHJ Tindal first considered the 2009 will purportedly made by the testator, about which there were three concerning features:

> [55] *Firstly, it was executed within two months of Stanley's discharge from compulsory 'section' in hospital which raises serious concerns about his state of mind and capacity. Secondly, it was prepared in the throes of a dramatic change: Stanley's separation from Kathleen and reconciliation with Agnes, which proved very short-lived. Thirdly despite that, Agnes is not even mentioned in the 2009 will. To make matters worse, there is a total absence of contemporaneous evidence.*

The 2009 will therefore acutely raised the concern of Andrew Strauss QC in *Walker* about the presumption of capacity in s.1(2) MCA: where "*there is a dearth of evidence and the burden of proof may be decisive; in such cases the common law position would be reversed if the Act applies*." Working through the Hegelian synthesis he had developed previously, however, HHJ Tindal found the answer. He started with the common law position:

> *56. At common law, given the three serious concerns I have outlined, I am prepared to accept that the omission of Agnes from the will means it is not 'rational on its face' (I accept 'on its face' is debatable and I will return to it). This means the common law presumption of capacity in Key does not apply. It is a very simple will indeed and the silence about the jointly-owned cottage with*

> *Kathleen is probably explicable in relation to the second Banks limb if they held it as joint tenants as they later did with the Bungalow (c.f. Simon). The absence of any evidence of explanation (Hoff) against the background of the recent mental health episode raises concerns on the first limb of Banks. However, the real concern is the third and fourth limbs of Banks. The unexplained exclusion of not only Kathleen but also Agnes would appear to undermine the third limb – Stanley's ability to 'comprehend and appreciate the claims to which he should give effect'. Moreover, this feature – especially Agnes' omission – with the close correlation of Stanley's mental health episode and his abrupt change of will the following year back to Kathleen (see below) would make it difficult to be satisfied on the balance of probabilities (with no presumption of capacity) that "no disorder of the mind….[or] insane delusion [had brought]…about a disposal of it which, if his mind had been sound, would not have been made." In short, I find the will is invalid because it has not been proved that Stanley had capacity to make it in December 2009.*

Turning then to the MCA, as a cross-check, HHJ Tindal noted that:

> *57. […] a simple application of the 'presumption of capacity' under s.1(2) MCA might suggest a different result. Here, Mr Strauss QC was concerned in Walker that a dearth of evidence would mean that presumption was decisive and a will may be valid despite such concerns. As I have explained, a different result does not trump the common law test, but does suggest further consideration. In fact, this would show that far from being inconsistent as might first appear, the two tests once properly understood are consistent. However s.1(2) MCA may operate in prospective welfare decisions, for past property transactions (not wills), as Asplin LJ (as she now is) said in Gorjat at p.139, s.1(2) simply put a common law presumption of capacity on a statutory footing. As she added, under this, the evidential burden can still shift if there are concerns even applying that legal burden. The three serious concerns I have highlighted clearly do shift the evidential burden and the absence of contemporaneous documentation – especially of explanation from or to Stanley – meaning the three concerns (which are evidenced, indeed undisputed) cumulatively would rebut the s.1(2) MCA presumption of capacity. Moreover, if Stanley's 2009 will is actually 'rational on its face' (as would have been argued had any party sought to propound the 2009 will and which would be my own view), there would have been a presumption of capacity at common law too (Key), but the result would have been the same for the same reasons. To repeat: whilst statutory and common law approaches at first sight appear different, on reflection they are consistent and lead to the same result: Stanley did not have capacity to make his 2009 will. So, I place no evidential weight on it for any later wills.*

Turning to a second, 2010, will, HHJ Tindall had:

> *60.* […] *no concerns whatsoever about the validity of his 2010 will. It was validly executed and I infer Stanley had full knowledge and approval of it – not least as he signed it having prevaricated over Martin. Far from suggesting incapacity, that suggests Stanley was well-aware he was favouring Martin over his other children. Given the contemporary explanation from Kathleen and the reassurance for Stanley that he could change his will if he survived her, the will is rational on its face and so there is a presumption of capacity at common law. It is true the 2010 will was rather*

more sophisticated than the 2009 one, but it was clearly and simply explained by letter and following Hoff, the understanding required is that of an appropriate explanation of the relevant information to the decision: namely the nature and effect of the will, the extent of property and the different claims. There is no indication either of any lack of understanding of the extent of the various claims and who was being included and excluded (each catered for individually as reflected in both wills seen alongside one another); nor the extent of relevant property (clearly differentiated in the various legacies), nor indeed the nature of effect of the will. It is also clear any disorder or delusion Stanley may have had the previous year was not causative (like the testator in Banks). As a cross-check under the MCA, the result would be exactly the same for similar reasons: there was a presumption of capacity not rebutted indeed confirmed by Stanley's evident understanding, retention and weighing of the Banks 'relevant information' and the absence of 'causal nexus' to his past 'disturbance of the mind'. So, the will was valid.

By 2014, the problem was a deterioration in the donor's mental state. However:

65. At common law, the rule in Parker as updated in Perrins could not apply to Stanley's apparently deteriorating mental state because his will had changed between instruction (of which there is no contemporary evidence of that change) and execution. However, as the June 2014 will was duly executed and rational on its face, a presumption of capacity applies at common law (Key) and the file note on that day evidences Stanley's understanding of the nature and effect of the will (hence his desire to save tax), the extent of his property (including the Bungalow by survivorship notwithstanding his promise to Diane) and the claims to which he should give effect (including Martin). Whilst Stanley may have experienced a recurrence of mental disorder some days later, his execution of the will on 13th July seems entirely rational, lucid and unrelated to it (if rather callous).

66. Using ss.2-3 MCA as a cross-check, the same result would be reached. The 'material time' under s.2(1) MCA was 13th June 2014 given Stanley's instructions had changed. Given the 'disturbance of his mind' less a week later, whilst there is a presumption of capacity under s.1(2) MCA, as with 2009, the evidential burden has shifted. However, whilst there was no 'Golden Rule' capacity assessment, that does not make the will invalid (Key and Burns). Unlike 2009, the points made above about the first three Banks limbs still apply and do prove Stanley's understanding, retention and weighing of the requisite 'relevant information' under s.3(1) MCA. Moreover, by analogy with s.3(2) MCA (and indeed Hoff at common law), the solicitor gave a detailed explanation to Stanley and received rational responses in return. However unfair this 2014 will was on Diane, that does not suggest incapacity (s.1(4) MCA; Sharp, Hawes in common law). Therefore, as it was validly executed and known/approved, the 2014 will was valid.

Further wills followed, with the final one purportedly being executed in May 2020, about which (for reasons carefully explained in the judgment [4]) HHJ Tindall had no concerns; it

[4] Notwithstanding the 'ingenious' arrangement for witnessing required as a result of COVID-19, involving the witness watching the signature through the car window. Although this predated the amendment to the Wills Act permitting 'remote attestation,' HHJ Tindal was clear that it was a valid execution.

therefore superseded all previous wills and was admitted to Probate.

Comment

This has been a lengthy summary, because, whilst HHJ Tindall's conclusions on the law can be (and were) shortly expressed at a high level, they require setting out in some detail to appreciate their nuances. It is particularly important and helpful that HHJ Tindall spent such time and effort explaining the two worlds – the CoP and the Chancery Division – to each other, and to explaining how apparent differences in fact mask important similarities. His analysis is not just of assistance to lawyers seeking to explain *Banks* to baffled GPs (or to Chancery Division judges wishing to use the MCA as a cross-check), but also to Court of Protection practitioners interested in the proper application of the presumption of capacity. The approach that HHJ Tindall sets out is – as Alex has suggested elsewhere – not only relevant to the retrospective analysis of testamentary capacity, but the retrospective analysis of such other important instruments as advance decisions to refuse treatment.

Whilst it was convincing to us, we are aware that HHJ Tindall's Hegelian synthesis may not necessarily appeal to everyone, as he did have to engage in some relatively heroic retrofitting of modern-day concepts onto the *Banks* test. For our part, it still remains unsatisfactory that, formally, there are two tests to apply depending on whether one is considering the real-time position for purposes of a statutory will, or after the event for purposes of Probate. Indeed, it might be thought to be even more unsatisfactory given that HHJ Tindall has now so elegantly identified how they will lead to the same outcome. It may be that the appellate courts in due course build on his analysis to find that, in fact, the common law has evolved to the point where it is indeed appropriate to apply the MCA. We are bound to say that it is difficult avoid the conclusion that it would be 'cleaner,' if the Law Commission's current Wills project were to lead to one statutory test to rule them all, albeit making clear that it is building (where appropriate) on the learning that has underpinned the common law in this area for well over a century

Short note: cross-border dual management

Potter Rees Dolan Trust Corporation Ltd v Wl & Anor [2023] EWCOP 19 concerned the management of funds awarded in a damages claim in England to a person now habitually resident in Poland. The case had a tangled procedural history, caused in large part by the attitude taken by a lawyer acting for a period of time by a guardian appointed for the man in Poland. However, ultimately, Senior Judge Hilder broadly endorsed (subject to a number of final points, including costs, to be addressed further in submissions) an approach which maintained a deputyship in place in England & Wales and a framework for transferring funds to the guardian in Poland. As she noted:

> *56. There is a degree of complexity inherent in maintaining dual management systems but, in this matter specifically, I am satisfied that any disadvantages in that complexity are outweighed by the advantages of addressing 'best interests' concerns which have arisen.*
>
> *57 […] . The proposals are detailed and have clearly been carefully considered on both sides. On a broad overview, they seem to me properly to address the practical realities of [the man's] habitual residence in Poland, [his mother's] natural love and affection for him, and*

> *her real caring responsibilities for him. They also seem to me to contain proper safeguards for* [the man] *in the light of concerns raised and communication difficulties experienced to date and aired in these proceedings.*

Cross-border management of personal injury awards are a notoriously complex area, and whilst the judgment in this case is intensely fact-specific, it is helpful in confirming that there may sometimes be a place for maintenance of a dual framework to secure the interests of the person.

Powers of Attorney Bill

The Powers of Attorney Bill will have its second reading in the House of Lords on 16 June.

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Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see here.

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book (with an early bird price available until 31 July 2023), see here.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in July. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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