Key Takeaways from *Leonard v Leonard* [2024] EWHC 321 (ChD)

In this article, Constance McDonnell KC and George Vare consider the recent case of *Leonard v Leonard,* in which they acted for the successful claimants (assisted by Anneliese Mondschein). Mrs Justice Joanna Smith DBE upheld the Claimants' claims that their father, Dr Leonard, neither had capacity to execute his purported final will in October 2015, nor knew and approved of its contents.

Their analysis focuses on three key points arising from the judgment that litigators in this area, as well as those in non-contentious practice, may find interesting and instructive: The Judge's analysis and clarification of the test in *Banks v Goodfellow*, (2) the role of expert evidence in capacity cases, and (3) the importance of the role private client lawyers play in drafting wills for elderly or vulnerable people.

Banks v Goodfellow

The *Banks v Goodfellow* test remains seminal in this area of law; it has stood the test of time and despite attempts to reconcile it with the Mental Capacity Act 2005 (see *Baker v Hewston* [2023] 1145 (Ch) - but that is another article in and of itself) it remains the yardstick by which the Court will retrospectively assess capacity.

Under *Banks* a testator must:

1. Be able to understand the nature of making a will and its effects.
2. Be able to understand the extent of the property of which they are disposing.
3. Be able to comprehend and appreciate the claims to which they ought to give effect.
4. Have 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.

These four limbs are analysed by Joanna Smith J at paragraphs [149] –[164] of the Judgment. Particular reference should be made to paragraph [152] where the Judge sets out an authoritative and comprehensive summary of the key principles and authorities on each of the above four limbs. We do not set out this summary here, but recommend it to practitioners as a 'one-stop shop' for how the Court will approach the *Banks v Goodfellow* test, and how particular (often common) issues will be addressed by the Court.

The Judge considered each of the four limbs individually. The Defendants had submitted that the first limb concerned the ability to understand the effect of a will in the abstract, rather than the effect of the specific will in question. They argued that if a testator were capable of understanding that a will was a formal document containing wishes as to what should happen to property after death, the first limb was satisfied. The Judge rejected that argument, and held that the first limb requires a consideration of the provisions of the particular will under consideration (relying in particular on *Hughes v Pritchard* [2022] Ch 339). A key consideration in this regard will be the relative complexity or simplicity of the provisions of the disputed will.

The Judge's finding is a welcome clarification of the operation of the first limb of the common law test. Remarkably, there had been little authority on the point and the textbooks are equivocal (compare e.g. *Theobald on Wills, 19th ed* at 4-013 (written before *Hughes v Pritchard* was decided) and *Frost, Lawson & Jacoby, Testamentary Capacity Law, Practice and Medicine 1st edn* (2015) at 2.33-2.37).

The Judge also focused on the fourth limb at [155]-[157]. Indeed, this was perhaps the most modern, forward-looking aspect of her judgment. Medical experts disagree to some extent on whether the fourth limb does, or should, encompass long-lasting illnesses such as dementia, as opposed to short episodes such as the onset of psychosis or delusions (see [477] of the judgment). Given the potentially devastating impact dementia can

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have on an individual's empathy, irationality, and indeed their personality, the Judge's acknowledgment that dementia could cause a testator to fall within limb four (and did in this case – see [476]-[477] of the judgment) is, in the writers' view, a welcome development.

Given the modern understanding of mental illness and the impact different diseases and mental health issues can have on an individual, this can only be good news for ensuring that the Courts keep pace with medical developments.

Expert Evidence

The *Banks v Goodfellow* criteria are matters, ultimately, for the court. Where, then, does expert medical evidence fit in? It is worth quoting from paragraph [139] of Her Ladyship's judgment in full, where she answers this question:

> *"[...] While the court can potentially gain considerable assistance in a case requiring a retrospective assessment of mental capacity from the experts' analysis of existing medical records, their explanation as to the nature and likely cognitive impact of the condition from which the deceased was suffering, their analysis of investigations, scans and tests carried out on the deceased together with their assessment of the potential rate of cognitive decline, nevertheless there is only very limited assistance to be gained from their views (for example) of individual emails sent by the deceased or evidence given by the witnesses in their statements, particularly where they are being asked to give their views on individual documents in a vacuum, without any clear understanding of the totality of the evidence."*

The role of a medical expert at trial is simple; to provide their opinion on medical evidence, such as a testator's GP records, diagnostic tests etc. The difficulty, however, is that experts necessarily have to rely on other documentation and witness testimony to build a fuller picture of the testator's abilities and cognitive function. If the wider evidence on which their opinion is based is ultimately not accepted by the Court, then their opinion is likely to be undermined.

We do not think experts should refrain from commenting on, and relying on, non-medical documentation (or indeed, facts as stated in witness evidence) to form their opinions, particularly in cases where the medical records are incomplete, unavailable, ambiguous or unsatisfactory for the purpose of casting light on the testator's condition at the relevant time(s). In this case, the experts' observations on the documents were of some (albeit limited) assistance to the Court, but the Judge's analysis is a helpful and timely reminder that the Court's factual findings can undermine the assumptions on which an expert's opinion has been based.

The Golden Rule

Ms Wells, the chartered tax adviser (who was not a solicitor but was employed by a law firm) who drafted the 2015 Will in this case did not comply with the "Golden Rule" (see [228]), the substance of which is:

> *"that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings" (per Briggs J, as he then was, in Re Key Deceased [2010] 1 WLR 2020 (Ch) at [7]).*

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There were a litany of failings in this regard; this was not just one oversight. These failings led the Judge to attach no weight to Ms Wells' evidence that she was 'totally satisfied' that Dr Leonard had testamentary capacity, and ultimately accept the Claimants' submission that *"this total lack of awareness on her part*

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of the obvious need for caution in dealing with an elderly testator renders her views as to Jack's capacity worthless" [428]. Strong words, that no private client practitioner wants to be on the receiving end of.

Perhaps more importantly, from the Defendants' perspective, the Court held that these *"failures almost certainly had a negative impact on [Dr Leonard's] will-making ability and overall understanding of the complex task in which he was engaged; regrettably they have also increased the difficulties to which this dispute has given rise"* [429].

The evidence of professional advisers involved in the will-making process will inevitably be at the forefront of the evidence relied upon by the party propounding the will. However, as demonstrated by this case and others (such as *Key v Key and Reeves v Drew*), in the words of the deputy judge in *Re Ashkettle, deceased* (endorsed by Asplin LJ in *Hughes v Pritchard*): *"Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless".*

In fact, in *Leonard* the the Judge went even further, finding that Ms Wells' actions had made it less likely that Dr Leonard was capable of understanding the 2015 Will.

This should act as a warning, not only to those instructed to draft wills for elderly or vulnerable people, but also for litigants who seek to rely on the evidence of those individuals, that the repercussions can be severe if sufficient care is not taken to obtain clear and informed instructions from clients and (if necessary) to follow the Golden Rule.

The issue of liability for the costs of the litigation will be determined in April 2024

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