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Having mental capacity when you don't

Richard Manyon, Partner at Payne Hicks Beach Solicitors, 17th March 2016

In order to leave a valid will, you need to have mental capacity at the time you sign the will, right? Wrong.

The recent, sad case of Burns v Burns [2016] EWCA Civ 37 once again shows that setting aside a will on the ground that the testator lacked capacity can be difficult, and should be approached with caution.

The facts were fairly simple. Eva Burns, who died in May 2010, owned a 50% share in her home. The other 50% belonged to her son, Colin Burns. There was no dispute about this ownership arrangement.

Eva left a 2005 will providing that her 50% share should be divided equally between her two sons, Colin and Anthony. Anthony challenged the 2005 will on the basis that Eva lacked capacity at the date the will was executed. If the 2005 will were to fail, a will of 2003 would be admitted to probate. The 2003 will left Eva's entire share of her home to Anthony alone. As at the date of the trial, the financial difference between the parties was agreed to be around only £26,000.

In the period until 2003, Anthony had lived with Eva, but left as a result of an argument with his brother. After Anthony's departure, Colin began to play an increasingly important role in his mother's welfare. She was at this stage 83 years old. In November 2004, Eva gave handwritten instructions to a solicitor that she would like to change her will so as to benefit her children equally (and to revoke a power of attorney in favour of Anthony and grant one in favour of Colin).

The will was drafted and approved by Eva in December 2004, and she apparently intended to execute it at around that time but did not follow up immediately. Instead, there was then a period during which Eva's mental health declined, and there was a good deal of evidence in this regard in the form of mini mental state examinations and other contemporaneous assessments, as well as expert opinion heard by the first instance judge. By the time the will came to be executed in July 2005, there was significant evidence that Eva lacked capacity (albeit that there was no formal finding to this effect).

The decision at first instance, upheld on appeal, was that the will was 2005 will was valid notwithstanding the issues regarding Eva's capacity at the time of execution. This was based on the case of Parker v Felgate [1883] 8 PD 171 which held that a will which has been drawn up in accordance with a testator's instructions at a time that they had capacity will not be invalid if it is subsequently executed at a time when the testator lacked capacity, so long as the testator understands at the time of execution that what they are signing is that will.

Therefore, in these circumstances, having Banks v Goodfellow mental capacity is not necessary at the time that a will is executed. The usual considerations concerning understanding the act of disposing of property, the extent of one's estate, the claims on one's bounty do not necessarily need to be addressed.

It was therefore not relevant whether Eva had full capacity in July 2005. It was sufficient that she did at the time that she gave instructions for the will to be prepared in December 2004, and merely that she

understood that she was executing her will at the later date. The Court also found that Eva knew and approved of the contents of her will.

It is also noteworthy that the Court was critical of the solicitor who drafted the will for ignoring (and being ignorant of) the "golden rule" in relation to producing wills for the elderly or infirm, for failing to ask open questions, for failing to consider the attendance of a medical professional in relation to the drafting or execution of the will, for missing papers in the will file and for failing to find out about a previous will. Despite this, the evidence was not sufficient to invalidate the will, although the Court indicated a different result might have been possible if the will itself had been a more complex document.

The case is a good example of how difficult it can be to succeed in a testamentary challenge on the basis of a lack of testamentary capacity, and in particular to consider carefully the chronology of events in relation to the drafting, as well as the execution, of the will. There may be more than one date at which the testator's mental capacity falls to be considered and determined.