Challenges to the validity of wills: reminders from recent decisions

By Darryl Browne

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Snapshot

- There are an increasing number of challenges to the validity of wills alleging lack of testamentary capacity or insufficient knowledge and approval.
- When a solicitor is involved in the preparation of a will, the solicitor's recollection, practice in assessing mental capacity and records will often be crucial.
- Where there is reason to doubt the client's testamentary capacity, a medical practitioner's opinion about the client's ability to remember, to reflect and to reason, and do so in a rational way, may assist the solicitor's decision about testamentary capacity.

The last six months have seen major decisions concerning challenges to the validity of wills due to lack of a testator's testamentary capacity and lack of knowledge and approval. The decisions include *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831 (16 December 2016); *Roche v Roche* [2017] SASC 8 (8 February 2017); *McNamara v Nagel* [2017] NSWSC 91 (17 February 2017); *Estate Stojic, Deceased* [2017] NSWSC 168 (3 March 2017); *Phillips v Phillips; Phillips by his Tutor NSW Trustee & Guardian v Phillips* [2017] NSWSC 280 (22 March 2017); *Hookway v Hookway* [2017] TASFC 4 (7 April 2017); *Gray v Taylor; The Estate of the late Stanislaw Zajac* [2017] NSWSC 497 (9 May 2017) and *Estate of Beryl Lee Hordern (Deceased); Homersham v Carr* [2017] NSWSC 753 (13 June 2017). Some involved successful challenges to the will. All except *Estate Stojic* involved the active participation of solicitors. These decisions provide useful reminders about the care needed with the preparation of wills.

Are there signs of mental decay?

The testator in *Hobhouse v Macarthur-Onslow* was Lady Macarthur-Onslow. In June 2002, the testator was diagnosed with dementia. In February 2004, she gave instructions for a new will whereby her children would 'pretty much share the assets'. In September 2004, the daughter secretly tape recorded her mother. The tape suggested that the testator retained testamentary capacity but wanted her children treated equally. In October 2004, she made a will giving control of 80 per cent of her estate to her son. The testator died in 2013. Katrina Hobhouse challenged the validity of the will, alleging lack of testamentary capacity, failure of knowledge and approval, and the existence of undue influence. (The undue influence allegation was jettisoned at trial.)

The challenge to testamentary capacity was unsuccessful, largely because of the evidence of the deceased's treating specialist that the testator was capable of understanding the general nature and purport of the will at the relevant time. The challenge to knowledge and approval of the contents and effect of the will was largely successful, with the Court satisfied that the testator did not know and approve the parts of the will which disproportionately favoured the son. This was a 'relatively exceptional finding'. It allowed the Court to sever the offending parts of the will and grant probate for the remainder. In the course of reaching these decisions the Court made adverse comments about the solicitor's practice. For instance:

- ***A copy of the will was not given to the client in advance of the meeting*** when she could have considered it carefully and in leisure. Although the legal transactions were different in each instance, similar comments have been made in *Irvine v Irvine* [2008] NSWSC 592 and *Evolution Lifestyles Pty Ltd v Clarke (No 3)* [2016] NSWSC 1237. It should be observed however that giving the client their draft will in advance of the meeting is rare.

- ***The solicitor did not keep a file note of the meeting.*** It is highly recommended that a solicitor take detailed notes of questions asked and answers given, and make general observations whenever there are doubts about a client's testamentary capacity. Apart from all else, this is because the 'evidence of an experienced and impartial solicitor, who knew the deceased, would normally carry great weight' (*Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275, at [207]). Similar comments were made in *Phillips v Phillips* and *Estate of Hordern*. In *Gray v Taylor* (at [48]) it was said that the solicitor's 'notes are a useful resource giving her support to her account of the course of the meeting'. File notes alone, though, will not prevent a successful challenge to the legal transaction (*Aboody v Ryan* [2012] NSWCA 395), but it can be crucial even with other types of legal transactions (*Mace v Mace* [2015] NSWSC 1659). Provision of the notes to a prospective challenger in advance of a court challenge can help secure a costs order if the challenge fails (*Roche v Roche (No 2)* [2017] SASC 75).

- ***The testator was not asked open questions.*** Open-ended questions allow for an evaluation of the client's understanding (*Estate of Stanley William Church* [2012] NSWSC 1489). An illustration of the reason for adopting this approach is given in *Doulaveras v Daher* [2009] NSWCA 58, at [65] as follows:

A solicitor who gives a detailed and careful explanation to someone sitting on the other side of the desk might form the view that that person understood the transaction if the person remained silent during the explanation, looked at the solicitor during it, periodically nodded, and when asked at the end whether all that had been understood, also nodded. Alternatively, a solicitor might form that view on the basis that the person on the other side of the desk periodically asked questions that related to the subject matter. In the first of those situations, if the person on the other side of the desk had, unbeknown to the solicitor, a serious deficiency in brain functioning, the solicitor's conclusion might not be a reliable one, however honestly it may have been arrived at.'

A solicitor must assess mental capacity in every instance a client engages in legal action ... Where there is a doubt about mental capacity, the task of assessment can't be delegated or abrogated. The solicitor must make the assessment bearing in mind that it is task, time and content specific.

For these reasons it was said in *Gray v Taylor* that 'where testamentary capacity is in doubt, at the very least, a solicitor should ask the testator questions to ascertain the testator's basic understanding, to gain reasonable assurance regarding testamentary capacity' (at [126]).

• ***The solicitor did nothing to test for testamentary capacity*** after learning that the client was diagnosed with dementia some two years earlier and was undergoing active treatment for that condition. The solicitor could have engaged the client's medical practitioner to provide information about the client's mental ability to remember, reflect, reason and, generally, that he or she did so in a rational way (*King v Hudson* [2009] NSWSC 1013; *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18).

What assistance can a medical practitioner provide?

Where there is reason to doubt a client's mental capacity it is often prudent to seek a medical opinion if time, circumstance and the client's instructions allow. In *Gray v Taylor* it was said that this was 'good practice', but the adequacy of the medical opinion to assist the solicitor's determination of testamentary capacity needs to be carefully scrutinised. This is clear from both *Phillips v Phillips* and *Roche v Roche*.

In May 2005, Bill Phillips suffered a significant brain injury. He was aged 82 years. In April 2006, Phillips made a will and an Enduring Power of Attorney. In October 2006, Phillips made another will leaving the majority of his estate to his son James and $50,000 to each to his other four children. He destroyed his April 2006 will. In March 2007, Phillips received $1.2 million compensation for his brain injury. In February 2008 the Supreme Court appointed a financial manager for Phillips. In May 2008, Phillips's former doctor told Phillips' solicitor that Phillips was incompetent to make a will. In May 2008, Phillips' treating GP certified that Phillips was competent to make only minor changes to his will. In June 2008, Phillips made a new will reducing some and increasing other legacies to his other children, but the residue was still left to James. In 2014 Phillips died.

In the proceeding, *Phillips v Phillips* [2017] NSWSC 280, the validity of the last two wills was successfully challenged on the basis of lack of testamentary capacity. There were various reasons for this conclusion. One was the absence of any contemporaneous record or recollection from the solicitor or anyone else about how the testator was on the day he executed the 2008 will. Another was the absence of evidence from the drafting solicitor as to his practice to make his own assessment of a client's mental capacity when a will is executed. The judge noted that the solicitor did not consider himself qualified to make such an assessment and that his practice was to 'refer out' these concerns to the testator's general practitioner (who may or may not have been qualified to make such an assessment in any event) and then rely on that practitioner's opinion.

It needs to be stated that a solicitor must assess mental capacity in every instance that a client engages in legal action. Often this is not an exacting task. Where there is a doubt about mental capacity, the task of assessment can't be delegated or abrogated. The solicitor must make the assessment bearing in mind that it is task, time and content specific. Accordingly, it must be made for each different legal action, at the time the action occurs.

The solicitor had overlooked the assessment of Phillips's former doctor that Phillips was incompetent to make a will and had not enquired into the treating GP's statement that Phillips was competent to make only minor changes to his will. The Court found that there was insufficient evidence of Phillip's testamentary capacity to make the 2008 and 2006 wills. The outcome was that James was ordered to pay the costs of the proceedings, including part of the plaintiffs' costs on an indemnity basis, and, although the executor, he could not have recourse to the estate (*Glenda Phillips v James Phillips; John Matthew Phillips by his Tutor NSW Trustee & Guardian v James Phillips (No 3)* [2017] NSWSC 409).

The approach of the solicitor in *Roche v Roche* [2017] SASC 8 is to be preferred. The solicitor preparing the will wrote to a medical specialist to whom the client had been referred by the client's treating medico, requesting a report on the client's testamentary capacity. The specialist provided a brief letter that did little more than assert that the client had testamentary capacity. Inadequate reports of this nature are not unusual; for other recent examples see *Estate El Chami; Habib v El Chami* [2016] NSWSC 1208 and *Re Oliver (dec'd)* [2016] QSC 264. The solicitor persevered and asked the doctor to expand on his report. The solicitor attempted to contact the doctor on numerous occasions thereafter. The doctor finally provided an adequate report. This conduct was favourably mentioned when the Court determined that the unsuccessful challenger to the validity of the will pay the executor's costs of the proceedings (*Roche v Roche (No 2)* [2017] SASC 75).

How long do you keep your files and file notes?

In June 2006 and July 2006, Peter Hookway made wills. He died in July 2006 survived by a son and daughter, Stirling and Tamzin. In September 2006, probate was granted. The second will, but not the first, contained a gift of valuable real estate to a discretionary trust for the testator's grandchildren. Stirling and Tamzin were the trustees of the trust and had an informal arrangement that the trust property was to be held as to 50 per cent for the benefit of Stirling's two children, and 50 per cent for the benefit of Tamzin's child.

In 2012, there was a falling out between Stirling and Tamzin. As a result of the falling out, Stirling no longer agreed to maintain the informal arrangement. In 2015, some nine years after her father's death and the grant of probate, Tamzin brought proceedings for the revocation of the grant of probate of the second will, and a grant for the first will which did not contain a discretionary trust. The Court concluded that the testator lacked testamentary capacity to make the second will (*Hookway v Hookway* [2017] TASFC 4). As probate is a public act, and the ultimate purpose of the court is to ensure the due and proper administration of the estate and the interests of the parties beneficially entitled to it, the delay of nine years and Tamzin's conduct in the interim did not present an obstacle to revocation of the grant.

Apart from meeting the relatively unusual facts of *Hookway*, the suggestion to retain file notes indefinitely is made because the need for evidence of mental capacity can arise many years after the legal work is performed. An example is *Commonwealth v Cornwell* [2007] HCA 16; (2007) 234 ALR 148; 81 ALJR 933. In 1999 Cornwell commenced proceedings asserting that the Commonwealth was vicariously liable for the advice given to him by an employee in 1965 which, by relying upon the advice, had meant that he had 'lost the opportunity of joining the Commonwealth Superannuation Fund on and from ... 1965 and in consequence upon his retirement on 31 December 1994 received a lesser benefit than that which he would have received had he been admitted to the Fund on and from ... 1965'. The High Court determined that the claim was not statute barred. A similar issue could have arisen if Cornwell had made a will in 1965 and died in 1994. In *Estate of Hordern*, even though most of the file was destroyed 'in the ordinary course after seven years', some were retained 'because of their importance to the question of the deceased's testamentary capacity'. There is much to be commended about this approach.

Hobhouse v Macarthur Ondow; Phillips v Phillips and Roche v Roche remind us of the reason for making contemporaneous file notes. *Hookway v Hookway* and *Commonwealth v Cornwell* point to the need to keep them indefinitely. **LSJ**