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Essential validity of wills: the free and capable testator

BY **DARRYL BROWNE** - MAY 08, 2026 8:00 AM AEST

SNAPSHOT

- To be valid, a will must be made by a free and capable testator.
- This article, the first in a two-part series, considers that requirement by reference to testamentary capacity, including the presumption arising from formal validity and rationality.
- It also highlights the critical role of solicitors in assessing capacity and recording will-making instructions.

The essential validity of a will turns on whether it represents the last will of a free and capable testator. That issue is conventionally analysed by reference to four subsidiary issues, including testamentary capacity. Recent decisions illustrate how courts approach the inquiry and the role played by those involved in the will-making process.

What does free and capable testator mean?

In *Re Estate of Ahmed Abou-Khalid* [2024] NSWSC 253 (Lindsay J), the Court stated:

‘The ultimate question for the Court in assessment of the [essential] validity of a will is whether it represents the last will of the deceased as a free and capable testator. That question is conventionally (and logically) analysed by reference to four main, subsidiary questions. First, whether at the time the will was made the testator had “testamentary capacity”; secondly, whether the will was made with the testator’s “knowledge and approval” of its contents (that is, intentionally and knowingly); thirdly, whether the testator’s execution of the will was obtained by an exercise of “undue influence” (generally meaning “coercion”) on the part of an identified individual or individuals; and, fourthly, whether the testator’s execution of the will was obtained by the “fraud” of an identified individual or individuals’ (at [187]).

Each of these four main, subsidiary issues: testamentary capacity, knowledge and approval, testamentary undue influence, and testamentary fraud are distinct. Each has been considered in one or more significant recent decisions. These are discussed in this article.

Ecclesiastical law is different

Because the law relating to wills developed separately from the common law and equity (*Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 (Lindsay J)), often different legal principles apply to wills than apply to other legal actions. An example is the test for mental capacity to make a will (called testamentary capacity). It has been the law since at least 1572 that a valid will can be made only by a person of sound mind (*Marquess of Winchester’s Case* (1598) 6 Co Rep 23a; 77 ER 287), but, developed separately, the test for testamentary capacity became more specific than exists with other legal actions. In 1870, the test was settled in *Banks v Goodfellow* (1870) LR 5 QB 549 (*‘Banks v Goodfellow’*).

Another example is that there is a rebuttable presumption that a person of ‘full age’ has mental capacity with all transactions (*BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 44 (*‘BIF23’*) at [37] per Gordon A-CJ, Edelman and Steward JJ) except a will. This means that someone asserting a lack of mental capacity has the burden of proving that assertion (*Szozda v Szozda* [2010] NSWSC 804 by reference to *Attorney-General v Parnter* (1792) 3 Bro CC 441; (1792) 29 ER 632). However, there is no presumption of testamentary capacity unless it is proved that the will is formally valid (which means it complies with section 6 of the *Succession Act 2006* (NSW)) and rational.

The other subsidiary issues also reveal differences between common law and equitable principles, as well as ecclesiastical principles. These are discussed in the second part of this article published next month.

Testamentary capacity

The test for testamentary capacity settled in *Banks v Goodfellow* is often now expressed in more contemporary language. In *Read v Carmody* [1998] NSWCA 182 (Powell JA; Meagher and Stern JJA agreeing), the test was stated as follows:

‘[The matters that the court is required to consider when determining whether the deceased had testamentary capacity] have, over the years, been expressed in varying forms and in differing language, but all formulations seem agreed that “testamentary capacity” encompasses the following concepts:

1. that the testator... is aware, and appreciates the significance, of the act in the law which he – or she – is about to embark upon;
2. that the testator... is aware, at least in general terms, of the nature, and extent, and value, of the estate over which he – or she – has a disposing power;
3. that the testator... is aware of those [who]... may reasonably be thought to have a claim upon his – or her – testamentary bounty, and the basis for, and nature of, the claims of such persons;
4. that the testator... has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons’.

This test (**‘the Banks formulation’**), and the presumption of testamentary capacity arising from the will being formally valid and rational, were considered in the recent decisions of *McInerney v D’Ortenzio (Formerly O’Dea)* [2026] SASCA 7 (Livesey P and David JA; S Doyle JA writing separately in relation to when a will is rational but otherwise agreeing) (**‘McInerney’**); *Wenzler v Chahine* [2026] VSCA 10 (Emerton P, Richards and Kenny JJA) (**‘Wenzler’**) and *Guamani v Guamani* [2026] NSWSC 14 (Kunc J) (**‘Guamani’**).

McInerney

McInerney involved the essential validity of wills made by Shirley O’Dea in December 2018 and January 2019 (**‘the disputed wills’**) – they were identical except the earlier will had ‘Draft’ stamped on it. The disputed wills were properly executed but the Court found they were not rational. The trial judge found the presumption of testamentary capacity did not apply and the person propounding the disputed wills had not established testamentary capacity. Satisfaction of the second and third elements of the *Banks* formulation was disputed and not established.

The Court of Appeal observed that an overview of the whole evidence:

‘showed that an elderly woman [94-95] with increasing physical and cognitive impairments made very radical changes to the testamentary intentions reflected in her many previous wills, particularly the will made on 15 February 2018. On the findings made by the trial Judge, the changes reflected in the [disputed wills] were not adequately explained, they benefited the appellant, and they occurred in a context where the appellant maintained an inappropriately close level of involvement in the will-making process’ (at [168])

The Court accepted that persons who are elderly and physically infirm may still possess testamentary capacity. The disputed wills were formally valid. The main focus was on whether the disputed wills were rational.

Were the disputed wills rational?

In the Court’s view, the circumstances which raised the issue of rationality were the unexplained and substantial change in the testator’s testamentary intentions in the disputed wills, and the appellant’s involvement in the making of the disputed wills where he stood to gain from the changes.

As to the first circumstance, the testator had made wills at various times between 2001 and February 2018, gifting most of her farmland to the Catholic Church Endowment Society Inc with a parcel to a good friend, Harold Lane. In the disputed wills, the testator gave most of her farmland to the appellant, James McInerney, who was a friend.

Writing separately, S Doyle JA agreed that the foregoing factors were relevant to determining whether the will was rational but contrasted this broader, flexible approach to a narrower approach to determining this issue. The narrower approach confined the court’s consideration to the face of the will. This involved an assessment of whether the will was worded in intelligible English, and the gifts made grammatical and legal sense, for the purpose of determining whether the presumption of testamentary capacity was displaced.

When courts require evidence of testamentary capacity because the death certificate discloses dementia when the testator made the will, notwithstanding that the will is rational on its face (as occurred in *Re Macpherson* [2022] QSC 20), this is an application of the broader approach.

Task specific

It is commonly stated that the mental capacity to make a will or take other legal action is task, time and content specific (*BIF23* at [86] per Jagot and Beech-Jones JJ). Accordingly, the fact that the testator in *McInerney* had taken other legal action in the two weeks before making the January 2019 will – she signed a respite agreement, and made an advance care directive and enduring power of attorney – and her mental capacity to do so was not disputed, did not mean she possessed testamentary capacity to make the disputed wills.

The importance of a solicitor's evidence

It is often said, as it was in *Guamani*:

‘In many testamentary capacity cases, the evidence of a solicitor experienced in wills and estates who prepared and attended upon the execution of the doubtful will can be of critical importance’ (at [115]).

However, in both *McInerney* and *Guamani* the solicitors’ evidence of their respective client’s testamentary capacity was not accepted. In *McInerney*, this was because the solicitor did not provide independent advice and his dealings with the testator ‘in relation to the making of her wills fell well short of performing the duties he owed to her’ (at [242]). For instance, he did not undertake any testing of her testamentary capacity.

In *Guamani*, where the second element of the *Banks* formulation (being knowledge of the testator’s estate) and the fourth element (namely, weighing claims) were not satisfied, the Court disregarded the solicitor’s evidence, finding it ‘of very limited assistance’ (at [115]). The solicitor gave evidence of his ‘usual practice’ but the Court considered that evidence had no probative value as the events leading to the death-bed execution of the will were ‘far from usual circumstances’ (at [143]).

These observations can be contrasted with those made in *Wenzler*. In that case, there were duelling contemporaneous medical opinions, and the evidence of the ‘very experienced’ (i.e. 42 years practising) solicitor who prepared the will and the absence of anything irrational about the changes to previous wills was important in concluding that the challenge to the third element of the *Banks* formulation was not successful. The Court of Appeal commented:

‘There was nothing inexpert or even hurried about the process that [the solicitor] put in place to ensure that he understood and gave effect to [the testator’s] instructions for her will. As might be expected of an experienced solicitor, [the solicitor’s] notes of [the testator’s] instructions on 8 and 23 May 2018 were very clear. They included a statement of [the testator’s] reasons for removing [some of] her nephews... from her will and bequeathing a smaller amount than in the previous will to [another nephew]. [The solicitor’s] notes of the 23 May 2018 also recorded [the testator] as saying that the [neighbour] “has been her friend and confidant for many, many years and helped her with many aspects of her life”. [The solicitor’s] notes also recorded [the testator’s] description of the [neighbour] as a “very dear and trusted friend”’ (at [126]).

The solicitor was aware of the testator’s low English language proficiency and read the testator the contents of her last will, the 2018 will, before she executed it. The Court felt that little turned on the solicitor not being aware of an adverse mental capacity assessment made by a neuropsychologist two months earlier nor the possibility of the testator’s statements about her family being incorrect. It said:

‘It may well be that [the testator] was entirely mistaken in her opinion about the [nephew]. This said, even if mistaken, it should be accepted that... her reasons were not in and of themselves evidence of cognitive or testamentary incapacity. Even if she were mistaken about the [nephew], her mistake did not, without more, establish her inability to “evaluate and discriminate between the respective strengths of those who had a claim upon her bounty”... it was clear that, by her bequests, [the testator] sought to confer the greatest benefits on the people who in her opinion had given her the greatest care. There was nothing irrational in so doing’ (at [144])’

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