The importance of appreciating the claim on the testamentary capacity

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Summary

In the recent case of *West v Smith*[1], the Supreme Court of Western Australia held that a regularly executed will for a $1.5 million estate was invalid because the testator lacked mental capacity. The case illustrates the importance of gaining a thorough understanding of testators when preparing their will and identifying who may reasonably have a claim on the estate.

Mental capacity in making wills

A testator must have sufficient mental capacity in order to make a valid will. The elements for proving mental capacity come from the English case *Banks v Goodfellow*[2] and require that the testator must:[3]

- understand the nature of making the will and its effects;
- understand the extent of her estate;
- comprehend and appreciate the claim on her testamentary bounty;
- not have any insane delusions (or lucid intervals).

The test for mental capacity does not necessarily require a positive finding that the testator suffered from an insane delusion.[4] For example, a valid will also requires that the testator had the mental capacity to comprehend and appreciate the claim on her bounty.[5] Ultimately in *West v Smith*, it was the testator's failure to rationally judge her son's claim to the bounty which invalidated the will.

Diane and her son Nathan

Diane was born in March 1938. She had two sisters. In 1947, Diane's father died. In 1960, Diane married Noel and in 1962 gave birth to her only child, a son called Nathan. Noel and Diane separated in October 1982 and later divorced. Nathan lived in the same home as Diane in Perth until early 1984. On 25 April 1992, Diane's mother passed away.

Across 1981-1982, Nathan obtained a certificate in civil engineering at Wembley Technical College. In 1983, Nathan attempted to gain a diploma in civil engineering but dropped out because he could not afford this course.

Around 1983 to 1984, Nathan became increasingly unhappy living with his mother owing to her irrational conduct towards him. This culminated in a friend of Diane's physically assaulting Nathan in early 1984 with Diane "apparently not at all concerned."

Nathan moved out shortly after and started working in the Pilbara region of Western Australia. He attempted to visit his mother when on annual leave. However, Diane would either not allow Nathan inside the house or would not answer the door even if she was inside. Diane also rebuffed Nathan's efforts to introduce his young family to Diane when he moved back to Perth in 1999.

Diane and her father

There was substantial and unchallenged trial evidence that Diane believed that she was regularly 'hearing' from her dead father. That evidence included:

- Diane often saying to Nathan from when he was five "my father's not happy with you" and also telling him that "she could communicate with the 'other side'."

- Following her separation, Diane more frequently telling Nathan that "my father's not happy with you" and talking more and more as though she had been speaking with her father.
- Diane saying on one of Nathan's visits to her after moving out "my Dad told me that you are not to be trusted".
- Letters in 1992 from Diane to her sister, Rosemary, concerning their mother's will.
- An advice 'from Dad' dated 13 September 1992 concerning the funeral of Diane's mother that stated "my Father and a largish built lady were standing together when the coffin was lowered into the grave".

On top of this, the Court accepted expert psychiatric evidence that in all probability, Diane had psychotic symptoms in the early 1990s.

Diane's will and estate

Diane made her will on 27 April 1993. She left nothing to Nathan. Her will though did have a specific clause explaining why she decided to exclude Nathan as follows:

> I specifically do not want my son Nathan Guy Smith to receive any benefit from my estate. I record that I maintained him and paid for his tertiary education at Wembley Technical College for 2 ½ years while his father and I were separated and immediately after he received the benefit of the said education he left my household and has given me no support of any nature since then.

Instead, Diane named Mr James Bowe West her residuary beneficiary. Further, she appointed James' father, Mr Bruce West as her executor. The will was regularly executed with a solicitor and legal secretary witnessing it. At trial, the solicitor deposed that he had no memory of Diane and that he believed that her file had been destroyed.

Diane died on 11 October 2014 leaving a significant estate worth approximately $1.5 million. The gift of the residuary estate came as perhaps a surprise, given James "had never met or even heard of a Diane Smith in his life prior to October 2014." It emerged though that following Diane's divorce, "Bruce and Diane had gone out on a date or two together at some time."

Outcome

The Court found that Diane's will was the product of a mental disorder suffered by Diane. Therefore, Diane lacked mental capacity when she made her will "particularly as regards her rationally assessing the position of her only child as a possible beneficiary under her will."

It followed that Diane's will was invalid. The Court therefore refused James' action for a grant of probate in solemn form and granted letters of administration in favour of Nathan. Consequently, Diane's estate was intestate and Nathan was entitled to all of it.

Lessons

Given the weight of essentially unopposed evidence in this case, it was completely understandable that the Court determined that Diane lacked mental capacity in making her will.

Ordinarily, evidence affirming mental capacity from the lawyer preparing the will and the testator's medical practitioner at the time of executing the will would have particular value. In this case though there was no such evidence. Indeed, the evidence from the witnessing lawyer suggested that he may not have doubted Diane's capacity. This is because while he had no memory of the deceased, he also believed that he would likely remember if he had doubts about Diane's mental capacity.

Nonetheless, the relationships to Diane of the people included and excluded in her will were a significant 'red flag'. As Diane's only child, Nathan had an obvious claim on her estate. James in contrast virtually had no moral claim because he never knew Diane.

Diane's instructions for excluding Nathan, as evidenced by the specific clause in the will, were also a concern. The Court found that this clause as a matter of substance was wrong in many respects.

Invalidating a will because a testator does not appreciate the claim on her testamentary bounty is quite extraordinary. It is more usual for the testator to appreciate the claim but deliberately exclude a person to whom she owes a moral obligation. That can lead to a very different yet also significant risk – a family provision claim.

It is therefore essential that the testator and the will drafter fully canvass who may have a moral claim on the estate. If the testator wishes to exclude a person with a strong claim, factual notes should be recorded and kept separately with the will. Those notes may help corroborate that the testator had mental capacity at the time of making the will. Although one cannot prevent a family provision claim being made, those notes would also provide evidence against claimants.

[1] *West v Smith* [2018] WASC 12 (17 January 2018).
[2] *Banks v Goodfellow* (1870) LR 5 QB 549.
[3] G E Dal Pont and K F Mackie, *The Law of Succession* (LexisNexis Butterworths, Australia, 2013) 38-42.
[4] *Easter v Griffith* (1995) 217 ALR 284.
[5] *Easter v Griffith* (1995) 217 ALR 284.

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