Rise in Contested Wills

Scammell v Farmer (2008)

This recent case discusses the applicability of the test for capacity contained in the Mental Capacity Act 2005 to the capacity of a testator (person making) of a Will.

The case concerned a testator who was diagnosed with early onset Alzheimer's Disease in September 2001, for which she was prescribed (and took) medication. She was diagnosed with cancer of the oesophagus in April 2003, from which she died in July 2003.

The testator's daughter was the main beneficiary under the disputed Will, which replaced a Will, made in 1995. The earlier Will left the majority of the estate to the testator's two granddaughters who were the claimants in this action.

The main part of the estate was comprised of a property, which the daughter had given to her mother several years previously (the daughter was wealthy and owned a number of properties). Upon her discovery of the 1995 Will, leaving this property to the grandchildren, the daughter expressed her disappointment and asked her mother to reconsider her Will.

At first her mother refused to do so but eventually she changed her mind and the daughter made an appointment with a solicitor.

The effect of the new Will was that, instead of the house (which by 2003 had increased in value to some £165,000) being divided equally between the granddaughters, they were now to share only £4,000! Unsurprisingly they challenged the Will on the basis that their grandmother lacked capacity when the new Will was made in 2003.

The first question raised, was whether an assessment of capacity to make a Will should proceed under common law principles or under the Mental Capacity Act 2005.

Much of current law is based on centuries old "case law" and there was agreement between counsel that the test of mental capacity in section 3 of the Act is a modern restatement of the test propounded in Banks v Goodfellow 1870.

The judge pointed out that there was an obvious difference between the two (Banks v Goodfellow and the Mental Capacity Act 2005) in that the onus of proving capacity under the Act is on the complainant. At common law the position is different.

The judge referred to paragraphs 4.31 to 4.33 of the Code of Practice relating to the Act, the latter paragraph actually states that when cases concerning a testator's capacity to make a Will come before the court "judges can adopt the new definition if they think it is appropriate".

The judge did not think it appropriate to decide this case under the Act and concluded that the question of whether or not a particular testator had capacity when a Will was made does not fall within the scope of the Mental Capacity Act 2005, instead it should be determined under the existing common law principles.

He did hint however that this was because the case involved a death in 2003 and should rightly have been concluded before the provisions of the Act came into force. To apply the Act in this case would effectively give it retrospective effect.

The granddaughters claim was ultimately dismissed when the judge found that the testator was capable of making a will on 21st January 2003 and was not coerced by her daughter into making the provisions she made.

The Independent reported in January 2008 that the number of families contesting a relative's Will has risen by 200% since 2004.

This follows a number of high profile cases reaching the news such as the farm labourer who inherited a £2.3 million farm estate after a 2-year battle and the woman who left her £10 million fortune to her favorite restaurant.

While most documents are contested for being unfair or for not making suitable provisions for family more claims are being made for an alleged lack of testamentary capacity or undue pressure.

The former is largely down to people being better informed about their right to make a claim under the Inheritance Act, the growing value of estates and the recent high profile cases.

It may be that people are unaware that their Will could trigger litigation, or that they are unaware certain people may be able to claim against their estate even if they have been excluded from the Will.

Many of our clients at the English Will Company have said that a key reason for making a Will was that they wanted to leave their estates "tidy and without leaving arguments / disputes behind them".

Therefore advice should be sought by all clients about this possibility from a professional so that they can weigh up the likelihood of a claim and the chance of it being successful, and to then take appropriate steps to avoid this potentially expensive and family divisive situation arising.