SUCCESSION LAW NOTES:

Studied Semester 2 2019

Topic 4 - Mental Requirements for Will Making

AGE

Rule: minors (-18) cannot make valid wills – s 5 Wills Act 1997

Exceptions:

- Minors can make (and alter/revoke) a will in **contemplation of marriage**
  - if marriage does not happen – will is of no effect – s 6 Wills Act 1997
- A **court may make an order authorising** a minor to make (or revoke) a will in specific terms– s 20 Wills Act 1997
  - This may be appropriate where:
    - The minor has significant assets
    - The circumstances are such that distribution in accordance with intestacy would be inappropriate
    - The minor may have a short life expectancy
  - Note: the minor must still have testamentary capacity *cf statutory wills*

TESTAMENTARY CAPACITY

- Testators must have sufficient mental capacity to make a valid will.
- Testamentary capacity requires that the testator have **sound mind, memory and understanding**.

Elements from *Banks v Goodfellow* test (in simple language)

1. Understand the nature and effect of a will
2. Understand the nature and extent of their property
3. Comprehend and appreciate the claims to which they ought to give effect
4. Be not suffering from any disorder of the mind or insane delusion that would result in a disposition that a sound mind would not have made

Australian courts also say it's a testator's capacity to:

- Remember (the relevant property and those who have claims upon it)
- Reflect (so as to consult on the relative weight of the claims) and
- Reason.

Note: they don't have to have actually done these things, they just have to have had capacity to.

- Question of fact
- Legal test not a medical test

Particular circumstances:

- **Old age or infirmity** → not by themselves sufficient to establish a want of mental capacity (although they may "excite the vigilance of the court")
  - *Age, illness, feebleness, eccentricity, partial unsoundness of mind will not necessarily be sufficient to deprive testator of capacity* – Kirby in *Re Estate of Griffith* (1995)
- **Suicide**→ does NOT support a presumption of mental incapacity
- **Bereavement** → may cause affective disorder - *Re Key* [2010]

ELEMENT 1: UNDERSTANDING OF NATURE AND EFFECTS OF ACT

Sufficient to prove that the testator understood <u>they were making a will</u> with the requisite knowledge and approval.

- Not necessary to show that the testator was capable of understanding each and every clause of the will.

ELEMENT 2: AWARENESS OF THE NATURE, EXTENT AND VALUE OF THE ESTATE

- Only need a <u>general knowledge</u> of the nature of the testator's property – don't need to know every item or value
  - *Kerr v Badran* [2004] NSWSC 735 → Differences between life in 1870 (*Banks v Goodfellow time)* and 1995 → More assets, more complicated assets, increased life expectancy, more dementia

ELEMENT 3: COMPREHENSION AND APPRECIATION OF CLAIMS ON TESTATOR'S BOUNTY

- Note the tension between testamentary freedom AND capacity to evaluate/discriminate between claims.

If testator does not provide for someone who had a moral claim on the testator, ask whether it's because:

1. The testator was unable to comprehend and appreciate the claim,
    - *Through metal illness or delusion for example*

    OR
2. The testator was simply exercising testamentary freedom to exclude that person
    - *Perhaps because of eccentricity, spite or capriciousness, or preference for other claimants.*

WHEN IS CAPACITY REQUIRED?

Normally testator requires testamentary capacity at **time of execution off the will**

Exception: Rule in *Parker v Felgrate*

- Will can be admitted to probate if the testator had **capacity when giving the lawyer instructions**, but lost it by the time the will was executed.
    - BUT will must conform to instructions and there is a real danger when the instructions are communicated through an intermediary.

PROVING LACK OF CAPACITY

Where the will is rational on its face and duly executed = presumption of capacity

Evidence to the contrary shifts burden to the propounder to show that any delusions testator had did *not* affect the provisions of the will propounded – *Bull v Fulton* (1942)

- Standard of proof: balance of probabilities (Kirby in *Re Estate of Griffith* (1995))

Golden rule for solicitors: when testator aged, or seriously ill, solicitor should arrange for medical practitioner to confirm testator's capacity and understanding: *Re Key* [2010] 1 WLR 2020

- This was a significant factor in finding capacity in *Re Estate of Joyce Helen Greer* [2019]
    - More had disinherited one of her sons because she didn't like his partner – Celeste. Called her French prostitute and would randomly call people they knew to complain about her.

Examples: LACK testamentary capacity	**Examples: HAVE testamentary capacity:**
Timbury v Coffey (1941) - alcoholic wrongly believed wife was cheating and changed will to exclude her - testator did not have testamentary capacity for new will *Bull v Fulton* (1942) - changed her will due to deluded belief that nephews (solicitors) had forged her signature - will was invalid → the delusion had a 'direct bearing on the provisions of the will' in deciding to exclude the nephews *Re Estate of Griffith* (1995) - NSW Court of Appeal – so quite authoritative - Original will left everything to her son – she then made 5 more which all excluded him. - In that period, he had lived with her to look after him after her husband died. He had to leave several times due to her conduct (including threatening him with a knife). She disliked his religion and profession. - Held she was unable to consider his claims upon her bounty. She lacked capacity for all wills that excluded him.	*Re Estate of Joyce Helen Greer* [2019] - relied heavily on contemporaneous medical examination ordered by solicitor who knew it was dodgy making a new will late in life disinheriting one of her sons. Kirby's dissent in *Re Estate of Griffith* (1995) - Gave primacy to the principle of freedom of testation - Where capacity is in issue, onus is on person propounding the will, but also evidentiary onus to displace presumption from due execution - Sanity is presumed unless contrary is shown

Flynn v Roccisano [2004] VSC 346 - Daughter excluded from mother's will - mother was schizophrenic and had auditory hallucinations - Will invalid – distributed on intestacy *Re Key* [2010] 1 WLR 2020 - Original will left most things to sons (rather than daughters) - Radically new will made a week after wife's death (splits things quite equally between the 4) - incapacity caused by bereavement *Re Menzies* [2019] VSC 179 - Testator made a few wills over a couple of days in hospital - McMillan not prepared to infer that his capacity remained unchanged over 5 days - Granted probate of the earliest will, when capacity was confirmed.	- Courts must steadfastly resist the temptation to rewrite the wills of testators which they regard as unfair, unwise or harsh

SEVERANCE

If part of a will is effected by a lack of testamentary capacity, can you just sever that part?

- Yes → *Estate of Bohrmann* [1938] All ER 271
- No → *Woodhead v Perpetual Trustee* (1987) 11 NSWLR 267 ← for our purposes follow this one

Estate of Bohrmann [1938] ← English case
- Will made in 1936. 4 subsequent codicils.
- He was a strange man, apparently 'devoid of ordinary sentiments of affection of mankind' and suffered delusions he was being persecuted by London City Council.
- Last codicil contained clause 2 that a gift made to charities should be read as if the word England had been deleted, and United States was there instead.
- Cousins challenged validity of the will

Application to invalidate the whole will rejected.
- Judge found that that clause in the codicil was caused by his delusion regarding the London City Council – severed that part from the grant of probate.

Woodhead v Perpetual Trustee (1987) ←Australian case
- Elderly testator's will left everything to her sister with gift over to granddaughter
- Her sister lived in Ireland and they hadn't had any contact in over 30 years.
- Testator suffered delusions including that she'd recently seen her sister on a motorbike in Sydney (even though sister had never been to Australia) and that sister had ugly dwarf children.
- Other than these delusions, elderly testator was normal. Her treating GP said he didn't know of anything that would suggest she wasn't of sound mind.

Argument:
- granddaughter argued these delusions impacted the testamentary dispositions to sister (by bringing sister to testator's mind, and making her think that they were close in proximity). Argued gift should be severed, but that the giftover to granddaughter should remain.
  - Didn't want to argue that whole will was invalid – because then sister would inherit anyway under intestacy.
- Plaintiff argued (relying on Bohrmann) that court should remove the part that was affected by the insane delusion and leave the balance undisturbed – judge declined to follow Bohrmann

Held: testator didn't have capacity – declined to follow Bohrmann
- *If the will maker suffers from an insane delusion which affects the disposition of his property, then it seems to follow that he is not a competent testator.*
- The existence of an insane delusion is not necessarily a barrier to testamentary capacity.
  - The question is whether such delusion exercises any influence on the particular disposition → held that these delusions affected testatrix's mind.