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Article Information

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Confused and vague – did the Willmaker lack testamentary capacity?

This recent case of the Supreme Court of South Australia concerned an application to admit a Will in solemn form: Docking v Schwarzkopf [2015] SASC 18 (13 February 2015)

This recent case of the Supreme Court of South Australia concerned an application to admit a Will in solemn form. The plaintiff sought to have the Court pronounce against the force and validity of the deceased's last Will in favour of a previous Will. The plaintiff submitted that the deceased lacked testamentary capacity due to mental illness at the time of making and executing the last Will.

Facts

Albert Docking (deceased) died on 2 August 2009, aged 92 years old. The deceased's wife died in about 1985. Graeme Docking (the plaintiff) was the nephew of the deceased. The plaintiff and the deceased would speak on the phone regularly and the plaintiff and his wife would visit the deceased whenever they were in Adelaide.

On 27 April 1989, the deceased made and duly executed a Will appointing the plaintiff as the sole executor of his estate (the 1989 Will). The 1989 Will made specific bequest of photographs to the plaintiff and a motor vehicle to the deceased's brother, Ralph Docking. The residue of the estate was to be divided equally between the plaintiff and Mark Packer under the 1989 Will.

On 19 June 2007, the deceased made and duly executed a new Will (the 2007 Will) purporting to revoke all former Wills and testamentary dispositions. The 2007 Will appointed another nephew of the deceased, Michael Schwarzkopf (the defendant) as sole executor of his estate. Under the 2007 Will the deceased bequeathed the whole of his estate to the defendant providing that if the defendant predeceased him, then his whole estate was to go to the defendant's daughter.

The plaintiff sought to have the Court pronounce against the force and validity of the 2007 Will on the basis that the deceased lacked testamentary capacity due to dementia at the time he made and executed the document. The plaintiff also sought to have the 1989 Will admitted to probate in solemn form. The defendant did not participate in the trial of the action and the matter proceeded in his absence.

In his evidence, the plaintiff described several occasions, beginning in about 2005, on which the deceased appeared "confused and vague". This was supported by evidence from a clinical neuropsychologist, Dr Field who had assessed the deceased at the request of the Guardianship Board (Board) on 19 October 2007. Dr Field was asked by the Board to determine:

- whether the deceased had mental capacity within the meaning of section 3 of the *Guardianship and Administration Act 1993* (SA) (the Act)
- whether the deceased had testamentary capacity in June 2007
- whether the deceased had testamentary capacity on 10 September 2007 to enable him to enter into an Enduring Power of Guardianship in favour of the defendant.

Dr Field concluded from his assessment that "the deceased showed evidence of significant cognitive deficit consistent with an established dementia" that had been present for a considerable time, he suffered a mental incapacity as defined in section 3 of the Act and lacked testamentary capacity at the time of making and executing the 2007 Will.

Outcome and Principles

The sole issue in these proceedings was testamentary capacity. Justice Stanley referred to Chief Justice Cockburn's judgment in *Banks v Goodfellow* as the starting point for the consideration of testamentary capacity. In that judgment Chief Justice Cockburn had said:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect…

Justice Stanley noted that the mere existence of a mental illness does not necessarily mean that the willmaker lacks testamentary capacity. If, the willmaker retains sufficient intelligence to understand and appreciate the significance and effect of a testamentary act a Will will not be invalidated due to lack of testamentary capacity.

The 2007 Will was executed in accordance with the formalities under the *Wills Act 1936* (SA). As such, the presumption is that, in the absence of evidence to the contrary, the deceased had the requisite testamentary capacity at the time of making and executing the 2007 Will. However, Justice Stanley was persuaded there was evidence to the contrary which established that the deceased lacked testamentary capacity at the time of making the 2007 Will.

The 1989 Will had been duly executed and also benefited from the presumption that the deceased had the requisite testamentary capacity at the time.

In the circumstances, the Court made orders pronouncing in favour of the force and validity of the 1989 Will and against the 2007 Will.