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THE LAW OF CAPACITY: SOME KEY PRINCIPLES

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Introduction

1. In this talk, I consider some key issues relating to the law of capacity which practitioners dealing with an individual's property and affairs may come across.² I also wish to consider the question of what happens when a person (P) has lost capacity to manage their property and affairs. In particular, I will offer some comment on the new Gibraltar Mental Health Act 2016, which significantly reforms Gibraltar law in relation to the property and affairs of persons lacking capacity. Although I understand that this Act has not yet come into operation³, when it does so many of the provisions regarding the property and affairs of a person lacking capacity will be drawn from the English Mental Capacity Act 2005. There is therefore significant insight to be drawn from the English case law applying the 2005 Act.

Capacity is issue/ decision specific

2. The first, and most important point about English law relating to capacity is that it is decision-specific and (very largely) time-specific. Historically the English courts have applied common law tests for capacity to do certain acts or take certain decisions, which need to be satisfied at the material time. Some of the key cases for private client practitioners are as follows:

¹ I am indebted to Penelope Reed QC and David Rees QC of 5 Stone Buildings for their assistance with this talk, which draws on some previous talks they have given.

² I do not in this talk consider capacity issues relating to personal welfare (e.g. capacity to marry, to have sexual relations), which is a topic all of its own.

³ Section 1 (2) states that it comes into operation on the day appointed by the Minister by notice in the Gazette. In an exchange of emails with the Laws of Gibraltar website which publishes the statutory provisions in force on the internet, they informed me that the Act is not yet in force. There is some indication that training has already been provided on the Act earlier this year in preparation for its implementation: <http://chronicle.gi/2017/02/specialist-training-on-mental-health-act/>.

2.1. *Banks v Goodfellow* (1870) LR 5 QB 549; *Perrins v Holland* [2011] Ch. 270 (capacity to make a will);

2.2. *Re Beaney* [1978] 2 All E.R. 595; *Singellos v Singellos* [2011] Ch. 324 (Capacity to make a gift, including into a settlement)

2.3. *Masterman-Lister v Brutton & Co (Nos 1 & 2)* [2003] 1 WLR 1511; *Dunhill v Burgin* [2014] UKSC 18 (capacity to litigate).

3. As we will see, the English Mental Capacity Act 2005 (ss. 1-3) follows this approach when it comes to the question of deciding whether P lacks capacity, and therefore as to whether the Court of Protection has the power to step in and take a decision on behalf of a person or to appoint a person (a receiver⁴/deputy) to take decisions on behalf of P. The focus is on the individual decision in question and whether P has the necessary functional ability to take it at the material time. The same wording has been used in sections 86-88 of the Gibraltar Mental Health Act 2016, and so I will consider this test in detail later.

Testamentary capacity

4. The test here is that which was set out by Cockburn CJ in a very old decision, *Banks v Goodfellow*⁵.

5. Cockburn CJ formulated the test in this way:-

A testator:-

- (1) Needs to have capacity to understand that he is making a will, and that it will have the effect of carrying out his wishes on death;
- (2) He must be able to understand the extent of the property he is disposing of;

⁴ Currently under Gibraltar law a receiver will be appointed, but such appointees are due to be renamed deputies under the new legislation, as they were in England following the passage of the Mental Capacity Act 2005.

⁵ *Banks v Goodfellow* (1870) LR 5 QB 549 at 565

- (3) He must recall those who have claims on him and understand the nature of those claims⁶ so that he can both include and exclude beneficiaries from the will; and, with a view to the latter object
 - (4) No disorder of the mind should poison his affections, pervert his sense of right or prevent the exercise of his natural faculties and no insane delusions should influence his will or poison his mind.
6. In its recent consultation paper on reforming the law of wills, *Making a Will*, the Law Commission has recited criticisms of the archaic language of the test and the fact that it does not reflect modern medical understandings of capacity.⁷
 7. One point which must never be forgotten is the fact that the Court is looking for capacity to understand the above matters, not proof of actual understanding⁸. So the focus is on the level of functioning which P has to carry out the tasks required, not on whether he actually carried them out. However, of course, evidence showing that P was not in fact actually able to carry out those tasks is often relevant.
 8. The law regarding the burden of proof in probate disputes where capacity issues are raised is noteworthy and also contrasts, as we will see, with the approach under the Mental Capacity Act 2005. In *Key v Key*⁹, Briggs J (as he then was) held as follows:-

The burden of proof in relation to testamentary capacity is subject to the following rules:

- (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.
- (ii) In such case the evidential burden then shifts to the objector to raise a real doubt about capacity.

⁶ *Boughton v Knight* (1873) 3 P & D 64

⁷ See these and other problems with the test identified at page 26 onwards of the consultation paper.

⁸ *Hoff v Atherton* [2004] EWCA Civ 1554; [2005] WTLR 99

⁹ *Key v Key* [2010] EWHC 408 (Ch); [2010] 1 WLR 2020

- (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.

9. Practitioners who face the unenviable task of drafting wills for elderly testators or those who have suffered a serious illness, may also wish to note the so-called 'golden rule' - namely (*inter alia*) that the making of such a will ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding.¹⁰ Although failure to follow this rule does not render a will invalid, it can cause the draftsman to be the subject of serious criticism from the court in the event of a probate challenge.
10. When considering a possible challenge based on capacity, one needs to bear in mind the fact that serious mental illness may not be an impediment to the ability to make a will unless it has, at the material time, an effect on the testator's ability to fulfil the *Banks v Goodfellow* test. In *Vegetarian Society v Scott*¹¹ the fact that the testator was suffering from schizophrenia and logical thought disorder did not deprive him of testamentary capacity because capacity is so time and issue specific that the Court concluded he did have capacity to make his will at the time he did so and in that regard his thought processes were logical.
11. That said, the rule in *Parker v Felgate*¹² is somewhat of an anomaly here. This rule, which was confirmed in the Court of Appeal in *Perrins v Holland*¹³, allows a testator who has lost capacity to execute a valid will provided that at the time he gave instructions for the will he did have capacity and that at execution he knows he is making a will for which he has previously given instructions.

Capacity to make a gift

12. In *Re Beaney (Deceased)*¹⁴ Martin Nourse Q.C., sitting as a deputy judge of the High Court, set out the following criteria for capacity to make a gift:

¹⁰ *Re Simpson* (1977) 121 Sol Jo 224, better recorded at (1977) 127 NLJ 487

II Vegetarian Society v Scott [2013] EWHC 4097 (Ch); [2014] W.L.R. 525

¹² *Parker v Felgate* (1883) LR8P.D.171

¹³ [2011] Ch. 270

¹⁴ [1978] 1 WLR 770.

"The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of."

13. Even where the gift is not so extensive as to require the degree of understanding needed for a will, the donor must be capable of understanding that he or she is making a gift and not, for example, transferring property to someone else simply to facilitate its sale.

14. In *Gorjat v Gorjat* [2010] EWHC 1537 (Ch), Sarah Asplin QC (as she then was) considered the nature of the burden of proof in gift cases. The Judge held that the burden of proving lack of mental capacity lies on the person alleging it. However, where the claimant is able to make out a case on capacity to a sufficient degree to call into question the validity of the transaction in question, the evidential burden shifts to the defendant to prove that the person had capacity.

15. In the decision of *Singellos v Singellos* [2011] Ch. 324, the High Court held that rule in *Parker v Felgate* (see above) can also apply to lifetime dispositions.

What happens if a person loses capacity to make a will, make gifts, or to manage their property and affairs?

16. When P loses capacity, it is at this point that the powers of the Court of Protection are engaged both in England & Wales and in Gibraltar.

17. The current Gibraltar Mental Health Act 1968, as amended, sets out the test for capacity in section 45. Section 45 provides that the functions of the Chief Justice with regard to a person's property and affairs are exercisable 'where, after considering medical evidence, he is satisfied that a person is incapable, by reason of mental

disorder, of managing and administering his property and affairs.’ Notably this is a test which focuses on P’s ability to administer his property and affairs as a whole, rather than individual decisions. It is in line with the pre-Mental Capacity Act 2005 position in England.

18. The Mental Health Act 2016 will mark an important shift in the manner in which capacity is determined for Court of Protection applications. Sections 86 to 88 replicate sections 1 to 3 of the Mental Capacity Act 2005.

19. Section 86 will begin by setting out various key principles:

The principles.

86.(1) The following principles apply for the purposes of this Part.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Part for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

20. Notable here in particular is the presumption that a person has capacity until it is established otherwise and the focus on assisting people in order that they may be able to take decisions where they would struggle on their own. The legislation also clearly establishes the distinction between decisions which are unwise and the inability to make decisions.

21. Section 87 (so far as material) goes on to set down the requirement that at the material time and in relation to the particular matter at hand, P must be unable to make the decision owing to a temporary or permanent impairment of or disturbance in the functioning of the mind:

People who lack capacity.

87.(1) For the purposes of this Part, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance; or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Part, any question whether a person lacks capacity within the meaning of this Part must be decided on the balance of probabilities.

22. So the key point to note here is that there are two elements to the test. There is a diagnostic test (the person must have an impairment of, or a disturbance in the functioning of, the mind or brain) and a functional test (as a result of that impairment the person must be unable to make a decision).

23. Section 88 then brings the focus even closer onto the decision in question and the type of mental functioning which is needed for it, in addition to the ability to communicate the decision:

Inability to make decisions

88.(1) For the purposes of section 87, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision;

(b) to retain that information;

(c) to use or weigh that information as part of the process of making the decision;
or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another; or

(b) failing to make the decision.

24. The English Court of Protection will, in borderline cases, analyse in quite granular detail whether or not P is able to deal with the four specific tasks outlined in the equivalent of section 88 (1). A good example is the recent decision of *London Borough of Barnet v SL* [2017] EWCOP 5. In that case, the court was considering whether or not SL had capacity to litigate in Court of Protection proceedings concerning an application for an order authorising a deprivation of her liberty resulting from her care regime. SL suffered from schizophrenia and obsessive compulsive disorder. Whilst it was held that she could understand the information relevant to the decisions to be taken in the litigation, and could communicate a decision, she could not retain, use or weigh the information relevant to the decision because her condition impaired her concentration and ability to reason. Very relevant to this finding was the complexity of the various potential outcomes of the proceedings and their consequences which SL needed to appreciate in order to take part. So again the particular nature of the decision involved and the way that P's illness will impact on the mental functioning required by section 88 (1) in relation to that decision is highly important. In practice this can mean that, for example, P may not have capacity to manage his or her property and affairs, but might have capacity to appoint someone to do this.

The common law tests: are they displaced by the Mental Capacity Act 2005?

25. One point of debate in England & Wales has been whether the test for capacity in the Mental Capacity Act 2005 has displaced the common law tests for testamentary capacity and capacity to make a gift. After some debate in previous cases, it was held

in *Re Walker* [2014] EWHC 71 (Ch) at High Court level that it had not in respect of testamentary capacity, and the same conclusion was reached in respect of lifetime transactions in *Kicks v Leigh* [2014] EWHC 3936. However, there has not been confirmation of this at appellate level. The Law Commission has suggested that its preferred option for reform of the test for testamentary capacity would be to replace the *Banks v Goodfellow* test with the test in the Mental Capacity Act 2005.¹⁵

Taking decisions once lack of capacity has been established: the new best interests test and scope of the new Mental Health Act

The powers of the Court of Protection under the Mental Health Act 2016

26. Section 68 of the Mental Health Act 2016 will set out the powers of the Court of Protection:

68.(1) The powers under section 65 extend in particular to—

(a) the control and management of P's property;

(b) the sale, exchange, charging, gift or other disposition of P's property;

(c) the acquisition of property in P's name or on P's behalf;

(d) the carrying on, on P's behalf, of any profession, trade or business;

(e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;

(f) the carrying out of any contract entered into by P;

(g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;

(h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;

(i) the execution for P of a will;

(j) the exercise of any power (including a power to consent) vested in P, whether beneficially or as trustee, or otherwise;

¹⁵ Para 2.65 of the Law Commission report.

(k) the conduct of legal proceedings in P's name or on P's behalf.

(2) No will may be made under subsection (1)(i) at a time when P has not reached 18.

(3) The powers under section 65 as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the Court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18.

27. This section contrasts in a number of respects with the list of the existing powers of the court set out under section 47 of the Mental Health Act 1968. Notably it explicitly allows the execution for P of a statutory will, whereas this is not mentioned in section 47 of the 1968 Act. The English Mental Health Act 1959, on which the Gibraltar legislation is based, did not allow for the authorisation of statutory wills.¹⁶ Careful consideration should be given in the future to the advantages that statutory wills may bring, including in situations where P has made a will of doubtful validity, has not made a will at all, or where there has been a significant change in circumstances since P made a will whilst he had capacity.

The best interests test

28. Prior to the implementation of the Mental Capacity Act 2005, English law adopted a 'substituted judgment' approach where decisions were being taken on behalf of P by the Court of Protection, where the goal was to determine what P would have done if he had capacity.

29. The principle in section 1 (5) of the Mental Capacity Act 2005 to the effect that a decision made on behalf of P must be made in his best interests marked a fundamental reform. This is now due to be implemented in the Mental Health Act 2016, with the best interests test being set out in more detail in section 89:

89.(1) In determining for the purposes of this Part, what is in a person's best interests, the person making the determination must not make it merely on the basis of—

¹⁶ This power was not conferred until 1970 - Section 103(1)(dd) MHA 1959 inserted by the [Administration of Justice Act 1969](#) with effect from January 1, 1970, later [s.96\(1\)\(e\) MHA 1983](#).

- (a) the person's age or appearance; or*
- (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
- (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
- (3) He must consider–*
- (a) whether it is likely that the person will at some time have capacity in relation to the matter in question; and*
- (b) if it appears likely that he will, when that is likely to be.*
- (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*
- (5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.*
- (6) He must consider, so far as is reasonably ascertainable–*
- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity);*
- (b) the beliefs and values that would be likely to influence his decision if he had capacity; and*
- (c) the other factors that he would be likely to consider if he were able to do so.*
- (7) He must take into account, if it is practicable and appropriate to consult them, the views of–*
- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind; and*
- (b) anyone engaged in caring for the person or interested in his welfare,*
- as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).*

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which are exercisable by a person under this Part where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the Court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

30. Essentially, the court is required to take an objective view of what is in P's best interests in light of all the relevant circumstances. The following points can be derived from the key English authorities, many of which concern statutory will or gift applications:¹⁷

- The principles applied in relation to cases under the MHA 1983 are no longer directly relevant to cases under the MCA 2005.
- The weight to be attached to the various factors set out in section 4 MCA 2005 will, inevitably, differ depending upon the individual circumstances of the particular case, and in any given case there may be one or more features or factors which are of "magnetic importance" in influencing or even determining the outcome.
- The wishes and feelings of the person in question (which are ex hypothesi the wishes and feelings of a person who lacks capacity to take the decision in question) form an important part of the picture, although the weight to be attached to them will be case and fact specific.
- Although the goal of the Court's inquiry is no longer to reconstruct what the person himself would have done were he to have capacity, this remains a factor which it is entitled to have regard to as part of the overall balance sheet when determining the person's best interests.

31. Certain judges have also suggested that it is important for the person in question to be remembered for having "done the right thing" by their will. However, often different parties will have a different idea of what is the 'right thing', and this point was recognised by Morgan J in *Re G (TJ)* [2010] EWHC 3005. Nevertheless, in a recent decision, the court held that this point can be of some relevance depending on the case: *Re JKS*.

¹⁷ *Re P* [2010] Ch 33; *Re M* [2011] 1 WLR 344; *Re D* [2012] Ch 57; *Re G(TJ)* [2011] WTLR 231.

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