COLLINS & MAY | LAW

NEWSLETTER

Vol 17, November 2019

TESTAMENTARY CAPACITY

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Often a change in circumstances will prompt you to take steps to make a Will or revisit an existing Will made years ago which is out of date, for example before having children.

If the reason someone wishes to revisit their Will is prompted by declining health, their capacity to make a Will must be considered.

In order to make a Will, the will-maker must have the requisite mental capacity for the Will to be valid. More often than not, this is relatively straight forward to determine. Issues can sometimes arise for example where a will-maker's health is declining.

In order to have the required capacity to make a Will, the will-maker must not only be of sound mind but they must also understand the contents of the Will and the moral obligations they owe to certain family members and potential claims that can be made against their estate.

For example if a will-maker wishes to change an earlier Will by removing a child from benefiting from their estate, they need to understand the effect of removing the child including the social expectation to provide for family members.

If there is ever cause to believe a will-maker may not understand the implications of signing a Will, it may be prudent to arrange for a doctor's visit so that a formal capacity assessment may be undertaken. It is important to provide the doctor with as much information as possible to assist them with their assessment.

A will-maker must know the property they will be disposing of, who will be receiving the property and how it is to be distributed.

The High Court decision of *Farn & Ors v Loosely* is the leading authority on testamentary capacity.

In that case Ms Slater died in 2014. She made 2 Wills, one in 2011 and one in 2014. The later Will was made 6 days before her death.

She was a widow and had no children.

In the 2011 Will she gave her estate equally to all four of her sisters' children and the child of her sister in law.

In the later Will she left all of her estate to the two children of her sister. She excluded the children of her other sister and the child of her sister-in-law.

The later Will was challenged on the grounds Ms Slater did not have testamentary capacity at the time she signed the later Will and therefore the earlier Will was valid.

The Court commented that it is not just the date the Will was signed that is relevant. If, when instructions were given by Ms Slater, she had testamentary capacity, the Will can be valid even though testamentary capacity had been lost by the time the Will was signed.

There was a discussion in the judgment where there is a significant change from an earlier Will and whether there needs to be an enquiry as to why Ms Slater made the change. If there was some factual background to support the change (ie. falling out with a family member) this would support that she had capacity. Likewise if there was no rationale for the change, this could indicate a lack of understanding.

The Court considered all of the circumstances when the Will was made in reaching a decision including meeting with the solicitor, the level of medication, the will-maker's health at the time the Will was signed and medical evidence. The Court's decision was that the Appellants failed to establish capacity. The later Will was held to be invalid and the provisions of the earlier Will applied benefiting all five children.