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Recent developments in Succession

Wills and Probate

The issue of sufficient capacity at the time a testator makes a will is something that is often very difficult to determine for a solicitor and capacity may often be challenged where the "Golden Rule" has not been followed.

However, certain care should be taken when defending claims brought by those challenging capacity, not to roll over on claims where the Golden Rule is not followed and when there is evidence that the testator suffers from lack of capacity.

An example of such a case is the recent case of **RE THE ESTATE OF EVA BURNS (DECEASED) sub nom (1) STEVEN ANTHONY BURNS (2) LAURA OLIVIA GRAMAUSKAS (APPOINTED BY ORDER TO REPRESENT IN THESE PROCEEDINGS THE ESTATE OF ANTHONY BURNS (DECEASED)) v COLIN LESLIE BURNS (2016).** On the facts of this case, there was evidence that the solicitor failed to follow the golden rule and medical evidence showed that there were capacity issues at the time of making of the will. A geriatrician concluded on the basis of assessments of the testator that the testator was

"poorly orientated as to where she was in time and place, had poor recall ... and ... had problems with analysis and simple task planning".

One may conclude that such evidence was clear evidence of lack of sufficient testamentary capacity. Not so. The Judge found following a trial in the High Court that the testator had sufficient capacity. This was upheld by the Court of Appeal.

On analysis of the Burns case, it was clear that when examining the evidence at the time of the actual making of the will in 2004, that the testator's solicitor had focussed the mind of the testator and it was found that at that point there was sufficient understanding and capacity once focussed, albeit the testator appeared disorientated generally.

The approach of Judges in cases claiming lack of capacity is clear. The facts will always be meticulously reviewed, and medical evidence will not always be conclusive of lack of sufficient testamentary capacity. Further, the golden rule is a guide not a rule of law, and if not followed, does not necessarily mean that a defence to a claim for lack of capacity has necessarily got poor merits. In summary, claims for lack of capacity are always set at a high bar as the courts are very reluctant to set aside a will on the grounds of lack of capacity. If you are bringing such claims, both the medical evidence and the factual evidence at the time of the making of the will need to clearly demonstrate lack of capacity and should not provide for any reasonable doubt as to lack of capacity.

JAMES S RUDALL
Barrister
Clerksroom Chambers
5th February 2016