

Much Determines the Validity of Wills

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One of the common disputes with wills concerns determining whether or not the person who made the will - who by then is usually no longer with us - had what is known as "testamentary capacity". In other words, were they capable, in the eyes of the law, of making the will at the time they did?

But what does this actually mean in practice? How can you tell if a will is valid or invalid?

The law in this area revolves around a very old English case (from the year 1870) by the name of *Banks v Goodfellow*. The test set out in this case has been adopted many times in Australia and confirmed by courts all the way up to the High Court of Australia as constituting the law in this country.

Under the *Banks v Goodfellow* test, a person making a will must:

- understand the nature of the will and its effect
- have some idea of the extent of the property of which they are disposing under the will
- appreciate the claims to which he or she should give effect.

Importantly, all three of these limbs must be satisfied. Usually the first two are relatively straightforward, but the third one can be an area of hot dispute - particularly if one or more of the beneficiaries believes that they have been dealt a harsh hand by the will maker.

To satisfy the third limb, it needs to be shown that the person who made the will:

- was able to recollect who their expected beneficiaries should be
- was also able to understand why those people would have claims on the estate and
- based on this, has made a conscious, rational and free decision to exclude or limit the entitlement of one or more of the beneficiaries.

Some judges in applying these tests have looked at the will itself and used it as proof in itself of irrationality. Such cases will usually involve dramatic or sudden changes made to a will.

In other cases, judges have tended to treat the will itself as sacrosanct in the absence of direct evidence of incapacity which, when we are talking about a deceased person, can be quite difficult.

The lesson for will makers is to make sure you consider these issues when working what to put in your will and how to go about making it. For beneficiaries, particularly those who believe they have been treated unfairly, this is an area to have a very close look at.

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