

Banks v Goodfellow remains good law and has not been superseded by the Mental Capacity Act 2005 (Clitheroe, Re Probate)

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Private Client analysis: Banks v Goodfellow remains good law and the test for assessing testamentary capacity. Mrs Justice Falk ruled that Banks applies and was not swept away by the Mental Capacity Act 2005 (MCA 2005). The court also provided further guidance on the legal definition of a delusion, stating that the false belief must be both irrational and fixed. To establish whether the false belief is a delusion, there should be a holistic assessment of all the evidence. Written by Rachel Leech, associate solicitor at Birkett Long LLP.

Clitheroe, Re Probate [\[2021\] EWHC 1102 \(Ch\)](#)

What are the practical implications of this case?

The case has put to bed that the test for testamentary capacity is the one set out in *Banks v Goodfellow* (1870) LR 5 QB 549, and not MCA 2005. *Banks* is therefore the test that Will writers should assess capacity against. It is also the test that any medical practitioner should consider when assessing testamentary capacity and the test the court should apply when retrospectively assessing testamentary capacity in contentious probate cases.

The case also provided clarification on the legal definition for delusions. It was held that the false belief must not be a simple mistake which could be corrected. It must be irrational, fixed and out of keeping with the person's background.

Therefore, for contentious probate cases concerning delusions, this needs to be established. It is also what medical practitioners should consider when being asked to consider whether, legally, the belief is delusional. For Will writers, they should consider whether a person's belief is a false one, which is irrational and fixed, and therefore a delusion.

To establish whether the false belief is a delusion, there should be a holistic assessment of all the evidence. It is not essential to show it would have been impossible to reason the person out of the belief if the fixed nature of the belief can be shown another way, such as the belief being formed and maintained in the face of clear evidence to the contrary which the individual was aware of and would not have forgotten.

What was the background?

This bitter probate dispute was between John Clitheroe and his sister Susan Bond and concerns the validity of two Wills made by their late mother, Jean Clitheroe. Jean almost entirely excluded Susan from those Wills, the first of which was made shortly after her daughter, Debs, died. Debs' death was a pinnacle moment and when the family relationship drastically changed. Beforehand, Susan was very close to her mother but less than a year after Debs died, all contact ceased due to allegations Jean made about Sue.

After a five-day trial before Deputy Master Linwood, it was held both Wills were invalid as Jean was suffering from 'insane delusions' about Susan, and her mind was poisoned against her. John Clitheroe did not discharge the burden of proving his mother was not suffering from delusions, or if she was, that it did not impact upon the making of her Wills.

John Clitheroe appealed. The main basis of the appeal was that the wrong tests for testamentary capacity and delusions was applied at first instance.

What did the court decide?

The court held, given it was not argued in the first instance, it was not in the interest of justice to permit the appellant to argue that the previous decision was wrong as *Banks*, rather than [MCA 2005](#), was applied.

Nonetheless, Falk J said the ground would have failed. The conclusions reached in *Walker v Badmin* [2014] EWHC 71 (Ch) and *James v James* [2018] EWHC 43 (Ch) were correct; *Banks*, as noted by the Court of Appeal in *Sharp v Adam* [2006] EWCA Civ 449, has withstood the test of time and has not been overridden by [MCA 2005](#). Falk J stated that it was clear Parliament did not intend for [MCA 2005](#) to alter the common law, other than to allow the execution of statutory Wills when someone lacks capacity. She concluded by stating that there was no sufficiently good reason to depart from well-established case law, and that she had significant doubts whether it would be possible for the High Court to do so.

In relation to the argument that the wrong test for delusion was previously applied, this aspect was adjourned to allow the parties to engage in alternative dispute resolution. However, Falk J stated to establish a delusion it must be shown the false belief must be irrational, fixed and out of keeping with the person's background.

To establish this, there should be a holistic assessment of all the evidence. This would take account of the nature of the belief, the circumstances in which it arose and whether there was an evidential basis for it, whether it was formed in the face of evidence to the contrary, the period for which it was held and whether it was the subject of any challenge. What is required to show the belief is a delusion will depend on the individual case.

Case details:

- Court: Business and Property Courts of England and Wales, Chancery Appeals (ChD), High Court of Justice
- Judge: Mrs Justice Falk
- Date of judgment: 4 May 2021

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