

Modernising the Mind: Will the Transition to the MCA 2005

Resolve or Relocate the Conflict in Capacity Disputes?

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In 2026, the law governing testamentary capacity remains rooted in the Victorian authority of *Banks v Goodfellow*¹, even as virtually all other questions of decision-making capacity are determined under the modern framework of the Mental Capacity Act 2005 (“MCA”). This misalignment creates a striking inconsistency; a 19th-century, judge-made test continues to govern the disposition of property on death, while the statutory regime applies to decisions made during life.

The Law Commission’s 2025 Final Report on Wills², accompanied by a draft Wills Bill³, proposes resolving this inconsistency by replacing *Banks* with the MCA’s functional test, bringing testamentary capacity within the same statutory framework that governs other adult decision making.

Yet that apparent coherence conceals a deeper reorientation of the law’s approach to capacity. While the MCA offers a structured and objective framework, its focus on functional decision-making risks reducing capacity to cognition alone. By contrast, the common law recognises that capacity extends beyond cognition, encompassing the integrity of affections and moral judgement. The shift to a functional test risks diminishing the court’s ability to interrogate decisions shaped by vulnerability, blurring the line between unreasonableness and “*poisoned’ judgement*”^{4 5}.

¹ [1870] L.R. 5 Q.B

² Law Commission, Modernising Wills Law (Law Com No 419), HC 861-I

³ Law Commission, Modernising Wills Law (Law Com No 419), HC 861-II

⁴ *Banks v Goodfellow* [1870] L.R. 5 Q.B, 565

⁵ *Clitheroe v Bond* [2020] EWHC 1185 (Ch), [41]

This tension is most clearly illustrated by the recent decision in *Leonard v Leonard*⁶ which demonstrates the continued significance of the evaluative fourth limb of *Banks* and exposes what may be lost under a purely functional MCA-based test.

The Status Quo: The Enduring Logic of *Banks v Goodfellow*

*Banks v Goodfellow*⁷ remains, for now, the cornerstone of testamentary capacity in English law. Its test comprises four limbs: (i) understanding the nature and effect of making a will; (ii) understanding the extent of one's property; (iii) comprehending the claims to which one ought to give effect; and (iv) not being subject to any disorder of the mind that "poisons" one's affections, perverts one's sense of right or prevents the exercise of one's natural faculties in disposing of their property by will⁸.

Rather than setting a purely cognitive threshold, the test involves a flexible assessment of the testator's decision-making⁹. Importantly, *Banks* looks beyond a testator's ability to reason, and embeds a moral dimension, ensuring that wills reflect the testator's "*natural affections*"¹⁰ recognising that testamentary capacity also involves an appreciation of family relationships and the claims that may properly arise from them¹¹.

The first three limbs require only that the testator is capable of comprehending these matters, rather than demonstrating perfect or exhaustive knowledge of them¹². This preserves testamentary autonomy while avoiding an unduly rigid evidential burden.

⁶ [2024] EWHC 321(ChD)

⁷ [1870] L.R. 5 Q.B

⁸ *ibid* 565

⁹ *ibid* 565

¹⁰ *ibid* 562

¹¹ *ibid* 565, 570

¹² *Scammell & Anor v Farmer* [2008] EWHC 1100 (Ch) *it was sufficient that the testatrix could only give a broad indication of the value of her estate.*

It is the fourth limb, however, that gives *Banks* its distinctive character. The concept of “*poisoning of the affections*”¹³ introduces an evaluative element, allowing the court to consider whether a testator’s decision has been affected by mental disorder. Crucially, it is not an assessment of disposition’s fairness, but a causal inquiry into how it came about i.e., whether disorder of the mind has brought about a disposition of the testator’s estate which would not otherwise have been made¹⁴. A testator may therefore satisfy the first three limbs yet lack capacity where mental disorder has shaped their testamentary choices.

This reflects a critical feature of the common law. The question is not simply whether a testator *can make* a decision, but whether that decision reflects a mind capable of rational judgment. While the law does not enforce substantive fairness, it permits scrutiny of decisions that depart so markedly from ordinary patterns of familial provision that they call for explanation and enables the court to distinguish eccentric but rational decisions from those that cannot properly be regarded as the product of sound judgement.

This feature has particular significance in cases involving progressive or fluctuating cognitive conditions, where capacity may be superficially intact, yet judgement is materially impaired.

Evaluative vs Functional Capacity: *Leonard v Leonard*¹⁵

The decision in *Leonard*¹⁶ illustrates the practical significance of the evaluative approach embedded in *Banks*. The testator, an elderly, wealthy individual, executed a 2015 will which significantly altered the distribution of his estate in favour of his second

¹³ *Banks v Goodfellow* [1870] L.R. 5 Q.B. 565

¹⁴ Theobald on Wills 19th edn, 4-106

¹⁵ [2024] EWHC 321(ChD)

¹⁶ *ibid.*

wife and her family, to the detriment of his children from his previous marriage. The will was prepared without meaningful professional supervision, over an extended period where cognitive concerns were not adequately addressed.

Crucially, the medical evidence established that the testator was suffering from dementia characterised by “*marked cognitive and motor slowing*” and impaired executive functioning¹⁷. The court found this impairment to be progressive and accompanied by episodes of confusion and declining judgement in the period leading up to execution of the will¹⁸.

From a functional perspective, the evidence might nevertheless have suggested capacity. The testator appeared able to understand the nature of making a will, identify his assets, and recognise potential beneficiaries. As the expert evidence confirmed, dementia does not necessarily preclude understanding or communication and may coexist with apparent lucidity¹⁹.

The court, however, reached a different conclusion. Applying the fourth limb of *Banks*, Mrs Justice Joanna Smith DBE, agreed with the decision in *Sharp v Adam*²⁰ that inquiry is “*concerned as much with mood as with cognition*”²¹, requiring the court to assess whether a disorder of the mind has “poisoned his affections” or “perverted his moral sense.”²² The court concluded that the testator’s dementia had precisely that effect. The 2015 will reflected a distortion of judgement attributable to mental disease, rather than a rational exercise of testamentary autonomy.²³

¹⁷ *Leonard v Leonard* [2024] EWHC 321(ChD), [433] – [435]

¹⁸ *ibid* [434], [438]

¹⁹ *ibid* [436]

²⁰ [2005] EWHC 1806 (Ch)

²¹ *ibid* [93]

²² *Leonard v Leonard* [2024] EWHC 321(ChD), [155]

²³ *ibid* [476] – [478]

The case therefore illustrates a form of capacity that is cognitively intact but evaluatively deficient. The testator could understand and articulate relevant information yet lacked the ability to engage in reasoning about the moral claims on his estate. This distinction reflects the focus of the fourth limb of *Banks*, which treats capacity as extending beyond cognitive ability to the quality of the testator's judgement and affections.

Leonard v Leonard demonstrates that apparent cognitive competence does not preclude a finding of incapacity. The court will look beyond a testator's ability to understand and communicate decisions to examine the substance of their reasoning, permitting scrutiny of decisions that appear rational in form but are distorted in substance.

It is precisely this evaluative dimension that is placed in question by the proposed move to the Mental Capacity Act 2005.

The 2025 Law Commission Report and the Turn to Clinical Certainty

The Law Commission's proposal to adopt the MCA introduces a functional, standardised approach²⁴. Under the MCA, capacity depends on the ability to understand, retain, and use or weigh relevant information²⁵. This will mirror the approach in statutory will applications, which already applies the functional capacity test.²⁶ This framework offers clarity and clinical certainty, grounding assessments in structured evidence rather than judicial intuition.

However, this shift has significant consequences. The MCA begins from a presumption of capacity, placing the burden on those challenging the will. This is not merely

²⁴ Law Commission, Modernising Wills Law (Law Com No 419), HC 861-I

²⁵ Mental Capacity Act 2005, s 3

²⁶ Mental Capacity Act 2005, s 18 (1) (i)

procedural. Claims that may succeed under *Banks*, particularly those turning on disordered judgement rather than impaired understanding, may fail under an MCA-based framework.

While the MCA tests if a person can "weigh" information, this is a purely functional inquiry. It cannot replace the evaluative "fourth limb" of *Banks*. A testator might technically process facts while still acting under the influence of grief, dependency, or cognitive decline that distorts their judgement without breaking their logic. Consequently, the MCA is more precise regarding medical capacity but narrower in its reach; it checks if the "machinery" of the mind is working, but it can no longer scrutinise whether the decision itself is rational or fair.

While the 1975 Act²⁷ offers some protection where distorted reasoning leads to the exclusion of a spouse or other eligible beneficiary²⁸, this is only a partial response. The Inheritance Act is a post-death, outcome-focused mechanism, limited to defined classes of claimant and unable to perform the preventative role served by *Banks*.

Implications of Wills Reform in practice

The implications of this shift are immediate in practice. Under *Banks*, disputes can turn on solicitor evidence, lay testimony, and the coherence of the will itself. Advocacy therefore involves constructing a narrative around the testator's relationships and reasoning.

Under an MCA-based approach, the focus shifts to expert evidence. Medical assessments and cognitive testing become central, and the litigator's role moves to scrutinising clinical methodology.

²⁷ Inheritance (Provision for Family and Dependents) Act 1975

²⁸ *ibid* S.1

While this promises greater evidential discipline, it carries a cost. The law may become less responsive to “high functioning” but vulnerable testators, those who satisfy functional criteria, yet whose decisions are shaped by distorted judgment. In such cases, the pursuit of clinical certainty risks coming at the expense of substantive justice.

Conclusion

The Law Commission’s proposed reform advances coherence and clinical certainty in the law of testamentary capacity. Yet it also shifts the inquiry from the quality of judgement to the mechanics of cognition.

This does not resolve the tensions inherent in capacity disputes, it relocates them. The risk is not uncertainty, but certainty about the wrong things prioritising measurable cognition over whether a decision reflects a sound and unpoisoned mind. The challenge is to modernise without sacrificing the moral insight embedded in the common law.

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