A Victorian Tragedy: The extraordinary case of Banks v Goodfellow. By MARTYN FROST [London: Wildy, Simmonds & Hill Publishing, 2018. xii + 262 pp. Hardback £19.99. ISBN: 978-08-54902-53-8.]

At the time of writing, the basic test for determining whether a testator has sufficient capacity to make a valid will derives from *Banks v Goodfellow* (1870) L.R. 5 Q.B. 549. Cockburn C.J. held it essential that a competent testator:

> shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made (at 565).

John Banks the elder believed that he was being pursued by various spirits including a deceased man once known to him. The decision was instrumental in establishing that the mere fact that a testator was prone to suffer from the symptoms of a mental illness, including such delusions, did not prevent him from making a valid will if free from the symptoms at a particular time.

In his stimulating book, Martyn Frost ventures beyond his experience as a wills consultant and as co-author (with Lawson and Jacoby) of *Testamentary Capacity: Law, Practice, and Medicine* (2015) to provide an historical account of the background to one of the most significant cases in property law. He aims to provide "a sort of biography of a case rather than a biography of any single individual". Chapter 1 contains a brief biographical sketch of John Banks the elder, the son of a Keswick pencil manufacturer, and his family. The next chapter considers his life, illness and death. Frost concludes that in modern terms, John would be diagnosed with paranoid schizophrenia. John lived with his parents until they died, except for a "voluntary" spell at Dunstan Asylum, and was then a lodger in various houses. Frost gives a largely sobering account of Victorian treatment of, and attitudes towards, the mentally ill. He also sets the scene using the problematic assumptions and inconsistencies in the evidence of those who would testify against the will. While the five judges involved in the case "clearly focused on what John was capable of, not how he behaved", those giving evidence "considered his actions and appearance" (including extreme mental agitation at times) "and dismissed him as being a madman and therefore not capable of making a will (or doing anything significant for himself)". These themes pervade the book. Frost notes that the notice of John's death (in 1865 from "Epilepsy, Insanity and Coma" at the age of 53) gives no funeral details since it was not published until two weeks after the funeral took place. This apparent callousness towards a deceased man who happened to be mentally ill adds a further tragic note to the tale.

Chapter 3 concerns Banks the elder's wills, the focus being on two made in 1863. John asked a Mr Tolson, a grocer who had been collecting rents for properties that John had inherited, to bring John's attorney, Mr Ansell, to a meeting at the home where John was lodging so that will instructions could be given. As Frost notes, the fact that these men knew John from the context of property dealings itself indicated his capacity to manage his affairs. Interestingly, it was Ansell's usual practice to ensure that a draft will prepared at the initial meeting was validly executed even though he would later prepare an engrossed final version for execution, given the delays that could be caused by travel, bad weather etc. This explains why *two* wills were executed within a month. While John's landlord's wife and her brother would later attempt to disparage the events of the meetings and John's mental state during them, Ansell and Tolson were able to vouch for his condition at the time and his ability to understand what was going on. Both wills left John the elder's entire estate to his niece, Margaret Banks Goodfellow. This leads to an initially puzzling aspect of the subsequent litigation, since Margaret was John's heir at law (i.e. beneficiary on

intestacy) and therefore ostensibly stood to benefit whether or not the will was valid. Cockburn C.J. thus described the will as "idle": (1870) L.R. 5 Q.B. 549, 571. For Frost the explanation for the litigation is that Margaret died before reaching majority and leaving no spouse or issue, so that her inheritance would have failed on John's intestacy and gone to *his* heirs rather than Margaret's (who would inherit if Margaret had herself inherited *by will*). Brook ("*Banks v Goodfellow* (1870): Defining Testamentary Capacity" in Sloan (ed.), *Landmark Cases in Succession Law* (2019)) broadly concurs on the substantive outcome but argues that the answer lies not in any contingency, but in the fact that following John the elder's intestacy the real property would go *his* heirs following Margaret's death because he was the last "purchaser". Another puzzle, less easily resolved, is why no specific attempt was made to challenge an apparently valid earlier 1838 will, in which John left his estate to his predeceasing sister.

In chapter 4, the author outlines what little is known about Margaret, the will beneficiary. Her short and tragic life began with her mother dying in childbirth and ended via tuberculosis at the age of only 20. Significantly, however, her death occurred in the same place as her uncle's, and the fact that she had moved there at his instigation does much to explain the terms of his will.

In chapter 5, the legal proceedings themselves are addressed. Frost provides a vivid account of the trial before the Cumberland Spring Assizes in 1869, in which John Banks the younger, the elder's nephew who stood to benefit on his intestacy, challenged the will. The challenge was defended by Edward Barron Goodfellow, Margaret's half-brother and her heir at law. It is significant that it was brought only after Margaret's death, which, on Frost's analysis, "gives the inescapable impression that it was not the will that was being objected to but the ultimate beneficiary", an approach to litigation that is hardly unusual even today. In this case, "[i]t is not known if there was any animosity" pre-trial between the litigants or if John Banks the younger simply thought that the "Banks money should not go to a Goodfellow". Frost highlights the speed with which the dispute was resolved as compared to its modern equivalents. While he notes that no costs orders survive, Brook points out that in a later judgment ((1871) L.R. 11 Eq. 472) John Banks the younger was required to pay the executor's costs. Frost nevertheless succeeds in showing the extent to which the evidence for the claimant focused on the testator's general condition rather than his state of mind at the time he executed the will. This reflected the approach to the law following *Waring v Waring* (1848) 6 Moo. P.C. 341. *Waring*, not universally accepted at the time, based testamentary capacity on a philosophy of the "unity and indivisibility of the mind". This maintained that unsoundness of mind in one respect (so long as it existed at all times) prevents soundness in other respects. Delusions existing before and after the execution raised a presumption that they existed during the execution even if they did not appear on the face of the will. Frost compellingly critiques *Waring* and defends Brett J.'s jury direction leaving open the possibility of a lucid interval. Frost makes the jury's decision to find the will valid seem predictable, since the claimant's case essentially rested on the notion that an experienced practitioner had displayed either "serious malpractice or utter incompetence". The Court of Queen's Bench upheld the direction and the verdict. Frost highlights Cockburn C.J.'s key and enlightened role in developing the recognition of "partial insanity": in *Banks* he held the *Waring* principle unnecessarily wide and that testamentary capacity can exist provided no delusion influenced the particular disposition, and he was defence counsel in the famous criminal case of *R v M'Naghten* (1843) 10 Cl. & Fin. 200. He calls Cockburn C.J. the "real hero" of the story and suggests he may have awaited the opportunity presented by *Banks*.

Frost's aim is not to provide a detailed account of the law of wills, and he resorts to summary descriptions. He briefly covers the importance of *Banks* in contemporary cases without focusing on the paradox of the case: the more "rational" a will appears on its face, the more freedom a testator has to make an "irrational" one. Commenting on the Law Commission's suggestion (in *Making A Will* (Consultation Paper 231 (2017)) that *Banks* should be reformulated in legislation, Frost opines that "[i]t would be a pity if the test disappeared simply because it

was...perceived as too old or that some readers today might struggle with the language of Dickens' time". While those factors may indeed be insufficient in themselves to justify change, it seems clear that the Commission is not provisionally proposing such reform "simply" because of them. Its proposal is that the *Banks* test be "recast in simple, modern terms, and in terms more in line with current psychiatric thinking". It convincingly argued that a reformulation could accommodate the full range of factors that can affect capacity; four limbs should be expressly used (escaping confusion over whether the *Banks* test has three or four limbs); and the new formulation should clarify that the test is whether the testator was *able* to understand the will rather than whether he *did*, and that a reformulation makes the law more accessible. It would make the law more *acceptable* to modern ears by removing potentially offensive and value-laden language such as "insane delusion", "pervert", "poison" and "sense of right", which demonstrates that the modern "struggle" with *Banks* is not merely one of understanding but of propriety. The Commission's alternative suggestion is that the *Banks* test should be entirely replaced: the Mental Capacity Act 2005 should extent to testamentary capacity, because it is anomalous that different tests apply when capacity is assessed retrospectively (as in *Banks*) or prospectively (in the context of a statutory will). This is not obviously the subject of comment in the book.

Its next two chapters contain biographies of the claimant and the defendant respectively. John Banks the younger had emigrated to the US and Canada, returning to England when he was informed of Margaret's death and then possibly going back to America at the conclusion of the litigation. He died back in Keswick, apparently having experienced prosperity as a painter. Frost focuses on the tale of Edward Barron Goodfellow's void marriage to his late wife's sister, his unaccompanied voyage to New Zealand, and his untimely demise there. "The victor in the litigation ended his life with no property and no money, separated from the mother of his children, she and the children having already abandoned his name".

The final chapter is devoted to "The Questions that still Remain", including "Where did John Banks the Elder's Money Go?". The author queries the testator's lack of surplus cash at his death, and suggests that the litigation might mask advantage that others took of him while alive. In useful appendices, the author provides notes on the cast of characters, chronology and geography, brief biographies of the legal figures involved, and a full reproduction of the Queen's Bench judgment.

This well-researched book provides fascinating insights into the history of a very significant decision, setting it successfully in its context. The text at times verges on being clunky, repetitive and even trite. One is occasionally left with the sense that some historical digressions (interesting in themselves) were included to compensate for the scarcity of more relevant evidence. But the work has real value for the succession expert and the general reader, not least in painting a grim picture of the reality of Victorian life, death and illness.

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