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Wills, spills, forgery & other ills

It's a family affair: Constance McDonnell presents a review of key contentious probate cases

IN BRIEF

- Testamentary capacity & weight of evidence of a solicitor or other professional who prepared the will.
- Want of knowledge & approval.
- Claims by adult children.

Three recent cases in which testamentary capacity was an issue highlight the weight which is likely to be given to the evidence of a solicitor or other professional who prepared the will.

In *Edkins v Hopkins* [2016] EWHC 2542 (Ch), HHJ Jarman QC sitting in the Cardiff District Registry considered the validity of a will made by a testator (T) three months before his death at the age of 59 due to alcoholic liver damage. The will had been prepared by a solicitor who had many years' experience of drafting wills and who attended T at home. She did not follow the Golden Rule as she did not feel it was necessary. She did, however, produce a very full attendance note. By the disputed will T gave shares worth £822,000 to his friend Mr Edkins (E), a flat worth £75,000 to T's wife and split his residue as to 75% to E and 25% to T's wife and three sons.

It was held that T had capacity, largely on the basis of the solicitor's attendance note, despite 'very poor health and episodes of confusion and memory lapse'. T also knew and approved of the contents of the will. An undue influence claim failed despite findings that at the time the will was prepared T was very vulnerable physically and mentally, was entirely reliant for his physical needs on his wife and E (both of whom were bringing him alcohol), E had a high level of control over T running his business and personal affairs, and there was unsatisfactory evidence as to E's knowledge of the will.

In *White v Philips* [2017] EWHC 386 (Ch) HHJ Saffman sitting in the Leeds District Registry considered a will made in June 2010, seven weeks before T's death due to cancer. The will had been prepared by a legal executive, and gave T's wife a right to reside in the matrimonial home, and subsequently gave the net proceeds of sale of the house to one of T's daughters together with the residuary estate. T's relationship with his wife had abruptly deteriorated from about April 2010. T's wife said this was due to T's unwarranted perceptions about her as a result of drug toxicity (namely serotonin syndrome due to palliative care drugs). The medical experts held different views as to capacity, but an expert in drugs in psychiatry acknowledged that T's daughter's expert had more experience in considering testamentary capacity.

It was held that T had capacity in relation to his June 2010 will. T did suffer at times from opiate toxicity. However, even if by reason of a disorder of mind T became unjustifiably antagonistic towards his wife, that did not poison his affections or prevent his sense of right. It was noted that T did not actually disinherit his wife, but gave her a right to reside in the house which formed the bulk of T's estate. The judge also took into account that a social worker and legal executive had both considered T had capacity in June 2010.

In *Lal Ram v Lal Ran Chauhan* (19 July 2017, Leeds County Court) HHJ Saffman set aside a will by which T had left her £200,000 estate to the defendant (one of her three sons). The will had not been professionally prepared, whereas T's previous wills had been. The defendant could not rely upon any evidence as he was debarred from doing so having failed to comply with case management directions. No party produced any psychiatric report as to T's capacity. A family friend who had been present when the will was executed gave evidence that T only gave monosyllabic answers as to whether she understood the will. It was held that the defendant had failed to discharge his burden of proof of showing that T had capacity in relation to the disputed will.

A slightly different point about the test for testamentary capacity arose in *Ball v Ball* [2017] EWHC 1750 (Ch), a decision of HHJ Paul Matthews sitting in the Bristol District Registry. The testatrix in that case died in 2013 aged 78, and was survived by her 11 children (of whom three were claimants

and eight were defendants). She had made a will in 1992 which excluded the claimants and split her estate between her other eight children and her grandsons. In 1991 the claimants had reported their father (T's husband) for sexual abuse when they were children. T's husband had pleaded guilty to such a charge and had received a suspended prison sentence. The claimants suggested that T's mistaken belief that her husband was innocent equated to incapacity. This suggestion was rejected by the judge, who considered that there must be a physical or psychiatric cause of lack of capacity, rather than the mere fact that T had made a mistake.

Want of knowledge & approval

As with testamentary capacity, two recent cases in which knowledge and approval was an issue highlight the weight which is likely to be given to the evidence of a solicitor who prepared the will.

In *Poole v Everall* [2016] EWHC 2126 (Ch) HHJ David Cooke sitting in the Birmingham District Registry set aside a will on the basis that T had not known and approved of its contents. T had died in 2013 at the age of 46. He had been in a serious motorcycle accident in 1985 which left him with severe physical and psychiatric injuries, and which resulted in a personal injury damages award in 2000 of over £1m. The defendant had been T's carer since 1994 under a local authority placement. In 2000, a Court of Protection Receiver was appointed to manage T's financial affairs. In 2007, the Receiver became a Deputy. A will leaving 95% of T's estate to the defendant and 5% to T's partner was prepared by the defendant three months before T's death.

T's brothers claimed that the will was invalid due to lack of capacity, want of knowledge and approval and/or undue influence. T had been admitted to hospital numerous times due to psychotic episodes

linked to serious cannabis abuse. T's brothers were themselves alcoholics and drug users. Eventually T obtained an anti-harassment injunction against one of them. T's Deputy had helped him to make wills, including one in February 2012 which left T's estate to charities, and a minor share to T's brothers. When unaccompanied by the defendant, T gave instructions for no, or very small, gifts to him. After discussions with the defendant, T would talk of giving 50% of his estate to him. T was discharged from hospital at the end of May 2012 (which was procured by the defendant and was not in T's best interests). The defendant arranged for a change of doctors for T in late 2012. The defendant prepared an online will for T in December 2012, and suggested that he create an audio recording on an iPad of a discussion about the will. However, the defendant failed to explain the will properly to T during that discussion, but only made remarks such as, 'So there's just me and Sue and then everything is just basic then'. The will was not read to T, but part of a Letter of Wishes was read to him noting that nothing had been left to T's family. The Deputy was not informed of the new will.

It was held that T had testamentary capacity (in accordance with the Deputy's evidence), but the defendant could not discharge the burden of proving knowledge and approval as the only evidence of it came from the defendant himself. T was vulnerable and suggestible and had impaired capacity, the bulk of estate was given to a person upon whom he was dependent, and the will was drafted by that person and had not been discussed with anyone else except the defendant's partner. The defendant had isolated T to prevent others having influence over him, but the judge considered it more likely that the reason T had signed the will was because he did not understand what the words in it meant, rather than that he had done so as a result of undue influence.

In *Kunicki v Hayward* [2016] EWHC 3199 (Ch) Jonathan Klein sitting as a deputy Judge held that T had executed a valid will by which he gave his residuary estate as to 50% to his daughter and 50% to his granddaughters (two of whom were T's son's daughters). T's son, who was a residuary beneficiary under T's previous will, alleged lack of capacity (due to cancer drugs), want of knowledge and approval and fraudulent calumny. The will had been prepared by a solicitor who was a member of STEP (Society of Trust and Estate Practitioners) and Solicitors for the Elderly and who had done the ACTAPS (Association of Contentious Trust and Probate Specialists) course. She had prepared hundreds of wills and her evidence was persuasive. The solicitor had explained the will in some detail in a letter to T, which T had clearly read as he replied to it suggesting corrections to the will. The will was short and relatively straightforward, and the solicitor's attendance note recorded that she had read the will to T before he executed it.

It was held that a testator who knows and approves of the contents of a will may not have appreciated the legal effect of words used in the text of the will, and therefore the existence of a drafting error did not obviate knowledge and approval.

> *"The claimants suggested that T's mistaken belief that her husband was innocent equated to incapacity"*

Fraud & forgery

In *Morris v Browne* [2017] EWHC 631 (Ch), Barling J pronounced in favour of the validity of a will propounded by T's daughter, of which she was sole executrix and the major beneficiary. The defendants were her three half-siblings who had already obtained a grant of administration of the basis of an intestacy. The trial was conducted on the basis of written evidence only.

The judge stated that it was 'troubling' that the defendants had sworn an oath and obtained a grant of administration on the basis of intestacy when they were aware of the existence of the will, and that it was 'extremely troubling' that they had not distributed any of T's estate to the claimant, and had not contacted her as beneficiary. The defendants were ordered to account for T's estate on the basis of wilful default.

In *Marcou v Christodoulides* (10 February 2017, Central London County Court) Recorder Lawrence Cohen QC set aside a will on the basis that it had been produced by the fraudulent calumny of one of the testatrix's two daughters. The claimant had been angered by T's transfer of Euro 500,000 into the joint names of T and the defendant, and had made representations to T repeatedly over the following months that the defendant had 'stolen' or 'helped herself to' T's money. The claimant knew that such information was false. T believed the representations, which led her to exclude the defendant from her will.

In *Patel v Patel* [2017] EWHC 133 (Ch), Andrew Simmonds QC found that a will had been forged by one of the testatrix's four sons. The claimant sought to prove a will of which he was sole executor and beneficiary, which would have given him control of a $50m stake in a family company. T was said to have executed a will typed by the claimant's secretary (based on a manuscript written by the claimant) in the presence of two witnesses: a friend of T and a former employee of the claimant. The claimant was said to have read and explained the will to T.

It was held that the claimant, his former secretary and the two purported attesting witnesses had all lied on oath. There was evidence that T had pre-signed blank pages with a company letterhead. The disputed will was on such a page with the letterhead cut off. The forensic expert evidence was that T's signature pre-dated the witnesses' signature by a significant period (based on light exposure), and that there were indentations in the surface of the will which matched T's signature (which was consistent with her having pre-signed the piece of paper which was used to create the pretend will in the course of signing several blank letters). Further, the claimant had sent an email to one of his brothers in 2014 saying that T had never spoken of having executed a will. Surveillance evidence revealed that the claimant and his attesting witnesses had met immediately before trial (which they had denied), which was held to have been a 'last-minute joint revision session… so as to ensure that the witnesses' evidence was as consistent as possible'.

Following that decision, in May 2017 Marcus Smith J gave permission for committal proceedings to be brought against the claimant, the purported attesting witnesses and the claimant's former secretary for contempt in the face of the court and/or contempt by interfering with the due administration of justice by advancing fraudulent proceedings, making or causing to be made a false statement

in a document verified by a statement of truth, making a false statement in a sworn document without an honest belief in its truth and making a false oral statement to the court while under oath without an honest belief in the truth of the relevant statement: [2017] EWHC 1588 (Ch). The judge said at the time that 'there can hardly be a more serious allegation of contempt of this sort'.

On 19 September 2017, the three witnesses eventually instructed separate solicitors to the claimant. On 2 October 2017, their new solicitors informed the other parties that they admitted previously lying. On 3 October 2017, the claimant admitted the principal allegations against him. On 7 December 2017, Marcus Smith J imposed a sentence of 12 months' immediate imprisonment on the claimant, and sentences of three months' imprisonment on each of the other three contemnors suspended for 12 months: [2017] EWHC 3229 (Ch). A concurrent private prosecution against the claimant is pending and due to be tried in November 2018.

Claims under the 1975 Act by adult children

In *Ball v Ball* (already referred to above) in August 2017 HHJ Paul Matthews dismissed a 1975 Act claim by three adult children of the testatrix who had suffered sexual abuse at their father's hands. The father's estate had passed to T, who in turn had split her £157,000 estate between her other eight children and grandsons. There was no evidence initially nor any documentary disclosure as to the financial circumstances of any party. Witnesses were recalled to give such evidence. The three claimants were 'getting by' in modest circumstances, and could all do with a lump sum to advance them in life but did not need further income for maintenance (and in fact were generally better off than the defendants). The abuse by the father was not authorised, instigated or encouraged by T. T's conduct in reacting to the claimants' complaints about their father by disinheriting them did not create any kind of moral obligation to the claimants, and there were no other special circumstances.

However, an adult child's claim under the 1975 Act succeeded in *Nahajec v Fowle* (18 July 2017, Leeds County Court). In that case, HHJ Saffman awarded £30,000 out of a £265,000 estate to the 31-year-old claimant. T had left his entire estate to a friend. He had separated from the claimant's mother when the claimant was 11 years old and cut himself off. The claimant and T had a brief reconciliation in 2007–2009 but T cut himself off again as he disapproved of the claimant's boyfriend. The claimant worked 32 hours a week for a salary, plus 10–15 unpaid hours to gain experience to become a veterinary nurse. Without debts of £6,600, she would have been able to fund her outgoings on her 'frugal' existence with only modest expenditure on 'fun' items.

It was held that although the claimant was an independent adult, her claim was based on 'something more' than a qualifying relationship. (The 'something more' appears to have been that she had repeatedly tried to have a relationship with T, she was not profligate, she was seeking to exploit her earning capacity, and she had a genuine ambition to improve herself by becoming a veterinary nurse.) The defendant had money problems too, which militated against a significant award to the claimant. A £30,000 award would enable the claimant to clear her debts and should enable her to improve her position by undertaking a course so as to qualify as a veterinary nurse. **NLJ**

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