

Probate Claims Challenging the Validity of a Will

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We give every single case the care and attention it deserves.

Introduction

1. Under the Civil Procedure Rules, 'probate claim' means a claim for, *inter alia*, a decree pronouncing for or against the validity of an alleged Will not being a claim which is non-contentious (or common form) probate business (CPR Pt 57.1(2)(a)(iii)). Probate claims are governed by the rules in Section I of Part 57 of the CPR.

2. The validity of a Will can be challenged on the following grounds:

- (i) want of due execution;
- (ii) incapacity;
- (iii) want of knowledge and approval;
- (iv) undue influence;
- (v) forgery and fraud;
- (vi) revocation.

This part of the article will focus on recent case law relating to the testator's testamentary capacity and knowledge and approval of his/her Will.

CPR r.57.7

3. CPR r.57.7 provides that:

Contents of statements of case

57.7 – (1) The claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate.

(2) If a party disputes another party's interest in the estate he must state this in his statement of case and set out his reasons.

(3) Any party who contends that at the time when a will was executed the testator did not know of and approve its contents must give particulars of the facts and matters relied on.

(4) Any party who wishes to contend that –

- (a) a will was not duly executed;
- (b) at the time of the execution of a will the testator lacked testamentary capacity; or
- (c) the execution of a will was obtained by undue influence or fraud,

must set out the contention specifically and give particulars of the facts and matters relied on.

(5) (a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form¹ and, for that purpose, will cross-examine the witnesses who attested the will.

(b) If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will.

¹ A grant in solemn form is made where a will is the subject of an action in which persons interested under another will or on intestacy are made parties, because there are doubts about the validity of the will. If, after hearing the evidence, the court is satisfied that the will is valid, it pronounces for it in solemn form. A grant of probate, whether in common or solemn form, is a judicial act and is treated in all courts in England and Wales as conclusive evidence of the title of the executors, of the formal validity of the will and of its contents until such time as the grant is revoked.

Costs warning

4. All probate claims are allocated to the multi-track (r.57.2(4)). Such litigation can often become protracted and expensive. Before putting forward a positive case in opposing the validity of a Will, some consideration should be given to the ultimate merits of such a course of action. A successful litigant may be dismayed to find that the estate has been eroded or even depleted by the contentious litigation.

“The cost of contesting the 2007 Will is a calamity for this family in every way. By the standards of a present day probate case the Deceased’s estate is modest, less than £200,000. We were told in general terms that efforts to achieve a family compromise came to nothing, though, of course, details of the “without prejudice” negotiations have not been disclosed. The failed negotiations mean that the estate will become, if it has not already become, worthless. A 6 day trial with 26 witnesses does not come cheap. Now there is this appeal. It may be recalled that the foggy family law suit in Jarndyce v. Jarndyce dragged on before the Lord Chancellor for generations until nothing was left for the parties to take. The Civil Procedure Rules and the efforts of legal advisers have not dissuaded these parties from following a course leading to the dissipation of the whole of the Deceased’s estate in costs and legal fees, which has happened faster than under the dilatory procedures of the unreformed Court of Chancery in the Jarndyce days.” – per Lord Justice Mummery in Burgess v. Hawes [2013] EWCA Civ 94.

Testator’s Mental State

5. Since the times of Banks v. Goodfellow², there have been considerable advances in medical science and an increasing awareness of illnesses such as dementia and its impact on a person’s mental capacity. According to statistics published by the Alzheimer’s Society³, dementia affects one in three people over 65. In 2012, there were 800,000 people in the UK with dementia. That number is expected to increase to 1,000,000 in 2021. In the circumstances, it is perhaps not surprising that an increasing number of probate claims are brought on the basis that the testator lacked mental capacity by reason of senile dementia.

² (1869-70) L.R. 5 Q.B. 549

³ Dementia 2013 infographic (http://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=2164)

6. This part of the article will focus on three recent authorities on the subject of testamentary capacity and want of knowledge and approval. Whilst reiterating the importance of upholding the right of elderly people to leave their property as they choose, even if their mental faculties have declined (but not depriving them of testamentary capacity), the Courts are nonetheless willing to hold that a Will is invalid when the circumstances of the case support a finding of lack of knowledge and approval.

Banks v. Goodfellow⁴

7. The golden rule of testamentary capacity pronounced in the case of Banks v. Goodfellow has withstood the test of time and has been applied in countless cases since the Court of Queen's Bench delivered its judgment in 1870. This has remained the case despite the coming into force of the Mental Capacity Act 2005. In Scammell v. Farmer⁵, the High Court held that the obvious difference between the position at common law and the position under the 2005 Act was that the onus of proof of incapacity under s.1(2) of the 2005 Act was from the outset, and remained, on the complainant. At common law, the burden of proof lies with the person propounding the Will.

8. The test set down in Goodfellow is as follows:

"It is essential to the exercise of such a power that a 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."

⁴ (1869-70) L.R. 5 Q.B. 549

⁵ [2008] EWHC 1100 (Ch)

Burgess v. Hawes⁶

9. This case involved a dispute between Mrs. Daphne Burgess's ('B') three children, Peter, Libby and Julia. In 1996, B had made a Will providing for her residual estate to be divided equally between her three children. In 2007, Julia made a solicitor's appointment, as a result of which B made a new Will, dividing her residual estate between Libby and Julia. Libby and Peter challenged the validity of the 2007 Will on the grounds of both (a) lack of testamentary capacity and (b) want of knowledge and approval. Pronouncing against the validity of the 2007 Will on both grounds, the judge at first instance relied on the following findings:

- (i) At the time of making her final Will, B was suffering from failing health. The judge accepted expert testimony that there was strong evidence that she suffered from cerebrovascular disease which, in the light of evidence given by other witnesses and accepted by the judge, amounted to dementia of modest severity.
- (ii) B remained close with Peter up to the time of her death.
- (iii) Peter fell out with Julia in the summer of 2006.
- (iv) The 2007 Will was prepared by an experienced solicitor in will matters. The solicitor had two meetings with B and allowed Julia to remain in the room with B at both meetings. Although he later recorded that B was "*entirely compos mentis*" and that he had no hesitation in taking instructions from her, he had not carried out any formal assessment of B's mental capacity and had little opportunity to do so.
- (v) A draft of the 2007 Will was not sent to B for her to read in advance. At the second meeting, the solicitor read the draft will over to B and explained the meaning of it in the presence of Julia.
- (vi) There were mistakes in the 2007 Will, some of which had originated from Julia and none of which was picked up by B before she executed it.

⁶ [2013] EWCA Civ 94; [2013] W.T.L.R. 453

(vii) Accepting the evidence of the expert, the judge found that if B omitted Peter from the residuary gift on erroneous grounds, it was more likely than not that that was as a result of the vascular dementia from which she was suffering.

10. Having summarised the relevant authorities on testamentary capacity and want of knowledge and approval, Mummery LJ added that

“the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.”

11. In circumstances where the 2007 Will was prepared by an independent solicitor, Mummery L.J. had difficulty in accepting that the judge’s findings are sufficient to overcome the strong prima facie case for the validity of the Will and justify the judge’s conclusion that B lacked testamentary capacity in a case in which it was found that B knew she was making a will and appreciated the extent of her property. His concern was that *“the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property.”* (emphasis added)

12. In the circumstances, whilst entertaining doubts as to the correctness of the judge’s finding on testamentary capacity, Mummery LJ decided that it was unnecessary for him to express a concluded view

on the first ground of appeal in view of his conclusion on the second ground of want of knowledge and approval.

13. A person propounding a testamentary document must be able to show that at the time of execution the testator knew and approved of its contents. The test of whether or not the testator ‘knew and approved’ of its contents is objective and the standard of proof is the balance of probabilities. In *Fuller v. Strum* [2001] EWCA Civ 1879, Peter Gibson LJ commented that in circumstances where the suspicion of the court is aroused, the law places a burden on the propounder of the will to prove affirmatively that the deceased knew and approved of the will which he was executing. All the relevant circumstances will be scrutinised by the court which will be ‘vigilant and jealous’ in examining the evidence in support of the will. The evidence required to dispel the suspicion will depend on the circumstances and vary according to the varying degree of suspicion aroused.

14. Going back to the case of *Burgess*, Mummery LJ held that the judge’s findings, which included the fact that Julia was the ‘driving force’ behind the instructions given for the 2007 Will, were sufficient to support the judge’s overall conclusion on B’s want of knowledge and approval of the contents of the 2007 Will.

Tociapski v. Tociapski⁷

15. The Claimant and the Defendant in this case were the two sons of Mr. Igor Tociapski (‘D’). D made a will in 2007 under which the Claimant and the Defendant were the only persons entitled to share in his estate. In 2009, D made another will leaving the entirety of his estate to the Defendant. The Claimant sought a declaration that the 2009 will was invalid on the grounds of want of knowledge and approval and undue influence.

16. Upon hearing the appeal from the Claimant, Mr. Isaacs QC concluded that whilst D had impaired judgment and impaired capacity at the time of making the 2009 Will, he did have the requisite testamentary capacity. However, given the circumstances relied upon by the Claimant, including the fact that D was totally dependent on the Defendant while being frail and elderly and probably mentally disordered, and in the

⁷ [2013] EWHC 1770 (Ch)

absence of any evidence from the Defendant, the reading over of the 2009 will by the Defendant to D is insufficient to establish that D understood what he was doing and its effect. The Will was accordingly set aside.

17. Whilst each case will turn on its facts and suspicions that are considered sufficient to invalidate the Will in one case may be dispelled by rebuttal evidence in another, the following are some examples of matters to look out for:

- (i) The Will contains spelling or other errors and/or uses language that is out of character for the testator.
- (ii) The Will contains untrue statements.
- (iii) The Will contains a radical change in disposition made without a rational explanation, or that there is no rational explanation for the dispositions generally.
- (iv) The most obvious beneficiaries, especially those who were named in previous Wills, are not mentioned.
- (v) Important assets (such as real properties) in the testator's estate are not specifically mentioned or dealt with.
- (vi) By reason of disability and/or impaired capacity, the Will, especially one that is lengthy and complicated, was read to the testator.
- (vii) Frailty or vulnerability of the testator and his reliance on the beneficiary under the challenged Will.

Simon v. Byford⁸

18. The Claimant (R) claimed that a will made by his deceased mother (C) in 2005 was invalid. C had died in 2009, aged 91. She had four children (J, R, H & D). J and H were the principal defendants. D had died in 2004.

⁸ [2013] EWHC 1490 (Ch)

In wills made before 1994, C had left a legacy of £20,000 to her assistant (M) and divided the remainder of her estate equally between the four children. In wills of 1994 and 1996, she left the legacy to M, left her shares in the family company and the flat she owned to R, and divided the remainder equally among the four children. C made the 2005 will at her 88th birthday party, attended by J and H but not by R. That left the estate equally to the three surviving children and D's family trust, subject to M's legacy. By 2005 C was suffering from mild to moderate dementia. The witnesses called by R and by the defendants gave conflicting accounts of the extent of her dementia. The court was required to determine C's mental capacity to make the will and whether she had known and approved of it.

19. In delivering his judgment, N Strauss QC referred to the case of Sharp v. Adam [2006] EWCA Civ 449 which in turn cited the judgment in Goodfellow. In addition, regard was had to the following well established principles:

- (i) What was legally required was due execution of a will that the court could be satisfied expressed the wishes of a testator at the time when he did have full testamentary capacity and had not been subsequently revoked. Full testamentary capacity was not required at the time of due execution, the testator need only understand that he had previously given instructions for the will, and the requirement for knowledge and approval of the will did not mean that such capacity was necessary. – Perrins v. Holland [2010] EWCA Civ 840.
- (ii) The test of capacity is issue-specific, and is to be considered "in relation to the particular transaction and its nature and complexity".
- (iii) It is not necessary that the testator should be able to understand the legal terminology which gives effect to his wishes.

20. In relation to the issue of knowledge and approval, the judgment of Lord Neuberger M.R. in Gill v. Woodall [2010] EWCA Civ 1430 was cited:

"In Fulton v. Andrew (1875) LR 7 HL 228, 469, Lord Hatherley said that "When you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed

it,...those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator.”

21. In *Simon v. Byford*, experts on both sides were satisfied that D possessed all the elements of testamentary capacity except for the ability to comprehend and appreciate the claims to which she ought to give effect. The will was made on one of her ‘good’ days. In upholding the validity of D’s will, N Strauss QC gave the following reasons:

(i) It is clear from *Goodfellow* and the earlier authorities, and from many subsequent decisions, that the law upholds the right of elderly people to leave their property as they choose, even if their mental faculties have declined considerably. This must include many cases in which they can no longer remember all the circumstances relevant to the division of their property between the people they wished to benefit; to make this a qualification for testamentary capacity would be inconsistent with the case law.

(ii) While there may be cases in which the requirement for the testator to understand the claims to which he ought to give effect can only be met if the testator is capable of understanding, and possibly only if he does understand, the different provisions of an earlier will, this is not such a case. It must be a matter of degree. In this case the previous will was 9 years earlier, and the differences were slight; the beneficiaries under both wills were the obvious ones, and all received substantial gifts under both wills. Nobody was omitted.

(iii) In any event, on a proper analysis of the facts, D was capable of understanding the provisions of her previous will.

22. Further, the Court was satisfied that D knew and approved of the provisions of the 2005 Will.

Conclusion

23. Peter Gibson LJ commented in Fuller v. Strum that,

“Probate proceedings peculiarly pose problems for the court because the protagonist, the testator, is dead and those who wish to challenge the will are often not able to give evidence of the circumstances of the will. The doctrine of “the righteousness of the transaction” whereby the law places a burden on the propounder of the will, in circumstances where the suspicion of the court is aroused, to prove affirmatively that the deceased knew and approved of the will which he was executing, is a salutary one which enables the court in an appropriate case properly to hold that the burden has not be discharged.”

24. What is an ‘appropriate case’ will always depend on the facts of the case. Challenging the testator’s mental capacity may be difficult in cases in which the Will is prepared by an independent legal advisor. Expert medical evidence can be expensive to obtain and are regarded with caution by the courts. If a Will is made in circumstances that are suspicious, a disappointed beneficiary under another Will or the rule of intestacy may have better prospects of success by requiring the defendant to prove the ‘righteousness of the transaction’. Provided that there is sufficient and proper basis for doing so, a defendant to a probate claim who simply wishes to challenge the validity of the Will by requiring it to be proved in solemn form will benefit from costs protection (r.57.7(5)). In determining the principle of costs, courts can and will have regard to the conduct of the parties both before and during the proceedings. Offers of settlement, whether or not made under Part 36 of the CPR, can be taken into account. The general rule that costs follow the event may be disapplied in appropriate cases.

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