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Challenging Suspicious Wills

Workshop 2

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Introduction

- Testamentary capacity
- Knowledge and approval
- Undue influence
- Fraudulent calumny
- Due execution

The Problem (1/7)

- 2021 – Jack died, aged 88, leaving his only son, Paul
- 2020 – Jack made a new Will (the “2020 Will”)
 - (1) 50% of his residuary estate to one of his carers, Jill
 - (2) 50% of his residuary estate equally between a number of charities, which he had no special links to prior to his death
- Will prepared without professional help/advice

The Problem (2/7)

- Jack's health prior to/at the time of executing the 2020 Will:
 - Occasionally expressed a belief that he had been visited by his long-deceased mother
 - Never formally diagnosed with dementia or any other cognitive impairment
 - Medium/short-term memory not as good as in the past, but could still read the newspaper, do the crossword, write letters and hold rational conversations

The Problem (3/7)

- Jack's relationship with Paul prior to/at the time of executing the 2020 Will:
 - Paul had not visited for some time prior to the 2020 Will being executed due to Covid restrictions
 - Prior to lockdown, Paul had visited 3-4 times a year and assisted Jack with a number of financial matters
 - Jack had told people that Paul had not visited for years and did nothing to help him
 - Recently Jack had first expressed a general dislike for Paul
 - Good relationship with Paul's daughter, Tiffany

The Problem (4/7)

- Jack's previous will (the "2015 Will")
 - Executed in 2015 following the death of Jack's wife
 - Number of legacies to friends, relatives and charities (some different than those under the 2020 Will)
 - Whole of residuary estate to Paul absolutely if he survived Jack
 - If Paul did not survive him, residuary estate to be held upon trust for Paul's surviving children in equal shares absolutely.

The Problem (4/7)

- Evidence of Jill (main beneficiary)
 - Jack told her he wanted to make a new will
 - Jack purchased a pro forma draft will
 - She completed dispositive provisions by hand on Jack's instructions
 - She was aware Jack proposed to include her as beneficiary
 - She protested that solicitor should be involved; Jack said this was unnecessary
 - She asked whether Jack had many previous wills; he said not since his wife's death (which was of course incorrect)

The Problem (5/7)

- Jill arranged for two friends to act as witnesses
- Witnesses' evidence:
 - Attended Jack's house
 - Jack (keeping his social distance) asked them to witness the 2020 Will, which he handed to Jill to hand to them
 - Cannot recall whether the 2020 Will was already signed, or whether Jack signed in their presence; they just signed as requested
 - 2020 Will contained regular attestation clause

The Problem (6/7)

- Witnesses' evidence (continued)
 - Jack appeared to be happy with what went on
 - They do not claim that:
 - the 2020 Will was read to Jack by anyone when they were present
 - he read it in their presence
 - he made any comments on its contents

The Problem (7/7)

- Paul's position:
 - Suspicious of Jill's involvement
 - Claims Jack found her attractive and was obsessed with her
 - Claims she took full advantage in persuading him to make the 2020 Will which benefitted her personally
 - Strongly suspects she made comments to Jack fuelling his apparent and recent dislike of Paul

Testamentary capacity

***Banks v Goodfellow* (1870) LR 5 QB 549**

- The testator must be capable of:
 - understanding the nature of his act;
 - understanding the extent of the property of which he is disposing;
 - comprehending and appreciating the claims to which he might give effect; and
 - not be subject to any disorder of the mind as shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties and that no insane delusion shall influence his will in disposing of her property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Issues to consider

- Mistaken beliefs
 - Jack's mistaken belief that Paul had not visited him for some years and did nothing to help him
 - Mere fact testator is mistaken as to material fact is not sufficient as mistake does not by itself operate to invalidate will
 - *Ball v Ball* [2017] EWHC 1750 (Ch)
 - But mistake may provide basis for claiming that testator was suffering from a delusion which affected their testamentary capacity

Issues to consider

- Delusions
 - Only a delusion if no person in possession of their senses could have believed what the testator believed, such that the belief must have been the product of insanity
 - *Ball v Ball* [2017] EWHC 1750 (Ch), at [44]
 - Key question is whether the relevant irrational belief is fixed
 - *Clitheroe v Bond* [2021] EWHC 1102 (Ch) at [102]

Issues to consider

- Delusions (continued)
 - Jack's belief that he had been visited by his long-deceased mother
 - Must be causal link between delusional belief and the disposition
 - *Ledger v Wootton* [2007] EWHC 2599 (Ch), at [5]
 - *Lloyd v Jones* [2016] EWHC 1308 (Ch)
- Unreasonable beliefs, suspicions or fears may be evidence of incapacity even if not delusions
 - *Ledger v Wootton* [2007] EWHC 2599 (Ch)

Issues to consider

- Forgetfulness
 - Jack's forgetfulness of 2015 Will
 - Capacity not to be equated with test of memory
 - *Simon v Byford* [2013] EWHC 1490 (Ch)
 - *Simon v Byford* upheld on appeal – see in particular [2014] WTLR 1097, at [41]

Issues to consider

- Forgetfulness (continued)
 - Testator does not have to be able to justify to himself a difference between a previous will, even if there were particular reasons for the terms of the previous will
 - *Goss-Custard v Templeman* [2020] EWHC 632 (Ch), at [136]

Issues to consider

- Testator must be capable of recollecting all the persons whom he might reasonably wish to benefit, the nature of their claims etc.
 - *Harwood v Baker* (1840) 3 Moore 282, at 291
 - *Abbott v Richardson* [2006] W.T.L.R. 1567, at [186] and [194]
- No evidence he considered claims of others who were beneficiaries under 2015 Will, such as relatives, friends and Tiffany; limited range of beneficiaries under 2020 Will

Issues to consider

- Perversion of right poisoning affections may be evidence of incapacity
 - *Sharp v Adam* [2006] EWCA Civ 449
 - *Re Ashkettle* [2013] EWHC 2125 (Ch)
- Irrational dislike of Paul

Issues to consider

- Expert medical evidence
 - GP
 - Specialist on testamentary incapacity
- Lay witness evidence

Knowledge and approval



Knowledge and approval

- Pre-requisite to the validity of a Will that the testator knew of and approved its contents
- A Will executed in ignorance, or without acceptance, of its contents is invalid
- The question is whether the contents truly represented the testator's testamentary intentions (*Fuller v Strum* [2002] 1 WLR 1097, at [65])
- Must be proved in every case. However, where the circumstances are such as to arouse the suspicion of the court, the burden falls on the propounder to prove knowledge and approval affirmatively

Issues to consider

- Suspicious circumstances
 - *Turner v Pythian* [2013] EWHC 499 (Ch)
- Jill involved in will-making process
- No professional involvement
- No positive corroborative evidence from anyone (apart from Jill) that Jack read 2020 Will

Issues to consider

- But even grave suspicions may be rebutted by evidence that the testator probably knew and approved of the contents of the Will
 - *Hart v Dabbs* [2001] W.T.L.R. 527
 - *Fuller v Strum* [2002] W.L.R. 1097
- 2020 Will not complex
- Evidence from attesting witness
- Exclusion of Paul consistent with Jack's previous statements

Undue influence



Undue influence

- Requires actual coercion
- There must be proof of coercion overpowering the volition of the testator. “Victimisation”, “domination” and “coercion” are the words used in the authorities
 - *Hubbard v Scott* [2011] EWHC 2750 (Ch), at [45]
- Not just physical violence. Extends to verbal bullying or simply talking to a weak or ill person in such a way that that person may be induced, for quietness’ sake, to do anything. A “drip drip” approach may be highly effective in sapping the will
 - *Edwards v Edwards* [2007] WTLR 1387, at [47(vi)]

Undue influence

- The claimant must establish (by proof or inference):
 - the opportunity to exercise influence
 - the actual exercise of influence
 - the actual exercise of influence in relation to the Will
 - that the influence was “undue” (i.e. went beyond persuasion)
 - that the Will before the court was brought about by these means

Wharton v Bancroft [2011] EWHC 3250 (Ch), at [30(e)]

Issues to consider

- No direct evidence of coercion
- Influence is not necessarily undue – i.e. not undue influence where testator succumbs to the charms of another, makes a will in their favour and cuts out his relatives

- *Hubbard v Scott* [2011] EWHC 2750 (Ch)

Fraudulent calumny



Fraudulent calumny

- *Kunicki v Hayward* [2017] 4 WLR 32 identified the following elements:
 - a false representation
 - to the testator
 - about the character of an existing or potential beneficiary
 - for the purpose of inducing the testator to alter her testamentary disposition
 - knowledge that the representation is untrue, or recklessness as to its truth
 - causation: the disputed Will is only made because of the fraudulent calumny

Issues to consider

- Paul cannot prove specific statements
- Possible (although unlikely) that fraudulent calumny can be made out on basis of cogent circumstantial evidence
 - *Marcou v Christodoulides* [2017] 2 WLUK 274
- Civil standard of proof, but cogency and strength of evidence required to prove fraud is heightened by the nature and seriousness of the allegation
 - *Nesbitt v Nicholson (Re Boyes)* [2013] EWHC 4027 (Ch) at [113]
 - *Rea v Rea* [2019] EWHC (Ch)

Due execution



Due execution

- The testator must sign her will or acknowledge her signature in the presence of two or more witnesses present at the same time (Wills Act 1837, s. 9(c))
- Witness should intend by their signature to attest that the testator signed or acknowledged his signature in their presence, and not for other reasons
 - *Re Sherrington* [2005] EWCA Civ 326; [2005] W.T.L.R. 587

Issues to consider

- Witnesses cannot recall whether Jack signed the 2020 Will in their presence, or even whether it was signed before they were present and when they were present implicitly acknowledged by Jack
- However, the strongest evidence is required to rebut presumption of due execution
 - *Re Sherrington* [2005] EWCA Civ 326; [2005] W.T.L.R. 587
 - *Channon v Perkins* [2006] W.T.L.R. 427

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