

Challenging Suspicious Wills

Workshop 1

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29 October 2021



Introduction

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

The Problem (1/8)

- **May 2021 – Lucy died, aged 70, leaving 3 children: Fred, Mark and Helen**
- **April 2021 – Lucy made a new Will (“the 2021 Will”)**
 - **(1) Holiday home, subject to tax, to Mark**
 - **Lucy had previously indicated she was minded to leave holiday home to Mark**
 - **(2) Residuary estate, including her home, equally to Fred and Helen**
 - **Net value of holiday home worth c. £150,000 less than the half shares of residue**
- **March 2021 – Lucy’s husband of 40 years died**
- **2020 – Lucy’s previous will**
 - **If survived husband, residuary estate to her 3 children in equal shares absolutely**
- **2019 – Lucy and Mark had major row, principally over money, appeared to have made up**

The Problem (2/8)

- **When Lucy executed the 2021 Will:**
 - **Living at home**
 - **Suffered a stroke some years ago. Partial recovery, but speech and mobility affected**
 - **Range of health problems**
 - **COPD, diabetes, angina and depression**
 - **In receipt of multiple medications**
 - **Deeply affected by her husband's death**
 - **Prescribed anti-depressants for her low mood**
 - **Health had significantly deteriorated**
 - **Recently been hospitalised. However, not expected to die any time soon**
 - **No record of impairment in medical records**

The Problem (3/8)

- **2021 Will prepared by solicitor, Mr Jones**
- **Fred had contacted Mr Jones.**
- **Mr Jones visited Lucy twice: (1) to take instructions and (2) to supervise execution**
- **Visit 1 – to take instructions**
 - **Fred present**
 - **Lucy told Mr Jones she was in poor health and grieving**
 - **Lucy wished to make equal provision for 3 children, but unsure how as Mark wanted holiday home**
 - **Fred produced list of Lucy's assets and values**
 - **Mr Jones indicated possibility to prepare Will so children equally entitled, but Mark received holiday home on account of his share**
 - **Lucy to consider the matter further**

The Problem (4/8)

- **Email the next day purportedly from Lucy to Mr Jones:**
 - **Lucy wanted to leave the holiday home to Mark, subject to tax**
 - **Remainder of her estate to be divided equally between Fred and Helen**
- **Medical notes on the same day record Lucy's complaints to GP:**
 - **Lucy was feeling terrible**
 - **After the death of husband and due to bad health, she felt all of the stuffing had been knocked out of her**
 - **She was very low**
- **Mr Jones prepared draft of the 2021 Will in accordance with email**

The Problem (5/8)

- **Visit 2**
 - **Mr Jones read the Will to Lucy**
 - **Lucy indicated she understood and approved contents**
 - **Mr Jones recorded no reason to doubt Lucy's testamentary capacity**
 - **No doctor instructed to certify Lucy's testamentary capacity**
 - **Neither Lucy, nor Fred (present initially) told Mr Jones Lucy felt all the stuffing had been knocked out of her**
 - **Mr Jones explained Mark might end up with less than his siblings**
 - **No figure put on disparity**
 - **No reference to the value of the holiday home**
 - **No discussion of the consequences of making the gift subject to, or free from, tax**

The Problem (6/8)

- **Visit 2 - to supervise execution**
 - **Mr Jones recorded statements from Lucy:**
 - **Appreciated Mark might do worse than her other children**
 - **Content with such an outcome, as problems with Mark in the past**
 - **Sometimes doubted whether Mark really cared for her or for her money**
 - **Mark lived some distance away, had not visited Lucy since husband's funeral**
 - **Two other children lived locally and had been on hand to support her**

The Problem (7/8)

- **Execution**
 - **2021 Will witnessed by Mr Jones and by a trainee solicitor**
 - **Trainee solicitor's evidence:**
 - **He was out of the room when Will executed by Lucy**
 - **Added his signature as witness, on return, having been asked to do so by Mr Jones in the presence of Lucy, who raised no objection**
 - **Mr Jones' evidence:**
 - **Standard practice**
 - **Lucy would have signed the Will in the presence of himself and his assistant**
 - **Both present at the same time**

The Problem (8/8)

- **Mark claims:**
 - **Prevented by Fred from visiting Lucy**
 - **Threatened by Fred with physical assault if he sought to come anywhere near Lucy**
 - **Fred was very domineering**
 - **Number of occasions in past when Fred had lost his temper with Lucy**
 - **Lucy was afraid of Fred**
 - **Number of disparaging remarks by Fred to Lucy about Mark, re interest in Lucy's money**
 - **Lucy had forgotten Mark's incurred expenditure on improvements to the holiday home**

Testamentary capacity



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

- The testator must be capable of:
 - understanding the nature of her act;
 - understanding the extent of the property of which she is disposing;
 - comprehending and appreciating the claims to which she might give effect; and
 - not be subject to any disorder of the mind as shall poison her affections, pervert her sense of right, or prevent the exercise of her natural faculties and that no insane delusion shall influence her 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

- Medical records do not record any impairment of Lucy's brain, memory or thinking
- Involvement of solicitor
 - *Hawes v Burgess* [2013] EWCA Civ 94
- Rationality of instructions

Issues to consider

- Golden rule
 - *Re Simpson* (1977) 127 New LJ 487
- Effect of bereavement
 - *Key v Key* [2010] EWHC 408 (Ch)
 - *Dharamshi v Velji* [2013] EWHC 3917 (Ch)
- Effect of forgetfulness
 - *Simon v Byford* [2014] EWCA Civ 280
 - *Hughes v Hughes* [2021] EWHC 1580 (Ch)

Issues to consider

- Expert medical evidence
 - GP
 - Specialist on testamentary incapacity

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 para. [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

- Involvement of solicitor
- Will read to Lucy
 - *Gill v Woodall* [2011] Ch 380
- Understanding the effect of the will
 - *Hoff v Atherton* [2005] WTLR 99
 - *Carapeto v Good* [2002] WTLR 801
 - *Kunicki v Hayward* [2017] 4 WLR 32
- Lucy was advised of probable effect of Will

Issues to consider

- Instructions changed within 24 hours by email and no draft will considered
- Extent of disparity between siblings not explored nor discussed
- Change of instructions not explored
 - *Mundil-Williams v Williams* [2021] EWHC 586 (Ch)
- Effect of bereavement
 - *Key v Key* [2010] EWHC 408 (Ch)
- Potential fall-back solution
 - *Hawes v Burgess* [2013] EWCA Civ 94

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 para. [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 para. 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), para. 30)

Issues to consider

- No direct evidence of coercion
- Plausible alternative explanation for the 2021 Will, i.e. that Lucy was upset by Mark's conduct and believed that he was only interested in her money

Issues to consider

- Lucy's abrupt change of mind in a way that favoured Fred and Helen
- Where no direct evidence of coercion, undue influence may be inferred
 - *Schrader v Schrader* [2013] EWHC 466 (Ch)
 - Requires cogent evidence

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

- Fred told Lucy that Mark was only interested in her money
- Lucy repeated this to the solicitor when justifying the inequality

Issues to consider

- Even if such a representation was made by Fred, it would have to be proved:
 - it was false
 - it was made by Fred with knowledge that it was untrue or with reckless disregard as to its truth
 - it was made with the purpose of inducing Lucy to alter her Will
 - Lucy was in consequence induced to change her Will

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))
- No requirement for a witness to attest and sign a will in the presence of the other witness, just that he or she does so in the presence of the testator (Wills Act 1837, s. 9(d))

Issues to consider

- On the trainee's evidence, the 2021 Will was not signed in the presence of both witnesses
- However, the strongest evidence is required to rebut presumption of due execution
 - *Kentfield v Wright* [2010] EWHC 1607 (Ch)
- Lucy may have acknowledged her signature in presence of both witnesses, e.g. by gesturing with a nod of the head

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