The Thursday Morning Webinar

An Introduction to Probate

The webinar will start shortly

Next week: Simon Trigger and Dominique Smith on Fundamental Dishonesty

15TH October 2020

1 CHANCERY LANE

Revocation

- Last will
- Marriage/Civil Partnership automatically revokes a will
- Divorce/annulment does not, but former partner treated as having died

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Executors

- Fiduciary duties
- Assets vest in executors on death
- May need to apply for grant of probate
- If no executors, vest in Public Trustee

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Covid-19 changes

- Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020
- Can now be present by videoconference

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Intestacy

- No will
- S46 Administration of Estates Act 1925 determines distribution
- Vests in Public Trustee, pending appointment of administrator

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Rule 22 – Non-Contentious Probate Rules 1987

- 1. Surviving spouse or partner
- 2. Sons or daughters
- 3. Parents
- 4. Brothers and sisters
- 5. More distant relatives

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Inheritance (Provision for Family and Dependants) Act 1975

- Where will/intestacy leaves inadequate provision for family members/dependants, that party may apply for provision
- 6-month time limit

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Probate claims

- CPR 57 challenges to
  1. Executors conduct of duties;
  2. Interpretation of will;
  3. Validity of will.

1. Challenge to executors

- Legal status of personal rep.
- Duties of personal rep.
- Administration
  - Due diligence;
  - Account and inventory;
  - Devastavit;
  - Can apply to court for directions;

1. Challenge to executors

- High Court has power:
  - To remove personal rep. and appoint replacement;
  - To appoint another person as administrator prior to grant.

2. Challenge to terms of will

– Marley v. Rawlings [2015] A.C.129

- "When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions" (para 19)

2. Challenge to terms of will

– Marley v. Rawlings [2015] A.C.129

- Aim is " … to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context" (para 20)
- "In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents" (para 23)

2. Challenge to terms of will

- S21 AJA 1982
- "(1) This section applies to a will—
- (a) in so far as any part of it is meaningless;
- (b) in so far as the language used in any part of it is ambiguous on the face of it;
- (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
- (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation."

2. Challenge to terms of will

- S20 AJA 1982 - Rectification
- The court may rectify a will so as to carry out the testator's intentions, if it is satisfied that the will is so expressed that it fails to do so in consequence of:
- (a) a clerical error; or
- (b) a failure to understand his instructions.

- 6-month time limit

3. Challenge to validity of will

- Testator
- (a) must have the requisite mental capacity to make a will;
- (b) must know and approve its contents;
- (c) must not be the subject of undue influence.

3. Challenge to validity of will

- (a) Mental capacity
- *Greaves v. Stolkin, Turner v. Phythian and Bateman v. Overy* [2014] EWHC 432 (Ch)
  - "(i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.
  - (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.
  - (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less"

3. Challenge to validity of will

- (a) Mental capacity
- *Banks v. Goodfellow* (1870) LR 5 QB 549
- English law *"leaves everything to the unfettered discretion of the testator"* on the assumption that *"the instincts, affections and common sentiments of mankind may safely be trusted to secure, on the whole, a better disposition of the property of the dead"* than stereotyped and inflexible rules.
- "It is essential to the exercise of such a power that a testator 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."

3. Challenge to validity of will

- (a) Mental capacity
- *Burns v Burns* [2016] EWCA Civ 37
- "[33] … the testator must:
- (a) Understand that he is giving his property to one or more objects of his regard;
- (b) Understand and recollect the extent of his property;
- (c) Understand the nature and extent of the claims upon him, both of those whom he is including in his will and those whom he is excluding from his will;
- (d) Ensure 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."

3. Challenge to validity of will

- (a) Mental capacity
- Statutory test of mental capacity found in the Mental Capacity Act, 2005 is not to be used: *James v. James* [2018] EWHC 43 (Ch)
- *Simon* v. *Byford* [2014] EWCA Civ.280, "capacity depends on the potential to understand. It is not to be equated with a test of memory…."

3. Challenge to validity of will

- *In re Perrins* [2009] EWHC 1945 (Ch)

(1) Common law test it is capable of being influenced by contemporary attitudes.

(2) General understanding has increased enormously since 1870.

(3) We now recognise that an adult with impaired mental capacity is capable of making some decisions for himself, given help.

(4) Thus we recognise that the test of mental capacity is not monolithic, but is tailored to the task in hand: *Hoff* v. *Atherton* [2005] WTLR 99, 109.

(5) Contemporary attitudes toward adults with impaired capacity are more respectful of adult autonomy.

(6) Even the traditional test must be applied in the context of the particular testator and the particular estate. A testator with a complex estate and many potential beneficiaries may need a greater degree of cognitive capability than one with a simple estate and few claimants.

3. Challenge to validity of will

- *Zorbas v. Sidiropoulous (No 2)* [2009] NSWCA 197

"The criteria in Banks v. Goodfellow are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v. Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation."

3. Challenge to validity of will

- *Re Simpson* (1977) 121 Sol Jo 224 (1977) 127 NLJ 487
- "In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding." "Golden Rule"
- *Parker* v. *Felgate* (1883) 8 PD 171
- "…what is required at the date of execution is that the testator understands that he is executing a will for which he has previously given instructions. It is not necessary that the will is put to him clause by clause; or that its general purport is explained. It is not even necessary that the testator would have understood the will if it had been put to him clause by clause. What is necessary is that the testator knows that he is making a will; and believes that it is the will for which he had previously given instructions. The justification of the principle is the importance that English law has always attached to testamentary freedom."

3. Challenge to validity of will

- *(b) Knowledge and approval*
- Chadwick L.J. in *Fuller v. Strum* [2002] 1 WLR 1097 at para.59 - "truly represent the testator's testamentary intentions"
- *Hoff v Atherton* [2004] EWCA Civ 1554 at para. 64 - "to say that he did understand what he was doing and its effect"
- Simon v. Byford [2014] EWCA Civ.280
- *"When we move on to knowledge and approval what we are looking for is actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made..."*

3. Challenge to validity of will

- *(b) Knowledge and approval*
- *Hoff v Atherton*
  - *"A finding of capacity to understand is, of course, a prerequisite to a finding of knowledge and approval. A testator cannot be said to know and approve the contents of his will unless he is able to, and does, understand what he is doing and its effect. It is not enough that he knows what is written in the document which he signs. But if testamentary capacity — the ability to understand what is being done and its effect — is established, then it is open to the court to infer that a testator who does know what is written in the document which he signs does, in fact, understand what he is doing. And, where there is nothing to excite suspicion, the court may infer (without more) that a testator who signs a document as his will does know its contents. It would be surprising if he did not."*
- Presumption that such knowledge and approval existed when the will was executed

3. Challenge to validity of will

- *(b) Knowledge and approval*
- *2-stage approach:*
  - *(1) for the challenger to a will to raise suspicious circumstances;*
  - *(2) If burden of proof passes, for propounder of will to show testator did know and approve of will.*

Gill v. *Woodall* [2011] Ch. 380 at 22:

value of such a two-stage approach to deciding the issue of the testatrix's knowledge and approval […]questionable. […] better to adopt Crerar v. Crerar:

"consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption.""

3. Challenge to validity of will

- *(b) Knowledge and approval*
- *Barry* v. *Butlin* (1838) 2 Moore's Privy Council Cases 480
- *"The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present Appeal: and they have been acquiesced in on both sides. These rules are two; the first that the onus probandi lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.* ***The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."***

3. Challenge to validity of will

- *(b) Knowledge and approval*
- *Fuller v. Strum [2002] 1 WLR 1097*
- *"Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. 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 (Barry v. Butlin (1838) 11 Moo PC 480 at p. 483 per Parke B.)."*

3. Challenge to validity of will

- *(b) Knowledge and approval*
- Chadwick L.J. in *Hoff v Atherton*
- *"Further, it may well be that where there is evidence of a failing mind — and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will — the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will — that is to say, that he did understand what he was doing and its effect — it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents — in the wider sense to which I have referred."*

3. Challenge to validity of will

- *(b) Knowledge and approval*
- *Fuller* v. *Strum*
- *"I do not doubt that it is possible for a court to find that part of a will did have the knowledge and approval of the deceased and that another part did not. An example would be if a solicitor, who has been instructed to draft a will, obtains the deceased's approval of the draft but subsequently before execution adds a clause without drawing it to the attention of the testator and keeps the executed will. But the circumstances in which it will be proper to find such a curate's egg of a will are likely to be rare. In my judgment it would not be proper for the court to pronounce against part of a will as a means of expressing the court's disapproval of the propounder. Where a will has been duly executed by a deceased of testamentary capacity who knew that he was making a will and is shown to have known and approved of a specific part of the will, the court must consider how real is the possibility that the deceased did not know and approve of the remainder of the will and that requires a careful examination of all the circumstances including the directions and dispositions of the will."*

3. Challenge to validity of will

- *(b) Knowledge and approval*
- *"Righteousness of transaction" Fuller* v. *Strum*
- *"…not to be taken by the court as a licence to refuse probate to a document of which it disapproves; whether that disapproval stems from the circumstances in which the document was executed as a will or whether it stems from the contents of the document. The question is not whether the court approves of the circumstances in which the document was executed or of its contents. The question is whether the court is satisfied that the contents do truly represent the testator's testamentary intentions. That is not, of course, to suggest that the circumstances of execution or the contents may not, in the particular case, be of the greatest materiality in reaching a conclusion whether or not the testator did know and approve of the contents of the document and did intend that they should have testamentary effect. But their importance is evidential. There is no over-riding requirement of morality. If Lord Hatherley's reference to "the righteousness of the transaction" in a speech delivered in the late nineteenth century leads to mis-understanding at the beginning of the twenty first century, then the time has come to consider whether that phrase is still helpful. For my part, I think it is better to avoid it."*

3. Challenge to validity of will

- *(c) Undue influence*
- *(1) There are no presumptions of undue influence where gifts are made within certain relationships and so an explanation is called for.*
- *(2) It is not sufficient to prove that a testator was persuaded to take a particular course. The challenger must establish that his free will was overborne. The reason is this. Whereas in inter vivos transactions a donor or transferor cannot easily renege, a testator is usually free unilaterally to change the provisions of his will.*
- *(3) Because person alleged to have been influenced (the deceased) is not available to give evidence, there is a high burden of proof (even though on the civil standard) on the person alleging the influence.*

3. Challenge to validity of will

- *(c) Undue influence*
- *Hall v. Hall (1868) LR 481*
- *"To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, - these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's."*

3. Challenge to validity of will

- *(c) Undue influence*
- *Wingrove v. Wingrove (1885) 1 P.D. 81*
- *"To be undue influence in the eyes of the law there must be - to sum it up in a word - coercion ... if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would be equally be coercion, though not actual violence. These illustrations will sufficiently bring home to your minds that even very immoral considerations on the part of the testator, or of someone else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, 'this is not my wish, but I must do it'..."*

3. Challenge to validity of will

- *(c) Undue influence*
- *Edwards v. Edwards* [2007] EWHC 1119 (Ch)
- *(i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence.*
- *(ii) Whether undue influence has procured the execution of a will is therefore a question of fact.*
- *(iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition.*
- *(iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.*

3. Challenge to validity of will

- *(c) Undue influence*
- *Edwards v. Edwards* [2007] EWHC 1119 (Ch)
- *(v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;*
- *(vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will.*

3. Challenge to validity of will

- *(c) Undue influence*
- *Edwards v. Edwards* [2007] EWHC 1119 (Ch)
- *(vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside.*
- *(viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone.*
- *(ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent.*

3. Challenge to validity of will

- *Larke v Nugus* letter
- Caveats

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Next week: Simon Trigger and Dominique Smith on Fundamental Dishonesty

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