Knowledge & Approval and Rectification

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Introduction

1. Contentious probate has become in recent times, as most practitioners will be aware, a growth area of litigation. This has come about for two principal reasons:

   1.1 Firstly the context of such litigation usually originates from disputes within families. Family members often have a sense of entitlement and feel very strongly if they perceive that they have been dealt with unfairly by the will of a parent or other family member and inter-family disputes in my experience tend to be one of the most acrimonious forms of litigation. The combination of family passions and money can be a toxic combination, though this factor is of course not a new development.

   1.2 The main driving force behind the increase in litigation in this area is the recent exponential rise in property prices. This has meant that it is by no means unusual for estates to be valued at in excess of £500,000 and therefore those with a sense of grievance perceive that there is something worth fighting for, even if the legal costs of a fully contested probate action can make significant inroads into a £½ million estate.

2. In contentious probate litigation, the validity of a will can be challenged on a number of grounds, including testamentary capacity, lack of knowledge and approval, undue influence and fraud. This webinar will concentrate on knowledge and approval. Before turning to a more detailed examination of this topic, it is instructive to bear in mind the remarks of Mummery LJ (a highly regarded judge in this area of law) in **Hawes v Burgess 2013 EWCA Civ 74**:

12. *As for want of knowledge and approval of the contents of the 2007 Will, the scope of the inquiry indicated by a long line of authorities gives rise to other questions distinct from lack of mental capacity to make the will: Wintle v. Nye [1959] 1 WLR 284; Fuller v. Strum [2001] 1 WLR 1097; Gill v. Woodall [2011] WTLR 251. The relevant questions to ask in this case are-*

    i) *Do the circumstances of the 2007 Will arouse the suspicions of the Court as to whether its contents represent the wishes and intentions of the Deceased as known to and approved by her? The judge said "Yes."*

    ii) *Has scrutiny of those circumstances by the court dispelled those suspicions? The judge said "No."*

13. *In answering those questions in a particular case the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed.*

14. *I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law: 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.*

Knowledge and approval

3. A testator must have known and approved of his will and its dispositive provisions.

4. What is meant by knowledge and approval? Despite some judicial uncertainty on this issue, the better view is that the testator must understand what was in the will when he signed it *and what its effect would be*, see: **Gill v Woodhall 2010 EWCA Civ 1430**. In **Hoff v Atherton 2004 EWCA Civ 1554** it was stated as follows in the Court of Appeal:

> *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****.* [my emphasis]

However, where a testator employs an expert draftsman to formulate his instructions by deploying appropriate legal language in the will, the fact that the testator might not really understand the language used by the draftsman does not mean that he does not have knowledge or approval of the will. In such cases the testator is deemed to have adopted the language in the will and knowledge and approval is imputed to him, see: **Greaves v Stolkin 2013 EWHC 1140 (Ch)**.

5. As to proof of knowledge and approval, the following principles apply:

5.1 In the vast majority of cases, there is an evidential presumption of knowledge and approval arising from proof of the will being duly executed by a testator with testamentary capacity, see **Sherrington v Sherrington 2005 EWCA Civ 326**. That presumption derives in turn from the presumption of capacity where the will is duly executed and rational on its face. In many cases the witnesses and solicitors involved in the preparation of the wills in question may well be dead or untraceable and in such cases wills are routinely admitted to probate in common form on the basis of the presumptions, without any actual substantive proof of knowledge and approval.

5.2 The position is different, of course, where knowledge and approval is challenged. Nowadays the courts adopt a less rigorous approach to presumptions and, as set out in **Gill vWoodhall**, there is in substance a single-stage test which is whether the testator has understood what was in the

will when it was executed and what its effect would be. In determining this issue, all the circumstances of the case must be considered.

5.3 That said, in both **Gill v Woodhall** and **Hawes v Burgess** it was pointed out that where a will was professionally prepared and then read over to a testator by an experienced solicitor, it will be difficult to succeed on a claim of lack of knowledge and approval. It might not raise a legal presumption, but it does constitute evidence from which an inference of knowledge and approval can be drawn in the absence of some countervailing evidence.

5.4 In the textbooks and reported cases there are a number of factors that tend to suggest a lack of knowledge and approval; where those factors are present, the suspicions of the Court are aroused and it will be vigilant to ensure that actual knowledge and approval is established. In such cases the propounder of the will must adduce positive evidence of knowledge and approval; how compelling and persuasive that evidence needs to be will depend on the extent to which the circumstances surrounding the execution of the will are suspicious. Examples of such factors are as follows:

5.4.1 Where the testator is blind, dumb or illiterate.

5.4.2 Where the testator's mental capacity is impaired, albeit not to extent of lacking testamentary capacity.

5.4.3 Where the will is drafted by a person taking substantial benefit under it.

5.4.4 Where a person is actively involved in the procuring of a will under which he takes a substantial benefit, by suggesting the terms of the will and choosing the solicitor to be instructed by the testator.

5.4.5 Where the terms of the will represent a radical departure from long held testamentary dispositions, particularly where the person in whose favour the changes are made is involved in procuring the will and has influence over the testator.

5.4.6 Where substantial benefits are conferred on the testator's carers.

5.4.7 Cases where the beneficiary is the doctor or solicitor of the testator (or someone in some other similar position) and is involved in procuring or executing the will.

6. It is possible for there to be knowledge and approval of part of a will, as result of which it can be admitted to probate without the parts which of which the testator did

not have knowledge and approval. However, it was pointed out in **Fuller v Strum 2001 EWCA Civ 1879** that such circumstances would be extremely rare.

Rectification

7. As set out above, where there has been an error in the drafting of a will, this will sometimes have the result that the testator does not have knowledge and approval of will as drafted to the extent that he cannot be said to have understood its legal effect.

8. In some cases, this issue can be resolved as a matter of construction. **S21 Administration of Justice Act 1982** ("the Act"), provides that, where any part of a will is meaningless or ambiguous, extrinsic evidence of the testator's subjective intentions may be adduced, which is a departure from the usual rule of construction of legal documents to the effect that evidence of a party's subjective intentions is inadmissible. In **Brooke v Purton 2014 EWHC 547 (Ch)** it was held that the concept of ambiguity in **S21** should be broadly construed.

9. There may, however, be cases where the mistake cannot be cured by deploying **S21** as an aid to construction. In such cases it might be possible to have recourse to **S20** of the Act, which provides that, where the Court is satisfied that the will as drafted fails to carry out the testator's intentions due to either a clerical error or a failure to understand his intentions, then the Court may order rectification of the will so as to carry out his intentions.

10. Dealing firstly with a failure to understand the testator's intentions, this is limited to cases where the drafter of the will fails to understand the instructions given. It is widely acknowledged that this provision therefore has limited scope and does not cover circumstances where the draftsman fails to understand the legal effect of the words used by him or uses the wrong technique in drafting, in circumstances where he nevertheless understands the testator's instructions.

11. As regards clerical errors, the position is as follows:

    11.1 In **Marley v Rawlins 2014 UKSC 2** (which is the only case on rectification to have reached the House of Lords or Supreme Court) it was held that the following description of the expression "clerical error" in **Bell v Georgiou 2002**

EWHC 1080 (Ch) was the best judicial summary of the cases decided as at 2014:

The essence of the matter is that a clerical error occurs when someone, who may be the testator himself, or his solicitor, or a clerk or a typist, writes something which he did not intend to insert or omits something which he intended to insert … The remedy is only available if it can be established not only that the will fails to carry out the testator's instructions but also what those instructions were.

11.2 In **Marley** it was held that a will which was invalid by reason of the drafting error resulting in lack of knowledge and approval, could be cured by rectification.

11.3 The Supreme Court held **S20** should be construed as widely as possible on the basis that the general thrust of **Part IV** of the Act was to make it easier to make a valid and effective will.

11.4 It was held that rectification under **S20** was not confined to correcting drafting errors, but could extend to other sorts of error, including mistakes resulting from the way the will had been executed.

12. In **Marley** a husband and wife had intended to make mirror wills; in error, however, the husband executed the wife's will and vice versa. The Supreme Court corrected this error by rectification under **S20**.

13. The general view is that the decision in **Marley** should not be taken as resulting in the Courts having assumed a general power to waive defects in the formal requirements relating to execution under **S9 Wills Act 1837**, as the facts in **Marley** were exceptional.

14. However, it is likely that most drafting errors will be now capable of rectification under **S20**, provided that convincing proof can be adduced both that the will as drafted did not reflect the testator's intentions and as to his true intentions. Accordingly, **S20** will in many cases cure mistakes that would otherwise lead to a finding of a lack of knowledge and approval.

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