PUMP COURT
CHAMBERS

Contentious Probate

Recap: Responding to a probate claim.

1. If a defendant does not wish to raise any positive case but wants the will to be proved in solemn form and, for that purpose, to cross-examine the witnesses who attested the will, they may give notice of this in their defence. In these circumstances, the court will not make an order for costs against them unless it considers that there was no reasonable ground for opposing the will (CPR 57.7).

2. In their defence (CPR 7 claims), the defendant must state:
   2.1. Which of the allegations in the particulars of claim they deny.
   2.2. Which of the allegations they are unable to admit or deny, but which they require the claimant to prove.
   2.3. Which of the allegations they admit.
   2.4. Where the defendant denies an allegation, they must state their reasons for doing so; and if they intend to put forward a different version of events from that given by the claimant, they must state their own version (CPR 16.5).

3. The period for filing the defence is 28 days after service of the particulars of claim (CPR 15.4 and CPR 57.4).

4. The person seeking to propound a will has the burden of proving that it was duly executed. He may prove this by showing due execution and, if it is not irrational on its face and there are no suspicious circumstances, this will discharge that burden of proof. If a defendant (either to the claim or to a counterclaim) raises some issue that raises some doubt, the burden might shift onto the other party. Where testamentary capacity and want of knowledge and approval are put in issue, the burden remains with the person seeking to propound the will; in all other cases, the burden usually shifts to the person raising the issue.

5. The following are common defences:

   5.1. Want of due execution.

   5.2. Capacity

   5.3. Undue influence.

   5.4. Fraudulent Calamity

   5.5. Fraud.

   5.6. Knowledge and approval.

   5.7. Sham.

   5.8. Revocation.

   5.9. Forfeiture

Recap: Testamentary capacity:

6. When a person executes their will, they must at that time have the requisite mental capacity to do so. This means that they must understand what they are doing, and the extent of the property which they are giving away in the will. They need to be able to comprehend and appreciate the claims to which they ought to give effect; and for this purpose, no disorder of the mind must poison their affections, pervert their sense of right or prevent the exercise of their natural faculties. No insane delusion must influence their will in disposing of their property [*Banks v Goodfellow (1870) LR 5 QB 549, Cockburn CJ at page 565*].

7. *Common law test*: The first three limbs all relate to a testator having to have basic understanding of what they are doing, what they own, and who they might want to leave it to. The case of *Charles v Fraser* [2010] EWHC 2154 (Ch) is a good example of where such understanding was not present. In that case, the testatrix informed her solicitor that she had no relatives. In fact, it transpired that she had several relatives that she had simply forgotten about. It was therefore held that she did not have testamentary capacity.

8. The fourth limb of the test can be invoked in situation where a person is able to understand they are making a Will, knows what they own and who their property might go to, but that they suffer from an illness which prevents them from making a rational decision on the matter. In *Kostic v Chaplin* [2007] EWHC 2298 (Ch) the evidence showed that the testator's natural affection for his son had been distorted by his delusions to such an extent he could not dispose validly of his estate by Will. In particular, the testator believed there was an international conspiracy against him in which family members, including his son, were involved.

9. This well-established test for capacity has been developed further in *Key and another v Key and others [2010] EWHC 408 (Ch)*, where Briggs J took into account the testator's powers of decision making as well as his powers of comprehension and concluded that the testator lacked testamentary capacity because he was unable to exercise his decision-making powers. In *Simon v Byford and others [2014] EWCA Civ 280*, the Court of Appeal confirmed that the test for testamentary capacity depended on potential capacity to understand and was not to be equated with memory. The decision also confirmed that the requirement that a testator understood what they were disposing of, by will, was limited to the extent of their property and did not extend to understanding the collateral consequences of testamentary dispositions. Therefore, the court found in favour of the will of a testator who had forgotten the reasons for a particular disposition in an earlier will and may not have appreciated the consequences of changing that disposition.

10. *Statutory test of capacity:* The test for capacity has been put on a statutory footing, by sections 1 to 4 of the Mental Capacity Act 2005 (MCA 2005), although the MCA 2005 is not directly concerned with the execution of wills. Section 2 of the MCA 2005 provides that a person lacks capacity in relation to any matter if at the material time they are unable to make a decision for themselves in relation to it because of an impairment of, or a disturbance in the functioning of, the mind or brain, whether the impairment or disturbance is permanent or temporary. The approach to be taken in determining capacity is in section 1 of the MCA 2005, while section 3 sets out the factors relevant to whether a person is able to make a decision.

11. The intention of the legislation appeared to be a codification of the existing law that is applicable to wills but the courts have refused to apply the provisions directly [*Scammell and another v Farmer [2008] EWHC 1100 (Ch)*), *Re Walker decd [2015] WTLR 493* & *James v James and others [2018] EWHC 43 (Ch)*] because Parliament must be assumed not to have intended to overrule a well-established common law rule without expressly providing for it in legislation.

12. *Presumption of capacity*: If a will, rational on its face, is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. However, if there are circumstances in evidence which counterbalance that presumption, the decree of the court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when they executed it [*Symes v Green* (1859) 1 Sw & Tr 401, Sir C Cresswell at page 402]. In *Hawes v Burgess and another* [2013] EWCA Civ 74, the Court of Appeal held that strong evidence was required to find that a testatrix lacked testamentary capacity when an experienced solicitor contemporaneously recorded his view that she had capacity. If the issue of the testator's capacity is raised, the burden of proof remains with those seeking to propound the will.

13. *Timings*: Lack of capacity describes a situation whereby a person is unable to make a valid Will due to some sort of mental impairment. The impairment could be permanent or temporary. The crucial point to consider will be the time at which the Will was made.

14. The key point in time in capacity claims are when the person gave instructions for their Will and (if different) when they executed the Will. As per *Parker v Felgate* (1883) LR 8 PD 171, it is possible for a Will to be valid in a situation where a person had capacity to give instructions, but this deteriorated before they executed the will sometime later. In such instances, it will simply be necessary to show that they sufficient capacity to understand that they were signing a Will for which they had previously given instructions.

15. *Drafting:* Any allegations relating to the testator's capacity must be pleaded specifically and particulars of the facts and matters relied on must be given (CPR 57.7.4).

16. *Avoiding disputes*: Disputes about the capacity of an elderly or seriously ill testator can be avoided or reduced when practitioners prepare a will, if they arrange for a medical practitioner to confirm that the testator has the requisite capacity and make a contemporaneous record of their examination and findings (the "golden rule"). However, in *Wharton v Bancroft and others [2011] EWHC 3250 (Ch)*, Norris J acknowledged that there are practical issues for practitioners following this rule, particularly where the testator has a matter of days to live.

17. The importance of obtaining a family tree and previous wills cannot be overstated. Remember patients with severe physical ill health are not being monitored by medical practitioners for their mental health – they are being made comfortable. Encourage family members to proactively engage with medical practitioners in advance executing wills. File notes.

18. "Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could 7 not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs." [Gill v Woodall and others [2010] EWCA Civ 1430per Neuberger MR at para 16].

Important new law:

19. *Re Clitheroe [2021] EWHC 1102 (Ch)*. The decision is important for two main reasons. The Court had the opportunity to: (1) consider a full articulation of the arguments that the Mental Capacity Act 2005 had or should replace the common law Banks v Goodfellow test; and (2) conduct a close examination of the tests for delusions under the Banks v Goodfellow test.

20. MCA 2005 or Banks v Goodfellow?

20.1. Whether the Banks v Goodfellow common law test for testamentary capacity in a contentious probate claim brought after death has been replaced by the statutory test under ss.1-3 of the Mental Capacity Act 2005 applied in the Court of Protection has been considered (and rejected because the scope of the Mental Capacity Act 2005 is limited to the Court of Protection's jurisdiction over living persons and does not extend to contentious probate in

the High Court: had Parliament intended to replace or amend Banks v Goodfellow, it would have done so in express terms).

20.2. The point was not raised in *Re Clitheroe* at first instance [2020] EWHC 1185 (Ch) before Deputy Master Linwood, where it was held that the deceased lacked testamentary capacity to make two Wills excluding the defendant by reason of an affective disorder including a grief reaction that gave rise to insane delusions about the defendant and her conduct.

20.3. The claimant/appellant attempted to raise the point on appeal to Falk J but was not permitted to do so: to raise the point on appeal was contrary to the overriding objective in circumstances where the parties had agreed that Banks v Goodfellow was the correct test and aspects of the trial would have been conducted differently otherwise.

20.4. That decision notwithstanding, Falk J determined the question, approving James v James and Re Walker and largely adopting the reasoning therein, namely that it is apparent from the terms of the Mental Capacity Act 2005 that it is concerned only with decision-making of and on behalf of living persons (and the past capacity of living persons to do limited, defined acts, such as make Lasting Powers of Attorney).

20.5. Whilst Falk J declined to overturn the 150-year-old common law test, she did highlight the tension in having two tests, including the possibility of a person lacking capacity, but it being impossible to make a statutory will for him [75]. Similar problems may arise from the disunity between the statutory and common law tests for capacity to contract, which are described at [66].

21. Test for delusions:

21.1. Perhaps more interestingly, the Court considered the question of insane delusions, a limb of the Banks v Goodfellow test that has attracted increasing attention in recent years (e.g. *McCabe v McCabe [2015] EWHC 1591 (Ch)* which highlighted [at 278] that a belief is not a 'delusion' or a 'confabulation' if it is justified by what caused it to be formed, i.e. by something that has actually happened).

21.2. On appeal, the issue was whether, as a matter of existing authority, for a belief of a testator to amount to an insane delusion, it is necessary for it to be impossible to reason the testator out of that belief. Falk J held that while an insane delusion will often satisfy that test, it is not a necessary requirement that it do so: the proper test is whether the belief is irrational, fixed, and out of keeping with the testator's background. While compliance with that test will often be demonstrated by proof the testator could not be reasoned out of their belief, it may also be demonstrated by how the testator formed and/or maintained the belief in the face of clear evidence to the contrary (so that there is no sensible basis to conclude the testator was merely mistaken or had forgotten the true position), or without any evidence at all on which to base it.

21.3. Accordingly, so explained, the test may be 'lower' than previously thought, such that more delusions claims may be forthcoming in future. The practical concern for the Will draftsman may be that they should ask a testator to explain the basis for any particularly operative belief they express when giving instructions for the dispositions they wish to make, to flag up possible delusions and/or minimise the scope for future dispute as to the nature of this belief.

21.4. Deputy Master Linwood's decision, below, on the expression and application of limb 4 of the Banks v Goodfellow test (delusions) was criticised by the Judge. She has for the first time fully reviewed the authorities on what is required to demonstrate a delusion, holding that a delusion must be a false belief which is both irrational and fixed. Whilst in many cases an obvious way to demonstrate the fixed nature of a false belief is to lead evidence that the testator could not be reasoned out of it, that is not a necessary part of establishing a delusion [102].

21.5. The correct approach is to conduct a "holistic assessment of all the evidence. This would take account of the nature of the belief, the circumstances in which it arose and whether there was an evidential basis for it, whether it was formed in the face of evidence to the contrary, the period of time for which it was held and whether it was the subject of any challenge" [104].

21.6. The Judge was concerned that the Deputy Master had not taken full account of the need for the beliefs to be fixed [110], accordingly she adjourned the appeals for ADR [143].

Recap: Knowledge and approval:

22. *Burden of proof*: The burden of proving the validity of the will (called the *onus probandi*) lies in every case on the party propounding the will. They must satisfy the court that the instrument that they are propounding is the last will of a free and capable testator.

23. One or two stage approach to burden of proof?

23.1. In *Gill v Woodall and others* it was stated that, where a judge had heard evidence of fact and expert opinion over a period of many days relating to the deceased and the execution of the document being put forward as a valid testamentary disposition, this two-stage approach, of asking whether the preparer had caused suspicion and then examining the evidence to contradict it, was questionable; it would be better in these circumstances for the court to consider all the relevant evidence available and then, drawing such influences as it could from the totality of that material, to come to a conclusion whether or not the burden of establishing knowledge and approval of the contents of the document had been discharged).

23.2. In *Sharp v Hutchins [2015] EWHC 1240 (Ch)*, the High Court was satisfied that the correct approach was to apply the single-stage test set out in *Gill v Woodall* but held that the court could use the two-stage test reflecting the analysis in *Barry v Butlin* as a cross-check to the conclusions reached using the single-stage test.

24. The burden of proof is a balance of probabilities [*Fuller v Strum [2001] EWCA Civ 1879*], but the extent of the burden depends on the seriousness of the suspicion that has been aroused.

25. *Affirmative proof required*: Proof of testamentary capacity of the testator and the due execution of the will, without more, gives rise to a proper inference of knowledge and approval but in certain cases, affirmative proof of knowledge and approval is required. To do this the propounder of the will must show that the testator understood the terms of the Will and what effect those terms would have.

26. In *Gill v Woodall and others* , the circumstances of the execution of the will appeared in line with authorities in which there was a strong presumption of knowledge and approval. However, the Court of Appeal found that the testator did not know and approve the contents of her will. In the leading judgment, Lord Neuberger MR stressed that the facts of the case were exceptional (arising from the testator's unusual mental condition).

27. Where a party writes or prepares a will under which they take a benefit, this will "excite the suspicion of the court"; in other words, the court will be vigilant in examining the evidence in support of the instrument. It is unlikely to pronounce it to be valid unless that suspicion is removed; affirmative evidence of knowledge and approval is needed to prove that the instrument does express the true will of the testator [*Barry v Butlin 2 Moo PC 480*].

28. The court also needs affirmative evidence of knowledge and approval where the testator has a disability affecting their speech, hearing, eyesight, or their ability to write or more often referred to as deaf, dumb or blind.

29. *What must be proven*: Want of knowledge and approval describes a situation whereby a person has executed a Will in circumstances where they did not actually know what was in the document that they were signing and were therefore unable to provide their approval. This means, for a Will to be valid, the person making the Will must know the contents of the Will and approve them. This could be done by reading it or having it read to them.

30. The test for capacity involves asking a generic question, was the testator capable of understanding what was in their Will? With knowledge and approval, the question is much more specific and subtle. Here, we are required to ask whether the person actually knew and approved of the contents of their Will. Such cases will always involve an investigation of the circumstances surrounding execution e.g. ability to read and converse about the contents of a newspaper/article.

31. The case of *Barry* concerned a Will made by an elderly testator under which a quarter of his estate was left to the lawyer who drafted the Will for him. Other beneficiaries included his Butler. His only son was entirely disinherited. The reason for disinheriting the son could be explained by all ties having been broken after the son absconded from a criminal trial. Accordingly, while the preparation of the will did "excite the suspicion of the court", the reason did remove that suspicion. The person seeking to propound the Will had to present further evidence that the testator did actually know and approve the contents of the Will and that the reason was true and rational. The Will was upheld as a result.

32. In *Hawes v Burgess [2013] EWCA Civ 74* the Court of Appeal upheld the lower court's finding that a Will was invalid for want of knowledge and approval and illustrates the importance of obtaining a full account of how exactly a testator's Will came into existence, including who made the arrangements, who was present and what reasons were provided to explain the contents of the Will. The following factors were crucial in the court's findings:

    32.1. One of the principle beneficiaries (a daughter of the testator) had orchestrated the making of a new Will. She made all the arrangements for her mother to make a new Will.

    32.2. The new Will disinherited one of the children, despite the testator being on excellent terms with that child.

32.3. The daughter had remained present during the Will preparation meeting, answering many of the questions on her mother's behalf.

32.4. No draft Will was provided to the testator prior to execution.

32.5. These circumstances were said to be enough to excite the court's suspicion and the appellant had been unable to remove that suspicion with evidence.

33. We often deal with cases involving testators who have disabilities which mean that it would be more difficult than usual for them to know and approve of the contents of their Will. In the case of *Buckenham v Dickensen [2000] WTLR 1083*, the testator was deaf and partially blind. There was little evidence to show that the Will was presented to the testator in such a way that he could have provided his approval. This case shows how important it is to take note of communication issues and adapt the process to ensure that knowledge and approval can be shown. Communication issues also often arise where a person speaks poor English. In such cases it may be prudent to use a solicitor that can speak their first language or to employ an impartial interpreter. If this does not take place, the Will may very well be open to challenge.

34. Homemade DIY Wills are particularly vulnerable to challenge. When a Will is professionally drafted the solicitor will generally go through it with the testator to make sure they fully understand its effect. They also often oversee the witnessing of the Will or at least give instruction on how to execute one. But when no independent professional is involved, suspicion can fester, and it isn't always easy to dispel. Misgivings can be amplified when language is used that would not be associated with the testator or the Will contains things that are not true or out of character. Questions can also be raised when the choice of witnesses seems unusual.

35. Even when a Will is prepared by a solicitor suspicion can still arise. Was the solicitor previously known to the testator for instance? When a testator has made previous Wills with another solicitor over a period, but then changes solicitor for no apparent reason, it is easy to see how mistrust can arise. This is especially so if the legacies are significantly different to previous Wills, the previous Wills are not brought to the new solicitor's attention, the principle beneficiary was not close to the testator, or the overall effect of the Will seems irrational.

36. Gathering of evidence is key to success. Ideally you need to be able to rely upon several factors that cast real doubt on whether the testator had knowledge of the terms of the Will and approved its contents. Remember, the key witness, the testator, will not be available to give evidence. This means that these cases are often shrouded in conjecture and speculation on the way the testator lived and interacted, their ability to read and understand what they have read, making a definitive assessment difficult where the evidence is suggestive rather than conclusive. It is no doubt a result of this uncertainty that many challenges based on lack of knowledge and approval result in out of court settlements, often at or after a mediation.

37. *Overlapping claims*: There can sometimes be an overlap between challenging a will on the grounds of lack of knowledge and approval, and a challenge made on the grounds of undue influence. Has the main beneficiary been closely involved in the making of the Will, for instance? Is it someone in a position of trust? Do they have a dominating personality? Is it possible that they have poisoned the mind of the testator in relation to other potential beneficiaries? The burden of proof may be decisive in determining which claim to pursue as those that plead undue influence in probate have to prove it.

38. Consideration must also be given to the conduct and state of mind of the testator themselves. Had they been behaving irrationally or acting out of character? Was their health impaired or were there any signs of a deterioration in their mental faculties, short of losing testamentary capacity altogether?

Important new law:

39. *Re Williams (Deceased) [2021] EWHC 586 (Ch) is important because it considers the best way to give effect to the testator's true intentions when want of knowledge and approval is lacking and a claim for rectification had not been pleaded. And held that the will could be admitted to probate with deletions to reflect the testator's true intentions.*

40. In *Williams* the testator was divorced and had four sons, one of which (Richard) had farmed the land with his father all his life and lived in the farmhouse with him. The farm comprised the bulk of the assets in the testator's estate. In 1990 the testator had made a will leaving Richard his share in the farming partnership and the residue to his four sons. Richard was given an option to purchase the farm from his brothers. The testator decided to amend his will in 2014 and instructions were initially given to a secretary at the firm in person and subsequently over the telephone when a paralegal contacted him (unannounced) to confirm them. File notes of the communications were prepared on both occasions, and these were considered carefully at the hearing.

41. However, the second set of instructions from the testator differed significantly in terms of the bequest of the farm. The instructions to the secretary meant that Richard would have the agricultural tenancy and a 62.5% share of the reversion (which would fall into residue), with a 5-year option to buy the remaining 37.5% share. The instructions as recorded by the paralegal meant that Richard would have the farm outright and these were incorporated by her into a draft will and letter of wishes that were sent to the testator. The testator noted an incorrect address in the draft so had clearly read the will. The testator signed his new will at the solicitor's office in the presence of Richard (although there was a file note to confirm that this was at the testator's specific request). Although physically frail, there was no question about the capacity of the testator.

42. There were many factors to support a conclusion that the testator did intend to make a gift of the farm to Richard, including the fact that he had capacity, had clearly read the draft carefully and that it had been prepared by solicitors following receipt of detailed instructions. However, the court held that there was a lack of knowledge and approval because:

42.1. The contents of the 2014 will differed from the initial instructions given to the secretary and the testator hadn't contacted the firm to change these; the paralegal had contacted him.

42.2. The testator hadn't been prepared for the phone call and the paralegal had made no reference to the fact that he had changed his mind about the farm.

42.3. There was no specific discussion about the option clause from the 1990 will, which was omitted in the 2014 will.

42.4. The precise shares of residue in the 2014 will made little sense if the farm had already been bequeathed specifically, because there was nothing much left in residue.

43. *Power to admit wills with deletions*: *Re Morris, deceased [1972] P 62* demonstrates the court's power to admit a will to probate with deletions to reflect the testator's true intentions. *Re Horrocks, deceased [1939] P 198* explored the limits of this power, namely that the court cannot omit words which cause a material alteration in the effect of the rest of the will.

44. However, these cases can be contrasted with the more recent case of *Marley v Rawlings [2014] UKSC 2*, *[2015] AC 129* in which the Supreme Court decided that the proposed deletions amounted to a "word game with haphazard outcomes". In that case, it was significant that the deletions only achieved the intended result because another beneficiary had pre-deceased the testator.

45. Distinguishing the present case, HHJ Keyser QC held that the deletion of the wording in the will making a specific gift of the property to Richard would not materially alter the sense of the rest of the will and was therefore permissible.

46. *File notes: It is also a salutary tale for delegating to junior staff who may have not understand the legal and/or factual subtleties in this cause of action. Here there was good reason for the* testator to give his farm to the son who had farmed the land and lived at the farmhouse all his life. But the case serves as a reminder of the importance of clear file notes to record the testator's instructions as these were considered carefully at the hearing. Further, practitioners should ensure that the effect of a will is confirmed and very clearly explained to a testator, particularly if it favours one child over others and substantially alters the provisions of an earlier will.

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