Browne Jacobson

Contentious private client roundup – 2023

22 November 2023 Daniel Edwards

2023 - the year of the Contentious Probate case. That's certainly how it has felt, with barely a fortnight passing by without a case of interest popping up. There have been too many for just one article, but here's our selection of a few we think were particularly newsworthy.

Mental Capacity

May of this year saw the judgment in **Baker v Hewston**. This was a claim to set aside a Will based on lack of 'mental capacity'. The testator in this case had a diagnosis of dementia but, notwithstanding that, the court found his final Will was valid, and that it did not fail for lack of capacity.

The point of interest in this case was the extensive analysis by the court on the interplay between the test for mental capacity established in **Banks**, and the test set out in the Mental Capacity Act 2005.

The court concluded the test in the Mental Capacity Act was only to be used as a "cross-check" to the test in **Banks**, which, it emphasised, remains good law.

It will be interesting to see how this point is addressed by a higher court, which it undoubtedly will be, at some point in the future.

Undue Influence

As the days grew long and warm, in June we had a rare thing; a successful challenge to a Will based on undue influence (**Jones v Jones**).

The judge in that case acknowledged there was no hard evidence that the deceased had signed her Will as a result of undue influence, and rightly observed that is often the case in claims of this nature.

Looking though at all the circumstantial evidence, and applying the "balance of probabilities" test, the court was content to set aside the Will on the basis of undue influence.

The following month, like the proverbial bus, we had a similar decision in **Rea v Rea**.

The key takeaway in this case was that the judge cited eight key circumstances which he felt gave grounds to set aside the Will. Some of the circumstances he referred to will be common in a lot of cases of this nature, and other circumstances might even have been cited as proof that the Will was in fact valid. Nevertheless, in this case the Will was also set aside.

Just 3 weeks before the judgment in *Rea* was published, a claim for undue influence had failed in **Copley v Winter.** The claim was unsuccessful despite the court finding the circumstances were "*consistent with the hypothesis of undue influence".* Indeed, the judge went on to list six factors which they felt pointed towards undue influence, and only four that did not.

These three cases taken together, decided within weeks of each other, demonstrate just how unpredictable cases of this nature are. The maxim "*it depends which judge you get on which day*" was perhaps never more true.

Knowledge and Approval

July also saw a successful Will challenge based on “lack of knowledge and approval” (**Ingram v Abraham**).

The facts in Ingram were complicated – the judgment ran to 84 pages - but put most simply, the deceased had a with the First Defendant, Simon, during which she told him she wanted him to prepare a Will. He then did that for her, and the terms of the Will were such that he inherited everything from the estate. He had read the content of the Will to her over the telephone, whilst driving, prior to its execution.

The court refused to admit the Will to probate, and found that the deceased’s intentions had only been to “give” her estate to Simon so that he could distribute it to her children. The Will in question was therefore not valid due to a lack of knowledge and approval of its contents by the deceased.

Mutual Wills

2023 might even be considered “year of the Mutual Will case” as not one, not two, but *three* cases made their way to reported trials.

In March we had ***Naidoo v Barton.*** The judgment set out the key legal principles for the creation of mutual wills:

1. The “contract” must be one that is enforceable at law i.e. it must comply with the usual rules for enforceability of contracts;
2. The wills **do not** need to *expressly* say that the testators must not revoke their will - the agreement can be implied from evidence;
3. The wills must be intended to be mutually binding **on one another** i.e. there must be an agreement from both parties not to change their will, not just from one person to the other;
4. The binding agreement can be contained outside of the terms of the will; and
5. The burden of proof must be discharged by the person claiming the wills are ‘mutual’.

The court had little hesitation in holding the will in question to be 'mutual' in nature, especially given it (and the corresponding will of the other party) was expressed on its face to be mutual.

(In an interesting twist, the court elected to set aside the will in question on the basis of undue influence by one of the Defendants, the making of a mutual will being unusual, and therefore calling for a good explanation, which it felt was absent here).

In July 2023 the Court of Appeal got in on the act, with its judgment in **McLean v McLean**.

The wills in that case were made by a solicitor, and his file note of his meeting with his two clients was quoted heavily in the judgment, including, importantly:

“Clients said that they would like to appoint each other as their sole executor and trustee and for the surviving spouse to receive everything on the first spouse’s death.

On the second spouse’s death, clients would like the residuary estate to be divided equally between the 4 children.

I raised the issue that if Mr McLean were to pass away first, then there was no guarantee that Mrs McLean would not change her will and leave her entire estate to Brett [their son]*. Mr McLean explained that he trusts his wife implicitly. They have been married for 45 years and there is no way that she would do this.”*

At first glance that might seem like an agreement between the husband and wife, or at least something akin to an agreement; it certainly suggests an understanding that Mr McLean was making his will to try and ensure his estate (ultimately) passed to his four children equally, and not only to Brett (his only child with Mrs McLean).

But, after careful analysis, the judge in the trial had decided this was not enough to create mutual wills. There was a difference, the court held, between trusting somebody to do something, and agreeing with them – in a mutually binding fashion – they would do it.

The Court of Appeal had little trouble in upholding the decision of the trial judge, re-affirming that;

“What is required to establish mutual wills is a clear agreement……Expectation, or trust, is not enough. The evidence in this case established only trust”.

Costs

Finally, November saw judgment handed down on the issue of costs in **Richefond v Dillon**.

The case itself had been decided on the basis that a specific legacy in the Will was upheld, but the gift of residue was not (meaning it instead passed by intestacy).

The Claimants in the proceedings were the executors of the Will. One of their number stood to benefit significantly if the Will was upheld. The other two did not, but had very much “thrown their lot in” with the other executor in the way the litigation had been run.

CPR 46.3(2) states;

“The general rule is that [a trustee party to proceedings] is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate."

But the Practice Direction to Part 46 adds;

"A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred”

The question before the court on costs was whether the executors were entitled to their costs from the Estate, or whether the costs had not been “properly incurred”, which could create an exception which meant the “general rule” should be deviated from.

In previous cases there have been identified two exceptions to the “general rule” which would often be applicable in cases concerning Will challenges.

The first of those is where a person who makes a will (or persons who are interested in the residue) have really been the cause of the litigation. The second is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. So it fell to the Court to consider whether the facts in this case warranted either of those principles being brought into operation.

Not surprisingly, given one of the executors had a vested interest in seeking to prove the Will, and given the stance they had taken in the proceedings could not be described as anything like “neutral” the court found the general rule should be deviated from in this case.

A large part of the court’s reasoning in reaching its conclusion was based on the fact the Claimants had issued the claim *before* making investigations of the party who drafted the Will, and seeking evidence from them on certain key points. Had they done so, the court noted, the Claimants would have been aware that the evidence did not favour their position. It was therefore “not reasonable” for the Claimants to issue proceedings when they did.

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