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**Contentious Probate Update**

1. This part of the afternoon’s seminar is intended as a brief review of some recent contentious probate cases. It is not a comprehensive survey of all recently reported cases in the area, nor necessarily of the significant ones. It is merely a review of those that seemed of interest to me.

**Baker v Hewston [2023] EWHC 1145 (Ch)**

1. I begin with **Baker v Hewston**. It is not the most recent of cases, with judgment having been handed down almost a year and a half ago on 5th May 2023, but it has given rise to some fairly widespread academic and practitioner discussion and it deals with a central concept to many contentious probate cases, namely the test for testamentary capacity.
2. The case is a High Court decision made by HHJ Tindal sitting as a High Court Judge in the Business & Property Courts in Birmingham. The facts of the case need not concern us to any great extent for present purposes. The Deceased, Stanley, had a fairly complicated family that consisted of two partners that had died before him, three children and eight grandchildren. His last will was made in 2020 when he was 90 years old. He had made six wills during the period from 2010 to 2020, with family members shifting into and out of inheritance with changes in those wills. There was no medical evidence of incapacity at the time of the 2020 will, though Stanley had had a diagnosis of dementia some years before 2020, and it appears that he had had an episode of mental incapacity in 2009. His solicitor gave evidence that he was satisfied that Stanley knew and approved of the contents of the 2020 will and there was nothing to suggest a lack of testamentary capacity when he made the 2020 will. The executors brought the claim to prove the 2020 will in solemn form and at the trial the judge reviewed the previous wills, finding that they had all been validly made except an earlier 2009 will (in respect of which it had not been proved that Stanley had capacity to make it). The judge held that the changes that Stanley had made in his testamentary dispositions between 2010 and 2020 had more to do with capriciousness than capacity and that the 2020 will was valid and should be admitted to probate, as it superseded the earlier wills.
3. So far, so unremarkable. The interest though, in the case, is that the judge attempted to reconcile the common law test for testamentary capacity in **Banks v Goodfellow (1870) LR 5 QB 549** with the statutory test for capacity in **ss.2-3 Mental Capacity Act 2005**. As has been suggested by some commentators, Judge Tindal has ambitiously attempted to synthesise the contrasting positions taken between Chancery and Court of Protection practitioners and was well-placed to do so as a judge sitting in both jurisdictions.
4. I have to confess a certain prejudice as a probably fairly crusty Chancery practitioner (though I hasten to add that I do appear from time to time in the Court of Protection): I rejoiced, at least internally, when this debate about the potentially differing tests appeared to have been shut down by Nicholas Strauss QC sitting as a High Court Judge in **Re Walker dcd [2014] EWHC 71 (Ch)**. He deprecated the then recent tendency in cases and textbooks to suggest that the test for capacity in the **Mental Capacity Act 2005** was a modern restatement of **Banks v Goodfellow**. He held that the tests were different and served different purposes, with the test under the Act applying to whether living persons were able to take decisions, and if they were not, how decisions should be taken on their behalf in their best interests. He held that the correct and only test for testamentary capacity, to be taken in probate proceedings when an issue testamentary capacity arose, was the test in **Banks v Goodfellow**. As Judge Tindal noted, that position has been trenchantly endorsed in the current edition of *Theobald on Wills*, in which the learned editors expressed the view that although it was a decision only at first instance, it was clearly correct.
5. Judge Tindal has, perhaps, re-opened the debate to a certain extent, although his aim appears to have been to reconcile the potentially different tests. What is his reasoning for doing so? Well, Judge Tindal identified what he saw as a practical problem. He said that if the common law test and the statutory test were substantively different then it would give rise to a risk that different decisions could be reached about capacity in different courts for the same living testator. The Chancery Division could find that a testator had capacity to make a will, so that it was valid, but the Court of Protection might find that the same testator lacked capacity and so could make a statutory will for him. Or, as Judge Tindal thought worse, that the Chancery Division might decide that a testator lacked capacity, so his will was invalid, but the Court of Protection might find that the same testator had capacity, so decline to make a statutory will for him, with the result that he ended up intestate. For my own part, although I agree with Judge Tindal that this would be an impracticable, illogical or inconvenient result, I am unsure that it would be likely to arise in practice, except in rare circumstances.
6. However, the key points to take from Judge Tindal’s analysis of the two tests, is as follows. First, in Judge Tindal’s view, **ss.2-3 Mental Capacity Act 2005** do not strictly apply to testamentary capacity in probate cases. He accepted that the common law test applied here and that deciding whether a testator had testamentary capacity in a probate case is not a purpose of the **Mental Capacity Act 2005**. I respectfully agree. This must be right and is consistent with the decision in **Re Walker**, among others.
7. However, he tentatively proposed a ‘compromise solution’ to reconcile the two tests: (a) he said that the statutory and common law tests on capacity were aligned, and consciously so; (b) he said that the statutory test on capacity was broadly consistent with the common law test on testamentary capacity; (c) he suggested that the statutory test and the **Banks v Goodfellow** criteria are consistent and can accommodate each other; and, finally, (d) that the statutory provisions are appropriate to be included by analogy with the common law approach to testamentary capacity in probate cases.
8. In relation to his suggestion of the tests being consciously aligned, Judge Tindal’s view was that, to avoid any impracticality, it was necessary to interpret the **Mental Capacity Act 2005**, where it is applied in the context of testamentary capacity, as being aligned with the common law test in **Banks v Goodfellow**. He suggested this is what Parliament intended.
9. In relation to the consistency of the two tests, Judge Tindal expressed the opinion that the differences between the statutory test and the common law test were overstated by Nicholas Strauss QC in **Re Walker**. On presumption of capacity, for instance, under **s.1(2)** **Mental Capacity Act 2005**, capacity is presumed but the evidential burden shifts if a prima facie case of lack of capacity is made out. Under the common law, although the burden of proof is on the propounder, a testator is presumed to have testamentary capacity if a will is rational and coherent on its face and duly executed; the evidential burden then shifts back if a real doubt as to capacity is raised. As such, in Judge Tindal’s view, there is much similarity. He went on to suggest that the requirements of **s.3(1)** (which requires a person to be able to understand all the information relevant to the decision) and **s.3(4)** (which requires a person to understand information about the reasonably foreseeable consequences of the decision), are also not inconsistent with the common law test when considered in the context of testamentary capacity. This means that in relation to making a ‘unilateral’ will, **s.3(4)** would not require consideration of the consequences for others and would recognise the testamentary freedom of a testator to make a will that might be hurtful, unfair or capricious. Further, Judge Tindal suggested that in the context of making a will, all the relevant information for the purposes of **s.3(1)** would be the information considered relevant for the purposes of the common law test.
10. That led on to Judge Tindal reconciling the traditional four limb test for testamentary capacity in **Banks v Goodfellow** with **ss.2-3 Mental Capacity Act 2005**. He suggested there was a straightforward way of reconciling them, so that the statutory provisions accommodated the common law test. He said, for instance, that where the Court of Protection was required to assess issues of testamentary capacity under the **Mental Capacity Act 2005** then the relevant information under **s.3** would be the same as the first three limbs of **Banks v Goodfellow**, namely did the person understand the nature of making a will and its effects, did he understand and retain the extent of his property, and was he able to weigh the nature and extent of the claims upon him, both those he is including in the will and those he is excluding from it.
11. In relation to the fourth limb of **Banks v Goodfellow** (that no disorder of the mind or insane delusion shall bring about a disposal of it, which if his mind had been sound, he would not have made), Judge Tindal accepted that the language is different from **s.2** and that **s.2** has no requirement for the counterfactual “but for” question, but he indicated that his view was that they could be read in a way that they broadly accommodated one another.
12. That led to Judge Tindal’s final point, which was that the two tests should act as a cross-check. That meant that for the Court of Protection, when considering a person’s capacity under the **Mental Capacity Act 2005**, it should use **Banks v Goodfellow** to put ‘flesh on the bones’ in **ss.2-3** where the decision related to making a will and in a probate case, whilst the common law test in **Banks v Goodfellow** was the test to be applied and had stood the test of time, the **Mental Capacity Act 2005** could be used as a ‘cross-check’. Judge Tindal opined that if the cross-check suggested a different result, it did not trump the common law test but might suggest further consideration.
13. It remains to be seen how much traction the observations of Judge Tindal will gain. Many of his observations about trying to reconcile the two tests are sensible though strictly obiter. His decision on the facts in the case required him to apply the common law test, which he did, and which he had found was the correct test to apply in a probate case, and he then used a consideration of the provisions of **ss.2-3 Mental Capacity Act 2005** as a cross-check, which in that case led to exactly the same conclusion. We may, though, be in the territory again where at some point some guidance from the Court of Appeal is required.

**Leonard v Leonard [2024] EWHC 979 (Ch)**

1. This was a case involving what appears to have been a bitter and hard-fought probate dispute between on the one hand the testator’s children of his first marriage (the claimants) and on the other hand the testator’s second wife and her family (the defendants). In that respect, it was a fairly common probate claim. The claimants were seeking to propound a 2007 will in their favour and to propound against a 2015 will that purported to benefit the defendants. In her main judgment, Joanne Smith J found that the 2015 will was invalid for lack of testamentary capacity and knowledge and approval on the part of the testator.
2. A separately reported judgment of Joanne Smith J handed down in April 2024 is of interest in relation to costs, and the potential interrelation between a Part 36 offer in a contentious probate claim and the potential exceptions to the normal rule as to costs that might arise in a probate claim. The judgment contains a useful summary of the applicable principles.
3. In relation to the interaction between a Part 36 offer and the common law exceptions that can apply in probate cases to the usual rule that costs follow the event, this issue did not arise on the decision made by the judge in **Leonard** as she reached the view that one of the exceptions did not apply and the other arose for a period that ended some time before the Part 36 offer was made. The judge indicated that it was common ground between the parties that the two probate exceptions cannot override the effects of **CPR 36.17(4)** and that there was no attempt by the defendants to seek to argue that the exceptions should be relied on to support an argument that the enhanced consequences of **CPR 36.17(4)** were unjust. She did, however, indicate that circumstances might arise where the facts relevant to the second exception might also be relevant to the Court’s consideration under **CPR 36.17(5)** of whether it would be unjust to make an order under **CPR 36.17(4)**.
4. Turning to the exceptions, the judge identified the two exceptions to the general rule as to costs in probate cases as being:
5. whether the litigation was caused by the testator or a beneficiary – if so, the court may order the unsuccessful party’s costs to be paid out of the estate; and
6. whether the circumstances, including the knowledge and means of knowledge of the opposing party, led reasonably to an investigation of the matter – if so, the court may make no order as to costs.
7. In paragraph 14 of her judgment, Joanne Smith J set out a helpful summary of the rationale for, and general approach to be taken to the exceptions:
8. The exceptions were to strike a balance between two principles, namely that parties should not be tempted into fruitless litigation in the knowledge that their costs would be defrayed by others and doubtful wills should not pass easily into proof by reason of the costs of opposing them.
9. The exercise of the Court’s discretion on costs is governed by the **CPR**, but the considerations of policy and fairness underlying the exceptions remain as valid now as before the **CPR**.
10. The exceptions are guidelines not straightjackets and their application depends on the particular facts of the case.
11. A positive case must be made out on one or both exceptions before the Court departs from the general rule as to costs. It is necessary to make out a very strong case on the facts for an unsuccessful litigant to get their costs out of the estate under the first exception.
12. In relation to the first exception, the trend of recent authorities was to carefully scrutinise a claim to rely on it and to narrow rather than expand the circumstances in which it might be engaged: in particular, nowadays the Court attached less importance to its independent powers to investigate the circumstances in which a will was executed and was alert to the dangers of encouraging litigation and discouraging settlement.
13. The narrowing of the scope did not apply to the second exception because there is still a public interest that where reasonable suspicions are raised as to the validity of a will, it should be proved in solemn form.
14. Even where one or both exceptions might be engaged, there may still be a point that is reached where the litigation becomes ordinary hostile litigation, from which point the normal rule that costs follow the event will apply.
15. On the facts of the case, the judge held that the first exception did not apply at all. She acknowledged that in looking at the question of whether the testator had been the cause of the litigation, it was not necessary to show moral fault or culpability on his part and that the circumstances could include leaving testamentary papers in a state of confusion, or where a will cannot be found, or using difficult language, and could extend to circumstances involving doubt as to testamentary capacity. But it was also relevant to consider the state of knowledge of the unsuccessful proponents of the will and where they had had ample opportunity to form an opinion as to the testator’s testamentary capacity, the first exception did not protect them in taking a view which turned out to be mistaken.
16. As to the second exception, the judge accepted that it was engaged but that it is not an all or nothing exception. Investigation might be justified at the outset but as the position becomes clearer a point may be reached where it no longer applies and the normal rule as to costs then takes effect. The Judge also held that the exception could apply equally to unsuccessful challengers to a will as to unsuccessful proponents of a will. On the facts, she reached the view that in that case the second exception applied up to and including an early mediation between the parties (March 2021) but not thereafter.
17. The Part 36 offer had been made in September 2021 and it was accepted that the judgment in the case had been at least as advantageous to the claimants as the Part 36 offer, so that **CPR 36.17(4)** applied in principle. The argument mounted by the defendants, which was not specific to the context of a probate claim, was that the Part 36 offer was alleged to not have been a genuine attempt to settle the proceedings. On that basis, the defendants argued that it would be unjust to make an order under **CPR 36.17(4)** relying on **CPR 36.17(5)**. The judge rejected that. She held that the offer was genuine at the time it was made in the sense that it contained an element of give and take and a genuine element of concession to which a significant value could be attached in the litigation. In this respect, the offer contained a modest increase in legacies to the defendants (1.9% of the value of the estate) and conceded a counterclaim in relation to lifetime gifts (which was then conceded prior to trial), but crucially for Joanne Smith J, it was made at an early stage of the proceedings and was genuinely made to limit and avoid the costs of litigation that were subsequently incurred.

**Rea v Rea [2024] EWCA Civ 169**

1. I confess that when the decision was made for me to give a contentious probate update in the early part of the year, the Court of Appeal had recently handed down its judgment in **Rea v Rea**, which it did in February this year, and the suggestion was made that I should talk about this case because the Court of Appeal had done down our own Judge David Hodge KC. I note that in the last few weeks the Supreme Court has refused permission to appeal, so it appears that it is going no further.
2. The decision is, I should say, a rare case of the Court of Appeal overturning a decision of Judge Hodge. I will not attempt a staunch defence of Judge Hodge’s judgment, as I would make a very poor fist of it, I am sure, and he is far more capable of doing so. What I will say is that the decision of the Court of Appeal appears to me to be harsh, in circumstances where Judge Hodge had heard all the live evidence and clearly formed a view as to the credibility and reliability of the witnesses at trial, which in his usual way were clearly expressed and given with detailed reasoning.
3. However, the decision of the Court of Appeal serves to reinforce the extremely high bar that has to be overtopped to establish that a will was procured by undue influence in the usual case, as here, where there is no evidence of actual force or coercion to support the allegation of undue influence.
4. In this case, the testator had made a will in 2015 in favour of her daughter, and excluding her three sons. She had made an earlier will, nearly 30 years before, dividing her estate equally between her four children. The 2015 will was professionally prepared. The instructions for the will were given to the solicitor at a meeting in the presence of the daughter, though was later executed at a second meeting when the daughter was not present. The solicitor sought a medical opinion on the testator’s capacity before the will was executed because of her age and his concern about the exclusion of the sons, but the doctor opined that the testator had capacity and he had no reason to believe she was being coerced or was under undue influence.
5. The Court of Appeal reviewed the usual authorities in relation to the requirements for undue influence in probate cases, including **Hall v Hall (1865-9) LR 1 P&D 481** (“a testator may be led but not driven”) and **Wingrove v Wingrove (1885) 11 PD 81** (“if he could speak his wishes to the last, he would say, ‘this is not my wish, but I must do it’”).
6. In relation to the burden and standard of proof, Newey LJ after considering the authorities expressed the position in the following terms: “I would accept that undue influence can be proved without demonstrating that the circumstances are necessarily inconsistent with any alternative hypothesis. On the other hand, the circumstances must be such that undue influence is more probable than any other hypothesis. If another possibility is just as likely, undue influence will not have been established. When making that assessment, moreover, it may well be appropriate to proceed on the basis that undue influence is inherently improbable” (para.32).
7. Strangely, there did not appear to be any reference in the Court of Appeal to the judgment of Lewison J in **Re Edwards [2007] EWHC 1119 (Ch)** at para.49, where he provided a summary in relation to undue influence in probate cases:

“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 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;

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;…..

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.”

1. I should say that it is unclear to me whether Newey LJ intended in any way to water down or depart from proposition iii) made by Lewison J. At trial, Judge Hodge had expressed himself as being satisfied that the facts were consistent only with the daughter having procured the making and execution of the 2015 will by the exercise of undue influence, overpowering the testator’s volition without convincing her judgment. He had set out a series of reasons for that finding. Nevertheless, the Court of Appeal, whilst accepting that it is of course in only very limited circumstances that an appellate court should interfere with findings of fact made by a trial judge, and accepting that Judge Hodge had made such findings, considered that those findings were insufficient.
2. The Court of Appeal concluded that Judge Hodge was mistaken as to his findings that there had been undue influence and that he needed to consider other possibilities. Newey LJ said at para.57: “the Judge needed to consider whether the circumstances were as consistent with Anna deciding to make a new will either entirely of her own accord or after being encouraged to do so by Rita. Undue influence was, to my mind, clearly no more likely than at least the latter of these hypotheses”. As such, the appeal was allowed essentially on the basis that proof had not been established to the requisite standard by discounting the possibility of other hypotheses.

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