

PGDLPO

US Legal System

Wills :

The relevant time. It must be shown that the testator was of sound disposing mind at the time when the will or codicil was made. The law requires that there should be sound disposing mind both at the time when the instructions for the will are given and when the will is executed, but it would appear that if the will is shown to have been drawn in accordance with instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to execute as his will a document drawn in pursuance of those instructions though he is unable to follow all its provisions. Supervening insanity will not revoke the will nor will a recovery validate a will or codicil made during absence of testamentary capacity. A will has been admitted to probate although a codicil made shortly after has been refused on the ground of want of sound disposing mind at the time of its execution.

Criterion of sound disposing mind. At common law sound testamentary capacity means that four things must exist at one and the same time :

- (i) The testator must understand that he is giving his property to one or more objects of his regard;
- (ii) He must understand and recollect the extent of his property;
- (iii) He must also 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;
- (iv) 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.

The testator must realize that he is signing a will and his mind and will must accompany the physical act of execution. It is said that perversion of moral

feeling does not constitute unsoundness of mind in this respect, but this is really a matter of degree. The criterion to be applied has been thus stated by Cockburn CJ, in *Banks v Good fellow* :

‘It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall 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’.

The mere fact that the testator was egocentric or was subject to one or more delusions is not of itself sufficient. It must be shown that the delusion had, or was calculated to have, an influence on testamentary dispositions. Further it has been said, without in any way detracting from the authority of *Banks v Goodfellow*, that it must be recognized that psychiatric medicine has come a long way since 1870 in recognizing an ever widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision making. A will has been held good subject to the deletion of a clause affected by a delusion.

Mental disorder. The law relating to persons suffering from mental disorders is now governed by the Mental Health Act 1983 (MeHA 1983) as heavily amended by the Mental Health Act 2007.

Under the Mental Health Act 2007 there is only one definition of ‘mental disorder’ meaning any disorder or disability of the mind and the term ‘mentally disordered’ is to be construed accordingly. Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for these purposes. A person with a learning disability to be suffering from mental disorder unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part.

The provisions of the Mental Health Acts govern the classification and treatment of persons suffering from mental disorders but, since 1 October 2007, they no longer govern the management of property, which is not subject to the provisions of the Mental Capacity Act 2005.

However, simply because a person is deemed to be suffering from mental disorder within the meaning of the MeHA 1983, or even that he is detained pursuant to the powers contained in the MeHA 1983, does not necessarily mean that he is incompetent to make a will. Each case must, it seems, be considered with reference to the general definitions noted above; and medical and psychiatric evidence will be important.

Delusions. A delusion is a belief in the existence of something which no rational person could believe and, at the same time, it must be shown to be impossible to reason the patient out of the belief. To avoid a will, the delusion must be such as to influence the testator in making the particular disposition made. The existence of a delusion is quite compatible with the retention of the general and faculties of the mind. It is a question of fact whether the delusion affects the disposition, and, even where the delusion is connected with the subject-matter of the disposition, it is not a necessary conclusion that the delusion affected it. A parent may take a being subject to such a delusion as will avoid a will, but there is a point where such a view ceases to be a harsh unreasonable judgment and must be held to proceed from some mental defect. For the will to stand the testator's mind must not be dominated by a insane delusion so as to overmaster his judgment to such an extent that he is incapable of disposing of his property reasonably and properly or of taking a rational view of the matters to be considered in making a will. The well-trusted legal decision, that best of all guides on this question, is the following statement of Cockburn CJ in *Banks v Goodfellow*.

'Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if the reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to

interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.’

It cannot be said that there are people who are not suffering from delusional insanity but are incapable of making a will. A testator may be stated by medical evidence to have recovered from delusions, and yet the will be pronounced against on the ground that the onus of proof has not been discharged, even where the dispositions are probable. The court may grant probate of will and codicil with the deletion of one clause from the codicil which has been affected by a delusion. A pretended delusion assumed for the purpose of deception will not invalidate a will.

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UK Legal System

Will :

Capacity and Disposing Intent

Testamentary Capacity

I.IN GENERAL

General position. At the present time, the question of capacity has become of importance only in the case of persons who are minors and of persons who are not of sound mind, memory and understanding. Such incapacity as formerly existed in the case of married women, aliens and convicts has been removed. It goes without saying that corporate bodies are incapable from their very nature of making a will, though they may benefit under the will of an individual person. To some extent two or more individuals may make a joint will.

Testamentary capacity and domicile. Questions of testamentary capacity have to be determined by the law of the domicile of the testator at the time of the making of the will.

Supervening incapacity. A will made by a person of full capacity is not revoked by the fact that he subsequently becomes incapable of making a will and a will made by a sane person is not revoked by his subsequent insanity.

Removal of disability. A will made at a time when the testator or testatrix is incapable of making a will is not rendered valid by the fact that the incapacity ceases during his or her lifetime, unless the will has been re-executed after such cesser.

II.ALIENS

No disability since 1870. By virtue of the Naturalization Act 1870 an alien has been under no disability with regard to disposing by will of any property acquired after the coming into force of the Act.

III.CRIMINALS

No disability. There is no restriction on the testamentary capacity of persons convicted of crimes and it seems that convicted criminals never were under a disability but until the abolition of forfeiture of property, a person convicted of treason or felony ceased to have property in respect of which a will could operate. The Criminal Justice Act 1948, s 70, repealed the provisions of the Forfeiture Act 1870, and from 18 April 1949, a criminal has been subject to no disabilities affecting his property and no administrator is now appointed. Such a restriction would now breach a person's right to property.

IV.MINORS

General disability. Wills executed before 1 January 1970, are governed by the Wills Act 1837, s 7, which provides that no will (except for the special provisions affecting soldiers in actual military service and mariners or seamen at sea) made by a person under the age of twenty-one years is valid. This rule applies notwithstanding that the will has been confirmed by a codicil executed on or after that date. Wills made on or after that date by persons who are aged eighteen years or over are valid. A person attains a particular age at the commencement of the relevant anniversary of the date of his birth. A will made on a person's eighteenth birthday is therefore valid.

V.MARRIED WOMEN

No disability. A married woman is now under no disability in disposing by will of her property.

VI.SOUND DISPOSING MIND

Mental Capacity Act 2005. The test for mental capacity, whether to make a will or do any other act, has previously been established by a series of judicial decisions, the most significant of which are noted in the following paragraphs. The Mental Capacity Act 2005, section 1 to 4 of which were brought into force on 1 April 2007, puts the test for mental capacity on a statutory footing. The Act is intended to be a codification of the existing law and, in the case of wills, the existing authorities will continue to be relevant.

The Mental Capacity Act 2005 and the Code of Practice under it, provide a new definition of capacity and it is likely that judges will use the new statutory definition to develop common law rules in particular cases. Medical experts are expected to find the statutory definition easier to use and may ignore the existing rules. The Mental Capacity Act 2005 provides that the starting point should be

that there is a presumption of capacity: s 1(2); this reflects the common law presumption.

Lack of capacity is catered for in s 2 by reference to a 'functional' approach which is 'decision specific'. The section provides that :

'For the purposes of this Act, a person lacks capacity in relation to a Matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary.'

The provisions which, in reality, provide the test for capacity are to be found in s 3(1) which provides that :

'For the purposes of section 2, a person is unable to make a decision for himself if he is unable –

- (a) To understand the information relevant to the decision,
- (b) To retain that information.
- (c) To use or weigh that information as part of the process of making the decision or
- (d) To communicate his decision (whether by talking, using sign language or any other means).

That is qualified by the remainder of s 3 so that :

- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of –
- (a) deciding one way or another, or
 - (b) failing to make the decision.

As these new rules are adopted and applied in wills cases there should be less reliance on the previous case law tests of testamentary capacity as embodied in such time-honoured cases as *Banks v Goodfellow*.

The relevant time. It must be shown that the testator was of sound disposing mind at the time when the will or codicil was made. The law requires that there should be sound disposing mind both at the time when the instructions for the will are given and when the will is executed, but it would appear that if the will is shown to have been drawn in accordance with instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to execute as his will a document drawn in pursuance of those instructions though he is unable to follow all its provisions. Supervening insanity will not revoke the will nor will a recovery validate a will or codicil made during absence of testamentary capacity. A will has been admitted to probate although a codicil made shortly after has been refused on the ground of want of sound disposing mind at the time of its execution.

Criterion of sound disposing mind. At common law sound testamentary capacity means that three things must exist at one and the same time: (i) The testator must understand that he is giving his property to one or more objects of his regard; (ii) he must understand and recollect the extent of his property; (iii) he must also 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. The testator must realize that he is signing a will and his mind and will must accompany the physical act of execution. It is said that perversion of moral feeling does not constitute unsoundness of mind in this respect, but this is really a matter of degree. The criterion to be applied has been thus stated by Cockburn CJ, in *Banks v Goodfellow* :

'It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall 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.'

The mere fact that the testator was eccentric or was subject to one or more delusions is not of itself sufficient. It must be shown that the delusion had, or was calculated to have, an influence on testamentary dispositions. A will has been held good subject to the deletion of a clause affected by a delusion.

Mental disorder. The law relating to persons suffering from mental disorders has been consolidated by the Mental Health Act 1983 (MeHA 1983). The provisions of that Act govern the classification and treatment of such persons but, from 1 October 2007, will cease to govern the management of property, which will then become subject to the provisions of Mental Capacity Act 2005. The MeHA 1983 currently defines four categories of mental impairment, namely :

'mental disorder' which means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind and 'mentally disordered' shall be construed accordingly;

'severe mental impairment' which means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and 'severely mentally impaired' shall be construed accordingly;

'mental impairment' which means a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is

associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and 'mentally impaired' shall be construed accordingly; and

'psychopathic disorder' which means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.

Under Mental Health Act 2007 those definitions will be reduced to one, namely: 'mental disorder' meaning any disorder or disability of the mind and the term 'mentally disordered' is to be construed accordingly. Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for these purposes. A person with a learning disability is not to be considered by reason of that disability to be suffering from mental disorder unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part.

However, simply because a person is deemed to be suffering from mental disorder within the meaning of the MeHA 1983, or even that he is detained pursuant to the powers contained in the MeHA 1983, does not necessarily mean that he is incompetent to make a will. Each case must, it seems, be considered with reference to the Mental Capacity Act 2005; the general definitions noted above; and medical and psychiatric evidence will be important.

Presumption of sound disposing mind. It is presumed that the testator was sane at the time when he made his will but, if the question of his sanity is contested, the onus is on the person propounding the will to prove that the testator was of sound disposing mind at the time when he made his will. While there must be a vigilant examination of all the evidence, if the court feels there is no doubt substantial enough to defeat a grant of probate, the grant must be made. Complete proof of capacity or even proof beyond reasonable doubt is not essential. A will not irrational on its face, duly executed, is admitted to probate without proof of competence unless such competence is contested. The law presumes that a state of things shown to exist continues to exist unless the

country is proved and thus a testator, when there is no suggestion of insanity, is presumed to have remained sane and, on the other hand, if there is evidence of insanity at a time prior to the making of the will, the person propounding the will must prove competence at the relevant time.

In the latter case the presumption in the first instance is against sanity especially where the will contains dispositions which are prima facie not such as an ordinary testator would make. Such presumption as there is, is always affected by the provisions of the will itself. If these are such as a sane person would make, and, still more, if the will is drawn by the testator himself the will can be held valid. If the dispositions are irrational, the presumption is against the will.

Lucid interval. Where the testator is shown to have been insane prior to the date of the will, it must be shown that the will was made during a lucid interval. Even a person of unsound mind so found could make a will during a lucid interval. To establish the existence of a lucid interval is not necessary to prove complete mental recovery. It is sufficient if it is shown that the testator understands that he is making a testamentary disposition and what is required of him in making the disposition and that any delusion from which he is still suffering does not affect such disposition. A person may suffer from intermittent insanity and perhaps the burden of proving a lucid interval is then less than where it is sought to prove an isolated interval, but, once insanity is established, it is for the person setting up the lucid interval to prove the lucid interval and that the testamentary act was done during the interval.

Delusions. A delusion is a belief in the existence of something which no rational person could believe and, at the same time, it must be shown to be impossible to reason the patient out of the belief. To avoid a will, the delusion must be such as to influence the testator in making the particular disposition made. The existence of a delusion is quite compatible with the retention of the general powers and faculties of the mind. It is a question of fact whether the delusion affects the disposition, and, even where the delusion is connected with the subject-matter of the disposition, it is not a necessary conclusion that the delusion affected it. A

parent may take a harsh view of the character and conduct of his children or relations without being subject to such a delusion as will avoid a will, but there is a point where such a view ceases to be a harsh unreasonable judgment and must be held to proceed from some mental defect. For the will to stand the testator's mind must not be dominated by an insane delusion so as to overmaster his judgment to such an extent that he is incapable of disposing of his property reasonably and properly or of taking a rational view of the matters to be considered in making a will. The well-trusted legal decision, that best of all guides on this question, is the following statement of Cockburn CJ in *Banks v Goodfellow* :

'Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if the reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.'

It cannot be said that there are people who are not suffering from delusional insanity but are incapable of making a will. A testator may be stated by medical evidence to have recovered from delusions, and yet the will be pronounced against on the ground that the onus of proof has not been discharged, even where the dispositions are probable. The court may grant probate of will and codicil with the deletion of one clause from the codicil which has been affected by a delusion. A pretended delusion assumed for the purpose of deception will not invalidate a will.

Religious belief and delusions. Religious beliefs may amount to delusions which justify a finding of incapacity but where a person held a belief that he was commanded by the Deity to carry out particular work, this did not show his

incapacity to make a will. Superstitious terrors have been stated to be sufficient to set aside a will where they deprive a man of the exercise of his free judgment.

Senile decay and illness. Unsoundness of mind may be occasioned by physical infirmity or advancing years as distinguished from mental derangement and the resulting defect of intelligence may be a cause of incapacity, but the intelligence must be reduced to such an extent that the proposed testator does not appreciate the testamentary act in all its bearings. In particular, the instructions for the will may have been given when the testator was of far better understanding than when the will was actually executed, and in these cases the will is generally pronounced for. Where it is shown that the testator was incapable of reading the will and it is not read over to him, it is generally rejected but the criterion in such cases is whether he was really aware of the contents. A will has been found for where the testatrix could only answer the drawer by means of nods and pressure of the hand in answer to questions as to her intentions, but where the testatrix had suffered from delusions, the dispositions being probable and made when her medical attendant stated that she had recovered from her delusions, it was held that the onus of showing capacity had not been discharged. The infirmity of the testator will strengthen certain presumptions which arise against the will in any case, eg where the will is contrary to the previously expressed intentions of the testator as to his testamentary dispositions or where the will is drawn by the propounder and is wholly or largely in his favour. Old age, or the near approach of death at any age, lend strength to suggestions that the testator had no proper knowledge of the contents of the will, or that there was undue influence, or the suspicion arising from the fact that the will is largely in favour of the person drawing or procuring it. A desirable safeguard in such circumstances is for the will to be witnessed by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examinations and findings. This has been described as the 'golden rule' although that is not, of itself a touchstone of validity, but only a means of minimizing disputes. It has been said that the grand criterion by which to judge whether the mind is injured or destroyed is to ascertain the state of the memory, for without memory the mind cannot act.

Eccentricity and foolishness. Eccentricity or mere foolishness is insufficient to show want of capacity to make a will. It has, however, been said that what may be mere eccentricity in one person may be shown to amount to incapacity in another. Foolishness, like eccentricity, must be judged on a review of the whole life of the testator and the life and habits of a persons may make what would be mere foolishness in one, incapacity in the case of another. Both eccentricity and foolishness must be disregarded unless accompanied by evidence of general conduct amounting to insanity.

Drunkenness. Habitual drunkenness giving rise to acts very like those of a madman or to deterioration of the mental faculties is not per se proof of incapacity. It may be shown that the testator was not under the influence of liquor at the time the will was made.

Evidence of sound disposing mind. Both oral and documentary evidence is admissible to show that the testator was of sound disposing mind at the relevant time. All statements made by him at the time of making the will or preparatory thereto are admissible to prove that he knew the character of the act he was undertaking. The fact that the will is in his own handwriting is strongly in favour of his capacity. The evidence of an attesting witness, since it must impeach his own act of attestation, is admissible but in general requires corroboration. Evidence of the manner in which the act of making the will was performed is admissible, and also evidence of its accord with natural affection and moral duty, and its conformity to past and subsequent declarations of intention. Evidence of conduct before and after the actual making of the will is admissible, but it carries little weight where there is satisfactory evidence of sound disposing mind at the actual time of making the will, and its importance varies with the nature of the mental disease from which the testator is alleged to be suffering. Generally, evidence of the general habits and course of life is of a greater weight than that of particular acts. It has been doubted whether the fact that unsoundness of mind has existed or exists in the testator's family is admissible. The treatment of the testator by his friends and relations is admissible as for or against them, but not

as against their parties, such evidence being admissible to introduce what the testator did with regard to it but not otherwise. General reputation that a person is suffering from unsoundness of mind is not admissible. The evidence of a medical witness who has attended the testator is admissible but such a witness cannot be asked to give his opinion as to the existence of facts which he has not himself observed. The evidence of experts, however, has been held not to outweigh that of eye-witnesses who had opportunities for observation and knowledge of the testatrix but a scientific witness who did not see the testator may be asked his opinion upon the facts proved in evidence.

Solicitor's duty. It has been suggested that a solicitor taking instructions for a will or supervising the execution of a will, has a duty to satisfy himself that the client has testamentary capacity. Where such capacity is in doubt it might be useful for the solicitor to record his or her impressions of the testator's state of mind, at the time. It has been suggested that solicitors should follow the 'golden rule' that a medical practitioner should be present where there are doubts about the testator's capacity. This so-called 'golden rule' provides guidance as to how disputes may be avoided but is not a touchstone of validity or a substitute for established tests of capacity or knowledge and approval.

VII.POWER TO MAKE WILLS FOR MENTALLY DISORDERED PERSONS

The jurisdiction. The Mental Health Act 1959 (MHA 1959) conferred in s 102 a wide general power on the court with respect to the property and affairs of a mentally disordered person ('a patient') to do all such things as appear necessary or expedient in order to provide maintenance for the patient or his or her family, or otherwise for administering the patient's affairs. Without prejudice to this general provision s 103(1) conferred specific powers to manage and deal with the patient's property in the patient's name; and to make settlements and gifts of the patient's property. However, the MHA 1959 did not confer the power to make a will for the patient a deficiency which was remedied by the Administration of Justice Act 1969, s 17, which added a new provision, as paragraph (dd), to this effect to the MHA 1959, s 103(1). This new power was considered in a number

of reported decisions and guidelines relating to the law and practice were laid down by Vice-Chancellor Megarry in *Re D(J)*. The MHA 1959 was repealed and the legislation consolidated in the Mental Health Act 1983, the relevant parts of which are themselves repealed by Mental Capacity Act 2005 with effect from 1 October 2007 and the jurisdiction is now to be found in the Mental Capacity Act 2005, ss 16, 18(1) and Sch 2, paras 1-4.

If a person (referred to as "P") lacks capacity in relation to a matter or matters concerning P's property and affairs, the court may, by making an order, make the decision or decisions on P's behalf in relation to the matter or matters. The powers as respects P's property and affairs extend in particular to the execution for P of a will although no will may be made under subsection (1) (i) at a time when P has not reached 18. The jurisdiction can only be exercised where the judge has reason to believe that the patient is incapable of making a valid will for himself. It will be appreciated that it is possible for a person subject to the Court of Protection to have capacity to make a personal will and in such cases that should be done subject to guidance and advice.

The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it.

The details relating to the formalities governing the exercise of this jurisdiction are to be found now in the Mental Capacity Act 2005 Sch 2. This provides that the will must state that it is signed by P acting by the authorized person, should be signed by the authorized person with the name of P and with his own name, in the presence of two or more witnesses present at the same time, and these witnesses attest and subscribe in the usual way and the will is then authenticated with the official seal of the Court of Protection,. Where these formalities are complied with then it is provided that the will shall have the same effect for all purposes as if the patient were capable of making a valid will and the will had been executed by him in the manner required by the Wills Act 1837 (WA 1837).

However, this does not apply to the will in so far as it disposes of immovable property outside England and Wales, or in so far as it relates to any other property or matter if, when the will is executed P is domiciled outside England and Wales, and, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales.

With the exception, of course, of s 9, the WA 1837 applies to such wills. The will so made, often referred to as a 'statutory will (although judicial will would seem more apt) becomes the patient's will for all purposes and thus precludes the Court of Protection from jurisdiction to make a different distribution.

Guidelines governing the exercise of the jurisdiction. The Vice-Chancellor in RE D(J) has stated the factors or considerations which should guide the court when exercising the power. These guidelines will assist not only the masters concerned with making the order but more importantly the patient's relatives and their legal advisers in formulating a set of agreed proposals that can form the basis of the application. The crucial consideration is that the court will regard the disposition of the estate subjectively from the patient's point of view and will, so to speak sit in his armchair and make for him a will that he or she is likely to have made. The other stated guidelines are as follows. It is to be assumed that the patient is having a brief lucid interval at the time when the will is made. Secondly, during the lucid interval the patient has a full knowledge of the past and a full realization that as soon as the will is executed he or he will relapse into the actual mental state that previously existed with the prognosis as it actually is. These two propositions although recognized to be somewhat curious assumptions are consistent with the accepted practice regarding making of settlements for the patient. The court will assume, thirdly, that during the hypothetical lucid interval the patient is to be envisaged as being advised by a competent solicitor. Finally, the patient will be assumed to take a fairly board view of any claims upon his bounty and the court will not be concerned with examinations analogous to a profit and loss account. Although, recognized by the judge not to be either exhaustive or precise these principles for factors do provide useful guidance on the judicial attitude to the power vested in them.

Illustrations of the exercise of the jurisdiction. The power can be invoked to remedy an injustice caused by effect of ademption on a specific devise or an emergency or salvage jurisdiction to avoid an undesirable intestacy. The court has exercised the jurisdiction to make a will for a person who had inherited a substantial estate. The will made provision for such persons and purposes for whom/which the patient might have been expected to provide if she had not been mentally disordered on the assumption that she would have been a normal decent person who would have acted in accordance with contemporary standards of morality.

Practice Direction. Procedural guidelines regarding the exercise of the jurisdiction are to be found in the Court of Protection Rules and in a practice direction. Applications may not be heard by a Deputy and because of the complexity of the matter, the size of the estate, or dispute between the parties, the matter may be referred to a nominated judge. The application should be made by one or more of the persons who seek to benefit. The applicant must name as a respondent :

- (a) Any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application;
- (b) Any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and
- (c) Any prospective beneficiary under P's intestacy where P has no existing will.

Exceptionally, where the matter is one of great urgency, the court can proceed on the application of the receiver without notice to affected parties.

The application should be supported by evidence of reasonably detailed information as to the size of the estate, the income, and the expenses of maintaining the patient. Other relevant matters include the nature or character of the patient when of testamentary capacity and the financial or other

circumstances of all those who claim to receive benefits under a will. Thus full particulars as to age, family fortune, needs and general circumstances of the patient and the general background of his affairs in addition to the facts directly relating to the application need to be provided. The Practice Direction does not require that the evidence should state the patient's domicile or pay regard to any immovable property outside England and Wales (which is not subject to the will), as was the former practice but applications should still deal with those matters. A draft will and any existing will or wills should also be included. Where the patient has been incapable since birth the court will not have any subjective indications of the testator's wishes and thus will have to make assumptions as to these.

I. KNOWLEDGE AND APPROVAL

Knowledge and approval. Before a paper is entitled to probate the court must be satisfied that the testator knew and approved of the contents at the time he signed it. It has been said that this rule is evidential rather than substantive and that in the ordinary case proof of testamentary capacity and due execution suffices to establish knowledge and approval, but that in certain circumstances the court requires further affirmative evidence. It was at one time thought that the fact that the will had been duly read over to a capable testator on the occasion of its execution, or that its contents had been brought to his notice in any other way, should when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. However, the better view now seems to be that such a circumstance raises but a prima facie presumption of knowledge and approval. In *Fuller v Strum* the proposition that a testator can have knowledge and approval of part of his will but not of another part was affirmed. An obvious example would be where a person preparing a will for another fraudulently included wording in the will which was contrary to the testator's instructions but which were not noticed by the testator when the will was executed. The court has always had power to omit words from a will which were inserted per incuriam, quite apart from the more recently conferred jurisdiction to rectify wills under s 20 of AJA 1982.

In some cases where the testator employs an expert draftsman to provide the appropriate wording to give effect in law to the testator's intentions, the testator has to accept the phraseology selected by the draftsman without himself really understanding its esoteric meaning and in such a case he adopts it and knowledge and approval is imputed to him. This principle is carried further by the so-called rule in *Parker v Felgate* to the effect that a will which has been prepared in accordance with previous instructions given when the testator fully understands the contents and effect thereof is valid, notwithstanding that at the time of execution the testator does not in fact have that understanding.

When evidence required. The cases referred to above, when affirmative evidence of knowledge and approval of the contents of a will be required include the following: testators who are deaf and dumb, or blind, and when the person who prepared the will received a benefit under the will.

The evidence in support of the plea. The Court of appeal in *Fuller v Strum* set out the law relating to proof of knowledge and approval of the contents of a will. First, the *onus probandi* lies in every case upon the party propounding a will and he must satisfy the Court that the instrument so propounded is the last will of a free and capable testator; *Barry v Vutlin*. Second, proof of testamentary capacity of the deceased and the due execution of the will, without more, will give rise to a proper inference of knowledge and approval; *Fuler v Strum*. Third, 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; *Fuller v Strum* and *Wintle v Nye*. Fourth, the standard of proof required in relation to knowledge and approval in a probate case is the civil standard – that is, the court must be satisfied, on a balance of probability, that the contents of the will do truly represent the testator's intentions; *Fuller v Strum*. It is possible for the court to infer knowledge and approval from the circumstances. The extent of the evidential burden depends on how grave a suspicion is aroused by the circumstances in which the will was made.

It has been said that where a question is raised concerning knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending or at least relevant to, the preparation and execution of the will itself, but it is accepted that the allegations could also be relevant to the testamentary capacity of the deceased or to a plea of undue influence. It is open to a party alleging want of knowledge and approval to cross-examine the person propounding the will on matters which may result in establishing fraud or undue influence on the part of such person, even though fraud or undue influence are not pleaded. Further there is authority to the effect that the failure or deliberate omission of a party, who had raised a plea of want of knowledge and approval in a probate action, also to plead undue influence, does not preclude such a party from introducing in support of his plea matters of fact which would also, at least in a broad sense, be relevant in support of a plea of undue influence. However the defense of want of knowledge and approval is not to be used 'as a screen behind which one man is to be at liberty to charge another with fraud or dishonesty without assuming the responsibility for that charge in plain terms'.

Will prepared by a beneficiary. It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding it. Baron Parke expressed the rule as follows in *Barry v Butlin*.

'... 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.'

The degree of suspicion will vary with the circumstances of the case, and the burden of dispelling that suspicion may be slight or 'so grave that it can hardly be removed'.

Solicitors. Where the will is prepared by a solicitor under which he takes a benefit, it has been held that the solicitor has a duty not merely to tell the client that he should obtain independent advice but, if the client declines to do so, to refuse to act further in the matter. The Law Society has published rules regarding this matter in The Guide to the Professional Conduct of Solicitors. A gift to a solicitor of an insignificant amount is permitted provided the client does not feel obliged to make such a gift. There is no need for independent advice where the solicitor takes under a secret trust or communication by the client to him provided that the solicitor cannot benefit personally or financially from the gift to him.

II.MISTAKE

Introduction. Where it is alleged that the testator did not know and approve of particular words or clauses in the will on the grounds of mistake, there are three possible remedies available. First, the court of probate has always had power to omit (but not to add) words from probate and this jurisdiction will remain applicable to wills of testators who die before 1 January 1983. Second, in the case of testators who die on or after that date, the Administration of Justice Act 1982, s 20 has conferred additional power on the court (in specified circumstances) to rectify defective wills. Third, omissions or errors in wills can sometimes be cured by a court of construction as a matter of construction.

Mistake in will : power to omit words from probate. Where the testator is shown to have known and approved of a particular word or clause in the will, it cannot be excepted out of the probate. The court will, however, except out of the grant a word or clause which has been introduced into the will inadvertently, without the knowledge or instructions of the testator, and will refuse probate of a document executed by mistake. The court will omit from the probate words shown to have been introduced by mistake and has power to revoke a probate containing a mistake, but cannot omit a word where to do so would alter the meaning of what remains. The fact that the testator read and executed the will raises a prima facie inference that he knew and approved of its contents, but the

court is free to consider the possibility of fraud or mistake in the light of all the possible evidence. Although a testator who had delegated to a draftsman the task of drafting an instrument and had executed it as drafted might in some circumstances be bound by a mistake which the draftsman had made, this would not be so where the mind of the draftsman had never really been applied to the words introduced and never adverted to their significance and effect and there was a mere clerical error on his part. In the case of deaths on or after 1 January 1983, the power to rectify such clerical errors would now be available.

Undue influence and fraud. Fraud and undue influence are really questions of knowledge and approval rather than of testamentary capacity since what has first to be proved is not the lack of capacity of the testator, but the act of others whereby the testator has been induced to make dispositions which he did not really intend to make. Although undue influence is not impossible in the case of a testator of sound health and understanding, it is far more common in the case of a testator of weak or impaired mental capacity or in failing health. A gift obtained by undue influence or fraud is liable to be set aside upon proof of the undue influence or fraud. Undue influence means coercion to make a will in particular terms. The principle has thus been stated by Sir J P Wilde in *Hall v Hall*.

‘Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened.’

The proof of motive and opportunity for the exercise of such influence is required but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator. The mere proof of the relationship of parent and child, husband and wife, doctor and patient, solicitor and client, confessor and penitent, guardian and ward, or tutor and pupil does not raise a presumption of undue influence sufficient to vitiate a will and although coupled with, for example, the execution of the will in secret, such relationship will

help the inference, yet there is never in the case of a will a presumption of undue influence. There is no presumption of undue influence, which must be proved by the person who sets up that allegation. The onus of proof resting upon a party propounding a will where circumstances of suspicion are disclosed does not extend to the disproof of an allegation of undue influence or fraud, the burden of establishing which always rests upon the parties setting it up. The person who affirms the validity of the will must show that there was not force or coercion depriving the testator of his judgment and free action and that what the testator did was what he desired to do. The act of the testator in making the will or gift must be inconsistent with any hypothesis of undue influence. Exaggerated description of the conduct of a proposed beneficiary is insufficient. Where the testator is influenced by immoral consideration, there is no undue influence provided the will expresses his wishes. Much less influence will induce a person of weak mental capacity or in a weak state of health to do any act and in such cases the court will the more readily find undue influence and where a legatee for a large amount or one where a fiduciary relationship is found to exist between the testator and the beneficiary propounds a will prepared by himself more than ordinary proof of the authenticity of the will is called for this is so where the will is signed by a mark instead of the testator's usual signature.

Undue influence has been found to be exercised by a person who was dead at the date of the execution of the will, and, in a rare case, exercised on a person other than the testator. Undue influence exerted for the benefit of someone other than the person exerting the influence is equally subject to the rules concerning undue influence as influence exerted by someone of his own benefit. The party setting up a case of undue influence must give the particulars of the acts alleged in exercise of it with necessary dates but not the means of the persons present. Evidence of a statement of the party exerting the undue influence though not made in the presence of the testator is admissible. A plea of undue influence ought never to be but forward unless the person who pleads it has reasonable grounds to support it.

RECTIFICATION

Rectification. Although the law of probate permits the court to omit words from a will in certain circumstances, the general equitable doctrine of rectification was not previously available as a remedy in the law of wills. Although it is beyond the scope of this work to consider rectification in detail one or two important characteristics can be noted. Rectification is an equitable discretionary remedy primarily available to remedy mistakes in written instruments recording the terms of contracts. The remedy is however generally available and has always been applicable to unilateral documents such as voluntary settlements. Wills, have hitherto, been one of the very few types of document which could not be rectified. The point was expressed by Templeman J in *Re Reynette-James, Wightman v Reynette James*.

“Any document other than a will could be rectified by inserting the words which the secretary omitted, but in this respect the court is enslaved by the Wills Act 1837. Words may be struck out but no fresh words may be inserted...’

The Administration of Justice Act 1982 (AJA 1982) has now conferred a limited power to rectify wills to remedy two types of mistake; first, those caused by clerical errors, and secondly those arising from a failure to understand the testator’s instructions. The power to rectify applies only to the wills of testators who die on or after 1 January 1983.

Clerical errors. The Administration of Justice Act 1982, s 20 provides as follows :

‘If a court is satisfied that a will is so expressed that it fails to carry out the testator’s intentions, in consequence –

- (a) Of a clerical error .. it may order that the will shall be rectified so as to carry out his intentions.’

It has been stated that the term ‘clerical error’ means an inadvertent error made in the process of recording the intended words of the testator in drafting or in the transcription of his will.

Thus where a solicitor failed to include a clause in a later will which was intended to mirror a clause in an earlier will which it replaced, it was held to be an error made in the process of recording the intended words of the testatrix. The will was rectified to include the omitted clause. The introduction of a clause which is inconsistent with the testator's instructions in circumstances in which the draftsman has not applied his mind to its significance or effect is also a 'clerical error' for the purposes of this provision.

This provision seems apt to cover cases such as *Re Morris*, where it will be recalled the codicil as written revoked 'clause 7 of the will' whereas the admitted intention had been to revoke 'clause 7(iv) of the will'. The omission of the Roman numeral (iv) was accepted on all sides as a clerical error, and such a case would now be simply resolved by the addition of the missing number, or words as the case might be. In many of these cases the error will be that of the draftsman, typist or amanuensis but the section is not so limited.

Failure to understand the testator's instructions. The second situation where the AJA 1982, s20(1) introduces a power of rectification is as follows.

'If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence –

(a) ...

(b) Of a failure to understand his instructions,

It may order that the will shall be rectified so as to carry out his intentions.'

It will be noticed that this provision is confined to cases where a draftsman fails to understand instructions and thus has a limited scope. The section does not cover the more common type of mistake, ie cases where the testator (and possibly his solicitor as well) fails to understand the legal effect of the words actually used, and thus produces the wrong result although using the intended expression; where in effect, all concerned may know what the testator wants but fail to use the right technique to achieve it.

But where it can be established first, that the will fails to embody the testator's instructions, and secondly, what those instructions were, then it is now open to the court to rectify the will so as to make it embody them. An example of such a case is where for instance, the testator has instructed his solicitor to draw his will in such a way as to leave certain property to X; the solicitor failing to understand what is wanted draws the will in such a way as to leave the property to Y, and the testator, not appreciating the mistake executes the will. Such a will could be rectified under the power in section 20.

It is apparent from the wording, '... a failure to understand his instructions ...', that the power of rectification in this second context is available only where there has been the intervention of another person. This will typically be where the testator has instructed another to draft his will, whether that person be a solicitor or a lay person, or where the testator dictates his will to an amanuensis. Thus this power would not be available in the much more common cases where mistakes occur, where a lay testator writes out his whole will using inappropriate or unsatisfactory language.

Further in order for the remedy to be available it must be established not only that the will fails to carry out the testator's instructions but also what those instructions were. This will be a matter of proof and there is no guidance in the section as to the admissibility of the evidence in support. Section 21, which provides for the admissibility of extrinsic evidence as an aid in a will's interpretation, does not assist here, but clearly extrinsic evidence must be admitted to aid rectification since by definition the instructions of a will are not to be found within the will.

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