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Challenging Wills: Want of Knowledge & Approval and Other Stories

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A. The Substantive Law (In Brief)



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Want of Knowledge and Approval in a Nutshell

Propounder must prove that testator knew & approved of contents of will at time of execution (or time of giving instructions).

This ensures that the will “truly represents the testator’s testamentary intentions”.

Burden of proof presumptively discharged where testator had testamentary capacity and will was duly executed.

But “suspicious circumstances” will increase the weight of the burden of proof and require affirmative proof satisfying the Court that the testator in fact knew and approved of the contents of the will.

Circumstances Exciting Suspicion:

- Substantial beneficiary active in writing or procuring the writing of the will.
- Long-held testamentary wishes radically departed from.
- Language or form uncharacteristic of testator.
- Gifts made to persons in positions of influence over testator.

Circumstances Dispelling Suspicion:

- Will duly executed by testator with capacity.
- Will prepared professionally, on written instructions.
- Will read over to testator (by independent professional).



One-stage/holistic test:

Court should “consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the the contents of the document which is put forward as a valid testamentary disposition”.

Gill v. Woodall [2010] EWCA Civ 1430,
per Lord Neuberger MR at [22].



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B. Relationship with Fraud & Undue Influence



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“Willing to Wound, but Afraid to Strike”?

Re R [1950] 2 All ER 117, per Willmer J at 123

- *Wintle v. Nye* [1959] 1 WLR 284: “Although fraud was not alleged in the pleadings, it was open to those who challenged the will so to cross-examine the solicitor [*who prepared the will, was named as sole executor, and took the sizeable residue*] as to suggest the inference that the reason the testatrix did not know and approve the contents of the will was that he was fraudulent” (Headnote).
- Burden (and costs risk) of proving knowledge and approval on propounder. Burden (and costs risk) of proving fraud or undue influence on challenger.
- Unsurprising that (as per Law Commission) “in a number of instances wills are being challenged on the basis of want of knowledge and approval, when in fact the circumstances would more appropriately give rise to a claim to undue influence”. (Law Commission therefore proposes to reform law of testamentary undue influence.)
- “A plea of want and knowledge and approval is not to be used as a cloak to conceal what is in reality a charge of dishonesty or undue influence”: *Burns v. Burns* [2016] EWCA Civ 37, per McCombe LJ at [52]. Yes, but how far does that actually go? See *Reeves v. Drew* [2022] EWHC 159 (Ch), per Michael Green J at [344] – [349].



“[Counsel] said that they were not relying on or seeking to prove fraud; rather they raised doubts and suspicions about the attendance notes and they said that Mr Curnock was not an honest or credible witness. But the main point is that they put the Claimant to proof, as they are entitled to, as to whether the deceased knew and approved the contents of the 2014 will and they did not need to go further and allege that this was a fraud, even if this may be an inevitable conclusion on the facts.

I do not think that the Defendants were bound to plead fraud or dishonesty in these circumstances. It is not a necessary part of their case and they do not need to set the bar that high. They simply say that the Claimant has not discharged the evidential and legal burden of proving that the 2014 will represented the true intentions of the deceased and part of the reason for that is that Mr Curnock’s evidence was untruthful and his attendance notes unreliable. It is not necessary to explain why Mr Curnock acted as he did. I too will not speculate as to that.

As for the Claimant, it was obviously in her interests for the 2014 will to be executed in the terms that it was and it may necessarily follow that a finding that the deceased did not know and approve the contents carries with it the strong implication that she engineered an extraordinary fraud on her father by getting him to execute the 2014 will without knowing its terms or thinking they were something else. However again it is not necessary for the Defendants to prove that this was what happened and that it was fraudulent or dishonest. They cannot know exactly what happened and can fairly say that the Court is only concerned with examining whether the deceased knew and approved the contents of the 2014 will.

Accordingly my task is to assess by reference to the totality of the relevant evidence before me whether the Claimant has proved on the balance of probabilities that the deceased knew and approved the contents of the 2014 will”.



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C. Knowledge & Approval of Part?



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“A Curate’s Egg of a Will”

Fuller v. Strum [2001] EWCA Civ 1879, per Peter Gibson LJ at [36]

The same principles apply to knowledge and approval of part of a will as they do to knowledge and approval of the whole: *Guardhouse v. Blackburn* (1866) LR1P&D 109. (For a recent discussion, see the *Richefond v. Grizzle* litigation.

“I do not doubt that it is possible for a Court to find that part of a will did have the knowledge and approval of the deceased and that another part did not. An example would be if a solicitor, who has been instructed to draft a will, obtains the deceased's approval of the draft but subsequently before execution adds a clause without drawing it to the attention of the testator and keeps the executed will. But the circumstances in which it will be proper to find such a curate's egg of a will are likely to be rare”: *Fuller*, per Peter Gibson LJ at [36].

As regards legalese, “the testator has to accept the phraseology selected by the [expert] draftsman without himself really understanding its esoteric meaning and in such a case ... knowledge and approval is imputed to him”: *Greaves v. Stolkin* [2013] EWHC 1140 (Ch).



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D. Costs in Probate Claims



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Costs in Probate Claims

Spiers v. English [1907]

Two Exceptions

1. Deceased/Residuary Beneficiaries to Blame?
2. Circumstances Lead Reasonably to an Investigation of the Matter?

NB Neither exhaustive nor rigidly prescriptive: CPR can apply.

CPR r.57.7(5)

The “Passive” Defence

See *Lumb v. Lumb* [2023] EWHC 2052 (Ch): another of the “three special costs rules or principles applying in probate proceedings”.

Position of Executors

Worth Proving Will?

Remember that there is no *duty* on an executor to prove a will.

Consider, too, the position where the executor is also a beneficiary: see *Richefond v. Grizzle* [2023] EWHC 2796 (Ch).

CPR r.46.3

Default Rule for PRs

When are costs “properly incurred”?

See PD46, Para. 1.1. for examples.





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E. Procedure

(Please refer to hand-out.)



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F. Problem Question

Trouble in Paradise...



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- Donald and Melanie have one son, Barry. Donald has four other children from two previous marriages: Donald Jnr & Tiggy from one marriage; and Ernie & Princess from the other.
- Donald's previous will, revoked on his marriage to Melanie in 2005, made large gifts to various charitable bodies and divided the majority of the remainder of his estate between Donald Jnr, Tiggy, Ernie, and Princess equally.
- In early 2022, Donald and Melanie look to make new wills using [wewriteanywill.com](https://www.wewriteanywill.com). (Donald is concerned by both his failing eyesight and the effect of an intestacy on his intention to bequeath money to charity.)
- Donald and Melanie fill out an online questionnaire. Donald wants his share of the family home to pass to Barry, albeit with Melanie having a right of occupation unless and until she remarries. Donald also wants his residue to go to "his children", together with a small gift to charity.

- **Mr G, an employee of WWAW, visits Donald and Melanie a few weeks later to go through their online questionnaires. During the discussion, which largely centres on golf, Donald:**
 - **Confesses that he doesn't really understand any of the legal jargon ("*severing a joint tenancy?*") and wants to delegate everything to Mr G.**
 - **Notes that Donald Jnr and Tiggy are taken care of, because their mother owns a luxury golf resort with him.**
 - **Says that, while he still owns some bonds, "everything else" has already been transferred into Melanie's name, for which she should be grateful.**
 - **Mentions Barry (away at school) and Princess (who he loves dearly), but doesn't mention Ernie at all, or any gifts to charity.**

- A few weeks pass, and Mr G sends draft wills to Donald and Melanie for execution. Donald and Melanie print off the wills and sign them in the presence of their neighbours. They also execute a severance of the joint tenancy of their home.
- In the middle of 2022, Donald Jnr's and Tiggy's mother dies. Her share in the golf resort passes to Donald. Donald himself then dies (domiciled in England) in mid-2023. His will appoints Melanie, Princess, and Mr T (a neighbour) as his executors. It also:
 - Contains a gift of £20,000 to Mr G (allegedly supported by attendance notes); and
 - Leaves everything else to Princess.
- What happens next?





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Thank you

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