Inferred intentions and want of knowledge and approval

The exact circumstances under which a claim for want of knowledge and approval will be successful are hard to pin down. In *Gill v Woodall* [2011] Ch 380, Lord Neuberger MR stated at para. 22 that a court should

> *"consider all the relevant evidence available and then, drawing such inferences as it can from the totality of the 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 contents of the document which is put forward as a valid testamentary disposition."*

Practitioners are faced with a difficulty in trying to determine from the outset what inferences a court is likely to make given the sum total of material that might influence a court's decision, and in particular how a court will weigh different factors.

The recent case, *In the Estate of Beryl Parsonage (Deceased)* [2019] EWHC 2362 (Ch), involved two competing allegations of want of knowledge and approval, made on quite different grounds, one of which was accepted and one of which was rejected. It offers useful guidance for practitioners trying to work out how the courts may weigh different factors in assessing allegations of this kind.

The facts and background

The testator had initially made a will that favoured D1 (the "Earlier Will"). It was D1's position that this was fair given certain historical land transactions that had allegedly favoured C and the other siblings over D1. The Earlier Will was prepared by a solicitor who had recorded in his notes that the testator was making unequal provisions in the will to balance out these gifts. C's position in outline was that no such transactions had taken place, or alternatively that the transactions had not been for any substantial benefit to C and the other siblings.

Whilst suffering from dementia, the testator later altered her will to divide her estate equally between all her children. This later will (the "Later Will"), was accompanied by a letter explaining the rationale for the alteration, and referring to the fact that, contrary to her earlier expressed view, she had not in fact favoured the other siblings by way of any gifts of land. It is a marked and interesting feature of the case that no explanation was given in the letter or elsewhere as to why she had previously held the contrary view or why she had changed her mind, with the letter merely stating that she had.

It is worth emphasising that the change of mind regarding the disposition was based on a change of mind regarding the underlying facts and matters that provided the rationale for the disposition. It was the evidence of all the siblings that the overarching intention of the testator had always been to treat her children equally. What had changed, by all accounts, was the testator's view of whether she had made the gifts of land or not, and thus what might count as 'equal'.

C sought a declaration that the Earlier Will was invalid for want of knowledge and approval. D1 sought a declaration that the Later Will was invalid for lack of testamentary capacity, or in the

alternative, that it was invalid for want of knowledge and approval. C was supported in his contention by one other sibling, D4, and D1 was supported in his contention by another sibling, D3. The court found in favour of C on each basis.

The expert evidence

C's expert witness played an important role in the proceedings. Primarily on the basis of new material in his verbal evidence, the allegation of lack of testamentary capacity failed, as did D1's primary line of argument for want of knowledge and approval (which will not be considered here).

However, in his verbal evidence C's expert confirmed that the testator would not, in her state of mind at the time of making the Later Will, have been able to resist suggestions as to what had happened with regard to the alleged historical gifts of land. On this basis counsel for D1 made the following submissions (here put in the author's words):

i. The testator would not have been able to resist a suggestion put to her about the alleged historical gifts of land;

ii. There is no account of the circumstances in which the testator changed her mind as to whether such gifts were made, and in particular no account suggesting what prompted her to change her mind as to whether she had made such gifts or not;

iii. The change of mind was most likely to have been the result of a suggestion by D4, the testator's younger daughter, who was in regular contact with the testator and stood to benefit under the revised will;

iv. In any case, the court ought not to be satisfied, in the absence of any account as to what prompted the change of mind, and given the suggestibility of the testator, that the change of mind and associated change of testamentary disposition was the product of the testator's "own intelligence and volition" (*Fuller v Strum* [2001] EWCA Civ 1879).

It is unfortunate that the judgment does not expressly mention the suggestibility of the testator. It is, therefore, a matter of some speculation as to why the argument was rejected. What is clear is that the court, with the evidence before it, was content to find that the testator had independently "reached a conclusion … that her then current will was wrong … because it caused her children to be treated unequally. What sparked this thinking process is not explained by the evidence" [184].

Why did the court infer that the testator had independently changed her mind when it had explicitly found that there was no explanation on the evidence as to what had caused the thinking process? It is necessary to note that the court found D4 to be a reliable witness, and so her

evidence that she had made no such suggestion carried independent weight [114]. However, perhaps the more interesting point from the practitioner's perspective is that the court placed a good deal of weight on two further bases: First, as stated above, all the siblings stated that the testator had long avowed an intention to treat her children equally, and second, that in the view of the court, the provisions of the Later Will did not do so.

In regard to this second point, the court considered in some detail the available evidence regarding the alleged historical land transactions, and decided that all they amounted to was "essentially a cashflow advantage" [163]. It seems that the court was happy to infer that the testator did in fact change her mind independently because in the court's view the testator was moving from a false belief to a true belief. I.e., after examining the evidence of the earlier land transactions, the court found that there probably had not been gifts of substantial value, and consequently the rationale for the Earlier Will had been objectively mistaken. It is interesting to conjecture what the court would have found if in its view the testator had been moving from a true belief about the underlying facts to a false belief. Perhaps in those circumstances it would have required an explanation as to why she had changed her mind.

By contrast, the court found against the validity of the Earlier Will on the basis of want of knowledge and approval. It is instructive to contrast the two allegations.

Particular facts of the Earlier Will

The Earlier Will was prepared by a solicitor. Moreover, it was prepared when the testator was, by all accounts, in possession of testamentary capacity. By familiar principles, these factors would weigh in favour of its validity.

Moreover, despite the Learned Judge making some negative remarks about D1, there was no finding in regard to any actions on the part of D1 that, at the time of the making of the will, would in and of themselves have constituted an act or set of circumstances whereby the testator would have been deprived of her free will or somehow misled by D1 into thinking that she had made gifts that in fact she had not. In this regard, the court was in an analogous position to that in regard to the Earlier Will. The court had to make inferences as to the testator's mental state such that it could then draw conclusions about whether the contents of the will had been known of and approved.

C had had no knowledge of the making of the Earlier Will, but alleged that it must nevertheless have been made without knowledge and approval. The argument was primarily based on the claim that as a matter of fact, there had been no historical gifts of land in favour of the other siblings, or insofar as there had been they were not proportionate to the benefit conferred upon D1 under the Earlier Will.

In regard to the benefit conferred upon D1, the court was impressed by the fact that the property left in the Earlier Will contained an overage agreement, whose value was now high [212], the true value of which, in the finding of the court, the testator must consequently not have appreciated.

Again, the court appears to have relied heavily on its view of whether the contents of the Earlier

Will did, as a matter of fact, treat the children equally, with such a view based on the court's view about the actual historical land transactions, and the value of the overage agreement.

These trumped the fact that the will was prepared by a solicitor, that the testator was not suffering from any mental condition at that time that might impair her or make her susceptible to influence, and that there was no particular finding as to the interference of D1 in the process. Nevertheless, in the judge's own words, it was one of the "rare cases" where "keeping in mind the cautions in the authorities about finding want of knowledge or approval where prudent procedures have been followed" the evidence pointed "overwhelmingly" to such a finding [216].

Conclusion

It is of course difficult to tease out independent principles from a judgment that is made on the basis of a broad and diverse body of evidence. However, the peculiar constellation of factors in *Parsonage*, when correctly analysed, indicates that a court may place a great deal of weight on its own view of the underlying factual matters when determining what the testator must have thought, or is likely to have thought, about those same factual matters.

As a general thesis this is perhaps unremarkable. On the whole the courts, like anyone else, must assume in the absence of contrary evidence that persons are more likely than not to be correct about everyday matters in which they are involved and which are likely to be significant for those persons, for example the making of substantial gifts.

However, what is not quite so obvious is what attitude a court is likely to take when, as in *Parsonage*, a testator has undergone a considerable change of mind about those matters. In such circumstances, it is tempting to think that there ought to be an independent explanation as to why the change of mind came about. After all, in such circumstances we know that the testator, as it stood, could initially accept the factual view that the court has later determined as mistaken. This seems to call out for an explanation as to what has changed for the testator. So, for example, one might imagine possible cases where a change of mind is explained by new evidence or information being acquired by the testator, or the cessation or commencement of some external influence on the testator's thinking. In such instances it would be obvious why and how a testator might then come to an altered view of what the facts were. *Parsonage* shows that such an explanation is not always necessary, and that a court may be willing to infer that an independent and quite striking change of mind came about, without requiring any particular explanation as to why.

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Adam Stewart-Wallace
Ten Old Square
Lincoln's Inn
WC2A 3SU
AdamStewart-Wallace@tenoldsquare.com
020 7405 0758