Judgments

Ashman v Thomas

[2017] EWHC 3136 (Ch)

Chancery Division

Deputy Master Pickering

11 January 2018

Judgment

Mr Joshua Hedgman (instructed by **Taylor Rose TTKW**) for the Claimant

Mr Francis Hoar (instructed by **Mordi & Co**) or the Defendant

PART I: INTRODUCTION

1. On 6 May 2013 Carmen Thomas (“the Deceased”) died aged 79 years old. On 5 November 2013 letters of administration were granted to her son, Clyde Thomas. On 11 April 2014 the Deceased's brother, Aliston Ashman, issued the present claim seeking to revoke the above letters of administration and for a pronouncement in solemn form in favour of one of three wills purportedly made by the Deceased of which he was the named executor and principal beneficiary. In July 2016 a trial of a preliminary issue took place at which it was found that two of those wills failed for want of proper execution. The matter now before me is the trial of the remaining issues – effectively, the validity or otherwise of the final will.

PART II: THE BACKGROUND

2. The Deceased was born in Jamaica on 16 September 19331. She had 2 brothers including Mr Ashman. In due course, she married and had 3 children including Mr Thomas.

3. In the 1960s she moved to the United Kingdom. In due course she began living in a council house in Holloway Road, London N7. In the 1980s, however, she was able to buy that property under the right to buy scheme. Initially, she did so with the assistance of a mortgage but by the time of her death the mortgage had been repaid in full.

4. In about 2005 Mr Thomas also moved to the UK and (after a short period staying with his cousin) began living with the Deceased. Sadly, the Deceased suffered from poor health such that Mr Thomas became her principal carer, albeit assisted by social services. It was, however, Mr Ashman (who lived nearby) who was in charge of her finances. In any event, by 2007 the Deceased was partially housebound and would only go out if accompanied by Mr Thomas or Mr Ashman.

5. On 12 March 2008 the Deceased made, or purportedly made, the first will ("the 2008 Will"). It was on a standard pre-typed form (as commonly found on the internet or at stationers) but completed in handwriting. Under its terms it appointed Mr Ashman as executor. There were some gifts to her three children (including Mr Thomas) but the residuary estate (which was largely to be the proceeds of sale of the property in Holloway Road) was to go to Mr Ashman.

6. By late 2011 the Deceased had become doubly incontinent and completely housebound. It was also in 2011 that concerns were raised by the social services team at the London Borough of Islington as to potential neglect and financial abuse of the Deceased by Mr Ashman as a result of which a safeguarding investigation was initiated. In any event, on 5 November 2011 the Deceased made, or purportedly made, the second will ("the 2011 Will"). It too was on a standard pre-typed form and completed in handwriting. Once again it appointed Mr Ashman as executor (albeit together with his daughter) and once again he was also the principal beneficiary of the residuary estate.

7. On 18 May 2012, by which time the social services investigation was well under way, the Deceased made, or purportedly made, the third will ("the 2012 Will"). As with the others, it was on a standard pre-typed form and completed in handwriting; and it too appointed Mr Ashman (and his daughter) as executors and made Mr Ashman the principal beneficiary of the residuary estate.

8. In about October 2012 the London Borough of Islington brought proceedings in the Court of Protection to be appointed as "deputy" of the Deceased's property and financial affairs arising out of "concerns of neglect and financial abuse carried out by Mr Ashman"2.

9. Various steps were taken in those proceedings including the service of a number of witness statements but on 6 May 2013, before any resolution could be reached, the Deceased died.

10. On 5 November 2013 Mr Thomas, apparently unaware of any of the purported wills and working on the assumption that his mother had died intestate, applied for and obtained letters of administration in relation to the Deceased's estate.

11. On 11 April 2014, however, Mr Ashman issued the present claim in his capacity as "sole executor

named in the last will dated 12 March 2008 or one of the executors of the last will dated either 5 November 2011 or 18 May 2012" seeking the revocation of the above letters of administration and the pronouncement in solemn form in favour of one of the above three wills. That claim form was supported by a witness statement (which exhibited the above three wills) and Particulars of Claim, although for the reasons set out below I have not been provided with a copy of the latter document.

12. On 21 May 2014 Mr Thomas served a detailed Defence which, first, required Mr Ashman to prove due execution of each of the wills and, second, in the event of due execution being proved, challenged the validity of such each such will in any event on various grounds including lack of testamentary capacity, want of knowledge and approval, and undue influence.

13. On 4 September 2014 (and following the issue by Mr Thomas of proceedings for conversion against Mr Ashman) the matter came before the court at which time an order was made for the trial of various preliminary issues - effectively, whether or not the 3 wills had been validly executed in accordance with section 9 of the Wills Act 1837.

14. On 15 and 16 July 2016 the above trial of the preliminary issues took place before Master Matthews. On 19 July 2016 the Master delivered a detailed and thorough judgment in which he found that the later two wills (in other words, the 2011 Will and the 2012 Will) had not been validly executed. In relation to the 2008 Will, however, he held that there had been valid execution3. It is also worth recording that in the course of his judgment the Master made various findings of dishonesty against Mr Ashman. In particular, he found that all 3 wills had been handwritten by Mr Ashman and that his denial of this in cross-examination had been a "childish lie".

15. The Master went on to give directions for the disposal of the remainder of the claim which, following his findings that the 2011 Will and the 2012 Will had not been validly executed, now comprised Mr Thomas' challenges to the 2008 Will on the grounds of lack of testamentary capacity, want of knowledge and approval, and undue influence. He also ordered Mr Ashman to pay the costs of the of trial of the preliminary issues, such costs to be subject to detailed assessment if not agreed, together with a payment on account of such costs of £17,500 payable by 4.00 pm 2 August 2016.

16. Mr Ashman failed, however, to pay the above costs on account whether by 2 August 2016 or otherwise. Accordingly, the matter came back before the court on 9 March 2017 at which time Deputy Master Nurse ordered that unless the above costs4 were paid by 4.00 pm on 31 March 2017, Mr Ashman's claim would be struck out. Again, however, Mr Ashman failed to comply as a result of which the above sanction took effect and Mr Ashman's claim was struck out.

17. Given that the claim is a probate claim, however, that was not the end of the matter. In particular, while Mr Thomas had been successful in challenging the 2011 and 2012 Wills, his challenge to the 2008 Will remained to be tried. Accordingly, on 4 July 2017 the matter came before Deputy Master Kaye who directed that while Mr Ashman's statement of case (in other words, his Particulars of Claim and his Reply) stood struck out and, further, that was he debarred from raising a positive case in relation to the 2008 Will, nevertheless Mr Ashman "may still participate in these proceedings for the purpose of testing [Mr Thomas'] evidence". The matter was then listed for a final trial for the court to:

"…determine whether to propound the Purported Will of 12 March 2008 or find that the Deceased died intestate…"

18. That, of course, is the trial now before me.

PART III: THE TRIAL

19. At the trial I first heard evidence from Mr Thomas who confirmed his various witness statements before being cross-examined by counsel on behalf of Mr Ashman. I set out the key points made by Mr Thomas in his evidence below. In general, however, although his recollection was not always perfect, it was clear to me that he was an honest witness who was trying to assist the court.

20. The only other witness from whom I heard live evidence was Sally Shiu, a social worker within the Ongoing Support and Review Team at the London Borough of Islington. Within the trial bundles were 2 witness statements from her including one dated 20 March 2013 which she had made for the purposes of the proceedings in the Court of Protection. Key passages within that statement include the following:

"4. …I undertook two mental capacity assessments, one in March 2012 to see if Mrs Thomas has the capacity to manage her finances and one in October 2012 to see if Mrs Thomas has capacity to make a will…

7. …Mrs Thomas would often talk to me about her childhood and her children. It became clear to me that Mrs Thomas loved her children very much and wanted to visit them in Jamaica. When Mr Thomas (her son) reported that he thinks Mr Ashman has made a will getting Mrs Thomas to sign everything over to him, I asked Mrs Thomas who she would like her flat and money to go to after she passes away, she was shocked that I could even ask her such a question because she said on a visit in June 2012 of course it would be her children and said who else would she want it to go to.

8. Then in July 2012 I received a phone call from Mr Thomas who informed me that his sister in Jamaica (Mrs Thomas daughter) reported that Mr Ashman had, following an argument with Mrs Thomas daughter, regarding him having dug a grave for Mrs Thomas in Jamaica, waved a piece of paper in her face claiming that everything Mrs Thomas has will go to him, I asked Mrs Thomas if she had undertaken a will. Mrs Thomas said she did not know if she had undertaken a will. Again I asked Mrs Thomas who she would like everything to go to and she was insistent that everything go to her children. I felt it would be in her best interests to undertake a mental capacity assessment to see if she has the capacity to make a will in view of her desire that all her assets go to her children…

9. After conducting the testacy capacity assessment, I had a brief discussion with the Client Affairs Team who said that they have solicitors who can assists to draw up a will so a statutory will could be arrange. I informed Mr Clyde Thomas that I had completed the capacity assessment and found that Mrs Thomas does have capacity to complete a will and advised that Mrs Thomas should be supported to undertake a will. My involvement with the case ended when the team manager requested I transfer the case to a different worker in our team because I had the case for a year, this was an operational decision…

12. …During home visits to Mrs Thomas she would often talk about her childhood and her love of her children, Clyde Thomas and her children in Jamaica. She was always consistent that her children should be left her flat and any money upon her death…

13. Mrs Thomas volunteered this information "…my father said Mr Ashman is a vicious brute and a criminal who would [steal] from a dead rat…" … "I came to this country with my brother Mr S (Mrs Thomas

other brother, now deceased) and Mr Ashman followed. I worked, he (Mr Ashman) did not work I maintained him, I had to give him a lot of my money, this is part of the reason I could not bring my children over from Jamaica" … "He (Mr Ashman) is greedy"…

14. During the same review Mrs Thomas said that "for the time being it would be best for Mr Ashman not to visit". Even with a diagnosis of dementia, Mrs Thomas was always very clear and consistent that only her children should get everything upon her death and no one else should have any of her assets, only her three children."

21. Given that Mrs Shiu was a wholly independent witness with no financial or other interest in the outcome of this matter, I found her evidence to be particularly useful. She was cross-examined by counsel for Mr Ashman and also answered a number of questions from me. One particularly powerful piece of evidence came when I asked Mrs Shiu about the time, referred to in paragraph 7 of her statement, when she asked the Deceased directly to whom she wanted her estate to pass after her death. In answer to my question, Mrs Shiu said that when the Deceased replied that she wanted her estate to pass to her children and said "who else would she want it to go to", the Deceased was "almost angry" and that she would never "forget the look in her eye", thereby suggesting the strength of the Deceased's feelings.

22. In any event, I have no doubt that Mrs Shiu was also an honest witness who was trying to assist the court. She was also a very impressive one with a good recollection and understanding of the underlying events.

PART IV: LACK OF TESTAMENTARY CAPACITY

23. As stated above, Mr Thomas's first challenge was on the ground that at the time that she made the will the Deceased lacked testamentary capacity.

(a) The law

24. The leading authority on lack of testamentary capacity remains ***Banks v Goodfellow*** (1870) LR 5 QB 549 in which Cockburn CJ said at page 565:

"…It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. 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…"

25. In short, therefore, in order for a testator to have capacity to make a will, it is necessary that he or she is able to understand 3 things, namely: (1) the nature and effect of making a will, (2) the extent of the property available for him or her to leave, and (3) the potential beneficiaries to whom he or she may wish to leave any property.

26. Further useful guidance appears in the more recent case of ***Ledger v Wootton*** [2007] EWHC 90 in

which Alistair Norris QC (as he then was) said at paragraph 5:

“The principles of law which underlie my approach to the question of capacity may be stated as follows: —

(a) The burden is on the propounder of the Will to establish capacity;

(b) This remains the case even if the propounder has already obtained a grant in common form…

(c) Where a Will is duly executed and appears rational on its face, then the Court will presume capacity;

(d) An evidential burden then lies on the objector to raise a real doubt about capacity;

(e) Once a real doubt arises there is a positive burden on the propounder to establish capacity…”

(b) The present case

27. In the present case, counsel for Mr Thomas invited me to find that the Deceased lacked sufficient capacity on the basis of various matters set out in Mr Thomas's witness statement and confirmed by him in oral evidence. These matters included the following:

(1) On one occasion shortly after he had arrived in the UK he saw his mother put on her dress the wrong way around.

(2) On another occasion she had put a pot on the hob and lit the hob with nothing in the pot.

(3) In 2005 she had asked why her friend “White George” was not coming to see her despite the fact that that friend lived in Jamaica and she had not seen him since the 1960s.

(4) In 2005 she asked why her uncle Albert had not called her despite the fact that he had died in 1967.

28. I accept that the above matters – none of which was, or could have been, challenged – suggest a certain level of confusion and possibly the onset of dementia. I note, however, that merely showing that a testator suffered from confusion or some level of dementia is insufficient to render that person incapable of making a will. As ***Banks v Goodfellow*** makes clear, even if a person does not have full mental capacity, so long as they are able to understand the 3 matters set out above, they will have sufficient capacity to make a will.

29. I also note that no formal medical evidence of capacity had been adduced. In fact, the only contemporaneous and independent assessment of the Deceased's capacity to make a will was carried out by Mrs Shiu5. While I take into account that Mrs Shiu is not medically qualified (and nor is she legally qualified and so may well have not had the ***Banks v Goodfellow*** principles in mind), she appears to be the only person during the Deceased's lifetime who at least considered the issue in hand, namely, the capacity of the Deceased to make a will, and formed a view (albeit not an expert one) that she did have sufficient

capacity.

30. As stated above, where a will is duly executed (which it has found to be) and appears rational on its face (which it does), the evidential burden shifts to the person seeking to assert a lack of capacity. Taking account of the various matters set out above, including in particular the contemporaneous assessment carried out by Mrs Shiu in the period shortly before death, it seems to me that Mr Thomas has not discharged the evidential burden on him. In short, therefore, I find that the challenge to the 2008 Will based on lack of testamentary capacity fails.

PART V: WANT OF KNOWLEDGE AND APPROVAL

31. Mr Thomas's second challenge was on the ground of want of knowledge and approval.

(a) The law

32. In ***Hawes v Burgess*** [2013] EWCA Civ 94 Mummery J neatly summarized the law in relation to a challenge to a will based on want of knowledge and approval as follows:

"12. As for want of knowledge and approval… the scope of the inquiry indicated by a long line of authorities gives rise to other questions distinct from lack of mental capacity to make the will… The relevant questions to ask in this case are —

(i) Do the circumstances of the [the will] arouse the suspicions of the Court as to whether its contents represent the wishes and intentions of the Deceased as known to and approved by her?...

(ii) Has scrutiny of those circumstances by the court dispelled those suspicions?...

13. In answering those questions in a particular case the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed."

33. In ***Gill v Woodall*** [2011] WTLR 251, however, Lord Neuberger MR questioned the above two-stage approach stating:

"22. Where a judge has heard evidence of fact and expert opinion over a period of many days relating to the character and state of mind and likely desires of the testatrix and the circumstances in which the will was drafted and executed, and other relevant matters, the value of such a two-stage approach to deciding the issue of the testatrix's knowledge and approval appears to me to be questionable. In my view, the approach which it would, at least generally, be better to adopt is that summarised by Sachs J in the unreported case of ***Crerar v Crerar***, cited and followed by Latey J in ***Morris*** [1971] P 62 , 78E-G, namely that the 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 contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption.”

34. Although I accept that the two-stage approach will often be beneficial, in my judgment the more holistic approach advocated by Lord Neuberger is, in general, likely to be preferable. In particular, where a will has found to be duly executed, the burden is very much on the person asserting lack of knowledge and approval to establish their case on the balance of probabilities; and the fact that there may be circumstances which excite the suspicion of the court does not shift the evidential burden in any way. Instead, a judgment has to be formed by the court taking into account the relevant evidence as a whole as to whether or not the testator did or did not know and approve of the will in question.

(b) The present case

35. In the present case, the 2008 Will was found by Master Matthews to have been duly executed. Accordingly, the burden is very much on Mr Thomas to show that his mother did not know and approve of the 2008 Will.

36. In order to discharge this burden, once again Mr Thomas seeks to rely on both his own evidence (written and oral) and that of Mrs Shiu (again both written and oral), as well as the various finding of fact made by Master Matthews during the trial of the preliminary issue. To this extent, it seems to me that the following evidence is of particular relevance:

(1) The largely unchallenged evidence of Mr Thomas that the Deceased was often mistreated and bullied by Mr Ashman.

(2) The fact that the Deceased was clearly frail – both physically and emotionally – and accordingly was likely to be particularly vulnerable to abuse.

(3) The fact that the 2008 Will was not prepared with the assistance of a solicitor (or indeed any professional) but was instead, as found by Master Matthews, prepared by Mr Ashman.

(4) The fact that, as also found by Master Matthews, Mr Ashman had lied to the court and had tried to cover up the fact that he had prepared the 2008 Will.

(5) The fact that, notwithstanding a court order requiring him to do so, Mr Ashman had delayed several months before disclosing the various wills.

(6) Perhaps most compelling of all, the largely unchallenged evidence of Mrs Shiu – a wholly independent witness with no axe to grind – who had been told by the Deceased that not only did she consider Mr Ashman to be “a criminal who would steal from a dead rat” but, moreover, that if she were to make a will the Deceased very strongly would have wanted her children, who she loved very much, to benefit – in other words, wishes and sentiments diametrically opposed to the provisions of the 2008 Will.

37. If I were to adopt a two-stage approach, I would have had little hesitation in finding that the above circumstances were more than sufficient to excite the suspicion of the court and – particularly given that Mr Ashman was debarred from adducing a positive case – that, to use the language in ***Hawes v Burgess***, "scrutiny of those circumstances" had not "dispelled those suspicions".

38. As stated above, however, I have preferred to adopt the more holistic approach referred to by Lord Neuberger in ***Gill***. Nevertheless, taking into account the totality of the above evidence, I have no hesitation in finding that Mr Thomas has discharged the heavy burden on him. In particular, I have found particularly persuasive the wholly impartial evidence of Mrs Shiu who, as stated above, gave evidence to the effect that the Deceased told her that she wanted her children to benefit from her estate after her death - and, moreover, that she did not regard her brother particularly highly. In relation to this evidence, I have considered whether it is possible that the Deceased may in fact have wanted to benefit her brother at the expense of her children and, whether for reasons of embarrassment or otherwise, told Mrs Shiu something which was not true. It seems to me, however, that although this scenario is possible, it is highly unlikely. A person is of course free to make a will as they please – and this may include the making of a will in favour of a brother at the expense of children. But where there is evidence, as there is here, that the Deceased did not regard her brother highly, and was close to her children, combined with evidence of the brother being abusive (towards the Deceased) and dishonest (towards the court), I find that it is highly unlikely that the Deceased told a "white lie" to Mrs Shiu. I find that it is far more likely that what the Deceased told Mrs Shiu was true – namely, that if she were to make a will, she would wish to make it in favour of her children.

39. In conclusion, therefore, I find that the Deceased did not know and approve of the 2008 Will which, accordingly, must fail.

PART VI: UNDUE INFLUENCE

40. Mr Thomas's third and final challenge was on the ground of undue influence. Given that I have already found against the will on the ground of want of knowledge and approval, it is not strictly necessary for me to consider this point but given that I have heard argument in relation to the same I set out my findings in any event.

(a) The law

41. The approach to be taken by the court when considering whether to avoid a will on the ground of undue influence was summarised by Lewison J (as he then was) in ***Re Edwards, Edwards v Edwards*** [2007] EWHC 1119 at 47 as follows:

"(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 the 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.”

42. I take into account all of the above guidance and in particular note that, unlike in relation to *inter vivos* transactions, in relation to wills there can be no presumption of undue influence – only the establishment on the balance of probabilities of actual undue influence will suffice.

(b) The present case

43. In relation to undue influence, again Mr Thomas relies on both his own evidence and that of Mrs Shiu including in particular the frailty and vulnerability of the Deceased, together with the abusive and bullying behaviour of Mr Ashman towards the Deceased – all of which I accept.

44. It seems to me, however, that Mr Thomas's case on undue influence does not sit easily with his case on want of knowledge and approval. Undue influence typically arises where a testator makes a will knowing and appreciating what they are doing but does so not as a free agent but instead as a result of improper pressure from a third party. In the present case, however, the evidence suggests that the Deceased did not know or appreciate that she had made a will – hence my finding that the 2008 Will must fail for want of knowledge and approval. This being the case, it seems to me the issue of undue influence does not come into play and accordingly I do not propose to set aside the 2008 Will on that ground too. I should make it clear, however, that if I am wrong and the Deceased did know and appreciate that she had made the 2008 Will, I would have had no hesitation in finding that it had been made as a result of the undue influence of Mr Ashman and, in those circumstances, would have set it aside on that ground instead.

PART VII: CONCLUSION

45. In conclusion, therefore, I find that the 2008 Will fails for want of knowledge and approval and that accordingly the Deceased died intestate. I will invite the parties to agree an appropriate form of order which should of course include confirmation of Mr Thomas' grant as administrator of his mother's estate.

DEPUTY MASTER PICKERING

2 December 2017

1Although nothing turns on it, I have also seen a reference to the Deceased having been born on 3 December 1929.

2Witness statement of Sally Shiu dated 20 March 2013.

3On the basis that there was not the “strongest evidence” as required by ***Sheringham v Sheringham*** [2005] EWCA Civ 326 to rebut the presumption that it had been duly executed.

4Together with interest plus certain further costs.

5See paragraphs 4 and 9 of Mrs Shiu's witness statement dated 20 March 2013 as well as the mental capacity assessments at pages 103 to 106 of bundle 2.