A GENERAL UPDATE ON CONTENTIOUS PROBATE – 2016

Tim Walsh – July 2016

Standing

1. *Randall v. Randall* [2016] EWCA Civ 494 - 27 May 2016

   A creditor of a beneficiary of an estate has standing to bring a probate action.

   The Facts

   A husband and wife divorced. As part of their divorce settlement, they agreed that if the wife were to inherit more than £100,000 from her mother, she would keep the £100,000 and the balance would be split equally with the ex-husband.

   Predictably, when the wife's mother died she left £100,000 to the wife and the balance of her estate (a further £150,000) to her grandchildren. The husband brought a probate claim to challenge the validity of the will alleging that it was not duly executed in accordance with section 9 of the Wills Act 1837. If he succeeded, the wife would inherit the further £150,000 with the husband entitled to £75,000 under the divorce settlement.

   The Deputy Master struck out the claim on the basis that the husband had no standing to bring a probate action.

   The Law

   CPR r. 57.7(1) states that: *"The claim form [in a probate claim] must contain a statement of the nature of the interest of the claimant and of each defendant in the estate"*. It was common ground that this meant that a probate claimant must claim an "interest" in the estate.

   Generally, a creditor cannot administer an estate if there is another person who has an apparent right to do so. Under the NCPR a creditor of an estate can obtain a grant of administration as of right only if, in the case of a testate estate, there are no executors, residuary legatees or personal representatives of residuary legatees willing to act (r. 20) or in the case of an intestate estate, only if there is no willing member of various classes of beneficiary and the Crown has not claimed *bona vacantia* (r.22).

   Moreover, there is long standing authority in the form of *Menzies v. Pulbrook and Kerr* (1841) 2 Curt 846 that: *"…the creditor of an estate does not have a sufficient "interest" in the estate to allow him to challenge the validity of a will".*

   The Master of the Rolls, overturning the decision of the Master, held that *Menzies* remains good law. However, one must not assimilate the position of a creditor of a *beneficiary* with a creditor of an *estate*.

"[22] …There is no doubt that a creditor of an estate does not have sufficient interest in an estate to bring a probate claim and that Menzies is still good law. But the interests of the two types of creditor are fundamentally different. The interest of the creditor of a beneficiary is to ensure that the beneficiary receives what is due to him or her under the will or on an intestacy. The interest of a creditor of an estate is to ensure that there is due administration of the estate. The creditor of the estate is not interested in which beneficiary receives what."

It followed that the husband, as a creditor of the wife, had a sufficient interest in challenging the will and ensuring that the wife received all that was due to her.

Randall v. Randall is also important because the Court of Appeal gave tacit approval to the decision of Judge Mackie QC in *O'Brien v. Seagrave* [2007] EWHC 788 (Ch) held that a claimant under the Inheritance (Provision for Family and dependants) Act 1975 had a sufficient interest in the estate to bring a probate claim.

Costs

2. *Elliott v. Simmonds* [2016] EWHC 962 (Ch) – 29 April 2016

Guidance on costs under CPR r. 57.7(5)

Under CPR r. 57.7(5)(a) a defendant (often a caveator) may give notice that he does not raise any positive case "*but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will*". R. 57.7(5)(b) then adds: *"If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will".*

There is little previous modern case law on this costs rule but in *Elliott* the Deputy Judge gave the following guidance:

(1) Where r. 57.7(5)(b) applies, and a defendant had a reasonable ground for opposing a will, then no order for costs should be made; each party bears his own costs.

(2) Such an order under r. 57.7(5)(b) will not affect any entitlement of an executor to recover a costs indemnity from the estate because CPR r. 44.10(b) specifically preserves such a right where the court makes "no order" as to costs.

(3) Applying *Davies v. Jones* [1899] P. 161, the mere fact that a will has been upheld does not mean that there were no reasonable grounds for opposing it. If, for example, the will draftsman is dead, or attesting witnesses are dead or vague that may justify the court making no order as to costs.

(4) The "two great principles" in a probate action are (as to which see *Spiers v. English* [1907] P 122): (a) if a person who makes a will or persons who are interested in

residue have been the cause of the litigation, a case is made out for costs to come out of the estate; (b) if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them.

(5) A reasonable, but nevertheless ultimately mistaken belief in a state of affairs which, if not mistaken, would lead to a will being pronounced against does amount to a reasonable ground for opposing a will.

(6) On the facts of the case, none of the grounds for subjecting the witnesses to cross-examination were reasonable and so r. 57.7(5)(b) could not be fully invoked. However, the defendant was only to be ordered to pay the costs from the date on which she had sufficient material on which to form a view about whether there was any reasonable ground to oppose the will. This was said to involve application of the principle in *Killick v. Poutney* [2000] WTLR 41 that: *"the judge in a probate action is concerned in an inquisitorial capacity to seek the truth as to what is indeed the testator's last testament and accordingly is not bound by the manoeuvres of the parties".*

3. *Breslin v. Bromley* [2015] EWHC 3760 (Ch) – 21 December 2015

CPR r. 57.7(5) and the question of when a testatrix (or beneficiary) is to be taken to have caused the litigation

The facts

The claimant was the executor and beneficiary of his aunt's will. He had taken his aunt to a solicitor so that she could draw up a will. The aunt did not execute the will at the solicitor's offices but executed it elsewhere in circumstances that some of the beneficiaries found questionable. The second and third defendants challenged the validity of the will. The third defendant also accused the claimant of undue influence, but later abandoned that allegation.

The claimant successfully brought proceedings for a declaration that the will was valid but the second and third defendants argued that they should not have to bear any costs because the litigation was the claimant's fault for not ensuring proper execution of the will.

The Result

Newey J. gave the following guidance:

(1) Whilst the normal rule is that costs "follow the event" he reiterated the rule (already noted above) that in a probate action:

(a) if a person who makes a will or, on Newey J's formulation, "a principal beneficiary" have been "really the cause of the litigation" costs may come out of the estate;
(b) if the circumstances "reasonably led to an investigation of the matter", then the costs may be left to be borne by those who have incurred them.

(2) The mere fact that the principal beneficiary of the challenged will "can be said to be responsible for a will having been executed otherwise than in front of a solicitor" is not sufficient for him to be viewed as the cause of the litigation about it.

(3) Applying *Re Cutcliffe's Estate* [1959] P6, a testator is not to be taken to have *"prompted litigation by leaving his own affairs in confusion"* just because he *"misled other people and perhaps inspired false hopes in their bosoms that they may benefit after his death"*.

(4) Whilst it remained a possibility that the court could make no order as to costs if the circumstances "reasonably led to an investigation of the matter" it was now the position that "*The Courts appear to be less willing to deprive a [successful] party of costs on this basis that was once the case"*. On the facts, the decision of one of the parties to advance a positive case challenging the will was a "commercial decision" and so she would be ordered to pay part of the costs.

(5) One of the parties had, though, invoked SPR r. 57.7(5) and on the facts of this case there were reasonable (if unsuccessful) grounds for opposing the will. For that party, there was therefore "no order" as to costs.

Removal of personal representatives and failure to agree costs

4. *Hutchinson v. Grant* [2016] 2 Costs LR 189 (CA) – 27 January 2016

Removal of PRs and the procedural position in default of agreement on costs

The parties were brother and sister. Their father died in 2009 and they thereafter took a joint grant of administration in relation to the small estate. Eventually the sister made an application under section 50 of the Administration of Estates Act 1985 to remove the brother; he counterclaimed for an order to remove the sister.

At the hearing the Judge predictably invited the parties to negotiate. They did and reached agreement for the appointment of a neutral third party solicitor. Regrettably, they could not agree costs. The brother then requested an adjournment and, when that was refused, he left court. The judge proceeded to hear the substantive application and simply removed the brother (leaving the sister in office).

The brother appealed against the decision to remove him alone.

The Decision

The trial judge's approach (which was not criticised in the Court of Appeal) was that he did not need to make determinations about the parties' grievances with one another: *"The only question is, what should I decide about the future representation of this estate? …The real issue…is, does [the sister] remain in place or does some third party…come into place?..."*.

In *BCT Software Solutions Ltd. v. C Brewer & Sons Ltd.* [2004] CPR 2 the court had previously determined that:

> *"…in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties 'If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well.'"*

The position was no different in proceedings for the removal of an administrator. It did not matter that the parties had both agreed to step aside; since they had not agreed the issue of costs the substantive application remained to be determined. In this regard the Judge had not misled the brother (prior to his departure from court when an adjournment was refused) and so there was no procedural irregularity in continuing to hear the section 50 application.

Capacity and Want of Knowledge and Approval

5. *Burns v. Burns* [2016] WTLR 755 (CA) – 28 January 2016

Mini-Mental Scores and evidence of incapacity

The Facts

The appeal concerned a dispute over the will of the late Eva Burns with each of her two sons (Anthony and Colin) contending for a decree in solemn form of rival wills.

Under a 2005 will, the deceased's estate was left to the sons in equal shares. However, she had made an earlier will in 2003, under which Anthony was to receive a larger share of her estate. He challenged the validity of the 2005 will on the basis that his mother had lacked testamentary capacity at the date of its execution and she did not know and approve of its contents.

The evidence indicated that by 2003, when the deceased was 83, her mental condition was giving rise to sufficient concern on Anthony's part for him to approach Social Services. Assessments known as "Mini Mental State Examinations" were carried out in October 2003 and May 2005, and an occupational therapy assessment was carried out in May 2005. A geriatrician concluded on the basis of those assessments that the deceased was "*poorly orientated as to where she was in time and place, had poor recall...and...had problems with analysis and simple task planning*". The District

Judge, however, concluded that she had the requisite testamentary capacity in 2005 and that she knew and approved the contents of the later will and he accordingly pronounced for the 2005 will.

The Decision of the Court of Appeal

The decision of the Court of Appeal breaks no new ground but it is an important reminder of the dangers of over-reliance on the ubiquitous MMSE scores that we see in these cases.

As the expert evidence explained, MMSE tests are the standard tests for measuring cognitive deficits indicative of dementia (and, therefore, potential incapacity) and scores below 24 provide "*significant evidence of cognitive impairment"*.

Here the evidence had been that, by Autumn 2003, the deceased lacked personal care, failed to attend to gas appliances like her cooker, lacked memory and was confused. Moreover, she was assessed by a community psychiatric nurse as having an MMSE score of only 19 out of 30. She was unable to state the year, the date, the season, the day or the month and could not write a sentence. Nor could she recall three common objects mentioned to her by the nurse a few minutes earlier.

Despite all of this, the Court of Appeal upheld the finding that the deceased had capacity and knew and approved the contents of the will on the bases that: (i) the 2005 disposition would have been a rational one, (ii) it was simple to comprehend and to state, (iii) she had attended the offices of her solicitors in person to collect necessary documents and (iv) she had, in other ways, evinced sufficient evidence to satisfy the requirements of *Banks v. Goodfellow*.

As to knowledge and approval, the deceased had been seen alone by her solicitor who read the 2005 will to her and was clearly satisfied that she understood and approved it. Whilst the facts were sufficient to "excite the suspicion of the court" that was enough to allay those concerns.

Of more general application, the Court of Appeal expressly approved the approach advocated by Morgan J. in *Cowderoy v. Cranfield* [2011] WTLR 1699 at [139]:

> *"Traditionally, the courts have adopted a two stage approach to the evidence in a case where knowledge and approval is in issue. The first stage was to ask whether the circumstances were such as to 'excite suspicion' on the part of the court. If so, the burden was on the propounder of the will to establish that the testator knew and approved the contents of the will. If the circumstances did not 'excite suspicion', then the court presumed knowledge and approval in the case of a will which had been duly executed by a testator who had testamentary capacity. It was pointed out in Gill, that it may sometimes not be necessary, or even helpful, to adopt this two-stage approach. In a case, like the present, where the court has heard detailed evidence as to the character and state of mind and the wishes of*

the testator, it may be more appropriate to proceed directly to answer the ultimate question, which is whether the testator knew and approved the contents of the will, that is, whether the testator understood what he was doing and its effects: see at [21]-[22], [64].”

Statutory Wills

6. *In re Jones* [2016] WTLR 661

Circumventing intestacy and the Inheritance Act with a statutory will

Mr. Jones (P) was an 81 year-old intestate man who suffered with dementia and lacked testamentary capacity. He was married to his wife of 40 years and had one daughter from a previous marriage who lived in Canada. The daughter had suffered from addiction and mental health problems and serious financial difficulties. Since she was 13 she had seen P only once, when she was 23, and again in the past year; otherwise there had been only infrequent telephone contact. P's estate was worth about £2.3m.

If P died then either:

(i) His estate would pass under the rules of intestate succession with the effect that his wife would receive a £250,000 statutory legacy. The estate would thereafter be split equally between the wife and the daughter so that the daughter would receive a little over £1m.

(ii) The effect of intestacy could be varied by claims under the Inheritance (Provision for Family and Dependants) Act 1975 for “reasonable financial provision”.

However, under section 16 of the Mental Capacity Act 2005, if a person lacks capacity in relation to a matter concerning his property and affairs the court may, by making an order, make a decision on that person’s behalf in relation to that matter (see section 16(2)). By section 18(1)(i) of the Act these powers expressly extend to the execution of a will on behalf of a person lacking capacity to make a will. It is open to any person who has an interest under an existing will or intestacy, and to any person for whom P might be expected to provide, to make an application. It is an under-utilised way of avoiding posthumous disputes but also of side stepping the limitations of the 1975 Act.

The Guidance

The decision of Judge Eldergill is helpful both in summarising the principles but also in trying to rationalise the various authorities on the relevance of “being remembered for

having done the right the thing". Broadly, he stated that the correct approach was as follows:

(1) The statutory Will jurisdiction does not simply allow the court to make such Will as might appear "objectively reasonable".

(2) Any decision to authorise a statutory will must be made in P's "best interests".

(3) There is no definition of "best interests" in the Mental Capacity Act 2005. However, section 4 contains a checklist of matters for the decision-maker to consider.

(4) The 2005 Act requires the court to undertake a structured decision-making process. The court must consider all relevant circumstances and in particular (insofar as they are reasonably ascertainable): (i) the person's past and present wishes and feelings, (ii) the beliefs and values that would be likely to influence their decision if they had capacity, and (iii) the other factors that they would be likely to consider if they were able to do so.

(5) If it is practicable and appropriate to consult them, the court must also take into account the views of the following persons as to P's best interests: (i) anyone named by him as someone to be consulted on the matter in question or on matters of that kind, (ii) anyone engaged in caring for him or interested in his welfare, (iii) any donee of a lasting power of attorney granted by him, and (iv) any deputy appointed for him by the court.

(6) The 2005 Act lays down no hierarchy as between the various factors listed in section 4 which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's "best interests".

(7) The weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case. In any given case there may be one or more features or factors which are of "magnetic importance".

(8) P's wishes and feelings will always be a significant factor to which the court must pay close regard. The weight to be attached to P's wishes and feelings will always be case-specific and fact-specific and requires consideration of (i) the degree of P's incapacity; (ii) the strength and consistency of the views expressed by P; (iii) the possible impact on P of knowing that his wishes and feelings are not being given effect to; (iv) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of implementation; and (v) the extent to which P's wishes and feelings, if given effect, can properly be accommodated within the court's overall assessment of what is in his best interests.

(9) It may be in P's best interests to avoid post-death litigation (see *Re D* [2010] EWHC 2159 (Ch)).

However, the Court provided some additional more practical guidance as to when it may, or may not, be appropriate to apply for a statutory will:

First: *"…where P with capacity has just made a will excluding Y and/or has recently expressed clear views that he dislikes Y, does not want to see Y and does not want Y to share in his estate, and P is then incapacitated by a stroke, in ordinary circumstances it would be inappropriate to make use of his incapacity to now make a Will in favour of Y simply because the decision-maker believes he ought to have done so.".*

Moreover, *"the onset of mental incapacity is not an opportunity for moral correction"*.

Conversely, however:

> *"[66] That still leaves room, of course, for the case at the other end of the spectrum where the court authorises a statutory Will which makes good the omissions of P but does not seek to correct their considered acts and decisions. For various reasons all of us never quite get round to doing many of the things we know we ought to do. Making a Will may be one of them. Most people would wish to make a Will if they knew both that they were going to be incapacitated by a stroke tomorrow and the consequences of dying intestate or leaving a defective Will. They would seek to avoid the sometimes arbitrary nature of intestacy, the consequences of dying intestate on those dear to them, the resulting inconvenience and worry for their family, the possibility of family discord and avoidable litigation arising from a failure to make clear their intentions.*
>
> *[67] Thus, in the absence of clear evidence to the contrary, one is entitled to assume that had P given proper thought to their pending incapacity and intestacy he or she would have wanted to put their house in order and make a Will. They would want to do the right thing and not to leave family members with such unintended consequences and problems. Hence, it seems to me, the case law emphasises that adult autonomy is not the only consideration and that in many cases and for many people it is in their best interests that they be remembered with affection by their family and as having done 'the right thing' by a Will.*
>
> *[68] That is a long-winded way of saying that in the absence of evidence to the contrary most people want to do the right thing by their family and loved ones and a judge is entitled to take that view, in the absence of evidence to the contrary and any relevant legal considerations."*

On the facts, the Judge decided to split the estate so that the wife received 75% and the daughter 25%. The wife accordingly received more than on intestacy and, arguably, more than under a 1975 Act claim. However, the daughter also benefited because her share was to be split as part immediate lifetime gift and part legacy.

Forfeiture

7. *Henderson v. Wilcox* [2016] 4 WLR 16

The forfeiture rule and seeking relief

Ian Henderson killed his mother in 2013 in a serious assault. He was acquitted of murder but convicted of manslaughter on the basis that he had not intended to kill her. Mr. Henderson also suffered with mental health problems and so was sentenced to be detained in a secure hospital. He was depressed, had a learning disorder and autism. Part of his difficulties may have stemmed from the fact that he had lived his entire life with his mother and never had a relationship with any other person; his mother believed that he had been born with a hereditary brain illness that might cause his death at any time prompting her to keep him isolated from other people.

Under the terms of his mother's will, Ian had been intended to inherit her entire estate. The deceased's home did not form part of her estate because it had been settled on "Family Protection Trusts" during her lifetime. Ian was one of the trust beneficiaries.

The Decision

As long ago as *Re Crippen* [1911] P108 it was settled law that "*no person can obtain, or enforce, any rights resulting to him from his own crime"*. This so-called "forfeiture rule" is defined in section 1(1) of the Forfeiture Act 1982 as "*the rule of public policy which in certain circumstances precludes a person who had unlawfully killed another from acquiring a benefit in consequence of the killing"*.

Under section 2 of the 1982 Act the court has a discretion to modify the application of the rule (except in the case of a murder conviction). However, the discretion is couched in negative terms in section 2(2) so the court shall not disapply the forfeiture rule:

> *"unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case".*

In respect of the Family Protection Trusts, the Judge determined that the forfeiture rule simply did not apply. The interests that Mr. Henderson had, or might acquire, under those discretionary trusts did not result from the death of his mother. He had acquired the status of a discretionary beneficiary when the trusts were executed and they had been neither enlarged nor created by her death. If the trustees exercised their powers to make payments to him, he would receive them as a result of the decision itself and not by virtue of the mother's death.

The position in relation to the will was different. The forfeiture rule was engaged and the "justice of the case" did not require its modification. Crucial to that determination was the limited weight that the Judge felt able to attach to the son's own mental disorders relative to his culpability:

> *"[55] I accept that the degree of Ian's culpability is somewhat lessened by his relatively low IQ, and the difficulties and consequent frustration he faced in having to assume the role of carer for his mother when she became too old to look after him as she had done for most of his life, in circumstances where he did not have the life skills to do so. There is no clear medical view as to the extent to which he suffered from recognised mental disorders such as depression or PTSD or from autism, but to the extent he did, or was on the borderline of such disorders, they may have contributed to his actions and so lessened his culpability.*
>
> *[56] However only one of the medical experts was prepared to attribute any substantial causative role to such disorders. Against those factors, there are others which in my view compel the conclusion that Ian's degree of culpability was nonetheless high.*
>
> *[57] Ian has at all times had the mental capacity to know what he is doing, understand the nature of his acts and to appreciate the difference between right and wrong. None of the medical experts considered him unfit to plead in the criminal case. No case of diminished responsibility was put forward…"*

Donatio Mortis Causa

8. *King v. Chiltern Dog Rescue* [2016] 2 WLR 1

Donatio Mortis Causa: When to "run DMC"

Seven animal charities appealed against a decision that an aunt had transferred her house to her nephew by a donatio mortis causa.

In March 1998 the aunt had made a will leaving a number of modest legacies to friends and relatives and leaving the bulk of her estate to the seven charities. By 2007, the aunt was frail and elderly and the nephew went to live with her. Around November 2010, she presented the nephew with the title deeds to her house, saying: "*This will be yours when I go*". He claimed that her use of the words and the way she looked at him made it clear that she knew her health was failing and that her death was approaching. He took the deeds from her and put them in his wardrobe. The aunt died in April 2011. During the six months before her death, she signed three separate documents, purporting to leave her property to the nephew. None of the documents complied with the requirements of section 9 of the Wills Act 1837. The will of 1998 therefore took effect, but the court found that the aunt had effected a donatio mortis causa whereby her house had passed to him on her death.

The charities submitted that the earlier case of *Vallee v Birchwood [2013] EWHC 1449 (Ch), [2014] Ch. 271* had been wrongly decided and there had been no effective donatio mortis causa.

The Decision

Broadly, a DMC arises when a donor (D) makes a gift because he anticipates death on the understanding that, if D dies, the donee will keep it.

The Court of Appeal provided a comprehensive review of the 3 core requirements of a valid DMC:

(I) The donor (D) must be contemplating his impending death when he makes the gift. In addition:

- This requirement means that D "*should be contemplating death in the near future for a specific reason"*.
- Whilst DMC does not require D to be "on his deathbed" he must have "*good reason to anticipate death in the near future from an identified cause*". However, the death which D is anticipating need not be inevitable.
- The fact that D is an elderly person approaching the end of his natural life span is not sufficient. For this reason *Vallee v Birchwood* had been wrongly decided.
- The DMC comes to an end (and so is ineffective) if D fails to succumb to the death which was anticipated when he made the DMC.

(II) The second core requirement is that D makes a gift which will only take effect if and when his contemplated death occurs. Until then D has the right to revoke the gift. In addition:

- D should specifically require the property back if he survives but that requirement is relaxed if death is inevitable.
- A DMC gift will "*lapse automatically if D does not die soon enough"*.

(III) The third requirement is that D should deliver dominion over the subject matter of the gift to the donee.

- For this purpose, "dominion" means physical possession of (a) the subject matter, or (b) some means of accessing the subject matter such

as a key, or (c) documents evidencing entitlement to possession of the subject matter.

On the facts, the Court of Appeal determined that the requirements for DMC were not made out.

The first requirement was not satisfied because the donor was not contemplating her impending death at the time of the gift. She was 81 but that alone was insufficient.

The second requirement also was not met. The donor had said "this will be yours when I go" but that was more consistent with a statement of testamentary intent than a gift which was conditional on the donor's death within a limited period of time. Attempts to make a will were also inconsistent with the proposition that the donor had already disposed of her assets by means of a DMC.

The third requirement was satisfied. In the case of unregistered land, it was sufficient to hand the deeds to the donee.

Will construction and secret trusts

9. *Rawstron v. Freud* [2015] 1 P&CR DG6

Freudian slips and secret trusts

The artist Lucian Freud died leaving "at least 14" children and a net estate worth £96m. The net residuary estate was worth around £42m.

The gift of residue was at Clause 6 of Lucian's will: *"I GIVE all the residue of my estate…any property over which I have a general power of appointment to the said Diana Mary Rawstron and the said Rose Pearce jointly".* The residuary legatees were a solicitor and one of the deceased's children and they were both executrices.

The executrices (the claimants) contended that the gift of residue was a gift to them absolutely. They asserted, however, that the gift to them was subject to a trust imposed by Lucian Freud so that, by virtue of Clause 6, they were constituted fully secret trustees.

One of Lucian Freud's sons argued that, on a proper construction of the will, the gift was not to the residuary legatees absolutely but was given to them to hold on the trusts of the will. He argued that that could only be a half-secret trust and that, because of the different requirements for the creation of a half secret trust, that was potentially invalid and may have resulted in a partial intestacy under which he would then inherit.

By way of re-cap of the general principles:

(i) A trust is "fully secret" if the testator makes a testamentary gift to a named legatee without stating that the legatee is to hold on trust for a beneficiary rather than as beneficial owner. Either before or after making his will, the testator must have told the legatee that he wishes him to hold the property on trust for a beneficiary, and the legatee must have expressly or impliedly promised to do so. A trust giving rise to the testator's intentions is enforced against the legatee, even though it does not appear in the will, and the agreement between the testator and the legatee does not comply with the formalities under the Wills Act 1837.

(ii) A trust is "half secret" when property is given by will to a legatee with an express direction in the will that he is to hold upon trust, but the terms of the trust are not disclosed in any testamentary document. If the terms on which the named beneficiary is to hold the property are communicated to him before or at the time when the will is made and the will states that it has been so communicated, the trustee must carry it out.

One of the curiosities of the case was that the dispute over whether the will created a fully secret or half-secret trust was very probably sterile because one of the executrices filed a statement to the effect that, even if the Defendant's construction of the Will was correct "*the secret trust attaching to the gift would still qualify as a half secret trust, as its terms were communicated to my fellow Claimant and [me] before the Will was executed*".

The Claimants considered, however, that the material which supported that case was confidential, and that providing it to the Defendant was likely to lead to ever increasing demands for verification. As a result, they refused to provide it to the Defendant and so the question of construction had to be determined.

At para. 11 *et seq.* the Deputy Judge gave a useful summary of the rules of construction drawn from the Supreme Court's decision in *Marley v. Rawlings* [2014] UKSC 2 and the Court of Appeal's decision in *RSPCA v. Sharp* [2010] EWCA Civ 1474.

The Judge found that the Claimants took as beneficial legatees rather than as trustees (save to the extent that they were fully secret trustees). As always, the question of construction is specific to the facts and the terms of the will but three points, in particular, emerge from the judgment:

First, the court should be vigilant before accepting that solicitors take as beneficial legatees:

> *"[56] On the one hand, because one of the individuals upon whom clause 6 of the Will is expressed to confer a gift is the testator's solicitor, and even more so because the Will was drawn by that solicitor or by that solicitor's firm, I consider that…public interest considerations…require the court to be vigilant*

before accepting that clause 6 means that the Claimants take as beneficial legatees. On the other hand, the law recognises secret trusts, it is common place for solicitors to be appointed as trustees, and one reasonable explanation for a clause which confers a beneficial gift on a solicitor is that the testator intended to impose a fully secret trust. In the present case, it is the Claimants' evidence that the gift of residue is indeed subject to a trust under which the First Claimant does not stand to benefit. It was not suggested that I should not have regard to this evidence, and, while I do not consider that it is admissible as an aid to construction, it seems to me that it meets the public interest considerations on the facts of this particular case."

Secondly, and conversely, the court should not be seduced into needlessly inferring that any intended trust must reflect the trusts of the Wil:

"[57] …In short, even if it may be reasonable to suppose that the apparent beneficiaries in accordance with a will have secretly acquiesced with the testator to hold the residuary legacy on trusts, that does not mean that those trusts are referred to in (but not defined by) the will, or that the apparent beneficiaries are mere trustees in accordance with the terms of the will."

Thirdly, in cases of will construction such as this, it is legitimate to contrast the last will with earlier manifestations of testamentary intent.

Lucian Freud had made an earlier will (drafted by the same solicitors) in which there was a gift of residue which was clearly subject to a half secret trust. Namely:

"MY Trustees shall hold the Trust Fund on the trusts and with and subject to the same powers and provisions communicated before the execution of this Will to the persons named in clause 1 and set out in a deed already executed by me and them (which is not to form part of this Will)"

This, said the Judge, led to "the only reasonable conclusion" that Lucian Freud did not intend the revised later version of the gift of residue to create a half-secret trust.

And Finally…

10. *In the Matter of the Baronetcy of Pringle of Stitchill* [2016] UKPC 16 – 20 June 2016

On 5 January 1683 His Majesty King Charles II granted the Baronetcy of Stitchill to Robert Pringle "*ac heredibus masculis de suo corpore"* ("*and the male heirs of his body"*).

The eighth baronet, Sir Norman, died of TB on active service in France in 1919. He had married Florence Vaughan in 1902. Her first son was Norman (born in 1903) and her second son was Ronald (born in 1905). Sir Norman (Jnr) became the ninth baronet after his father's death.

As a result of DNA evidence it was alleged that Sir Norman (Jnr) was the illegitimate result of "irregular procreations" by Florence in 1902. As a result, it was claimed that he was not the legitimate ninth baronet and that the current (eleventh) baronet had not legitimately succeeded to the title. The son of Ronald Pringle brought the claim.

The Decision

This was a spat over "a title of honour" heard by seven Lords in the Privy Council. No land or other property was in issue. However, as Lord Hodge stated: *"the questions may be more generally relevant to property rights, if, for example, land is held in trust for the heir male of a deceased person…"*. Also, although a Scots case, it had wider significance and application to English Law.

Possibly of greatest interest is that the case marks how far the law has shifted in allowing legitimacy to be challenged.

There is a presumption that a child born during a marriage is legitimate. Historically, to rebut the presumption it was necessary to lead evidence that sexual intercourse had not taken place or that there was impotency. Indeed, until the Law Reform (Miscellaneous Provisions) Act 1949 there was a rule of law based on public policy that neither a husband nor a wife could give evidence as to whether marital intercourse had taken place between them (see *Goodright v. Moss* (777) 2 Cowp 591). In *Russell v. Russell* [1924] AC 687 the Earl of Birkenhead described such evidence as "*unbecoming and indecorous"*.

Contrast the *Pringle* case where DNA evidence was admitted more than 100 years after the alleged liaison in order to prove illegitimacy. The "afterthoughts" of the Privy Council are, perhaps unsurprisingly, a thinly veiled invitation for the enactment of a long-stop date on such challenges:

> *"Afterthoughts*
>
> *[84] The Board cannot conclude without expressing its sympathy for the late Sir Steuart Pringle, a distinguished officer, who faced an unwelcome challenge in his autumnal years, and also Simon Robert Pringle, the heir presumptive, who had grown up in the belief that his father was rightfully the tenth baronet and that he would in time succeed to the baronetcy.*
>
> *[85] In the past, the absence of scientific evidence meant that the presumption of legitimacy could rarely be rebutted and claims based on assertions that irregular procreations had occurred in the distant past were particularly difficult to establish. Not so now. It is not for the Board to express any view on what social policy should be. It notes the ability of DNA evidence to reopen a family succession many generations into the past. Whether this is a good thing and whether legal measures are needed to protect property transactions in the past,*

the rights of the perceived beneficiary of a trust of property, and the long established expectations of a family, are questions for others to consider."

And the 2016 award for magnanimity in defeat must go to Simon Pringle whose response was reported in the Daily Mail:

"I want to congratulate Murray for winning the verdict and express the hope that he and his successors will wear the title as honourably as my father". He added: "I have no complaints about either the process or the decision."

Tim Walsh
Guildhall Chambers, Bristol
1 July 2016