Matthew Hodson, Editor.

Contents

Farrar's Building News
Matthew Hodson
Page 1

Ilott v Mitson: the most authoritative guidance to date
Joshua Hedgman
Page 2

Challenging the formal validity of Wills
Aidan O'Brien
Page 9

The substantial validity of Wills
David Roderick
Page 15

CHAMBERS OF
PATRICK HARRINGTON QC
www.farrarsbuilding.co.uk

I am pleased to present the first edition of the Farrar's Building Trusts and Probate newsletter.

It is our intention to provide a series of text book style articles on the fundamental aspects of contentious probate litigation, as a go-to guide and starting point for research.

To that end we have two excellent articles on the formalities and essential requirements of a valid Will, with a host of tips and tricks to assist in challenging or defending Wills.

We start, however, with a comprehensive review of this year's most important case – the Supreme Court decision in *Ilott*.

To subscribe to these updates, please email: marketing@farrarsbuilding.co.uk

Ilott v Mitson: the most authoritative guidance to date

by Joshua Hedgman

1. On 15th March 2017, the Supreme Court gave Judgment in *Ilott v The Blue Cross & Ors* [2017] UKSC 17. This was the first time that a challenge to the reasonableness of a will had made it to the highest court in the land. The outcome was decidedly long awaited.

2. This article will consider the impact of the decision for practitioners dealing with challenges to the reasonableness of the provision, if any, made by a will or intestacy. It will summarise the relevant facts before commenting on four key matters:
    a. New guidance on the structure of 1975 Act claims.
    b. The meaning of the 'maintenance' standard and its implementation.
    c. The value judgment behind 'reasonable financial provision'.
    d. A distinct word of caution: these cases remain unpredictable with any number of different, but entirely permissible, outcomes.

Facts

3. Mrs Ilott was born to the Deceased who was widowed at the time. At 17, she left home to live with her boyfriend. The Deceased did not approve and there followed 26 years of estrangement until the Deceased passed at the age of 70. By will made in 2002, the Deceased left her estate to a number of charities with which she had no particular connection. The value of the estate was relatively modest at £486,000 with the principal component being a house in the Home Counties.

4. Two key strands underpin the case:
    a. First, the period and extent of the estrangement: Mrs Ilott married the man that she left home for and the couple had 5 children. The family lived in complete financial independence and, for the most part, social isolation from the Deceased following a series of unfruitful

reconciliation attempts. As a result, the Deceased formed an intention to exclude Mrs Ilott from her will as long ago as 1984.

b. Second, the straitened financial circumstances in which the family lived. Mr Ilott held some part time work as an actor and Mrs Ilott remained at home to care for the children. The family relied on a cocktail of state benefits, which brought the total family income up to a little more than £20,000 per annum. The family lived frugally and had been unable to replace the car and various items of household equipment that had failed. The family had never been on holiday and the children had not been able to complete any extra-curricular activities. A small sum of around £4,000 existed in savings.

(a) New guidance on the structure of 1975 Act claims.

5. It has hitherto been common to deal with 1975 Act claims in two parts:
   a. First, the threshold value judgment: did the will or intestacy make reasonable financial provision for the claimant?
   b. Second, the provision discretion: if not, what reasonable financial provision ought now be made?

6. Counsel would habitually address these questions in turn, which is an approach that inevitably lends itself to repetition. Lord Hughes acknowledged that it might still be convenient to separate the issues in some cases (particularly where there is a dispute as to whether the deceased has failed to make *any* reasonable provision). However, his Lordship recognised that *"in many cases, exactly the same conclusions will both answer the question whether reasonable financial provision has been made for the claimant and identify what the financial provision should be"*.

7. Accordingly, practitioners should be prepared for courts to deal with the reasonableness of the provision and the consequent order together. There will likely be one value judgment made on the sensitive facts of each case. The type of order possible on the facts may well feed into the question of whether or not reasonable provision has been made in the first place.

8. This is a welcome development. It will clearly assist parties at a round table meeting and in court to consider the relevant factors jointly as opposed to engaging in the artificial process of making the same points twice over.

(b) The meaning of the 'maintenance' standard and its implementation

9. The standard of provision for all applicants other than spouses or civil partners is such as it would be reasonable for that person to receive 'for maintenance'.

10. Lord Hughes endorsed the words of Browne-Wilkinson J in *Re Dennis* [1981] 2 All ER 140, in which it was held that 'maintenance' was not equivalent to 'providing for the well-being or benefit of the applicant'. Instead, 'maintenance connotes only payments which, directly or indirectly, enable the applicant in the future to discharge his cost of daily living whatever standard of living is appropriate to him'.

11. Lord Hughes defined 'maintenance' as follows: *"the concept of maintenance is no doubt broad…but it cannot extend to any or every thing which it would be desirable for the claimant to have"*. His Lordship held that *"It is not limited to subsistence level"* but went on to remind trial judges not to exceed the standard of 'maintenance' by treading into conferring capital on a claimant.

12. His Lordship gave a number of examples as to the form of provision that 'maintenance' could take on the facts of any particular case:
    a. Periodical payments under a trust (although it was noted that the provision of income need not necessarily follow the periodical model).
    b. A lump sum from which to draw income (which can equally meet the need to provide income and may be cheaper for the executors and other beneficiaries).
    c. A lump sum to enable particular purchases such as a car to get to work or, as in Mrs Ilott's case, to purchase particular household goods and attend to upkeep of the property.
    d. Provision of housing (particularly in cases where the Deceased has provided maintenance in this form during their lifetime).
    e. Provision of a life interest, perhaps in a house or trust fund (which may balance the competing need to provide maintenance for the claimant whilst not conferring excess capital upon him/her).

13. A word of caution: these examples are clearly not intended to be prescriptive and judges continue to enjoy a broad discretion on the form of the final order. It may well be possible, on the right facts, to combine different forms of provision to discharge the standard of maintenance.

14. There remains the obvious point that it will not always be possible to entirely satisfy even the applicant's limited maintenance needs from the estate. There will be cases where the estate is modest or there are a number of competing beneficiaries/applicants. In those cases, it will not be practicable to wholly meet the needs of the claimant, however reasonable those needs are.

15. In determining the level of maintenance, the court must have regard to the chosen beneficiaries. It will be an error to require those beneficiaries to justify their competing claim by reference to need in the same way that an applicant must necessarily do so. Lord Hughes noted that the Court of Appeal had been wrong to proceed on the basis that the increased award to Mrs Ilott did not prejudice the charities.

16. The guidance in respect of 'maintenance' does not really alter the existing understanding that most practitioners will have. There is, however, a reminder to practitioners of how easy it can be to depart from 'maintenance' when making the final order. This may yield the advent of hitherto less frequent orders such as life interests etc. in a bid to avoid conferring too much capital on a claimant. On the other hand, defendants may now be prepared to offer greater lump sums to reflect the inconvenience of periodical or lifetime orders that do not facilitate a clean break.

(c) The value judgment behind 'reasonable financial provision'

17. The only question for the court is whether or not the will, or intestacy, makes reasonable financial provision. This is an objective question.

18. Practitioners must be aware of an easy trap to fall in to. The question of whether reasonable financial provision exists <u>is not the same question</u> as whether the Deceased acted reasonably in making the will (or failing to make a will in the case of an intestacy).

19. It is often the case that the reasonableness of the financial provision and the reasonableness of the Deceased's actions will elide and produce the same answer. One does not have to think too much before reaching an example. Take, for instance, the affluent parent who throws a child out of the family home and onto the street through no fault of that child. But there will be situations where the two questions divorce the answer:

20. An unreasonable testator may nonetheless make reasonable provision. A testator might act entirely unreasonably and spitefully in excluding a child but the absence of any provision may nonetheless prove reasonable where that child goes on to make a successful way in the world with no need for any maintenance at all.

21. Equally, a reasonable testator may make unreasonable financial provision. This would typically be the case where circumstance has overtaken the will or election for intestacy. Lord Hughes gave the example of a testator reasonably excluding a claimant at the time of executing a will but resultant unreasonable provision following the later onset of a chronic condition or disability to that claimant.

22. Further, in all claims except those of spouses or civil partners, need for maintenance is only the first hurdle. Establishing a need for maintenance is not, in itself, sufficient to qualify for an order. In the past, courts have often looked for a special or moral obligation upon the deceased in order to find for an adult child (although in recent years there has been some judicial reservation about whether the special or moral obligation amounts to a separate requirement). Lord Hughes accepted that *"something more than the qualifying relationship is needed to found a claim"*. His Lordship commented: *"the presence of absence of a moral claim will often be the centre of the decision under the 1975 Act"*. It therefore seems that a moral claim will be helpful to an applicant but the requirement for that elusive 'something more' is wider than a moral claim or sense of obligation.

(d) A word of caution: these cases remain distinctly unpredictable

23. For as much as the Supreme Court have given helpful and long-awaited guidance on the concepts of 'maintenance' and 'reasonable financial provision', an even clearer message emerges for practitioners:

24. Claims under the 1975 Act are notoriously difficult to predict. This is both in respect of (a) the prospects of establishing entitlement to an order and (b) the form and content of that final order. It is for this reason that 1975 Act claims often afford fertile ground for settlement.

25. Lord Hughes began his speech with an express qualification. His Lordship stated that the appeal was only one type of case that *"may raise difficult individual questions under the 1975 Act, which have to be resolved on a case-by-case basis"*. He continued: *"But there is no occasion for this court to attempt to meet every difficulty to which claims for family provision may give rise"*.

26. Lady Hale made much the same point as follows: *"I have written this judgment only to demonstrate what, in my view, is the unsatisfactory state of the present law, giving as it does no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance"*.

27. The wide ambit of very different, but entirely permissible, outcomes is best demonstrated on the rather tortuous appellate history of the case:
    a. At first instance, District Judge Million awarded the sum of £50,000.
    b. On appeal, King J concluded that the very long and deep estrangement meant the Deceased had no remaining obligation to make any provision.
    c. In the Supreme Court, both Lord Hughes and Lady Hale indicated that a further permissible outcome might have been the purchase of the property with the grant of a life interest in it to Mrs Ilott and, thereafter, a reversion to the estate.

28. We have, therefore, an example of three starkly different results from the exercise of the same value judgment. These ranged from no provision at all (per King J) to an award of £50,000 capital (DJ Million) and finally to an award of a life interest in a property at the most generous end of the spectrum. Importantly, the Supreme Court indicated that any of those outcomes were permissible, which rather demonstrates the risk to all parties engaged in 1975 Act litigation. In the event, DJ Million's order was restored: it was the first instance decision and had been arrived at by no error of law or principle. There existed no grounds upon which an appellate court could interfere with it.

29. Accordingly, the Supreme Court decision serves as a reminder to practitioners that prospects of success are highly sensitive in these cases. There can be no substitute for a detailed appreciation of the particular facts. Practitioners must be acutely aware of the fact that trial Judges enjoy a very broad and generous discretion in the determination of 1975 Act applications and much will turn on the ability of the advocate to persuade at first instance. The trial Judge will make a value judgment and an Appeal Court will not lightly interfere with it.

Conclusions

30. The Supreme Court has brought some welcome clarity to the tests of 'maintenance' and 'reasonable financial provision'. The procedure for advancing and resisting these cases is likely to be simpler in view of the fact that the two-part test is to be discouraged. Correspondence and submissions should now proceed more succinctly and with a greater focus on the factors that determine the value judgment.

31. But it remains a value judgment and, it follows, a distinct source of litigation risk for all parties engaged in this field.

32. In short, some helpful guidance on key concepts but an area of law that remains decidedly fraught with litigation risk. Given the clear warning that appellate courts should not lightly interfere with first instance decisions, it is distinctly unlikely that another 1975 Act case will be heard in the Supreme Court for some considerable time.

Challenging the formal validity of Wills

by Aidan O'Brien

The validity of a Will can be challenged on any of the following grounds:

- A failure to adhere to proper formalities
- Lack of testamentary capacity
- Lack of knowledge / approval
- Undue influence
- Fraud
- Forgery

This guide shall limit its consideration to the first of these grounds, relating to the 'formal validity' of a Will. The remaining grounds go to 'substantial validity' and will be the subject of later papers.

<u>What are the proper formalities?</u>

When contesting a Will the first task is to determine whether it has been executed in compliance with the Wills Act 1837. The Act provides a number of formalities that must be complied with in order to ensure that a Will is valid.

As a general rule, a Testator must have attained the age of 18 at the time of making a Will (the Wills Act 1837, s.7).

In addition, for deaths arising after 1 January 1983, Section 9 of the Wills Act 1837 (as substituted by the Administration of Justice Act 1982, s. 17) ('the Act') dictates that no Will is valid unless:

a. It is in writing, and signed by the Testator, or by some other person in his presence and by his direction; and

b. It appears that the Testator intended by his signature to give effect to the Will; and

c. The signature is made or acknowledged by the Testator in the presence of two or more witnesses present at the same time; and

d. Each witness either:-

- attests and signs the Will; or
- acknowledges his signature, in the presence of the Testator (but not normally in the presence of any other witnesses), but no form of attestation shall be necessary.

<u>The Will must be in writing</u>

A Will may be documented by a range of different means that make the terms visible (i.e. ink, pencil, type or otherwise). Where a Will is written in both pencil and ink, there is a presumption that the pencil text is merely deliberative and will be excluded from probate unless the court determines that it represents the Testator's final intentions.

<u>The Will must be signed</u>

The Act, section 9 (a) dictates that a Will may be signed by the Testator, or by some other person in his presence and by his direction. A 'signature' can be anything that the Testator intends to stand as such.

By way of example, the following have been found to qualify as signatures:

- The signatory's initials: In the Goods of Savoy [1851] 15 Jur 1042
- The phrase *'your loving mother'*: In the Estate of Cook [1960] 1 WLR 353
- A thumb print: Re Finn [1935] 52 TLR 153
- A seal or stamp: Re Emerson [1882] 9 L.R.I.r. 443

- A segment of the Testator's name: In the Goods of Chalcraft [1948] 1 AII ER 700.

Whilst a Testator need only sign part of his name, it is a requirement that he has completed all he intended to write. Furthermore, the Testator must complete it in the presence of two witnesses (as opposed to completing only part of his signature in front of two and thereafter completing it in front of only one – see Re Colling [1972] 3 AII ER 729).

The fact that a Testator has been assisted in signing the Will does not render it invalid, albeit in instances where they are too weak to do so it is permissible (and perhaps prudent) to allow someone else to sign on the Testator's behalf (see below).

If the Testator chooses to sign the Will himself in the presence of two witnesses, assisted by another person, the Will is only validly signed in accordance with section 9 (a) if the Testator makes some positive and discernible physical contribution to the signing process.

<u>Signature by another</u>

A person other than the testator is permitted to sign a Will provided that it is done in the presence of the Testator and at his direction. A signature will be effective even if the person signing on behalf of the Testator signs in his own name. In order for a Testator's direction to be valid it must be via positive communication (as opposed to mere acquiescence). Such a direction can be communicated verbally or non-verbally.

When the Testator directs another person to sign the Will on his behalf and that person does so, in the presence of the two witnesses, he must indicate to the witnesses that the signature was placed there at his request. The Will is then 'signed' by the Testator within Section 9 (a), and no subsequent acknowledgement of his signature is necessary.

The Act, section 15 makes a gift void if an attesting witness is the recipient, but this does not extend to signing at the direction of the Testator (albeit this is relevant to the issue of knowledge and approval). Notwithstanding this, it is clearly undesirable that beneficiaries should be permitted to execute a Will in their own favour, in any capacity. Such circumstances

will excite the suspicion of the court and demands that it closely examines the evidence in support of the instrument.

Timing of signature

It is essential that the Testator's signature is put to the document after the testamentary dispositions have been included, unless the writing of the Will and making of the signature were all part of one operation.

Testator intends his signature to give effect to the Will

A Will shall not be valid in the absence of such intention. For example, if a Testator is under the false understanding that a Will is not valid until dated, and therefore signs it and leaves it undated, he lacks the requisite intention to execute the Will.

By way of slight deviation, section 9 does not require that a Will be dated and so the absence of such does not invalidate the same. Despite this, one can clearly envisage the raft of problems that can arise where there are two testamentary instruments in existence given that it may be impossible to determine which is the most recent.

Interestingly, Marley v Rawlings [2014] UKSC 2 involved a husband and wife who made mirror Wills and then mistakenly signed each other's document. It was eventually determined that the Testator intended his signature to give effect to the document he signed (albeit he was mistaken as to which document that was) and hence the Act, section 9 requirements had been met. It followed that the Will was properly executed and could be admitted to probate, following which it could be rectified to properly express his intentions.

Signature is made or acknowledged in the presence of two or more witnesses present at the same time

The Act, section 9 (c) requires that for a Will to be valid, the Testator's signature must be made or acknowledged by the Testator in the presence of two witnesses both present *at the same time*. This requires the witnesses to be in the visual presence of the Testator at the relevant time.

Such witnesses do not have to know that the document being signed is a Will nor do they have to be able to see the whole document. It is sufficient that the witnesses can see the Testator writing what the court determines to be his signature.

As previously mentioned, a witness should not be a beneficiary to the Will. If they are, they will lose whatever gifts or bequests they were entitled to under the Will by dint of section 15 of the Act.

Practitioners should bear in mind that they owe a duty to the Testator at execution and also when the Will is returned after execution. Following Esterhuizen v Allied Dunbar [1998] 2 FLR 668, it is prudent to offer to personally oversee the execution of a Will (as opposed to merely leaving written instructions to the client).

Witness signature or acknowledgement

Once the aforementioned steps have been taken, the witnesses must sign or acknowledge the Will in the presence of the Testator with the intention of attestation. For a Will to be valid, the Testator needs to be physically present (within visual sight, albeit he does not need to avail himself of the opportunity to look) and mentally present (conscious of the attestation).

It is important to remember that the witnesses do not need to sign in the presence of each other, only in the presence of the Testator (cf. making or acknowledgement of Testator's signature in presence of both witnesses). As such, it is permissible for a Testator to sign in the presence of both witnesses, for W1 to leave without signing and for W2 to attest the Will in the Testator's presence. W1 can then sign the Will in the Testator's presence at a later date. In these circumstances the Will would still be valid.

Attestation Clauses

A rebuttable presumption of due execution arises when a Will contains an attestation clause stating that all formalities have been properly complied with. In the absence of such a clause, affidavit evidence will generally be required from the person putting forward the Will so as to prove due execution.

The fact that witnesses may give evidence to the effect that they have no recollection of witnessing the deceased sign the Will is not enough to rebut the presumption of due execution. Even positive evidence that the witness did not see the deceased sign may not be enough to dislodge the presumption unless the court is satisfied that it has the *'strongest evidence'*. The same approach applies to evidence that a witness did not intend to attest when he saw the deceased sign when the Will contains their signatures and an attestation clause. It follows that it is difficult to challenge a Will on this basis in the absence of very strong evidence that the witnesses could not have witnessed it (e.g. both witnesses claim they were nowhere near the place of execution stated in the attestation clause on the particular date).

Practical Considerations

Before challenging the formal validity of a Will it is critically important to fully understand the implications of doing so. It may well be that there is a prior validly executed Will that will be admitted into probate in its place, or the intestacy rules could apply.

In the event that the consequences of a successful challenge warrant the costs involved for the client, it is important to act swiftly so as to prevent a Grant of Probate being taken out such that the assets within the estate are distributed in accordance with the invalid Will (i.e. in the first instance by entering a caveat at the Probate Registry – see Non-Contentious Probate Rules 1987, r.44 – these a currently being revised).

A caveat will prevent the sealing of a grant provided it is entered prior to 10 am on the date of grant. The caveat remains effective for 6 months but can be renewed by a further 6 months (on an unlimited number of occasions) by making a written application prior to the caveat's life-

time. In the event that a grant has already been issued an order for revocation will need to be sought.

The substantial validity of Wills

By David Roderick

Following on from Aidan O'Brien's guide to the formalities which must be complied with in order to ensure the formal validity of a will, this article considers two grounds of challenge to a will's substantial validity:-

- Lack of testamentary capacity;
- Want of knowledge and approval.

Testamentary capacity

Age/Privilege –

A person under the age of 18 is not capable of making a valid will unless they are privileged by virtue of being a soldier in actual military service, a member of the naval or marine forces in actual military service, or a mariner or seaman being at sea (s.7 and 11, Wills Act 1837 as amended, and Wills (Soldiers and Sailors) Act 1918). However, if the will was made prior to 1 January 1970 the age of capacity required is older, at 21 years.

The common law test –

The testator must be mentally capable of making a will. That is to say, possessing the capacity to understand, rather than actual understanding of, the following concepts set out in _Banks v Goodfellow_ (1870) 5 QB 549:-

"*It is essential* […] *that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made*. "

The separate requirements are therefore that the testator is capable of understanding:-

- the effect of his wishes being carried out at death;
- the extent of the property of which he is disposing. It is not however necessary to have a precise and detailed knowledge; rather an ability to appreciate the approximate value (_Schrader v Schrader_ [2013] EWHC 466 (Ch)).
- the several persons who ought to be considered as possible beneficiaries and to comprehend their relationship to himself and their claims on his property (_Boughton v Knight_ (1873) L R 3 P&D 64).

The law does not require a perfectly balanced mind. Capricious, frivolous or ill-intentioned motives do not invalidate a will.

The statutory test for mental capacity in the Mental Capacity Act 2005 ("MCA 2005") does not replace that common law test (other than for the making of wills by the Court of Protection for persons lacking capacity), but s.3 of the MCA 2005 contains considerations which will be relevant to assessing a lack of testamentary capacity:-

3 (1) … a person is unable to make a decision for himself if he is unable–

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another, or

(b) failing to make the decision.

Time for satisfying the test –

Ordinarily, the testator must have testamentary capacity at the time when he executes the will. However, if the testator deteriorates after giving instructions to a solicitor but before execution of the will, it remains valid if (1) the testator had capacity at the time when he gave instructions to the solicitor for the preparation of the will, (2) the will was prepared in accordance with his instruction, and (3) at the time of executing the will, he understands that he is executing a will for which he has given instructions (*Parker v Felgate* (1883) 8 P.D. 171, upheld in *Perinns v Holland* [2010] EWCA Cov 840).

Challenge on the basis of incapacity –

Challenges to the validity of a will based on the testators lack of testamentary capacity are common and increasing, due to factors such as ‘do-it-yourself’ wills, an ageing population

with commensurate cognitive disabilities such as dementia, inflated real property values increasing the value of estates, etc.

Therefore in practice the golden rule –

It is therefore particularly important where there is any doubt about testamentary capacity that solicitors ensure the will is approved or witnessed by a medical practitioner who satisfies themselves as to capacity, and who then records the examination (a 'golden but tactless' rule, derived from *Kenward v Adams* (1975) The Times, November 29, and *Re Simpson* (1977) 121 Sol Jo 224). Further, it is strongly advisable as a precaution that if there was an earlier will it should be examined and any proposed alterations should be discussed with the testator.

Should a will be challenged on the basis of lack of capacity, a failure to follow this best practice will expose a solicitor to allegations of negligence. The courts have nevertheless accepted that complying with the obligation will be subject to the particular circumstances of each case (for example, where the testator is close to death and a medical examination cannot be arranged, and capacity had been considered by a solicitor and recorded in a comprehensive note, *Wharton v Bancroft* [2011] EWHC 3250 (Ch)).

The burden of proving capacity -

The legal burden of proof rests with the person propounding the will to prove that the testator had the testamentary capacity at the relevant time (*Barry v Butlin* (1838) 2 Moo.P.C. 480, *Waring v Waring* (1848) 6 Moo.P.C. 341). However the evidential burden of proof may shift from one party to another. The fluctuating burden is described at paragraph 97 of the judgment of Briggs J in *Key v Key* [2010] EWHC 408 (Ch):

"(i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity."

A further rebuttable presumption is worthy of note: if at a period prior to the execution of the will the testator suffered from a serious mental illness, a presumption arises that it continued and that the testator lacked capacity (*Bannatyne v Bannatyne* (1852) 2 Rob. 472). The presumption may be rebutted by establishing that the testator made the will during a lucid interval or after full recovery.

Knowledge and Approval

Testamentary capacity requires proof of the capacity to understand certain important matters relating to the will, whereas demonstrating knowledge and approval relates to the specific contents of that will (*Hoff v Atherton* [2004] EWCA Civ 1554), or put otherwise, "*testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made*" (per Lewison L.J. paragraph 47 *Simon v Byford* [2014] EWCA Civ 280).

In *Gill v Woodhall* [2011] Ch.380, the Court of Appeal confirmed the correct approach to considering knowledge and approval was to ask a single question: had the testator understood (a) what was in the will when she signed it; and (b) what its effect would be. The question should be considered in the light of all the available evidence, and the appropriate inferences to be drawn from that evidence.

Again, the legal burden of proof lies with the propounder of a will to prove that the testator knew and approved of the contents at the time of execution. This burden of proof can be discharged by proof of testamentary capacity and due execution.

On proof that the testator was of testamentary capacity and that he duly executed the will, in ordinary circumstances a rebuttable presumption arises that he knew and approved of its contents at the time of execution (*Barry v Butlin* (1838) 2 Moo.P.C. 480).

Affirmative proof of knowledge and approval may take any form. The fact that the deceased gave instructions for the will or that it was read over by him or to him is the most satisfactory proof. There must however be a proper and sufficient reading of the will. It might not be a proper reading of the will by the testator if he merely cast his eye over it (*Garnett-Botfield v Garnett-Botfield* [1901] P.335).

It is not essential to prove that a will originated with the testator and, therefore, proof of instructions may be dispensed with, provided that it is proved that the testator completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied that disposition (*Constable and Bailey v Tufnell and Mason* (1833) 4 Hagg. Ecc. 465).

Suspicious circumstances

Importantly, if a will was prepared and executed in circumstances which lead to a valid suspicion that the will did not express the mind of the testator, that suspicion must be removed by affirmative proof of the testator's knowledge and approval. Where circumstances excite the vigilance and suspicion of the court, a very high degree of proof may be required.

A common example of circumstances which will raise suspicion is where the will was prepared by a person who takes a substantial benefit under it. "*If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed*" (*Barry v Butlin*). If the legacy is very small in relation to the size of the estate, such a suspicion may not arise.

A very high standard of conduct is required of the solicitor receiving a benefit in these circumstances, see *Re a Solicitor* [1975] Q.B. 475 (*a solicitor has now not merely to advise a client to obtain independent advice before making a will but to ensure that the client received that advice before he* [the solicitor] *took under the will*). Where a solicitor drafted wills for his elderly aunts appointing himself executor and beneficiary of one-third of their estate, when both were in poor health and where one probably lacked testamentary capacity, it was held that the gravest suspicions were aroused! (*Cushway v Harris* [2012] EWHC 2273 (Ch)).

Further commonly occurring suspicious circumstances are:-

- Where there is a notable departure from longstanding testamentary intentions (*Re Gallagher* [2008] EWHC 3449 (Ch);
- Where the testator's instructions were given in answer to leading questions (*Green v Skipworth* (1809) 1 Phill. 54).
- Wills prepared by elderly testators in favour of their carers (*Devas v Mackay* [2009] EWHC 1951 (Ch), *Re Rowinska* [2005] EWHC 2794 (Ch)).

When considering a challenge to the validity of a will, it is however important to bear in mind that the circumstances in issue can only raise a suspicion of lack of knowledge and approval if they are circumstances with some relevance to the preparation and execution of the will itself. Additionally, the court will not allow the rule in *Barry v Butlin*, *Fulton v Andrew* (1875) L.R. 7 H.L. 448 (that a party who writes or prepares a will under which he takes a benefit excites suspicion) to be used as a screen for allegations of fraud and dishonesty.