Capacity, the golden rule, and execution of wills

Poole v Everall provides a stark reminder of the court's preferences when considering whether or not to affirm a will, write **Emily Exton** and **Marina Griggs**

Emily Exton, pictured, is a partner and Marina Griggs a solicitor in the dispute resolution team at Forsters
@ForstersLLP
www.forsters.co.uk

David Poole was involved in a serious motorcycle accident in 1985 aged 19, leaving him with permanent physical and psychiatric disabilities. He was placed in the home of Mr Everall, who became his full-time foster carer.

In December 2012, Everall prepared a will for Poole, appointing himself as executor and leaving himself 95 per cent of Poole's estate (the approximately £1.1m he had received in compensation). A previous will executed by Poole in February 2012 (prepared by Jonathan Lloyd, his solicitor and financial affairs deputy) had left the estate to charities and to Poole's partner and brothers, and nothing to Everall.

The December will was challenged on a number of grounds in *Poole v Everall* [2016] EWHC 2126 (Ch). Judge David Cooke addressed each challenge in turn, emphasising the difficulties involved in challenging a will, even in circumstances where the facts seem to point towards invalidity.

Due execution

HHJ Cooke stated: '[T]he presumption that an apparently duly executed will is in fact in compliance with the requirements of formality is a very strong one.' Technically the burden was on Everall to prove that the will was duly executed, but the legal presumption was almost entirely in his favour. The judge clearly doubted whether the witnesses to the new will were present at the signing (as required by section 9 of the Wills Act 1837). However, without 'the strongest' evidence against due execution, he was bound to find that the will was executed in accordance with the appropriate formalities.

Capacity and the 'golden rule'

Following *Banks v Goodfellow* (1870-71) L.R. 11 Eq. 472, to have capacity to make a will a testator must understand the nature of the act they are engaged in and its effects, must be capable of understanding the extent of the property being disposed of, and also appreciate the 'claims on his bounty' (family or moral obligations).

No formal medical capacity assessment was carried out when the December will was made and executed. However, although the so-called 'golden rule' (that, if there is doubt, the will should be witnessed or approved by a doctor who is satisfied of the testator's capacity), established in *Kenwood v Adams* [1975] CLY 3591, was not followed, the judge was clear that 'it is not necessary in every case that there should be a contemporaneous formal assessment by a qualified medical professional before the court can be satisfied'.

While there was reasonable doubt as to capacity, given Poole's medical history, the judge was satisfied that he had capacity to make the December will. The court was particularly persuaded by the fact that Poole had been the subject of a formal medical assessment confirming capacity ahead of the execution of the February will and that capacity was likely to remain. Weight was placed on the fact that Lloyd was an experienced solicitor and his opinion (expressed in a letter to Everall in December) was that Poole retained testamentary capacity.

Knowledge and approval

Knowledge and approval are presumed in the case of a testator with full capacity who has had a will's contents read to them by an independent solicitor immediately before signing. Poole, however, had not had the contents of the new will read to him in full, even by Everall.

Everall therefore had to prove that the requisite test had been met, bearing in mind that the court will be particularly suspicious where a will has been prepared by someone who stands to benefit under it.

The judge found that Everall could not satisfy the burden placed upon him. Only Everall gave evidence that Poole fully understood the terms of the will and his evidence was that he did not read the terms to Poole but left it for him to read alone, giving minimal explanations that did not draw attention to the extent of the gift in Everall's favour. In the context of Poole's vulnerability, the judge was not satisfied that he understood the extent of the alterations made in the new will. It was therefore found to be invalid.

The challenge on undue influence was dismissed. Poole did not know and understand the terms of the will, therefore it could not be argued that he was coerced into agreeing them.

Poole provides a stark reminder of the court's preferences when considering whether or not to affirm a will. The general presumption in favour of validity is not easily shaken, but a will-drafter who exploits the vulnerability of a client to prepare a self-serving will can have an uphill battle to prove that the testator knew and understood what they were doing. **SJ**

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