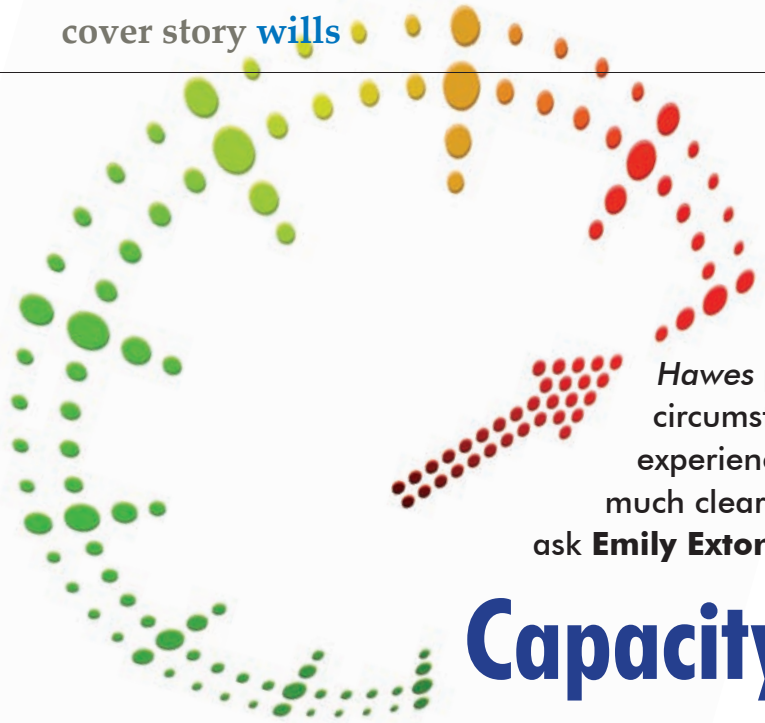

Hawes provides further guidance on the circumstances where a will drafted by an experienced solicitor may be challenged. So how much clearer are practitioners about their duties, ask **Emily Exton** and **Katherine Robinson**

Capacity limit: could your cli

Last month the Court of Appeal sent tremors in private client circles when it found in *Hawes v Burgess* [2013] EWCA Civ 94 that a will drafted by an experienced and independent solicitor should be held invalid because the testatrix did not know and approve its contents. The judgment provides a useful reminder and further guidance to solicitors about their duties and responsibilities when drafting a will. Contentious practitioners, too, will want to consider the ruling, both for the guidance it provides to those looking to challenge the validity of a will, and for the court's comments on the devastating effect that the costs of such litigation can have on those involved.

Absent fraud or forgery, the validity of a will can generally be challenged on four grounds:

1. if the will has not been properly executed in accordance with the Wills Act 1837;
2. if the testator does not have testamentary capacity when executing the will;
3. if the testator does not know and approve the contents of the will; and
4. if the testator was unduly influenced in the making of the will.

Although there was no issue regarding the formalities of the will in *Hawes*, the case sheds light on the court's approach to the other grounds for challenging a will. In particular, the Court of Appeal judgment provides guidance regarding questions of testamentary capacity and lack of knowledge and approval (grounds 2 and 3 above).

At first instance, the judge had found that the testatrix lacked capacity and that her daughter Julia had been a "controlling force" in the drafting of the will (see box).

Testamentary capacity

The three-limb test for testamentary capacity is laid down in *Banks v Goodfellow* (1869-70) LR 5 QB, which set out that a testator has capacity if:

1. he understands the nature of making a will and its effects;
2. he understands the extent of the property of which he is disposing; and
3. he is able to comprehend and appreciate the claims to which he ought to give effect and is not affected by any disorder of the mind that influences his will in disposing of his property.

The trial judge in *Hawes* held that the third limb of the test in *Banks* was not met. The judge relied on expert evidence in the field of psychiatry regarding the vascular dementia suffered by the testatrix. It was found that the testatrix had a disorder of the mind which impaired her understanding of the provision that she ought to make for Peter. Julia appealed this part of the decision on the grounds that the facts did not support the judge's conclusion.

The Court of Appeal expressed unease about the trial judge's finding that the testatrix did not have testamentary capacity. Although it was not necessary for the court to reach a concluded view on this issue, the leading judgment from Lord Justice Mummery said that:

- it is reasonable to expect that a testatrix who has the requisite understanding to satisfy the first two limbs of the *Banks* test will satisfy the third limb of the test;
- the court should be careful about accepting the evidence of a medical

Hawes: daughter was 'controlling force'

The testatrix in *Hawes* made a will in 1996 which divided her residuary estate equally between her three children. In 2007, she attended a meeting with an independent and experienced solicitor and instructed him to draft a new will. Her daughter, Julia, was involved in making the appointments with the solicitor and in giving instructions for the 2007 will, under the terms of which the testatrix's residuary estate was divided between her two daughters to the exclusion of her son, Peter.

Peter and his sister Libby were not informed of the changes to the will at the time, and disputed the validity of the new will following their mother's death in 2009.

At first instance, the trial judge found that the testatrix did not have capacity to make the 2007 will, and that she did not know and approve its contents. The judge held that Julia had been "the controlling force in the instructions given for the drafting of the 2007 will".

The Court of Appeal was satisfied that the 2007 will was invalid for want of knowledge and approval, but was uncomfortable with the trial judge's finding that the testatrix did not have testamentary capacity. The court said that a will drafted by an independent solicitor, who met with the testatrix and considered that she was capable of understanding the will, "should only be set aside on the clearest evidence of lack of mental capacity".

expert given after the event, where that expert did not meet or examine the testatrix;
- it is a "very strong thing" for a judge to find that a testatrix does not have capacity to make a will, when that will has been prepared by an experienced and independent solicitor following a meeting with her, where that solicitor had read the will back to the testatrix and where the solicitor considered (and had recorded in an attendance note) that the testatrix was capable of understanding the will; and
- a will so drafted by a solicitor "should only be set aside on the clearest evidence of lack of mental capacity".

ent's will be challenged?

There have been several other recent probate cases where the court has stressed that a solicitor's view of a testator's capacity can be persuasive in certain circumstances. For example, in the undue influence case of *Wharton v Bancroft* [2011] EWCH 3250, Norris J said that the solicitor in that case should not be criticised for failing to follow the "golden rule" that a medical attendant should opine on the capacity of any aged testator, or testator who suffers from a serious illness.

In some circumstances, it was entirely appropriate for the solicitor to make his own assessment of capacity and get on with the job of drafting the will.

Similarly, in the negligence case of *Thorpe v Fellowes Solicitors* [2011] EWHC 61 (QB), Mrs Justice Sharp found that solicitors were only required to make enquiries as to a person's capacity if there were circumstances that would raise doubts as to this capacity "in the mind of a reasonable practitioner".

It was unnecessary, and often insulting, for solicitors to obtain medical evidence every time they are instructed by an elderly client just in case they lack capacity.

Knowledge and approval

The trial judge in *Hawes* also found that the testatrix did not know and approve the contents of her will. That conclusion was reached on the basis of "all the evidence I have had and read", without the judge identifying the specific matters relevant to the decision.

Julia appealed this part of the decision on the basis that the judge was wrong to reach such a conclusion without giving reasons for displacing the strong presumption of validity in favour of the will executed at the offices of an independent and experienced solicitor.

The Court of Appeal considered the case of *Gill v Woodall* (2011) WTLR 251, where Lord Neuberger's leading judgment said that the court should consider knowledge and approval as a single issue. If the circumstances of a will aroused the court's suspicion as to whether it represented the intentions of a testator, as known to and approved by him, then the court should scrutinise those circumstances to decide whether those suspicions can be dispelled.

"Although in *Hawes* no blame was placed on the legal advisers for the failure to reach a settlement, it is likely that the court will take a dim view of litigation which exhausts the entirety of a modest estate"

The Court of Appeal found that the trial judge had correctly applied the law and that the circumstances of the 2007 will justified the court insisting on positive proof of the testatrix's knowledge and approval. In particular the following circumstances provoked suspicion:
- Peter and his mother remained close until her death, yet she did not tell him that he was cut out of her will;
- Julia was instrumental in making the arrangements for her mother to see the solicitor, she remained in the room while instructions were given and contributed to those instructions;
- the will was prepared at a time when Julia had fallen out with Peter, and was made without the knowledge of the other siblings; and
- although the will was drafted by a solicitor, he did not send the testatrix a draft to check before it was executed.

A similar approach to the question of knowledge and approval was taken in *Wharton*, where the judge said that it was for those challenging a will to produce evidence of circumstances which provoked the suspicion of the court as to whether the usual inference in favour of a will properly prepared by a solicitor may be drawn. The court's ultimate task is then "to consider all the relevant evidence available and, drawing such inferences as the judge can from the totality of that material, to come to a conclusion as to whether or not those propounding the will have discharged the burden of establishing that the document represents the testamentary intentions of the testator".

In the recent case of *Schrader v Schrader* [2013] EWHC 466 (Ch), Mr Justice Mann followed the approach taken in *Wharton* to the question of knowledge and approval. Although in *Schrader* the will was prepared by a professional will-writer instead of a solicitor, the judge held that the will-writer "was sufficiently close to a solicitor in this respect" for the usual inference to apply to a will executed before her.

Modern day *Jarndyce*

Lord Justice Mummery likened the *Hawes* case to the "foggy family law suit in *Jarndyce v Jarndyce*" from Charles Dickens' novel *Bleak House*, which dragged on for generations until the family's money was exhausted by lawyers' fees.

In this case, despite the Civil Procedure Rules and the efforts of the legal advisers to achieve a family compromise, the whole of the testatrix's estate was dissipated on legal fees. The litigation also left a rift in the once-close family which is likely to be beyond repair. In the words of Lord Justice Mummery, "a six-day trial with 26 witnesses does not come cheap".

Although in *Hawes* no blame was placed on the legal advisers for the failure to reach a settlement, it is likely that the court will take a dim view of litigation which exhausts the entirety of a modest estate where the lawyers do not make every effort to encourage the parties to reach a compromise. Solicitors drafting wills can try to ensure that such litigation is avoided, for example by seeing the client separately from family members who may influence their instructions, or stand to benefit more than others, and by taking detailed attendance notes.

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