A return to normality in the law of testamentary capacity - *Hughes v Pritchard* [2022] EWCA Civ 386

Introduction

The recent case of *Hughes v Pritchard* [2022] EWCA Civ 386 provides a rare example of an appellate court overturning the factual findings made at first instance. It provides guidance on several issues that are likely to be of interest to practitioners dealing regularly with probate matters, including i) the approach the court should take in assessing evidence regarding a testator's capacity, and ii) the information that needs to be available to a medical professional when assessing capacity under the test in *Banks v Goodfellow*.

Background

The case concerns the validity of the will of Evan Richard Hughes (the "Deceased"). He was a businessman who also held several significant plots of agricultural land in Wales.

The disputed will was executed on 7 July 2016 (the "2016 Will"). It replaced a previous will made in 2005 (the "2005 Will").

The Deceased had three children: Gareth, Carys, and Elfed. Elfed had devoted much of his life to farming his father's land. He sadly killed himself in 2015.

The Deceased's health deteriorated after 2015, and by 2016 he was suffering from moderate dementia.

The Deceased was nonetheless aware that he would need to alter his testamentary dispositions in the light of his son's death. Under the 2005 Will, the land that Elfed had farmed (known as "Yr Efail") was left to him and shares in the deceased's company were left to Gareth. Under the 2016 Will, Yr Efail went to Gareth. Elfed's widow was left a life interest in a separate parcel of agricultural land, to pass on her death to her three sons equally. By the time of the 2016 Will, the shares had significantly diminished in value.

The solicitor involved in the drafting of the 2016 Will, Ms Roberts, was conscious of the Deceased's capacity issues. She arranged for a Dr Pritchard to assess capacity before the 2016 Will was executed. He confirmed at the time the 2016 Will was executed that he was content that the Deceased had capacity to do so. Ms Roberts herself took detailed attendance notes of both the drafting and execution of the will. She recorded in these that she was also confident in the Deceased's capacity.

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The decision at first instance

However, Dr Pritchard gave evidence at trial that he had not been aware of the dispositions made in the 2005 Will when he assessed the Deceased's capacity. He said that he understood the 2016 Will to be merely a tidying up exercise, and not to materially alter the dispositions made in the 2005 Will, whereas in fact the Deceased had not left Yr Efail to Elfed's family. As a result, he did not ask the deceased why he was proposing to leave the land to his son Gareth rather than to Elfed's widow and sons.

HHJ Jarman (sitting as a judge of the High Court) found at first instance (*Hughes v Pritchard* [2021] EWHC 1580 (Ch)) that Dr Pritchard's failure to ask the Deceased about the changes in his testamentary intentions with respect to Yr Efail and his reasons for the change meant that very little weight could be given to the contemporary medical evidence. He found further that as Ms Roberts had no medical qualifications herself and relied on Dr Pritchard, her evidence was to be given little weight either. He placed greater weight on evidence relating to the Deceased's conduct and conversations before and after the 2016 Will was executed, and found that the Deceased lacked capacity to make the 2016 Will in three different ways, any of which would vitiate his capacity to make the 2016 Will (¶¶85-88):

1. Capacity to appreciate the understanding that he had with his son Elfed over the many years that the latter had looked after the farm for no financial reward, and the promises made to Elfed's widow and children after his death.

2. Capacity to understand the extent of the disputed agricultural land because his visuospatial impairment was such that he had difficulty interpreting maps.

3. Capacity to understand that the changes implemented by the 2016 Will were more than just those necessary to neaten up the dispositions made by the 2005 Will following Elfed's death.

The judge at first instance accordingly pronounced against the validity of the 2016 Will.

The Court of Appeal's decision

The Court of Appeal held that the trial judge had been wrong to find that Dr Pritchard's lack of knowledge of the 2005 Will vitiated his evidence as to capacity on the bases i) that there is no rule that a medical practitioner's attention should be drawn to changes made by a new will (¶94), and ii) that the testator should not be required to justify any changes in testamentary dispositions in order to prove that they have capacity – they are entitled to leave their estate as they choose "*however capricious that choice may be and however ungrateful or unfair the terms may be to those whose expectations of testamentary benefit are disappointed*" (¶95).

The court also held that the trial judge was wrong to give little weight to the evidence of Ms Roberts because where a will is explicable and rational on its face, has been prepared by an independent lawyer

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who has is aware of the legal requirements and has discussed and read over the draft will with the testator, the conclusions reached by that lawyer are likely to be "*of considerable importance when determining whether a testator has testamentary capacity*" (¶79). They clarified, however, that dicta of Mummery LJ in Hawes v Burgess [2013] WTLR 453, [2013] EWCA Civ 74 do not create a presumption of validity where a will has been drafted by an experienced lawyer.

The effect of this judgment is to return the law regarding medical evidence of capacity to the status quo – that whilst it is useful, it should not be relied on by a court to the exclusion of all other evidence when making findings as to capacity.

Comment

The effect of this judgment is to return the law regarding medical evidence of capacity to the status quo – that whilst it is useful, it should not be relied on by a court to the exclusion of all other evidence when making findings as to capacity. It also underlines the importance of contemporaneous evidence, and will reassure solicitors concerned by the finding at first instance that a medical expert could second guess at trial an assessment given at the time the will was made.

This does not mean, however, that practitioners should feel there is no longer any need to provide a medical expert with information as to previous testamentary dispositions. Whilst the Court of Appeal held that such knowledge is not necessary, its provision was nonetheless described as "*a prudent step*" (¶94). The judgment does not displace the *Banks v Goodfellow* requirement that a testator needs to understand the nature of the act and its effects, and to be able to comprehend and appreciate the claims to which they ought to give effect. Knowledge of former wills remains a helpful tool in determining whether a testator satisfies these requirements. Practitioners may therefore wish to err on the side of caution and ensure when arranging a capacity assessment that the medical expert is aware of any changes from previous wills and able to question the testator on them.

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