New Court of Appeal Decision on Testamentary Capacity (James Fryer-Spedding)

Today's Court of Appeal judgment (28.1.16) in *Burns v. Burns* [2016] EWCA Civ 37 represents the latest statement of the law concerning testamentary capacity, knowledge and approval of the contents of a will, and the rule in *Parker v. Felgate*.

The appeal concerned a challenge to the will made by the late Mrs. Eva Burns in July 2005. She made this will after taking 2 Mini Mental State Examination tests. The results of those tests put Mrs. Burns' mental capacity in doubt.

At trial the expert evidence from a consultant geriatrician was that these MMSE tests provided "good evidence that [Mrs. Burns] was poorly orientated as to where she was in time and place, had poor recall (short term memory) and that she had problems with analysis and simple task planning. Furthermore the deficits identified were persisting for a period of 3 months."

In 2003, when Mrs. Burns was 83 years old, the MMSE test showed that she was unable to state the year, the date, the season, the day or the month. She could not write a sentence. Nor could she recall three common objects mentioned to her by the nurse a few minutes earlier in the examination.

A further MMSE test taken in May 2005 made similar findings, albeit on this occasion she was able correctly to identify the current month.

Mrs. Burns met a solicitor to make a will in July 2005. She had corresponded with him at the turn of the year, but had not met him to give her instructions. That solicitor was unaware of Mrs. Burns' previous will of 2003 and did not ask her to explain the changes proposed by the new will.

In the words of the trial judge the solicitor "…did not know about the 'golden rule'. He appeared to be oblivious to the concept…". Rather (again in the words of the trial judge) the solicitor had a "general discussion with her, passed the time of day. Spoke about the weather, asked how she was. These were not open questions. They were not questions designed to test the faculty of Mrs. Burns." He read the will, she said she understood it, and it was executed.

The appellants submitted at trial and on appeal that this meeting between Mrs. Burns and her solicitor was precisely the sort of "idle ceremony" against which the Court had warned in *Buckenham v. Dickenson* [2000] WTLR 1083.

The trial judge then went on to find that the challenged 2005 will was valid: on the basis of the rule in *Parker v. Felgate* (i.e. that the will was drawn in accordance with instructions given by Mrs Burns when she had full capacity, and executed when she lacked it but in circumstances where she still appreciated she was signing a document embodying her previous instructions). Alternatively the judge found that Mrs. Burns had testamentary capacity to execute her simple will in July 2005.

There followed an appeal to the Court of Appeal. At the heart of the appeal was the appellants' contention that the trial judge's findings of fact were against the weight of the evidence: and, in particular, failed to give proper weight to the MMSE test results.

The appellants submitted on appeal that "…the grand criterion by which to judge whether the mind is injured or destroyed is to ascertain the state of the memory, for without memory the mind cannot act" (*Williams on Wills* (10th edn., para. 4.17). The Court of Appeal weighed this against two old American authorities cited in *Banks v. Goodfellow*: *Den v. Vancleve* and *Stevens v. Vancleve.* Those decisions discuss how a testator with a mind that is "in some degree debilitated" with a memory "in some degree enfeebled" may, nonetheless, be of a sound disposing mind and memory.

The Court of Appeal ultimately upheld the decision at first instance with the consequence that the 2005 will stands. In doing so the Court restated the tests for testamentary capacity, knowledge and approval, and the rule in *Parker v. Felgate*.

The result ultimately turned on an affirmation of the trial judge's findings of fact. Even so it is a striking study of how a valid will may be made by a person with a failing memory: even a singularly poor one, as in Mrs. Burns' case.

James Fryer-Spedding (9 St. John Street Chambers, Manchester) appeared in the Court of Appeal for the appellants, instructed by Simon Pedley of Mills & Reeve. The respondents were represented by Andrew Clark, also of 9 St. John Street Chambers.