

Contentious Statutory Will applications

The pitfalls, the options, and the future

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OUTLINE

- **There is still limited number of authorities on contested statutory will applications, even fewer on contested costs applications at the conclusion of the proceedings**
- **Has there been a sea change in the Court's approach to applications to depart from the normal rule as to costs in health and welfare cases and property and affairs applications?**
- **What are the key considerations when preparing and responding to applications of this nature?**
- **What are some of the pitfalls?**
- **What does the future of will making look like?**

A cautionary tale...

- Deputy District Judge Weeraratne KC handed down two judgments arising out of a contested statutory will application
- The substantive application was agreed
- There were three areas of dispute that the court needed to decide
 - The scope of Practice Direction 9E and whether it was engaged in the proceedings;
 - Whether there were exceptional circumstances which justified dispensing with service
 - Costs

P (Statutory Will) [2024] EWCOP 12

- The application was brought by P's brother and deputy for a variation to a statutory will made in 2008.
- P was represented by the Official Solicitor.
- The issues
 - Is a beneficiary or potential beneficiary likely to be materially or adversely affected by the proposed application, such that paragraph 9 of PD 9E is engaged?
 - If so, are there '*exceptional circumstances*' which justify dispensing with service?

The arguments....

The Decision

- **PD 9E applies to this case and to each class of beneficiary under consideration**

'It is not in dispute that under the proposed statutory will the class of carers are intended to benefit through an increase in the legacy and the removal of clause 5.2(b) as described above. I accept for the reasons given by the OS that this means they are likely to be materially affected by the changes so that the notification obligation arises. I cannot see that there is a cogent rationale for construing 'materially' as being negative in nature when 'adversely' is also a negative concept. ' [42]

I also accept that the proposals regarding the charitable legacy are likely to adversely affect charity even if they do not fall to be identified until P passes away. The applicant did not dispute that any residuary beneficiary is likely to be adversely affected by the proposed changes to the statutory will. Case law demonstrates the applicability of PD 9E to charities and not just to individuals and its terms do not indicate any such restriction. I have already noted that the fact that there are no identified charities in the will is not an unusual mechanism by which testators leave charitable bequests. [43]

Service

- **The court's discretion may be exercised to dispense with service where there is a compelling reason to do so.**

'So far as the carers are concerned I accept that there are compelling reasons to dispense with service. This is because they are advantaged by the proposed amendments, and moreover, it is in P's best interests that his care is not disrupted or that his carers unsettled by the prospect of an increased inheritance under his will, or that if a conflict should arise between carers.' [40]

'In relation to the A-G I do not accept that there are exceptional circumstances for dispensing with notification and I accept the reasons given by the OS.' [41].

The Judge's remarks

'The applicant has in my view fundamentally misunderstood the purpose of notification. The requirements of procedural fairness whether underpinned by the ECHR or the principles of natural justice must be given high regard. The rhetorical question posed by the applicant, and the objection that the hypothetical nature of charity makes notification otiose misses the point that the court is seized with the matter now and once the statutory will takes effect the Court of Protection will no longer have jurisdiction in relation to it. This also means that notification now is not premature.'

'The lack of identification of specific charities does not provide a compelling reason to avoid notification and an opportunity for representation on the diminution of provision to charity. There is an identified and practical mechanism for achieving the same via the A-G. The fact that to date case law to date has dealt only with identifiable beneficiaries does not preclude this conclusion.'

The Costs application

2024 EWCOP 9

- The Official Solicitor made an application for costs
- The court considered the application on the papers, and received 14 pages of written submissions on behalf of each party and 11 pages from the OS in reply
- The Official Solicitor relied on grounds falling under the headings of 'conduct' and 'success', or lack of it.
- The court found that the deputy had been unsuccessful in his arguments but that this would not be sufficiently good reason for departing from the general rule [22].
- On conduct, the OS argued as follows:
 - The deputy had unreasonably raised and pursued points which were plainly without merit ignoring clear case law (COPR 19.5(2)(b)).

The costs application

- The Deputy has conducted the proceedings in an aggressive manner (COPR 19.5(2)(c).
- The Deputy has failed to comply with PD9E by not considering or appreciating what it required, and not providing documents and information as required by Paragraph 6 of PD 9E, and then delayed remedying that failure.
- The court was referred to correspondence, including correspondence where the OS had sought to correct the deputy's '*misunderstanding*' of certain aspects of the law.

The Judge's observations

- The Deputy's arguments on the interpretation of PD 9 E and its application to the carers and charity '*...stretched credulity in some respects.*'
- '*My view that the Deputy had fundamentally misunderstood the purpose of notification... indicates his lack of understanding of PD9E, the case law, and the points raised prior to the hearing by the OS in correspondence, as demonstrated throughout the hearing and before.*' [27]
- '*I regret that I did not consider that it was reasonable for the deputy to raise the arguments and contest the matter, as he did.*' [28]
- Both parties made allegations of aggression and the Deputy made serious (strenuously denied) allegations of professional misconduct.

The Judge's observations

“These submissions underline to me the point I have concluded above which is that the deputy has vigorously contested the PD9E notification issue without reasonable regard to PD9E, and existing case law, leading to protracted and perhaps tense correspondence on both sides. It is not possible for me to determine the level of aggression and criticism between the parties. There clearly have been frustrated exchanges on both sides for reasons I cannot clearly determine on the papers and which it is neither proportionate nor necessary for present purposes to hold a hearing to determine. The matters complained of by the OS are illustrative of an approach to the overall conduct of these proceedings by the deputy that have led to there being what I have determined to be an unnecessary contested hearing on what should have been a relatively straightforward issue. I say nothing about whether the deputy has been aggressive in these proceedings and as noted he disputes any aggression on his part.” [33]

The Decision

- The conduct of the deputy ‘...*due to a fundamental misunderstanding of the purpose of PD9E, justify a departure the general rule as to costs in COP 19.2*’ [35]
- The court ordered the deputy to pay, P’s costs (being the costs incurred by the OS acting as his litigation friend) of the determination of the service issue under PD9E from 4 July 2023, including the hearing, and to bear his own costs of determination of PD9E issue of the same date, including the hearing.

Learning Points

- The broad scope of conduct
 - Aggression
 - The application was pursued with ‘vigour’
 - Email advice received from the opposing party was taken into account
 - What would be the cost consequences if the order for service had been agreed?
- Consideration of whether a hearing is in fact required
- The tone of correspondence
- Is the dispute intractable?
 - If it is, what is the most proportionate way of dealing with it
 - Mediation
 - A third party?

The Centre of the Proceedings

- How is P going to be supported to participate in the proceedings
 - Can P participate
 - How can evidence as to P's past and present wishes be produced
 - Are there disputed facts upon which P's wishes are based
 - Do they need to be resolved?
- Can the application be traced back to P's wishes?
- Has s.4(6) been addressed in its entirety?
- How should the evidence as to P's wishes and feelings be approached/ascertained?

ADS v DSM [2017] EWCOP 8

- Remains a very helpful authority on contested statutory will applications
- In contested cases involving disputed facts, there must be a proper investigation of P's wishes, particularly where there are concerns of undue influence.
 - *The approach dictated by the MCA means that the following factors must be considered:*
 - *How JK's capacity at the times she made relevant statements is to be taken into account in assessing their weight*
 - *Whether assertions made by JKS in connection with her expressions of her testamentary intentions have a sound factual base and so could be said to be rational (reasonably held), sensible and responsible;*
 - *Whether JKS was the victim of any inappropriate influence when expressing her testamentary wishes and feelings;*
 - *How the terms of, the reasoning behind, and any statements of testamentary wishes or feelings or representations made by or on behalf of JKS either (a) at the time of or (b) by, with court approval, entering into a settlement of litigation in the Chancery Division of the High Court between her and A (and his wife) and approved by the that court as being in JKS's best interests should be taken into account; and*
 - *What disputes of fact have to be resolved to enable the COP to properly assess these factors [23]*

A Checklist

- Aintree University Hospitals NHS Foundation Trust (Respondent) v James (AP) (Appellant) [2013] UKSC 67

'The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision – makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for that patient is likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be.' [39]

A Checklist

- **ITW V Z & Ors [2009] EWCOP 2525**
 - First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [\[2007\] EWHC 2003 \(Fam\)](#), [\[2009\] 1 FLR 443](#), at paras [121]-[124].
 - ii) Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular *a priori* weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P's wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the test of incapacity under the 2005 Act is, as under the common law, 'issue specific', so in a similar way the weight to be attached to P's wishes and feelings will likewise be issue specific.

A checklist

- iii) Thirdly, in considering the weight and importance to be attached to P's wishes and feelings the court must of course, and as required by section 4(2) of the 2005 Act, have regard to *all* the relevant circumstances. In this context the relevant circumstances will include, though I emphasise that they are by no means limited to, such matters as:
 - a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings: *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [\[2007\] EWHC 2003 \(Fam\)](#), [\[2009\] 1 FLR 443](#), at para [124];
 - b) the strength and consistency of the views being expressed by P;
 - c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to: see again *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [\[2007\] EWHC 2003 \(Fam\)](#), [\[2009\] 1 FLR 443](#), at para [124];
 - d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
 - e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.

The Law Commission

- A glimpse into the future...
- The Law Commission's project is a general review of the law of wills.
- Two specific aims of the project are to (a) support testamentary freedom, including reform aimed at encouraging and facilitating will-making and reform aimed at supporting testators' intentions and (b) protecting the testator from fraud and undue influence.
- Supported will making:

'We envisage that a scheme of supported will-making would fill the gap between wills made by testators who clearly have testamentary capacity and statutory wills made by the Court of Protection on behalf of testators who are determined not to have capacity. It would apply to testators who are capable of understanding what is necessary to make a will, but who need support in order to do it.'

The Options

- Carefully consider and scrutinize the evidence as to P's wishes and feelings at the earliest opportunity
 - Is the evidence sufficient?
 - Is further investigation required?
 - Is a third party required to assist with ascertaining P's wishes?
 - Is there a factual dispute, upon which P's views are based, does it need to be determined?
- Is the case being advanced centered around P's ascertainable wishes and feelings?
- If it is not possible to ascertain P's wishes and feelings, have the other factors in s.4 been considered and addressed?
- Courtesy
- **Mediation mediation mediation.**

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