

## Difficulties in challenging due execution

01 NOVEMBER 2017

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In *Ashman v Thomas*, a nephew and uncle found themselves locked in a dispute over which, if any, of three wills was valid. These were handwritten on printed will forms, not in the Deceased's handwriting. All appeared to be executed correctly.

As a preliminary issue, the judge had to decide whether any of the three wills were validly executed, before the Court dealt with the other grounds of attack. The judge was very critical both of the limited evidence put before Court and the witnesses themselves.

### Background

Carmen Thomas lived in Islington and had three children, including the Defendant, Clyde Thomas. Clyde cared for her in her last years.

Carmen appeared to have made three wills, all witnessed by Dorothy and Rudyard Smith. In all three, Carmen's brother, the Claimant, Alastair Thomas, was named executor.

The 12 March 2008 Will (the 'First Will') included pecuniary legacies to Carmen's three children. Alastair received the proceeds of sale of Carmen's flat. It contained a printed attestation clause which appeared to have been completed correctly. The two substantive pages each bore two diagonal lines, so it looked as if the writing had been crossed out.

The 5 November 2011 Will (the 'Second Will') contained similar provisions to the First Will. Again, it contained a printed attestation clause which appeared to have been completed correctly.

The 18 May 2012 Will (the 'Third Will') was longer than the first two, but was again similar in its effect. It contained a standard attestation clause which had been completed, although there were three copies of this attestation clause, all of which had been filled in.

Carmen died on 6 May 2013.

On 5 November 2013, Clyde was appointed administrator of her estate on the basis that Carmen had not made a will. Alastair, brought a claim to revoke this appointment, on the basis that he was named executor in Carmen's three wills.

Clyde attacked all three wills on different grounds.

The Court decided that before the case went to a full trial, it needed to determine which, if any, of the wills had been validly executed.

### The Evidence

The judge heard evidence from Alastair, Clyde and Dorothy Smith. Rudyard was suffering from dementia and so was not called to give evidence.

1. When/where were the wills signed?

Alastair explained the circumstances in which the three wills were signed in 2008, 2011 and 2012.

He said that on each occasion his daughter had picked Carmen up from her home and drove her to Dorothy and Rudyard's house in Willesden.

He said that Carmen signed her wills there, witnessed by Dorothy and Rudyard.

However, Clyde said that Carmen had only rarely left the house between 2007 and 2011. Clyde added that, since he moved to England in 2004, his mother had never travelled by car and was afraid to use public transport.

Clyde acknowledged that Alastair would come to visit around once a month, and 'from the beginning, [Alastair] would sometimes go into my mothers' [sic] bedroom to talk to her'. Carmen would never tell Clyde what they discussed.

## 2. Who filled in the wills?

Alastair said that he filled in the Third Will.

However, 'he did not remember whether he himself wrote the two earlier wills', even though the handwriting was stylistically similar to the Third Will.

The judge said that 'even to [his] untutored eye', the handwriting of the wills was different from any of the signatures (ie of Carmen, Dorothy and Rudyard). He added that 'in my judgment it is plain as a pikestaff that [Alastair] wrote all three wills' and that 'the refusal by [Alastair] to admit writing the first and second wills is just a childish lie'.

## The law

A will is properly executed if it is signed in the presence of two or more witnesses. Each witness must sign the will in the presence of the testator (although not necessarily in the presence of each other).

If a will appears to be properly executed, there is a presumption that the will has been validly executed. This is known as 'the presumption of due execution'. There needs to be the 'strongest evidence' to rebut this presumption.

The difficulty in challenging the presumption of due execution was shown in the Court of Appeal in *Channon v Perkins*. Both witnesses had given evidence that they did not think they had signed the will, but the Court of Appeal preferred to regard that as a failure of their memory rather than deciding that the will had not been duly executed.

Clyde argued that the test for whether Carmen had knowledge and approval of the Will (which is another requirement for a valid will) is an essential part of the test for whether a will is duly executed. Alastair disagreed.

The judge decided that the test for due execution stood on its own. Once he had established that the will had been duly executed, he would look at whether Carmen had knowledge and approval of the wills (but later, at the full trial).

## Was the evidence strong enough to rebut the presumption?

The judge considered whether there was strong enough evidence to remove the presumption that each will had been validly executed.

The judge found that that 'it was impossible for [Carmen] to have signed the Second and Third Wills in Willesden' and that this was 'a fabrication' by Alastair. The judge held that Carmen was 'entirely housebound, since 2011'. The judge noted that Carmen was incontinent, and doubly so since 2011. He said that 'an elderly lady who is doubly incontinent is not going to want to go out. She will be embarrassed. She will find it awkward...I think it is therefore much less likely that by 2011 she would want to leave the house at all'.

The judge also thought it telling that Alastair's daughter did not give evidence at the hearing.

He considered this to be the 'strongest evidence' which meant that there was no longer a presumption of due execution for the Second and Third Wills.

He decided that the Second and Third Wills 'were not executed before the attesting witnesses' and so were not validly executed. He thought that Dorothy was mistaken when she said that she witnessed Carmen executing all three wills. He thought it likely that Carmen instead signed the wills when she and Alastair had their private meetings in her bedroom.

However, the judge decided that, for the First Will, the 'evidence is not sufficient to overcome a presumption' of due execution. He decided that Dorothy witnessed Carmen signing that Will. The Will was validly executed even though there were lines crossing out the pages of the Will.

## Conclusion

The case highlights the difficulties of attacking a will because it has not been duly executed. Even suspicious circumstances and witnesses to the will with hazy recollections are not sufficient to overturn this presumption. Despite all the unsatisfactory evidence, the judge decided that there was not enough to override the presumption of due execution.

There is a separate question as to whether the practice of hiving off certain issues in dispute is appropriate.


At the full trial, where the Court will decide on the other points of dispute, the evidence is likely to be much the same as was before the Court here, which raises the question of whether it is appropriate to incur the expense and time of a preliminary issues hearing.

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