Foll/Appl Herbert Brothers (decd), Re (1990) 101 FLR 279
Appl Roos v Karpenkow (1998) 71 SASR 497
Appl Rasheed v Rasheed (2000) 77 SASR 346

[HIGH COURT OF AUSTRALIA.]

NOCK . . . . . APPELLANT;
DEFENDANT,

AND

AUSTIN AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY. *Nov.* 15, 18, 29.

Barton, Isaacs and Gavan Duffy JJ.

Will—Validity—Knowledge and approval of contents—Evidence—Benefits received by persons preparing will—Suit for probate—Costs of unsuccessful opposition.

In a suit to obtain probate of a will which was prepared by the plaintiffs, one of whom was a solicitor, and under which both plaintiffs received large benefits,

Held, that, the trial Judge having directed his mind to the question whether, in view of the suspicious circumstances, the plaintiffs had established that the testator knew and approved of the contents of the will of which they claimed a grant of probate, and having found that they had established that fact, and there being evidence to support that finding, his decision in favour of the plaintiffs should not be disturbed.

Held, also, that as the circumstances led reasonably to an investigation and as the fact that those circumstances aroused suspicion was largely due to the conduct of the plaintiffs in not seeing that the testator had independent advice, the defendant should have the costs of her unsuccessful opposition out of the residue in which the plaintiffs alone were interested.

Per Isaacs J.: Propositions of law stated relevant to the proof of a testator's knowledge and approval of the contents of his will.

Decision of the Supreme Court of New South Wales (*Harvey* J.) varied and affirmed.

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APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its probate jurisdiction by Arthur John Samuel Austin and Alfred Joseph Morgan claiming a grant of probate to them of the will of Edward Nock, deceased, made on 11th December 1917 and of which they were executors. The defendant, Jessie Emily Nock, the widow of the testator, who had lodged a caveat against the grant of probate to the plaintiffs, by her defence alleged that the will was not duly executed; that the testator was not at the date of the will of sound mind, memory and understanding; that the testator did not know and approve of the contents of the will; and "that the execution of the said alleged will was obtained by the fraud of the plaintiffs and others acting with them in preparing and causing to be prepared in their own favour the said alleged will without properly bringing home to the mind of the testator the effect of his alleged testamentary act."

By the will in question the testator, after a bequest of £100 to the plaintiff Morgan, who was his solicitor, and of his household furniture, &c., to his wife, gave, devised and bequeathed his real estate and the rest and residue of his personal estate to his executors and trustees upon trust to pay £4 per week to his wife during her life and after her death to pay £3 per week to his adopted son, Edward Spring Nock, during his life, and after his death upon trust to sell and convert and to divide the proceeds equally between the Winton Hospital, Queensland, the Blackall Hospital, Barcoo River, Queensland, the plaintiff Austin and the plaintiff Morgan, share and share alike. The testator appointed the plaintiffs executors and trustees of the will.

The other material facts are stated in the judgments hereunder.

The suit was heard by *Harvey* J., who made a decree ordering that probate of the will should be granted to the plaintiffs, who should be at liberty to retain their costs as between solicitor and client out of the estate. No order was made as to the costs of the defendant.

From that decision the defendant now appealed to the High Court.

Loxton K.C. (with him *Davidson*), for the appellant. The charge

of fraud was withdrawn at the hearing, and the only sense in which there can be said to be fraud is that a will in the respondents' favour was prepared by them. That fact arouses suspicion, and the Court should not admit the will to probate unless the suspicion is removed (*Tyrrell* v. *Painton* (1)). The learned Judge was not justified in accepting the uncorroborated evidence of the respondent Austin as to whether the testator fully understood the effect of what he was doing, he being one of the persons in respect of whom the suspicion is raised. Under all the circumstances the Court should say that the suspicions have not been removed, in view of the fact that it was the duty of the respondents, and especially of Morgan, to procure an independent solicitor to prepare the will. [Counsel referred to *Parker* v. *Duncan* (2); *Barry* v. *Butlin* (3); *Brown* v. *Fisher* (4); *Fulton* v. *Andrew* (5).] The appellant is entitled to her costs below from the respondents. In view of the circumstances an inquiry was necessary, and the costs of that inquiry should be borne by the respondents, whose conduct rendered the inquiry necessary (*In the Estate of Osment*; *Child and Jarvis* v. *Osment* (6); *Spiers* v. *English* (7); *Wilson* v. *Bassil* (8)).

Shand K.C. (with him *Monahan*), for the respondents, were only called upon as to the question of costs. The costs were in the discretion of the Judge subject to appeal to the Full Court (*Wills, Probate and Administration Act* 1898, sec. 153), and there is no appeal to this Court except by leave. Where the right principle of law has been applied in awarding costs but the Judge has gone wrong on the facts in applying the principle, this Court will not interfere (*Dwyer* v. *Vindin* (9); *Spiers* v. *English* (7)). The charge of fraud was persisted in until the hearing, and that was a ground for depriving the appellant of her costs. In any event there should be no costs of this appeal.

Davidson, in reply. If the appellant succeeds as to the costs below she should have her costs of this appeal, for in order to get that

(1) (1894) P., 151, at p. 156.
(2) 62 L.T., 642.
(3) 2 Moo. P.C.C., 480.
(4) 63 L.T., 465.
(5) L.R. 7 H.L., 448.
(6) (1914) P., 129.
(7) (1907) P., 122.
(8) (1903) P., 239.
(9) 4 C.L.R., 216.

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relief it was necessary to go into all the facts to see whether the case fell within the principle applicable.

Cur. adv. vult.

NOV. 29.

The following judgments were read :—

BARTON AND GAVAN DUFFY JJ. In this case the propounders of the will are the two executors, Austin and A. J. Morgan, and they are also large beneficiaries—large, that is, in relation to the total value of the estate, which is said to be about £5,480.

The testator had a wife, who survives him, and a son, who enlisted in the Australian Army. By her statement of defence the widow raised the following issues: (1) that the will was not duly executed; (2) that the testator was not at the date of the alleged will, viz., 11th December 1917, of sound mind, memory and understanding; (3) that the deceased did not at that time know and approve of the contents of the document.

There was a fourth issue raised in the following terms: "that the execution of the said alleged will was obtained by the fraud of the plaintiffs and others acting with them in preparing and causing to be prepared in their own favour the said alleged will without properly bringing home to the mind of the testator the effect of his alleged testamentary act."

The last ground of opposition was abandoned at the hearing. We have therefore no allegation of fraud in the shape of undue influence to consider. The first ground, namely, no due execution, was not insisted on, at any rate in the appeal. There remain the two grounds as to capacity and as to knowledge and approval of the will, and of these only the second was seriously relied on.

A very large quantity of evidence was taken. The evidence as to the testator's capacity and as to his knowledge and approval of the will was minutely given, and was tested by most searching cross-examination. The learned Judge pronounced in favour of the will after close consideration of the evidence. This Court had not the advantage of hearing the evidence and of observing the demeanour of the witnesses. Its view can only be founded on what it reads. Upon that material the evidence appears to be not only

clearly but overwhelmingly in favour of the will. Under the tests which were available to *Harvey* J. in much fuller measure, he came unequivocally to that conclusion. It is manifest, therefore, that this Court cannot disturb the conclusions of fact. But it is argued that the will was executed under circumstances of suspicion so grave that the Court, notwithstanding the cogency of the evidence and the clearness of the Judge's conclusions, ought to pronounce against the document. We think it is a question of fact whether that suspicion has been dispelled. The defendant, by withdrawing the allegations contained in the fourth paragraph of the statement of defence, has relieved us of the necessity of considering whether there was any fraud or misconduct on the part of the plaintiffs or either of them, and the suspicion must be confined to the question whether without any such fraud or misconduct the testator failed to understand the nature and effect of his act. That suspicion was dispelled from the mind of the learned Judge. Our perusal of the evidence satisfies us that he was right. But here again we do not rely entirely on our own judgment, because the learned Judge's opportunities were so much better. If we doubted his conclusions we should still hesitate to disturb them as conclusions reached at so great an advantage.

In *Tyrrell* v. *Painton* (1), a case of a will executed under suspicious circumstances, *Lindley* L.J. laid it down that the proper question for a Judge to ask himself in view of such elements of suspicion is this: "Do the defendants affirmatively establish to my satisfaction that the testatrix knew what she was doing when she executed this will?" If the President who heard that case below had considered that question, there would probably have been no interference on the part of the Court of Appeal. It is advisable to quote some passages from the three judgments on that aspect. *Lindley* L.J. said (1): "If this case had turned on the conflict of evidence, I should not have considered that we could come to a conclusion differing from that of the President." His subsequent remarks show that the question whether the suspicion arising from the circumstances had been dispelled was a question of evidence. *A. L. Smith* L.J. said (2): "If the learned President had had his mind clearly brought

(1) (1894) P., at p. 156. (2) (1894) P., at p. 158.

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to the undisputed facts of the case, including therein the letters written by Mrs. Bye, and had then addressed himself to the oral evidence, and found as he did, I should not have been disposed to interfere with his decision." *Davey* L.J. said (1) :—" If this had been merely a case of drawing a different conclusion from the evidence, I should have been slow to differ from the President merely because I thought that on the evidence as it appears on paper I should have come to the opposite conclusion. The question appears to me to be whether the learned Judge applied his mind to the right issue."

Upon these extracts it appears how little hope there is for the reversal of the Judge's conclusion upon a will where his mind has been applied to the right issue, and to the facts adduced on each side, weighing them after full investigation as to the reliability of the witnesses. And the criterion applies to wills executed under suspicious circumstances ; such circumstances constituting weighty elements of fact in determining the issue raised by the third paragraph of the defence : this is shown by the question stated by *Lindley* L.J. (2) as the right one for the Judge at the hearing to determine in such a case.

It is unnecessary to discuss a number of the cases cited ; but we may as well quote the terse statement of the principle by Sir *Samuel Evans* in the case of *In the Estate of Osment* (3) :—" It is well established that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and cause it to be vigilant and jealous in examining the evidence in support of the instructions for the will ; it ought not to pronouce for the document unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. That is the principle . . . ."

In the present case the will was drawn by one of the executors, Mr. A. J. Morgan, a solicitor. The instructions were taken by his co-executor, Mr. Austin, from the lips of the testator, and brought to Mr. Morgan in his office. These two gentlemen participate largely in the residue. Not too much is to be made of the fact that two months earlier the testator had made a will in which the proportion

(1) (1894) P., at p. 159. (2) (1894) P., at p. 156.
(3) (1914) P., at p. 132.

allotted to these two gentlemen was larger. The testator left only a few pounds a week to his wife, and nothing to his son (of whose drinking habits he did not approve) until after her death. Then he was to have £3 a week for his life, the balance of income going to Austin during the son's life, while after his death there was a trust for conversion and division in equal parts between two Queensland hospitals and the two executors.

No doubt these facts created circumstances of suspicion, and necessitated vigilance and jealousy on the part of the Court in weighing the evidence. That vigilance and that jealousy have been exercised to the full by *Harvey* J., and to the best of our judgment he has exercised them correctly, and we find no shadow of reason for differing from his decision.

Albeit that we agree with the learned Judge upon the merits, we are of opinion that his order may properly be varied as to costs. We not only think that the circumstances led reasonably to an investigation in regard to the propounded document, but we think that those interested in the residue have been in large measure the cause of the litigation. Mr. Morgan should not have prepared a will which gave him a large share in the estate, and Mr. Austin has acted somewhat indiscreetly in not asking the testator to let him take the instructions to some uninterested solicitor. These were suspicious facts deserving consideration not only on the merits but on the question of costs. And they deserve the more consideration in the latter aspect when it is recollected that provision much less than the plaintiffs might have expected was to their knowledge being made for the widow and son, provision which in its slenderness, at least in the case of the widow, they can scarcely have considered to be adequately explained by any facts they have brought forward.

We are therefore of opinion that the defendant should have the costs below out of the residue.

As to the costs of this appeal, seeing that the defendant has succeeded as to portion of the order appealed from, we think that the dismissal should be without costs.

ISAACS J. The material facts are that on 11th December 1917 Edward Nock executed a will in due form whereby (*inter alia*) he gave

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very substantial benefits to Arthur John Samuel Austin and Alfred Joseph Morgan. The instructions for the will were given to Austin verbally by Nock. Austin, who is an estate agent, conveyed the instructions to Morgan, who was Nock's lawyer. Morgan caused the will to be prepared, but did not interview Nock. Austin read the document over to Nock, no one else being present. It was attested by two strangers, justices of the peace, in the presence of Austin, but in the absence of Morgan. Nock died about three weeks afterwards.

The widow challenges the will. Four grounds were set up in her statement of defence: (1) denial of execution; (2) denial of capacity; (3) denial of knowledge and approval of contents; (4) fraud of plaintiffs in preparing and causing to be prepared in their own favour the will without properly bringing its effect home to the testator's mind. At the trial the fourth ground was abandoned. Due execution and capacity are not now challenged. The only issue left is whether the testator knew and approved of what he was doing.

Harvey J., who heard the oral testimony, accepted the evidence of Austin and Morgan (among other witnesses for the plaintiffs) as truthful, and, if Austin's evidence is true, there can be no doubt Nock quite understood what he was doing. Learned counsel for the appellant have urged, however, that Austin's account should not be accepted as accurate, because his participation in the making of the will throws suspicion on him, and therefore he has the onus of doing everything reasonably possible to clear away that suspicion; that, by his not seeing that Nock had independent advice or that some one else was present to corroborate the story as to reading over the will, he had so acted as to leave the suspicion still existing, and that, notwithstanding the withdrawal of the fourth ground of objection, the conduct of Austin may still, on the doctrine of *Tyrrell* v. *Painton* (1), be used against him on the broad question of suspicious circumstances. Morgan's evidence relative to an earlier will is challenged on the same grounds, with the additional circumstance that Morgan was also Nock's legal adviser.

There is no doubt that, notwithstanding the learned primary Judge accepted both Austin and Morgan as witnesses of truth, this

(1) (1894) P., 151.

appellate Court in the discharge of its functions could and should disregard that opinion if, as the Privy Council said in *Raja Row* v. *Enoogoonby Sooriah* (1), "among the circumstances of the case some *test* can be discovered," which here would mean that if there were shown some fact or circumstance of so indubitable and strong a character as to show the witnesses were not credible witnesses, or some fact or circumstance that, notwithstanding honesty on their part, would leave the evidence of testator's knowledge and assent unsatisfactory. If, in other words, the evidence were such as to convince us either that they were dishonest, or that, assuming their honesty, their recollection could not be relied upon so as to satisfy the conscience of the Court by allaying the suspicion engendered by their admitted participation in the making of the will, then I should be prepared to accede to the appellant's argument.

But no such fact or circumstance appears. That they, and especially Morgan, fell short of the care that is most desirable in such circumstances is undeniable. Morgan especially should have seen that Nock had independent advice, and should have told Austin so. But outside that, nothing can be pointed to as displacing either their honesty as witnesses or their recollection. The fact that no ill-feeling or other reason is shown to have existed, leading Nock to limit the benefits to his wife and his adopted son, is not sufficient. So long as there is freedom to dispose of one's property by will, a testator is not bound to expose to the world the delicate and perhaps indefinable relations that exist within his family circle. It may be that Nock felt quite justified from his own standpoint in limiting his family benefit, and for reasons which sufficiently appealed to him but which no one else could mentally measure or appreciate. Nor are the terms of the will of such a nature as to cast doubt on the ability of Nock to properly understand them: they are short, simple and clearly expressed.

In the result, therefore, unless the view pressed by learned counsel is right that in law Austin and Morgan, by reason of their participation in making the will under which they took such extensive benefits, have not sufficiently satisfied the onus of clearing away the

(1) 2 Kn., 259, at p. 260.

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suspicion their conduct *primâ facie* arouses, the appellant must fail.

The relevant law is not doubtful. It may be thus stated:—(1) In general, where there appears no circumstance exciting suspicion that the provisions of the instrument may not have been fully known to and approved by the testator, the mere proof of his capacity and of the fact of due execution of the instrument creates an assumption that he knew of and assented to its contents (*Barry* v. *Butlin* (1); *Fulton* v. *Andrew* (2)). (2) Where any such suspicious circumstances exist, the assumption does not arise, and the proponents have the burden of removing the suspicion by proving affirmatively by clear and satisfactory proof that the testator knew and approved of the contents of the document (*Baker* v. *Batt* (3); *Tyrrell* v. *Painton* (4); *Shama Churn Kundu* v. *Khettromoni Dasi* (5)). (3) If in such a case the conscience of the tribunal, whose function it is to determine the fact upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the document does contain the real intention of the testator, the Court is bound to pronounce its opinion that the instrument is not entitled to probate (*Baker* v. *Batt* (6); *Fulton* v. *Andrew* (2)). (4) The circumstance that a party who takes a benefit wrote or prepared the will is one which should generally arouse suspicion and call for the vigilant and anxious examination by the Court of the evidence as to the testator's appreciation and approval of the contents of the will (*Barry* v. *Butlin* (7) and *Fulton* v. *Andrew* (2); per Lord *Shaw* in *Low* v. *Guthrie* (8)). (5) But the rule does not go further than requiring vigilance in seeing that the case is fully proved. It does not introduce a disqualification (per Lord *James* in *Low* v. *Guthrie* (9)). (6) Nor does the rule require as a matter of law any particular species of proof to satisfy the onus (*Barry* v. *Butlin* (1)). (7) The doctrine that suspicion must be cleared away does not create "a screen" behind which fraud or dishonesty may be relied on without distinctly charging it (Lord *Loreburn* L.C. in *Low* v. *Guthrie* (10)).

(1) 2 Moo. P.C.C., at p. 484.
(2) L.R. 7 H.L., 448.
(3) 2 Moo. P.C.C., 317, at p. 321.
(4) (1894) P., 151.
(5) L.R. 27 Ind. App., 10, at p. 16.
(6) 2 Moo. P.C.C., at p. 320.
(7) 2 Moo. P.C.C., 480.
(8) (1909) A.C., 278, at p. 284.
(9) (1909) A.C., at pp. 282-283.
(10) (1909) A.C., at pp. 281-282.

If, therefore, the Court could see that Austin's account of the reading over of the will by him to Nock and the subsequent personal reading of the document by Nock himself and the express approval of the contents by Nock were not to be relied on, the proponents must fail. But assuming the Court vigilantly watched Austin's behaviour as a witness and the surrounding circumstances, and formed the opinion that as a witness he is trustworthy, there seems in this case no escape from the position that the third issue must be found in proponent's favour (see *Shama Churn Kundu's Case* (1)), and that " fraud " as a distinct issue to destroy the effect of actual knowledge and assent—which would then be its only relevancy—cannot be relied on.

On the main issue, therefore, the appeal must fail.

But there is also an appeal against the refusal of *Harvey* J. to allow the present appellant her costs of suit. As, unfortunately, I was unable to be present during Mr. *Shand's* argument, I say nothing as to the order that should be made on this point. But there are certain general considerations so well established that I feel it desirable to refer to them. The appellants rely on the doctrine stated in many cases, one of which is *In the Estate of Osment* (2). It is this: that where a party having created suspicion in relation to a will under which he benefits is under the burden of clearing away that suspicion, then, as justice requires him to do so in the presence of any person interested should the suspicion be justified, he must, though eventually successful, ordinarily pay the costs of the person whose presence he has made necessary so far as his benefit extends.

A solicitor preparing a will may without any hesitation accept some comparatively trifling gift as a mark of his client's satisfaction as his legal adviser; but that is very different from accepting the benefit of an extensive share in the estate to the deprivation of members of the family, without taking care either to test thoroughly the donor's real intention or, preferably, to see that he gets independent advice.

How is a solicitor to place disinterestedly before his client the absolute and the relative claims of the various members of the

(1) L.R. 27 Ind. App., at p. 16.

(2) (1914) P., 129.

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family if he is himself absorbing a considerable share of the property? The course pursued by a solicitor not observing the proprieties may be most objectionable and yet not sufficient to destroy the gift. At the same time, it is open to the consequence of recouping the person challenging the will for the costs it has naturally occasioned him.

The same result may follow with regard to any other person also benefiting under the will, if he is privy to the line of conduct followed by the solicitor. As to how far these well-known principles should be applied in the present case depends upon the conclusion to be drawn from the facts, as to which I have not had the advantage of hearing Mr. *Shand*.

Order appealed from varied by allowing the defendant her costs of the hearing out of the residuary estate. Order being so varied, appeal dismissed.

Solicitors for the appellant, *McDonell & Moffitt*.
Solicitors for the respondents, *Harold T. Morgan & Morgan*.

B. L.