ORIGINAL

4.

IN THE HIGH COURT OF AUSTRALIA

NORMAN

V.

THE TRUSTEES EXECUTORS & AGENCY COMPANY LIMITED

15/-

ORAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 28th March 1956.

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

NORMAN

v.

THE TRUSTEES EXECUTORS & AGENCY COMPANY LIMITED

JUDGMENT (ORAL)

McTIERNAN J.
~~WILLIAMS J.~~
TAYLOR J.

NORMAN

v.

THE TRUSTEES EXECUTORS & AGENCY COMPANY LIMITED

JUDGMENT (ORAL)

McTIERNAN J.: The questions with which the Court is concerned are: (1) whether the deceased was a capable testatrix; (2) whether she knew and approved of the contents of the will and codicils of which the plaintiff claimed probate. The onus of proof in respect of each issue rests upon the plaintiff.

Dr. Louat wisely decided not to press the issues of due execution and undue influence.

The standard by which the question whether the onus of proving testamentary capacity is discharged is stated in these terms in the case of Worth v. Clasohm, (1952) 86 C.L.R. 439 at p. 453:

> "A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the Court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt by proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties placed before the Court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the Court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution."

Applying this rule to the evidence here, I think there is ample evidence to support the finding of testamentary capacity in respect of the will and the two codicils. The proofs of the testamentary capacity are strong. The documents of which probate is sought are all rational and upon their faces are the products of the mind of a person with testamentary capacity.

The evidence of the instructions given to the solicitors is very cogent evidence of testamentary capacity: so is the evidence of the witness Mr. Cowdery.

I do not go through the evidence. It has been read and fully discussed in argument. The evidence of Drs. Daniel and Stephens proves that at the time these documents were executed the testatrix was very sick. But taking the whole of the evidence of each of these witnesses it is not inconsistent with testamentary capacity: and taken with the evidence regarding the instructions for the will and the evidence of Mr. Cowdery, I do not think that the medical evidence raises a substantial doubt as to the testamentary capacity of the testatrix at any relevant time.

The case for the appellant on the issue of knowledge and approval is weaker even than his case on the issue of testamentary capacity. The evidence regarding the preparation of the will is overwhelming that it was the free and well understood act of the mind of the deceased. This evidence was exhaustively read and discussed in argument. Upon the evidence there is no room, in my opinion, for any real suspicion that this will was procured by any person and that the testatrix altered her prior testamentary dispositions in favour of the defendant without knowing what she was doing.

I think that the appeal should be dismissed. But this conclusion does not necessarily involve that the Court agrees with any views which the learned judge expressed which are capable of meaning that in monetary matters the defendant acted dishonestly towards the deceased.

TAYLOR J.: I agree with what has been said by the other members of the Court and there is nothing which I would wish to add.

O R D E R

The order of the Court then is that the appeal is dismissed with costs.

NORMAN

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THE TRUSTEES EXECUTORS AND AGENCY CO. LTD.

JUDGMENT (ORAL) WILLIAMS J.

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JUDGMENT (ORAL) WILLIAMS J.

I agree. The appeal is from a decree made by Mr. Justice Myers in Probate admitting to probate three testamentary papers of the deceased Clarice Norman who died on 5th August 1954. The three testamentary papers consist of a will dated 28th January 1954 and two codicils dated respectively the 7th and 12th July 1954.

The material period in considering the evidence therefore is the first six months of 1954, but I do not understand the defendant in the suit, the appellant here, to contend that if he fails on the issue of the validity of the will itself he still desires to contend that the codicils were not validly executed. That would be a somewhat unnatural desire in view of the fact that under the first codicil he receives an additional payment of £400.

I pass therefore to the period which I have mentioned and it is clear from the medical evidence that in January 1954 the testatrix was suffering from diabetes and from a cancer of the rectum and that her health was seriously affected. She was weak in her legs and had to be wheeled about in a chair and her sight was so affected that she had to be read to. She was in a physical condition from which her memory was likely to be affected and she was likely to become confused and vague and forgetful.

There is a considerable body of evidence of a very general character that this was her mental condition, evidence that she would ask for the wrong thing, would forget what she was saying in the middle of a sentence and would easily become confused. There is an equal body of evidence to the contrary,

evidence that despite her bodily ailments she continued to be mentally bright and alert.

His Honour preferred to believe the witnesses who gave evidence to the latter effect, but in any event all this evidence lies on the fringe of the case. The important evidence is that which discloses the understanding she had of her property and of those who had claims upon her bounty.

The ailments she was suffering from were certainly not such as necessarily to make her incapable of managing her affairs or to deprive her of testamentary capacity.

There was at most a likelihood that her mind could be affected to this extent, but the really important evidence which his Honour accepted shows that she could manage her affairs and had testamentary capacity. One thing is clear, and that is, if her ailments were affecting her mind in this way, considerable deterioration in her mental capacity must have occurred between the date of the will and her death. But Mr. Cowdery's evidence, which his Honour accepted, showed that in March and even in July 1954 she understood the source and nature of her income and was able to give him instructions with respect to its disposal and her affairs generally. To him she appeared mentally alert and able to carry on an intelligent conversation even in July.

The will itself was prepared by an experienced solicitor, Mr. Christie, who unfortunately died before the hearing. He had prepared a previous will for her in 1948. The only distinction in the dispositions of that will in favour of the appellant and the dispositions in his favour in the will of the 28th January 1954 is that under the former will he acquired an absolute interest in the home in which they lived in Hopetoun Avenue Vaucluse, whereas under the later will he acquired a right of residence in that home, with a further right, if he gave up residence and the home was sold, to share in the proceeds of sale in equal shares with a nephew of the testatrix. The bequest in his favour, that of any money standing in the joint accounts at her death, remained the same in both wills.

As I have said, Mr. Christie had prepared the previous will for her in 1948. In January 1954 she asked Cowdery to arrange for Christie to see her. Christie spent about an hour with her alone at her home on January 13th, receiving instructions for the will. He then prepared a draft and sent it to her but she was not satisfied with the dispositions relating to the home. In a letter to Christie she suggested alternative dispositions, possibly assisted by Mr. Linden Jones who acted as her amanuensis. Christie prepared a new draft embodying these new dispositions with some necessary modifications. He telephoned her to this effect and later, on the 26th January, sent the new draft to her with an accompanying explanatory letter. The new draft was read to her by her nephew and she asked him to return it to Christie, which he did. The will was then engrossed, taken out by Christie himself to her home, and executed in Christie's presence.

The only reasonable inference to be drawn from these events is that the testatrix initiated and directed the making of the new will, that she gave Christie the necessary instructions to that effect and that she knew and approved of its contents. It was she who decided upon the changes she wished to make in her previous will and it was she who was not satisfied with the first draft and required the alterations. The will itself is, on its face, a perfectly rational will for her to make. It disposes of her property between her husband and her relatives and its contents are sufficiently detailed and precise to indicate she was fully aware of her property and of the merits of those who had claims upon her.

The onus of proof in these cases is well established and is stated, amongst other cases, in the extract from the judgment to which my learned brother, Mr. Justice McTiernan, referred. The onus was on the plaintiff, the executor who propounded the will, to satisfy the Court that this was the will of a fully competent testatrix. His Honour was satisfied that that onus had been discharged. The question of mental capacity

is a question of fact and an appeal from a decision of the trial judge on a question of fact is one in which it is always difficult for the appellant to succeed, although of course in a proper case the appeal will succeed. But in this case I fully agree with the conclusion to which the learned judge has come. In saying that I would like to add, as has already been said by the presiding judge, that I must not be taken to agree with the strictures which his Honour made upon certain of the witnesses, particularly the defendant, or the remarks he made about raising the issue of undue influence and pursuing it. That was an issue which I think he was entitled to raise and if he failed he would suffer the ordinary punishment, that is, to be condemned in costs. In this case his Honour must have relented somewhat from his initial remarks because he did not in the end condemn the defendant in costs on that issue.

In my opinion the appeal fails and must be dismissed with costs.