FIVE STONE BUILDINGS

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Tracey Angus

Gill v Woodall and others - when is influence undue?

The first instance decision in Gill v Woodall and others is noteworthy because there have been less than half a dozen reported cases since the Wills Act 1837 where the court has pronounced against a will on the ground that it was procured by undue influence. The order at first instance was upheld on appeal but as the Court of Appeal found that Mrs Gill did not know what her will said, they found it unnecessary to determine the RSPCA's appeal against the finding of undue influence.

In contrast, there are numerous reported cases where the court has set aside gifts for undue influence and yet there is no obvious reason why a person is more likely to be unduly influenced into making a lifetime gift than a will. This rarity of findings of undue influence in probate cases may be attributed in part to a combination of the fact that a claim of undue influence does not have to be pleaded in order to be put in cross-examination and the fact that the exceptions to the "costs follow the event" rule in probate claims are not generally applied to unsuccessful pleas of undue influence. It is also possible that in some cases where wills might have been procured by undue influence (for example, the various cases where a beneficiary played a significant role in the preparation of the disputed will) the court has pronounced against the will on the ground of want of knowledge and approval without having to consider whether the testator was forced to make his will.

However, to a large extent the dearth of reported cases is attributed to the difficulty or, at least, the perceived difficulty of proving that a will has been procured by undue influence. Unlike a lifetime gift, no presumption of undue influence will arise in relation to a will simply by virtue of the testator and beneficiary having a particular kind of relationship with each other (eg parent and child, attorney and client, priest and confessor) or by virtue of the fact that the testator reposed trust and confidence in the beneficiary. In order to set aside a will for undue influence, it is always necessary to bring some positive evidence of coercion.

In my view the difficulties of establishing that a will was procured by undue influence are often overstated. Undue influence should mean the same whether it applies to a will or a gift or any other legal transaction. Just as is the case with a lifetime gift, proving coercion does not necessarily entail proving the alleged influencer used physical violence or threats. It is sufficient if he used"[p]ressure of whatever character…if so exercised as to overpower the volition without convincing the judgment." Usually, but not always, persuasion or moral blackmail, no matter how unattractive, will be insufficient. However, coercion can take many forms depending on the nature of the characters involved:

> *"..It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence.*
>
> *The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and depression … may so fatigue the brain, that the sick person may be induced, for quietness sake, to do anything. This would equally be coercion, although not actual violence"*

The textbooks refer to the need to provide compelling evidence of coercion and the party who seeks to uphold the disputed will inevitably relies on Lord Cranworth's warning in Boyse v Rossborough (1857) VI HL2 that "in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances are consistent with the hypothesis of it having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis". However, the burden of proof which applies is the civil one and this must mean that any hypothesis contrary to undue influence must not only be credible but must be at least as likely as undue influence.

In practice, what is required is sufficient evidence to outweigh the inherent improbability that an adult of sound mind has been coerced into executing a will against their wishes.

Also, the fact the court cannot presume there has been undue influence simply because the relationship between testator and beneficiary is of a particular kind does not mean that the court cannot infer that a will was procured by undue influence from evidence of the actual nature of the relationship between the alleged influencer and the testator. The court can properly draw an inference that a will was procured by undue influence from characteristics of the testator which made him vulnerable to pressure from the alleged undue influencer or from evidence that he was habitually coerced by the alleged undue influencer in other transactions. Although, in any given case, there is unlikely to be a bright dividing line between legitimate but morally unattractive persuasion on the one hand and coercion on the other, this type of forensic difficulty is true of other types of plea in probate claims. For example, in a claim based on the final limb of the Banks v Goodfellow test, it is often very difficult to discern whether a feeling of extreme hostility towards a family member is attributable to the testator's personality and the process of ageing or to a mental disorder affecting his judgment.

At first instance in Gill, the Deputy Judge decided that, on the balance of probabilities, Mrs Gill did not wish to make a will disinheriting her only child in favour of a charity she was known to dislike but that she made the will in dispute because she was coerced into doing so by Mr Gill. He described their relationship as follows:

> *"…where Mr Gill took a particular stance with which Mrs Gill did not agree, she would, nevertheless, defer to Mr Gill and do what he required if he maintained his stance. This was because of fear of Mr Gill's bad temper and outbursts of fury. This was particularly so after Mr Gill suffered from his aortic aneurysm in 1987 because of Mr Gill's increasing irritability and loss of temper with resultant fury of which she was afraid. Mrs Gill was also concerned in relation to Mr Gill's health and the risks posed thereto by any substantial loss of temper on his part. She was further concerned to ensure that she did not lose the support and assistance of Mr Gill upon whom she was very dependent."*

He went on to find that Mrs Gill made the will she did because Mr Gill

> *"…directed his domineering and bombastic personality to Mrs Gill, utilising her anxiety and fear of his explosive character, and of the possibility of losing her support upon which she was so dependent, to coerce her into making the Will…"*

On appeal the RSPCA argued that Mrs Gill wanted to or made a choice to defer to her husband's wishes and that deference is not coercion and that, accordingly, she was not unduly influenced by him. However the point of importance is not that Mrs Gill wanted to or chose to or decided to defer to Mr Gill (which was common ground) but how she came to do so. A person with a gun to their head will usually make a choice or decision to hand over their wallet when asked to do so. They would prefer to give over their money than their life.

Nevertheless that person has been coerced because the wish or choice to hand over the money is not made free of force. Mrs Gill's motives for deferring to Mr Gill could only be inferred and the trial judge inferred, as he was entitled to, from what he knew about their relationship and Mrs Gill's vulnerability arising from her mental disorder, that Mrs Gill chose to defer to Mr Gill in the matter of her will as she did in other matters, out of fear of his bad temper and that she might lose his support upon which she was so very dependent as a result of her severe agoraphobia. In my view, if these were the reasons why Mrs Gill deferred to Mr Gill in matters of importance, then her deference was not the result of a free choice but of coercion.

1 [2009] EWHC B34
2 [2010] EWHC 1430
3 Hall v Hall (1868) L R 1 P & D 481, 482
4 Wingrove v Wingrove (1885) 11 PD 81, 82
5 See Wingrove v Wingrove (1885) 1 PD 81 at 82-83; Edwards v Edwards [2007] EWHC 119 at ¶ 47 xv).
6 See Parfitt v Lawless (1872) L 2 P&D 462; Boyse v Rossborough (1857) VI HLC at 48-51; Edwards at ¶4, 17, 19, 50, 53

Members' News

Henry Harrod has been advising trustees on dealing with the members of a fractured family. **Shân Warnock-Smith Q.C.** is instructed in international trust cases in Hong Kong, BVI and Bermuda. **Chris Whitehouse** has been advising on the Revenue's attack on home loan / double trust schemes and **Mark Blackett-Ord** has edited Atkins' Court Forms title Partnership and is in probate and professional negligence claims. **Martin Farber** has been engaged in a commercial dispute about the music industry, **Andrew Simmonds QC** is preparing for the first pensions case to be heard by the Supreme Court (in June) and **Penelope Reed QC** successfully acted for the Claimant in the proprietary estoppel case of Suggitt v Suggitt. **Michael O'Sullivan** has been in the Court of Protection on several applications and **Barbara Rich** recently acted for charitable beneficiaries in a case involving a 15-year delay in administration of an estate. **Tracey Angus** has been in some High Court trials and the appeal in Gill v Woodall and has written about the issue in her article. **Henry Legge** is acting in the IBM and BT pension cases and in trust and art-related matters. **David Rees** appeared for the Official Solicitor in the case of Re G(TJ) which considered the "best interests" test under the Mental Capacity Act 2005. Since January **Anna Clarke** has been in the successful mediation of three disputes and has appeared in the High Court in two more. **Leon Sartin** acted for the PPF in relation to the ownership of a Museum Collection by a charitable company and **Tom Entwistle** is acting in professional negligence claims relating to will drafting and lifetime tax planning advice. **Joseph Goldsmith** acted (with Andrew Simmonds QC) for the claimant trustee in Prudential Staff Pensions Ltd v. The Prudential Assurance Company Ltd [2011] EWHC 960 (Ch). **Mark Baxter** is appearing in contentious probate and Court of Protection claims. **Ruth Hughes** appears up and down the country in the Court of Protection for the Official Solicitor. **William East** has acted in a complex Inheritance (Provision for Family and Dependants) Act 1975 case involving an adult child. **Jordan Holland** has completed his secondment at the Court of Appeal and now advises on probate and trust matters. All other members have been very busy and **Sarah Haren** has had a baby called Iris and returns to work later this year.

DOTAS COMES TO IHT

The Disclosure of Tax Avoidance Schemes legislation ("DOTAS") has for the first time been extended to IHT with effect from 6 April 2011. The relevant legislation is in two SIs (SI 2011/170 and 2011/171) which are supplemented by Revenue Guidance published on 22 March 2011. The DOTAS provisions (which already applied to all the direct taxes and VAT) give the Revenue notice of when a new tax avoidance scheme is marketed and of the number of taxpayers using the scheme. As a result the Revenue may comment on the schemes (usually adversely!) in "spotlights" and may then introduce blocking legislation (which may take effect from the date of the original spotlight comments).

The extension to IHT was prompted by Melville schemes designed (inter alia) to avoid the IHT entry charge (which may be at 20%) when property is settled. Over the years, three variants of the basic scheme have been used, each stopped by legislation with the most recent (Melville Mark III) being dealt with in FA 2010. It was, however, widely felt to be inevitable that a further variant of the scheme would be produced circumventing this relatively narrowly - drafted legislation. Hence the extension of DOTAS to IHT but only to require notice of Melville-type schemes: viz new arrangements having the effect of avoiding IHT charges on the creation of a settlement. Note therefore that no other IHT schemes are reportable (for instance arrangements aimed at maximising APR or BPR). Note also that the intention is to require the reporting of new schemes: viz schemes devised and marketed from 6 April 2011. Existing arrangements are "grandfathered". The relevant regulation states:

"Arrangements are excepted from disclosure under these Regulations if they are of the same, or substantially the same, description as arrangements-

(a) which were first made available for implementation before 6th April 2011; or

(b) in relation to which the date of any transaction forming part of the arrangements falls before 6th April 2011; or

(c) in relation to which a promoter first made a firm approach to another person before 6th April 2011."

The Guidance contains a list of "illustrative" grandfathered schemes (such as settling property which qualifies for 100% APR or BPR or which constitutes normal expenditure out of income). If in doubt about whether the rules apply, taxpayers and their advisers are urged to report the scheme.

The history of the DOTAS legislation has been one of gradual extension and if that pattern is repeated all "new" IHT schemes will, in due course, become reportable. It is, however, by no means certain that this will happen, given that IHT is a controversial tax with many in the Conservative Party in favour of its abolition. Recently the Office of Tax Simplification, in considering IHT reliefs, commented:

> "2.30 We consider that a more appropriate approach to the inheritance tax reliefs is to consider the scope and operation of inheritance tax with reference to the original and desired policy rationale, and thus to consider individual reliefs in context. In addition, any review of inheritance tax needs to include a review of the taxation of trusts, which are often used to pass family assets between generations.
>
> 2.31 The Inheritance Tax Act 1984 was not consider by the Tax Law Rewrite project, and a complete review of the tax would enable the policy rationale for various provisions to be analysed, reliefs to be reviewed and, where necessary, either repealed, simplified or increased in line with inflation, and a simpler system overall to be considered.
>
> …
>
> 2.33 In the light of all this our conclusion is that there should be a proper review of inheritance tax, whether by HMRC, HM Treasury or the OTS. This would clearly be a longer term project. In short, this is a tax that needs a 'top down' review..."

So far as the present limited extension of DOTAS is concerned, it is unfortunate that the relevant legislation is so widely drafted that reliance will have to be placed on the issued Revenue Guidance. As Mr Gaines-Cooper and those taxpayers who entered into home loan schemes have discovered to their cost, relying on Revenue Guidance can lead to tears.

Chris Whitehouse

Upcoming Seminars

Barbara Rich 13 June 2011
Chancery Bar Association Fraud Seminar
Email : chancerybar@aol.com

Chris Whitehouse
Professional Conferences
Tel: 01923 859 626
15 June 2011 (London) "Estate Planning" and "Wills & Administration"
22 June 2011 (London) "Practical Lifetime Tax Planning" and "Wills and Estates Administration in Practice
28 June 2011 (Manchester) "Wills, Probate & Advising the Elderly Update 2011"

Chris Whitehouse 8 September 2011
Surrey Law Society Annual Conference
Email: admin@surreylawsociety.org.uk
Capital Tax Planning

Chris Whitehouse 14 September 2011
STEP West of England Annual Lecture
Exeter
Email : mail@dasls.com

Chris Whitehouse 20 September 2011
Suffolk and North Essex STEP

Updated information is available on our website, www.5sblaw.com

Reflections on Pitt v Holt, Futter v Futter [2011] EWCA Civ197

Farewell to the rule in Hastings-Bass! Or is something left after all? The decision of the Court of Appeal in these cases, led by a mighty judgment from Lloyd LJ, now gives reality to the worst fears of some practitioners.

The rule took its name from In re Hastings-Bass deceased [1975] Ch 25 (CA). But that decision was negative in effect, rejecting the Crown's argument that the advancement in that case was void, and many commentators (myself included) had pointed out that it did not truly justify the modern development of the rule. The Court of Appeal have now gone further, holding that the modern rule was actually inconsistent with the Hastings-Bass decision itself.

The most considered previous statement of the modern rule was expressed by Lloyd LJ himself in Sieff v Fox [2005] 1 WLR 3811. His formulation required (somewhat abbreviated) : —

- The exercise of a fiduciary power;
- The effect of the exercise, or perhaps only its tax consequences, being different from the fiduciary's intention;
- Evidence that the fiduciary would have acted otherwise if he had taken account of all relevant factors and no irrelevant ones.

This did not require proof of any breach of duty on the part of the fiduciary, and it was unclear whether the successful invocation of the rule made the disposition void or voidable. But a careful study of the argument in the Hastings-Bass case itself showed that this modern rule was exactly what the Court of Appeal had expressly rejected in that case. Instead, there is a far narrower rule, based on the decision of Cross J in In re Abrahams' Will Trust [1969] 1 Ch 463, that if trustees exercise a power of advancement but some of its trusts cannot take effect as intended, and if the resultant effect cannot reasonably be regarded as beneficial to the intended beneficiary, then the exercise is not within the power and is void : see [1975] Ch 25, 40H–41C; [2011] EWCA Civ 197 paragraphs 56–58. This is an objective test.

This narrower rule is apparently restricted to dispositions like advancements (applications for the benefit of a beneficiary) exercised by creating (or attempting to create) trusts also in favour of others. In the case of a partially void appointment the law was already clear that the effective parts of the appointment remain valid.

The Court of Appeal have, however, spelt out a second rule, namely that if trustees (or other fiduciaries) act within their powers but in breach of duty, then the disposition may be voidable at the instance of a beneficiary (not the trustees themselves), subject to any available equitable defences and to the Court's discretion. A failure to take account of the tax consequences of the disposition may still be sufficient here.

But this rule too is subject to an important restriction, namely that if the trustee has acted in accordance with appropriate professional advice, then he has not acted in breach of duty, and the disposition is not voidable.

The Court also had much to say about the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake. Two broad types of mistake were identified: a mistake as to the legal effect of the disposition (as in Gibbon v Mitchell [1990] 1 WLR 1340); and a mistake as to a prior fact or a point of law. Here the Court concentrated on two different restrictions. First, it was said in Ogilvie v Littleboy (1897) 13 TLR 399 (upheld on appeal to the House of Lords sub nomine Ogilvie v Allen (1899) 15 TLR 294) where Lindley LJ said at page 400 : —

> *'In the absence of all circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious character as to render it unjust on the part of the donee to retain the property given to him.'*

Second, it was held by Millett J in Gibbon v Mitchell that a mistake about the tax consequences of a disposition does not amount to a mistake about its legal effect.

Despite these restrictions it is possible that some (but by no means all) Hastings-Bass cases may be cast, or re-cast, as claims based on a mistake by the appointor as to the legal effect of his disposition, provided only that the Ogilvie test is satisfied, namely that it is unjust for the donee to retain the benefit.

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