Neutral Citation Number: [2016] EWCA Civ 494

Case No: A3/2014/3636

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**DEPUTY MASTER COLLAÇO MORAES**
**HC13C04634**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2016

**Before:**

**THE MASTER OF THE ROLLS**
**LORD JUSTICE McCOMBE**
and
**LADY JUSTICE KING**

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**Between:**

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| **COLIN ALAN RANDALL** | **Appellant** |
| **- and -** | |
| **HILARY ANN JOCELYN RANDALL** | **Respondent** |

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**Jeffrey Littman** (instructed by **Colin Randall**) for the **Appellant**
**Mark Baxter** (instructed by **Rix & Kay LLP**) for the **Respondent**

Hearing date: 10/05/2016

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# Approved Judgment

**Master of the Rolls:**

1. The appellant (H) and the respondent (W) are divorced. As part of their divorce settlement, they agreed that, if W were to inherit more than £100,000 from her mother, she would keep the £100,000 and the balance would be split equally between H and herself. On her death, W's mother left £100,000 to W in her will and (after some small specific legacies) the balance of her estate (estimated at £150,000) to W's children. H brought a probate claim to challenge the validity of the will alleging that it was not duly executed in accordance with the provisions of section 9 of the Wills Act 1837. If, as H contends, the will was invalid, he would be entitled to an estimated £75,000. W contends that H has no standing to bring such a claim. Whether this contention is sound as a matter of law was determined as a preliminary issue by Deputy Master Collaço Moraes on the assumption that, as alleged by H, "it does not appear that the deceased intended by her signature to give effect to the alleged will". The Deputy Master decided that H has no sufficient interest in the will and therefore has no standing to bring the claim. H appeals with the permission of Lewison LJ.

2. W will not seek the revocation of the grant of probate. Yet if the will is invalid (as on the assumed facts it is), she and her children are taking advantage of invalid testamentary dispositions so as to defeat H's entitlement to half of the balance of £150,000. In practice there is no route by which the will can be brought before the court to be proved in solemn form or the grant of probate be revoked unless in a probate claim brought by H.

*The issue*

3. The starting point is Rule 57.7 of the Civil Procedure Rules ("CPR") which provides that, to bring a probate claim "(1) the claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate". It is common ground that the effect of rule 57.7 is that a probate claimant must claim an "interest" in the estate. Para 4 of PD 57 provides:

> "In giving case management directions in a probate claim the court will give consideration to the questions—
>
> (1) Whether any person who may be affected by the claim and who is not joined as a party should be joined as a party or given notice of the claim…."

4. The central issue in this case is whether the creditor of a beneficiary of an estate has an "interest" in the estate. Having reviewed the earlier case-law, the Deputy Master concluded:

> "91. In my judgment, on a proper analysis of the authorities, whether a person has an interest in the estate is to be determined by a reference to the touchstones of: (1) whether they are personal representatives, (2) the grant of representation, and (3) the entitlement to a distribution of the estate. The court is concerned with identifying an interest in the estate and not whether someone is 'interested' in the estate. Just as a creditor of an estate, while interested in the estate, has

> no interest in the estate, so in my judgment a creditor of a beneficiary of the estate has no interest in the estate, though he is possibly interested in the estate.
>
> 92. While it is not necessary for my decision, in my judgment to construe an 'interest in the estate' to include a claim by a creditor of a beneficiary of an estate will widen the gateway to an extent that would render the requirement of little if any value.
>
> 93. The safeguard provisions of section 121 of the Senior Courts Act 1981 and the general supervisory role of the court in probate proceedings provide the mechanism for the court to intervene when it considers it appropriate to do so. It follows that in a case where there is a risk of injustice the courts can intervene to ensure that a wrong is not perpetrated."

5. Mr Baxter seeks to support this conclusion. As expressed in his skeleton argument, Mr Littman submits that "the scope of the 'interest' required is (or should be) delimited more broadly so as to include those whose interest lies in ensuring that a beneficiary receives the gift he should receive, in order to take a benefit whether directly or indirectly out of that gift".

6. There is also an issue between the parties as to whether the Deputy Master was right to hold that the rule that a creditor of a beneficiary of an estate has no "interest" in the estate was a "substantive requirement of the common law" rather than a rule of practice and procedure.

*The history and previous authority*

7. CPR 57.7 replicates a long-standing requirement that a party to a probate claim must have an "interest" in the estate. In Tristram's "*The Contentious Practice of the High Court of Justice in respect of Probates & Administrations*" (1st ed 1881), Dr Tristram wrote at p 80:

> "The foundation of title to be a party to a probate or administration action is interest – so that whenever it can be shown that it is competent to the Court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect the interest or possible interest of any person (*Kipping and Barlow* v. *Ash*, 1 Roberts. 270; 4 N. Cas. 11; *Crispin* v. *Doglioni*, 2 S. & T. 17; 29 L.J. 130); such person has a right to be a party to such a suit in the character either of plaintiff, defendant or intervener."

8. These words have appeared (with immaterial amendments) in subsequent editions of Tristram and Coote's "*Probate Practice*".

9. In each edition, the authors have cited *Kipping and Barlow v Ash* (1845) 1 Rob 270, a decision of the Prerogative Court, as an authority in support of the statement in the text. In that case, the devisor by his will disposed of all of his personal estate. Under

the will, he devised real estate to his brother and, in the event of his brother dying in the devisor's lifetime (as occurred), to his brother's children. Under the will they had no interest in the personalty. By a codicil, the devisor gave the children pecuniary legacies and revoked the devise to them of the real estate. A caveat was lodged on behalf of the children and the proctor assigned to them declared that he opposed the codicil. The proctor for the executors denied the interest of the children to oppose the codicil saying that "by the law and practice of this Court, they are not entitled to oppose the codicil in this Court". Sir Herbert Jenner said:

> "It has been argued for the executors that the other party has no interest to oppose the codicil, as under the will their only claim is to a portion of the real estate; that it is by the codicil alone they are entitled to any share of the personalty. I am not prepared to say that it is not competent to the party to oppose the codicil, for instance, on the score of fraud; that they can be precluded from shewing fraud in the transaction. Though at present that is merely a suggestion, still I know not what case may be made out against the codicil. I am therefore of opinion that they have an interest, and that the bare possibility of an interest is sufficient."

10. The earlier decision of the Prerogative Court in *Menzies v Pulbrook and Kerr* (1841) 2 Curt 846 has assumed some importance in the present case. Menzies, who was a creditor of the estate of the deceased, wished to contest the validity of the will and oppose probate passing to the executor. Menzies opposed the application by the executor for administration of the deceased's effects. The question for the court was whether creditors of the estate have the right to challenge the validity of a will. After an analysis of previous case-law, all of which the judge said supported the proposition that a creditor of an estate has no right to oppose a will and that the only right he has is to have the estate administered by someone, he said:

> "These cases then appear to me to establish the rule of practice as contended for by the counsel for Menzies, and to be precedents which the Court must adhere to, unless the principle on which they are founded be shewn to be unsound. Now, some cases were cited in which a creditor has been allowed to contest the right to administration against the next of kin; but in those cases it appeared that the next of kin had no interest in the property, and they do not effect the question before the Court.
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> I apprehend that a creditor, except by the practice of the Court, has no right to the administration of the estate of a deceased; he has no right by the statute: he is the appointee of the Court and I do not know, if circumstances shewed that the creditor was not a proper person, that the Court might not appoint another person.
>
> The rule contended for in this case is founded in reason and sound sense. Sir George Lee says, "if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense, and delay to executors," and I think much

> inconvenience; if a creditor has a right to oppose a will, he has an equal right to call in a probate, and put the executor upon proof of the will in solemn form; and if one creditor has this right, every creditor has it; and if a creditor has a right to oppose a will, an executor has a right to oppose the interest of a creditor; and the Court would be called upon to determine questions out of its jurisdiction, whether a debt was barred by the Statute of Limitations; whether the instrument under which the creditor claimed was duly stamped, and various other points. I am therefore clearly of opinion, that the rule which has been acted upon so long ought not to be disturbed. "

11. The basis of this decision was that (i) a creditor cannot administer an estate if there is another person who has an apparent right to do so; (ii) the court was applying a rule which had been acted on for so long that it ought not to be disturbed; and (iii) the rule was in any event founded in reason and sound sense, because, were it otherwise, the administration of estates "would create infinite trouble, expense and delay to executors". The first of these factors is now reflected in rules 20 and 22 of the Non-Contentious Probate Rules 1987 which set out exhaustively who may claim a grant of administration as of right. A creditor of an estate can obtain a grant of administration as of right only if, in the case of a testate estate, there are no executors, residuary legatees or personal representatives of residuary legatees willing to act (rule 20); or in the case of an intestate estate, only if there is no member of a class of beneficiaries and the Crown has not claimed *bona vacantia* (rule 22). There are no circumstances in which the creditor of a beneficiary is entitled to a grant as of right.

12. As the Deputy Master said, *Menzies* has stood the test of time and continues to be referred to in Williams, Mortimer & Sunnucks *Administrators and Probate* 20th ed (2015) at 34-17. It is clear authority for the proposition that the creditor of an estate does not have a sufficient "interest" in the estate to allow him to challenge the validity of a will.

13. The next case is *Dixon and Dickenson v Allinson* (1864) Tr and Sw 572. This was a decision of the Court of Probate which had succeeded to the probate jurisdiction of the Prerogative Court on 1 January 1858. By a codicil, a wife left her husband shares and stock. She died at sea in 1864 and he died a few months later. Dixon and Dickenson were executors of both wills. A caveat had been entered in the wife's estate and the executors propounded the will and codicil in solemn form. Various creditors of the husband issued proceedings against the executors of his will for administration of his real and personal estate. One of the creditors went into liquidation and official liquidators had been appointed. The court was moved on behalf of the plaintiffs "for leave to cite [the liquidators], as representing [the deceased's] creditors, who were interested in the codicil of [the deceased] under which [the deceased's] estate would be benefited, to see proceedings to the present suit". In allowing a citation to issue to the liquidators to see the codicil proved, Sir J. P. Wilde said:

> "There are certain persons representing the East of England Bank as creditors of the husband; these are official liquidators of the bank; the question is, what interest have they in the matter? They are creditors of the husband, and, as such,

> interested in supporting the codicil propounded, by which the husband's estate would be benefited; thus, though somewhat circuitously, they have a real and substantial interest. In *Kipping and Barlow* v. *Ash*, 1 Rob. 270, Sir H. Jenner Fust considered that the bare possibility of an interest was sufficient to enable a person to oppose a testamentary instrument. In the present case I think it is quite proper to cite the official liquidators."

14. Mr Baxter submits that *Dixon* is distinguishable from the present case. He says that the joinder of the liquidator was derived via the husband. As the husband was dead, in the normal course the only persons who could be joined to represent the interest of his estate would have been his personal representatives. But as they were already claimants in another capacity, it was necessary for the court to identify some other person who was well-placed to represent his estate. As the liquidator had obtained administration of his estate, he was the closest to a personal representative available to fulfil that role. In any event, he submits that the decision in *Dixon* was not concerned with who may *bring* a contentious probate claim, but who may be *joined* to such a claim. In other words, it was concerned with the broader test which is now enshrined in PD 57 para 4, not the narrower test set out in CPR 57.7. Finally, he submits that, even if *Dixon* is authority for the proposition that a creditor of a deceased beneficiary may bring a contentious probate claim in an estate in which the beneficiary's estate is interested, that does not assist H because W is still alive.

15. I do not accept that the basis for this decision was that the liquidators were the only persons who could be joined to represent the husband's interest. Sir J.P. Wilde said in terms that the plaintiffs were the liquidators of the husband and "*as such*…were interested in supporting the codicil" (emphasis added). The essential point was that the creditors were allowed to be joined because, by reason of being creditors of the husband, they had an interest in the estate. The citation of *Kipping and Barlow* provides further support for this interpretation. The basis for the decision in that case was simply that the party seeking to oppose the codicil had an interest in opposing the will. There is no suggestion that the court considered it to be material that the liquidators were seeking to be joined to the claim rather than to bring the claim in the first place.

16. In *The Goods of Timothy White, deceased* (1893) LR Ir 31, it had been found in earlier proceedings that a son of the deceased had obtained a grant of letters of administration as if his father had died intestate, by knowingly suppressing the fact that his father had in fact made a will. A creditor of the deceased's wife sought leave to issue a citation to recall the letters of administration granted to her son. The court said (at p 386) that there was no doubt of the jurisdiction of the court to grant such an application "in the case of a creditor who has an interest" in the issuing of such a citation. The question was what interest a creditor had to have to enable this to be done. The President referred to Tristram and Coote's *Probate Practice*:

> "The question then is, what is the interest of a creditor necessary to enable this to be done? I turn to Tristram and Coote's Probate Practice, a treatise in which I find, as a rule, the law and practice of this Court accurately and clearly stated. At page 367 the subject of actions for the revocation of probate,

> and the revocation of letters of administration, is discussed; and, after stating the object of such suits, I find that the parties to actions for revocations are plaintiffs, defendants, or interveners, and that the foundation of their title is the same viz. that of interest. At page 369 is a summary of the result – "The foundation of title to be a party to a probate or administration action is interest – so that whenever it can be shown that it is competent to the Court to make a decree in a suit for the revocation of probate or administration, which may effect the interest or possible interest of any person, such person has a right to be a party to such suit in the character either of plaintiff, defendant, or intervener." No words can be more extensive, and therefore, if Mr. Hennessy's client has any possible interest, he is entitled to be either plaintiff or defendant. A creditor of a person who has an interest under a will has a sufficient interest to entitle him to be made a party."

17. The President then cited *Dixon* and concluded that a citation should issue to recall the letters of administration that had been granted. The Deputy Master said (para 78) that *Timothy White* had been wrongly decided because (i) it was contrary to the decision in *Menzies,* (ii) it was decided without reference to *Menzies,* and (iii) it misinterpreted *Dixon.* For the reasons that I set out at paras 22 and 23 below, I do not consider that *Timothy White* was wrongly decided.

18. In *Green v Briscoe* [2005] EWHC 809 (Ch), the deceased's former wife claimed reasonable financial provision out of the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"), that her transfer of property to the deceased should be set aside and that the court should pronounce against the validity of the deceased's will. The defendant asserted that the claimant had no interest in the will entitling her to bring the claim at all. The defendant's application to dismiss the claim was determined by Master Bragge at a case management conference. The Master referred to CPR 57.7 and some of the earlier authorities including *Menzies,* and concluded that the claimant's claim under the 1975 Act did not give her an interest in the estate. He said at para 19: "But I think when the court is talking about an interest it is talking about an interest or possible interest in the estate, not simply being interested in it". She did not "have the sort of interest that CPR 57 is talking about" (para 20).

19. A different view was expressed by Judge Mackie QC in *O'Brien v Seagrave* [2007] EWHC 788 (Ch). Like *Green,* this case concerned the question whether a claim under the 1975 Act gave the claimant an interest in the estate within the meaning of CPR 57.7 sufficient to bring a probate claim. The claimant was the partner of the deceased. The defendants were the former wife of the deceased and her son. After the death of the deceased, they produced a will and obtained a grant of probate. The claimant brought a probate claim seeking a declaration that the will was invalid on various grounds. The defendants objected to the claim on the basis that the claimant did not have an interest in the estate. The Master struck out the claim. Judge Mackie allowed the claimant's appeal, holding that the term "interest" in CPR 57.7 included a right to bring a claim for financial provision under the 1975 Act. At para 9, the judge said:

> "The Claimant has a clear and accepted financial interest in the outcome of this dispute and one would therefore in general expect her to have a right to bring an action of this kind. There is no authority which holds that a claim under the Act is not capable of being an "interest". Furthermore there is not even a formulation or definition of "interest" in a decided case with which a broad construction would be inconsistent. Through no fault of the Master concerned, the reasons for his decision in *Green v Briscoe* are not available and, even if they were, while entitled to respect, they would not bind me. It is true that judgment for the claimant will not of itself, produce an immediate financial result but that is equally true of other areas of litigation where a claimant is permitted to go ahead, most obviously many claims for declarations. The court has in recent years, increased the range of circumstances where it will permit a party to seek a declaration as to its rights or as to the existence of facts or as to a principle of law. If this claim fell not within the probate jurisdiction but more generally within the CPR it seems to me that the answer to the question whether she would be recognised as having a sufficient interest so as to be able to seek a declaration would be- "yes of course". I do not accept that a construction of "interest" to include an interest under the Act would open the flood-gates, as Mr Harrap submits it might. The facts of this case are unusual but if there were others like it, this would merely emphasise the importance of removing a potentially unjust obstacle. There is a further practical reason why one should construe, *"interest" to* include a potential Inheritance Act claim. If this action could not proceed but the claimant's claim under the Act went ahead, then the judge, when considering all the circumstances, might well feel considerable unease about proceeding on a possibly false assumption about the validity of the will. That might in turn lead to Section 121 being invoked and to further delay, uncertainty and expense for this small estate. In my judgment therefore the claimant's right to bring proceedings under the Act is, against the background facts of this case and upon the basis of the authority cited to me, a sufficient interest to permit her to proceed as a claimant under CPR Pt 57."

20. Mr Baxter submits that *O'Brien* is authority only for the proposition that a person who has a claim under the 1975 Act has a sufficient interest to bring a probate claim. If a person makes a successful claim under the 1975 Act, he or she becomes a beneficiary of the estate, not a creditor: see *Lansforsakringar Bank AB v Wood & others* [2007] EWHC 2419 (QB). Mr Baxter contends that a claim to be a beneficiary of the estate under statute is much closer to a claim to be a beneficiary under a will or intestacy than to a claim to be a creditor of a beneficiary contingent on the extent of the beneficiary's interest in the estate (whose claim is against the beneficiary only after the personal representatives have completed administration and distribution).

*Summary of W's case*

21. In summary, Mr Baxter submits that a person's right to put an executor to proof of a will in solemn form (a contentious probate claim) depends on their being able to assert the right to administer the estate. The only persons entitled to administer an estate are (i) those named as executors in a will, (ii) those entitled to share in the estate on distribution and (iii) the creditors of the deceased. These all have the requisite degree of "privity" with the estate to give them an "interest" in it. This is a rule of substantive law. It cannot be modified by procedural rules. This strict test for bringing a contentious probate claim is to be distinguished from the more relaxed rule (now reflected in PD 57 para 4) which governs the joinder of a party to an existing probate claim. In short, H was not entitled to administer the deceased's estate. He is a stranger to the estate and therefore has no sufficient interest in it to give him standing to bring this probate claim.

*Disposition*

22. The Deputy Master was wrong to assimilate the position of a creditor of a beneficiary of an estate with that of a creditor of an estate. That is why he was wrong to conclude that *Timothy White* was wrongly decided on the grounds that it was inconsistent with *Menzies.* There is no doubt that a creditor of an estate does not have sufficient interest in an estate to bring a probate claim and that *Menzies* is still good law. But the interests of the two types of creditor are fundamentally different. The interest of the creditor of a beneficiary is to ensure that the beneficiary receives what is due to him or her under the will or on an intestacy. The interest of a creditor of an estate is to ensure that there is due administration of the estate. The creditor of the estate is not interested in which beneficiary receives what.

23. The passage which has appeared in every edition of Tristram that has appeared since 1881 (see para 7 above) is expressed very broadly: "in a suit for probate or administration, which may affect the interest or possible interest of *any* person" (emphasis added). The court was right to say in *Timothy White:* "no words can be more extensive".

24. Judge Mackie QC was right in *O'Brien* to hold that there is no decided case which is inconsistent with a broad construction of the meaning of "interest". Mr Baxter submits that *O'Brien* can be upheld on the ground that a successful claimant under the 1975 Act is a beneficiary of the estate. But even if that is correct, this was not the reason given by Judge Mackie for reaching his conclusion. He adopted a broad construction of "interest". I would adopt his reasoning and hold that, unless there is authority binding on this court which requires us to adopt a narrow interpretation of "interest" in CPR 57.7 or there are cogent arguments for doing so, justice requires that it should extend to a person such as H. Such authority as there is tends to support the wider view: see *Kipping and Barlow, Dixon* and *Timothy White*.

25. I said at para 2 above that, if H does not have an "interest" in the estate of the deceased, there is in practice no route by which his claim that the will is invalid can be brought before the court. The Deputy Master said that section 121 of the Senior Courts Act 1981 provides the mechanism "for the court to intervene when it considers it appropriate to do so". Section 121(1) is in these terms:

> "Where it appears to the High Court that a grant either ought not to have been made or contains an error, the court may call

> in the grant and, if satisfied that it would be revoked at the instance of a party interested, may revoke it."

26. It is difficult to see how the claim sought to be made by H in the present case could be dealt with by the court calling in the grant under this provision. No example has been cited to us of a case where a court has called in a grant in circumstances such as these. If H is not party to a probate claim because, *ex hypothesi*, he does not have an "interest" in the estate, it is difficult to see how he would be able to bring his claim to the attention of the court so as to engage section 121. I do not consider that the injustice inherent in Mr Baxter's case can be cured by recourse to section 121.

27. I should add that I do not accept that the question whether a person has a sufficient "interest" in an estate to be eligible to bring a probate claim is a matter of substantive law. Whether a will is invalid is, of course, determined in accordance with rules of substantive law. But the question of who has a sufficient interest to be permitted to bring a probate claim to prove that a will is invalid is *prima facie* a procedural matter. It is noteworthy that in *Menzies* Sir Herbert Jenner referred to the cases as having established a "rule of practice" that creditors of an estate have no right to oppose a will. I also note that in *Kipping and Barlow*, it was submitted by the proctors for the executors that "by the law and practice of this Court" the children were not entitled to oppose the codicil. In short, whether a person has a good claim is a question of substantive law. Whether he has the right to bring his claim before a court is a question of procedure.

28. If there is any doubt as to whether H would have had an "interest" in the deceased's estate before the introduction of the CPR, this was resolved by the CPR themselves. As rule 1.1(1) makes clear, the CPR "are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost". CPR rule 1.2 provides that the court "must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules; or (b) interprets any rule". CPR 1.1(2) provides that "dealing with a case justly and at proportionate cost includes, so far as practicable (a)….(f)...". It is true that none of the objectives set out in rule 1.1(2)(a) to (f) provides the answer to what is the correct interpretation of CPR 57.7. But I accept the submission of Mr Littman that justice in the general sense requires H to be able to bring his probate claim to set aside the will.

29. I should add that I agree with Judge Mackie that, if this claim did not fall within the probate jurisdiction but fell within the general jurisdiction of the court, it is obvious that H would have a sufficient interest in the subject-matter of this litigation to bring the claim. He is not a mere busybody. He has a real interest in challenging the validity of the will. In the absence of authority which requires us to hold otherwise, I conclude that he has a sufficient "interest" in the will to bring this claim.

*Conclusion*

30. I would therefore allow this appeal.

**Lord Justice McCombe:**

31. I entirely agree with the Master of the Rolls that this appeal should be allowed for the reasons given by him. I only add a few words of my own in view of the fact that we

are differing from the carefully considered judgment of the Deputy Master on a point of probate practice of some novelty. I do so also with respect to the very interesting and helpful arguments that were addressed to us by counsel. I am grateful to them both.

32. My first observation is that I agree with Lord Dyson that the issue that we have to resolve is one of practice and procedure rather than of substantive law. He says in paragraph 3 above that the starting point is CPR 57.7 which, in a sense it is, although it is also an end point in the practice that has evolved. The rule requires the claimant to state in his claim form "the nature of the interest of the claimant and of each defendant in the estate". The rule does not tell us what an "interest" is for these purposes and that is what has been debated in the course of the appeal. It seems to me that the nature of an interest adequate to found a right to bring probate proceedings has been defined by the probate courts, as a matter of practice and procedure, in their decisions over the years. The courts have determined, on a pragmatic basis from case to case, which "interests" qualify and which do not. It would be surprising if there were rigidity about the test. The facts of individual cases will be infinitely variable as the decided cases (and the facts of this case) illustrate. The rule requires the party beginning the proceedings to identify the parties' respective "interests".

33. It is to be noted that CPR 57.7 is in effect no more than a restatement of the rule of practice, descended from the old probate courts, which long appeared in the Rules of the Supreme Court. In its final form RSC Order 76 rule 2(2) provided:

> "Before a writ beginning a probate action is issued it must be indorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates."

CPR 57.7 is to like effect.

34. I agree with the Master of the Rolls that the decision of Warren P in the *Timothy White* correctly stated the law and that the Deputy Master was wrong to conclude otherwise. As Mr Littman observed the case was cited in the 1900 and 1906 editions of what is now Tristram & Coote's Probate Practice, edited by Dr Tristram himself, before the case mysteriously disappeared from the book in the 1915 edition following Dr Tristram's death. No explanation was given in that later edition for the removal of the reference to the case and, for my part, I am not prepared to take that as any indication that the case was wrongly decided. To the contrary, as already mentioned, I consider that it was entirely correct and consistent with the decision in the *Dixon* case and not inconsistent with *Menzies*. It was not necessary for Warren P in *Timothy White* to consider the decision in *Menzies* which was concerned with a different issue from the one with which he had to deal, namely the alleged interest of the creditor of the deceased's estate rather than the interest of a creditor of a beneficiary under that estate.

35. Mr Baxter argued that the six categories of person, identified in the 11th edition of Coote & Tristram (as it was then called) (pp.372-373), as being entitled to put an executor or other person interested in a will to proof of the will in solemn form, was an exhaustive list of "interested" parties for these purposes and that no others were competent to mount a probate action. The list in summary was: 1. The widow and

next of kin entitled on intestacy; 2. A legatee named in the will, whose legacy has been omitted from probate; 3. An executor or legatee under a rival will; 4. A creditor in possession of administration; 5. A person in possession of administration under section 73 of the Court of Probate Act 1857 (i.e. under a discretionary grant), as appointee of the court (citing *Menzies*); 6. The heir at law, devisee, or other persons pretending an interest in real estate relating to personal as well as to real estate in certain defined circumstances. Categories 4 and 5 were said to be entitled to put the will to proof in solemn form only before probate in common form had been issued.

36. It seemed to me that this list could only have been illustrative of circumstances in which persons had been found to be entitled to require proof of a will in solemn form. Category 2 in particular seems to be a very esoteric example of a relevant interest. The decided cases to which we were referred and the broad principle appearing in edition after edition of the main text book convinced me that the rules of the old probate court were infinitely flexible to meet the justice of each case. In any event, as the Master of the Rolls has said in paragraph 28, the new procedural code and its overriding interest must be sufficient to entitle the appellant in this case to bring the present action.

37. As I said during the argument, it appears to me to be highly unjust that if, in circumstances similar to the present, a will had been forged in an attempt to defeat an order made in divorce proceedings, the party affected could not challenge the validity of the will in probate proceedings. The facts of the present case seem to me to be in principle no different.

38. For these further reasons also, I would allow this appeal.

**Lady Justice King:**

39. On 12 May 2006, following negotiations between their respective solicitors, H and W reached an agreement in financial remedy proceedings following their divorce. That agreement was formalised in a consent order. As is noted by the Master of the Rolls, an undertaking was given by W to the court and to H by which she agreed that "in the event that the Petitioner receives hereafter any property and/or monies from her mother by way of inter vivos gifts/and or inheritance, the Petitioner shall retain the first £100,000…. and the balance shall be divided equally between the Petitioner and the Respondent".

40. Both parties had legal advice and knew that this agreement could not in any way bind W's mother as to her future testamentary disposition. The risk, as identified on behalf of W in the offer of settlement letter found in the bundle, was not that her mother might choose to leave her estate elsewhere, but that the money may be needed to fund her care in her old age.

41. It is only rarely that an undertaking in relation to a potential future inheritance such as the one with which this court is concerned is found in a matrimonial finance consent order; its inclusion can only have come about as a consequence of an acceptance on the part of W that a potential future inheritance from her mother was, pursuant to Matrimonial Causes Act 1973 s25(2)(a), a "financial resource which one of the parties to the marriage has or is likely to have in the foreseeable future"

42. The assets in the case were modest and both parties rightly appreciated the desirability of avoiding incurring the costs of a two day trial if that could be achieved. Accordingly the agreement reached provided W with the larger percentage of the liquid assets (namely the sale proceeds of the house) whilst H retained the prospect of a modest lump sum payable in due course by W from her mother's estate, which money would supplement his small pension fund.

43. The settlement of financial remedy cases is encouraged on every level to the extent that Financial Dispute Resolution court appointments (FDR appointments: Family Procedure Rules 2010, r.9.17(1)) were specifically designed to be for the purposes of "discussion and negotiation". Agreement having been reached either at FDR or, as here, immediately before trial, not only are the courts thereafter reluctant to go behind the agreement as to its terms, but each party should be able to rely on the integrity of the other party fairly to implement and honour the terms of their agreement.

44. For understandable reasons the profound difficulties faced by H in enforcing the undertaking given by W if it is the case that the Will of W's mother (which purported to leave exactly £100,000 to W) was not validly executed as a consequence of some action of bad faith on W's part, was not raised in argument. What is clear is that addressing the issue in the context of H having an 'interest' for the purposes of CPR 57.7 and therefore his being able to bring a probate claim, provides a more direct route to determine whether W has acted in a way which is contrary to the essence of her undertaking.

45. It follows therefore that not only do I agree with the Master of the Rolls and Lord Justice McCombe that the H has an interest in the subject matter of this claim for the reasons given, but also that, as the Master of the Rolls says at paragraph 28, "justice in the general sense requires H to be able to bring his probate claim to set aside the will".