TANNER v. THE PUBLIC TRUSTEE

The question of the attitude of the court to a beneficiary who is instrumental or involved in preparing a will was recently considered by the Court of Appeal in *Tanner* v. *Public Trustee*.[1] Such cases turn very much on their facts and the facts in *Tanner* are set out very fully by MacArthur J.[2] Very briefly they are that Mr Tanner prepared a will (called here the 1966 will) for Mrs Budd (the testatrix) which differed in several respects from a previous will (the 1961 will), drawn by the Public Trust Office. The 1966 will was not shown to the Public Trust until after Mrs Budd's death.

Mr Tanner was the husband of Mrs Budd's niece and Mrs Budd had a close (and later dependent) relationship with them; Mrs Tanner and her sister being her only close relatives. Mr Tanner had been 'like a son' to Mr Budd and had eventually become the proprietor of Mr Budd's business. Mrs Budd had made a substantial *inter vivos* gift to Mrs Tanner and a substantial interest-free loan to Mr Tanner. Under the 1966 will Mrs Tanner's entitlement was to approximately £24,000; under the 1961 will it was £2,000.

Doubts were expressed by the Public Trust Office about Mrs Budd's testamentary capacity in 1966 and as to her desire to alter the provisions of her earlier will.

Accordingly, the Public Trustee (who remained neutral throughout) instituted the action to obtain a decision of the Court as to which of the two wills should be admitted to probate. By an order in chambers the New Zealand Foundation for the Blind was directed to represent all the beneficiaries who fared better under the 1961 will, except for the Early Settlers Association who were to be separately represented, although their interests were virtually the same.

Mrs Tanner was to represent all the beneficiaries who received more under the 1966 will than the 1961 will. The action became a contest between Mrs Tanner, supporting the 1966 will, and the two charities which denied the validity of that will, and supported the 1961 will. Wild C.J. pronounced for probate of the 1961 will.

The case deals with the situation where a beneficiary of a will has been instrumental in its preparation. This must be clearly distinguished from cases of undue influence. Undue influence, as the term is used in connection with wills, deals with coercion, usually by violence or threats of violence.[3] *Tanner* does not raise any such facts. It is clear that the Court of Appeal recognised this, MacArthur J. saying "These statements . . . do not raise any issue of fraud or undue influence".[4]

1. [1973] 1 N.Z.L.R. 68.
2. Note 1, at 69 et seq.
3. 16 Halsbury (3rd ed.) p. 207(v): 17 Halsbury (3rd ed.) p. 675, para. 1301. Also Winder; 3 M.L.R. 99 at 104 and 56 L.Q.R. 97 at 106.
4. *Tanner*, n. 1, at 71.

Where undue influence is raised the onus of proving it is on the party who alleges it, not on the propounder of the will, as it was in *Tanner*.

A leading case in the field is *Barry* v. *Butlin*,[5] where the testator's will was drawn up by a solicitor who took about a third of the testator's estate under it. Parke B. said that there were two settled rules in this area.[6]

> The first is that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, 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 calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

In that case the will was admitted to probate, the only son being a fugitive from justice, who had been shunned and feared by his father for many years. The law as there set out was affirmed in *Fulton* v. *Andrew*[7] where Lord Hatherley elaborated on the distinction between a beneficiary who helps prepare the will and an ordinary legatee. As to an ordinary legatee he said[8]

> It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of understanding it. But there is a further onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a will. They have thrown on them the onus of showing the righteousness of the transaction.

The cases referred to have been adopted in New Zealand and affirmed in *McDonald* v. *Valentine*[9] and *Chatterton* v. *Howie*.[10] However several points are made somewhat clearer by the decision in *Tanner*.

First, the onus of proof clearly lies on the party propounding the will. Generally that will be the executor and he need not necessarily be the beneficiary who has been involved in the preparation of the will. This is clear from *Tyrrell* v. *Painton*[11] where the executor was one son of the respondent and the will was prepared by another son of the respondent.

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5. 2 Moo P.C. Cas 480: 12 E.R. 1089.
6. Ibid., 482.
7. (1875) L.R. 7 H.L. 448.
8. Ibid., 471 & 472.
9. [1921] N.Z.L.R. 49.
10. [1926] N.Z.L.R. 595.
11. [1894] p. 151.

Here the procedure in Tyrrell's case was followed. As MacArthur J. put it,[12]

> In the present case, although it is the Public Trustee who is in the technical sense propounding the 1966 will, I think that the onus of proof lies on Mrs Tanner and those whom she represents, including her husband. They support that will as against the 1961 will. The case has been pleaded and fought throughout on the basis that there is no distinction between them; and they must stand or fall together.

Secondly, Wild C.J. at the trial[13] appears to have based his judgment on the benefit to Mr Tanner and the fact that his legacy increased to £3,000 from £1,000.[14] MacArthur J. found that he would have held the rule in *Barry* v. *Butlin*[15] to be applicable even had Mr Tanner taken nothing,[16]

> . . . the reason being that the substantial gift of residue to his wife would have been a circumstance exciting the suspicion of the Court.

The justification for this is *Tyrrell's case*,[17] where the repondent took a substantial gift under a will prepared by his son. It was held that the rule in *Barry* v. *Butlin*[18] applied, Davey L.J. saying[19]

> It must not be supposed that the principle in *Barry* v. *Butlin* is confined to cases where the person who prepares the will is the person who takes the benefit under it — that is one state of things which raises a suspicion; but the principle is, that whenever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour of it unless that suspicion is removed.

Thirdly, Turner P. considered the question of what Lord Hatherley meant in *Fulton* v. *Andrew*[20] by the phrase 'the transaction'. He felt that Wild C.J., having found that Mr Tanner had failed to show the 'righteousness of the transaction' as regards the increase in his legacy, was not bound to set aside the 1966 will *as a whole*. Speaking of the trial decision he said[21]

> It seems to me that he [Wild C.J.] assumed that the "transaction" the "righteousness" of which is to be made the subject of inquiry was the execution of the will — the whole

12. *Tanner*, n. 1, at 73.
13. Unreported.
14. *Tanner*, n. 1, per MacArthur J. at 73 ll 42-49.
15. See n. 5.
16. *Tanner* n. 1, at 73, ll. 8-10.
17. See n. 11.
18. See n. 5.
19. See n. 11, 159 et seq.
20. See n. 7.
21. *Tanner*, n. 1, at 90.

> will. But the cases do not appear to me generally to use the words "the righteousness of the transaction" in quite this sense. These words, where they are used, seem to me to refer rather to the particular benefaction of the person propounding the will, which may be quite a different matter, and may lead to quite a different result.

He went on to consider *Barry* v. *Butlin*,[22] *Fulton* v. *Andrew*[23] and *Craig* v. *Lamoureux*[24] and concluded that in each of these cases 'the transaction' referred to was the transaction in respect of the legacy of the beneficiary who had prepared the will. In respect of *Tyrrell* v. *Painton*[25] he said[26]

> . . . Davey L.J. does use the words in resolving the same question as that raised in this case — whether the whole second will must be granted probate or not. But in that case it should be noted that the second will gave to the proponent of it 'nearly the whole of (the testatrix's) property'; and accordingly the will and the benefaction of the proponent could properly be regarded as in fact *the same* transaction. That cannot be said of the case before us, in which there were other very substantial beneficiaries named in the will under examination whose parts in the events under consideration were never in the slightest degree assailed.

He concluded, regarding the righteousness of the transaction of the person propounding the will, that[27]

> . . . the unrighteousness of the transaction is not properly to be accepted as a decisive reason for refusing probate *of the whole will*, including the benefactions of the niece, the grandnieces, and grandnephew, the righteousness of which was not attacked.

Fourthly, the Court of Appeal considered the so-called 'rule in *Guardhouse* v. *Blackburn*'[28] which arose as a result of a strict interpretation of the Wills Act.[29] There two words inadvertently included by a solicitor in a codicil had the effect, if read literally, of defeating two very substantial legacies under the will. Sir J. P. Wilde[30] held that (except where fraud had been practiced on the testator)[31]

> the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when

22. See n. 5.
23. See n. 7.
24. [1920] A.C. 349.
25. See n. 11.
26. *Tanner*, n. 1, at 91.
27. Idem.
28. (1866) L.R. 1 P & D 109.
29. 1937 (U.K.).
30. Sitting alone.
31. See n. 28, at 116.

> coupled with his due execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof.

Atter v. *Atkinson*[32] was a case with facts similar to *Tanner*. There, Sir J. P. Wilde (addressing the jury) said,[33]

> There is a proposition of law, however, which I consider it is my duty to put before you. The question of fact is, did [the testatrix] really ever read the contents of this document? If you are satisfied that she did read it, then, as a proposition of law, I feel bound to tell you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity,[34] she read this residuary clause, the fact that she afterwards put her signature to it is conclusive to show that she knew and approved of its contents.

These statements have been approached with caution. The headnote of *Fulton* v. *Andrew*[35] states,[36]

> There is no unyielding rule of law (especially where the element of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further enquiry is shut out.

This area of the law was recently discussed in *Re Morris (Deceased)*.[37] That was a case where a codicil, as a result of a solicitor's inadvertence, revoked clauses 3 and 7 of a will instead of clauses 3 and 7(iv). Under clause 7 there were some twenty different legacies. The Court declined to grant probate of the codicil.

MacArthur J. discussed *Guardhouse* v. *Blackburn* and decided that while there may well have been "good reasons in the interests of justice nearly 100 years ago which compelled the Court to fetter its own power to get at the true facts; that the more modern trend in many fields had been to strike such fetters off".[38]

He also quoted Latey J.'s opinion[39] that the modern position is as put by Sachs J. in *Crerar* v. *Crerar*[40] and that the Court has "to consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact

32. (1869) L.R. 1 P & D 665.
33. See n. 32 (Again sitting alone) at 670.
34. And presumably, in the absence of fraud.
35. See n. 7. The headnote accurately expresses the decision on this point.
36. Cited by Turner P. in *Tanner*, n. 1, at 89.
37. (1971) P. 62.
38. See n. 1, 74.
39. See n. 37.
40. Unreported (1956); cited, n. 1, 74.

that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive nor do they raise a presumption of law".[41]

Although recognising that *Re Morris (Deceased)*[42] and *Crerar* v. *Crerar*[43] were both cases involving mistake, MacArthur J. 'saw no reason why the principle should not be of general application'. He observed[44]

> I think that in the present case the facts . . . that the will was read over to the testatrix and that she executed it are not conclusive on the question whether she knew and approved the contents of the will; but the facts must be given 'the full weight apposite in the circumstances'.

Turner P. did not discuss *Re Morris (Deceased)*,[45] but he reached a similar conclusion based on *Barry* v. *Butlin*,[46] *Fulton* v. *Andrew*[47] and *Wintle* v. *Nye*.[48]

THE COURT OF APPEAL'S DECISION

The Court of Appeal decided against the appellants and the 1966 will. Some of the Court's reasons relate to detailed study of the relationship of the evidence to various notes and papers and there is not space to consider them here, but the major reasons are more easily stated.

i "(2) Mrs Budd had complete trust and confidence in Mr Tanner as regards her business affairs and she relied on him alone. He was in a position of influence towards her."[49]

ii The difference between the 1966 will and Mrs Budd's previous wills (1961, 1952, and 1952) which were all quite similar.

iii "(6) Mr Tanner kept the 1966 will secret (except as regards his wife) until after Mrs Budd's death, a period of about 18 months. This is a suspicious circumstance which has been specifically referred to in some of the decided cases, e.g. *Wintle* v. *Nye*."[50]

iv And lastly, the large *inter vivos* gift to Mrs Tanner, and the large interest-free loan to Mr Tanner.

MacArthur J. concluded,[51]

> I have been left in no doubt, on a survey of the whole of the

41. Cited, n. 1, 74.
42. See n. 37.
43. Unreported; cited, n. 1.
44. See n. 1, 74.
45. See n. 37.
46. See n. 5.
47. See n. 7.
48. [1959] 1 W.L.R. 284.
49. See n. 1, at 85.
50. See n. 48.
51. Ibid., 87.

evidence, that the appellants have failed to establish the very heavy onus of proof that rests upon them, and that they have failed to show that the 1966 will does express the true will of the deceased.

Richmond J. concurred, giving no separate judgment.

Turner P. agreed, saying "I think that it has been necessary, in affirming [Wild C.J.'s] decision, as I now do, to state clearly what are the grounds upon which for myself I would affirm it. These do not include the righteousness of the transaction;[52] but a broad survey of the whole of the circumstances, which I adopt with gratitude from the judgment of MacArthur J., has left me in no doubt that their effect should have been — as it was — that those propounding the second will failed to satisfy him, in the words of *Theobald* 13th ed. 111, that the testatrix in fact knew and approved of its contents".[53]

Accordingly the appeal against the decision of Wild C.J. was dismissed.

CONSIDERATIONS ARISING FROM THE DECISION

First, should the whole of the 1966 will have been set aside?

(i) It may be that the whole of the 1966 will was set aside on the grounds of the first principle of *Barry* v. *Butlin*.[54] That is, where any person propounds a will there is an onus on him to satisfy the Court that the instrument so propounded is, in fact, the last will of a free and capable testator. In general, in the case of the majority of wills, the proof of due execution and the absence of any suspicious circumstances will be sufficient to satisfy the Court.

However, where there are suspicious circumstances the Court will require much stronger proof. One of the most suspicious circumstances will be that a person who takes a benefit under the will, has been instrumental in its preparation. In some cases the suspicion will be easily removed. Often aged persons will have assistance in their affairs from members of their families, and equally often they will make testamentary provision for such persons; but additional circumstances may make apparently innocent assistance sinister.

It is clear from the cases what some of these additional circumstances will be:

(a) a scheme of disposition markedly different from previous careful wills and which has increased emphasis on the assisting party (or some person closely associated with him).

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52. Bearing in mind the narrow scope he gives to the phrase 'the righteousness of the transaction'. He is referring to his affirmation of Wild C.J.'s decision to cut down the whole 1966 will.

53. See n. 1, at 92.

54. See n. 5.

(b) the suppression of such a will from other family members and friends until after the testator's death; and

(c) generous provision for an assisting party already well provided for *inter vivos*, if at the expense of others not so provided for.

It seems that the suspicion of the Court in the present case was aroused against the propounder of the 1966 will *either* on the ground that Mr Tanner's wife took a substantial benefit under the will and he had prepared it, *or*, on the grounds of *his* benefit. Once this suspicion was aroused, the Court looked at all the evidence and found, *not only* had the Tanner's failed to satisfy the Court as to the righteousness of their transaction, *but also* that taking all the circumstances into account the Court felt that the onus probandi had not been satisfied; that is, that the party propounding the will had failed to satisfy them that the instrument so propounded was the last will of a free and capable testator. So to find, the Court need not have before it evidence of either fraud or undue influence.

(ii) It may also be that the whole of the 1966 will was set aside because of the difficulties imposed by the pleadings.[55] Turner P. pointed out[56] that if the proceedings had been differently conducted it may have been possible to grant partial probate of the 1966 will, striking out the bequests of the Tanner's, but leaving the others intact. Is there any reason why he could not have disregarded the pleadings and so decided?

It seems clear from rules 59 and 61 or the Code of Civil Procedure[57] that Wild C.J. was entitled so to join the parties. Rule 59 (and similarly rule 61) speak of joining parties when separate actions would give rise to "any common questions of law or fact". Were there any such common questions?

If the Tanner's brought an action seeking probate of the 1966 will the questions of law involved would be, first, the general *onus probandi*, and second, the special onus thrown on them by Mr Tanner's participation in the preparation of the will. If the others taking increased benefits under the 1966 will sought probate, they would have thrown on them only the general *onus probandi*. In both cases the same questions of fact would be canvassed.

Accordingly it is submitted that the cases would have been similar enough to satisfy the requirements of Rules 59 and 61. They provide that "judgment may be given for such one or more of (the parties joined) as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment".

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55. By 'the pleadings' Turner P. seems to have meant the joining of the Tanner's with the other beneficiaries who took increased benefits under the 1966 will.
56. See n. 1, at 90.
57. Sims Practice & Procedure (11th ed.).

Hence it is submitted that the pleadings were not really a bar to Turner P. granting partial probate of the 1966 will. The real bar, clearly, was his decision in terms of *Barry* v. *Butlin*[58] that the general *onus probandi* had not been satisfied, as regards the whole will.

Secondly, was the onus of proof properly understood in the Supreme Court? It may be that Wild C.J. joined all those taking increased benefits under the 1966 will as propounders because he regarded their benefits as suspect. If he so regarded them because of the relationship of those persons to Mr Tanner, then it may well be argued that his net was cast too wide. In cases where the benefit has gone not directly to the preparer of the will the Courts have not put the relationship giving rise to suspicion much wider than husband and wife, or parent and child.

While cases may no doubt be imagined where benefits to a person outside those relationships with the preparer were regarded as suspect, it is submitted that to have done so here would have been incorrect. Especially where all those concerned were not only relatives of the preparer, but also the only close relatives of the testatrix.

No doubt a line must be drawn somewhere between persons who take a benefit, and have a relationship with the preparer, and those 'ordinary legatees' whose benefit is in no way suspect, but the Court of Appeal gives no indication where it ought to go in principle. As these cases usually involve complex questions of fact it may well, however, be best for the decision to be left to the Court in each case rather than to lay down a possibly restrictive principle.

Thirdly, when should partial probate be granted? Clauses are occasionally struck out of wills; sometimes as being too vague,[59] sometimes because they contain conditions impossible to fulfill[60] and so on. But what of a case where a legacy has been held invalid by virtue of suspicion attaching from participation in the preparation of the will? If the suspect legacy is ruled out, is the testator's will given better effect by the granting of partial probate of that will, or by granting probate of an earlier will (or finding the deceased intestate)?

A certain reluctance to grant partial probate is understandable. This would arise from a feeling that the suspect benefit may have been given "at the expense" of other beneficiaries, and that persons who take under the contested will might have been differently (usually more generously) dealt with had there been no suspect bequest. On the other hand, those taking even if partial probate is granted may well receive more than under a previous will (as would have been the case for the other beneficiaries under the 1966 will in *Tanner*).

As *Tanner* shows the answer is, clearly, that where the Court is convinced that the circumstances surrounding the will are such that it does not feel that it represents the true will of the testator in any

59. In *Re Warren (Dec'd), Taylor* v. *Warren* [1934] N.Z.L.R., s. 193.
60. *Re Smith (Dec'd)* [1908] G.L.R. 111.

respect then it will be cut down *in toto*. But where the Court thinks that the non-suspect bequests *do* express the true will of the deceased, then partial probate should be granted.
58. See n. 8.

Fourthly, was Turner P. correct as to the effect of granting partial probate of the 1966 will?

Turner P. said that[61] granting partial probate of the rest of the 1966 will (disallowing the bequests to the Tanner's) would have had the same result, as far as they were concerned, as cutting down the whole will. It is submitted that this view may be incorrect.

Presumably if the whole 1966 will was cut down the Tanner's took their bequests under the 1961 will. That presumably gave Mrs Tanner £2,000 and Mr Tanner £1,000. On the other hand if partial probate were granted of the 1966 will (i.e. cutting down only the bequests to the Tanners) then the Tanners would *prima facie* take nothing. However the *prima facie* disentitlement might have been alleviated by the provisions of the Administration Act, 1952.

As Mrs Tanner's bequest was a fraction of residue, Mrs Budd would have been intestate as to that fraction. Under s. 56 1(e) of the Act it would appear that half of that fraction would go to Mrs Tanner and half to her sister who would take because Mrs Budd left no spouse, no issue and (presumably) no parents. That leaves Mrs Tanner and her sister as issue of the next class — brothers and sisters of the deceased.

That would give Mrs Tanner £12,000, unless the Court could find some reason for refusing to apply the Act. The Court might assert a jurisdiction to prevent a statute being used as an instrument of fraud (but no fraud is here alleged), or to prevent anyone profiting by their own wrong (but there is no suggestion of any wrong by Mrs Tanner — and only a *suspicion* attached to her husband).

If this possibility had been examined by the Court of Appeal, it would be interesting to see to whether it may have influenced their decision to cut down the whole 1966 will.

D. A. WILSON

61. See n. 1, 90.