PROVING MISSING WILLS:

COOPER AND ANOR V CHAPMAN AND ANOR

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INTRODUCTION

In *Re the estate of Cooper, deceased (probate); Cooper (a child, by her litigation friend) and another v Chapman and others* [2022] EWHC 1000 (Ch), a draft will found on the Deceased's computer after his death could be admitted to probate as his last will in circumstances where the executed will could not be located, and the fact that it could not be located did not mean that it should be presumed to have been revoked by the Deceased.

The Court determined preliminary issues in a probate trial, where it concluded on the evidence (which included the evidence of the attesting witnesses to the will and expert evidence as to the date that the computer file had been created) that the draft will had been executed by the Deceased and attested by relatives of the First Defendant. Whilst the Deceased had not signed the will in the presence of the witnesses, he had 'acknowledged' his signature in their presence by gesturing towards the will and watching them sign it. This was sufficient to satisfy section 9 of the Wills Act 1837.

The Court also found that the will should not be presumed to have been revoked by the Deceased as a result of the loss of the original will in circumstances where there had not been any change in the Deceased's personal circumstances between the making of the will and his death approximately 18 months later.

BACKGROUND

The Deceased had been married between 2003 and 2016 (to the litigation friend of the Claimants in this case) and had two children of that marriage (the Claimants). He made a will in 2009 which left his estate to his wife and, in default of that gift, to his children. In late 2014, the Deceased suffered a sudden and catastrophic collapse in his mental health following recollections of childhood trauma. He became a psychiatric inpatient and his marriage collapsed.

Following his separation from his wife, the Deceased started a relationship with the First Defendant, a longstanding friend. His divorce was finalised in 2016 and in 2018 the Deceased decided (on the First Defendant's case) to make a new will which benefited the First Defendant. He drafted a will from a template on his computer and asked Mr and Mrs Hartley, relatives of the First Defendant, to witness it. There was evidence that the Deceased was resentful of the result of his divorce and that he stated that he did not wish to make provision for the Claimants, who he considered to have been adequately provided for in his divorce.

The Deceased died unexpectedly in 2019. The executrices of the 2009 will sought to administer the estate on the basis of that will. The First Defendant could not find the executed 2018 will but did find a draft of it on the Deceased's computer, which she sought to advance as the Deceased's last will. The Claimants issued proceedings for a grant of probate on the 2009 will, on the grounds that there was no evidence that the Deceased had executed the 2018 will (and that the First Defendant and the attesting witnesses' evidence in this regard was untruthful), alternatively, in the event that a will had been executed, that the fact that an executed will could not be found meant that the Deceased should be presumed to have revoked it.

The Court ordered that the questions of (a) whether the 2018 will had been validly executed; (b) what its contents were; and (c) whether it should be presumed to have been revoked by the Deceased, should be tried as preliminary issues.

THE DECISION

The trial judge (HHJ Klein, sitting as a Judge of the High Court) found that the 2018 will had been validly executed on 27 March 2018 and that, on the balance of probabilities, it had not been revoked by the Deceased. He found Mr and Mrs Hartley, the attesting witnesses, to be credible; they described – albeit not in identical terms – how the Deceased had signed the 2018 will prior to their arrival but gestured towards the will in their presence and stood by when they attested it. The Judge was satisfied that this was sufficient to constitute 'acknowledgement' of the Deceased's signature.

Another key piece of evidence, given the doubts cast by the Claimants on the attesting witnesses' evidence, was the expert evidence as to the date that the computer file had been created and last accessed; this was consistent with the date of execution as set out in Mr and Mrs Hartley's evidence.

The judge was satisfied that the First Defendant had rebutted the presumption of revocation raised when a duly executed will cannot be found after a testator dies. There had been no change in the Deceased's circumstances between the making of the will and his death; if anything, there was evidence (in the form of financial gifts and a nomination of the Deceased's pension) that the Deceased had a continuing wish to make financial provision for the First Defendant, and an absence of evidence that there was any change in the Deceased's view of the Claimants.

The Judge therefore found that the 2018 will had been duly executed in the form of the draft found on the Deceased's computer and had not been revoked. The First Defendant will therefore be entitled to a grant of probate on the said will (subject to a further challenge by the Claimants in respect of the Deceased's testamentary capacity).

THE PRACTICAL IMPLICATIONS OF THIS DECISION

It is generally understood that in order to be valid, a will must be signed in the presence of two attesting witnesses present at the same time, and that the original document must be produced after the testator's death in order to obtain a grant of probate. However, neither of these statements is strictly true. It is possible to prove a copy or draft will if the Court is satisfied that the original was executed and has subsequently been lost, and that the loss was not attributable to a revocation of the will by destruction. These questions will obviously be fact-sensitive and much will depend on the evidence available; in this case, the First Defendant was able to call the attesting witnesses to the 2018 will and was also able to point to the fact that the computer metadata evidence corroborated her position.

Further, under s.9 of the Wills Act 1837 a will is valid if the testator 'acknowledges' his previously-executed signature on his will. However, s.9 does not define what constitutes such an 'acknowledgment'; the authorities make clear that context is important and that even very small gestures can be sufficient. HHJ Klein considered the authorities in this area and found that the Deceased's gesture had been sufficient to constitute an 'acknowledgement'. In this case it was held that a hand gesture towards a pre-signed will, without any verbal acknowledgment, can be sufficient

to satisfy s.9; this is a rare modern case in this regard, with the majority of the authorities on the point being of some age.

Further, although where an original executed will cannot be produced after the testator's death there is a presumption that he destroyed it with the intention of revoking it, little evidence is now required to displace that presumption. The Court found that the absence of any evidence that there had been a change in the Deceased's personal circumstances – and thus his likely testamentary intention – between the making of the will and the Deceased's death was sufficient to rebut the presumption.

Thus, a copy of a draft (unsigned) Will found on the Deceased's computer after his death was entitled to be admitted to probate, although there remains a live issue as to the Deceased's testamentary capacity.

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