Neutral Citation Number: [2021] EWHC 937 (Ch)

Case No: PT-2020-CDF-000031

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

In the Estate of Elizabeth Pauline Thomas (deceased)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 19 April 2021

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

- -

Between:

DAVID RHYS THOMAS **(as Executor of the Will of** **Elizabeth Pauline Thomas deceased)**	**Claimant**
- and -	
(1) OWEN LAWLEY THOMAS **(2) ELEANOR FAYE THOMAS** **(3) GARETH JOHN THOMAS** **(4) GWENNAN THOMAS** **(5) SAMUEL THOMAS** **(6) RAPHAEL THOMAS**	**Defendants**

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Joseph Edwards (instructed by **Geraint Jones & Co**) for the **Claimant**
The **Defendants** appeared **in person**.

Hearing date: 16 April 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties by email and release to BAILII. The date and time for hand-down is deemed to be 2 p.m. on Monday 19 April 2021.

JUDGE KEYSER QC:

Introduction

1. This is my judgment upon a Part 8 claim for construction of a will. Although it is naturally a matter of concern to the parties, it involves no significant issue of law. I gave my decision at the conclusion of the hearing and now give my reasons.

2. Mrs Elizabeth Pauline Thomas ("the Deceased") died on 21 March 2018. She left a will dated 30 September 2004 ("the Will"). Probate of the Will was on 8 March 2019 granted to one of her sons, David, who is the executor named in the Will. The draft estate accounts showed assets of about £233,000 in August 2019.

3. The Deceased's husband had predeceased her, but she was survived by her three sons: David, who is the claimant in these proceedings; Owen, who is the first defendant; and Gareth, who is the third defendant.

4. The Deceased was also survived by a number of grandchildren, several of whom are mentioned by name in the Will. David has four children: Ellen Christie and Jens Rhys were born before the Will was made; Hannah and Niels have been born subsequently. Owen's daughter by a former marriage is Eleanor Faye; she is the second defendant and is referred to in the Will as "Fay". Owen has two further adult children by subsequent relationships, Oliver and Rose; they are not mentioned in the Will, although the Deceased knew of them when she made the Will and subsequently got to know them. Gareth has three adult children by his first wife: Gwennan, Samuel and Raphael; they are, respectively, the fourth, fifth and sixth defendants and are mentioned in the Will. Gareth also has three children by his second wife, all of whom are still minors ("the minor grandchildren"): Eliza, Aleksandra and Simone; they are not mentioned in the Will and were all born after its execution but before the death of the Deceased.

5. In January 2020 solicitors instructed by David as executor informed Gareth that David intended to distribute the Deceased's estate in accordance with the terms of the Will. All of the other residuary beneficiaries named in the Will have expressed agreement to that course, but Gareth raised objections, which he set out in a number of emails in and after January 2020. Much of the content of the emails concerns longstanding family grievances and does not warrant repetition here. However, Gareth made the following contentions: first, the Deceased was mentally ill when she made the Will; second, the Will was "invalid for many other reasons", which were unspecified; third, it was unreasonable that the Will made no provision for the minor grandchildren; fourth, he intended to bring a claim on behalf of the minor grandchildren under the Inheritance (Provision for Family and Dependants) Act 1975; fifth, David had wrongly given the Deceased's substantial library of religious books to a charity in lieu of a modest pecuniary gift in the Will and had in other respects failed to preserve the assets of the estates of the Deceased and of her late husband.

6. In consequence of Gareth's objections, David commenced these Part 8 proceedings on 30 July 2020. He seeks a decision as to the construction of the Will, in particular as to whether the minor grandchildren have any entitlement under it. He also seeks a direction giving him liberty to distribute the estate in accordance with the Will as so construed, on the footing that it is valid, unless within short order Gareth commence a

claim for revocation of the grant of probate or for provision for the minor grandchildren under the Inheritance (Provision for Family and Dependants) Act 1975.

7. All of the defendants apart from Gareth have filed acknowledgments of service stating that they do not intend to contest the claim; indeed, they are keen for distribution to take place without further delay. Gareth belatedly filed an acknowledgment of service stating his intention to contest the claim on these grounds:

> "That the main narrative is false.
>
> That the distribution of the will is both ambiguous, lacking inventory, and fails to describe assets at all, as well as dubious validity of distribution of all or part."

8. The first hearing of the claim was on 16 December 2020. None of the defendants had filed evidence; Gareth had not validly acknowledged service, though he attended the hearing. The district judge gave directions for amendment of the claim form to include a request for a direction to permit distribution if Gareth did not commence proceedings, for service of witness statements by any defendant wishing to give evidence at the trial by 13 January 2021, and thereafter for a one-day trial in a window commencing in March 2021. Gareth was subsequently granted an extension until 10 February 2021 for service of his witness statement.

9. Various witness statements were filed and served pursuant to the directions, including an unsigned statement from Gareth dated 9 February 2021. I read the statements but refused to receive oral evidence at the trial. None of the statements had any bearing on the issues in the case and there was never any likelihood that they would; they largely do no more than air grievances and disagreements that have arisen in the family over several decades. The issues that fall to be decided in these proceedings concern solely the meaning of the Will and whether David should be able to distribute in accordance with its terms unless Gareth brings proceedings within a defined time. The Part 8 procedure provides for all necessary material to be put before the court promptly, and by the time of the first hearing all of the material required or likely to be required for the determination of the claim was before the court. No application was ever made for permission to make a Part 20 claim within the proceedings.

The Will

10. The Will was clearly the product of much care and thought, but it was not professionally drafted; perhaps for that reason its interpretation has given rise to disagreement, though not in my view to any real difficulty. The easiest course for the purposes of this judgment is to set out its main provisions verbatim; however, for purposes of simpler reading and exposition, I shall provide numbering for the different paragraphs, which are unnumbered in the original and shall adjust the formatting to a small extent. After appointing David as the sole executor, the Will continued as follows:

"[1] In the event that I shall die before my husband John Thomas, I leave all my property to him.

[2] If my husband has died first, I leave my property to be divided amongst my sons and their heirs. At present, these are as follows: At present, these are as follows: Sons—Owen, Gareth and David; their children are Owen/Fay; Gareth/Gwennan and Samuel and Raphael; David/Ellen Christie Thomas and Jens Rhys Thomas. Any child still a minor when this will takes effect shall have their portion available to them for education, or some other need, at the sole discretion of the trustee/trustees.

[3] I give and bequeath as follows: Firstly, Two Hundred Pounds to the charity, The Vision of Good Hope, Moldova, … Secondly, Two Hundred Pounds to the Evangelical Library … Thirdly, Two Hundred Pounds to the Slavlands Christian Fellowship …, the three being Charities.

[4] The proceeds from the realisation of my assets shall be divided according to the following rules. As there are three sons, the proceeds should be divided into three equal parts, A, B and C.

(A) Further divided: two-thirds to Owen and one-third to Fay.

(B) For Gareth Thomas and his three children, Gwennan, Samuel and Raphael, the amount divided into four equal parts (that is, quartered), each of them getting a quarter. (Gareth was unable to assist his children during my lifetime, and this may help to redress that.)

(C) For David, a whole equal part, and, if deceased, the whole to his wife Jacomine. Should she also have died, one of the Trustees to be appointed (below) should disburse monies as needed for their children, at present only Ellen Christie Thomas and Jens Rhys Thomas.

[5] At this date, several of the above children being yet minors, I appoint two trustees who shall take care of their inheritances until they come of age, and they have their own care of their inheritance. I appoint David Rhys Thomas of [address] and Mrs Melanie Thomas, sometimes known as Mrs Wilmot-Deere, of [address], as trustees for those inheritors who may be yet minors at the time when this will comes into force."

How to construe a Will

11. The way in which courts interpret wills was set out very clearly by Lord Neuberger in his judgment in *Marley v Rawlings* [2012] UKSC 2, [2015] 1 AC 129:

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. In this connection, see *Prenn* at 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, per Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.
>
> 20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, 'No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.' To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that '[c]ourts will never construe words in a vacuum'.
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> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. …
>
> …
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> 23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see e.g. *Theobald on Wills*, 17th edition, chapter 15 and the recent supplement supports such an approach as indicated in *RSPCA v Shoup* [2011] 1 WLR 980 at paras 22 and

31). Indeed, the well-known suggestion of James LJ in *Boyes v Cook* (1880) 14 Ch D 53, 56, that, when interpreting a will, the court should 'place [itself] in [the testator's] arm-chair', is consistent with the approach of interpretation by reference to the factual context.

24. However, there is now a highly relevant statutory provision relating to the interpretation of wills, namely section 21 of the 1982 Act [viz. the Administration of Justice Act 1982] ('section 21'). Section 21 is headed 'Interpretation of wills – general rules as to evidence', and is in the following terms:

> (1) This section applies to a will –
>
> a) in so far as any part of it is meaningless;
>
> b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation

25. In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above. In particular, section 21(1)(c) shows that 'evidence' is admissible when construing a will, and that that includes the 'surrounding circumstances'. However, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question.

26. Accordingly, as I see it, save where section 21(1) applies, a will is to be interpreted in the same way as any other document, but, in addition, in relation to a will, or a provision in a will, to which section 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator's actual intention (e.g. by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared)."

Discussion

12. In my judgment, the meaning of the Will is perfectly straightforward. Its effect, in the circumstances that exist, can be summarised in the following manner (which is barely more than a paraphrase of the original text):

    1) First, the three pecuniary gifts, each of £200, are to be paid to the named charities.

    2) Second, the residue is to be divided into three equal parts: Part A, Part B and Part C.

    3) Third, those Parts are to be applied in the following manner:

        i. Part A is to be divided into two unequal parts: two-thirds is to go to Owen; one-third is to go to Faye.

        ii. Part B is to be divided into four equal parts: one each to Gareth, Gwennan, Samuel and Raphael.

        iii. Part C is to go in its entirety to David.

    4) Fourth, if any of the grandchildren who take under the Will are minors at the date of the death of the Deceased, their shares are to be held by the trustees until they come of age. (In fact, none of the grandchildren who take under the Will are minors.)

13. Although it was suggested at an earlier stage of the proceedings that the reference to "my sons and their heirs" in what I have shown as clause [2] of the Will might create some ambiguity, it does not do so. It is simply a summary explanation of the scheme of the Will, which is that the residue is applied in accordance with a threefold division pertaining to the three sons. Each division benefits a specific son and his "heirs" (here meaning little more than those who stand to take under him or by virtue of familial relationship to him), but it does so in the manner described in what I have shown as clause [4].

14. Any contention that the minor grandchildren take under the Will would be plainly wrong: it would be directly contrary to the provisions of the Will and would require rewriting it. Indeed, at the hearing before me Gareth made this point of his own accord. There can of course be no question of the Deceased having had any actual intention contrary to that expressed by the Will when she made it, so far as concerns the minor grandchildren, because they had not then been born.

15. No further questions as to the interpretation of the Will fall to be answered in these proceedings.

16. There remains the matter of the threat of further proceedings by Gareth against David as executor of the Will. Such proceedings can be considered in two categories.

17. First, Gareth has from time to time intimated an intention to bring proceedings for revocation of the grant of probate (on the grounds that the Deceased lacked capacity, or for some other unspecified reason) or for provision for the minor grandchildren

under the Inheritance (Provision for Family and Dependants) Act 1975. The prospect of such a claim can be addressed by a direction that, unless Gareth commence such a claim within a given period, David shall be at liberty to distribute the estate in accordance with the terms of the Will on the footing that the Will is valid. (See *Fitzhugh Gates (a firm) v Sherman* [2003] EWCA Civ 886, *per* Carnwath LJ at [55]-[57].) No such claim falls for consideration now; nevertheless, I shall make two comments. As regards revocation of the grant of probate, no substantial basis has yet been shown for supposing that the Deceased lacked testamentary capacity when she made the Will or that the Will is for any other reason invalid; and it has never been explained, nor is it apparent, how revocation of the grant of probate would assist either Gareth or the minor grandchildren. As for the suggested claim under the 1975 Act, I hesitate to say much about the rights of minors who are not represented before the court. However, quite apart from issues concerning time limits, it would be necessary for anyone bringing such a claim to consider the basis on which those for whom provision was being sought were qualified to apply for it under section 1 of the 1975 Act.

18. Second, Gareth has complained of what he says is David's failure to preserve the assets in the estate and keep it from loss. He concludes his witness statement by saying:

> "Being as the issues of inventory & value don't directly have a bearing on the case in hand, I intend to open a separate case raised by the issues of the actual estate value and how it was handled. This case will have a direct bearing as to whether the will can be executed [by which he means put into effect] at all and by whom in its current form."

The first sentence of that passage is correct in saying that such matters have no bearing on the present case. The second sentence is incorrect, if it means that the assets known to be in the estate cannot be distributed in accordance with the terms of the Will. If Gareth were to commence any proceedings against David for breach of his duty as executor, the merits of such proceedings and the nature of any relief would fall to be considered then; they have no bearing on matters at present.

The Order

19. For the reasons given above, and as I indicated at the conclusion of the hearing, I shall make a declaration as to the meaning of the Will in accordance with paragraphs 12 to 14 above and shall make an order enabling David to distribute the residuary estate in accordance with the Will as so interpreted unless Gareth shall have brought a claim for revocation of the grant or for relief under the 1975 Act within 28 days.

20. For the reasons stated at the conclusion of the hearing and not here repeated, Gareth will pay David's costs of these proceedings on the indemnity basis. Insofar as he has not paid those costs by the time the residuary estate is distributed, they may be taken out of his share.