

CHANNON & ANOR v PERKINS (A FIRM) & ORS (2005)

CA (Civ Div) (Mummery LJ, Arden LJ, Neuberger LJ) 1/12/2005

SUCCESSION - CIVIL PROCEDURE

ATTESTATION : WILLS : WITNESSES : WILL VALID ON FACE : NO RECOLLECTION OF ATTESTATION : PRESUMPTION OF DUE EXECUTION OF WILL : WITNESSES TO WILLS : POOR RECOLLECTIONS : TEST TO REBUT PRESUMPTION OF DUE EXECUTION : VALIDITY OF WILLS ON FACE : TESTATORS INTENTIONS : RELIABILITY OF WITNESSES : s.9 WILLS ACT 1837

Where a will was valid on its face and the witnesses to it accepted that the signatures that appeared on it were their own, but had no recollection of the execution of the will, taking the evidence as a whole a judge could not properly have reached the conclusion that such evidence satisfied the high test to rebut the presumption of due execution.

The first appellant (D) appealed against a decision that a will under which she was a substantial beneficiary had not been validly executed and should not be admitted to probate. The deceased (F) had made the will in 1996 when living with D. The will appeared on its face to have been properly attested in fulfilment of the requirements in the Wills Act 1837 s.9. At trial, the two witnesses (R and W) whose signatures appeared on the will accepted that the signatures were their own but denied having any recollection of attesting the will. Due to a personal trauma D could not remember the actual execution of the will. The judge held that her evidence was of no assistance in determining how R and W had come to be witnesses. He went on to hold that whilst giving the strongest weight to the presumption of due execution, the evidence of R and W comprised sufficiently strong evidence to rebut it. D argued that the judge had failed to give sufficient weight to the presumption of due execution and had erred in regarding the evidence of R and W as sufficiently credible to rebut it.

HELD: The judge had been wrong in deciding not to admit the will to probate. The strongest evidence was required to rebut the presumption of due execution of a will, *Sherrington v Sherrington (2005) EWCA Civ 326*, Times, March 24, 2005 considered. Where a will had been on its face properly executed in accordance with s.9 of the 1837 Act and represented the testator's intentions, there were good reasons for not holding that the will had not been properly executed on extraneous evidence. First, there was the practical reason that time diminished the reliability of witnesses and the greater the passage of time the less accurate the evidence would be. Such witnesses also had no interest under the wills that they had attested. Secondly, there was the matter of principle that rebutting the presumption deprived the testator of giving effect to his wishes where he had taken care that they should take effect in accordance with the requirements of the law. In the instant case, the judge had erred in holding that D could be of no assistance in determining how R and W had come to be witnesses. R and W had been friends of D and F and on its face that explanation was entirely convincing. D's evidence was important in setting the scene and in determining the inherent likelihood of what had occurred. Although the judge had referred to the fact that D could not remember the execution of the will as "remarkable" he had not suggested that D was dishonest. In relation to the evidence of R and W, both witnesses acknowledged that the signatures were their own but denied any recollection of signing the will. The fact that a witness could not remember signing a document tended to crystallise in his or her mind a view of the event that it had not happened at all. Moreover, in the present case there had been a significant period of 7 to 9 years between the execution of the will and the evidence of R and W. It would have been better if the judge had taken a more inquiring attitude to the various possibilities as to what could have occurred. It was impossible to lay down any rule but where a will was valid on its face and recollections were poor it might behove a judge to inquire into such possibilities. In all the circumstances, taking the evidence as a whole, the judge could not properly have reached the conclusion that such evidence satisfied the high test in *Sherrington*. However, in fairness to the judge, the decision in *Sherrington* had been made after his judgment and his approach might have been different if he had had the advantage of the reasoning in that case.

Appeal allowed.

Counsel:

For the first appellant: Thomas Dumont

For the respondents: Robert Arnfield

Solicitors:

For the first appellant: Henmans

For the respondents: Mayo & Perkins

LTL 1/12/2005 EXTEMPORE (Unreported elsewhere)

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