**Paper for Chancery Bar Seminar in Isle of Man**

# KNOWLEDGE AND APPROVAL – WHAT TO LOOK FOR?

**Alexander Learmonth**

New Square Chambers, 12 New Square, Lincoln's Inn

For a will to be valid, the formal requirements of signature and attestation must have been complied with. The testator must have sufficient capacity. The making of the will must be free of fraud or coercion. And the testator must 'know and approve' the contents of the will. In other words, unlike contracts or other legal documents, it is not enough merely the signatory has signed, in the absence of fraud, misrepresentation, or duress. The court must be satisfied that the testator knows what he is signing. Nonetheless, the fact that the testator has signed is itself prima facie evidence.

So what are we looking for when we want to prove a will? There are two aspects to this question. First, what exactly does it mean to 'know and approve' the contents of one's will? Secondly, what evidence in practice do we need to lead to satisfy a Court that this testator did know and approve his will? Neither of these questions are free from controversy, and controversially I begin by looking at the second. This is not because it is logically prior. It is not; logically we ought to know *what* we are trying to prove before we consider *how* we can prove it. I tackle the question of proof first, because oddly it is if anything less controversial than the question of what we are trying to prove. Ironically, it is perhaps this approach in the cases that has led to the confusion.

The traditional approach has been to apply various presumptions. The onus of proving a will is on the person propounding it. The court will presume knowledge and approval from the fact that a will has been duly executed by a testator with capacity. Back in 1838, the Privy Council explained in *Barry v Butlin* that where a will had been prepared by someone who took a benefit under it, affirmative evidence of knowledge and approval would be required; in other words, the presumption in favour of validity was removed, and the onus shifted back

to the person propounding the will. The testator was a man of "slender capacity, of a retired disposition, indolent habits and addicted to drinking, somewhat singular in his appearance, frivolous and even childish in his amusements and occupations". His attorney who drafted the will was to receive £3,000 under it, out of an estate of £12,000 or so, and his doctor and butler received similar amounts. His only son was excluded altogether. But he had cut off contact with his son after the latter had absconded from a criminal trial at the assizes, and having no other relatives was friendly with his doctor, lawyer and butler. The court found that the burden of showing knowledge and approval was not a particularly heavy one in the circumstances, and the evidence of the testator having annotated a draft of the will was sufficient to discharge it.

But in *Gill v Woodall* [2010] EWCA Civ 1430, Lord Neuberger of Abbotsbury MR pointed out that this series of evidential presumptions is just intended to help answer one question.

> [22] Where a judge has heard evidence of fact and expert opinion over a period of many days relating to the character and state of mind and likely desires of the testatrix and the circumstances in which the will was drafted and executed, and other relevant matters, the value of such a two-stage approach to deciding the issue of the testatrix's knowledge and approval appears to me to be questionable.
>
> … the court should "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."

One might however observe that *Barry v Butlin* was itself a case decided after hearing a great deal of evidence: 149 witnesses were examined.

At the time, the judgment in *Gill v Woodall* was considered something of a landmark in probate law. However, even since that judgment, though judges have applied the single-stage test – *Re Butcher, Wharton v Bancroft* – more have at most paid lip-service to it, and continued to be swayed by reference to the presumptions and the 'arousing of vigilance and

suspicion'. They were perhaps encouraged into the old method by the fact that Lord Neuberger himself adopted that approach in reversing the trial judge's finding of knowledge and approval:

> "[23] In order to explain why it seems to me right to take the unusual step of reversing the trial judge's conclusion that Mrs Gill knew and approved of the content of the Will, and also with a view to explaining the very unusual facts of this case, it is nonetheless convenient to follow the two stage process adopted by the Judge. After all, whether one approaches the issue, as the Judge did, in two stages, or whether one approaches it as a single question, as I would have thought was preferable, the answer should be the same."

The very unusual facts of that case were that Mrs Gill suffered from serious agoraphobia and anxiety disorder. Although she had testamentary capacity, she would have been so distressed by having to attend the solicitor's office that she would not have been able to focus on what was being said, and would just have signed to escape. Despite the actual result, the judgment in Gill is actually strongly discouraging of challenges to knowledge and approval. First, he emphasised the evidential power of a will having been prepared by a solicitor and read over to the testator before execution.

> "The proposition that Mrs Gill knew and approved of the contents of the Will appears, at first sight, very hard indeed to resist. As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will."

Secondly, Lord Neuberger also cautioned against too readily accepting parties' evidence that testators cannot have known what they were signing, influenced as it is by disappointment and corrupted by the lapse of time.

So having looked at how it is proved, by way of background, I'd like to discuss what the more fundamental question of what *it* is – what *is* knowledge and approval. The answer to that

simple question that I suggest sounds like simple common sense, but is surprisingly controversial.

The controversy is encapsulated in the expression of what knowledge and approval means Lord Neuberger's judgment in *Gill,* quoting the CA case of *Fuller v Strum*.

> "Knowledge and approval is traditional language for saying that the will *represented* the testator's testamentary intentions".

That leaves it unclear whether the will must actually give effect to those intentions, or must just be accepted by the testator as doing so; 'representing' the intentions in that looser sense.

The former approach – the commonsense approach – has a fair amount of support:

1. The Chancery Reports' *headnote* of *Gill v Woodall* is:

> "*Held* , (1) that the proper approach to the question of whether a testatrix had known and approved the contents of her will was to determine, given the effect of the factual and expert evidence, whether the testatrix had understood what was in the will when she had signed it *and what its effect would be*".

This formulation in the headnote comes not from Lord Neuberger, but from Lloyd LJ's judgment, following *Hoff v Atherton.* So, we are told, it is necessary for the testator to *understand* not only what was in the will, but also what the *effect* of the will would be. Though a testator signs a will having read every word, if he has no appreciation of what the will actually does, he does *not* know and approve it.

So, does "represent one's testamentary intentions" mean something different from "understand what he was doing and its effect"? It ought not to - both formulations derive from the same judge, Chadwick LJ, who sat in both *Fuller* and *Hoff*!

2. In *Hoff*, it had been expressly held:

> "It is not enough that he knows what is written in the document which he signs."

3. In *McCabe v McCabe* the two definitions from *Gill* are expressed as meaning the same thing:

> "a single question whether the testatrix understood what she was doing and its effect *so that* the will concerned represents her testamentary intentions".

4. In *Poole v Everall* in 2016, this was explained:

> "The question is whether he had a sufficient *understanding* of its contents *and their effect, so that* it can be said truly to represent his freely formed intention."

5. A bit further back, in *Carapeto v Good* (2002), it was said, quote:

> "I accept in principle that, in an appropriate case … proof of the requisite knowledge and approval can and will also require proof that the testator understood not just the nature of the testamentary provision he was proposing to make, but also its effect."

But other recent cases seem to have steered away from this requirement that a testator must appreciate the *effect* of the will in order to know and approve it, preferring a degree of latitude as to whether the will executed correctly sets out the testator's wishes.

At first glance, *Fitzgerald v Henerty*, 2016 (CA) appears to tend to this view. Rafferty LJ said that:

> "All that is necessary is knowledge and approval of the contents of the Will, *not* of their effect".

But This must be read in context. The point was that the testator did not give express instructions for an option clause in the will and may not have understood or approved it. The answer to the point was that the option agreement was a sensible means of giving effect to what the testator did in fact want to achieve. As Rafferty LJ says:

> "One begins with intention – here that the shares should go back to Vale — then asks whether the Will carried it through. It did."

*Kunicki v Haywards*, 2016, tackled the issue directly. It was held:

> "In my view, it is not a requirement of the plea, in all cases, that it must be established that the testator must have appreciated the legal effect of the words used in the document in issue. Suppose that a solicitor drafts a will believing it accords with her client's instructions but, through a drafting error which may be rectified by the court, the legal effect of the words is to divert a gift from its intended recipient to a third party. Suppose too that the solicitor advises or otherwise leads her client to believe that the effect of her drafting is that the intended recipient of the gift will receive it. Suppose too that the client fully and freely considers that advice or information and then approves the words used. I am of the view that it cannot be said, in these circumstances, that, solely because of the drafting error and its legal effect, the testator did not know and approve the contents of his will."

In other words, the client does not appreciate the effect of the will. He thinks the will has a dramatically different effect from its true effect. Yet apparently he still knows and approves of it. The modern cases are explained away in *Kunicki* as meaning that the testator's failure to understand the *effect* is simply an *evidential* indication that the testator never read it at all.

Note that the example is one which involves "a drafting error which may be rectified by the court". On what principled basis does the 'rectifiability' of the error affect the question of

knowledge and approval? He is trying to limit his comments to cases where irreparable harm is not caused, because rectification is available. This looks like a fudge.

In reaching that conclusion, *Kunicki* relies on old cases concerning the method of approximating rectification of wills, before the statutory power to rectify existed, by omitting words from probate that were said to have been introduced without the testator's knowledge and approval. A strong example is *Beech v Public Trustee* (1923):

> "A testator cannot give conditional approval of the words which have been put into his intended will by himself, or by others for him. He cannot say: 'I approve these words if they shall be held to bear the meaning and have the effect which I desire, but if not I do not approve them'. … if knowing the words intended to be used, he approves them and executes the will, then he knows and approves the contents of his will, and all the contents, even though such approval may be due to a mistaken belief of his own, or to honestly mistaken advice from others, as to their true meaning and effect"

But I would argue it is wrong to rely on these quasi-rectification cases. No one was seeking to invalidate the will as a whole. They were just trying to exclude some words but not others, and this necessitated all sorts of mental gymnastics: how to remove one word without changing the sense or effect of the rest of the will; whether it was legitimate just to try to get closer to the testator's intentions by omitting a word, even though it was impossible to give effect to them precisely, and so on.

In fact, in the majority of such cases, it is rarely suggested that the testator did not read the will, or did not know what the words *were*. The very reason the words were omitted was because they did not have the *effect* the testator intended. In *Re Morris* (1971), a codicil was intended to revoke clause 3 and sub-clause 7(iv) of the will, but the draftsman just wrote '3 and 7'. The testatrix read the codicil, but not in conjunction with her will, and so did not perceive the mistake. So she knew exactly what the codicil said, but did not understand its *effect*. The judge allowed the word "and 7" to be omitted from probate, because the mistake occurred by the draftsman's clerical error, and although that did *not* give full effect to her

wishes, the result was closer to her wishes than if the whole of clause 7 were revoked. The judge commented:

> "… on the facts as proved it is not credible that any person of common sense … using the English language in its ordinary meaning, could conclude that this testatrix knew and approved of the contents of this document. Of course, she did not. That some rule or rules of evidence or law could have been evolved by the court to require the court to hold by some fictitious or artificial reasoning that nevertheless she did know and approve is repugnant, to say the least."

In any case, all that law was developed before the House of Lords decision in the famous case of *Wintle v Nye*, which explains and expands on the 19th century House of Lords case of *Fulton v Andrew*.

In *Fulton*, the Lord Chancellor Lord Cairns referred to the duty the possibility that the reading of the will "had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause", and the need to be satisfied "that the effect of the clause with regard to the gift of the residue was made clear to him."

In *Wintle*, Viscount Simonds says:

> "What was in issue was whether she understood and approved the contents of the will she executed. To this issue the quality of her understanding was relevant. So at least thought the respondent, who led evidence designed to show that she was able to understand and approve the contents of a very complicated will — not, of course, the language of art in which it was couched, but the *character of the disposition* that she was making."

Lord Reid says that the jury "must be satisfied … that the respondent had not only shown to the testatrix the relevant information and discussed the will with her, but had brought home to her mind the effect of her will".

This is not confined to cases of suspected fraud. There was no plea of fraud in *Wintle*. It follows, I suggest, that an understanding of the effect of the will is an essential part of the requirement of knowledge and approval in all cases. In most cases, no doubt, it is quite right to *presume* that the testator knew the effect of the will, and so affirmative evidence of that will not be needed. The will has been read out, and is simple to understand. Or the will accords with the instructions, even though it is not so readily comprehensible. But where the will's effect does not leap off the page, or there is evidence testator may be labouring under a misapprehension about the will's effect, some evidence may be needed.

Thus, it was relevant in *Fuller v Strum* that:

> "if the testator did read the document, he must have understood the contents"

I.e, because the contents were simple. If understanding the contents was irrelevant to the concept, this observation would have been otiose.

In *Simon v Byford*, Lewison LJ says that:

> "knowledge and approval requires no more than the ability to understand and approve choices that have already been made".

An ability to *understand* the choices set out in the will is required. This shows that knowledge and approval requires an appreciation of the will's effect. Otherwise the word 'understanding' adds nothing.

ALEXANDER LEARMONTH
New Square Chambers, Lincoln's Inn