

BOOK REVIEW

CURRENT ISSUES IN SUCCESSION LAW

Edited by Birke Hacker and Charles Mitchell

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As the editors observe at the start of this book, the law on succession is a “neglected field” in England whilst Continental and comparative lawyers have rediscovered it to be of immense practical importance which deserves greater academic attention. The rules of succession are of great significance to all; as pointed out by Penelope Reed in Chapter Seven there is no shortage of probate disputes that end up in the Chancery Division as a result of “... an ageing population, the increase in the incidence of dementia and the rise of house prices making estates worth fighting over...” Since death is inevitable and everyone will die either testate, having made a valid will or intestate, without a valid will the law of succession affects us all. In order to address this gap in the law a conference took place in July 2015 at All Souls College Oxford attended by Chancery Judges, a member of the Court of Appeal as well as a number of leading academics and practitioners. This book comprises eleven of the conference papers. The result is an excellent book both as a reference work for students and practitioners and also of interest to the wider public who may be drawn in by the subject matter and possibly the picture on the loose leaf cover showing David Wilkie’s well-known painting *Reading of the Will*. In many ways the most engaging feature of this collection is the breadth of subjects covered. They range from the more traditional succession issues such as the reform of the rules of intestacy in Chapter One and Mutual Wills in Chapter Five to the more challenging issues of Testamentary dispositions in favour of informal carers in Chapter Eight and Proprietary Estoppel in Chapter Four. Much credit should be given to the conference organisers and book editors for ensuring that the conference and later the book had sufficient breadth and did not dwell overly on the minutiae of the rules of drawing up a valid will although that said Chapter Four shows how this in itself embraces many wider legal issues.

Curiously, the book starts with a chapter not about the rules that apply in drawing up a will but about the rules of intestacy when someone dies

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without making a valid will. This has traditionally been a difficult issue. When a person dies intestate the law must step in and apply rules which reflect what the law deems to be the wishes of the deceased had he or she made a valid will or thought about it. The chapter is a comprehensive review of the development of the rules of intestacy. It manages to interweave some pertinent observations on the current state of the law with some proposals for how reform should proceed if recommendations from the Law Commission are adopted. It highlights the difficult position of cohabitants whose rights are so often forgotten in English law. This chapter links well to Chapter Six where Birke Hacker one of the editors of the book reflects on how the law approaches the rectification and interpretation of a will. The quotation from Sir Horace Walpole made in the first paragraph¹ sums up a view taken by many in relation to the court's ability to rectify a will. Walpole writes having heard that a recently deceased Royal Naval Officer Sir William Rowley had disinherited his son and grandson:

... It is rather leaving an opportunity to the Chancery, to do the right thing, and set such an absurd will aside. Do not doubt it. The law makes no bones of wills. I have heard of a man who began his will thus: 'This is my will, and I desire the Chancery will not make another for me' Oh but it did ...

This is an excellent introduction highlighting the difficulty that the court has in attempting to rewrite what the testator had in mind when his intentions are not clear. To what extent should the law and the court play a role in deciding how one's estate should be distributed? There is a link here with cases of intestacy where the law has to second guess who the deceased would have wanted to benefit when there is no valid will to indicate such wishes. As Birke Hacker states "The problem is that we do not know what a testator in his innermost mind really wanted, and we have to establish his intentions as best we can from 'his last will and testament' he has left behind". Superficially in this case unlike intestacy the issue is one of interpretation of the will but the writer develops the wider issues such as whether the courts should interpret the will from accepted rules of interpretation of any document or from the point of view of the testator. Using examples from German Law she shows how the courts might come to a quite different conclusion according to the particular approach taken by a court.² The German courts will always interpret the will from the point of view of the testator. So she explains where a testator leaves his 'library'

¹ Ch 6 What's in a will? 132.

² Ibid 137.

to a legatee³ and it can be shown that the testator often referred to his wine cellar as his 'library' then the bequest is of the wine not of the books. At the heart of this chapter is the recently decided United Kingdom case of *Marley v Rawlings*⁴ where a testator had made it clear that he wished his estate to pass to his wife and if she predeceased him then to the man that the couple called their son, but owing to an error in each of the wills of the parties this intention was no longer clear. Everyone concerned was fully aware of what the testator had intended but it took the eminently pragmatic approach of the Supreme Court to resolve the issue. The writer highlights the importance of this fairly simple case because it is one of the few cases to reach the highest judicial level. It also seeks to address the problem of whether extrinsic evidence is admissible when interpreting a will. Unlike other formal documents the courts have interpreted the Wills Act 1837 very strictly. The courts have always been reluctant to admit extrinsic evidence even when it may assist in the interpretation of the testator's intentions.

Linking well to the question of interpretation and rectification is the discussion on the mutual wills doctrine in Chapter Five. As highlighted by the author Ying Khai Liew the English courts have applied the doctrine of mutual wills since the eighteenth century⁵ but the precise definition of its operation, the legal principles involved and its underlying rationale remain difficult to define. The author suggested that he would propose a new way of understanding the mutual wills doctrine consistent with its orthodox principles in which to a large extent he succeeds. This doctrine has always appeared to undermine the principle of testamentary freedom. As explained by the author in a typical mutual wills case two individuals come to an agreement that the first to die (A) will leave his property to the survivor (B) with B promising to leave whatever is left at her death to one or more ultimate beneficiaries C.⁶ This is dependent on the survivor B promising not to revoke her will after A's death. The author challenges all existing explanations for upholding the mutual wills doctrine in particular the view that B's obligation is 'floating' or suspended during B's lifetime and offers a range of alternative explanations. To some extent his conclusion is a new understanding but it is a compromise relying on two distinct analyses arising from different facts and he concludes that perhaps many of the problems arise from an attempt to apply the same explanation to both sets of facts. The cases fall into those where B receives property from A to be held for C and those cases where B promises that property owned by B absolutely will be held for C. His analysis shows that in the first case a

³ Ibid.

⁴ [2014] UKSC 2, [2015] AC 129.

⁵ Ch 5 Current Issues in Succession 99.

⁶ Ibid 100.

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constructive trusts arises making B trustee for A but in the second case a constructive trust arises compensating A who has relied on B's promise.

The modern challenges to testamentary freedom are also examined by Rebecca Probert in Chapter Two "Disquieting Thoughts: Who will benefit when we are gone?" This chapter explores the ability of individuals to challenge the disposition of an estate. In a wide ranging and fascinating review of the ability of challenges made to the disposition of an estate over the past eighty years, she maps the introduction of legislation giving such rights of challenge. Setting this in the context of Victorian and early twentieth century wills when almost complete freedom of disposition existed she illustrates the difficulties that such freedom created often using examples from literature. She reviews the changes in the law from the 1938 Act⁷ to the most recent amendments made by the Inheritance and Trustees' Powers Act 2014 and concludes with an analysis of the most recent changes. However this analysis goes much further than merely commenting on the changes she manages in this short section to evaluate the whole basis of the right to make a claim for financial provision with a wealth of views from a range of academics. Her conclusion highlights the incongruity of allowing a claim for financial provision on the death of a relative which in life could not have been sustained. Using a number of very recent cases she shows how finely divided the courts have been in the past as to how such legislation has been applied and she rightly questions why one type of choice is seen as trumping the other in particular why should the express words in the will not have priority?

In a collection as wide ranging as this it is impossible to consider in full all the different aspects of the law on succession but the review of proprietary estoppel in Chapter Four by Ben MacFarlane is particularly noteworthy. This chapter examines the claim that in upholding the doctrine of proprietary estoppel the settled aspects of the law of succession are undermined. He quickly challenges such a view stating the well-known view that proprietary estoppel prevents parties from unconscionability by exploiting strict legal rules. His short succinct chapter succeeds in explaining the justification for allowing proprietary estoppel to take precedence over provisions in a will. Starting with one of the more problematic cases *Suggitt v Suggitt*⁸ he shows the difficulties in applying the doctrine. Here a father had specifically excluded his son from his will but the son brought to the court evidence of promises made during the father's lifetime that he would inherit the farm and he had positioned his entire life on this promise. The difficulty here was that the court was upholding and giving legal effect to an informal non-contractual promise

⁷ The Inheritance (Family Provision) Act 1938.

⁸ [2012] EWCA Civ 1140, [2012] All ER (D) 100 (Oct).

above a validly executed will. He poses the important conceptual question as to whether proprietary estoppel is sufficiently distinct in its requirements and operation from contract law. His analysis shows that such promises can be upheld in spite of their informality and rather than basing their validity in contract law such rules are based in equity and are upheld in order to prevent injustice. One issue that could have been developed further is the question of the extent of the property that the claimant can claim. Where the estate has increased in size since the promise was made it is unclear as to whether and on what basis the claimant can claim the increased estate. The chapter ends with some final thoughts where he reflects on the role of proprietary estoppel concluding that it cannot be invoked simply because there is a failing in the strict rules of contract law or succession but rather it should be limited to mitigating the severity of the strict rules of contract, succession and property law. The overlap between the law of succession and proprietary estoppel has long troubled lawyers and this chapter makes a strong case that proprietary estoppel does not undermine the law of succession.

Perhaps the most controversial chapter in the book is Chapter Eight which considers grounds for the reversal of gifts to informal carers. Set in the context of the enormous increase in the need for social care and the inability of formal provision to meet this need, Brian Sloan shows how important informal social care has become in society; figures from the Office for National Statistics show that there are 5.8 million informal carers in England and Wales. He points out that many suffer financial and health disadvantages as a result of their responsibilities and it is quite likely that recipients of such care may recognise the carer in their will either from gratitude or moral obligation. The focus of his discussion is on challenges made to a will based on undue influence. This is a difficult area of law because the dependency that may arise where a person is in poor health and reliant on others for day to day living sets the scene for opportunities for undue influence to take place. He summarises the difficulties in distinguishing between persuasion and genuine undue influence. Although there have been many recent cases involving carers where claimants cite undue influence the modern judiciary frequently revert to nineteenth century guidance from Sir JP Wilde in *Hall v Hall*.⁹ Wilde had concluded in that case that:

...Importunity or threats, such as the testator has not had the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort ... if carried to a degree in which the free play of

⁹ (1866) 1 P & D 481.

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the testator's mind, discretion or wishes, is overborne, will constitute undue influence.

By comparison, Wilde held that "...other behaviour such as persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like ... are all legitimate..." Sloan describes the difficulties that the courts have faced in recent cases in distinguishing what constitutes a "sentiment of gratitude for past services or pity for future destitution" and what "constitutes behaviour that interferes with the free play of the testator's mind". He shows that evidence brought to court of independence of mind will defeat a claim of undue influence as in *Parker v Litchfield*¹⁰ where the will of an independently minded grandmother was upheld in spite of a claim of undue influence by her granddaughter. Where a testator is shown to be in poor health or of weak disposition the court will consider the facts in a different light. So in *Schrader v Schrader*¹¹ a judge set aside the will of a mother leaving her house entirely to one of her sons who had become her carer because there was evidence that the mother was a vulnerable lady in her mid-nineties and there was cumulative evidence that the son had exerted behaviour likely to influence his mother. The issue is often one of evidence and burden of proof. Should the court presume undue influence in cases involving carers? He concludes that in the current social context the courts should not set aside testamentary gifts to informal carers lightly and it is important not to apply the same principles as those used in *inter vivos* dispositions where a presumption of undue influence may apply.

This is a most interesting collection of essays. It highlights an area of law which has suffered neglect in recent years and yet as many of these essays show these are very topical and complex issues which need to be addressed today both from an individual's point of view and also as a matter of policy.

¹⁰ [2014] EWHC 1799 (Ch).

¹¹ [2013] EWHC 466, [2013] All ER (D) 89 (Mar).