Following the golden rules

Adam Carvalho and **Richard McDermott** discuss recent cases on the duties of executors and the concept of testamentary capacity

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***Usher and another v HMRC* [2016] UKFTT 50 (TC) concerned the £1.5m estate of Terence Guy, who died in October 2012. On 10 August 2013 the executors completed and filed a self-assessment tax return for the period from 6 April 2012 to the date of death.**

On 26 September 2013, one of the executors sent HMRC a cheque for the income tax due (per the executors' calculations), and stated in his covering letter: 'I will have to presume this is in full and final settlement, as I am now proceeding to finalise and distribute the estate.'

The executors then got on and distributed the estate, but they did not advertise for creditors beforehand. Had they done so, section 27 of the Trustee Act 1925 would have protected them from liability against any claims from creditors or beneficiaries that they were unaware of at the time of distribution.

On 26 September 2014 (i.e. exactly a year after the tax was paid), HMRC wrote to the executors and questioned the accuracy of the tax return. The revenue later issued an assessment of further income tax due for £14,457, as well as a penalty of £5,060 for the previous failure to disclose all relevant income.

The executors found themselves in a sticky situation, having not taken professional advice in the administration of the estate and having distributed all estate assets before finalising the tax position with HMRC. Although the self-assessment tax return for the period to the date of death excluded the deceased's investment income, that income was included in the papers forming part of the executors' inheritance tax return. It was therefore impossible for the executors to argue that they were unaware of the investment income.

Another problem was that the executors had no legal right of reimbursement against the beneficiaries and it was thought that there was little chance they would make an *ex gratia* payment to enable the executors to settle the extra tax (and resulting interest) and penalty.

The executors concluded that they would have to pay the extra tax (and interest), but they appealed to the First-tier Tribunal against the penalty notice.

The revenue accepted that it had delivered 'poor customer service' in its dealings with the executors. However, the revenue maintained that the penalty should be paid.

The tribunal reduced the penalty to nil, having taken the following factors into account:

- The likelihood that the beneficiaries (which included a number of charities) would refuse to reimburse the executors for the extra tax paid; and
- The revenue's admission that its own delays led to the executors' difficulties.

The tribunal expressed the hope that the beneficiaries would reimburse the executors for the extra tax, but reflected that 'these are matters over which we have no jurisdiction, and they must be left to the goodwill of all concerned'.

The tribunal also noted that had the executors obtained professional advice, then the problems encountered by the executors would have been avoided, but, equally, the beneficiaries would have had to bear the cost of such professional advice and would therefore have received correspondingly smaller legacies.

Testamentary capacity

The Court of Appeal's judgment in *Burns v Burns* [2016] EWCA Civ 37 provides a useful illustration of the law regarding testamentary capacity, knowledge and approval, and the rule in *Parker v Felgate* (1883) 8 PD 171.

Eva Burns died aged 89 in May 2010. She was survived by her two sons, Anthony and Colin. Mrs Burns had made a will in 2003 in which she left >>

>> her interest in her house to Anthony and then split her residuary estate equally between Anthony and Colin, and a later will in 2005 in which she simply split her entire estate between them.

Following Mrs Burns's death, Colin applied for pronouncement in solemn form of the 2005 will. Anthony claimed this will was invalid, in which case the estate would pass in accordance with the 2003 will (and he would inherit his mother's interest in her house).

In 2003 a community psychiatric nurse had carried out a mini mental state examination (MMSE) on Mrs Burns, who had scored 19 points out of 30. She could not state the day or month, write a sentence, or recall objects mentioned by the nurse moments earlier.

In late 2004 Mrs Burns wrote to her solicitor stating she wished to make a will splitting her estate equally between her sons. Her solicitor responded enclosing a draft of the 2005 will. A second MMSE was carried out and Mrs Burns scored 20 out of 30 (a slight improvement).

A consultant geriatrician stated that the MMSE tests showed Mrs Burns 'was poorly orientated as to where she was in time and place, had poor recall (short-term memory), and that she had problems with analysis and simple task planning'.

In July 2005, Colin took Mrs Burns to her solicitor's offices and she executed the 2005 will before witnesses. The solicitor's evidence was that Colin remained in the waiting room and that Mrs Burns, while frail, was in good mental health and understood the nature of the will and its contents.

The trial judge found that the solicitor 'did not know about the "golden rule". He appeared to be oblivious to the concept but was able to tell [the judge] that he, in 2005, met with Mrs Burns by herself and had insisted on doing so. He was able to tell [the judge] that he had a general discussion with her, passed the time of day.'

'Prudent guidance'

At first instance, the judge set out the basic 'make up' of testamentary capacity – 'the testator must: (a) understand that he is giving his property to one or more objects of his regard; (b) understand and recollect the extent of his property; (c) understand the nature and extent of the claims upon him… and (d) ensure that no insane delusion shall influence his will in disposing of his property…'.

The crux of the first instance judgment was that 'whatever her problems – repeated sentences, isolation, incontinence, forgetfulness – Mrs Burns knew that she had two sons and she knew what she had by way of assets'. The court accordingly upheld the 2005 will.

Anthony appealed. He died before the case went to the Court of Appeal so his executors represented his estate. Their position was that the trial judge did not assign proper weight to the relevant medical evidence. In particular, Mrs Burns did not have sufficient memory, and 'without memory, the mind cannot act'. The execution meeting was, as a result, no more than an 'idle ceremony'.

The court, however, noted two US authorities quoted in *Banks v Goodfellow* (1870) LR 5 QB 549 which make clear that a testator with an enfeebled memory may nonetheless possess a sound disposing mind. Colin argued that despite the deficiencies of her faculties Mrs Burns had capacity to execute her (very simple) 2005 will.

The Court of Appeal agreed, finding that the trial judge was entitled to conclude that Mrs Burns had testamentary capacity when she gave instructions for the 2005 will and approved the draft, and that she knew when she subsequently signed that it was the will she had requested. Accordingly, applying the rule in *Parker*, the Court of Appeal upheld the first instance decision.

Lord Justice McCombe also reiterated that the golden rule is 'prudent guidance' for avoiding disputes, not a touchstone of validity.

Finally, because Mrs Burns was mentally impaired and Colin had been involved in events relating to the preparation and execution of the 2005 will, proof of knowledge and approval was required. McCombe LJ said the trial judge did not have to take a two-stage approach: Mrs Burns's solicitor, an experienced private client lawyer, reached the view that Mrs Burns understood and approved what she was signing, and the trial judge was entitled to find that this was sufficient.

Probate fees

Readers will have seen the proposed consultation on changes to the fees due on a submission of probate applications. The potential fee increase is huge and strikes the authors as a rather opportunistic attempt to extract money from deceased people's estates – not least because the level of fees will bear no relation to the service received or the amount of work involved in the probate process.

If the proposed changes are adopted, then personal representatives will need to think carefully about how they will raise the necessary funds. Retail banks are, on the whole, willing to release cash held within a deceased person's bank accounts to pay funeral fees and to contribute to inheritance tax. It is hoped that they will be equally willing to release funds to pay probate fees, but it is likely there will be an element of administrative difficulty as the banks get used to the new fee scale. SJ

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