Preparing Wills: Guidelines for legal practitioners following the decision in Civil Appeal No. P170 of 2023

Introduction

On 20th March 2025, the Court of Appeal unanimously dismissed an appeal and cross-appeal and in so doing, the Court re-iterated the key principles which govern the execution of a Will and provided invaluable guidance to legal practitioners on the preparation of a will.

The Appeal

The deceased executed her last will on 28th October 2010 ("the 2010 Will"). Prior to this, she had made a will on 9th December 2004 ("the 2004 Will"), to which there was no challenge. At the time of making the 2010 Will, the deceased was 92 years of age.

The appellant, one of the deceased's five children and the main beneficiary and executor of the 2010 Will, appealed the decision of the lower court, in which Rahim J. held that the 2010 Will was not a valid will and testament, primarily on the basis that the deceased lacked testamentary capacity.

The Cross Appeal

The respondents, three of the deceased's other children, were executors of the 2004 Will, in which all five children were to share equally in the deceased's estate. The respondents cross-appealed on two aspects of the judge's statement of the law, namely, the golden rule point and on whether the judge ought to have considered the issue of undue influence since it had been pleaded and provided a separate basis to impugn the 2010 Will.

The decision of the lower court

Rahim J. in the lower court identified three key issues for determination:

1. Whether the deceased had testamentary capacity at the time of the execution of the 2010 will;
2. If she had testamentary capacity, whether she had knowledge and approved of the contents of the 2010 Will and
3. Whether the 2010 Will was procured by undue influence.

Having reviewed both the oral and documentary evidence, Rahim J. determined that the deceased lacked the testamentary capacity to have understood the effect of her instructions and to approve her instructions when she gave them to the attorney preparing her Will; that at the date she executed the Will, the deceased was more than likely unaware and could not appreciate that she was signing a Will for which she had given instructions; she was not "mentally capable" of knowing she was signing a Will and she did not have the requisite "knowledge and approval" to give instructions for and execute the 2010 Will.

In his assessment of the evidence, Rahim J. examined the approach taken by the attorney who prepared the Will and despite finding that he was a credible witness found that his evidence was unreliable. Rahim J. noted, *inter alia,* that while the attorney had known the family for

decades, he had not interacted with the deceased in the later years, he did not have her examined by a medical practitioner even though she was 92 years of age, the main beneficiary was present at the execution of the 2010 Will; the attorney did not enquire into the contents of the 2004 Will and the notes from the interview with the deceased had been destroyed.

Having considered all the evidence, Rahim J. found it unnecessary to make findings on undue influence and declared that the 2010 Will was not a valid Will and testament; pronounced in favour of the 2004 Will and ordered probate of same and further ordered the challenger to pay the costs of the claim and counterclaim to the executors of the 2004 Will.

The decision of the Court of Appeal

The Court of Appeal firstly emphasized that it would be slow to overturn findings of fact made by a trial judge who had the benefit of hearing and seeing the witnesses give evidence. The Court then proceeded to examine the trial judge's statement of the law on testamentary capacity and noted that Rahim J. identified proof of want of knowledge and approval, suspicious circumstances and loss of capacity between the time of giving instructions and execution as potentially being circumstances which might vitiate an otherwise validly executed will.

The Court proceeded to conduct a detailed examination of the judge's assessment of the evidence and the conclusions he drew and held that the judge's analysis was careful and thorough and based on the evidence. The Court concluded that the judge correctly directed himself on the law, that his findings were detailed and careful, that he demonstrated a good grasp of the evidence, that he made clear conclusions about the various witnesses and that he relied on the contemporaneous emails among the siblings and pointed to weaknesses in the preparing attorney's handling of the case to arrive at his decision.

The Golden Rule

At the lower court, Rahim J. identified that the golden rule necessitates that the making of a will by an old and infirm testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings (see dicta of Templeman J in **Kenward v Adams [1975] CLY 3591**).

The Court of Appeal recognized that the requirement for a medical practitioner to witness the making of a Will of an elderly or ill testator is not a rule of law in this jurisdiction; is not a requirement of the Wills and Probate Act and has not been established by any locally decided case. Notwithstanding, the Court of Appeal appreciated that where there is some doubt about a person's testamentary capacity, prudence suggests that appropriate evidence from a medical practitioner would not only be useful, but strongly advised. The Court iterated that a legal practitioner must act prudently in the conduct of his or her responsibilities and ensure that, as far as possible, a testator's free and unimpaired wishes should be given effect to.

Key guidance

The Court of Appeal then provided guidance on the steps that should be followed by legal practitioners on assessing a testator's mental capacity at the time of the making of a Will:

1. The attorney should question the person both at the time of taking instructions and at the time of the execution of the Will about the person's orientation as to time, place and occasion. The Court emphasized that general conversation relating to knowledge of common current and past events may also be helpful in being able to assess capacity.

2. Enquiry should be made of any previous Wills; who were the beneficiaries; and why any changes were being made. The Court recommended that a full enquiry should be made of all of the testator's assets capable of being bequeathed by Will, with care taken to verify the accuracy of the list of assets identified.

3. The attorney should avail himself of the opportunity to speak with the testator alone, or in the absence of any accompanying family member or person, and should specifically enquire, in language the testator will understand, whether he or she is being influenced or forced to make the dispositions contained in the Will. The Court also advised that if close family members are being specifically excluded from the Will, instructions should be taken as to why this is being done.

4. If after detailed questioning, there is any reason to doubt the testator's testamentary capacity, the Court indicated that the attorney should advise that a qualified medical practitioner be consulted to provide a report and should provide guidelines as to the legal requirements which must be satisfied.

5. Even after any medical report, the attorney should nonetheless engage in his or her own detailed enquiry.

6. A careful note should be taken of the questions asked and answers given; the instructions; any special reasons for changing a previous Will; and the process utilised for the execution of the Will, including whether the testator read it or whether it was read over to the testator before.

7. These notes should be preserved at very least until after probate of the Will has been granted and highly desirable for some time even after probate has been granted.

This case is a reminder to all legal practitioners to exercise due care in the preparation and execution of a testator's last Will and Testament. In the absence of statutory provisions that provide guidance to attorneys in the preparation of Wills, the case offers important practical guidance on best practice in preparing a Will and serves as a stark reminder that failure to exercise due care in so doing can lead to the setting aside of a deceased's Will.

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