WILLS

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The sovereign's will need not be proved by a grant of probate. However this is not the case for other members of the royal family. Their estates are subject to the usual Non-Contentious Probate Rules 1987 (NCPR).

The convention is that when a member of the royal family dies an application is made to the president of the Family Division, in their capacity as head of Probate, to seal the will of said royal. Prior to the judgment of Sir Andrew McFarlane, president of the Family Division, in respect of Prince Philip's will, there was no known record of any judgment or statement of reasons by any of his predecessors in respect of such applications. The applications were always heard in private and were granted.

Re Will of His late Royal Highness The Prince Philip, Duke of Edinburgh [2021]

Background

His late Royal Highness executed a will on 5 June 2013. He died on 9 April 2021, following which an application was made by his executor for an order that the will be sealed up and no copy of it made for the record or kept on the court file. The executor also applied for a direction to exclude the value of His late Royal Highness's estate from the grant of probate. On 28 July 2021 a hearing occurred in private and Sir McFarlane determined that the applications should be granted.

On 16 September 2021 an open and public judgment was delivered by Sir McFarlane to address the development of the conventional practice and the legal and historical context regarding it.

Her Majesty the Queen's private solicitor, Mr Julian Smith of Farrer and Co LLP, acted for the estate. In his affidavit he relied upon three factors, namely:

- the existence of a long-standing practice whereby personal representatives of senior members of the royal family would apply for the will of the testator or testatrix to be

sealed, there being no record of any such application having ever been refused;
- consistency of approach in respect of the wills of senior members of the royal family avoided difficulties which may occur if some wills were sealed and others not – for example the general public may infer a desire for concealment in respect of the sealed wills which was contrary to the public interest; and
- a 2013 consultation on revision of the NCPR contained a draft rule specifically relating to wills of senior members of the royal family which stated 'the President of the Family Division shall make an order that the will shall not be open to inspection', albeit the rules were not updated and the draft was not brought into force.

Mr Smith considered that there were also further matters the court should take into account. He referred to:

- Her Majesty's right to privacy in respect of personal matters;
- the testator's interests in maintaining confidentiality of his personal wishes;
- the interests of the legatees in being protected from intrusion into their privacy or harassment;
- the interests of those expected to be legatees who were not;
- the wider public interest; and
- s124 of the Senior Courts Act 1981 (SCA).

Mr Smith also asserted that there were five factors which supported the existence of the right of public inspection. These were categorised as:

- ensuring effect is given to the testator's wishes;
- facilitating the tracing and notifying of legatees;
- notifying the deceased's creditors;
- enabling others to come forward to prove a document where the will has been lost or supressed; and
- giving notice to potential claimants under the Inheritance (Provision for Family and Dependants) Act 1975.

Mr Smith noted there was a lack of force in these points in the context of a member of the royal family, where the estates are administered by professionals chosen to provide a high quality of service and where the death would likely be publicised nationally and internationally.

The Attorney General (AG) appeared as the defendant in the application made regarding the will, it being for the AG to represent the public interest.

Context and recent case law

The lack of a need for a grant of probate in respect of the sovereign's will was confirmed in *In the Goods of His late Majesty King George III, deceased* [1822] and *In the Goods of His late Majesty King George III* [1862]. Nonetheless this applies only to the sovereign.

Section 34 of the Supreme Court of Judicature Act 1873 assigned matters exclusively within the jurisdiction of the Court of Probate to the Probate, Divorce and Admiralty Division of the High Court. Section 1 of the Administration of Justice Act 1970 renamed the Probate, Divorce and Admiralty Division as the Family Division and, with non-contentious

probate remaining there, it is the president of the Family Division who retained jurisdiction.

Section 124 of the SCA provides as follows:

> *All original wills and other documents which are under the control of the High Court in the Principal Registry or in any district probate registry shall be deposited and preserved in such places as may be provided for in directions given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005; and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection.*

Section 125 of the SCA confirms that office copies or sealed and certified copies of wills under s124 are open to inspection as are grants of probate. Consequently the default position is that a will which forms the basis of a grant of probate is open to public inspection. In accordance with r58 of the NCPR, if a district judge or registrar considers such inspection to be 'undesirable or otherwise inappropriate', said will or document will not be open to inspection.

His Serene Highness Prince Francis of Teck (the brother-in-law of King George V) was the first member of the royal family to have his will sealed by way of a direction from the president of the Probate, Admiralty and Divorce Division. Prior to the application regarding His late Royal Highness The Prince Philip, the most recent directions concerned Her late Majesty Queen Elizabeth, The Queen Mother and Her late Royal Highness The Princess Margaret, Countess of Snowdon. The definition of the royal family has not remained the same over the years. In recent years the definition was such that members of the royal family are children of the sovereign or a former sovereign, the consort of the sovereign or former sovereign, and members of the royal family who at the time of death were first or second in the line of succession to the throne or the children of such a person. It is only executors concerned with such estates who may, as a matter of course, apply for such a direction.

The case of *Brown v HM Queen Mother's Executors* [2008] provided useful guidance. Robert Andrew Brown sought to have the wills of the late Queen Elizabeth, the Queen Mother and the late Princess Margaret, Countess of Snowdon unsealed. He alleged that he was an illegitimate child of Princess Margaret and so had an interest in the unsealing and inspection of said wills. Five issues of public importance were identified by the Court of Appeal, namely (described at para 19 of *Re Will of Prince Philip*):

> *i) What principle underlies the exposure of wills to public inspection on the terms of sections 124 and 125 of the 1981 Act?*
>
> *ii) What considerations are relevant to the question of whether inspection would be 'undesirable or otherwise inappropriate' under Rule 58?*
>
> *iii) Where a will is 'sealed' pursuant to Rule 58, what is the nature of the interest that an applicant must show in order to be permitted to inspect that will?*

iv) Is it appropriate to have a special practice in relation to Royal wills? If so:

v) What, if any, information about that practice should be made public?

It became apparent in *Brown* that an arrangement had been reached between Buckingham Palace, the Queen's solicitors and the AG's secretariat in respect of the applications to seal the wills, this seemingly having been approved by the former president of the Family Division (Dame Elizabeth Butler-Sloss). A lengthy document had been produced which involved a system of checks and balances, with the process being confidential. The core purpose of the process was the protection of the sovereign's privacy. As a consequence of this the former president had background information which assisted her on the applications that would not otherwise have been available to her. In any event there was a long-established practice, pre-dating the document, under which royal wills were sealed, with it being noted that special treatment for royal wills may be warranted due to the curiosity surrounding the private lives, friendships and affections of the royal family and those within their circle. Lord Phillips in *Brown* nonetheless noted that the president needed to explore the questions while possessed of the material facts.

Submissions

Counsel for the executor referred to CPR 39.2 which sets out a list of matters, at least one of which must be satisfied, in order for the court to order that a hearing takes place in private. It also requires that the court be satisfied a private hearing is necessary 'to secure the proper administration of justice'. He noted that CPR 39.2(a), (c), (f) and (g) were particularly relevant. These concern:

- publicity defeating the object of the hearing;
- the involvement of confidential information, with publicity damaging said confidentiality;
- the involvement of uncontentious estate administration or trust administration; and
- 'any other reason'.

It was noted that a private hearing with a public judgment would permit the court to limit publicity and control the process as opposed to the situation which would occur if there were a public hearing, an adjournment and the handing down of judgment weeks later. The latter would invite national and international media speculation which may be incredibly intrusive to the royal family and the sovereign. Counsel argued that the public interest included respecting the sovereign's right to privacy in respect of matters which were truly private and the importance of maintaining her dignity.

The AG and counsel for the executor were in agreement that the hearing should take place in private. Counsel rejected the court's idea of permitting lawyers for the media to attend and make submissions; constitutionally a third party cannot represent the public interest with a view contrary to that of the AG.

The court invited submissions on the idea of a time limit for such applications. The AG considered a period of 125 years to be appropriate and noted that this accorded with the perpetuity period in s5(1) of the Perpetuities and Accumulations Act 2009. The position on

behalf of the executor was the same, with it being noted that unsealing after that period should not be automatic.

The parties also made submissions as to whether a list of sealed royal wills held by the president of the Family Division should be published. Both contended that they should not, one of the main reasons being that this was likely to encourage applications to open them, especially from the media, which would result in speculation and intrusion into the private lives of the sovereign and the royal family. Alternatively it was asserted that if a list were published the court should make clear:

- the time limit after which inspection would generally be in the public interest, with no inspection being permitted prior;
- that an application would still be required after expiry of the time limit; and
- that there may be circumstances where it would be inappropriate to unseal the will despite the expiry of the time limit.

Judgment

It is unknown precisely what prompted the enactment of the ordinary rule that wills be open to inspection, now contained within ss124 and 125 SCA. Sir McFarlane noted that 'whether such a rule is still justified or acceptable to the public in the 21st century may be an open one'. Despite r58 of the NCPR providing for a situation which was the exception to the norm, the words 'undesirable' and 'inappropriate' did not require exceptional circumstances to exist. Only one of these conditions had to be satisfied and the words should be given their ordinary meaning.

The court accepted that in determining whether the will and other probate documents would be open to inspection, the public interest issue would likely be determinative. The evidence of the AG was of significant weight as regards the public interest, public law being such that the AG is 'uniquely entitled to represent the public interest'. His evidence was compelling such that it was inevitable that the application would succeed. Nonetheless Sir McFarlane also conducted his own separate assessment of the factors relevant to the application before reaching his conclusion.

There is an inherent public interest in protecting the dignity of the sovereign and close members of her family as set out in *Brown* and in Information Commissioners' Office guidance 'in order to preserve their position and fulfil their constitutional role'. Maintaining the dignity of the sovereign is of constitutional importance. Consequently protection of her private rights and those of close members of the royal family was in the public interest. The contents of their wills and details of their estates were said to be private matters. The exception in existence for senior members of the royal family was necessary to enhance the protection of their private lives so as to protect the dignity and standing of the sovereign and other close members of her family, given the public role of said positions.

Sir McFarlane accepted Mr Smith's evidence that the usual factors supporting public inspection were unlikely to apply to a senior member of the royal family. He noted that public curiosity is not the same as a public interest and there was no public interest in information which was wholly private. Instead the publicity which would likely be attracted if such information were placed in the public domain would be extensive and counteract

the aim of maintaining the sovereign's dignity. Further, HRH The Prince Philip likely executed his will on the understanding that it would not be open to public inspection and if the approach were to change it would not apply to his estate, only to the future.

The learned judge did however recognise that as much information as possible should be made available to the public about the process that applied to royal wills by way of publication of his judgment. This did not compromise the conventional privacy applied to communications from the sovereign.

For the same reasons that the substantive application was successful, the court also determined that the hearing should be held in private. It was accepted that, as a matter of public law, only the AG could speak for the public interest.

The court considered that in future applications the standard practice would be for a closed judgment to be given. It was not adopted in the existing application so as to avoid speculation that it was adopted specifically because there was some information relating to the estate or the will which justified avoiding publication of the judgment. Sir McFarlane noted that he had not seen the will nor been informed as to its contents.

As to the issue of a time limit it was noted that the factors justifying withholding publication would wane over time. There was no direct relevance between the 125-year perpetuity period and the time limit for these applications. The court considered 125 years to be unjustified but that a period much less than 80 years would be too short. In order to err on the side of caution as to the potential adverse intrusion into the contents of the private life and dignity of those to be protected by an order of the court, Sir McFarlane held a 90-year time limit to be proportionate and sufficient.

The passing of this period would trigger an internal private process whereby the will was concerned, with submissions made to the court as to whether it would be made public or re-sealed for a further period. The physical un-sealing would be conducted by an archivist from the Royal Archives or another professional appointed by the Keeper of the Royal Archives so as to ensure preservation of the document and the seals. Transparency required the publication of a list of sealed royal wills held by the president of the Family Division. This was not an invitation for any person to apply to open any or all of them. An application prior to the expiration of the 90-year period was likely to be dealt with summarily by the president of the Family Division and was highly likely to fail unless there was 'a specific, individual or private justification relating to the administration of the deceased's estate'.

Conclusion for practitioners

In the eyes of the general public the sealing of royal wills was likely perceived as an example of unjustifiable special treatment. The making of a public judgment by Sir McFarlane which considers the history and context of applications to seal royal wills, including the uniqueness of the role of the sovereign and senior royals, recognises the importance of openness and transparency. There is no doubt that the sovereign and senior members of the royal family are subject to media scrutiny in a way members of the general public are not. The public interest is not the same as the public appetite for speculative media coverage. Nonetheless the question remains as to whether the general rule is fit for purpose in the modern era, given the increasing importance of the right to privacy.

Cases Referenced

- Brown v HM Queen Mother’s Executors [2008] EWCA Civ 56; [2008] WTLR 425 CA
- In the Goods of His late Majesty King George III (1862) 164 ER 1250
- In the Goods of His late Majesty King George III, deceased (1822) 162 ER 89
- Re Will of His late Royal Highness The Prince Philip, Duke of Edinburgh [2021] EWHC 77 (Fam) (to be reported in the next edition of Wills and Trusts Law Reports)

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