Neutral Citation Number: [2025] EWHC 2633 (Ch)

Case No: PT-2023-BRS-000112

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 16 October 2025

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

FIONA JANE BURGESS	**Claimant**
- and -	
(1) JULIE ELIZABETH WHITTLE **(2) ROBERT PAUL ROWELL**	**Defendants**

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- -

Oliver Wooding (instructed by **Clarke Wilmott LLP**) for the **Claimant**
Graham Stott (instructed by **gunnercooke llp**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 14 October 2025

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This judgment was handed down at 10.30am on 16 October 2025 to the parties or their representatives and by release to the National Archives.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a probate claim concerning the estate of the late Elizabeth Rowell ("the deceased"), who died on 13 April 2017. The claimant and the defendants are the three (adult) children of the deceased. The claimant seeks to propound in solemn form a will dated 12 June 2014. The first defendant originally defended the claim, and counterclaimed to propound an earlier will dated 9 May 1984. The second defendant was and remains neutral as a party, and took no active part in the trial, though he made a witness statement, and was called as a witness, in support of the claimant's claim. The first defendant has two children, Matthew and Richard. Matthew is a beneficiary under the 2014 will, and Richard (who is autistic) is an object of dispositive powers in the will trust contained in clause 7 of the 2014 will. The claimant and Matthew are named in the will as the trustees of the will trust.

2. At the pre-trial review before me, a question was raised as to the position of Richard, a doubt having been raised as to his capacity make his own decisions, and to participate in these proceedings. It was initially proposed that a notice pursuant to CPR rule 19.13 be served on Richard, once it was established that he did in fact have sufficient capacity. However there appeared to be some difficulty in arranging for an appropriate expert report on capacity in the timescale available. After discussion, I ordered that the relevant notice should be served on the trustees of the will trust, rather than on Richard, because they (and not he) were the legatees under the will. Those notices were in fact served on both the claimant and Matthew.

3. Both of them filed an acknowledgement of service form, indicating no intention to contest the proceedings in their capacity as trustees. Strictly speaking, I doubt that it was a proper for the claimant to file such an acknowledgement of service form, because she is already a party to these proceedings, and she cannot be a party twice over: *cf Cotham School v Bristol City Council* [2024] EWHC 154 (Ch), [22]-[63]. But I need not spend any further time on that. What is important is that the notice procedure means that there can be no doubt that the *trustees* of the trust legacy are bound by the result of these proceedings. If so, then so are the beneficiaries: *cf* CPR rule 19.10.

Challenges to the 2014 will

4. On the pleadings as they stand, the first defendant makes a number of challenges to the 2014 will, although at the trial not all were pursued, and she said she was now neutral on others. I do of course bear in mind that the first defendant was acting in person when she drafted her statements of case, but I must take those statements as they are. She asserted that the 2014 will was invalid on four separate bases. First, the deceased lacked testamentary capacity at the time of making the 2014 will ("my Mother was mentally incapable of making a will in 2014"). Secondly, the deceased did not know or approve of the contents of the will. Thirdly, the deceased made the will under the "undue influence" of the person who took instructions for it, a wills consultant named Tom Wansbrough, who "constantly pressurised my Mother into making a new will". Fourthly, the original will was no longer available, and therefore the court should admit the earlier 1984 will to probate.

The relevant law

5. There is no real dispute as to the relevant law, but I will say a few words nonetheless for the benefit of the parties, who are not lawyers.

Testamentary capacity

6. As to the first of these questions, the test for testamentary capacity is well known. In *Banks v Goodfellow* (1870) LR 5 QB 549, Cockburn CJ said (at 565):

> "It is essential …that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

Moreover, it is now established that this test has not been affected by the provisions of the Mental Capacity Act 2005: see *Re Clitheroe* [2021] EWHC 1102 (Ch).

7. It is important to understand that the policy of the law is to enable persons who may be elderly, of modest or even limited intelligence, and even suffering from illness, and taking medication, to make wills. So, for example, simply being mistaken does not take away capacity. In *Re Belliss* (1929) 141 LT 245, Lord Merrivale P said that "Mere mistake of fact as to persons or property would not stand in the way of probate". The level of testamentary capacity must therefore not be pitched at too high a level. The court in *Banks v Goodfellow* (at 566-568) approved statements in earlier American authorities which emphasised that people had capacity to make wills though they had poor memories, though their faculties had declined with age and disease, and though they repeated themselves or asked foolish questions. And, as Lewison LJ said in *Simon v Byford* [2014] EWCA Civ 280, "capacity depends on the potential to understand. It is not to be equated with a test of memory."

Want of knowledge and approval

8. As to the second of these questions, the test for want of knowledge and approval was set out in *Reeves v Drew* [2022] EWHC 159 (Ch), where Michael Green J said:

> "336. The legal principles in relation to knowledge and approval are not seriously in dispute. The propounder of a will … must prove that the testator knew and approved its contents at the time of execution. That burden is normally discharged relatively easily by proof of testamentary capacity and of due execution. If both are proved, there is a presumption of knowledge and approval.[1] … However if there are suspicious circumstances around the making of the will or as to its contents, the vigilance of the court may be aroused and affirmative proof from the [propounder] may be required."

Undue influence

[1] On this presumption, see *eg Sherrington v Sherrington* [2005] EWCA Civ 326, [69].

9. Thirdly, the probate doctrine of undue influence (distinguished from that which operates in relation to inter vivos transactions) holds that a will is void if it is obtained by means of coercion of the testator's will, or by so-called "fraudulent calumny" (in effect, poisoning the testator's mind, so that a different will is made from that which would otherwise have been made). As to the former, in the words of Lewison J (as he then was) in *Edwards v Edwards* [2007] WTLR 1387,

> "47 … (v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense."

Loss of a will, and revocation by destruction

10. Fourthly, mere loss of an original will does not prevent probate being obtained. Thus, the Non-Contentious Probate Rules 1987, rule 54, provides for the admission to probate of a *copy* of a will. Indeed, where not even a copy of the will exists, it is possible to obtain probate of a *reconstruction* of the will from other evidence: see *eg Wildmore v Wildmore* (1938) 185 LT Jo 297 (where the will had been consumed by fire after the death of the testatrix). On the other hand, if it can be shown that the will has been destroyed by its maker, with the intention of revoking it, then it will be revoked: see the Wills Act 1837, section 20. Moreover, where a will is last traced into the testator's possession and is not forthcoming at his death after all reasonable search and inquiry, there is a presumption that the testator has destroyed it with the intention of revocation: see *Welch v Phillips* (1836) 1 Moo PC 299. But of course it is only a presumption, and may be rebutted on the evidence actually available.

The first defendant's position at trial

11. Despite her position on the pleadings, in the skeleton argument prepared by her solicitors for the trial, the first defendant now accepts, in the light of the expert report of Prof Alistair Burns (acting as a single joint expert), that the deceased had testamentary capacity when she made the 2014 will. Secondly, because of that, the first defendant is now neutral as to whether the deceased knew and approved of the contents of the 2014 will when she signed it. Thirdly, despite what the pleadings say, the first defendant does not now pursue a positive case of undue influence. Fourthly, the first defendant now accepts that the original of the 2014 will may have been lost *after* the deceased died. In that case any presumption of revocation by the deceased by deliberate destruction would not apply. Accordingly, she is neutral as to whether the claimant is able to satisfy the court as to how and when the original of the 2014 will came to be lost.

12. In these circumstances, if I accept the unchallenged expert evidence of Prof Burns, then I will find that the deceased did have testamentary capacity at the time of making the 2014 will. Secondly, if I find that the deceased did have testamentary capacity at that time, and that the will was duly executed in accordance with the law, the presumption of knowledge and approval of the contents of the will by the deceased will apply. In the absence of a successful challenge by the first defendant, the

claimant will have satisfied the burden of proof that otherwise lies on her to prove such knowledge and approval.

13. Thirdly, the burden of proving undue influence in a probate case falls upon the party so alleging: see *eg Re Edwards* [2007] EWHC 1119 (Ch), [47]. Since the first defendant does not now pursue such a case, that issue simply falls away. Fourthly, if the claimant establishes that the original will was in existence at the time of the death, but was lost *subsequently*, there can be no question of a presumption that the deceased herself destroyed it with the intention of revoking it, and there is no other evidence of a revocation. As I have said, mere loss of the original will does not prevent a grant of probate.

Witnesses

14. The following witnesses were called in support of the claim: Tom Wansbrough (the wills consultant), the claimant herself, and the second defendant. The first defendant did not cross-examine any of them, and their evidence is therefore unchallenged. On the other side, the first defendant, her husband and her son Matthew had all made witness statements for trial, but in the end none of them was called. That means that I do not have the benefit of their written evidence. I heard no *oral* evidence from Prof Alistair Burns, a consultant psychiatrist and Emeritus Professor of Old Age Psychiatry at the University of Manchester. However, I had the benefit of his unchallenged expert report, admissible in evidence under CPR rule 35.5. I am quite satisfied that he is properly qualified to give that expert evidence.

Facts found

15. It will be seen that the number of factual matters with which I need to deal is relatively limited, compared with other probate disputes. On the basis of the evidence I find the following facts. The deceased was born on 6 November 1934, and died on 13 April 2017, aged 82 years. She married her husband Frank Rowell in 1957, and they had three children, the claimant and the two defendants. Frank died in 1994. The deceased had worked for many years for Barclays Bank. They provided a free will-writing services for their employees. On 9 May 1984 the deceased, using this service, made a will giving her entire residuary estate (with the exception of a specific gift of jewellery to the claimant) to her husband if he survived her, but otherwise to such of her children as should survive her, and if more than one in equal shares, with a substitutionary gift over to the children of any such child who should predecease her. In fact, of course, Frank did predecease her, and so the gift of residue to her three children would thereafter have taken effect.

16. Unfortunately, the first defendant and her mother did not have an easy relationship, and there were some arguments between them. In 2009 they became badly estranged. It is not necessary for me to go into the details of or the reasons for this, but the estrangement was sufficiently serious that the deceased subsequently told the claimant on a number of occasions that she intended to change her will so as to exclude the first defendant from benefit. In fact, however, the deceased did nothing about it until 2014.

17. In January or February 2014, the deceased contacted Future Legal Services Ltd (“FLS”), a will writing company. A meeting was arranged between the deceased and

Tom Wansbrough, a wills consultant employed by FLS, but it had to be postponed because of Mr Wansbrough's illness. The deceased therefore met Mr Wansbrough (alone) for the first time on 12 May 2014. At that meeting he took the deceased's instructions and completed a will instruction form, which was then signed by the deceased.

18. After the first meeting, but before the second (referred to below), the deceased told the second defendant of her intention to make a new will using FLS. The second defendant told the claimant of this. Both the claimant and the second defendant had concerns about the use of this company, although those of the claimant were apparently allayed following a telephone conversation with Mr Wansbrough, in which the latter agreed to visit the deceased again with the second defendant present. The second meeting between the deceased and Mr Wansbrough took place on 20 May 2014, when the second defendant was indeed present. The deceased repeated the instructions which she had already given.

19. Mr Wansbrough thereafter provided those instructions to FLS, who drafted the will and sent it to the deceased. It was executed by her on 12 June 2014. It contains at the end an attestation clause in proper form, and is signed by the deceased and two witnesses. The latter appeared to be a retired couple living not far away from the deceased. On the evidence, I find that the will was duly executed as a matter of fact, and in accordance with the formal requirements of section 9 of the Wills Act 1837.

20. Neither the claimant nor the second defendant had any concerns at that stage about the deceased's capacity to make a will. She was living independently, administering her own medication and managing her own finances. The report of Prof Burns, instructed as a single joint expert (who in the usual way never saw the deceased during life), concludes on the material before him that she did indeed have capacity to make a will on the *Banks v Goodfellow* test. In light of the first defendant's own position at trial, I do not need to deal with this report in detail, but I may say that I have no hesitation in accepting Prof Burns' evidence.

21. He says that, in his opinion and on the balance of probabilities, the deceased would have had the ability (i) to understand the nature of a will and its effects, (ii) to know the extent of her estate, and (ii) to be aware of her family members and to appreciate who would have a claim on her estate. He then concluded:

> "12.5 In my opinion, [the deceased] had a disorder of mind, namely dementia due to cerebrovascular disease. However, I think at the time she instructed and signed her will, she was in the very earliest stages of the condition and her symptoms were not severe enough to affect negatively her testamentary capacity.
>
> 12.6 There is no evidence that [the deceased] had an insane delusion. There is no evidence that she was confused around the time she instructed and executed her will."

22. The evidence in this case makes clear that, in order to demonstrate a lack of testamentary capacity, it is simply not enough to show that the deceased person was indeed suffering from some form of mental disorder, such as cerebrovascular disease. It is necessary to show, further, that the effects of that disorder were sufficiently serious to negate testamentary capacity. A disorder may be slight at first, and become

more serious only later. Here the expert assessment is that, regardless of what happened later, at the time of making the 2014 will, the deceased's disorder of mind was not serious enough to rob her of testamentary capacity.

23. On this basis I find that the deceased did indeed have capacity to make a will at the time of the execution of the 2014 will. In these circumstances, it is not necessary for me to deal with the decline in her health in the following three years, ending with her death in a nursing home on 13 April 2017.

24. The terms of the 2014 will provide for the directors, members and beneficial owners of any share of Abbotts Wills and Probate Services Ltd of Hertford to be "the Executors and Trustees of this my Will" (although only one of them was to prove the will). However, there is also provision appointing the claimant and Matthew to be "the trustees of this Will and of any trust that might arise under it". Once again, the will contains a specific gift of jewellery to the claimant.

25. The deceased gave the residue of her estate in four parts. She gave a one third share to the claimant, and a one third share to the second defendant. In each case there was a substitutionary gift over in case of the predecease of the claimant or the second defendant. Thirdly, she gave a one sixth share of the residue to Matthew with a similar substitutionary gift over in case of his predeceasing her. Finally, she gave a one sixth share of the residue to her trustees to hold on certain trusts for the benefit of Richard during his life, including powers to pay or apply the income or capital to him or for his benefit, and otherwise to accumulate the income to capital, and after Richard's death to apply the income and capital of the one sixth share for the benefit of such of the other beneficiaries as the trustees think fit, and to distribute the whole of the share within five years of Richard's death.

26. After the deceased's death, Abbotts Wills and Probate Services Ltd appointed solicitors to apply for probate. That application to the probate registry was filed on 12 July 2017. But the first defendant had already lodged a caveat on 4 May 2017, about three weeks after the death. So its application was halted while the caveat was in place. As it happened, Abbotts Wills and Probate Services Ltd was struck off the companies register on 8 November 2020 and dissolved on 17 November 2020. The claimant and Matthew decided that they should themselves apply for a grant of administration, and instructed their own solicitors. A warning to the caveat was then entered by the claimant and Matthew on 11 June 2021 and an appearance to the warning by the first defendant on 24 June 2021. There then followed many months of inconsequential correspondence between the siblings. During this time, in February 2023, Matthew decided that he was no longer willing to apply for a grant because his relationship with the first defendant (his mother) was at risk. Ultimately, on 7 September 2023, the claimant issued the claim.

27. There is a question as to what happened to the original 2014 will. The evidence satisfies me that, at the time of the death of the deceased, it was not in her possession at all, but instead in that of FLS, which sent it to Abbotts Wills and Probate Services Ltd on 22 May 2017. That company provided it to the solicitors instructed to apply for probate. The solicitors completed the IHT returns on 12 July 2017. The oath was sworn on the same day, and refers to "the original last Will" being produced. The solicitors sent "the original will dated 12 June 2014" to the probate registry with their

application for probate, as evidenced by their letter dated 12 July 2017. The probate registry confirmed subsequently in an online conversation with the claimant on 18 January 2023 that it still held the will.

28. However, on 12 April 2024, the probate registry emailed to say that it did not hold the original will, but merely a copy. No explanation was given by the registry as to what had happened to the original. This is disappointing. A government body charged with documenting the transmission of estates on death should be able to do better than this. Nevertheless, for present purposes I find that the probate registry had the original will in its possession in 2023, and has since lost it.

29. Since the nominated executor, Abbotts Wills and Probate Services Ltd, is no longer in existence, the claimant puts herself forward for a grant in solemn form of letters of administration with the copy will annexed, limited until such time as the original will is found. Although she lives in Australia, the claimant confirmed through counsel that, if her claim succeeded, she intended to instruct solicitors in this country to extract the grant and to administer the estate on her behalf.

Arguments

30. The claimant submitted that, on the basis of the evidence of Prof Burns, the deceased had testamentary capacity at the time of making the 2014 will. The first defendant did not agree with that evidence, but realistically accepted that, without any evidence to the contrary, she had to accept it. Secondly, the claimant submitted that, given the conclusion on testamentary capacity, and given that the will had been duly executed, there was a presumption that the deceased knew and approved of the contents of the will. Moreover, there was no evidence to rebut the presumption. The first defendant said that she was neutral on that issue and made no submission. Thirdly, the first defendant confirmed that she was not pursuing the allegation of undue influence by Mr Wansbrough.

31. Lastly, the claimant submitted that on the evidence it was clear that the original will had been in the possession of FLS, Abbotts Wills and Probate Services Ltd, and that company's solicitors after the death of the deceased, and that the solicitors sent it to the Probate Registry as part of their application for probate. The registry confirmed in January 2023 that it had the will. Accordingly, there was no question of any presumption of revocation by destruction by the deceased. The first defendant said in submissions that she had never intended to argue for the operation of that presumption. Instead, she was merely saying that the original will could not be found and that therefore the previous (1984) will should be admitted to probate.

Discussion

32. I have already said that I am satisfied on the evidence of Prof Burns that the deceased had sufficient testamentary capacity to satisfy the legal test in *Banks v Goodfellow* at the time of executing the 2014 will. On the basis of the summary of the law which I have set out above, and the findings of fact that I have made, the presumption of knowledge and approval of the contents of the will applies, and the presumption of revocation by destruction does not apply. It is no objection in itself to a grant that the original will cannot be found. I know that the allegation of undue influence has not been pursued, but it is a serious allegation, especially against a professional person.

On the material before me, I consider that it should never have been made, especially in the unparticularised way that it was. Overall, I consider that this claim succeeds. As to the grant itself, I consider that it should be a grant to the claimant of letters of administration with the copy will annexed, limited until such time as the original will be found.

Conclusion

33. The claim succeeds, and a grant will issue to the claimant as set out above. I will consider the question of consequential matters when this judgment is handed down.