Case No: PT-2023-000574

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

The Rolls Building
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Fetter Lane, London
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Before:

MASTER MCQUAIL

- -

Between:

THE BRITISH DIABETIC ASSOCIATION **Claimant**
- and -
ELIZABETH ANNE CHENERY **Defendant**

- -
- -

MR SAM CHANDLER (instructed by **Withers LLP**) for the **Claimant**

THE DEFENDANT did not attend and was not represented

- -

Approved Judgment

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MASTER MCQUAIL :

1. I have before me this afternoon the trial on written evidence of a probate claim. The claim relates to Malcolm Roy Chenery who died on 4 May 2021 by suicide. The claimant is the British Diabetic Association represented by Mr Chandler, instructed by Withers LLP. The defendant, Elizabeth Chenery, has been represented by Lupton Fawcett but for reasons that will become apparent, she is not represented or present today. The defendant is one of the sisters of the deceased and would be entitled to share in his estate on his intestacy.

2. By the claim, the claimant asks the court to pronounce in solemn form of law for what is said to be the last will of the deceased which comprises two documents, which I will refer to in more detail in due course. The claim form was issued on 13 July 2023 and was accompanied by particulars of claim. It was also supported by a witness statement of testamentary evidence signed by Kelly Braund, a solicitor and senior legacy manager at the claimant.

3. The defendant filed an acknowledgement of service and a witness statement of testamentary evidence. The defendant said by her acknowledgement of service she did not intend to defend.

4. The testamentary evidence makes clear that nobody has knowledge of any testamentary document other than the two documents in question in these proceedings.

5. The initial witness evidence of Elizabeth Chenery was supplemented by a further witness statement signed by her in August 2024. The evidence of Elizabeth Chenery explains that the deceased had five surviving sisters, including Elizabeth herself, and there were also two further sisters who pre-deceased leaving between them three daughters and it is those persons who are interested on intestacy in the deceased's estate.

6. The evidence of Elizabeth Chenery explains that she has been in contact with all of her sisters and two of her three nieces. The evidence is, that with the exception of one sister, Jacqueline Clark, and one niece, Emma Richardson, that they agree with the claim and have expressed views that the deceased would have wished to benefit the Diabetic Society or Diabetes UK. Those were charities with which he had had some association and his wish in that respect was consistent with the fact there has been a history of diabetes within the family. Jacqueline Clark, did not initially, at least, agree with the claim and Emma Richardson has not been located.

7. In those circumstances, at the end of August of this year Deputy Master Collaço Moraes made orders that the defendant represent all the intestacy beneficiaries with the exception of Jacqueline Clark and ordered that Jacqueline Clark be served with notice of the claim pursuant to CPR 19.13 and, in the event that no defence was filed, this trial on written evidence was to happen today because in the absence of any defence, the procedural route to such a trial is open.

8. On 6 September 2024, Jacqueline Clark confirmed by email that she was content for her brother's estate to go to charity, that she was not going to actively oppose and she would leave the matter for decision by the court. Her previously expressed disquiet

about the will was not as to its formal validity but was because she had concerns about the deceased's capacity in particular because she did not believe that if he had had testamentary capacity he would have killed his dog, which is sadly what I understand to have happened shortly before he took his own life,.

9. There is a further witness statement of Beth Credgington of Lupton Fawcett dated 28 October 2024 which fills in some further background. There is a witness statement in the bundle of Mr Noel Winteringham, one of the attesting witnesses, that is dated 28 November 2022 and it was prepared originally in connection with an application to the Probate Registry to obtain letters of administration and contains what to this court looks like a slightly unusual statement of truth but which was a statement of truth he was directed to append to his witness statement by officials in the Probate Registry. Then there is a witness statement of Zoe Carlton, Mr Noel Winteringham's partner, that is dated 30 October 2024. Zoe Carlton is the other attesting witness.

10. Two further earlier witness statements of Mr Winteringham were sent to the Probate Registry in connection with the attempt to obtain letters of administration. They are dated 4 March and 29 July 2022 and they seem to be earlier iterations of Mr Winteringham's evidence before it was apparent what the questions that are thrown up by the unusual circumstances of the case really were. There is no material discrepancy between those witness statements. It is just that the later ones are more complete.

11. I turn then to the documents which appear to comprise the deceased's last will. There are two separate pieces of cardboard, each is about 15 x 20cm. They are both cut from food packaging. One is cut from the top of a Young's fish fillets box, the other is cut from the bottom of a Mr Kipling mince pie box. The testator's the writing is on what would have originally been the inside, the plain side, of those pieces of packaging. In each case the writing is in block letters and has every appearance of having been written in one go in the same stream of thought and by the deceased using the same pen.

12. The document on the rear of the Young's packaging starts "NYP" and then the number 1 in a circle. The document on the rear of the Mr Kipling packaging starts with a 2 in a circle. The second document appears to bear at its foot the signature of the deceased and the date, 3 May 2021, and above that are written what seem to be the signatures of Mr Winteringham and Ms Carlton, each again with the date 3.5.21 against them and bracketed against their names the inscription "121 KWN" which accords with the address of the attesting witnesses which is 121 Kingsway North, York.

13. The words of the deceased have been helpfully transcribed including a number of errors of spelling. The first page reads:

> NYP (1):
>
> "I CANNOT COPE WITH LIFE ANYMORE. EVERYTHING I HAVE DOES NOT MEAN A THING TO ME. I WOULD LIKE MY HOUSE AND BANK ACCOUNTS TO GO TO DIABETIC SOCIETY IF POSSIBLE AS I HAVE NO IDEA WHERE TO START

> WITH MODERN TECHNOLOGY. I AM A SUFFERING LONER WITH MENTAL HEALTH ISSUES, OTHER PEOPLE BECOME A NUISANCE TO ME WHEN I HIT ROCK BOTTOM. NOT WHAT MUM AND DAD WOULD WANT BUT THERE IS NO ANSWER TO ME. ALL THE DIVIDED FAMILY I HAVE NO WISH TO CONTACT OR SPEAK TO THEN AS THERE IS LONG STANDING BAD BLOOD SO IT IS WHAT IT IS. MONEY IN BANK WILL COVER A SIMPLE FUNERAL. MY WISH IS TO BE CREMATED AND MY ASHES TO BE BURIED OR SCATTERED IN YORK CRICKET CLUB. ME AND MY MOTHER'S FAVOURITE DAY'S OUT (NIGEL DURHAM I AM SURE WILL OBIGE AS HE IS A MAN OF MEANS AND WELL RESPECTED A TOP MAN AND SECRETARY). HOUSE CONTENTS CAN GO TO DIABETIC SOCIETY AND COLLECTION OF ORNAMENTS AND POTTERY CAN GO TO HORNSEA COLLECTOR'S SOCIETY. THOUSANDS OF PIECES IN FRONT BEDROOM? HOPE SOMEWHAN CAN SORT IT OUT IN MY WISH. THANK YOU. MALCOLM."

The second page reads:

> "(2) THE DOG IS ALL I HAVE GOT I WOULD LIKE (TILLY) TO BE CREMATED AND GO WITH ME AND MUM. IF IT CAN BE ARRANGED AS I CANNOT DO IT> MONEY AND JEWELLERY IN MY BEDROOM CAN GO TO DIABETIC SOCIETY I HAVE NO VALUE TO IT. AN UNUSUAL CASE BUT IT IS ALL HONESTLY SAVED UP FROM WHEN MOTHER WAS ALIVE. THIS UNDER DRESSER AND IN TOP OF DRAWS IN THE CORNER AND STORAGE JAR'S UNDER UMBRELLA STAND. HOPE YOU CAN SORT IT OUT FOR ME AS I HAVE NO IDEA. OUT OF TOUCH WITH MODERN WORLD I USE MY HAND'S FOR MY TORMENTED EXISTANCE NOT A LIFE."

There then follow the signatures to which I have referred.

14. The documents were found at 89 Spalding Avenue, York where Mr Chenery lived and where his body was found. They were taken away the North Yorkshire Police (NYP) referred to at the start of the first page. They were taken by the police because, as is apparent from what was written the words are not just words of intended testamentary disposition, they were also in the nature of a suicide note. The documents were retrieved from the police by Beth Credgington in August 2021.

15. As I have said, an attempt was made to obtain letters of administration in common form without the need for probate proceedings. The Probate Registry official were not prepared to do that because they were concerned that only one of the two pages was executed and were not prepared, therefore, to make a grant to more than the second page.

16. It is important to observe that the two pages on any reading do contain dispositions which were intended quite clearly on the words of the document to take effect on the deceased's death and from the words it is clear that the deceased had an intention to benefit the Diabetic Society, that he was not intending to die intestate and that his family were not close and they were not those who he wanted his estate to go to.

17. As I explained, those, who would benefit on an intestacy support the will being admitted to probate and their stance of non-opposition to the will allows this, the procedure of a trial on written evidence, to be followed. It is also instructive when considering the matter to have regard to the principle that the court should favour a result where the deceased, if possible, can be found to have died testate rather than intestate in the circumstances of the case.

18. The words of the will contain dispositions on the first page as follows:

    i) the deceased's house and bank accounts are to pass to the Diabetic Society

    ii) the house contents are to pass to the Diabetic Society

    iii) a collection of ornaments and pottery are to pass to Hornsea Collector's Society

    and then on the second page as follows

    iv) the money and jewellery in the bedroom are to go to the Diabetic Society.

19. The will is signed at the bottom of the second page by the deceased and dated 3 May 2021. Above his signature are the signatures of the two attesting witnesses.

20. Mr Winteringham's 28 November 2022 witness statement explains what occurred on 3 May 2021 as follows:

    > "On 3 May 2021 Mr Chenery came to my property at 121 Kingsway North, York and asked me to 'sign this paper'"…

    he at that point exhibits the attested second page of the will document and continues:

    > "Mr Chenery did not initially say that the document he held was a will and would not let me see it. Mr Chenery waited for my partner to return home as he said that he needed two witnesses to sign. Only when she returned home did Mr Chenery say that it was his will, stating that was what he would like to happen on his death. Mr Chenery allowed myself and my partner to read the will, myself and my partner signed and dated the document."
    >
    > "Only one page was produced to me and my partner and this was the page that we signed. Mr Chenery did not make any comment about a second page."

> "Mr Chenery's signature was on the will before myself and my partner signed."

The witness statement of Ms Carlton simply confirms that she agrees with the content of Mr Winteringham's statement as to what occurred on 3 May 2021.

21. Mr Chandler has very helpfully and carefully set out the relevant legal principles in his skeleton argument The first of those is as to the form that a will must take and sets out this passage from paragraph 1-001 of the *19th Edition of Theobald on Wills:*

> "There is no prescribed form or wording in which a will must be made in order to be valid, save that the document must be executed in accordance with the applicable statutory requirements. In *Re Berger* the Court of Appeal viewed the following propositions as regards wills as settled by authority. First, an instrument cannot be a 'provable will' (ie which will be admitted to probate in the English courts) if it does not contain a revocable disposition of the testator's property, such disposition to take effect upon death. Secondly, an instrument cannot be a 'provable will' unless the testator had an *animus testandi* at the time of its execution. Thirdly, this means only that the testator wishes to effect a testamentary disposition by means of that document, rather than that he should have addressed his mind to whether the instrument could be admitted to probate in the English court. Fourthly, regardless of form and appearance, it is possible to make a 'provable will' so long as one complies with the requirements above, has the necessary intention and the document in question is executed in accordance with the provisions of the Wills Act 1837. Fifthly, if the document has the necessary dispositive effect, and is properly executed, the necessary intention will be presumed (although the presumption is rebuttable by evidence). Applying this test, it has been held that a will which merely appoints an executor and expresses funeral wishes, with contains no provisions disposing of the deceased's assets, cannot be recognised as a valid form of will, and a will which merely appointed a guardian was held not to be admissible to probate, though this may no longer be followed."

From that, Mr Chandler derives these propositions: (i) that the will must contain revocable dispositions of property to take effect on death; (ii) a testator must intend to effect testamentary dispositions by the document and (iii) the document must be executed in accordance with the Wills Act 1837.

22. Mr Chandler referred to the case of *Weatherhill v Pearce* [1995] 1 WLR 592 where HHJ Kolbert sitting as a High Court judge said this: at page 598C:

> "The correct approach is for the court to give effect to clear testamentary wishes if it is possible and proper to do so and that as the law leans against intestacy the court should not be astute

to undermine a will unless there is clear evidence of non-compliance with the rules to be observed in its making.

23. The Wills Act 1837 section 9(1) as now in force is in the following terms:

> "9(1) No will shall be valid unless—
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) it appears that the testator intended by his signature to give effect to the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness either—
>
> (i) attests and signs the will; or
>
> (ii) acknowledges his signature,
>
> in the presence of the testator (but not necessarily in the presence of any other witness),
>
> but no form of attestation shall be necessary."

24. The *32nd Edition of Tristram and Coote's Probate Practice* at paragraph 3.96 explains the wide range of permissible modes of acknowledgement of a testator's signature, both express and implied, and importantly makes clear that provided a witness must see, or has seen, or has had the opportunity of seeing the signature or at least part of it and the acknowledgement happens in the joint presence of the witnesses before either has signed, that will be a sufficient acknowledgement.

25. In the case of *Weatherhill* the Judge said this at 598F:

> "In my judgment, also there was a sufficient acknowledgement of her signature by Mrs Weatherhill. It is plain that a signature which has already been written can be acknowledged in many ways and no set form is required. It is sufficient to proffer a document which all concerned know is a will for the witnesses to sign and no express declaration is necessary."

26. The key issue in the present case is that the two pages, or sheets, or pieces of cardboard on which the apparent will is written are disconnected. A will comprising a number of pages, even if only one is executed, may be valid and that again is clear from *Theobald* at paragraph 3-013:

> "Under the current version of section 9 of the 1837 Act, for deaths on or after 1 January 1983, it is not necessary that the testator's signature should be in any particular place on the

> will. It is merely necessary that the testator 'intended by his signature to give effect to the will'.
>
> "The sheets of which a will consists need not be severally signed by the testator, but they must be in the same room where the execution took place. At one time it was thought that, in order to prevent fraud, the sheets must also be attached in some way at the time of execution, or at any rate held in contact (eg with finger and thumb) at that time. However, it suffices if the sheets are all in the same room and under the control of the testator at the time of execution, and sheets found after the death of the testator bound together are presumed to have been so bound at the time of execution, even though the numbering of the sheets was not consecutive. In an Irish case it was held that if a will was written on several disconnected sheets and only the last was executed, the presumption was that the whole will was in the room and under the control of the testator at the time of execution and ought to be admitted to probate."

27. The Irish case referred to in the passage of *Theobald* to which I have referred is the case of *In the Goods of Tiernan* [1942] IR 574 which approves a much older, English decision of Lord Mansfield in *Bond v Seawell* 3 Burr. 1773 The key passage from *Tiernan* is at page 580 and there Hanna J said this:

> "These authorities establish, in my opinion, that if a will be written on several separate and disconnected sheets of paper and the last only be attested, although no part of the will may have been seen by the witnesses, it should be admitted to probate on the presumption that the whole will was in the room and under the control of the testator at the time of the execution. This presumption may, however, be rebutted by the circumstances of the case or by evidence which would be a question for the court or the jury."

The passage from Lord Mansfield's judgment in *Bond v Seawell* that is in point is this:

> "If it be doubtful 'whether the first sheet was then in the room or not', we [and that 'we' seems to refer to a number of other judges with whom he had consulted] we all think the circumstances sufficient to presume that it was in the room and 'that the jury ought to be so directed.'"

28. Accordingly Mr Chandler submits, the law presumes where there are sheets disconnected from the attestation sheet that the other sheet(s) or piece(s) of cardboard were in the same room and under the control of the testator at the time of execution.

Conclusions

29. I conclude that the document comprising the two pages which I have described was clearly intended from a reading of its content to be the will of the deceased It

contains dispositions of property intended to take effect on the deceased's death and it was also, at least as to the second page, described to the witnesses to the will as a will and as being what the deceased would like to happen on his death.

30. The attesting witnesses are clear that the deceased had already signed the second page when he presented it to them to be witnessed. The manner in which the witnesses describe the deceased presenting the second page to them for signature, describing at as his will and the statement that he needed two witnesses to his signature amount to an acknowledgement of his signature by the deceased sufficient to satisfy 9(1)(c) of the Wills Act.

31. Although the witnesses did not see the first page of the document, the law, as Mr Chandler has explained and as I accept, presumes that the first page would have been in the room at the time of the attestation by the attesting witnesses. There is nothing in the evidence to rebut that presumption of the presence of the first page.

32. The pagination by numbers (1) and (2) supports a conclusion that the deceased considered the documents to be a two page whole rather than separate items. The pages are in one hand and apparently written with one pen and although there may be some issue how the gifts of the home contents interact with the later gifts of specific content, there is as I read the documents together a tenor through the document as a whole, of the deceased systematically to deal with that of which the deceased power to dispose in descending order of value and importance. These further factors also support a reading of the will as a two page whole document.

33. Although the deceased did not show the first page to the witnesses it seems extremely likely that the pages were written in one go and would have been kept together and taken together to the home of the witnesses when he asked them to sign his will consistent with the presumption.

34. In the absence of clear evidence of non-compliance with the law's requirement that the pages of the will must all be present when execution takes place, the court should not try to thwart the testator's intentions as evidenced not only by the pages of the testamentary document as a whole but by the evidence of family members as to the deceased's wishes for his estate. I am therefore satisfied on Mr Chandler's primary case that the two pages which I have described should be admitted to probate in solemn form as the last will of the deceased.

35. Mr Chandler has an alternative case had I not found as I have done that by the law relating to the incorporation of documents within a will, by reference the court could have concluded that the first was incorporated into the second page testamentary document. Given what I have decided, I do not need to say more about that alternative case.

36. The only matter upon which I wished to be further satisfied at the conclusion of the earing was the clear identification of the claimant, being the British Diabetic Association, as the intended beneficiary and body entitled to take out letters of administration since the will refers to the Diabetic Society.

37. Following the hearing Ms Kelly Braund filed a further witness statement explaining that the claimant charity owns a number of registered sub-companies. These include

Diabetic Society Limited, Diabetes Society Limited and Society for Diabetes Limited. I am satisfied that the claimant is the charitable body now administering the funds of all three bodies which the will might be construed as intending to benefit

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(This Judgment has been approved by the Judge)

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