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1. [Re estate of Whittle \(deceased\) Whittle v Whittle and another \[2022\] EWHC 925 \(Ch\)](#)

Client/Matter: -None-

Re estate of Whittle (deceased) Whittle v Whittle and another [2022] EWHC 925 (Ch)

Chancery Division, Bristol District Registry

District Judge Woodburn

12 April 2022 Judgment

Charles Auld, counsel (instructed by **Royds Withy King LLP, solicitors**) for the **Claimant** **There was no attendance by or on behalf of either Defendant**

Hearing date: 17 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DISTRICT JUDGE WOODBURN

District Judge Woodburn:

1. The Claimant ('C') in this case is the brother of the First Defendant ('D1'). The Second Defendant ('D2') is the partner of D1. C is married to Julie and, together, they have two adult sons.

2. The Defendants are, jointly, the executors of the Will of Gerald Arthur Whittle ('Gerald'), who died on 7 December 2016 at the age of 92 years. Gerald was the father of the C and of D1.

3. Gerald's will was executed on 15 November 2016 ('the Will'). It appoints D1 and D2 as executors, save for a bequest to C of all the cars owned by Gerald, together with the contents of the shed and garage at Gerald's home (but subject to C clearing the shed/garage), left the residuary estate jointly to D1 and D2.

4. C disputes the validity of Gerald's Will on grounds that it was procured, by D1 and/or D2,

by fraudulent calumny, undue influence and want of Gerald's knowledge and approval. C seeks an order that pronounces against the Will. More particularly, C claimed that D1 falsely represented to Gerald (in October 2016 whilst Gerald was residing in a Care Home) that C had stolen money from his mother-in-law and that C

was a violent man who assaulted women. Later, on 11 November 2016, D1 told a Trainee Legal Executive (who had attended Gerald's home to take his instructions on a will) that C and his wife were 'psychopaths and criminals' who had 'removed large sums of money from an account belonging to Julie Whittle's mother', that, whilst Gerald was in hospital, C 'went to [Gerald's home] and went through [Gerald's] papers looking for PIN numbers and bank account details'.

5. C claims that D1 wrongly and falsely made other allegations of criminal damage against C.

6. Gerald died on 7 December 2016. The primary cause of death was Myeloid Leukaemia, secondary to chronic myeloid leukaemia. Underlying those primary causes was Diabetes, Hypothyroidism and chronic kidney disease. His death was registered by D1.

7. On 2 May 2017, C entered a caveat against the possible probate of the Will.

The proceedings

8. This Claim was issued in April 2020. The Defence is dated 10 June 2020. The Defendants denied fraudulent calumny. D1 admitted to making 'negative comments' about C on 11 November 2016 but claimed truthfulness in (and a genuine belief in the truthfulness of) the comments made. D1 accepted that she was present when the legal advisor first attended on 11 November 2016, but that D1 then absented herself whilst instructions were given to the advisor. The Defendants asserted that D1 had been 'appointed as the attorney for her father under

a lasting power of attorney for property and financial affairs and for health and welfare '**but she never used either of them as her father never lost his mental capacity...**'

9. The Defendants were pressed on their responses to the claim, particularly by way of Requests for Information. The first response to a request is dated 9 September 2020;

the second response to a further request is dated 16 December 2020; on 12 March 2021, the Defendants admitted specified facts, particularly concerning the creation and signatory to certain documents supposedly sent by Gerald, but actually sent by the Defendants.

10. On 7 April 2021 District Judge Watson conducted a CCMC at which directions were made leading to a trial date. Those directions included enhanced disclosure from the Defendants; the matter was listed for a 3-day trial. By the date of this hearing, the Defendants had defaulted in the payment of costs earlier ordered on 5 November

2020. Judge Watson imposed an 'Unless Order', warning the Defendants that they could lose the right to defend this claim if they did not pay the costs by a specified date. If they did lose that right, the trial would proceed on a consideration of the written evidence only.

11. The Defendants not only failed to comply with the provisions of the November 2020 Order but also failed to provide disclosure and to exchange statements of fact with C. By an order dated 25 October 2021, District Judge CJ Taylor confirmed that the Defendants were debarred from defending and that the matter would proceed on the written evidence. The time estimate was revised to 1 day.

12. By an application dated 7 December 2021, the Defendants sought relief from the sanctions previously imposed on them. District Judge Wales dismissed that application when it came on for hearing on 18 February 2022.

13. On 16 March 2022, the Court received a

letter from Knights, solicitors representing the Defendants. Having regard to the 'Unless Order' made by Judge Taylor and the dismissal of application for relief from sanctions, the letter explained why the Defendants would not be attending the final hearing or be represented at that hearing.

14. The matter proceeded on the written evidence of the Claimant and his wife, the paginated bundle of documents, including witness statement and also the oral submissions made by Mr Auld on behalf of the Claimant.

The Will

15. At the heart of the dispute between the parties is the Will. In essence, the Will left all that Gerald owned/possessed, to D1 and D2 in equal shares. What was left for C was '**.....all the cars [Gerald] own(ed)....together with the contents of the sheds and garages situated within [Gerald's home]**'.

16. At paragraph 6 of the Will, Gerald attributed, as a reason for leaving to C the contents of the sheds/garage, '**...because we have become estranged**'.

The Evidence

17. At this final hearing, the only admitted evidence came from the Claimants. Neither Defendant attended the hearing.

18. C argued that what was left to him in Gerald's Will was irrational and valueless. C argued that the cost of clearing Gerald's garage and sheds would out-weigh the value of any vehicles left by Gerald – the 'gift', says C, was not a valuable proposition, but more akin to a burden placed on C.

19. The evidence of C was that he had '**a good relationship with [his] father**'; that he visited his father regularly and since the death of his mother in 2005, visited his father '**at least weekly**'. C said that his father lived in a rural setting (alone since 2005), that Gerald did not have friends and rarely socialised. C said that he and his wife provided support for Gerald since the death of Gerald's wife in 2005.

20. The further evidence of the Claimant was that when his father was admitted to Abingdon Hospital on 2nd August 2016, it was the Claimant who was first contacted by the Hospital – C had been listed as Gerald's 'next of kin'.

21. Gerald's physical condition worsened from August 2016. I note particularly that from 2-6 August 2016, Gerald was admitted to Abingdon Hospital. At the time of this admission, Gerald was frail, debilitated by the effects of the leukaemia he suffered. He was unable to climb stairs. In the hospital, Gerald was given blood transfusions. He was then discharged back home but, as a consequence of Gerald's continuing weakness, he was then admitted to John Radcliffe Hospital from 14-24 August 2016.

22. After discharge from the John Radcliffe Hospital, Gerald was admitted, in August 2016, to the Close Care Home in Burcot (where C was again shown as Gerald's 'next of kin'). At the time of his admission, Gerald was able to walk short distances, with the aid of a Zimmer frame; he became a falls risk when he tired. Staff were required to be aware of his whereabouts so as to minimise risk of falls.

23. I have noted C's evidence of his telephone call with D1 on 14 October 2016. C's evidence is that, within this call, D1 called C a 'thieving little bastard', of being a 'pimp, living off immoral earnings of a prostitute'. He visited his father at The Close, the following day on 15 October 2016, but prior to entering his father's room overheard a conversation between D1 and Gerald. C overheard his sister telling Gerald that C **'....had stolen money from [C's mother in law]'** and that C **'...was a violent man who assaulted women'**. C interrupted and walked into the room, where, in the presence and hearing of Gerald, D1 proceeded to tell C **'..you're a cunt and thieving fucking bastard'**.

24. I have considered C's evidence that he visited his father at the Close Care Home on

26 October 2016. During this visit, C said that his father asked him whether he, (Claimant) had hit a girl 40 years earlier, whether C had been stealing by breaking into homes and whether C's wife, Julie, was a prostitute. C denied each of the allegations as being 'completely untrue and without merit'. C described his father as appearing upset

25. Gerald remained at The Close Care Home until 10 November 2016 when he was discharged back to his home.

26. Coincidentally, Ms Juliette Spanner, a Trainee Legal Executive of Slade Legal in Didcot attended at Gerald's home the following day, on 11 November 2016, in order to take his instructions for the preparation of a will.

27. Notwithstanding Larke v Nugus enquiries, no evidence has been produced by the solicitors to show how and by whom they were first contacted and with whom they arranged this meeting. D1 was present when Ms Spanner arrived. I have seen and considered the attendance note prepared by Ms Spanner (by the time of the Larke v Nugus enquiries she was no longer working for Slade Legal); it is dated 11 November 2016.

28. Ms Spanner met D1 at Gerald's home. If this meeting had been arranged by Gerald, (unbeknown to D1), one might reasonably expect a record of some surprise on the part of D1 at the (apparently) unannounced attendance by Ms Spanner so soon after Gerald's discharge from The Close; there is no reference to such, or any, surprise on the part of D1 recorded in the attendance note prepared by Ms Spanner. Moreover, D1 took it on herself to remain with Ms Spanner and Gerald in order to **'explain the background to [her] father making a will...'**. It is unclear from the attendance note why such an explanation was necessary – or countenanced. It is further unclear why such an explanation became necessary if D1 was unaware that Gerald had arranged for Ms Spanner to attend on him.

29. It is clear from the attendance note, however, that D1 immediately launched into an

assassination of the characters of both the Claimant and of his wife. In the presence and in the hearing of Gerald as well of that of Ms Spanner, D1 referred to C and his wife as 'psychopaths and criminals' who had 'done some terrible things to Julie Whittle's mother' prompting Julie Whittle's mother '**..to remove her daughter and David from her will**' according to D1.

30. D1 further accused C of rooting through Gerald's paperwork, stealing from Gerald, of selling cars belonging to Gerald, of attempting to force their way into Gerald's property prompting a report to the police and causing the police to issue '**a harassment order**' against C.

31. Having rubbished her brother's character, D1 then left to take Gerald's dog for a walk. It was against this immediate background that Gerald apparently proceeded to give instructions to Ms Spanner for his will. There is no record of a discussion with Gerald as to how he felt about what his daughter had just said and/or any recorded discussion as to its relevance to the making of Gerald's will.

32. Whilst the attendance note appears to set out Gerald's reasons for leaving the residuary estate to the Defendants jointly (particularly the gift to D2), there is no reference in this attendance note to any reasons given by Gerald for not allowing C to share in the residuary estate. There is no reference in the note to C being 'estranged' from Gerald and/or the reasons for such 'estrangement'. Ms Spanner was in little doubt that Gerald held mental capacity 'throughout the whole meeting'; she described Gerald as 'switched on' and 'in good spirits'. He, apparently, made careful and considered decisions throughout the meeting. Gerald, however, accepted (according to the note) that, physically, he was 'failing' and that he 'found mobility difficult'.

33. I have further seen and considered the letter sent to Gerald together with the draft will. That letter is dated 11 November 2016 (the same day on which the instructions for the will were obtained). Paragraph 6 on page D-210 makes reference to clause 6 of the will. The thrust of clause 6 of the Will was to leave a

specific gift (and task) to C and to seek to prevent C from contesting the provisions of the will. This letter makes no reference to the 'estrangement' of C from Gerald and/or its factual circumstances or other justification for use of this phrase.

34. Gerald was readmitted to hospital on 25 November 2016 for further blood transfusions; Gerald was described by the Hospital Palliative Care Team as 'vague and unable to follow conversation or give answers to questions'. The key symptoms show frailty, Anorexia and a general deterioration with limited prognosis due to the impact of the leukaemia. He was later discharged back home.

35. By 5 December 2016, Gerald was readmitted to John Radcliffe Hospital, prescribed end of life medication and described as very weak. This is a disposition which contradicts the quite strident, assertive tones and script in the letter dated 3 December 2016 purported to be sent by Gerald to the solicitors Slade Legal – we now know that this letter was not written by Gerald but was written by D1. The apparent signature of Gerald Whittle was placed by D1 as if it was sent by Gerald – D1 admits to this.

36. Gerald peacefully passed away during the day on 7 December 2016.

The Law

37. It is the Claimant who raises issues of fraudulent calumny, undue influence (of D1 on Gerald) and of Gerald's want of knowledge and approval in conceiving and in the execution of his will. In these particular regards, the burden falls on the Claimant to prove these contentions by the civil standard, that is to say, on the balance of probabilities found from the evidence presented.

38. Mr Auld submits that I need only find one of fraudulent calumny, undue influence or want of knowledge/approval.

(1) Fraudulent Calumny

39. I am grateful to Mr Auld for so succinctly setting out the law under this particular head. He has referred me to the well-thumbed judgment in **Edwards v Edwards [2007] WTLR 1387**. Quoting the words of Lewison J (as he then was), the law in this area may be summarised thus:

"There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:

i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;

ii) Whether undue influence has procured the execution of a will is therefore a question of fact; iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition; iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.

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; vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in

sapping the will; vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside; viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone; ix) The question is

not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent. "

40. C must prove on balance of the probabilities that D1, in particular, poisoned Gerald's mind by casting aspersions on C's character which D1 either knew were false or did not care whether they were true or false.

41. If D1 believed that what she has said about C's character and behaviour was the truth, the objective untruth of the statement becomes evidentially otiose as the will is not liable to be set aside in those particular circumstances.

42. The problem for the Defendants is that, evidentially, they have locked themselves out of these proceedings. They did not give disclosure of documents (as might support contentions of assault and/or theft); they did not offer to exchange statements of fact in order to support, or otherwise demonstrate belief in the truth of the several contentions of assault, prostitution, burglary, and/or other theft.

43. C specifically dealt with his character within his witness statement. He was security vetted by the Atomic Energy Authority prior to his

retirement in 2016.

44. C produced a letter from Thames Valley Police following its investigations of allegations by D1 of Criminal Damage and Threatening Behaviour by C towards D1. A 'thorough investigation' was undertaken and the conclusions independently reviewed. There was insufficient evidence presented to the police such as to warrant a prosecution of C. No charges were brought against C.

45. I have considered the witness statement of Julie Whittle who was compelled to deny as 'completely false' that she was a prostitute, that she has never behaved violently nor engaged in criminality. She had never known C to be violent or to otherwise behave criminally.

46. D1 has provided no evidence of the source and/or basis of her statements. D1 has not put herself in any position to demonstrate her belief in the truth of her assertions: **Re: Boyes** [\[2013\] EWHC 4027 \(Ch\)](#)

47. On all of the evidence presented to me, it is abundantly clear that the aspersions cast on the characters of both C and his wife, are not merely unproven by D1, but, I find, are completely false.

48. There is no evidence that D1 held any reasoned belief in the truth of these lies. Indeed, D1 must have known, at all times, the allegations to be false, harmful and hurtful particularly of C and his wife.

49. The issue then arises as to whether D1's falsehoods so tainted Gerald's mind and thoughts that he was compelled to exclude C from a more substantial share in Gerald's Estate? Was Gerald so pressured by the weight of D1's allegations as to be persuaded to marginalise C in the way described in the Will?

50. From August to early November 2016, Gerald moved from 91 to 92 years of age, he was attempting to live with the debilitating diagnosis and condition caused by leukaemia; his health was deteriorating; he was prone to

confusion and was physically frail. Although he had capacity to manage his property, affairs and finances, Gerald knew that he could not live in his home without assistance from C and/or from D1 or without an additional package of social and health care. There were increased admissions to hospital for Gerald and now, during this period, a referral to the Close Care Home.

51. The discovery by C of what D1 was saying to Gerald whilst he was in The Close Care Home in early October 2016 was a crucial discovery by C as to the attempts being made by D1 to influence her father's thoughts. The likely impact on Gerald of what he had heard from D1 on 15 October, may be evidenced from the questions put by Gerald to C about a week later on 26 October 2016, when C was compelled to answer questions put to him by his father as to whether C had been violent and/or dishonest and/or lived off the immoral earnings of a prostitute.

52. When added to the tirade unleashed by D1 on Ms Spanner on 11 November 2016 – in the presence and hearing of Gerald and immediately prior to him even giving instructions on the terms of his will, I find that D1 attempted and succeeded in falsely and unduly influencing Gerald to marginalise and/or minimise and/or exclude C from a substantial share in Gerald's estate.

53. The Will made immediately thereafter achieved these objectives for D1. Gerald left C with the value of the cars left in his garage/shed which value was to be set against the cost (to C) of clearing the garage/shed.

54. I find on the available evidence that Gerald had not made a previous will; that, but for the making of the Will in the manner made by Gerald, his estate would have been

subject to the Laws of Intestacy (set out in the Administration of Estates Act 1925) where the C would benefit more substantially than provided for in the Will.

55. It is, thus reasonable, indeed compelling, to

draw from the evidence above that the prime reasons for Gerald making the 2016 Will were to minimise the 'gifts' to C and to (ostensibly) provide a good reason for the provision of the minimised 'gifts' to C.

56. Given Gerald's frail and deteriorating condition in late October/early November 2016 and given the apparent purpose of this Will, I find that Gerald's thoughts and actions had been overborne by D1's falsehoods about C and his wife; D1 repeated those falsehoods to Gerald and otherwise in Gerald's presence and hearing. On one occasion, this actually led Gerald to challenge C on some of D1's allegations.

57. By the letter dated 3 December 2016 ostensibly from Gerald, but actually from D1 to Slade Legal, D1 (who, by now had clearly seen and considered the terms of Gerald's will) sought through this letter to set out Gerald's further wishes as to the disposition of his Estate. What was expressed in the letter were not Gerald's wishes, but that of D1. She had sent this letter, but there is no evidence that she had any authority from Gerald as to its contents and/or authority that it should be sent from Gerald to Slade Legal

58. I find on these facts that D1's strident, forceful, and repeated falsehoods imparted to Gerald about her brother, during a period of deterioration in Gerald's physical health as well as, no doubt, increased concern about his prognosis, amounted to undue influence by D1 of Gerald's thoughts and actions. The falsehoods imparted by D1 to Gerald so concerned Gerald that he challenged C on them. However, I find that there was no respite for Gerald from D1's falsehoods; she was a constant in his home, in his ears and in his mind: I remind myself thus: **'...simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything: Edwards v Edwards (above).**

59. On an analysis of the evidence produced in this case, I find the contention of fraudulent calumny (initiated by D1 in order to procure the current will made by Gerald) to be made out in

this case.

Undue Influence

60. If I am wrong on my findings in relation to fraudulent calumny, I now turn to a consideration of C's contention on Undue Influence. I repeat what I have said as to Gerald's health and disposition in the lead-up to my findings on fraudulent calumny.

61. I find that, acting on the falsehoods disseminated by her, D1 changed the locks on the doors to Gerald's home so as to exclude or otherwise limit and/or manage C's attendances, she changed the name of Gerald's next of kin with the hospitals and with the Care Home. She repeatedly and wrongly peddled falsehoods about C to anyone who cared to listen, particularly to her father. The letter from Thames Valley Police came much too late in February 2019 for Gerald to ascertain to truth of some of the lies being peddled by D1.

62. I agree with the assessment by Mr Auld that, during the tirade by D1 to Ms Spanner, Gerald was present and heard what D1 said to Ms Spanner. Gerald did not interrupt

D1's flow. I have little doubt that, by that stage, Gerald had heard the same allegations made previously. I find that Gerald was, by this stage, persuaded, by D1's repetition (now to a legal practitioner in his presence), in the veracity of the contentions.

63. As to how Ms Spanner came to be at Gerald's home a day after his discharge from the Care Home, I find on the evidence, that it is more than likely that the appointment was made by or on behalf of D1 who probably notified Gerald that morning of the visit by Ms Spanner. The formulation of the Attendance Note leads to such a conclusion. There was no surprise or question on the part of D1 of the attendance by Ms Spanner.

64. The one other concerning issue is Gerald's written reason in his Will for limiting the gift to C – Gerald said of C **'...we have become estranged'**. Gerald's reasoning is not evidenced – anywhere. C's evidence runs

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completely to the contrary – there is no evidence of estrangement. Gerald had nominated C as a 'next of kin' as at September 2016; such a nomination was unlikely in a case where a parent is estranged from an offspring.

Executors from the estate on the grounds of the unreasonable conducts of the Defendants, pursuant to CPR Part 46.3(3) and 46PD.1, paragraph 1.1(c).

Conclusions

65. Ultimately, therefore, I find that D1, by the repeated peddling of falsehoods about C and/or his wife, unduly influenced Gerald to make the November 2016 Will with a view particularly to marginalising C whilst attempting to minimise any challenge by C to Gerald's will.

73. I would ask that Mr Auld should please draw a suitable form of order for my consideration as set in the attached directions. A date and time will be set for the handing down of this judgment.

District Judge Woodburn

End of Document

66. The Will was a document concocted so as to marginalise and undermine C. It was procured by D1 as a consequence of her undue influence of Gerald.

67. I need not and do not deal with the issue of want of knowledge/approval for fear of repeating what I have said under the two previous heads.

68. The consequence of these findings is that I pronounce against the Will dated 15 November 2016

69. I, further, grant Letters of Administration of Gerald's estate to the Claimant. No other person has been put forward. For practical purposes, the principal asset now is more than likely to be Gerald's home. I also order an account to be taken of all of Gerald's assets received in the hands of D1 and/or D2.

70. I make an order that the Defendants shall jointly and severally pay the costs of the Claimant. Such costs have already been subject to costs management and, subject to any further applications, I order such costs to be paid by the Defendants to C.

71. In relation to 'incurred costs' the same to be assessed if not agreed. The Claimant has clearly succeeded in proving fraud and undue influence.

72. For the avoidance of any doubt, I also order that Ds shall not recover any costs as