IX WILSON, D.A. Tanner v the Public Trustee

LL.B. (Hons.)

D.A. WILSON (2)

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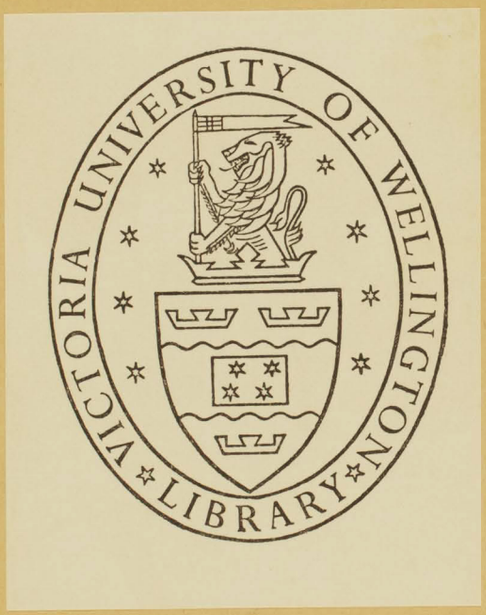
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T A N N E R V. T H E P U B L I C T R U S T E E

(1973) 1.N.Z.L.R. 68.

SUBMITTED FOR THE LL.B. (HONS) DEGREE AT THE VICTORIA UNIVERSITY OF WELLINGTON

28TH AUGUST 1974

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The question of the attitude of the Court to a beneficiary who is instrumental or involved in preparing a Will was recently considered by the Court of Appeal in Tanner v. Public Trustee.[1]

THE FACTS:

The facts of the case are quite complex, but for the purposes of this paper MacArthur J's lengthy examination of them can be compressed somewhat.[2]

The testatrix had made two Wills. One, dated the 13th of February 1961 (the 1961 Will), was drawn by the Public Trustee. The second, dated the 23rd December 1966 (the 1966 Will), was drawn by Mr Tanner, the husband of the appellant. The two Wills differed in several respects, the major differences (following MacArthur J's discussion) were these:-

(a) A legacy of £2,000 to Mrs Tanner in the 1961 Will was replaced in the 1966 Will by a share of residue amounting to about £24,000.

(b) A legacy of £1,000 to Mr Tanner in the 1961 Will was increased to £3,000 in the 1966 Will.

(c) Legacies to old friends in the 1961 Will (one of £1,500 and two of £200) were omitted from the 1966 Will.

(d) Legacies of £300 to four persons in the 1961 Will were replaced by shares of residue in the 1966 Will amounting to about £3,400 each. The four were all relatives of Mrs Tanner, and of the testatrix.

(e) Legacies of shares of residue amounting to £12,000 each in the 1961 Will to the Early Settlers Association, the New Zealand Foundation for the Blind, and the St. Mary's Girls' (Anglican) Home were replaced by legacies to the first two charities of £1,000. The third charity was omitted from the 1966 Will.

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1 (1973)1 N.Z.L.R. 68.

2 The language of MacArthur J. is quoted with such frequency in this passage that each individual quote is not shown.

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The relationships of the parties were these: The testatrix was a Mrs Budd. The Budd's had two nieces, daughters of Mrs Budd's sister. One of them, Gladys, became Mrs Tanner by a second marriage in 1964. Mr Tanner worked in Mr Budd's business for many years, and had eventually become the proprietor of it. The Budd's had no children and Mr Tanner became in effect a son to Mr Budd. After Mr Budd's death in 1960 Mr Tanner managed Mrs Budd's affairs until her death in 1968. At all times she had complete trust and faith in him.

Mrs Tanner also worked in the business and spent a lot of time with Mrs Budd. Particularly before Mrs Budd's admission to a rest home she was largely dependent on Mrs Tanner.

Mrs Budd did not have a wide circle of close friends and she was somewhat shy of strangers. She became progressively more retiring. When it became difficult to obtain home help she was moved to a rest home. Mrs Tanner made all the arrangements for the move, and after it the Tanners were her most frequent visitors. Her house was sold, a Power of Attorney being given to Mr Tanner for the purpose. A gift of the proceeds, being some £8,800, was made to Mrs Tanner. It was employed in her husband's business, but Mrs Budd did not know this.

The sale and gift occurred in 1966 and in the same year Mrs Budd made an interest free loan of £10,000 to Mr Tanner in order that he might buy out his partner. Near the end of October in that year the question of Mrs Budd making a new Will arose.

As part of their policy of quinquennial review of Wills held by them the Public Trust Office wrote to her pointing out that the St Mary's Girls' (Anglican) Home now formed part of a home for elderly women and that she might wish to alter her Will to provide for the disposition of that share of the residue. Apparently she then requested Mr Tanner to look into the matter and he then, for the first time, opened her box of papers which was being held at his home, and took a copy of the 1961 Will out to her at the home.

Mr Tanner discussed the 1961 Will with Mrs Budd in order to determine in what respects she wished to change it. It was found "that she repeatedly asked what she should do and Mr Tanner replied, 'It is your Will - your Will is your wish' and told her he could not tell her what she should do."[3]

As a result of the discussion Mr Tanner gave instructions to the Public Trust Office to prepare a new Will and they duly did so. The instructions for that Will were in fact those later embodied in the 1966 Will except in three respects:-

(a) They retained the two £200 legacies to two of Mrs Budd's friends in the 1961 Will which were omitted from the 1966 Will.

(b) They provided a legacy of £500 for one friend who was entitled to £1,500 under the 1961 Will and who was omitted from the 1966 Will.

(c) Mr Tanner's legacy was increased from £1,000 in the 1961 Will to £2,000. He was entitled to £3,000 under the 1966 Will.

An officer of the Public Trust Office called on Mrs Budd with a Will drawn up in accordance with those instructions. He received an impression that she did not have the requisite testamentary capacity and left. He also doubted whether the ideas conveyed to his office were all hers. He contacted the attending physician at the home who met Mrs Budd and felt sure that she had the requisite capacity and wanted to change her Will.

A second officer of the Public Trust Office called and he also felt she did not have the requisite capacity. On that day she was in bed and unwell. A further meeting with the Public Trust fell through as one officer was not available.

Mr Tanner, being annoyed at these delays, decided to get his Solicitors to prepare a Will. Mr Young of Young, Bennett & Co. was consulted and Mr Tanner said it would be best if

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3 By Wild C.J. at the trial: unreported. Cited by MacArthur J. in the Court of Appeal at 78.

Mr Young saw Mrs Budd with a member of the family present, as Mrs Budd was something of a recluse and might not discuss matters without their presence.

Mr Young discussed the position with his senior partner Mr Bennett.[4] They decided to see Mrs Budd without the family present and made an appointment to do so, advising the Public Trust Office. They found Mrs Budd cheerful and alert, but formed a definite opinion that she wished to leave things as they were.

In the evening Mrs Budd told Mr Tanner that two men had called to see her and that she did not know them and would have nothing to do with them. Mr Tanner said he could do no more for her in the matter of arranging her Will and she said to him "You can do it for me, can't you Walter?"[5] It was subsequently decided that Mr Tanner would prepare a Will. After a break while Mr Tanner was away on business, he eventually completed the Will.

The execution was left in the hands of a Mr Curtis, who had been a friend of Mr Tanner for over twenty years and was a Justice of the Peace. On the 23rd of December 1966 Mr Tanner took Mr Curtis to the home, introduced him to Mrs Budd, and left them. Mr Curtis chatted with Mrs Budd for some time and formed a clear impression that she had testamentary capacity. He read the Will through to her, clause by clause, and she followed a copy of her own. At the end of each clause he asked her if that was what she wanted.

When they had finished he asked her if she wanted to sign it, and called in the Matron. Mrs Budd signed the Will, and the Matron and Mr Curtis witnessed it. Mr Curtis did not know of the doubts which the Public Trust Office had as to whether Mrs Budd wished to change her Will, nor did he know

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4 Referred to by the Chief Justice as well known as a very careful family Solicitor of great experience.

5 Per MacArthur J. at 80.

that officers of the Public Trust had previously expressed doubts as to Mrs Budd's testamentary capacity.

On the 20th of May 1968 Mrs Budd died, and Mr Tanner took the Will (which he had held until that date) to the Public Trust Office, which had been named as executors in it.

THE COURSE OF THE TRIAL, PLEADINGS ETC:

The Public Trustee (who remained neutral throughout) instituted the action to obtain a decision of the Court as to which of the two Wills should be admitted to Probate. By an order in chambers the New Zealand Foundation for the Blind was directed to represent all the beneficiaries who fared better under the 1961 Will, except for the Early Settlers Association who were to be separately represented, although their interests were virtually the same.

Mrs Tanner was to represent all the beneficiaries who received more under the 1966 Will than the 1961 Will. The action became a contest between Mrs Tanner, supporting the 1966 Will, and the two charities which denied the validity of that Will, and supported the 1961 Will.

THE RELEVANT PRINCIPLES OF LAW:

This case thus deals with the situation where a beneficiary of a Will has been instrumental in its preparation. This must be clearly distinguished from cases of undue influence. Undue influence, as the term is used in connection with Wills, deals with coercion, usually by violence or threats of violence.[6] Tanner does not raise any such facts. It is clear that the Court of Appeal recognised this, MacArthur J. saying "These statements ..... do not raise any issue of fraud or undue influence."[7] Where undue influence is raised the onus of proving it is on the party who alleges it, not

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6 16 Halsbury, (3.ed.) p.207(v): 17 Halsbury (3.ed.) p.675, para.1301. Also Winder; 3 M.L.R. 99 at 104 and 56 L.Q.R. 97 at 106.

7 Tanner n.1. at 71.

on the propounder of the Will, as it is here.

A. THE BASIC PRINCIPLE:

A leading case in this field is Barry v. Butlin,[8] where the testator's Will was drawn up by a Solicitor who took about a third of the testator's estate under it. Parke B. said that there were two settled rules in this area. "The first is that the onus probandi lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."[9]

In that case the Will was admitted to probate, the only son being a fugitive from justice, who had been shunned and feared by his father for many years. The law as there set out was affirmed in Fulton v. Andrew[10] and Lord Hatherley elaborated on the distinction between a beneficiary who helps prepare the Will and an ordinary legatee. As to an ordinary legatee he said "It is enough in their case that the Will was read over to the testator and that he was of sound mind and memory and capable of understanding it. But there is a further onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a Will. They have thrown on them the onus of showing the righteousness of the transaction."[11]

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8 2 Moo P.C. Cas 480: 12 E.R. 1089
9 Ibid, 482
10 (1875) L.R. 7 H.L. 448
11 Ibid, 471 & 472

B. MATTERS ARISING IN TANNER:

The cases already referred to have been adopted in New Zealand and affirmed in two cases; McDonald v. Valentine[12] and Chatterton v. Howie.[13] However several points are made somewhat clearer by the decision in Tanner.

i. THE ONUS OF PROOF:

The onus of proof clearly lies on the party propounding the Will. Generally that will be the executor and he need not necessarily be the beneficiary who has been involved in the preparation of the Will. This is clear from Tyrrell v. Painton[14] where the executor was one son of the respondent and the Will was prepared by another son of the respondent.

Here the procedure in Tyrrell's case was followed. As MacArthur J. put it, "In the present case, although it is the Public Trustee who is in the technical sense propounding the 1966 Will, I think that the onus of proof lies on Mrs Tanner and those whom she represents, including her husband. They support that Will as against the 1961 Will. The case has been pleaded and fought throughout on the basis that there is no distinction between them; and they must stand or fall together."[15]

ii THE 'BENEFIT'

Wild C.J. at the trial[16] appears to have based his judgment on the benefit to Mr Tanner and the fact that his legacy increased to £3,000 from £1,000.[17] MacArthur J. found that he would have held the rule in Barry v. Butlin[18] to be applicable even had Mr Tanner taken nothing, "The reason being that the substantial gift of residue to his wife would have been a circumstance exciting the suspicion of the Court."[19]

The justification for this is Tyrrell's case[20] where, as we have

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12 (1921) N.Z.L.R. 49
13 (1926) N.Z.L.R. 595
14 (1894) P.151
15 Tanner n.1. at 73
16 Unreported
17 Tanner n.1. per MacArthur J. at 73, l 42 - 49
18 See n.8
19 Tanner n.1. at 18, l 8 - 10
20 See n. 14

seen, the respondent took a substantial gift under a Will prepared by his son. It was held that the rule in Barry v. Butlin [21] applied, Davey L.J. saying "It must not be supposed that the principle in Barry v. Butlin is confined to cases where the person who prepares the Will is the person who takes the benefit under it - that is one state of things which raises a suspicion; but the principle is, that whenever a Will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour / of it unless that suspicion is removed." [22]

iii. THE 'TRANSACTION'

Turner P. went into this area in some depth. He felt that Wild C.J., having found that Mr Tanner had failed to show the 'righteousness of the transaction' as regards the increase in his legacy, was not bound to set aside the 1966 Will as a whole.

Speaking of the trial decision he said "It seems to me that (Wild C.J.) assumed that the 'transaction' the 'righteousness' of which is to be made the subject of inquiry was the execution of the whole Will. But the cases do not appear to me to use the words 'the righteousness of the transaction' in quite this sense. These words, where they are used, seem to me to refer rather to the particular benefaction of the person propounding the Will, which may be quite a different matter, and may lead to quite a different result." [23]

He went on to consider Barry v. Butlin [24] Fulton v. Andrew [25] and Craig v. Lamoureux [26] and concluded that in each of these cases 'the transaction' referred to was the transaction in respect of the legacy of the beneficiary who had prepared the Will. In respect of Tyrrell v. Painton [27] he said "Davey L.J. does use the words in resolving the same question as that raised in this case - whether the whole second Will

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21 See n.8
22 See n.14 p.159 et seq
23 Tanner n.1. at 90
24 See n.8.
25 See n.10.
26 (1920) A.C.349
27 See n.14

must be granted probate or not. But in that case it should be noted that the second Will gave to the proponent of it 'nearly the whole of the testatrix's property' - and accordingly the Will and the benefaction of the proponent could properly be regarded as in fact the same transaction. That cannot be said of the case before us, in which there were other very substantial beneficiaries named in the Will under examination whose parts in the events under consideration were never in the slightest degree assailed."[28]

He concluded, regarding the righteousness of the transaction of the person propounding the Will, that "the righteousness of the transaction is not properly to be accepted as a reason for refusing probate of the whole Will, including the benefactions of the niece, the grandnieces, and grandnephew, the righteousness of which was not attacked."[29]

iv THE 'RULE' IN GUARDHOUSE v BLACKBURN:[30]

The 'rule' arose as a result of a strict interpretation of The Wills Act.[31] Guardhouse v Blackburn[32] was a case where two words inadvertently included by a Solicitor in a Codicil had the effect, if read literally, of defeating two very substantial legacies under the Will. Sir J.P. Wilde[33] held that (except where fraud had been practiced on the testator) "the fact that the Will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his due execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof."[34]

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28 Tanner n.1. at 91
29 Idem
30 (1866) L.R. 1. P & D 109
31 1837 (U.K.)
32 See n.30
33 Sitting alone
34 See n.30 at 116

Atter v. Atkinson[35] was a similar case. There, Sir J.P. Wilde (addressing the Jury) said, in a case with facts similar to Tanner: "There is a proposition of law, however, which I consider it is my duty to put before you. The question of fact is, did (the testatrix) really ever read the contents of this document? If you are satisfied that she did read it, then, as a proposition of law, I feel bound to tell you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity,[36] she read this residuary clause, the fact that she afterwards put her signature to it is conclusive to show that she knew and approved of its contents."[37]

These statements have been approached with caution. The headnote of Fulton v. Andrew[38] states, "There is no unyielding rule of law (especially where the element of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a Will read over to him, and has thereupon executed it, all further enquiry is shut out."[39]

This area of the law was recently discussed in Re Morris (Deceased).[40] That was a case where a Codicil, as a result of a Solicitor's inadvertence, revoked clauses 3. and 7. of a Will instead of clauses 3. and 7(iv). Under clause 7. there were some twenty different legacies. The Court declined to grant probate of the Codicil.

MacArthur J. discussed Guardhouse v. Blackburn and decided that while there may well have been "good reasons in the interests of justice nearly 100 years ago which compelled the Court to fetter its own power to get at the true facts; that the more modern trend in many fields had been to strike such fetters off."[41]

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36 And presumably, in the absence of fraud
37 See n.35 (Again sitting alone) at 670
38 See n.10. The headnote accurately expresses the decision on this point.
39 Cited by Turner P. in Tanner n.1. at 89.
40 (1971) P.62
41 See n.1. 74
35 (1869) L.R. 1 P & D 665

He also quoted Latey J's opinion[42] that the modern position is as put by Sachs J. in Crerar v. Crerar[43] and that the Court has "to consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material it has to come to a conclusion whether or not those propounding the Will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive nor do they raise a presumption of law."[44]

Although recognising that Re Morris (Deceased)[45] and Crerar v. Crerar[46] were both cases involving mistake, MacArthur J. 'saw no reason why the principle should not be of a general application.' Thus he found that "I think that in the present case the facts ..... that the Will was read over to the testatrix and that she executed it are not conclusive on the question whether she knew and approved the contents of the Will; but the facts must be given 'the full weight apposite in the circumstances'."[47]

Turner P. did not discuss Re Morris (Deceased),[48] but he reached a similar conclusion based on Barry v. Butlin,[49] Fulton v. Andrew[50] and Wintle v. Nye.[51]

SUMMARY OF THE COURT OF APPEAL'S DECISION:

The Court of Appeal decided against the appellants and the 1966 Will. Some of the reasons the judges gave relate to detailed study of the relationship of the evidence to various notes and papers and we do not have space to consider them, but the major reasons are more easily explained.

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42 See n.40
43 Unreported (1956) Cited n.1. 74
44 Cited n.1. 74
45 See n.40
46 Unreported Cited n.1.
47 See n.1. 74
48 See n.40
49 See n.8
50 See n.10
51 (1959) 1 W.L.R. 284

For example:-

i "(2) Mrs Budd had complete trust and confidence in Mr Tanner as regards her business affairs and she relied on him alone. He was in a position of influence towards her." [52]

ii The difference between the 1966 Will and Mrs Budd's previous Wills (1961, 1952, and 1952) which were all quite similar.

iii "(6) Mr Tanner kept the 1966 Will secret (except as regards his wife) until after Mrs Budd's death, a period of about 18 months. This is a suspicious circumstance which has been specifically referred to in some of the decided cases e.g. Wintle v. Nye." [53]

iv And lastly, the large intervivos gift to Mrs Tanner, and the large interest free loan to Mr Tanner.

MacArthur J. concluded, "I have been left in no doubt, on a survey of the whole of the evidence, that the appellants have failed to establish the very heavy onus of proof that rests upon them, and that they have failed to show that the 1966 Will does express the true Will of the deceased." [54] Richmond J. concurred, giving no separate judgment.

Turner P. agreed, saying "I think that it has been necessary, in affirming (Wild C.J's) decision, as I now do, to state clearly what are the grounds upon which for myself I would affirm it. These do not include the righteousness of the transaction; [55] but a broad survey of the whole of the

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52 See n.1. at 85
53 Idem
54 Ibid, 87
55 Bearing in mind the narrow scope he gives to the phrase 'the righteousness of the transaction'. He is referring to his affirmation of Wild C.J's decision to cut down the whole 1966 Will.

circumstances, which I adopt with gratitude from the judgment of MacArthur J., has left me in no doubt that their effect should have been - as it was - that those propounding the second Will failed to satisfy him, in the words of Theobald 13th ed. 111, that the testatrix in fact knew and approved of its contents." [56]

Accordingly probate was granted of the 1961 Will.

CONSIDERATIONS ARISING FROM THAT DECISION:

A. WHY WAS THE WHOLE 1966 WILL SET ASIDE?

i. It may be that the whole of the 1966 Will was set aside on the grounds of the first principle of Barry v Butlin.[57] That is, where any person propounds a Will there is an onus on them to satisfy the Court that the instrument so propounded is, in fact, the last Will of a free and capable testator. In general, in the case of the majority of Wills, the proof of due execution and the absence of any suspicious circumstances will be sufficient to satisfy the Court.

However, where there are suspicious circumstances the Court will require much more strenuous proof. One of the most suspicious circumstances will be that a person who takes a benefit under the Will, has been instrumental in its preparation. In some cases the suspicion will be easily removed. Often aged persons will have assistance in their affairs from members of their families, and equally often they will make testamentary provision for such persons; but additional circumstances may make an apparently innocent assistance appear more sinister.

It is clear from the cases that some of these additional circumstances will be:

1. A scheme of disposition markedly different from previous careful Wills and which has increased emphasis on the assisting party (or some person closely associated with him).

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56 See n.1. at 92
57 See n.8

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2. The suppression of such a Will from other family members and friends until after the testator's death.

3. Generous provision for an assisting party already generously provided for intervivos, if at the expense of others not so provided for.

Accordingly it seems that the suspicion of the Court was aroused against the propounder of the 1966 Will either on the ground that Mr Tanner's wife took a substantial benefit under the Will and he had prepared it, or, on the grounds of his benefit. Once this suspicion was aroused the Court looked at all the evidence and found, not only had the Tanner's failed to satisfy the Court as to the righteousness of their transaction, but also that taking all the circumstances into account the Court felt that the onus probandi had not been satisfied; that is, that the party propounding the Will had failed to satisfy them that the instrument so propounded was the last Will of a free and capable testator. To so find the Court need not have before it evidence of either fraud or undue influence.

ii. It may also be that the whole of the 1966 Will was set aside because of the difficulties imposed by the pleading.[58] He pointed out [59] that if the proceedings had been differently conducted it may have been possible to grant partial probate of the 1966 Will, striking out the bequests of the Tanner's, but leaving the others intact. Is there any reason why he could not have disregarded the pleadings and so decided?

It seems clear from Rules 59. and 61. of the Code of Civil Procedure [60] that Wild C.J. was entitled so to join the parties. Rule 59. (and similarly Rule 61.) talks of joining parties when

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58 By 'the pleadings' Turner P. seems to have meant the joining of the Tanner's with the other beneficiaries who took increased benefits under the 1966 Will.

59 See N.1. at 90

60 Sims Ed

separate actions would give rise to "any common questions of law or fact." Were there any such common questions?

If the Tanner's brought an action requesting probate of the 1966 Will the questions of law involved would be, first, the general onus probandi, and second, the special onus thrown on them by Mr Tanner's participation in the preparation of the Will. If the others taking increased benefits under the 1966 Will requested probate, they would have thrown on them only the general onus probandi. In both cases the same questions of fact would be canvassed.

Accordingly it is submitted that the cases would have been similar enough to satisfy the requirements of Rule 59. and 61. They provide that "judgment may be given for such one or more of (the parties who are joined) as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment."

So the pleadings were not really a bar to Turner P. granting partial probate of the 1966 Will. The real bar, clearly, was his decision in terms of Barry v. Butlin [61] that the general onus probandi had not been satisfied, as regards the whole Will.

B. WAS THE ONUS PROBANDI PROPERLY UNDERSTOOD IN THE SUPREME COURT?

Could it be that Wild C.J. joined all those taking increased benefits under the 1966 Will as propounders because he regarded their benefits as suspect? If he regarded the benefits as suspect because of the relationship of those persons to Mr Tanner, then it may well be argued that his net was cast too wide. In cases where the benefit has gone not directly to the preparer the Courts have not put the relationship giving use to suspicion much wider than husband and wife, or parent and child.

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61 See n.8

While cases may no doubt be imagined where benefits to a person outside those relationships with the preparer were regarded as suspect, it is submitted that to have done so here would have been incorrect. Especially where all those concerned were not only relatives of the preparer, but also the only close relations of the testatrix.

No doubt a line must be drawn somewhere between persons who take a benefit, and have a relationship with the preparer, and those ordinary legatees' whose benefit is in no way suspect, but the Court of Appeal gives no indication where it ought to go in principle. As these cases always involve complex considerations of the facts it may well, however, be best for the decision to be left to the Court in each case, than to lay down a possibly restrictive principle.

C. WHEN SHOULD PARTIAL PROBATE BE GRANTED?

Clauses are occasionally struck out of Wills. Sometimes as being too vague, [63] sometimes because they contain conditions impossible to fulfill [64] and so on. But what of a case where a legacy has been held invalid by virtue of suspicion attaching from participation in the preparation of the Will? If the suspect legacy is ruled out, is the testator's Will given better effect by the granting of partial probate of that Will, or by granting probate of an earlier Will (or finding the deceased intestate)?

A certain reluctance to grant partial probate is understandable. This would arise from a feeling that the suspect benefit may have been given "at the expense" of other beneficiaries, and that persons who take under the contested Will might have been differently (usually more generously) dealt with had there been no suspect bequest. On the other hand, those taking even if partial probate is granted may well receive more than under a previous Will (as would have been the case for the other beneficiaries under the 1966 Will in Tanner)

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63 In Re Warren (Dec'd), Taylor v. Warren (1934) N.Z.L.R. S.193

64 Re Smith (Dec'd) (1908) G.L.R. 111

As Tanner clearly shows the answer is that where the Court is convinced that the circumstances surrounding the Will are such that they do not feel that it represents the true Will of the testator in any respect then they should cut it down in toto. But where they feel that the non-suspect bequests do express the true Will of the deceased then partial probate should be granted.

D. WAS TURNER P. CORRECT AS TO THE EFFECT OF PARTIAL PROBATE OF THE 1966 WILL?

Turner P. said that [62] granting partial probate of the rest of the 1966 Will (disallowing the bequests to the Tanner's) would have had the same result, as far as they were concerned, as cutting down the whole Will. It is submitted that this view may be incorrect.

Presumably if the whole 1966 Will was cut down the Tanner's took their bequests under the 1961 Will. That would have given (and presumably did give) Mrs Tanner £2,000 and Mr Tanner £1,000. On the other hand if partial probate was granted of the 1966 Will (i.e. cutting down only the bequests to the Tanner's) then the Tanner's would prima facie take nothing. However the prima facie disentitlement might have been alleviated by the Administration Act, 1952.

As Mrs Tanner's bequest was a fraction of residue, Mrs Budd would have been intestate as to that fraction. Under S.56.1(e) of the Act it would appear that half of that fraction would go to Mrs Tanner and half to her sister, as they are the two members of the class that takes. They would take because Mrs Budd left no spouse, no issue and (presumably) no parents. That leaves Mrs Tanner and her sister as issue of the next class - brothers and sisters of the deceased.

That would give Mrs Tanner £12,000, unless the Court could find some reason for refusing to apply the Act. They might

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62 See n.1 90

claim a jurisdiction to prevent a statute being used as an instrument of fraud (but no fraud is here alleged), or to prevent anyone profiting by their own wrong (and there is no suggestion of any wrong by Mrs Tanner). And only a suspicion attached to her husband.

If this possibility ocurred to the Court of Appeal it is interesting to speculate as to whether it may have influenced their decision to cut down the whole 1966 Will.

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Due	Borrower's Name
	GR WALKER.
7-4	A. Pacyna
18/4	DM Lees
14/3	Bates
24/4	K. ST
26/4	K
28/4	
25/4	
30/4	
/	