

Judgment 30/2008

Brooks et al v Allen, Billen and Taylor (In re Jennifer Brooks, deceased) – Royal Court (Civil Action File 1159) – 28 August 2008

Will of personal estate – action to set aside, alleging want of testamentary capacity – preliminary hearing to decide where the burden of proof lay – the burden of proof may shift from one party to another in the course of a case – held that in the present case the burden of proof lay initially on the parties propounding the will to demonstrate that the Testatrix had the requisite mental capacity

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1159

The 28th day of August 2008 before Rosalyn Le Couteur Brelsford, Lieutenant Bailiff, sitting alone.

Between

PHILIP BROOKS
JASON GEORGE BROOKS
and
GREGORY ROBERT BROOKS
(The Plaintiffs)

and

PAULINE ANGELA ALLEN
(Executrix of the will of Jennifer Brooks)
(First Defendant)

and

KAREN BILLEN
(Second Defendant)

and

JUNE TAYLOR
(Third Defendant)

Whereas on the 22nd August the Lieutenant Bailiff considered an application for an Order that the burden of proof is upon the parties propounding the Will of the said Jennifer Brooks (the Defendants), to demonstrate that at the time the Testatrix made her Will she had the requisite mental capacity so to do and whereas the Lieutenant Bailiff heard thereon Advocate P T R Ferbrache Advocate for the Plaintiffs, Advocate P A Allen Advocate for the First Defendant, Advocate R I C E Harris Advocate for the Second Defendant, the Third Defendant being unrepresented the Lieutenant Bailiff this day HELD that the burden initially is upon the Defendants as the parties propounding the Will to demonstrate that at the time the Testatrix made her Will she had the requisite mental capacity to do so.

S M D ROSS
Her Majesty's Deputy Greffier

Approved Text

28 August 2008

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Date of hearing: 22 August 2008

Before Rosalyn Le Courteur Brelford, Lieutenant Bailiff

Between PHILIP BROOKS,
JASON GEORGE BROOKS and
GREGORY ROBERT BROOKS
The Plaintiffs

and

PAULINE ANGELA ALLEN
Executrix of the will of Jennifer Brooks
First Defendant

and

KAREN BILLEN
Second Defendant

and

JUNE TAYLOR
Third Defendant

Judgment handed down: 28th August 2008

Advocate for the Plaintiffs:	Advocate P T R Ferbrache
Advocate for First Defendant:	Advocate P A Allen
Advocate for Second Defendant:	Advocate R I C E Harris
Advocate for Third Defendant:	Unrepresented

Cases & texts referred to:

Trigg, Trigg and Griffin v Crapp and Trigg (1984) JJZ1 at 24
Jeremie, Law of Real Property in Guernsey
Hoff v Atherton (2005) Wills & Trusts Law Report 999
Halsbury Volume 50, paragraphs 314 & 315
Davies v Stirling (1983) J.J. 77

Introduction

1. On the 25th May 2006 the late Jennifer Bridget Elizabeth Mary Brooks (hereinafter called “the Testatrix”), executed a Will of Personal Estate in which she appointed Advocate Pauline Angela Allen (the First Defendant) to be her sole Executrix. By the said Will the Testatrix gave the sum of £100,000 to Karen Billen (the Second Defendant) “*as a token of my love and gratitude for all that she has done for me*” and £50,000 to June Taylor (the Third Defendant) “*in recognition of the friendship of June and her husband Shirley*”. The rest of her personal estate was to go to her four children in equal shares absolutely provided that should any of her children predecease her leaving issue such issue should take by representation and per stirpes absolutely. It is accepted that the Testatrix [suffered from ill

health was an alcoholic and that since 15th May 2001 she had been under guardianship and so remained both when she gave instructions and signed her Will. She was still under guardianship at the time of her death on 26th March 2007.

2. Since her death, three of her children Jason George Brooks, Philip Harvey Brooks and Gregory Robert Brooks (hereinafter called the Plaintiffs), have commenced proceedings against the Defendants seeking an Order that the Testatrix's Will be set aside "*for want of testamentary capacity*". The present interlocutory application before the Court is for an Order that the burden of proof is upon the parties propounding the Will (the Defendants), to demonstrate that at the time the Testatrix made her Will she had the requisite mental capacity so to do.
3. Advocate Ferbrache, acting for the Plaintiffs, submitted that although it is presumed that a testator was sane at the time when he made his Will, if the question of sanity is contested, the onus is on the person propounding the Will to prove that the testator was of sound disposing mind at the time when he made his Will. He drew my attention, inter alia, to the position under Jersey Law, as held by Eareat, B. in Trigg, Trigg and Griffin v Crapp and Trigg (1984) JJZ1 at 24:

"the proper rule is that it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and that therefore where, as here, there is a dispute as to the capacity of the testator, his testamentary capacity must be proved by the person setting up the will".

4. Advocate Allen, acting for herself, submitted that there is little authority in Guernsey relating to testamentary capacity and what there is, is contained in the text of Jeremie, Law of Real Property in Guernsey. Advocate Allen quoted Jeremie as stating that there may be a presumption of incapacity of a person under guardianship as a result of dementia but not when the person is under guardianship because of "*intoxication and prodigality*" as a guardian is appointed in this case "*for the purpose of securing him against wantnot for that of depriving him of any civil right*".
5. However, as Jeremie goes on to state, this does not stop a person's Will being questioned if he becomes "*so weak or deranged as to render him unfit to select the heir of his choice*".
6. Advocate Harris, acting for the Second Defendant, also referred to the excerpt from Jeremie. He further argued that the Court should first hear the full evidence on oath before it can determine whether the burden of establishing capacity has in fact shifted to the propounder of the Will. He directed me to the case of Hoff v Atherton (2004), in which Lord Justice Chadwick stated that the burden of proving soundness of mind lies on those propounding the Will in the light of all the evidence before the Court.

Conclusion

7. It is correct that the burden of proof may shift from one party to another in the course of a case. Thus where it is admitted by those propounding the Will that the deceased had previously suffered from incapacity at a period before the Will was made a presumption is raised against it, though not a conclusive one.
8. Once all the evidence has been given and is before the Court, the burden or onus of proof is rarely decisive. The Court must sift and evaluate that evidence and make its findings upon it. (Davies v Stirling (1983) J.J. 77)
9. While generally speaking, the law presumes capacity and no evidence is required to prove the testator's sanity, if not questioned, where any dispute or doubt exists as to the capacity of the testators "*his testamentary capacity must be established and proved affirmatively.....The issue of capacity is one of fact. The burden of proof of sanity is*

considerably increased when it appears that the testator had been subject to previous unsoundness of mind". (Halsbury Volume 50. Paragraph 314)

10. Once incapacity before the date of the Will has been established, the burden lies on the party propounding the Will to show that it was made after recovery or during a lucid interval and is therefore valid. *"In such a case the Will should be regarded with great distrust, and every presumption should in the first instance be made against it"* (Halsbury Volume 50 paragraph 315).
11. At this juncture therefore, for the above reasons, I find that the burden initially is upon the Defendants as the parties propounding the Will to demonstrate that at the time the Testatrix made her Will she had the requisite mental capacity to do so.