

## Poisoning a testator's mind: fraudulent calumny

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In *Whittle v Whittle & Anor* [2022] EWHC 925 (Ch), the High Court set aside the testator's will even though he possessed mental capacity and understood his will. The will was set aside on the basis that it was procured by fraudulent calumny (or, in the alternative, undue influence).

### Background

The testator died at the age of 92. Just a few weeks before his death he made a will which left the bulk of his assets to his daughter ("the first defendant") and her partner. Though the testator's health was failing and he was frail and vulnerable, there was no suggestion that he misunderstood his will or did not satisfy the mental capacity test requirements.

The testator was however dependent on others, including his the first defendant. Within this setting, the first defendant made a number of what the court considered to be false allegations against her brother ("the claimant") to her father. She told her father that the claimant was a violent man who assaulted women, committed criminal damage, and stole money from his mother-in-law. She also told him that he was living off what she stated were immoral earnings.

The claimant claimed that the will was procured on the basis of fraudulent calumny and/or undue influence.

### Fraudulent calumny vs undue influence

Undue influence claims differ subtly from fraudulent calumny claims. A claim in undue influence requires a claimant to show that the testator was made to change their will against their free will as a result of some



improper conduct (for example in circumstances where the testator is threatened, forcibly persuaded or coerced into changing their will). Conversely, fraudulent calumny occurs where the testator changed their will after false representations (or a series of false representations) are made about the character of another beneficiary, the testator's mind is 'poisoned' against that potential beneficiary and they decide to leave less of their estate to that beneficiary as a result.

So with fraudulent calumny, the question is not whether the testator lacked capacity to make decisions, but rather whether they made those decisions as a result of false statements.

## The judgment

The judgment focused primarily on fraudulent calumny and summarised the requirements for fraudulent calumny into three stages, namely that it must be proven on the balance of probabilities that:

- the defendant poisoned the testator's mind against the claimant by making a false representation to the testator about the character of a potential beneficiary;
- the claimant would be a natural beneficiary of the will but for the defendant's alleged actions; and
- the defendant either knew the representation was untrue (or reckless as to whether it was true).

The judge found no evidence to suggest the testator was going to draft a will prior to the first defendant's false statements. Therefore, the testator's estate would likely have passed by the laws of intestacy but for the first defendant's actions. The judge also found that on the balance of probabilities, the statements made were objectively false and the defendants believed them to be false.

Consequently, the High Court held that the testator's decision to draft the will had been subverted by his daughter's lies which were intentionally told to procure the will. Accordingly the will was set aside and the daughter was ordered to pay the costs of the proceedings.

The judge only briefly discussed the undue influence aspect and found that this part of the claim was also made out.

## Thoughts

Fraudulent calumny claims are often considered difficult claims to pursue as they rely on evidence which may not be available to the potential claimant, such as details of discussions that took place between the defendant and testator behind closed doors. That being said there are often multiple avenues for challenging the validity of a will and, accordingly, it is worth seeking professional advice at the earliest available opportunity to determine which approach is the most appropriate.

If you need some further help or advice on this topic, please get in touch or contact Dino Sikkell at [constandinos.sikkell@cripps.co.uk](mailto:constandinos.sikkell@cripps.co.uk).

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