

Nuncupative or Informal Wills

The recent decision of *Anne Ayling v Emma Summers & others* CH D 14/9/09 confirmed the possibility of oral and/or informal wills of certain testators being enforceable.

Providing certain conditions are met, the expression of wishes (whether oral or written) by soldiers, sailors and seamen will constitute an enforceable will, despite not complying with the formalities laid down in section 9 of the Wills Act.

Section 11 of The Wills Act states:

“any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act”.

Section 2 of the Wills (Soldiers and Sailors) Act 1918 then stated that Section 11 of the Wills Act:

“shall extend to any member of His Majesty’s Naval or Marine Forces, not only when he is at sea but also when he is co circumstanced that if he were a soldier he would be in actual military service within the meaning of that section”.

Therefore there must be evidence of a deliberate expression of wishes intended to have a testamentary effect, although the testator need not necessarily have to believe he is making a will. In addition the soldier must be *“in actual military service”* or the mariner or seaman must be *“at sea”* within the full meaning of that phrase (see below).

Anne Ayling v Emma Summers & others

This matter concerned two possible nuncupative wills which had been made by Ashley Edward Servoz-Gavin (“Ashley”) in 1985 and then again in 1990. The following issues arose:

1. The importance of the evidence of the witness to the conversations.
2. The extent to which the privilege extends to a *“mariner or seaman”* who is on board (or under instructions to board) a non British registered ship.
3. The meaning of *“at sea”*

Ashley was the illegitimate son of Agnes Ayling. Agnes’ twin sister Anne was the Claimant in this matter. Agnes’ eldest brother Walter had a daughter Christine and a grand-daughter Emma who are the Fourth and First Defendants. Both these Defendants supported the Claimant’s claim for admitting the nuncupative wills to probate, and were the principle witnesses. The other Defendants would benefit on intestacy.

Ashley was born on the 22 February 1946 and as an illegitimate child was apparently shunned by most of his family, the exceptions being Walter and Anne. As a result, Ashley grew up and was relatively friendly with his cousin, Christine and very close to his aunt Anne.

When Ashley was 14, he joined the army, eventually qualifying as a radio-officer in 1978. Thereafter he spent the rest of his life at sea working for various employers on different voyages.

The Evidence - May 1985

Christine gave detailed evidence of a conversation she had had with Ashley (at a time when he had told her that he had to catch a flight to join his ship) in May 1985 in which he had stated:

"I want everything to go to Aunt Anne".

Christine had stated in her written witness statement that she thought this conversation took place *"at the end of the Whitsuntide half-term 1985"* but that she could not recall the exact date other than it was late spring/early summer.

It subsequently transpired that the conversation could not have taken place during the Whitsuntide half-term because this was at the end of May by which time Ashley was on board a Dutch ship called the *Mijdrecht*, having boarded it on 22 May 1985. This was evidenced by a Dutch seaman's book (which is like a passport). It appears that following a doctor examination on 14 May, Ashley had remained in Rotterdam until he boarded the *Mijdrecht*.

The Judge did not place too much emphasis on this contradiction in evidence considering that Christine had simply said that she *thought* that the conversation was in the half-term holiday. She had also in oral evidence reconsidered and stated that it was more likely to have been around the beginning of May which coincided with her daughters birthday.

The Evidence - February 1990

Christine gave evidence of having another conversation with Ashley in February 1990 at a time when he was staying with her for a couple of nights. He repeated:

"what I told you before still applies. If anything happens to me, if I snuff it, I want everything to go to Auntie Anne".

Documentary evidence (including expenses claims) showed that on 12 February 1990 Ashley had made a telephone call for instructions to board a ship. He had then called Christine to arrange accommodation with her. Following this he had arranged a return ticket from Hull to St Albans, visited London to arrange a visa, visited Petty France and India House. On the 21 February he had caught a taxi to the airport, missed his flight to Bombay, returned "home" and then caught a flight to Bombay the following day on 22 February, boarding the ship the *CPLB Crawler* (Panamanian registered) on 25 February.

The Judge accepted all of Christine's evidence despite her evidence being based on her recollection of events that took place 19 and 24 years ago.

Intention

It was unnecessary to show that Ashley knew he was making a will. All that was necessary to show was that his words were intended to guide someone as to the disposition of his property after death and were not merely intending to be informative or a matter of interest.

The Judge accepted Christine's evidence and stated that the actual words used and the seriousness with which he spoke was enough to prove that Ashley was actually giving Christine instructions as opposed to mere information.

The Extent Of The Privilege Extended To "*Any Mariner Or Seaman*".

It was argued on behalf of the beneficiaries on intestacy that nuncupative wills were reserved for mariners and seaman serving on British Registered ships. The argument was that the rationale of Section 11 afforded the full privilege to those persons who are engaged in a dangerous occupation, in places where there may be no chance to make a will in the conventional way, and where their occupation is in the national interest. It is this "*national interest*" which was emphasised as being grounds to restrict the operation of the privilege. It was argued that the fact that Section 2 of the Wills (Soldiers and Sailors) 1918 Act doesn't specifically refer to civilian vessels supported this proposition.

The judge rejected this argument and stated that the clear wording of Section 11 of the Wills Act referred to all mariners and seaman. There was no reason to restrict the wording to seamen aboard British registered ships, and no need to import the concept of national service. He quoted the case of *In the Goods of Donaldson* [1840] in which it is stated "*there is nothing in the section of the Act which restricts the exemption to the Queen's soldiers*".

Being at Sea

The phrase "being at sea" has already been interpreted to include those that are on board the vessel and also those who are preparing to board the vessel. In other words if the testator was under orders or engaged to board a particular ship then he would be said to be "at sea" for the purposes of the Wills Act. See the following examples:

1. *In the goods of Newland Deceased* [1952]. Making a will while on shore-leave was accepted.
2. *In the Goods of Sarah Hale* [1915]. A typist usually worked on the ill-fated *Lusitania* and when not on board the ship would work in the offices in Liverpool. It was held that she was engaged to board the *Lusitania* for its next (and as it happened last) voyage and was therefore "at sea" when she made her will.
3. Making a will after receiving instructions to join another ship was sufficient to attract a privilege.
4. On the other hand where a seaman had been discharged from one ship and had not yet received orders to board another, he was held not to be "at sea".

The Judge held that from the conversation on 12 February 1990, Ashley was engaged to join the *CPLB Crawler*. It was shown that the nights on which he stayed with Christine were the 13 and 14 February at a time when he was therefore "*under orders*".

The Judge therefore found that the 1990 will was upheld and that it would have revoked any previous wills. The judge did however comment that the 1985 will probably would have failed, due to the fact that there was no actual documentary evidence of Ashley being under

orders to join a particular ship, despite his comment that he had to catch a flight to join his ship.

Costs

The costs of both sides to the dispute were met from the estate. The judge commented that circumstances were such that a challenge to the 1985 and 1990 wills was inevitable. Because the challenge was made sensibly and proportionately, the Judge allowed all parties costs out of the estate.

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