

Foreign Wills

The recent England and Wales Court of Appeal (EWCA) ruling handed down recently in the case between Jaswinder Sangha and the estate of Diljit Kaur Sangha, as represented by Sundeep Singh Sangha, as well as Mandi Vanderpuye, Harbiksun Singh Sangha and Jagpal Kaur Sangha, helps to illustrate the complexities which arise when the assets which make up an estate are divided between two different countries, and how the normal principles of will writing and estate planning can become somewhat blurred if a separate will has been created for each of the countries. The details of this particular case are quite complex, but worth recounting in at least a simplified version, as they clearly set out just how complex the situation of multi-national estate planning can become.

In general terms, the appeal related to the estate of Hartar Sangha, who had died in 2016. The original trial in 2020 involved a probate claim by Jaswinder, who had married Hartar in India in 1992. The claim made in this trial was that a will Hartar had made in 2007, leaving his English and Indian estates entirely to her, was his last valid will. The defendants in this probate claim were Hartar's children Sundeep and Mandi, and the estate of their mother Diljit, who died after Hartar and during the course of the proceedings. One area of dispute was whether the marriage between Hartar and Jaswinder was valid, with Sundeep and Mandi alleging that Hartar and Diljit had married in 1962 and never subsequently divorced.

During the course of the proceedings, Hartar's sister Jagpal Sangha joined as another defendant, on the basis of a will she had produced, made by Hartar in 2016, which divided his Indian estate between Sundeep, Diljit, Harbiksun Sangha, who was his son with Jaswinder, and Jagpal his sister, in equal measures. The will contained a revocation clause, which stated that " This is my last and final WILL and all such previous documents stand cancelled." For her part, Jaswinder claimed that this 'new' will was a forgery or, as an alternative, that the revocation clause it contained did not revoke the sections of the 2007 will dealing with the English estate. If the 2016 Will was found to be valid, Sundeep and Mandi claimed that it would revoke all previous Wills, and under these circumstances they would benefit with regard to the English estate in line with the rules of intestacy.

The findings of this trial were as follows:

- The 2016 Will was valid and not a forgery
- The 2016 Will revoked all previous Wills, including the 2007 Will, which was also valid

As a result of these findings, the English estate of Hartar was to be dealt with in line with the rules of intestacy, from which Sundeep, Mandi and Harbiksun would benefit. It was decided that a later trial would rule on whether Diljit or Jaswinder counted as the surviving spouse for the purposes of intestacy. Jaswinder appealed the decision on the 2016 revocation clause, claiming that Hartar could not have meant to revoke the part of the 2007 Will dealing with his English estate. Sundeep and Mandi filed a Respondent's Notice which complicated matters further by arguing that the 2007 Will had not even been duly executed, on the grounds that only one of the two witnesses was present when Hartar signed it. There were arguments and counter-arguments around exactly when Witness 2 signed the Will and whether this was sufficient to meet the requirements for witnesses set out under section 9 (d) of the Wills Act 1837.

Ultimately, the appeal was allowed, following a judgment which stated that:

- The revocation clause in the 2016 Will was not intended to revoke that part of the 2007 Will which dealt with Hartar's English estate. The basis of that judgment was that 'where a will is expressed to apply to specific, identified property in a particular jurisdiction, is made in that jurisdiction with the assistance of lawyers established and qualified in that jurisdiction, and has no other connecting factor with any other jurisdiction, the starting point should be an assumption that the will as a whole is only intended to apply to that property in that jurisdiction unless there is some good reason to believe otherwise.'
- The requirements detailed under section 9 (d) of the Wills Act 1837 were not sufficient to render the witnesses signatures invalid, and thus the Will not executed.

Finally, Sundeep, Mandi and Diljit's estate appealed to the Court of Appeal, and it is this final appeal which has now been allowed, the judgement stating as follows:

- The revocation clause in the 2016 Will did revoke the 2007 Will in its entirety
- The question of the witnessing of the 2007 Will remained unresolved, but was allowed to do so on the basis of the decision with regard to the revocation clause (i.e. it having been revoked, the witnessing of the 2007 Will became a moot point).

As well as providing a degree of closure for this particular case, this decision helps to clarify the way in which the law applies to the kind of revocation clauses involved. This is the first time that a judgement given at Court of Appeal level has approved the principle set out in the case of [Lamothe v Lamothe \[2006\] WTLR 1431](#), which stated that in circumstances in which a later will, such as the 2016 will in this case, contains a general revocation clause, such a clause will be applied in accordance with its plain meaning, unless the later will in question sets out a clear and unequivocal intention *not* to revoke earlier wills dealing with property in another country. In doing so, the Court of Appeal rejected the 'starting point' as set out in the original appeal judgement detailed above. Challenges to a revocation clause of this kind – in those cases in which the estate of the deceased is located in two or more jurisdictions – require a much heavier burden of proof than Jaswinder was able to meet in this case. Past examples include the case of *The Estate of Wayland (1951)*, in which the testator made a will in Belgium in 1947 intended to deal only with Belgian property and a will in 1949 in England. The 1949 will did include a general revocation clause, but explicitly stated that 'this will is intended to deal only with my estate in England'. Similarly, the 2007 case of *Benjamin v Bennet* featured a testator making a will in England followed later by a will in Barbados. The Barbados will contained a general revocation clause which was headed 'Barbados' and dealt only with assets in Barbados. The general revocation clause in the 2016 will made no such distinction between jurisdictions, and so the 2007 will was wholly revoked and the rules of intestacy applied to the English assets of the deceased.

What this judgement serves to underline is the fact that the situation regarding wills which deal with estates in more than one jurisdiction is highly complex, and the wills in question need to be drafted in a manner which makes the intentions of the testator clear, unequivocal and easily understood, particularly with reference to general revocation clauses, and the fact that upholding such clauses may lead to an estate in England and Wales being divided in line with the rules of intestacy.

In the majority of cases, anyone with assets in both England and other jurisdictions would be strongly advised to create separate wills in each of those jurisdictions, but to frame each will so as to ensure that it does not invalidate any existing English will. An English will which deals with assets in another jurisdiction may not be valid due to the fact that some jurisdictions have strict laws determining how a testator is allowed to distribute their assets after death. These 'forced heirship' rules mean that, in France, for example, a testator's children are entitled to a minimum share of their estate, ranging from half to three quarters depending upon the number of children. Clearly, rules of this kind would render an English will – in which the testator is free to leave their estate to whoever they wish – invalid.

Some of the complexity of this situation, in Europe at least, was removed with the introduction of a law known as the EU Succession Regulation, but commonly referred to as Brussels IV. Brussels IV was opted into by every country in the EU, with the exception of the UK, Ireland and Denmark, and states that the national laws of the country in which a testator's assets are situated will apply unless that testator explicitly states, in their foreign will, that they wish to apply English law. This rule applies to UK nationals and continues to do so despite the impact of Brexit. Brussels IV came into operation on August 17th 2015, however, so anyone who created a foreign will before this date will have to vary that will – usually with the creation of a codicil – to include an election stating that the testator wishes the laws of their nationality to apply to all of their assets worldwide. For those people who live in the UK and would like English law to apply to their estate, but do not yet have British citizenship, the situation can be more complicated. They will not be able to make an election as set out above, but English laws in regard to succession may still apply if it can be shown that they were 'habitually resident' in the UK, unless they were 'manifestly more closely connected' to another jurisdiction. The stronger the links to the UK are, the more certainty there will be, but nothing offers as much certainty as obtaining UK citizenship, and in all cases wills should be drafted with the help of legal experts in order to avoid the kind of complications seen in the case of Hartar Sangha.