WILLS

Wills: The public interest – whose view counts?

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Natasha Dzameh explores the Court of Appeal's decision on the will of His late Royal Highness Prince Philip

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Following the death of His Royal Highness Prince Philip the spotlight was shone on the practice of sealing royal wills. Sir Andrew McFarlane, president of the Family Division (the president), gave a public judgment addressing the history and context of such applications, including the uniqueness of the role of the sovereign and senior royals and the principle of open justice.

That judgment also addressed points regarding who represents the public interest and what, if any, role the media could or should have. The Court of Appeal delved into these aspects further in its judgment this summer.

Executor of HRH Prince Philip, Duke of Edinburgh (Deceased) v Guardian News and Media [2022]

Background

Although the sovereign's will need not be proved by a grant of probate this is not so for other members of the Royal Family, whose estates remain subject to the Non-Contentious Probate Rules 1987 (NCPR). On their death an application is made to the head of probate, ie the president of the Family Division, to seal the will. Consequently upon the death of Prince Philip his executor applied for probate and an order under r58 of the NCPR 1987 that said will be sealed up. Only representatives of the executor and the Attorney General were present at the hearing, which was heard in private.

At first instance the president held that r58 did not require exceptional circumstances to exist and the judge or registrar need only be satisfied that inspection was either undesirable or inappropriate. He ruled that the public interest issue would likely be determinative of whether the will and other probate documents would be open to inspection and that the Attorney General was 'uniquely entitled to represent the public interest'. He also conducted his own assessment of the relevant factors.

The exception from the ordinary rule regarding the publication of wills stemmed from the uniqueness of the position of the sovereign and head of state. The president noted the inherent public interest in protecting the dignity of the sovereign and close members of their family, with the former being of constitutional importance such that protection of the

sovereign's private rights and those of close members of the Royal Family was in the public interest. Protection of their dignity and standing was a form of enhanced protection of their private lives. The usual factors supporting public inspection, such as avoiding fraud or alerting third-party claimants, were unlikely to apply to a senior member of the Royal Family. Further, Prince Philip had probably been of the understanding, at the time of execution, that his will would not be open to public inspection in light of the convention having been in place for over a century.

The president also held that the hearing should be in private for the same reasons that the substantive application was successful. Although CPR r39.2 was not strictly applicable due to CPR r2.1(2), it was still relevant to this issue, particularly CPR rr39.2(3)(a), (c), (f) and (g). These require the hearing to be held in private if it is necessary to do so to secure the proper administration of justice and either:

> (a) publicity would defeat the object of the hearing;
> (c) the hearing involved confidential information (including information relating to personal financial matters) and publicity would damage said confidentiality;
> (f) the hearing involved uncontentious matters arising in the administration of a deceased person's estate; or
> (g) the court for any other reason considered a private hearing necessary to secure the proper administration of justice.

If there were to be announcements and hearings followed by a judgment on the matter over an extended period, this would likely create a media frenzy. To some extent this would defeat the purpose of the application.

The president accepted the submission by the executor's legal representative that only the Attorney General could speak as to the public interest as a matter of public law, such that there was no role, legally, for media representatives to put forward a contrary view of the public interest. He also accepted the view of the executor's legal representative that a private hearing accompanied by a full public judgment permitted the court to control the process and limited the publicity to only one event, ie publication of said judgment.

The president delivered an open and public judgment regarding the development of the conventional practice and the legal and historical context regarding it. The will was sealed up for 90 years and could only be opened in the interim with the president's consent.

Appeal

At the private hearing no media organisations nor Guardian News and Media (GNM), the appellant, had been invited to make submissions as to whether there should be limited press access at the hearing, even if heard in private, or on the issue of whether the hearing should be a private one at all.

GNM appealed on the basis that the president had erred, in that he:

> 1) misapplied *Gouriet v Union of Post Office Workers* [1977] in holding that only the Attorney General could speak to the public interest on media attendance at the hearing and the substantive issue;
> 2) denied the media the opportunity to make submissions on whether the substantive hearing should be held in private – this constituted interference with open justice or the media's rights under Art 10 of the European Convention on Human Rights

(ECHR) and was a serious breach of the accepted standards of procedural fairness; and
3) failed to consider any lesser interference with open justice than a private hearing which excluded all press representatives, thus applying too high a threshold to the question of whether the hearing should be held in private.

GNM sought an order setting aside the president's order and remitting the matter for fresh determination, with GNM taking part as an intervenor. GNM wished to make submissions on four issues:

- whether the will should be sealed;
- the order that no copy of the value of the estate of Prince Philip be made or kept on the court file;
- the process to be followed where an application was made to unseal the will; and
- the process to be followed regarding wills of members of the Royal Family.

Judgment

The Court of Appeal held it was incorrect as a matter of public law to say that only the Attorney General was entitled to speak to the public interest in the substantive hearing being held in public. The Attorney General's views on the public interest would carry great weight but the court could also request submissions from the media as to whether the hearing be in public, private or somewhere in between. *Gouriet* did not deal with that issue. The media representatives had no right to be heard before an order as to a private hearing was made but would normally be permitted to make representations at some point where orders would involve engagement of Art 10 of the ECHR. The president was correct to conclude that asking for such submissions would generate significant conjecture and publicity, contrary to the need to preserve the dignity of the sovereign and protect the privacy of the Royal Family. For completeness the Court of Appeal also confirmed that the Attorney General is uniquely entitled to represent the public interest and their view as to a particular course being strongly in the public interest would be compelling, albeit not determinative.

Only in rare and exceptional cases would it be appropriate for the court to sit in private, as was evident from CPR r39.2, which was relevant despite not being strictly applicable due to CPR r2.1(2). GNM's argument was fundamentally flawed, it having assumed, wrongly, that the media had a legal right to attend and make submissions whenever a party applied for a hearing to be held in private. Instead *A v BBC* [2014] established there was no such right. In not providing the media with an opportunity to make submissions on whether the substantive hearing should be in private, the president had not erred in law. The court could, where appropriate, notify the media and seek submissions as a matter of fairness.

The majority of the Court of Appeal did not think that the president had failed to consider lesser interference with open justice. He had considered the possibility of a representative attending on behalf of the media to make submissions. An alternative option would have been for the media to attend on the terms that they did not report what occurred until after the judgment was published and counsel were asked for submissions on this point. Ultimately, the president could not be criticised for not implementing this option.

There was a risk that alerting the media to the substantive hearing would result in a media storm and the case was an exceptional one, such that open justice was served adequately

by the publication of a full judgment. It was critically important to protect ‘the public interest in (a) protecting the dignity, and (b) protecting the private rights, of the Sovereign and the close members of her family’. Protracted hearings reported in the press would not have enabled these to be protected. The application was a non-contentious probate application so the private interests of testators and their families were important as well as the matter of the public interest in open justice. The principle of open justice could be derogated from only in exceptional circumstances and these were such circumstances. The hearing involved confidential financial information and that confidentiality would have been damaged by ill-timed publicity. Although there may be some debate about whether the matters were truly non-contentious, they were private matters involving the administration of the estate of a deceased person. It was necessary to sit in private to secure the proper administration of justice.

Although a perceived lack of transparency may be a matter of legitimate public debate, the NCPR allowed for some wills to be concealed from public inspection and it was not clear that there was a specific public interest in knowing how the assets of the Royal Family were distributed. The president had applied the statutory test properly and fairness did not demand that the media should have been invited to make submissions or even notified of the hearing.

The appeal was therefore dismissed. It is worth noting however that King LJ had reservations in respect of dismissal of Ground 3. She accepted the submission by GNM that the president did not consider a lesser interference, for example permitting accredited press members to attend the hearing subject to reporting restrictions. She noted that the challenges and complications of identifying the ‘accredited press’ were greater than ever but logistical challenges were not a justification, in and of themselves, for a hearing to take place in private when the media being present on terms would serve the interests of justice. Nonetheless the safeguards in the form of publication of a full and open judgment, with the Attorney General being present at the substantive hearing to represent the public interest, were such that she could not say the president was wrong in taking the course he did, albeit it may not have been the course she would have chosen.

Summary

While the Attorney General is in a unique position to speak as to the public interest, with their views carrying great weight, those views are not at the expense of all other voices on the issue of the public interest. The court may request submissions from the media as to whether a hearing shall take place in public, private or somewhere in between, but the media does not have a legal right to attend and make submissions whenever a party applies for a hearing to be held in private. Although it has no right to be heard before an order as to a private hearing is made, it will normally be permitted to make representations at some point where Art 10 of the ECHR is involved. Although the issue of how the assets of the Royal Family are distributed may be of interest to the public, the court questioned whether there was a specific public interest in knowing this.

Cases Referenced

- A v BBC [2014] UKSC 25
- Executor of HRH Prince Philip, Duke of Edinburgh (Deceased) & anr v Guardian News and Media [2022] EWCA Civ 1081; [2022] WTLR 1251 CA
- Gouriet v Union of Post Office Workers [1977] UKHL 5
- Re Will of HRH The Prince Philip, Duke of Edinburgh [2021] EWHC 77 (Fam); [2022] WTLR 1545 FamD

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