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No rest for the weary – *Croll v Thorpe* [2026] EWHC 2232 (Ch)

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Litigation is a daunting process, and many traditional chancery cases carry an additional emotional toll given their subject matter. One way in which the legal system manages this is by limiting a litigant's ability to re-litigate the same matter or to raise issues which should have been addressed originally, through rules on issue estoppel and abuse of process.

There are, however, limits to this, as was demonstrated in the case of *Croll v Thorpe* [2026] EWHC 2232 (Ch). That case concerned a probate dispute over the last will of Mr Arthur Dennis Thorpe, who died on 7 February 2024. The Claimant, Ms Croll, one of Mr Thorpe's daughters, sought to propound a will dated 17 August 2021 leaving Mr Thorpe's estate to her. An earlier will dated 5 March 2001 had instead left his estate to his wife, Mrs Margaret Mary Thorpe, who, by the time of the proceedings, had died and was represented by the Claimant's other siblings. The 2021 will was challenged on the basis of, among other grounds, a lack of testamentary capacity.

In support of that challenge, the Defendant siblings relied on a decision of the Court of Protection. Prior to the execution of the 2021 will, Mr Thorpe had executed a series of documents, including lasting powers of attorney (LPAs) in favour of the Claimant and her daughters. In July 2022, the Office of the Public Guardian applied to the Court of Protection to set aside those LPAs. This (and various other cross-applications) culminated in a hearing in the Court of Protection, where it was decided, following the assessment of the evidence, that Mr Thorpe lacked capacity to execute the LPAs. A paragraph of the Judge's judgment stated that the 2021 will "*cannot stand*". The Judge then declared, pursuant to s.15 of the Mental Capacity Act 2005, that Mr Thorpe lacked testamentary capacity to execute the 2021 will, which was accordingly invalid.

Following observations made by the Official Solicitor that s.15 of the Mental Capacity Act 2005 only permits decisions to be made as to Mr Thorpe's present rather than past capacity, and that prior case law had explained that the Court of Protection has no jurisdiction to rule on the validity of a will, the Judge indicated that the order should be amended. However, no steps were taken to formally amend the order, which remained in place.

Relying on the Court of Protection decision, the Defendant siblings sought strike out of, or summary judgment on, the claim. The question here was whether the decision gave rise to an issue estoppel which would prevent the validity of the 2021 will from being re-litigated in these proceedings. Master Clark decided that:

- As Mrs Thorpe was not a party to the Court of Protection proceedings, the factual findings there do not bind the Claimant in a claim against her, such as the present claim.
- The Court of Protection lacked jurisdiction to determine the testamentary capacity of Mr Thorpe at the time of the 2021 will. As the Judge himself acknowledged, he had no jurisdiction to do so under s.15 of the Mental Capacity Act 2005, which Master Clark agreed with.
- Beyond that, the Court of Protection also lacked jurisdiction to determine the validity of the 2021 will. This not only followed from the decision of *Re M (Statutory Will)* [2011] 1 WLR 344 (although Master Clark cited paragraph 44(i) of that decision, paragraph 50 is more apposite), but also from the fact that the 2021 will does not take effect until Mr Thorpe's death. As such, when the Judge had made the decision, the 2021 will had not yet taken effect and remained revocable. Issues as to validity of the 2021 will as an effective testamentary disposition had not crystallised when the Judge was making his decision.

In those circumstances, the summary judgment/strike out application failed, although Master Clark suggested that the conclusions reached in the Court of Protection proceedings (including the attempt to obtain permission to appeal) after a full assessment of the evidence are a strong indication of the likely outcome of the present claim.

Whilst it may be unsatisfactory that the Claimant effectively had a second bite at contending for the validity of the 2021 will, the premise of Master Clark's reasoning is sound. It does raise an interesting question of what could be done if it was discovered, in the lifetime of a testator, that they were being influenced or otherwise compelled by a third party to execute a testamentary document in a way that would in due course be invalid (short of the Court of Protection intervening to put in place a statutory will in the limited circumstances in which it can do so). If it had instead been the case of an *inter vivos* transfer, even one taking effect at some time in the near future, there would have appeared to be a range of legal tools, including injunctions, to prevent that transfer from being made.

Whatever the position, practitioners should be astute as in selecting the correct time to mount their validity challenge. The issue here arose only because the Court of Protection was invited (by a cross-application) to opine on validity at an inopportune moment when it would not otherwise have needed to do so. Selecting the wrong moment could lead to an experience like the present case, where there is no rest for the weary siblings of the Claimant, even after they had already emerged victorious in the first bout.