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1. *Nesbitt v Nicholson and others Re Boyes [2013] EWHC 4027 (Ch)*

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Overview | **[2013] EWHC 4027 (Ch)**, | [2014] All ER (D) 102 (Jan)

Nesbitt v Nicholson and others Re Boyes [2013] EWHC 4027 (Ch)

Chancery Division

Mrs Justice Proudman

19 December 2013

Will — Testator — Testamentary capacity — The Golden Rule — Undue influence by fraudulent calumny — Burden of proof — Whether testator had capacity to make will despite old age and fluctuating confusion — Whether second opinion of medical professional sufficient to establish capacity — Whether executor exerted undue influence.

Judgment

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MRS JUSTICE PROUDMAN:

1. Eric Arthur Boyes (known as Bill), who was born on 12 August 1923, died on 22 May 2010. The claimant (known as “Paddy”- I will refer to people by their first names for convenience sake and without intending any disrespect) was the testator's sister-in-law, namely the sister of the testator's wife Joy (“Joy”), who predeceased him on 11 February 2002. The first, third and fourth defendants are the testator's children. The first defendant (known as “Tricia”) was appointed executor (with her husband as her alternate) under a will of the testator dated 19 November 2009 (“the 2009 Will”) together with the partners of a firm of solicitors called Laceys, who drew up the 2009 Will. The second defendant (who takes no part in these proceedings) is a partner at Laceys who represents his firm and who (together with another) has taken out a grant *ad colligenda bona* on 26 July 2012.

2. The net estate was sworn at £391,573 in the grant and I am appalled that this action has been set down for six days and in the event was heard over five days. On 21 November 2013 when I started to read the papers I sent the parties' legal advisers an email requiring them to provide figures to the parties as to (a) the approximate amount of the costs to date and (b) the approximate likely costs of the trial. Then I said that (c) the legal advisers should explain the possibilities as to costs, for example: that some or all of the costs are ordered to come out of the estate; that the claimant is ordered to pay some or all of the costs; that the third and fourth defendants are ordered to pay some or all of the costs; that the first defendant is ordered to pay some or all of the costs; that there is no order for costs which means that the parties will have to pay their own. Then I said that (d) it should be explained (with sample figures) that even if one party is to receive costs from another party, he or she is unlikely to recover all the costs he or she has to pay to his or her legal advisers and (e) that if a party against whom a costs order is made cannot or does not pay that does not absolve the receiving party from paying his or her own lawyers. However, all the solicitors have assured me that their clients are aware of the costs position and I am well aware that I should not encroach on matters of client confidentiality.

3. It was not cited to me but I draw the parties' attention to the Overriding Objective in CPR Part 1 which applies to all current cases, namely to deal with cases justly “and at proportionate cost”, and that by rule 1 (2),

> “Dealing with a case justly and at proportionate cost includes, so far as is practicable-
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate-
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice direction and orders."

4. The phrase "and at proportionate cost" was added to rule 1 (1) in all cases from and after 1 April 2013, reflecting the emphasis placed on the concept of proportionality in the assessment of costs in the reformed costs rules. This present case became incapable of settlement when it became apparent that the costs would exceed the amount of the estate. I am told that Paddy's costs alone are likely to be in the region of £500,000, taking into account the uplift on a Conditional Fee Agreement.

5. I note that on 12 June 2013 Chief Master Winegarten gave the case a Category B listing, directing trial before a Deputy Chancery Judge, to be heard at Bournemouth, and he encouraged the parties to settle. I also note that on paper Asplin J allowed an appeal from him giving the parties permission to adduce evidence as to testamentary capacity, and the vulnerability and susceptibility to influence, of the testator. At this stage I will merely record my disapproval of what I see as the disproportionate costs in this case. This was not a case appropriate for a full-time High Court Judge to hear over six or even five days.

6. I am also very concerned at the position of the parties. Paddy, for example, is nearly 90 years of age, she lives in a residential care home and has little in the way of funds herself. She relies on the testator's estate to top up her money available for care fees. Although Hugh and Alastair look to Tricia and not to Paddy for costs, I can see that this action must be very distressing for Paddy, and indeed all the parties, on financial as well as personal grounds.

7. In this action the claimant, Paddy, seeks to propound the 2009 Will. The third and fourth defendants, Hugh and Alastair, put in issue both testamentary capacity and fraudulent calumny, on the basis that they believe that only incapacity or fraudulent calumny could have resulted in the 2009 Will. Hugh and Alastair say that an earlier will of the testator dated 4 September 2003, confirmed by a codicil of 7 August 2009, ("the 2003 Will" and "the 2009 Codicil") should be admitted to probate instead.

8. There is no dispute between the parties as to the law. It is common ground that because of the testator's age, infirmity and recent history the evidential burden shifted to the claimant to establish testamentary capacity. It is also common ground that the burden rested on the third and fourth defendants to establish fraudulent calumny.

9. By the 2009 Will, drafted by Laceys, solicitors, residue was given (subject only to a legacy of £500) in the events which happened to Paddy as to two-thirds and to Tricia as to one-third. By the 2003 Will, drafted by Preston & Redman LLP, solicitors, the testator initially appointed all three of his children, Tricia, Hugh and Alastair, to be his executors, and gave residue (subject only to a legacy of £250) in the events which happened to those three children in equal shares. By the 2009 Codicil the testator revoked the appointment of executors and trustees and appointed partners in Preston Redman LLP instead. There was no change to the beneficial dispositions. The testator's previous wills also left residue equally among Tricia, Hugh and Alastair.

10. Thus (I ignore for present purposes the small difference in the amount of the prior legacy) Tricia is in the same position under the 2003 Will and the 2009 Will and took no part in the proceedings save as a witness and an observer. She has not taken on the burden of positively proving the 2009 Will. Paddy benefits under the 2009 Will but not the 2003 Will and Hugh and Alastair benefit under the 2003 Will but not the 2009 Will.

11. However, Tricia is alleged by Hugh and Alastair to be the villain of the piece and doubtless (indeed there is a letter to this effect from their solicitors) they intend to seek costs against her rather than Paddy; it is she who it is said exerted the undue influence over the testator by making the fraudulent calumnies.

12. Paddy's previous wills, but not her current will (which benefits Tricia but not Hugh or Alastair), left her estate equally between Tricia, Hugh and Alastair. It is pleaded that, as Tricia is the beneficiary under Paddy's current will, made very shortly after the 2009 Will, she is likely to benefit indirectly through Paddy from the 2009 Will and

this motive is relied on in the pleaded claim. Moreover, Hugh and Alastair again plead that Tricia has a Lasting Power of Attorney over Paddy's affairs so will obtain control over her finances in the same way it is said that she did over those of the testator. In the pleadings it is alleged, in short, that Tricia is pursuing the litigation through Paddy for her own benefit. However this motive was not relied upon at trial and questions were not asked of Paddy or Tricia seeking to show that Tricia had a preconceived plan to benefit under Paddy's Will. Instead, Hugh and Alastair put their case firmly on fraudulent calumny motivated solely by the wish to exclude Hugh and Alastair from benefit.

13. There is no doubt that there is very bad feeling between Tricia on the one hand and Hugh and Alastair on the other, and that this bad feeling caused great distress to the testator and also to Paddy. Things that are said in court are set in stone and I can only hope (without much confidence) that this action has not meant that the siblings, who were close as children and indeed until 2009, will never be reconciled.

Background

14. For present purposes the story starts in 1991 when both Joy and the testator made wills with gifts of residue equally between Hugh, Tricia and Alastair. After Joy's death the testator again made a will on 1 May 2002 maintaining parity among the three children and also making bequests to each of his grandchildren. On 4 September 2003 he made the 2003 Will.

15. On 25 April 2002 the testator signed an enduring power of attorney (“EPA”) in favour of Tricia alone. She did not believe that the testator was mentally incapable of managing his property and affairs but she said in a witness statement that she,

> “registered the EPA on my father's accounts (due to his problems with telephone conversations and giving up driving). However my father continued to manage all his own affairs apart from the care that he needed. I assisted him by making some phone calls (from February 2009).”

I understood this to mean that she did not formally register the EPA but rather notified the testator's banks of its existence and her powers thereunder. This is confirmed by a dispute she had with Santander Bank where an employee did not accept that Tricia had the power to deal with the testator's assets notwithstanding the fact that the EPA had not been registered.

16. On 28 September 2003 Paddy also signed an EPA, this time in favour of Alastair (to whom she was close) as well as Tricia. Again, this was never registered. In March and April 2007 Hugh and his wife Belinda both signed EPAs in favour of the other and Tricia.

17. On 17 June 2009 the testator was admitted to hospital with a chest infection and was reported to be mildly confused. Two days later he was subjected to a Mini Mental State Examination in which he scored 28 out of 30, losing marks on orientation and recall. He was discharged too early and on 29 June 2009 he was admitted to a residential care home (the Retired Nurses National Home) where the notes say “no confusion”. However the next day they say “very confused this morning...” On 8 July 2009 he was readmitted to hospital with hallucinations, the following day he was reported as “slightly confused” and the day after that was aggressive towards staff and sedated.

18. Hugh lived in Chipping Campden and Alastair in New Maiden. Tricia lived near the testator in Bournemouth and saw him far more often than they did. Hugh would stay at the testator's bungalow when visiting his father and indeed arranged at about this time for broadband to be installed so that he could work there. Plainly all three siblings were worried about the testator's health at this time. Hugh was staying at the bungalow on this occasion so that he could visit the testator and provide cover as Tricia and her husband were taking a short holiday from 3 July 2009.

19. Hugh's evidence was that the testator told him that Tricia was stealing his money and asked him, Hugh, to cancel his bank cards. Hugh said that his father was generally acting out of character and, “I put this down to whatever illness was causing his strange behaviour. I did not believe that Tricia would take Dad's money.” Alastair gave evidence to the same effect.

20. However during the course of this case there has been an investigation into Tricia's conduct as the testator's attorney from which it transpires that she did indeed act entirely properly. I note that in Alastair's witness statement he said, not, “I did not believe it”, but “I did not want to believe [the allegations Dad had made about Tricia]”. At the time, both Hugh and Alastair were in the “did not want to believe” rather than the “did not believe” camp, as is evident from the fact that they both told others about the allegations in terms suggesting that they may have believed them.

21. On Sunday 12 July 2009 Tricia visited the testator in hospital and raised the subject of his long-term care with him. He said he intended to go into a care home and to sell his bungalow. Tricia, Alastair and Alastair's wife Portia then had a meeting at the bungalow on the same day. Alastair has a note of what happened at that meeting and other meetings but as they were not contemporaneous but only prepared after the testator's death I do not place much store by them.

22. There is a dispute as to what happened at that meeting. I find that Alastair did query the need for an immediate sale and Tricia did not like being challenged in this way. Alastair was concerned that “the figures did not add up”, and in the car on the way back Alastair and Portia complained about what they saw as Tricia's aggressive attitude, about the testator's finances generally and about the reasons for selling the bungalow. Tricia's account was that as Alastair and Portia were renting their own home out they were in favour of the same course for the testator, and there may have been some truth in that too.

23. On 15 July 2009 the testator signed an authority prepared by Tricia to proceed with selling the bungalow, and the next day Tricia spoke to Ann Ackroyd at Preston Redman LLP about the sale.

24. On 16 July 2009 there was another, this time fateful, meeting at the bungalow between Tricia, Hugh and Alastair. I find that Tricia did indeed, as Alastair alleged, complain somewhat hysterically that her brothers were not pulling their weight in their care of their father and of Paddy, that Tricia also complained that she could not spare the time to be a full-time carer and that there were angry words spoken on both sides.

25. Tricia says that she felt intimidated by both Hugh and Alastair, and that her brothers threatened to remove her as her father's attorney. Alastair says that he only suggested that she might cease to act to take some of the pressure off her and there was no talk of removal. There were undoubtedly discussions about the testator's finances which Tricia was unwilling to answer as she felt that the testator had already made up his mind to move and it was not the business of Hugh and Alastair to question the decision or her actions as his attorney and principal carer. She perceived Hugh as wanting to stay in the bungalow himself and undoubtedly both brothers, probably with the best of motives, were dubious as to the wisdom of an immediate sale.

26. That evening all three siblings and Tricia's husband had an Indian take-away at the bungalow, and relations seemed cordial enough. The siblings agreed a division of labour, but later Tricia, on thinking about the matter, decided that she would do it all herself.

27. The following day Tricia was due to go to Southampton for her PhD graduation ceremony. Each of Hugh and Alastair telephoned her to ask for the testator's black file containing all his personal details, but she refused. Alastair visited Paddy and told her that the testator had alleged that Tricia had stolen money from him. Paddy was both upset and cross and told him roundly that it was not true.

28. However, on the same day Hugh, with Alastair's approbation, telephoned his solicitor, then the Public Guardian's Office and then Dorset Social Services Adult Protection team, saying that they were both concerned about the testator. I asked them what concerns they had that could justify such a serious escalation and they replied that they were concerned at Tricia's aggressiveness, at their father's allegations that she had stolen his money and at her bullying and coercing him. However the only specific example that was given in oral evidence of the alleged bullying and coercion was of Tricia's allegedly high-handed attitude when she had insisted in April 2009 that the testator stop driving, saying she would remove his car keys if he did not do so voluntarily.

29. Tricia became aware through Paddy (and she says also Hugh, but Hugh denies this) of the testator's allegation that she had stolen some of his money. She did not hold this against the testator as she realised that it was the product of a probable urinary tract infection, but she was very angry with Alastair. She rang Mr Tucker, the person at Preston Redman LLP with everyday conduct of the testator's affairs other than conveyancing, and said that one brother wanted the property to be rented and the other wanted it to be retained, they were both intimidating and threatening and they were both alleging that she had coerced the testator.

30. On 20 July 2009 Hugh rang Ms Ackroyd, querying the testator's mental state. Ms Ackroyd spoke to Mr Tucker and her attendance notes show that the effect of Hugh's call to her was to stop the sale for the time being. Hugh also told Ms Ackroyd what the testator had said about Tricia's handling of his money, saying,

> “I did not know whether what he had said was accurate, or just a product of his confusion. I

> said I wanted to make sure the right people knew about it and had the chance to investigate..."

31. On 21 July 2009 Tricia sent the black file to Mr Tucker and told him she had changed the locks on the bungalow. She also wrote to Alastair saying she would not be communicating directly with him until “all legal matters relating to Dad and Paddy are settled”, and telling him that Preston Redman LLP was dealing with the testator's affairs. This letter was scanned and passed on to Hugh.

32. On 23 July 2009 Alastair telephoned Mr Tucker, saying that he did not think the testator had sufficient mental capacity to deal with his property and affairs, that it was not the best time to sell the bungalow and there was no pressing need to do so.

33. The next day Hugh discovered that the locks on the bungalow had been changed and was incensed. Tricia and her husband were there and she told Hugh to leave or she would call the police.

34. On 5 August 2013 the testator moved to the Sunrise care home. Tricia emailed Alastair and Hugh to say that the testator wanted time to settle in and that he did not have a phone in his room so that he had to receive calls from them in the family room downstairs. There were also instructions given not to allow anyone but her to visit in the short term. Hugh, Alastair, and members of their immediate family were named by Tricia as persons to be excluded. Hugh and Alastair discovered that the testator did indeed have a phone in his room and were angry and troubled that they were not allowed to visit him. Alastair therefore telephoned his father who seemed happy with the idea of a visit but said he “wanted a couple of days to settle in”.

35. Alastair visited the testator at Sunrise without warning on 7 August 2009 and discovered that the testator was at Preston Redman LLP and not at the home. Tricia had taken the testator to Preston Redman LLP but he saw Mr Tucker on his own. While there Alastair telephoned him and he agreed to see Alastair at Sunrise but only with a member of staff present. At that meeting at Preston Redman LLP the testator signed a personal welfare Lasting Power of Attorney in favour of Tricia and also executed a codicil to the 2003 Will which merely changed the executors from Hugh, Alastair and Tricia to members of Preston Redman LLP. His explanation for this was that it was sensible in view of the family dispute. As Tricia said, if the siblings could not get on during the testator's lifetime, there was no hope that they would do so after his death.

36. Alastair did indeed meet the testator at Sunrise later that day with Ray Woodill of Sunrise present. Alastair queried the necessity of selling the bungalow to meet care costs and told the testator that Tricia had been aggressive at the meeting on 16 July. The testator said that she had been upset by their behaviour. Paddy gave evidence that she, Paddy, was distressed by an unexpected call from Alastair on the same day when she was expecting her solicitor to call. Alastair, who was concerned about Tricia's input, told Paddy to do nothing with the solicitor. She telephoned Tricia in distress so Tricia cancelled the appointment for her.

37. Tricia decided that she had to do something to heal the family rift and got in touch with a charitable organisation called Mediation Dorset. The office administrator wrote to Hugh and Alastair on 11 August 2009 setting out the charity's position and explaining that they had been contacted by Tricia but were not acting on her behalf.

38. Both Hugh and Alastair gave evidence that they did not believe mediation was necessary given the contact they had re-established with the testator. They said that they wanted to keep him out of the disagreement between the siblings and could not see the point of a meeting without him present. What they wanted was a chance to speak to him to find out what they had done wrong. It is evident that they were not interested in mending matters with Tricia.

39. On 18 August 2009 Paddy also signed a personal welfare and property and affairs LP A in favour of Tricia.

40. On 19 August 2009 Hugh, Alastair, Belinda and two of the grandchildren visited the testator and apparently had a normal happy meeting without any discussion about mediation or the sale of the bungalow. On 26 August 2009, Belinda again visited the testator with the other two grandchildren. The testator asked about the argument between the siblings but Belinda would not be drawn, saying that he should ask Hugh and Alastair. On the following day the testator telephoned Hugh and spoke about the rift. However Hugh says that the testator appeared not to be able to hear what Hugh was saying in reply. That was the last time Hugh spoke to the testator.

41. At the end of August 2009 Tricia drafted an email to Hugh and Alastair, (with a copy signed by the testator)

in which she said,

> "...I am sorry that you seem unable to accept that I am communicating Dad's wishes. I take my power of attorney responsibilities seriously and I am sad that implementing what he wants has led to such conflict within our family. I would have really appreciated your love and support in trying to help our Dad. I am extremely hurt about the accusations you have made about me. Dad has incurred considerable unnecessary expense to prove that I am simply following his instructions. I hope that we can now draw a line under the unpleasantness. However, if I discover you making any further allegations against me, you will end up wasting yet more of Dad's money and I will be forced to take the matter further.
>
> The recent weeks have led to hurt on all sides. I would ask that you do not take out your grievance with me on Paddy. She is utterly devastated that you did not arrange a brief visit to her when the whole family has come all this way to see Dad...
>
> Finally I accept and apologise that I have contributed to the communication breakdown...I want you to know that you and Alastair are precious brothers who I still love as people. I hope you both take the trouble to give us a chance to patch things up by attending mediation."

42. Hugh said that the email "seemed so false", and Alastair said that Tricia "knows how to press the right buttons".

43. Accompanying this letter was a laboriously handwritten two page letter from the testator. Hugh agreed in oral evidence that the note was heartrending, although Alastair said he was suspicious that Tricia was controlling the testator. The letter reads,

> "The hospital diagnosed the very early stages of Lewy Body Disease as the cause of my recent problems.
>
> This has been a factor in my decision about long term care. Whilst I am aware that I may suffer bouts of confusion in the future, at present I am perfectly capable of making decisions. If the situation changes in the future, the home will advise Tricia to register the EPA.
>
> I have read Tricia's E Mails to you and I agree with her sentiments entirely. I am desperately upset about the rift in the family.
>
> I do not want further upset and waste of money on a needless argument about disposal of my home.
>
> I am *not* prepared to have any further discussion with you about my affairs or disposal of my property. I will be instructing Tricia about what I want to happen and agreeing actions for her in writing.
>
> If you have any feelings for me and the family, you will put your differences aside and heal the rift.
>
> I would wish you *both* to attend mediation and I would like to know whether you plan to do so by WENESDAY [sic] 9th September. In the event of mediation not taking place or being unsuccessful I will dispose of all property to charity. "

44. On the same day he also signed a series of notes about the contents of his bungalow, saying that he trusted Tricia implicitly in carrying out her power of attorney for him and in the event of allegations against her in that capacity he would cover her legal costs.

45. Belinda was particularly annoyed by Tricia's email and replied shortly and rudely, "...please don't send me any more of this absolutely unbelievable crap..." She followed this up with a letter on 1 September 2009, ending "the practice of exchanging gifts at Christmas time."

46. On the same day Alastair telephoned the testator to discuss the reasons for the letters. The testator replied that he did not want Alastair to ask any more questions about his affairs.

47. Alastair left it to Hugh to respond to the testator's letter, which he did on 3 September 2009, not by agreeing to go to mediation or otherwise heal the family rift, but by explaining his belief that the rift was Tricia's doing and the letter "simply heightens our concern about her manipulative behaviour". He said the dispute was

"NOT about money," but "to support your care and welfare" and that, "[n]one of your children actually need your money". He went on to say,

> "...for my part I would simply have directed any money you left me to your four grandchildren, to enable them to repay their student loans and have the same head start as you gave to your three children. I am really sorry that Tricia has dragged you into this- the resolution is in her hands."

48. On the same day he also sent Tricia a long email in angry terms saying that her behaviour was in specified respects "offensive", "a disgrace" and "ridiculous" and (incorrectly), "you do not have, never have had and will not in future have power of attorney for me", and suggesting instead of mediation a meeting in a public place for a meal or a cup of tea. He also said,

> "You imply in your email that I have made unfounded allegations against you- I can assure you that any statements I have made to third parties since Dad first went into hospital in June are the truth. I would happily repeat anything I have said under oath in a witness box-..."

49. On 7 September 2009 the testator signed a letter to Hugh and Alastair saying,

> "Please do not attempt to visit me, as I do not want to see you. I will tell you if I change my mind.
>
> I have asked the home not to put through phone calls. I will phone you as and when I choose.
>
> I do not want to hear or read any more about your dispute. If you do not respect my wishes, I will cut off all contact."

50. Tricia said that the testator was incensed by Hugh's letter and when she typed this letter she toned it down so as to leave the door open to a reconciliation in the future.

51. On 8 September Tricia responded to Hugh's letter to her as follows,

> "I am sorry that neither of you are willing to accept my apology. I wrote it with sincerity and honesty...
>
> Without the presence of an independent third party, I do not feel confident that either of you will remain calm for a civilised conversation with me, even in a public place."

52. She said she was still prepared to go to mediation but that otherwise the response would be the last personal communication with Hugh or Alastair. Alastair said in evidence that he had agreed, at a meeting with the testator on 2 September 2009, to go to mediation, but he did not communicate this directly to Tricia. He also said that the testator told him that he was not planning to change the terms of his will and that they agreed to meet again on 13 September.

53. Thereafter there was an unfortunate series of events whereby the Sunrise home intercepted letters from Hugh and Alastair to the testator about the contents of the bungalow. He had asked them to respond and when (as he thought) they did not, he was angry. However, Tricia then received the letters and showed them to the testator. She emailed Hugh and Alastair to tell them to ignore the previous correspondence. They were very angry at the interception of mail and what they saw as the tone of Tricia's letter, Hugh saying, "it heightened my suspicions".

54. On 22 September 2009 Mr Tucker saw the testator alone at Sunrise. Mr Tucker's attendance note says,

> "[He] appeared to be entirely bright and alert and appeared to be entirely clear with regard to the matters being discussed.
>
> Mr Boyes advised that he wished to consider changing his will....
>
> Mr Boyes said that he was very upset with the whole situation with regard to his family but he felt that his sons should no longer be entitled to his estate...
>
> Mr Boyes advised that he wished to take his sons out of the Will due to the way that they had been targeting him.
>
> Mr Boyes asked JSCT if he thought his sons might make a claim against the estate.
>
> In view of the information that JSCT had received from his daughter and from Mr Boyes previously, JSCT advised that it was likely that

> the sons would make a claim but unless they had some very strong reason for receiving some entitlement under the estate over and above the normal parent/son relationship it was unlikely that any claim would be successful.
>
> Mr Boyes advised that he would give the matter some further thought and leave his Will as it stands at the current time."

55. On the same day the testator (without assistance from Tricia this time - he went by cab with a carer) attended Mr Flower at the offices of Preston Redman LLP with a view to possibly obtaining a non-molestation order against Hugh and Alastair (because of "their attempts to hassle him into getting some money out of him from his will"), "but he hopes that a letter from us will do the trick in the first instance". As a result, Preston Redman LLP sent Hugh and Alastair warning letters dated 23 September 2009.

56. Hugh and Alastair say that they had not attempted to get in touch with the testator so as to cause such a reaction. Indeed, they had agreed on a joint response to the letter of 7 September, saying "when you would like to resume contact please would you ask Sunrise to inform us."

57. However, in addition to visits from Belinda and the grandchildren the testator had received Hugh's letter of 3 September (which according to Tricia he described as "a load of rubbish"), he knew that Hugh had spoken to Sunrise challenging the home in angry terms about intercepting his mail, he knew that Hugh had written to Phillip Smith of Sunrise questioning the embargo on visits, saying that he and Alastair were "concerned by his mental state", he knew that Hugh and Alastair were questioning his capacity generally, he had seen Belinda's email to Tricia of 31 August 2009 and he knew that Hugh and Alastair had complained again (on 8 September 2009) about Tricia to Social Services. Hugh and Alastair rely on the short time frame between the 2009 Codicil and the 2009 Will, but that cuts both ways. The siblings had not fallen out before and the testator was upset at what he saw as events unfolding thick and fast.

58. On 6 October Mr Tucker again saw the testator on his own. The testator produced some notes in his own handwriting about his wishes, saying that "due to the family situation" he no longer wished to make any provision for his sons. "He advised that his sons had both advised him that they did not need any of his money". Mr Tucker told him that he was perfectly satisfied as to the testator's capacity to make a will but because of his condition and the fall out within the family he had to obtain a medical certificate.

59. Thereafter the testator changed solicitors. Mr Tucker had what he described as an uncomfortable telephone conversation with Tricia on 23 October 2009. On 22 October, Hugh's solicitor, Andrew Leitch of Leitch and Co, had written to Preston Redman stating that the testator's mental health had deteriorated and questioning the authority of Preston Redman LLP to deal with the testator's affairs. Mr Tucker spoke to Mr Leitch, telling him that Preston Redman was satisfied as to the testator's mental capacity. He also saw the testator on that day and agreed to set up a meeting with Alastair and Hugh but, at the testator's request, "only after 4 November onwards". The testator explained that he had been,

> "driven into a comer by their actions...and did not want to expose Patricia to any more trouble... [He] advised that he didn't particularly want to take the course of action that he has [changing his will] but he felt that he didn't have any choice in order to prevent Patricia having any more aggravation."

60. It is plain that it was harassment of Tricia that was concerning the testator. At that meeting he said that "he thought his two sons would do anything to undermine Patricia as a result of the police business. [He] advised that Patricia will not apologise to his sons."

61. Also on 23 October 2009 Belinda telephoned Paddy and, according to Paddy, they had a blazing row over the family dispute. Paddy told Tricia that she had had an abusive call from Belinda and Tricia told the testator who referred to it in a handwritten list he gave to Mr Tucker.

62. Tricia was angry about the proposed meeting with Hugh and Alastair and said her father was not happy about it either. She said she thought that Mr Tucker was acting for Hugh and Alastair and not for her or her father. Mr Tucker reiterated that he was acting solely for her father. And if a meeting were to take place it would be as a result of her father's instructions, not hers. She responded that,

> "...she would not make any further apology to Hugh as she had apologised once and Hugh would not accept the apology...her brothers had reported her to social services for abusing her

father and she is fed up with the lies about her."

63. The proposal for a meeting with Hugh and Alastair was cancelled, the testator changed his solicitors from Preston Redman LLP to Laceys and Dr Shaw, the testator's GP, gave his medical certificate for Laceys not for Preston Redman LLP. Tricia gave various reasons for the testator wishing to change solicitors but it may well be (I make no finding about the matter) that the initiative came from her.

64. The testator, in a letter typed and written by Tricia, then complained to a senior partner at Preston Redman LLP, Mr Neville-Jones, about Mr Tucker. The letter refers to his annoyance about the challenges to his mental capacity and to the alleged withholding of Leitch & Co's fax from him. Mr Tucker's note says however that he did show the fax to the testator and Mr Tucker confirmed in oral evidence that he must have done so. The testator said in the letter, "I see the fax as another attempt to prevent or delay the sale of my bungalow- for which I hope to exchange contracts this week."

65. Thereafter, Tricia sent Kate Mansfield of Laceys a long background history. On 3 November 2009 Mrs Mansfield saw the testator at Sunrise on his own (there is a long and careful attendance note) where he gave instructions for an LPA in favour of Tricia and also gave instructions for the 2009 Will. On the same day he revoked the existing LPA in favour of partners of Preston and Redman LLP. Dr Shaw was asked to advise as to the testator's capacity both for the purposes of the LPA and for the purpose of the 2009 Will. He stayed with the testator for (according to Mrs Mansfield), "well over an hour".

66. The sale of the testator's bungalow was finally entered into on 30 October and completed on 6 November 2009.

67. On 17 November 2009 Deborah Pearce of Laceys visited the testator and he executed the new LPA. Her attendance note commented that, "He was entirely coherent and fluent and he seemed quite happily settled at Sunrise". On 19 November 2009 Ms Pearce attended him at Sunrise ("again he was utterly coherent") and Dr Shaw signed the certificate for the purposes of the LPA and also witnessed the testator's signature to the 2009 Will.

68. In December 2009 Hugh and Alastair did arrange to go to mediation, largely owing to the intervention of the testator's clergyman who was called in by Hugh to help establish contact, but a letter dated 18 January 2010 to Ms Norton shows that Alastair was still saying that,

> "I feel very strongly that having broken the law once through her [Tricia's] failure to register the EPA once Dad had been diagnosed with dementia and through actions which were not in Dad's best interests, we simply cannot trust her in future."

He was proposing that he should apply to the Court of Protection to become the testator's Court of Protection deputy.

69. In January 2010 Tricia withdrew from the mediation on the grounds she set out in an emailed letter she wrote to Hugh and Alastair on 28 January 2010. In short she said that she did not feel that she could achieve anything positive from mediation as, "I am well aware you only saw mediation as a means to access Dad, with no real intention of trying to put things right."

70. However Hugh and Alastair both feel that the whole mediation was a facade and arranged under false pretences. Neither can accept the plain fact that the testator did not want to see them and neither of them can accept that Paddy wants to keep her whereabouts secret from them also. They, Hugh in particular, frantically tried to enlist the help of anyone they could to establish contact with the testator in the months before his death, sending him letters via Sunrise, but to no avail.

71. Thereafter the testator's condition deteriorated and he became increasingly confused. I observe that on 11 April 2010 Tricia was writing to Ms Gilak of Laceys saying,

> "I would like someone independent to check whether Dad would like Hugh and Alastair to visit under 'supervision'. I felt ghastly watching Dad in a coma so close to death and wished with all my heart they could make their peace. I told Dad this when he awoke on Easter Sunday, but he replied the situation could not be avoided and he wanted to protect Paddy and me. When I told him this was not the issue and reiterated, as I have done before, that what matters is what he wants, he just clammed up."

72. Ms Gilak did indeed visit the testator for about 20 minutes on 15 April 2009 and it is clear that his instructions were still that although he wanted Hugh and Alastair to know of his poor health he did not want to

see them.

73. The testator died on 22 May 2010.

The witnesses

74. The principal witnesses were Tricia, Hugh and Alastair. Tricia has been in nursing all her life, Hugh is an IT specialist and Alastair is a teacher. They all have a high level of formal education, they are all very literate and they all have detailed recall of events. Tricia in particular was clear and sure in her evidence. However Tricia and Alastair were both to my mind extremely prickly when giving evidence. Indeed I would describe Tricia as combative, even towards me, although I was simply listening to her evidence, entirely undecided about the outcome of the case.

75. I have some sympathy with Mr Lewison's submission that Tricia cannot accept any views contrary to her own and complains about anybody who stands up to her. Thus she purported to give Mr Lewison "a warning" when he was merely putting his case to her, she fell out with Santander Bank when the officials refused to recognise her EPA on the ground that it was unregistered, she drafted and typed a letter from the testator to a senior partner about Preston & Redman LLP's handling of his affairs, having fallen out with Mr Tucker of that firm when he told her in terms that he acted for the testator and not for her, and she complained to the mediator Mrs Valerie Norton whom she perceived as covertly favouring Hugh and Alastair. She said in a letter of 22 January 2010,

> "I did not expect to be challenged the way I was...if I am honest, I ended up feeling that when you spoke, Valerie, it was Hugh's voice coming out of your mouth."

She also made a formal complaint about Sunrise which I am not in a position to assess.

76. Nevertheless I acknowledge the justice of Mr Norman's submission on behalf of Paddy that Tricia was wrong-footed by Hugh and Alastair's reporting her to the Adult Protection team and by their impugning her honesty until it was finally proved that she had handled her father's affairs properly. I note that on 1 February 2010 Hugh was still writing to Social Services, saying,

> "...My concern now is the same as the one I first raised with Dorset Social Services in July, namely that Tricia is abusing her position of trust as my father's Attorney. Dad made a serious allegation about financial abuse in July, which following advice from the Office of the Public Guardian and from Dorset Social services we passed on to his solicitor in good faith. Perhaps with hindsight it should have been a matter for the police as the solicitors' actions seem to have simply exacerbated the situation."

77. Tricia's account of the meeting of 16 July 2009 was that she remained calm whereas Alastair and Hugh shouted at her. I have little doubt that, as Alastair eventually accepted, the meeting involved both Alastair and Tricia shouting at each other. Hugh seemed a calmer person than either of his siblings, but it evidently was a shock and a disappointment to Tricia that he sided with Alastair in the dispute. I believe her when she said that she felt intimidated and threatened by both of them, although I also believe that they were unaware of this.

78. I have no doubt that Tricia, Hugh and Alastair were all honest in their evidence, each genuinely believing in the justice of his or her grievance. That is the pity of it; for all of them, the pain they were causing the testator and indeed Paddy appeared to be of secondary importance to their own hurt and in some instances fury. I know it is easy to be wise when sitting in judgment, but I can see no other explanation for the siblings airing their family dispute in public in circumstances where only the lawyers benefit from the exercise.

79. I also heard from Paddy. Again, I believe she was entirely honest, but she was hazy not only about dates but about the order and context of events, and she was unable in some instances to explain her sources of information to such an extent that I did not find her evidence particularly useful in all respects. However she did not waver in her faith in Tricia and in her disgust at the behaviour of Hugh and Alastair, and I take those matters into account.

80. Other witnesses were Dr Shaw, Mr Tucker, Mr Flower, Katharine Mansfield of Laceys, Ms Pearce, Ms Gilak, who was involved on the testator's behalf in the mediation, Mr Bailey and Mr Muller of Sunrise, and the mediator Mrs Norton. They were all honest witnesses who gave their evidence fairly and succinctly.

Testamentary Capacity

81. A person is only capable of making a will if of sound mind, memory and understanding. However these

requirements do not have to be present in a perfect state and often they are not. The question is not so much whether the testator had the degree of capacity that he once had, but whether he had "a disposing memory". Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged when he made his will? *Williams, Mortimer & Sunnucks* on Executors Administrators and Probate (19th Ed) says at paragraph 13-13,

> "One of the most difficult features where wills made by old people are in question is their varying state of mental capacity. At some times they may be confused while, at others, they are completely lucid. Fluctuant confusion of this nature is particularly characteristic of dementia with Lewy bodies and cerebrovascular dementia. Alzheimer cases usually hold a steady, if deteriorating, state and both conditions may co-exist. Evidence which conclusively shows that within a few days of his testamentary act a person was quite incapable of making a will does not necessarily prove that he was incapable at the time he made it. For this reason the evidence of those present when the deceased gave instructions for his will or at its execution (if they were not merely witnesses called into his presence for a few moments) is of considerable weight. This is particularly so where such persons were unprejudiced and where the court is satisfied that they took pains to assess the mental state of the deceased and where they give evidence of facts and matters which support their assessment."

82. Again, it is common ground that the classic statement of principle is contained in the judgment of Cockburn CJ in *Banks v. Goodfellow* *(1870) LR 5 QB 549*,

> "It is essential...that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made."

83. The so-called "golden rule" (sometimes called "the golden if tactless rule") is that when a solicitor is drawing up a will for an aged testator, or one who has been seriously ill, it should be witnessed or approved by a medical practitioner who has examined the testator and then recorded that examination: (see e.g. *Re Simpson, Schaniel v. Simpson* (1977) 121 SJ 224).

84. Guidance about assessing capacity is given in *The Assessment of Mental Capacity, Guidance for doctors and lawyers*, published (2nd Ed 2004) jointly by the British Medical Association and the Law Society. It makes suggestions under each of the *Banks v. Goodfellow* heads. However observance or non-observance of the golden rule is by no means conclusive. Again, I have been referred to the Mental Capacity Act 2005 but although there is some question as to the scope of the application of its statutory principles it is common ground that it is the *Banks v. Goodfellow* test which applies in this case.

85. At the time the 2009 Codicil was executed the testator had been in and out of hospital and a residential care home, had suffered bouts of confusion and was having hallucinations in June and the first part of July 2009. He was provisionally diagnosed on 16 July 2009 as having Lewy Body Disease, possibly related to Parkinson's disease, or alternatively had suffered minor strokes in his brain, cerebrovascular disease. The third and fourth defendants have floated the possibility that he may have been suffering from frontal lobe dementia. No conclusive diagnosis was ever made and doubts were expressed among the doctors as to whether he indeed had Lewy Bodies Disease. He was also registered deaf and had bilateral hearing aids. He mainly "heard" through lip-reading and therefore had problems with telephone conversations. He had arthritis in his hands which made writing difficult and he relied on Tricia to type correspondence for him.

86. On 27 July 2009 Preston Redman LLP obtained certificates from a medical practitioner, Dr A J Williams MD FRCP, that the testator was not suffering from impairment of the mind as defined in the Mental Capacity Act 2005 and had capacity to enter into a contract for the sale of his bungalow and to make a will. Dr Williams added that the testator fully understood the codicil. On 5 August 2009 he was moved to Sunrise and was about to sign a Lasting Power of Attorney. Mr Tucker also made a careful note of his attendance on

the testator (whom he saw on his own) before the 2009 Codicil was executed.

87. The 2009 Will was witnessed by the testator's GP, Dr Duncan Shaw MB ChB LLM DLORCS DRCOG MRCGP, who gave oral evidence of fact in this court. He was chosen among his practice partners to lead on the assessment of mental capacity. He is experienced in assessing mental capacity in patients with mental impairment, including early mental impairment. He writes about 40 reports a year on mental capacity for the Court of Protection including retrospective capacity reports so that he understands the tests necessary to establish testamentary capacity.

88. He examined the testator with a view to assessing his mental capacity on 3 November 2009 for the purposes of the LPA and for a will. His examination and findings were documented in a letter to Mrs Katharine Mansfield of Laceys dated 5 November 2009. He also wrote a report on 22 November 2010 and a statement with addendum on 11 September 2013. They all show that he spent time and effort with the testator, giving him a detailed examination. Dr Shaw found him entirely coherent and logical, but opined that he could be strong-minded and stubborn.

89. I have also read witness statements, heard evidence from several solicitors and looked at attendance notes apart from the ones summarised above. Thus, Mr Flower of Preston Redman LLP took instructions from the testator on 23 September 2009 about various matters including those impinging on changes to his will. Mr Flower attempted to assess capacity by asking the testator “numerous questions”, to discover if he knew who the Prime Minister was, what the testator used to do for a living, Hugh and Alastair's addresses, dates, and the names of his grandchildren and he concluded that “Mr Boyes gave no impression that he had any limitations on his capacity to understand the instructions that he was giving or the effect of them.”

90. There are witness statements and there was oral evidence from Ms Pearce and Mrs Mansfield of Laceys, both of whom were involved in the preparation of the 2009 Will. Both found the testator entirely coherent. Ms Pearce had 23 years experience as a legal executive of will-making and she oversaw the execution of the will on 19 November 2009. She said that “he was able to speak comprehensively about his life in the Army and then subsequently as an air traffic controller and he was also able to account the career history of his daughter and said she had done very well in obtaining her degree.” Ms Mansfield, a partner in Laceys, saw the testator once only and was only involved in the preparation of the will up to 9 November 2009. However she was plainly aware that there would be an argument about capacity in the future and was particularly cautious for that reason. She said,

> “At no point during the making of his will did I feel he lacked capacity...I did discuss it [leaving his sons out of his will] and he was fully aware of the implications...I have been asked to comment on the proposition that Mr Boyes may have had good days and bad days... Because I only saw Mr Boyes on no more than two occasions I have nothing to compare him with on the day that I saw him. However I can say that Mr Boyes, on those two occasions, in my opinion, was not confused and compatible with age, was not slow in his responses to my questions.”

91. Ms Gilak met the testator on 10 December 2009 and attested to the fact that,

> “I believed that he had full capacity to make the decisions he did to stop contact with his sons.”

92. Accordingly, in the present case the golden rule was fully observed both in relation to the 2009 Codicil and the 2009 Will. As the testator was elderly and infirm, had been in hospital and had suffered confusion and hallucinations this was undoubtedly best practice. Although observance of the golden rule does not provide a complete answer to the question of capacity, which must be measured under *Banks v. Goodfellow,* Laceys, and before them Preston Redman LLP, correctly sought a second opinion from an experienced medical professional. The lawyers took care to ask about the previous wills and why Hugh and Alastair had been cut out from the 2009 Will. The tests by which the testator was assessed were detailed and enough time was set aside for them.

93. There has been evidence from two expert witnesses who did not know the testator, Dr Lachlan B Campbell, a consultant psychiatrist with special expertise in Forensic Neuropsychiatry, on behalf of Hugh and Alastair, and Dr Andrew Barker, a specialist consultant in Old Age Psychiatry, on behalf of Paddy. They are both Fellows of The Royal College of Psychiatry. The two experts were not called to give oral evidence as their joint statement of 24 October 2013 shows no significant area of dispute between them.

94. Mr Lewison on behalf of the third and fourth defendants sought to say (a) that there was insufficient evidence to discharge the evidential burden of proof that the testator was not suffering from delusions when he made the 2009 Will and (b) that there was insufficient evidence as to the testator's state of mind on the day he executed the 2009 Will, Dr Shaw's examination having taken place on 3 November 2009.

95. As to (a), the parties agree that a good working definition of delusion is the psychiatrists' definition (see *Williams Mortimer and Sunnucks* at 13-18) of "a false fixed belief of morbid origin inconsistent with the patient's cultural or educational background". As to (b) it is again common ground that different legal principles may apply (considered in *Perrins v. Holland* [2010] EWCA Civ 840, [2011] Ch 270) where there is a difference in the capacity of the testator at the time when he gave instructions for the preparation of the will and the time when he executed it. However I need not consider either of these issues in detail since I am firmly of the view that there is no evidence whatever that the testator was suffering any delusion at the time he made the 2009 Will and that there is evidence that his state of mind was as good on the day he executed the 2009 Will as on the day that he gave instructions for it to be prepared.

96. Thus Ms Pearce said in her witness statement, replicating her attendance note, about the day of execution,

> "Again I found Mr Boyes coherent; he was able to speak comprehensively about his life in the Army and then subsequently as an air traffic controller and he was also able to account [sic] the career history of his daughter...
>
> Mr Boyes asked what would happen if the attorneys disagreed or if there was any intervention from other members of the family..."

97. Dr Shaw said that on the occasion he witnessed the will also he was satisfied that the testator had testamentary capacity.

98. Although in the joint statement the experts agree that the testator would only have testamentary capacity "on a good day", all the evidence points to the day he executed the 2009 Will being such a good day. Indeed, although Dr Campbell states that of course he could not say whether the testator was having a good day on 19 November 2009, he himself describes Dr Shaw's assessment as apparently "well-founded". In the joint statement Dr Campbell and Dr Barker agreed as follows:

> "The lawyers would have made a judgment on the day of signing.
>
> Dr Shaw was a witness to the Deceased's signature at the time of signing.
>
> The medical records are unremarkable around the material time, suggesting no substantial deterioration.
>
> On a balance of probabilities, the Deceased signed his final Will on a "good" day."

99. In particular I note that the periods of confusion occurred when the testator was suffering urinary and/or chest infections which had cleared up by the time he made the 2009 Will.

100. It is not necessarily the case that professionals, who are naturally keen to secure administration of an estate, will pay more than lip-service to the golden rule. However in this case I agree with Dr Barker's comment that, "I think it unlikely that all these professionals would not have noticed an impairment in reasoning in [the] circumstances." One of those circumstances was that all the solicitors involved (both at Preston Redman LLP and at Laceys) were well aware that there would be a challenge to any will both on the ground of lack of capacity and on the ground of undue influence. Both Preston Redman LLP and Laceys were therefore careful to assess the testator with these matters in the forefront of their minds.

101. I too, like Dr Barker, am "struck by the coherence of Mr Boyes' views, even when dealing with challenges by [his sons] as to his motives and capacity."

102. In my judgment the testator had much more than the bare requirements for testamentary capacity. As far as knowledge of his property was concerned, he knew the details of his current assets and his estate, the details and value of his bungalow, and he appreciated his investments in building societies. It is true that he made one mistake about the extent of his assets but Mr Lewison very fairly said that he could not rely on this in aid of testamentary incapacity.

103. The testator knew about his existing will and its

provisions and understood that he was cutting out Hugh and Alastair and their children from benefit from his estate. Indeed, a draft will was prepared by Preston Redman LLP which also cut out Hugh and Alastair and the testator plainly considered it critically as he amended it in his handwriting in Clauses 3 and 7 and then wrote on it “THIS IS CORRECT EXCEPT AMEND CLAUSE THREE CLAUSE 7”.

104. He was fully aware of the state of his family. Paddy lived locally in Christchurch and he used to see her regularly: twice a week including usually for tea on Sundays. He never forgot the names of his children, their spouses or his grandchildren. He was aware of dates. Before making the 2009 Will, Mrs Mansfield reminded him of the potential claims of his grandchildren on his bounty, describing them as “innocents” in the feud between the siblings, but he was adamant that Hugh could provide for his own children and they had no need of his, the testator's, money.

105. The testator was entirely coherent to his legal advisers about Paddy. Her evidence was that she was close to Joy and remained in constant contact with the testator after Joy's death. She says that she lived at home with her parents and when they became ill she gave up her work in order to care for them full time. She says that she thinks that Joy and, through her, the testator, were always conscious of this and the help this provided for the remainder of the family. She says that although she did not know that the testator had made a will in her favour until after his death she needs the money to fund her future care and she provides figures in support.

106. Hugh and Alastair say however that Paddy retired from her job on the grounds of ill-health rather than to care for her parents and that since she did not drive Joy spent a “significant amount of time” caring for and visiting her mother. Paddy was not a natural object of the testator's bounty. Again, it was said that Paddy was always adamant that she wanted to live in her own home so that the testator would not have had any reasonable grounds for thinking that she would need money to fund the cost of residential care.

107. However, as a matter of common sense the testator was aware that Paddy, like him, would not be able to remain indefinitely in her own home, however much she wanted to. In fact not long after the 2009 Will was made Paddy did indeed have to give up her flat. She completed the sale on 20 May 2010.

108. To my mind Hugh and Alastair's allegations miss the point. The testator may well have felt some obligation towards Paddy as a daughter living at home in circumstances where Joy lived with him and their children. However I accept that it is evident that the testator's primary motive was to exclude his sons from benefit rather than to benefit Paddy. He was plainly hurt by Hugh telling him that he had no need of his money, saying he would take his sons “at their word” in this regard. The testamentary control which an elderly and ailing testator has over his property remains one of the ways in which he believes he can still affect and exert control over his family.

109. While the testator and Joy had in the past wanted to maintain parity between their children, there was nothing irrational in the testator deciding to cut out Hugh and Alastair in the events which happened. By the time of his death they were fully grown and in employment and he saw them far more rarely than he did Paddy who lived, as he did, in Christchurch, Bournemouth. Paddy was clearly worried about her future financial security and the sequence of events in which Hugh and Alastair fell out of favour was entirely logical.

110. I have no doubt at all that when the testator made the 2009 Will he was of full testamentary capacity.

111. However testamentary incapacity is only the fallback position of Hugh and Alastair. They rely principally on fraudulent calumny.

Undue influence by fraudulent calumny/want of knowledge and approval

112. Mr Lewison made it clear that fraudulent calumny was the only head other than testamentary incapacity relied upon so that want of knowledge and approval or coercion are not relied upon separately from this head. Thus this is not the occasion for contending that the Chancery definition of undue influence as expounded by the House of Lords in *Royal Bank of Scotland v. Etridge [2002] 2 AC 773*-7 should apply in probate cases, and no-one has sought to do so.

113. The burden of proof rests on the person alleging undue influence or fraud. Although the standard of proof is the civil standard, the balance of probabilities, and undue influence can be found by the court drawing inferences from all the circumstances, the cogency and strength of the evidence required to prove fraud is heightened by the nature and seriousness of the allegation.

114. As Lord Lyndhurst said in *Allen v. M'Pherson* (1847) 1 HLC 191 at 207, there cannot be a stronger instance of fraud than a false representation about the character of an individual, made to the testator for the purpose of inducing him to revoke a bequest made in favour of that individual, or to exclude the person so calumniated from any benefit in his will.

115. Lewison J summarised the relevant principles of law as to fraudulent calumny (which were common ground between the parties in that case) in *Re Edwards* [2007] EWHC 1119 (Ch) at [47] (see also the decision of Morgan J in *Cowderoy v. Cranfield* [2011] EWHC 1616 (Ch)) showing the interaction between fraudulent calumny and undue influence,

> "i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
>
> ii) Whether undue influence has procured the execution of a will is therefore a question of fact;
>
> iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;
>
> iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;
>
> v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;
>
> vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;
>
> vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;
>
> viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my mind if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;
>
> ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."

116. I start with the experts' joint report, where they agreed,

> "Because of his cerebrovascular disease, the Deceased probably had a reduced ability to evaluate and weigh up facts."

117. Next I observe that all the professionals were alerted to the fact that undue influence might be asserted after the testator's death, and all were therefore careful to see him on his own.

118. Mr Lewison submitted that Tricia was careful

always to put her side of the case first, so as subtly to prejudice the lawyers to her way of thinking when Hugh and Alastair appeared to be acting as she had predicted.

119. However, the impressions of the independent people who saw and assessed the testator at the time necessarily carry weight. Dr Shaw says, and this is typical of the lawyers as well,

> "..whenever I met with Mr Boyes he was alone in his room and was therefore free to say whatever he wanted. Mr Boyes barely mentioned his daughter and he specifically denied any coercion on direct questioning, as stated in my assessment. I was honestly surprised to read that calumny was being alleged against his daughter."

120. Nevertheless fraudulent calumny is of course a question of law that is for me, and not the witnesses, to decide. Mr Lewison accepted, as Lewison J said in *Edwards*, that the essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. If a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone.

121. Mr Lewison relied on four matters in particular, between the date of the 2009 codicil and the 2009 Will, to show that Tricia knew that some of the aspersions she made about Hugh and Alastair were false or that she was reckless as to whether or not they were true or false. First, it was submitted that she must have known that, contrary to what the testator told Mr Flower on 22 September, Hugh and Alastair were not "hassling him for money", since Hugh's letter of 3 September was quite clear that none of the testator's children needed money. However, that was the way that Tricia and the testator saw Hugh and Alastair's behaviour and I have little doubt that they believed that was the root cause of it.

122. Secondly, it is said that she must have known that it was untrue that Hugh and Alastair had left the bungalow so untidy that potential buyers commented on the state.

It is said that she must have known this as she had the locks changed on the bungalow before it was on the market and she had tidied it up in the meantime. However, there is no evidence that she did so; the only evidence is that her husband tidied the garden, not the house.

123. Thirdly, it is said that she must have been reckless as to whether it was true or not that a letter written by Hugh's daughter Lizzie to the testator from Bristol University in October 2009 was "orchestrated by her parents" (that is a quotation from Tricia's background note sent to Mrs Mansfield on 2 November 2009), in other words, a way in for Hugh to re-establish contact with the testator. There seems little doubt that the letter was discussed between Tricia and the testator, as he said to Mrs Mansfield at their meeting the following day that he "wonder[ed] whether the letter from Lizzie is a ploy", although the testator had apparently refused to read it. Nevertheless, I have no doubt that Tricia believed, wrongly or not I cannot say, that it was or may have been a ploy on the basis that there was no return address and Lizzie was not in the habit of writing chatty letters to her grandfather.

124. Fourthly, it is said that Tricia must have known that the allegation (made by the testator to Mrs Mansfield on 3 November 2009) that "the family were snooping round getting addresses from other members of the family" was untrue as the allegation related to her cousin Grier's funeral which was not attended by Hugh, Alastair, their wives or Hugh's children. However, I am unable to express a view about the matter. Tricia's evidence was that this allegation related to an incident on Facebook and in any event I have no doubt that Tricia believed that it was true, even if it was not.

125. Mr Lewison also prayed in aid Tricia's habit of what he described as "putting letters in front of the testator to sign", saying that she exerted influence on him by putting suggestions into his head. In particular he mentioned the letter she wrote to him on 21 February 2010 repeating his reasons to him for cutting off contact with Hugh and Alastair. Again, and more pertinently since it predated the 2009 Will, it is said that she showed him her letter of apology of August 2009 in order to plant her own opinions in his mind. In other words, she would express her views to the testator so that they would be reflected back as his own. The problem with that submission is that it assumes what it sets out to prove, namely that the testator did not prompt the letters and was not in agreement with them.

126. Lastly, Mr Lewison submitted that there was no adequate explanation for the testator cutting Hugh, Alastair and the grandchildren out of the 2009 Will.

127. However both Hugh and Alastair steadfastly refused to accept that the testator was genuinely upset and angry that they were not abiding by his wishes. In his handwritten letter to them on 29 August 2009 he had told them how desperately upset he was at the rift in the family and begged them to engage in mediation, failing which he was going to change his will.

128. Hugh made it clear that he was not going to engage in mediation and, although Alastair said that he had told his father that he would, it is remarkable that the agreement he says he reached with his father is not referred to anywhere. When Tricia wrote to Hugh and Alastair saying that she was still prepared to mediate, all Alastair had to do, but he did not, was press the reply button saying that he had already agreed with the testator that he would do so. I do not doubt Alastair's version of the conversation, but I find that his decision to go to mediation was at that stage tentative and provisional only, it was never communicated to Tricia and the testator did not take it seriously.

129. It is plain that both Hugh and Alastair regarded their rift with Tricia as a separate matter from their father's wishes and it is equally plain that the testator did not. Both Hugh and Alastair continued to challenge Tricia's actions under the power of attorney and wanted her to be removed, they both questioned her honesty, and by complaining to the Adult Protection department of Social Services they both implied that she was in some way abusing the testator. Hugh contacted Dorset Social Services on 8 September (a decision jointly reached with Alastair) complaining again about Tricia's handling of her father's affairs. Alastair wrote to the Office of the Public Guardian on 26 October 2009 questioning Tricia's handling of Paddy's affairs and referring to her “underhand tactics” and “working to her own agenda”. They plainly continued to be in contact with Bournemouth Social Services as, on 1 February 2010, in response to a telephone call from Tim Drage of that department the previous day, Hugh emailed the letter to which I have already referred setting out his concerns about Tricia.

130. Again, they constantly questioned the testator's testamentary capacity and his capacity to manage his own property and affairs, matters that were consistently reported to him by his solicitors and by Tricia and not contradicted by Paddy. In circumstances where a man is old and physically frail I can imagine that there is nothing more frightening and frustrating than a false suggestion that he is unable to make financial decisions for himself. Hugh also tried to put a spanner in the works by the letter from Leitch & Co, suggesting that Preston Redman LLP did not have authority to act, and he did delay the sale of the bungalow through the telephone call he made to Ann Ackroyd on 20 July 2009. All those matters were changes of circumstances since the testator and Joy made their earlier wills.

131. As late as 17 February 2010, Alastair was writing to Laceys saying, “The allegation that I have repeatedly questioned my father's mental capacity is not true.” Again, in an email to Hugh of 5 March he said “I stated [to Terry Bailey of Sunrise] repeatedly that I was not questioning Dad's mental capacity”. And on 9 March 2010, Leitch & Co wrote to Laceys, presumably on instructions, “You mention that Hugh has repeatedly challenged his father's mental capacity. This is not so...”

132. Although Hugh and Alastair apparently believed what they were saying, the documents show that they did indeed question the testator's capacity. For example I refer to Hugh's telephone conversation with Ms Ackroyd on 20 July, the letter from Leitch & Co written on Hugh's instructions of 22 July 2009, Alastair's telephone conversation with Mr Tucker on 23 July 2009 and his letter to Ms Norton dated 18 January 2010. Hugh and Alastair kept in close contact and took a common stance.

133. There was also Paddy's evidence. She says she was bullied by Alastair and Belinda in particular, and gave examples of occasions when they went to see her. She gave an example of Alastair pressurising her to sign a document in the presence of her cleaner. She said she had seen her solicitor, Miss Natasha Cross of Laceys, on her own. She said that Hugh and Alastair had interfered in her care, not wanting her to sell her flat. She gave an example of them asking what other arrangements had been suggested to her for releasing equity from her flat to enable her to live in residential care.

134. As I have said, she was hazy as to details in her evidence, but I note that at the relevant time there was no question mark at all over Paddy's mental state. I observe that on 23 July 2009 Alastair told Mr Tucker that “he had no concerns about his Aunt's mental capacity”.

135. Although the testator told Mr Tucker on 22 September 2009 that he was not ready to disinherit Hugh and Alastair, he changed his mind.

136. I agree with Mr Norman that Hugh and Alastair have not discharged the burden of proving that Tricia did anything other than carry out her duties to the testator, legal and moral. Even if she did, I find that there was no fraud involved in any calumny of Hugh and Alastair as Tricia genuinely believed that their motives were suspect and that they were interfering with the testator's wishes.

137. The problem in this case, as in so many, is that the parties seem to think that a judge can look into the hearts of the witnesses and somehow divine the truth. That is not how the system works. A judge can only find facts on the evidence, properly adduced. Indeed sometimes where the facts cannot be determinatively ascertained on such principles a case may have to stand or fall by default on the burden of proof. I cannot tell what actually happened. I can only, as I have said, find facts on the evidence.

138. I quote a passage from Dr Barker in his report. I am in complete agreement with it:

> "The relationship between capacity and influence and the point at which influence becomes undue is a decision for the court. There are many claims and counterclaims about the relationship between Mr Boyes' sons and daughter, and it is very difficult to give a view on these, as they are so clearly contradictory. [I am in a better position, having seen them in oral evidence- I have found that they are all honest but see thing from diametrically different perspectives]. Similarly therefore it is difficult to give a view on the influence that Mrs Nicholson may have exerted. However, I would note that Mr Boyes chose his daughter, in 2002, as his sole attorney, and therefore presumably trusted her to act in his best interests if he lacked capacity for the management of his finances, and confirmed this intention in 2009. I would also say, from my experience of similar cases, that while there is evidence of physical and mental frailty and evidence of some dependence on others (by the fact that he was living in a care home) there is little evidence in this case of seclusion of Mr Boyes by a relative on whom he was dependent for his day to day living and emotional needs, circumstances under which influence can be particularly significant. He still appears to have been independently communicating with solicitors, his GP and care staff. There does also appear to be evidence from the legal correspondence from Preston Redman and Laceys that despite requests for no further direct or indirect communication (initially temporarily) from his sons, this did still occur, and this led to a further breakdown in his relationship with his sons. In his consultations with solicitors I was struck by the coherence of Mr Boyes' views, even when dealing with challenges by them as to his motives and capacity."

139. Accordingly, I pronounce for the 2009 Will in solemn form as requested in the claim.

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