

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PROBATE

In the estate of LOUISA ANN ASHKETTLE deceased

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th July 2013

Before :

Christopher Pymont QC

Between :

(1) ROBERT MICHAEL ASHKETTLE	<u>Claimants</u>
(2) DENNIS ROBERT ASHKETTLE	
- and -	
ROSALIND PATRICIA ANN GWINNETT	<u>Defendant</u>

Mr Alexander Learmonth (instructed by **Seddons**) for the Claimants
Mr Aidan Briggs (instructed by **Wellers LLP**) for the Defendant

Hearing dates: 29,30 April, 1,2,7 May 2013

APPROVED JUDGMENT

Christopher Pymont QC:

1. This is a probate action by which the Claimants ask the Court to pronounce against the validity of a will dated 18 January 1999 and the Defendant (by a late counterclaim) seeks a grant of probate of that will in solemn form. The Claimants' claim also seeks a grant in solemn form of letters of administration with the will annexed in relation to an earlier will dated 2 October 1986. There is no dispute about the 1986 will. The issues I have to determine are as to the validity of the 1999 will. The Claimants say (i) that this will was not properly executed (ii) that the testator did not have testamentary capacity to make it (iii) that the testator did not know and approve the contents of the will and (iv) that, if the testator did have capacity and did know and approve its contents, then it must have been procured by the Defendant's undue influence.

2. The testator was Louisa Ann Ashkettle ("Mrs Ashkettle") who died on 27 September 2007, aged 86. The Claimants are Mrs Ashkettle's two sons ("Robert" and "Dennis" respectively) and the Defendant ("Rosalind") is her daughter. The 1986 will left Mrs Ashkettle's estate to Rosalind, Dennis and Robert in equal shares. The 1999 will left her estate to Rosalind alone. The 1999 will contains an explanation of the change in the following terms:

"3. I have made no provision in this Will for my Son [Dennis] because we do not have a friendly and reasonable Mother and Son relationship and I believe that he has adequate means of his own."

"4. I have made no provision in this Will for my Son [Robert] because he has greatly upset me with his attitude towards my house and I believe that he has adequate means of his own".

Whether these reasons have any cogency is part of the issues I have to address.

Evidence

3. I have heard oral evidence from a large number of witnesses. On the Claimants' side, these include Dennis and Robert, Robert's wife Jacqueline and his children Richard and Victoria ("Vikki"), and Dennis's son Colin. The Claimants' witnesses also include Michael Gillan (a former employee of Robert's company) who met Mrs Ashkettle once in 1999 and, by a hearsay statement as she was unfit to attend the trial, Sally Melhuish, a friend of Robert and his wife. The Claimants also called Dr Nandin Pandita-Gunawardena, formerly consultant physician in Elderly Medicine at University Hospital Lewisham, who examined Mrs Ashkettle on 4 September 1997. On the Defendant's side, I have heard evidence from Rosalind herself and her son Gregory, as well as Mrs Ashkettle's neighbour, Anthony Gear, her sister-in-law Rosina Christie, her GP Dr Arun Gupta and her solicitor Ralph Stanger, who drew up both wills. I have also heard evidence from one of the witnesses to the 1999 will, Denise Mears, the other (Lynn Ramsay) having made a statement to the effect that she does not remember anything material.
4. The evidence before me includes a certain amount of documentary material, particularly as to Mrs Ashkettle's medical history. On the issue of her capacity at the time of the execution of the 1999 will, I have also heard the expert evidence of Professor Henry Hodkinson (called by the Claimants) and Professor Robin Jacoby (called by the Defendant). By their joint statement dated 18 August 2013, they agreed that Mrs Ashkettle suffered from dementia due to Alzheimer's disease and that Mrs Ashkettle probably had the capacity to understand the nature and consequences of the act of making a will; but

they differed on two important issues, namely whether Mrs Ashkettle lacked the capacity to appreciate, first, the extent of her estate and, secondly, the moral claims of those who might have expected to benefit from her bounty (these being legal criteria for capacity, derived from Banks v Goodfellow (1870) LR 5 QB 549). On these issues, Professor Hodgkinson's view is that Mrs Ashkettle lacked capacity while Professor Jacoby's view is that whether or not she lacked capacity will depend upon the Court's determination of the oral, factual (i.e. non-medical) evidence.

5. The evidence includes a number of photographs and home videos. I have found these for the most part unhelpful on the issues I have to determine, with the exception of the video I comment upon below, taken by Rosalind's son Christopher, which shows Mrs Ashkettle in the garden with Rosalind in 1998.
6. In the light of the experts' differences, I therefore proceed to explain my findings on the oral and documentary evidence I have heard and read. I am concerned in the first instance to consider the first three issues raised by the Claimants (whether the 1999 will was duly executed, whether Mrs Ashkettle had testamentary capacity and whether she knew and approved of the contents of the will) because the issue of undue influence only arises if the 1999 will were otherwise regular.
7. In making my findings, I have sought to allow for the fact that the principal events took place at least fourteen years ago and that memories are bound to have become weaker or less reliable with the passage of time. I have also tried to allow for the strong feelings which this dispute has engendered on both sides and which can be expected to have influenced the principal witnesses'

recollection of events. That said, I have concluded that Rosalind was an unconvincing witness, whose evidence on crucial matters is unreliable. Her attempts to explain away events which might be considered detrimental to her case (such as the consultation with Dr Pandita-Gunawardena, her answers to the questions on the Disability Living Allowance form and other aspects of the written evidence) were not credible. Her purported recollection in cross examination of the significance of an occasion in 1997 when Mrs Ashkettle passed out while walking in the park was unsupported by any contemporaneous medical evidence and lacked all conviction. She was particularly poor on dates: she gave specific dates for certain events, though without explaining how she remembered or identified them, but was otherwise rather vague or equivocal on timing. The question of dates (and thus the precise sequence of events) is of particular importance (as I explain below) when one considers the evidence as to how the 1999 will came to be prepared. In general, I prefer the evidence of Dennis and Robert on disputed issues, though I accept that they (and Robert in particular) feel some bitterness towards their sister and are wont to ascribe to her base motives which she may not deserve. I was also impressed by what I saw of the Claimants' supporting witnesses and less so by Rosalind's. These general conclusions have informed my findings below.

Findings of Fact

8. Mrs Ashkettle met and married her husband, Jack, during the Second World War and lived for some years in the East End, where they had been brought up. Dennis and Robert describe the marriage as an unhappy one, largely

because of Jack's "raging temper", though things appear to have improved when, in 1964 they moved away from Jack's own family to 27 Galahad Road, Downham. However, all her children agree that Mrs Ashkettle herself was a bright and cheerful person and a loving and caring mother who was very attached to all of them. Robert was particularly close to her. He explained that he suffered a life-threatening illness in 1965, when he was 14, and was in hospital for four months and then convalescing for another six. During that time he and his mother drew very close. Mrs Ashkettle continued to dote on him in later years. Robert, his wife Jacqueline and daughter Vikki all recall the way she fussed over him, sometimes to the point of embarrassment.

9. Jack Ashkettle died in 1990. Jack's family were not told of his death because (as Dennis explained) Jack himself had had no desire to see his family and would not have even attended his own mother's funeral to avoid them. Dennis recalls that as being a family decision (that is, agreed by Mrs Ashkettle and all her children) though Rosalind says it was Dennis's decision. Dennis must be right on this as he could not have prevented Mrs Ashkettle or Rosalind from passing on the news had they wanted to. Mrs Ashkettle's physical health began to decline thereafter, so that by 1993 she was living permanently with Rosalind. The arrangement appears to have been that Mrs Ashkettle would stay overnight at Rosalind's home in Bromley but would spend the days, or part of the days, at her own home. Mrs Ashkettle's deteriorating eyesight was a particular worry in that she would often fall. She was also already suffering from loss of memory and concentration, sometimes with potentially dangerous consequences, such as leaving the gas on unlit and putting an electric kettle on the hob (as Dennis and Robert recall). Concerns for Mrs Ashkettle's safety

must have played a large part in the decision that she should move in with Rosalind. All Mrs Ashkettle's children were initially very happy that she could rely upon Rosalind, rather than having to move to some kind of nursing home or other supervised accommodation.

10. Mrs Ashkettle's mental health thereafter declined further. Robert, Jacqueline and Vikki recall being told by Rosalind that Mrs Ashkettle's trousers had fallen down while she was at The Glades shopping centre and she was walking around unaware of the fact. On a separate occasion, Rosalind told them that Mrs Ashkettle had eaten a lipstick she had been given. Rosalind disputed these events but I accept the evidence I heard from Robert, Jacqueline and Vikki.
11. Whatever the precise circumstances of these, and other, reported incidents, it is clear that by 1997 even Rosalind had become concerned by her mother's mental condition. By this time, Mrs Ashkettle had had laser treatment on both eyes and cataract surgery on her left eye, following which her consultant ophthalmic surgeon, Mr Hugkulstone, wrote to her GP, Dr Israel, on 4 April 1997 reporting that Mrs Ashkettle

“is now delighted with the improvement in her vision. Both eyes are quiet and white with normal intra-ocular pressures. I have therefore discharged her from the clinic.”

Mrs Ashkettle's eyesight could no longer therefore, at this stage, offer a complete explanation for any lapses on her part. Rosalind did not accept this: her evidence was that the operations were not a success in that there was not the improvement hoped for, so that Mrs Ashkettle's eyesight “just got worse

with time.” I have concluded that here, as elsewhere, Rosalind has simply been unable to accept the truth of evidence which contradicts her case.

12. Rosalind took Mrs Ashkettle to see Dr Israel on 18 August 1997. Dr Israel’s notes on that occasion record

“memory problem ... living with daughter temporarily ... Ref Dr G for memory loss.”

In a side note, Dr Israel wrote “? Alzheimers” so she was clearly concerned by Mrs Ashkettle’s mental condition. The reference to “Dr G” was to Dr Pandita-Gunawardena, the consultant physician in Elderly Medicine at the University Hospital, Lewisham, to whom Dr Israel wrote the following day. She explained:

“Thank you for seeing Mrs Ashkettle whose daughter is very concerned about her memory loss. She has no medical problems and is not on any medication. She has had a few falls lately.

I would be grateful for your advice and necessary treatment.

I have arranged for FBC, TFT’s and U&E and urine test.

I would be grateful for your help.”

13. In her oral evidence before me, Rosalind advanced the hypothesis that her mother’s problems must have stemmed from a minor stroke she had suffered in the spring (or possibly July - her evidence is inconsistent here) of 1997. Rosalind’s evidence was to the effect that Mrs Ashkettle had had a black-out whilst walking in the park with her on a hot day. However, this incident was not so serious at the time for Rosalind to have taken Mrs Ashkettle to the doctor or for her to have mentioned it to the doctor when she did visit with her

mother on 18 August 1997. As will be seen, she also did not think it of any significance when she took Mrs Ashkettle to see Dr Gunawardena. Both Dr Israel and Dr Gunawardena could be expected to be looking for signs or symptoms of stroke given Rosalind's expressed concerns about memory loss but they mention nothing in this respect. I reject Rosalind's hypothesis, which struck me as an attempt to explain away the records of the consultations with Dr Israel and Dr Gunawardena so as to avoid the conclusion that Alzheimer's disease was diagnosed as early as September 1997.

14. On 4 September 1997, Rosalind and Robert together took Mrs Ashkettle to see Dr Gunawardena. That they both accompanied their mother on this visit reflects the seriousness of their concerns. I have heard evidence from each of the surviving participants in this consultation and I have considered Dr Gunawardena's notes and subsequent letter to Dr Israel, written later that day. The notes record some of Mrs Ashkettle's recent medical history, which Rosalind accepts must have been given by her. This includes a fall "2 years ago", when Mrs Ashkettle fractured her elbow (confirmed by other medical records in evidence) and two eye operations. Otherwise the note was in these terms:

"Poor memory ... it has been a gradual & progressive memory deterioration during that period of 2 yrs
Unable to name day, date & year
No p.h. [past history] of a stroke or TIA [transient ischaemic attack]
No fits
On no medication
Denies history of falling
Loses things, cannot find them
Physical health v. good
Colour [tick - i.e. normal] Occ[asional] visual hallucinations
B/P 150/90
Pu 76/min regular

CNS [central nervous system] no localising signs
[diagnosis] Probable Alzheimer's
T588 offered Daughter not convinced but will think about it & let Val know"

15. In his letter the same day to Dr Israel, Dr Gunawardena repeated the information he had recorded in his notes. He told Dr Israel that he had told Rosalind and Robert that Mrs Ashkettle had "early memory problems": he did not use the word "Alzheimer's" as he had "got the feeling from the daughter that mother would not have liked to have heard the diagnosis". However his clinical judgment was "probable Alzheimer's". Dr Gunawardena explained in evidence that this meant that his clinical diagnosis was of Alzheimer's disease, the "probable" not being a qualification of that assessment so much as an indication that it had not then been confirmed by the so-called litmus tests (e.g. blood test or biopsy). This explanation is consistent with what he says in his letter to Dr Israel about his discussion with Rosalind and Robert of available treatment programmes. In summary, the only drug then available in the UK for the treatment of Alzheimer's was Aricept but it was not yet available at the hospital or from many GPs. Dr Gunawardena therefore offered to put Mrs Ashkettle on an Alzheimer's study he was conducting (as also recorded in his notes), using a drug similar to Aricept; but Rosalind was not very enthusiastic about that and she and Robert would need to think about it and let him know what they wanted (again, as also recorded in the notes). This discussion and recommendation could not have taken place if Dr Gunawardena had any doubts about his diagnosis because the trial offered and the drugs referred to were specific to Alzheimer's.

16. Rosalind failed to provide an explanation in her witness statement as to what lay behind the decision to consult Dr Israel and subsequently Dr Gunawardena. In cross examination, she said she was concerned about her mother's slurred speech but there is no other evidence for a symptom of this kind and Rosalind may have been trying to fit the facts to her theory that her mother had suffered a stroke when she had a black-out in the park; at all events, I reject this evidence. More significantly, Rosalind accepted that she was concerned that her mother was asking "what is wrong with me?" and was "not herself", which seems to point to a more general concern of a kind with which Dr Gunawardena's diagnosis is entirely consistent.

17. As to the severity of Mrs Ashkettle's condition at this time, there is, first, the evidence that the family thought it sufficiently serious to be seeking medical advice, with Rosalind and Robert both attending the consultation with Dr Gunawardena. That suggests that there had been a serious deterioration in her condition over the 2 year period referred to in Dr Gunawardena's notes. These notes also record Mrs Ashkettle's inability to answer Dr Gunawardena's questions at the consultation as to the day, date and year; a separate piece of evidence in this connection is that, in a letter to her own solicitors dated 1 August 2003, Rosalind recalled that Dr Gunawardena had also asked her mother how old she was, what her name was and what the Queen's name was, but that her mother "just froze". It would therefore appear that Dr Gunawardena had asked six simple questions without getting any response at all. Professor Hodgkinson thought that the inability to answer questions of this kind would, of itself, put the degree of dementia on the borderline between mild and moderate. Professor Jacoby agreed that inability to answer questions

such as these would make it likely that other aspects of the standard Mini Mental State Examination (MMSE) would go unanswered, with the degree of dementia being, on that basis, moderate to severe. These opinions are suggestive rather than conclusive, as Dr Gunawardena did not carry out a full MMSE but I find, in the context of the family's decision to take medical advice, that the degree of dementia was becoming significant by September 1997. The experts also agree that Alzheimer's is a relentless and progressive disease so that no improvement could be expected over time and no lucid intervals would arise: on the contrary, the only expectation would be for the dementia to get worse.

18. Rosalind sought to explain Mrs Ashkettle's failure to answer Dr Gunawardena's questions by saying that his accent was too thick for her mother (and even Rosalind) to understand. Robert disagreed with this explanation and, having heard Dr Gunawardena give evidence, I reject it. It is in any case difficult to see how Dr Gunawardena's practice could have been as successful as it was over 30 years if he had had any difficulty in making himself understood by elderly patients. Rosalind was here, in my judgment, seeking to explain away, rather than to explain, evidence which damaged her case and the attempt is another reason why I find her evidence unreliable.
19. Rosalind also criticised Dr Gunawardena for his failure to carry out appropriate tests but a series of tests had been ordered by Dr Israel and the results were referred to in Dr Gunawardena's letter to her ("I note that her haematology and biochemistry are all normal"). It was, in part, the absence of any alternative explanation for Mrs Ashkettle's condition that led Dr

Gunawardena to his diagnosis of “probable Alzheimer’s”. Rosalind also complains that she was seeking a brain scan for her mother but Dr Gunawardena explained that brain scans were not routine for Alzheimer’s disease at the time and were only carried out if there were a possibility of another diagnosis such as a brain tumour or subdural haematoma (which was not the case with Mrs Ashkettle). In the absence of any alternative explanation, Dr Gunawardena’s diagnosis should in my judgment be taken as accurate.

20. Rosalind’s son Christopher was married in October 1997. Robert accompanied his mother during the ceremony and sat with her throughout the reception but she did not engage with anyone and maintained what Robert describes as “a blank, fixed expression for everyone.” I accept Robert’s evidence on this point.
21. On 19 January 1998, Rosalind signed a document entitled “Disability Living Allowance/Attendance Allowance Medical Report”. Her signature expressly confirmed that

“This statement has been read back to me and I agree it is full and correct.

I agree that this information is correct.”

The document was a standard form, completed by a Dr B.N. Gupta (not the Dr Gupta who was later to become Mrs Ashkettle’s GP) during the course of a home visit to assess Mrs Ashkettle’s needs, with Rosalind signing as her daughter and carer, and as the person providing the relevant information. The comments which Rosalind confirmed as accurate include these:

- “A.1. My mother lives on her own, she can get out of the bed but I have to dress her every day.
- 2. She can walk indoors, she can get to the bathroom. She manages stairs very carefully. She does not use any walking aid.
- 3. She falls over any time if not watched, last fall was 1 week ago. She fell two years [ago] and broke her left elbow. She fell in the garden last time.
- 4. She can wash her face and hands but she needs help to bath[e]. She can get to the toilet and can manage in the toilet. Some time she forgets where the toilet is?
- 5. She is not on any medication.
- 6. Meat has to be cut, then she can feed herself.
- 7. She does not cook any food.
- 8. She does not use a wheel chair.
- 9. She has to be undressed, then she can get into the bed.
- B.1. She does not go out on her own as she is not safe. She cannot remember things. Her eyesight is poor as well.
- 2. No fits [this being an answer to a question about “Blackouts, Fits, Comas” etc]
- C.1. She can turn over and manage to cover herself in bed.
- 2. She goes to the toilet to empty bladder, then wanders in the house every night early hours of the morning.
- D.2. No fits [again an answer to a question about “Blackouts, Fits, Comas etc” in the night].
- F. August 95 [in answer to the question: How long have these needs existed?]

22. Dr BN Gupta’s clinical findings were as follows:

“Mentally not orientated. She does not remember her birth date, month or year. Pleasant otherwise. No physical disability noted or found. Walks normally. [?] finger count at 3 metres. Her general condition is good ...

She is mentally confused and needs supervision.”

Dr Gupta also recorded that the need for the present amount of care began in August 1995 (by day and by night) before which no such care was needed.

23. Rosalind has disputed much of this report in her solicitors' letter of 8 June 2009 and later (in slightly different terms) in her witness statement and cross examination. Her principal objection seems to be that Dr Gupta was an elderly foreign man with poor English whom Mrs Ashkettle could not understand and who had made mistakes in writing down what she told him. That does not explain why she signed the document as an accurate record. Her explanation for that was that she could not read Dr Gupta's writing but I find this far-fetched on the copy I have seen. I accept the point made by Rosalind's Counsel that Dr Gupta was assessing care needs, not capacity, but that does not seem to me to explain why, in that case, Rosalind was so concerned to argue with what Dr Gupta had recorded both as to Mrs Ashkettle's needs (confirmed by Rosalind's own signature) and as to his clinical finding. In one respect ("my mother lives on her own") the information was plainly false. Rosalind has also not explained what was the purpose or what were the consequences of this visit, though presumably it was part of a claim for some kind of disability benefit.

24. For the rest of 1998, there appear to have been no further visits to the doctor. There is, however, plenty of evidence that Mrs Ashkettle's condition was getting worse. Dennis, who had been a regular visitor to see his mother at Rosalind's house, found that from around 1997/8, his mother had increasing difficulty in recognising him; he also recalls an occasion when he saw her trying to eat her napkin and another occasion when he had to force the toilet

door because his mother had locked herself in. He found the deterioration in Mrs Ashkettle's condition very upsetting because it became impossible to converse with her and she was unaware of what was going on around her. The situation was made worse because Rosalind was becoming impossible to deal with. He recalls a fierce row with Rosalind in late 1998 when he tried to raise concerns about his mother and she took it as criticism of the care she was providing (which was not his intention). Dennis stopped going to see his mother because there was no point if she did not recognise him and he did not want to risk a further row with Rosalind. Robert, though a less frequent visitor, had a similar experience. He became aware by late 1998 that his mother no longer recognised him and found Rosalind difficult in allowing him to visit.

25. It would seem that Mrs Ashkettle was unaware that in October 1998, she became great-grandmother to twin girls born to Robert's son, Richard: Robert, Jacqueline, Vikki and Richard recall Mrs Ashkettle's inability to register who the babies were on separate occasions between late 1998 and their christening on 9 May 1999 (when Sally Melhuish recalls Mrs Ashkettle as being "wholly vacant"). Mr Gillan recalls being unable to get a response from Mrs Ashkettle at a family party at Robert's house in the summer of 1999 and his evidence is supported by Robert's. Mrs Ashkettle was similarly unresponsive at Gregory Gwinnett's wedding in September 1999. Gregory gave evidence that he shared several good-humoured chats with his grandmother that day but, in view of all the evidence, I cannot accept his assertion that Mrs Ashkettle was "mentally ... as sharp as ever": by this time, Mrs Ashkettle's mental condition must have deteriorated badly.

26. The evidence of Mr Gear (Mrs Ashkettle's neighbour) as to short conversations or exchanges with her over the garden fence, even in 1999, did not support the contention that Mrs Ashkettle was at any stage capable of independent or coherent thought; and the evidence of Mrs Christie (Mrs Ashkettle's sister-in-law) that she was still speaking to her on the telephone in 1998 lacked cogent particularity and appears to have been in part influenced by Mrs Christie's continued dislike of Dennis for failing to inform her of her brother's death. By contrast, Colin, Dennis's son, gave evidence which I accept that his grandmother was unable to have any meaningful conversation with him on the last few occasions on which he visited her (which included his son's first and second birthdays in November 1998 and 1999).
27. A home video has been produced which was taken by Christopher Gwinnett in 1998 and shows Rosalind and her mother in Rosalind's garden. Rosalind disputed the date of the video, saying it was taken in September, but the correct date appears to me to be the "seventh" (i.e. July) rather than September, which is also more consistent with the profusion of colourful flowers on display. Mrs Ashkettle says nothing coherent during the admittedly brief conversation recorded. She is not silent however. In response to Christopher's saying "Eh?" at one point to his mother, she seems initially to dislike the expression but then remarks "A, B", which reminds her of the line in a song "Abe, my boy" – which she then sings (rather charmingly) to no-one in particular. She later comments "hopefully great-great grandchildren" apparently in response to a remark of Rosalind's but without any real context or logic. Towards the end of the video she mutters or bumbles audibly but incomprehensibly. While I appreciate that this video is short and

therefore of limited value, it does tend to contradict Rosalind's evidence that her mother retained her mental capacity throughout 1998. I was particularly struck, not only by Mrs Ashkettle's failure to engage appropriately in the conversation, but also by the way both Christopher and Rosalind talked across her, as if, even then, they were used to her talking without making sense. I was also struck by the apparent openness and cheerfulness of Mrs Ashkettle's disposition, which could easily mask her real condition from a person who did not know her. Christopher has not given evidence to explain his view of his grandmother in this video or more generally at this time, nor has Rosalind's husband Len. I find this surprising.

28. An important incident took place around the same time (i.e. the summer of 1998). Richard's partner was discovered to be expecting twins sometime around June and Robert was concerned that there would not be space in their current home for the whole family. Robert therefore suggested to Rosalind, in a telephone call, that Richard rent Mrs Ashkettle's house for around £700 a month; this would provide Richard and his family with a home at the same time as giving Mrs Ashkettle some extra income. Coincidentally, Dennis was at Rosalind's house when this telephone call was made and Rosalind spoke to him about it. Dennis did not see any problem with the suggestion but Rosalind was adamant that she would not allow it. Neither Robert nor Dennis raised this request with Mrs Ashkettle directly because they both believed that she was unaware of her surroundings by this time and unable to make a decision. Having heard Rosalind's refusal, Robert says he did not press the matter and Richard made alternative arrangements for his new family. Rosalind's evidence was that Robert was aggressively insistent on obtaining a

tenancy for Richard and that this was an important part of what caused the deep rift which now exists in the family. She describes how upset her mother was to be told of the request, believing (Rosalind said) that her house was to be taken from her. But I reject Rosalind's description of these events, which I regard as exaggerated and heavily dramatized. Robert's suggestion was a perfectly reasonable one in the circumstances and could not be reasonably understood as a threat to take Mrs Ashkettle's house from her; and there was no need for Robert to become aggressive in advancing the request as it was not his problem but Richard's and there were alternatives available. I prefer Robert's and Dennis's account.

29. I turn to the circumstances in which the 1999 will came to be prepared. The evidence for this consists of the statements and oral evidence of Rosalind and Mrs Ashkettle's solicitor, Mr Stanger, and a few papers from the solicitor's files. I would emphasise that the will file (if there was one) has not survived so that it is not possible to read what instructions were given or by whom or to track how they were implemented. The only attendance note which survives relates to an Enduring Power of Attorney ("EPA") which was executed at around the same time but this attendance note does not reveal what instructions were given for the will. In the result, both Rosalind and Mr Stanger were giving oral evidence as to the detailed instructions, otherwise unrecorded, but given some 14 years ago. I do not believe that I have heard a full and satisfactory explanation of what really happened.
30. To begin with, there is some confusion as to the dates upon which Mrs Ashkettle attended her solicitors' office. The attendance note for the EPA

records a visit on 25 November 1998 and the will itself is dated 18 January 1999 which was presumably the date of a second visit. However there appears to have been a third meeting, on 6 January 1999, which Rosalind recalled (without fully explaining how she had managed to date it) but which Mr Stanger omitted to mention in his written evidence. When this third meeting was put to him in cross-examination, Mr Stanger produced copies of his diary which indeed confirmed a meeting with Mrs Ashkettle and Rosalind at 3.30pm that day. That did not explain, however, what that meeting was for or what had transpired on that occasion nor why Mr Stanger had omitted to mention it.

31. The attendance note of 25 November 1998 records that Mrs Ashkettle had attended (with Rosalind) to make a new will but that Mr Stanger had taken the opportunity to explain about an EPA which, according to the note, Mrs Ashkettle decided to proceed with there and then. The note records

“Although somewhat frail, she [Mrs Ashkettle] expressed her wishes clearly and thus seemed to me to have the appropriate capacity to proceed”.

This statement raises a number of (unanswered) questions as to the nature of the discussion between the three participants and what precisely was said by Mrs Ashkettle (as opposed to Rosalind) to express her wishes. Mr Stanger’s evidence (unsurprisingly after 14 years) did not descend to this kind of detail. In view of the other evidence I have reviewed above, I do not accept this unsupported statement of Mr Stanger’s as to Mrs Ashkettle’s apparent capacity.

32. The attendance note also records that there was “a separate attendance note about the will”. However, as I have said, the will file (if there was one) has

not survived. It is impossible therefore to see how, when and in what precise terms Mrs Ashkettle (or anyone on her behalf) can be said to have given appropriate instructions. Mr Stanger's evidence did not supply any relevant detail on these matters. He seemed to me to have little if any recollection beyond what could be re-constructed from the surviving documents and his usual practice. Rosalind claims to have been out of the room when the will was discussed which, if true, means she cannot give evidence as to what was said and, if untrue, makes her evidence even more unreliable.

33. What does survive is, of course, the 1999 will itself. This includes the express explanation I have quoted above as to why Mrs Ashkettle was cutting out her two sons. However, these provisions cannot, in my judgment, truly reflect the actual circumstances at the time. On the evidence I have heard (and broadly accepted) it was quite wrong for the will to suggest that Mrs Ashkettle and Dennis "do not have a friendly and reasonable Mother and Son relationship". Dennis had been a frequent visitor to his mother and Rosalind until recently; he had only stopped coming because his mother could not communicate any more and Rosalind made it difficult to do so. The relationship between Mrs Ashkettle and Dennis had otherwise always been a close one. The phrase "friendly and reasonable" is to my mind a curious one to use for a mother – son relationship anyway; one would expect to read that the relationship was not "close" or "affectionate" or the like rather than "friendly" or "reasonable". Equally there was no basis for the comment, in Robert's case, that "he has greatly upset me with his attitude towards my house"; Robert had no "attitude" towards his mother's house, nor (as I have explained) could his request on Richard's behalf have reasonably given rise to any concerns on Mrs

Ashkettle's part which could possibly have "upset" her, let alone "greatly". In the case of each of Dennis and Robert, it is equally unclear what (if any) information Mrs Ashkettle could have had or understood (or conveyed to Mr Stanger) as to what "adequate means" were available to them. I regard these comments in the will as quite unwarranted and to that extent inexplicable.

34. I hesitate to make any findings about how these express comments about Dennis and Robert came to be included in the will. The suspicion on the evidence I have heard must be that they represent Rosalind's instructions rather than Mrs Ashkettle's. In the absence of a will file, or any full explanation from Rosalind or Mr Stanger as to how the instructions were given before, during or after the meetings on 25 November 1998 and 6 January 1999, it is impossible to reach any final conclusion. I am satisfied, however, that Mrs Ashkettle was not at that time in a position to appreciate the extent of her estate or the moral claims of those (namely Dennis and Robert) who might have expected to benefit from her bounty.
35. The will was executed on 18 January 1999. Mr Stanger signed it on Mrs Ashkettle's behalf, having read it to her. However, I regard Mrs Ashkettle's inability to sign as an indication of her lack of capacity rather than her poor eyesight or physical frailty. Mrs Mears was one of the witnesses and claimed in her statement to have had no doubts about Mrs Ashkettle's capacity. But her dealings with Mrs Ashkettle were fleeting and she did not give any details as to how she could have reached such a conclusion. On the contrary, her description of the will being read to her ascribes a rather passive role to Mrs Ashkettle, whose "assent" may have amounted to little more than a smile and

a nod. I am not satisfied on this evidence that Mrs Ashkettle could genuinely have understood what was being done in her name and on her behalf. The next day, Mr Stanger swore a statutory declaration as to the due execution of the will but this does not take matters any further.

36. Mr Stanger's firm's invoices for preparing the EPA and the 1999 will are in evidence and show charges of £40 and £60 for each respectively (plus VAT). The latter was dated 12 January 1999 and so must have been available for 18 January 1999 when, indeed, payment was made and the invoice receipted. These charges suggest that Mr Stanger's dealings with Mrs Ashkettle were brief and (from his point of view) entirely unexceptional. I am not satisfied from his evidence (in the absence of more detailed contemporaneous information) that Mr Stanger asked Mrs Ashkettle open questions sufficient to elicit the problem with her capacity which, from other evidence, I find to have existed by this time. Professor Jacoby explained how people with dementia can still maintain a "social façade" in certain situations, provided that they are not asked open questions and can get by by repeating familiar learned material. I am not satisfied from Mr Stanger's evidence that, in his brief dealings with Mrs Ashkettle, he penetrated any social façade she may then have presented. The false or inaccurate explanations for not benefiting Dennis or Robert cannot have been explored with her in any detail or their inaccuracy would have become apparent. Rosalind did not tell Mr Stanger of any of her mother's medical history so it may be that he was simply unaware, from his brief contact with her, that at the very least a medical opinion would be needed before a will could be executed.

37. On 19 January 1999, the day after the will was executed, Mrs Ashkettle visited the doctor's surgery. This was no longer the practice with which Dr Israel was connected but a new practice, further away, where Rosalind had had her mother registered on 19 November 1998. It is wholly unclear on Rosalind's evidence why she thought such a move would be appropriate at this time. Be that as it may, the medical records show that, on this visit, Mrs Ashkettle saw Dr Glendon who recorded (among other things)

“Problem with vision. Difficult to assess because of impaired mental state. To have check [with] Optician.”

The inability of Dr Glendon to assess her new patient's eyesight because of her “impaired mental state” is another indication that she was, by this time, unable to respond to her circumstances. Rosalind's Defence in these proceedings said of this note that it was unsigned and that “the Defendant will invite the court to infer from this that it was not taken by a doctor” but Dr A Gupta (Mrs Ashkettle's new GP) was able to identify both that the handwriting was Dr Mary Glendon's and that she was one of the doctors at the surgery. It remains wholly unclear to me why Rosalind would have put such matters in issue: she must herself have seen the doctor with her mother.

38. Mrs Ashkettle's later medical history supports the conclusion that her eyesight had deteriorated again. Mrs Ashkettle also appears to have suffered confusion in mid-2000 which was attributable to a urinary tract infection. Two letters from Lewisham health care workers in August and September 2000 confirm that Rosalind was Mrs Ashkettle's carer and the extent of Mrs Ashkettle's dependence on her and also show Rosalind refusing or avoiding assistance.

An appointment with Mr Hugkulstone in April 2001 was also not met; Rosalind accepted that there was no point in doing so. The next significant medical event was in December 2002 when Mrs Ashkettle suffered difficulties in swallowing her food. Dr Gupta visited her at Rosalind's house several times at this stage. He saw nothing which would have warranted a referral to the hospital so it is unlikely that Mrs Ashkettle then exhibited any symptoms of a stroke. Professor Hodgkinson explained that problems with swallowing are common in cases of Alzheimer's disease and, in the absence of other symptoms, that seems to be the likely explanation of Mrs Ashkettle's condition.

39. Towards the end of December 2002, Mrs Ashkettle was admitted to hospital, having been aspirating food and mucus, as seen on a barium swallow. It is agreed that, from this point on, Mrs Ashkettle was bedbound for the rest of her life and never spoke again. Gregory Gwinnett described his grandmother as deteriorating slowly from this point onwards but I reject that evidence, given the sudden change in her condition. It may be that this evidence is accurate though wrongly dated but, in the absence of any other reliable evidence from him as to the date of what he observed, it is impossible to derive anything material from it.

Legal issues and conclusions

40. There is little dispute between the parties as to the applicable law.
41. On the issue of execution of the 1999 will, the Claimants' initial contention was that Rosalind had not obtained a statement from either witness to its execution, which would usually be required for proof of a will. That point was

dealt with at the commencement of the trial when Rosalind produced late statements from both witnesses, one of whom (Denise Mears) then gave evidence. The only point then left was whether there was sufficient evidence that Mrs Ashkettle had given a positive direction or instruction for the will to be signed on her behalf (see Barrett v Bem [2012] Ch 573 at paras 23-4, per Lewison LJ). While I agree that the evidence is weak on this issue, I take the view that, in the circumstances, Mrs Ashkettle did give a sufficient direction for Mr Stanger to sign it on her behalf. Mr Stanger had had the will amended to enable him to do so, he had read the will to her and she had (on Mrs Mears's evidence) done sufficient to convey to Mr Stanger that he should sign on her behalf, which is what he then did. I conclude therefore, albeit tentatively, that the will was properly executed by Mr Stanger.

42. As for the issue of testamentary capacity, I have been referred to the well-known statement of principle in Banks v Goodfellow (1870) LR 5 QB 549 and the more recent glosses on its application in cases such as Key v Key [2010] 1 WLR 2020 and Cowderoy v Cranfield [2011] EWHC 1616. In the latter case, Morgan J (at paras 130-137) summarised the relevant authorities in terms which I would gratefully adopt. As Morgan J emphasises, the question is not as to whether or not the will is a fair one in all the circumstances of the case because a valid will can be unfair, vindictive or perverse; but if the terms of a will are surprising, that may be material to the court's assessment of the testator's capacity (or indeed his knowledge and approval of the terms of the will). Morgan J also adopts what was said by Briggs J in Key v Key, above, as to the evidential burden shifting to the propounder if the objector raises a real doubt about capacity.

43. I have also been taken to Hawes v Burgess [2013] EWCA Civ 94, where the Court of Appeal recently expressed the view that it is “a very strong thing” for a judge to find lack of testamentary capacity when the will has been prepared by an experienced and independent solicitor following a meeting with the testator, when it had been read through and explained to her and when the solicitor had formed the view that the testator was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational (see per Mummery LJ at paras 57 and 60 and per Scott Baker LJ at para 69). I accept the wisdom of these comments though I observe that they do not go so far as to suggest that, in every case, the evidence of an experienced and independent solicitor will, without more, be conclusive. Any view the solicitor may have formed as to the testator’s capacity must be shown to be based on a proper assessment and accurate information or it is worthless; and (as Mummery LJ acknowledges) the terms of the will may themselves suggest that the solicitor’s assessment was not soundly based.

44. On my findings in this judgment, the evidence as a whole shows that, by 18 January 1999, Mrs Ashkettle had lost testamentary capacity. She had been suffering from a progressive form of dementia since at least 1997 (when it was diagnosed by Dr Gunawardena) and (from his notes) at least two years before. Other evidence suggests that the problem had emerged even earlier. By the end of 1998, Mrs Ashkettle was unable to communicate in any meaningful way, though she may have retained a sufficient “social façade” to mask her mental deterioration from an incurious interlocutor. Mr Stanger’s evidence does not contradict this conclusion because he does not say, and it is impossible to recover, how and from whom he took his instructions or what he

relied upon in Mrs Ashkettle's demeanour or behaviour to satisfy the requirement of capacity; his contact with Mrs Ashkettle was extremely brief and, at least to some extent, filtered through Rosalind. There is no evidence as to what Mrs Ashkettle thought her property consisted of. Perhaps above all, the terms of the will make no sense. There is no proper support or explanation for the expressed reasons for excluding Dennis and Robert: these reasons are irrational and inexplicable in the context of Mrs Ashkettle's family life and history. They are not even explicable as the product of caprice or vindictiveness on the part of Mrs Ashkettle. Applying the approach of Briggs J in Key v Key, above, to the evidential burden in this case, I would conclude, at the least, that Dennis and Robert have raised a real doubt as to Mrs Ashkettle's capacity which has placed the evidential burden on Rosalind to prove it, a burden which she has failed to satisfy. I would indeed go further and say that the evidence shows that Mrs Ashkettle had no testamentary capacity at the relevant time.

45. As for the plea of want of knowledge and approval, I have been taken to cases such as Fuller v Strum [2002] 1 WLR 1097, Hoff v Atherton [2004] EWCA Civ 1554 and Gill v Woodall [2011] Ch 380. This question only arises if, contrary to my conclusion above, Mrs Ashkettle had had testamentary capacity: the question would be whether, in those circumstances, she actually knew and approved the terms of the will. If I am wrong on the issue of testamentary capacity, I would still conclude, for similar reasons, that Mrs Ashkettle did not know and approve the terms of the will. She did not read it for herself and, in my judgment, would have found it difficult to concentrate when it was read to her or to absorb what was being said to her. There is no

evidence that she understood what property she had to which the will would apply or, for that matter, that she genuinely understood what its effect was. The evidence of Mrs Mears and Mr Stanger does not establish that Mrs Ashkettle actually understood and approved what she was executing or that Mr Stanger's signature would have the effect of binding her; and Mr Stanger's evidence is anyway inadequate in explaining how, from whom and in what terms he received his instructions. The terms of the will as regards Dennis and Robert were irrational and inexplicable and indicate that Mrs Ashkettle did not understand what she was doing. Mrs Ashkettle's powers of understanding were not, on the evidence I have heard, sufficient to enable her to know and approve the terms of this will, even if she had retained capacity; that was Professor Hodgkinson's opinion and it is also my conclusion from the evidence. For these reasons, Rosalind has failed to satisfy me that the 1999 will should be granted probate even if Mrs Ashkettle had testamentary capacity.

46. I need not, in the circumstances, deal with the further issue of undue influence which would only arise if the 1999 will were otherwise valid.

Conclusion

I will therefore pronounce against the alleged will of 18 January 1999 and grant letters of administration with the will annexed in relation to the will of 2 October 1986. I will dismiss the counterclaim. I will hear argument as to the precise form of order, if it cannot be agreed.