Neutral Citation Number: [2022] EWHC 1334 (Ch)

Case No: PT-2021-CDF-000007

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

In the estate of Winifred Bernadette Williams deceased (probate)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

1 June 2022

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

CLAIRE LORRAINE WILLIAMS	**Claimant**
- and -	
CATHERINE HILARY WILLIAMS (as Executrix of the Estate of Winifred Bernadette Williams and personally)	**Defendant**

- -

And between:

CATHERINE HILARY WILLIAMS (as Executrix of the Estate of Winifred Bernadette Williams)	**Claimant**
-and-	
(1) CLAIRE LORRAINE WILLIAMS	
(2) HANNS WEBBER	**Defendants**

- -

Rhys Johns (instructed under **Direct Access**) for the **Claimant**
Owain Rhys James (instructed by **Red Kite Law LLP**) for the **Defendant**

Hearing dates: 11 and 12 April 2022
Further written submissions: 11 May 2022

- -

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.

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HIS HONOUR JUDGE KEYSER QC

This judgment was handed down remotely by circulation to the parties' representatives by email. The time and date for hand-down is deemed to be 10.30 a.m. on 1 June 2022.

JUDGE KEYSER QC:

Introduction

1. Mrs Winifred Bernadette Williams ("the deceased") was born on 4 February 1941 and died on 13 December 2019 at the age of 78 years. She was divorced from her former husband and was survived by two daughters, Miss Catherine Hilary Williams and Miss Claire Lorraine Williams, to whom for convenience and without intending any discourtesy I shall refer respectively as Catherine and Claire.

2. On 6 November 2019, a little more than five weeks before her death, the deceased executed a purported will ("the 2019 Will"), which contained the following material provisions:

> "1. I APPOINT my daughter Catherine Hilary Williams to be the sole executrix of this my Will
>
> 2. I GIVE all my personal chattels as defined by the Administration of Estates Act 1925 to my said daughter Catherine Hilary Williams absolutely
>
> 3. I GIVE all the rest and residue of my real and personal property whatsoever and wheresoever situate to my two daughters the said Catherine Hilary Williams and Claire Lorraine Williams alive at my death in equal shares".

3. The main asset of the deceased's estate is 26 Mirador Crescent, Swansea ("the House"), which is a three-storey property in Swansea. The deceased occupied the first and second floors as a self-contained maisonette, though at the time of her death she was resident in a care home. The ground floor is a separate flat; for some months prior to the deceased's death it had been occupied by Claire and by her partner at the time, Mr Hanns Webber.

4. On 7 April 2020, in reliance on her appointment as executrix of the 2019 Will, Catherine commenced a claim in the County Court at Swansea for possession of the House ("the Possession Claim"), naming Claire and Mr Webber as the defendants. In response, Claire intimated an intention to defend the Possession Claim by challenging the validity of the 2019 Will. Mr Webber made no response to the Possession Claim and has played no part in the proceedings. His relationship with Claire has ended and he no longer resides at the House. Claire continues to reside there, at least some of the time.

5. On 25 January 2021 Claire commenced proceedings in this court ("the Probate Claim"), challenging the validity of the 2019 Will on the grounds, first, that the deceased lacked testamentary capacity to make it and, second, that its execution was procured by undue influence on the part of Catherine. Claire seeks an order admitting to probate an earlier will of the deceased, dated 16 May 2012 ("the May 2012 Will"), which appoints Claire as executrix and provides that she shall be the sole residuary beneficiary.

6. By an order made on 3 February 2021 HHJ Jarman QC transferred the Possession Claim into this court and ordered that the two claims be consolidated, with the Probate Claim

being the lead claim. This creates some technical, though not I think practical difficulties, because the claimant in the Possession Clam is the defendant in the Probate Claim and only one of the defendants in the Possession Claim is a party to the Probate Claim; and there has been no direction that the Possession Claim stand as a Part 20 claim to the lead claim. The statements of case in the Probate Claim do not deal with the Possession Claim, and no defence was filed or required to be filed in the Possession Claim as its outcome was understood—and is agreed—to turn on the outcome of the Probate Claim. Accordingly, although I have not formally deconsolidated the two claims, I have dealt with the proceedings on the basis that the two claims have been tried together and I show them separately in the heading of this judgment.

7. In the remainder of this judgment, I shall first set out a factual narrative and then discuss in turn the issues of testamentary capacity and undue influence. The narrative will seek to include reference to the main events and sufficient information to explain how this dispute arose. However, it would be neither necessary nor profitable to record much of the detail of what the parties have to say about their mutual antagonism, which they made little if any effort to conceal when giving evidence at trial. Much of the evidence will go unremarked, though it is not ignored. Counsel very sensibly restricted their cross-examination to matters of central importance, mainly concerning events in 2019; had they not done so, the length of the trial would have been disproportionately lengthened. In the narrative that follows I shall from time to time record the evidence of a witness concerning a matter that was not explored in questioning and on which acceptance by one party of the other's case is not to be inferred. This will nevertheless help to give the "flavour" of the case and to show the underlying conflicts that have led to these proceedings.

8. I am grateful to Mr Johns and Mr James, counsel respectively for Claire and Catherine, for their submissions.

The facts

9. In the early 1990s Catherine was living with her daughter, Katie, in the ground-floor flat at the House. There was a disagreement between the deceased and Catherine; the deceased told Catherine to leave. Thereafter they were estranged from each other until 2017. In the mid-1990s Claire moved to London. However, she continued to visit her mother and they continued to have a good relationship with each other.

10. The deceased made a will dated 16 August 2010 ("the 2010 Will"), which was prepared on the deceased's instructions by Mr David Sanders, a licensed conveyancer and commissioner for oaths of David Sanders & Co in Swansea. The 2010 Will appointed Claire as the executrix and bequeathed the entire estate to Claire and Catherine in equal shares.

11. The deceased's next will was made on 22 March 2012 ("the March 2012 Will"). It again appointed Claire as the executrix and bequeathed the entire estate to Claire and Catherine in equal shares. The will was accompanied by a statement signed by the deceased and also dated 22 March 2012:

> "I have made my Will following very careful consideration of my financial position and the obligations I have to my family.

> I have two daughters, Claire and Catherine. My relationship with Catherine is not good and has not been good since she was a teenager. In fact Catherine moved away from home a couple of times. Catherine has also been of less support to me even though she lives the closest to me. I have always done my best to provide for and support Catherine; however I do not believe that Catherine appreciates this. My recent period of ill health, resulting in hospitalisation has b[r]ought this home to me as she has been no support to me during this time. On the other hand my daughter Claire has been a great support to me, and although she lives in London she has come back to be with me during my hospitalisation and I am very grateful to her for this.
>
> I am however very concerned that if I did not leave my estate to Catherine that she will make a claim on my estate. My estate is not large and I do not want the majority of it to be used up in legal costs defending a claim from Catherine. I am of the opinion that Catherine's view will be 'If I cannot have it, then no one shall have it.' It is for this reason only that I have left my residuary estate 50% to Claire and 50% to Catherine.
>
> If Claire should pre-decease me then her 50% share is to go firstly to any children she may have, and if she does not have any to Catherine's daughter Katy. If Catherine should pre-decease me then her 50% share is to go to Katy. I have not left anything to Katy in the first instance as I have not had a great deal of contact with her. Catherine has made contact with Katy difficult and denied me contact until Katy was about 11 through the courts. Also I believe that Katy will be well provided for by her other grandparents and father, and also I feel it is Catherine's responsibility to provide for Katy."

12. Only a very short time later, the deceased made the May 2012 Will. This appointed Claire as executrix. It left the entire estate to Claire or, if she predeceased the deceased, to Claire's issue. Only if none of those took a vested interest would the estate pass to Catherine or, if Catherine predeceased the deceased, to Katie. When the deceased made the May 2012 Will, she also signed a Letter of Wishes, which so far as material read as follows:

> "I confirm that I have made my daughter, Catherine, and my granddaughter, Katie, substitute residuary beneficiaries in my will because I want my daughter Claire to inherit my estate outright. I confirm that I have not included my ex husband in my will. It is of utmost importance to me that Claire inherits my estate.
>
> I do not want Catherine to share in my estate with Claire because Catherine has been unkind towards me over the years. She lives close to me in Sketty, Wales, but she never visits me. I wanted to have a relationship with my granddaughter Katie but Catherine stopped me from seeing her by obtaining a court order

> against me. Catherine was very cruel to me at that time and made up lies about me in court. In recent times she has mocked me. I only want her to receive benefit from my estate in the event that Claire and any children Claire should have pre-decease me.
>
> I do not want Katie to share in my estate with Claire because I have had little contact with Katie since she was four years old and she is practically a stranger to me. She has her own family. Katie has a good father and extended family and they will look after her financially.
>
> …
>
> My daughter Claire Williams has treated me with kindness and respect during my lifetime and she has been a good daughter to me. I want her to receive my estate on my death not only because she has been a supportive daughter to me but also because she does not have a family of her own.
>
> I have not been put under any undue influence from Claire to leave my estate to her, I have made this decision of my own free will."

13. The narrative can be picked up in 2017. Although it is unnecessary to examine in detail the deceased's personal and medical history, it is worth noting that an Occupational Therapy Assessment in February 2017 found that the deceased was experiencing some cognitive difficulties: a Montreal cognitive assessment indicated a moderate degree of cognitive impairment. The deceased's GP discussed this with her in May 2017, when the deceased expressed the belief that she did not have memory problems and that the real issue was depression and anxiety, for which she was receiving medication. The GP noted: "I agree this could slightly alter results".

14. In May 2017 the deceased attended at the offices of David Sanders & Co and spoke to Ms Nerys Sanders, a licensed conveyancer in that practice. The deceased told Ms Sanders that she wanted to give a power of attorney to Claire and Catherine jointly so that they could deal with her property and finances and take care of her health and welfare if she should lose capacity. The deceased told Ms Sanders that she did not have a good relationship with Catherine and had not spoken to her for some years, and that Claire and Catherine did not have a good relationship with each other. She expressed the hope that, by appointing both sisters to a power of attorney, she would be able to reunite the family. Ms Sanders was satisfied that the deceased understood what she was doing and was of sound mind. Accordingly, and by arrangement, a few days later she met again with the deceased, this time in the presence of both Claire and Catherine. In her witness statement, Ms Sanders said (I substitute my names for the parties for hers):

> "Both Claire and Catherine agreed with the facts the deceased had told me and in each other's presence confirmed Catherine did not have a good relationship with either her mother or her sister Claire and acknowledged Claire had been and continued to be her mother's primary carer.

> The deceased and her two daughters all agreed that to unify the family relationship the sisters would work together as Attorneys for their mother. This pleased the deceased."

15. Catherine's witness statement did not contradict this account of the meeting but placed a gloss on it. According to Catherine, the meeting became increasingly tense and uncomfortable because Claire insisted on being appointed as sole attorney; she only backed down and agreed to the plan for joint attorneys when Ms Sanders said that she would not prepare papers appointing Claire as sole attorney without the deceased's express instructions. This matter was, sensibly, not explored in cross-examination.

16. In accordance with her instructions, Ms Sanders prepared and executed a lasting power of attorney for financial decisions and a lasting power of attorney for health and welfare, and these were duly signed and sent for registration. The lasting power of attorney for health and welfare was duly registered on 25 August 2017. However, owing to a clerical error the lasting power of attorney for financial decisions was returned. A new form was signed and submitted for registration on 29 November 2017 but owing (it seems) to an error at the Office of the Public Guardian this was not registered. When the deceased was told of the problem she instructed Ms Sanders not to proceed with the registration as she had some reservations about the appointment of Catherine. On 22 January 2018 the deceased made a telephone call to Ms Sanders and instructed her to cancel the lasting power of attorney for financial decisions and not to register the lasting power of attorney for health and welfare. Ms Sanders stated:

> "The deceased explained [that] on the preceding weekend she had woken from an afternoon nap to find her daughter Catherine in the deceased's property going through her personal possessions including her jewellery boxes.
>
> The deceased was extremely upset and informed me she had asked her daughter Catherine to leave her property and never return and she did not want her to see her again."

17. A few days later the deceased attended by appointment upon Ms Sanders and revoked the lasting power of attorney for health and welfare. She told Ms Sanders that she still had a good relationship with Claire and intended to execute a new power of attorney appointing Claire alone. In fact, she did not give further instructions in that regard.

18. Catherine's account of this period was as follows. After Claire had returned to her home in London, Catherine began visiting her mother regularly at her home. Claire was apparently jealous of the relationship between Catherine and the deceased and began making frequent and intrusive telephone calls, both on the deceased's landline and on her and Catherine's mobile telephones, to check whether Catherine was with the deceased. This led to rows between the deceased and Claire. Catherine stated, with reference to the period at the end of 2017:

> "My mother and I discussed Claire's calls and my mother told me that she felt that Claire was trying to manipulate and control her. Claire wanted my mother isolated from the rest of the family so that she would be under Claire's coercive control and in my mother's own words she said that 'Claire was no good'. At that

> time, my mother was well enough to stand up to Claire but her calls to my mother were constant. … My mother also told me that she knew Claire didn't really care about her and that she was only pretending to for what she could get out of her."

19. In her statement, Catherine described an incident that occurred on Christmas Day 2017 when, after she and the deceased had spent a pleasant day together, the deceased suddenly and without cause accused Catherine of removing her medication from her bedroom. After an altercation, Catherine left. She stated:

> "[A]fter Christmas Day, I decided to cool things off with her for a while. I felt betrayed and insulted by being falsely accused of taking my mother's medication. Over the following months I had a number of calls from a withheld number, which may have been my mother calling me, but I was still upset about Christmas Day so I ignored them."

20. An entry in the deceased's GP records for 25 January 2018 records:

> "Still very troubled by her anxiety – would like to be referred to specialist. Has persecutory ideas about her daughter – says she was rifling through her house looking for money – also thought she had stolen her diazepam but then found them. Thinks her anxiety could be a result of traumatic marriage – emotional abuse, never physical. Cont[inue] mirtaz[apine] and diaz[epam], refer old age psych."

(I note also the letter of referral to Mental Health Services on the same date.)

21. Entries in the GP records in March and April 2018 show that the deceased saw a nurse in Mental Health Services on at least two occasions but that the deceased and her daughter—which must be Claire—did not want her to see a psychiatric nurse as they did not think she needed to do so.

22. In the summer of 2018 Claire and Mr Webber, with whom she had recently formed a relationship, went to stay with Catherine in Swansea. There was an argument; the details are unimportant. After that, when Claire and Mr Webber were in Swansea they stayed at the House. However, according to Catherine, Claire told her that the deceased required them to occupy the ground floor flat and would not allow Mr Webber any access to her maisonette. I accept Catherine's evidence on that point. In October 2018 there was an incident at the House and the deceased called the police, who removed Mr Webber. Catherine's evidence was that Claire and Mr Webber continued to see each other, though without the deceased's knowledge, but that their relationship grew increasingly troubled and that in late 2018 Claire came to stay with her for safety for a few nights; when she left, Catherine found that some of her possessions had been taken.

23. A GP note for August 2018 recorded that the deceased had seen a psychiatrist, who did not consider that she suffered from anxiety; the deceased, though, said that she had not told the psychiatrist everything and wanted a referral. There is no suggestion in the note that the involvement of the psychiatrist related to anything other than the deceased's anxiety.

24. A GP note in December 2018 recorded that the deceased had called police to report that money had been stolen from the House, but that the police had ascertained that the money had not been stolen and had called paramedics because of concern that the deceased was confused. The paramedics found on arrival that the deceased was stable and did not need to be admitted; they made a telephone call to the GP and advised the deceased to make an appointment to attend the GP.

25. Claire's evidence was that between February 2019 and November 2019 the deceased's confusion became worse and worse, so that by November she "was not functioning mentally at a level where she could understand the purpose of a will at all". I shall refer to some notable dates and events within that period.

26. A GP note for 15 March 2019 recorded: "Could trial GTN spray, but not sure she will know when to take given confusion."

27. A GP note for 29 March 2019 recorded:

> "[The deceased] has been in hosp Gowers ward Morriston hosp fax received today to say patient has been discharged and she's informed them she has apt today at 12pm apt checked and on flat for INR stales on discharge letter pt was found in street confused – admitted then for acute confusion."

On the same day the GP referred the deceased to the Memory Clinic at Mental Health Services:

> "This lady has had 3 acute medical admission[s] with confusion in the past 4 months, most recently after being found confused in the street one night. Her confusion appears chronic and progressive rather than transient[,] and following assessment by liaison psych in January they commented that she would be referred to memory clinic but I can't see whether this has been done. Her CT head during admission in January showed general atrophy and her MOCA [Montreal Cognitive Assessment Tool] was 15."

28. On 5 May 2019 the deceased fell at home and fractured her hip. She was admitted to Morriston Hospital and, after surgery, was later transferred to Singleton Hospital. Catherine learned of the fall on 21 May, when Claire told her of it in a telephone call. According to Catherine, Claire said that she would collect Catherine the following afternoon and take her to visit their mother, but she failed to turn up and she had to make her own way to the hospital.

29. On 6 June 2019 Catherine visited the deceased in hospital. Her evidence (which I accept) was that the deceased told her that she had given Claire £1,000 to pay some bills and was worried that she had not heard from Claire for some time. The deceased said that Claire had called the hospital to say that she was ill with mumps, but the deceased did not believe her. Later that month, both Claire and Catherine found themselves at the hospital at the same time; words were exchanged. Catherine's statement said: "As far as I was concerned, this was the end of my relationship with Claire. I couldn't pretend to be friends with her anymore. I wanted her to know that,

whatever she was up to, she was on her own and my only allegiance was with my mother."

30. Sometime in the spring of 2019 a neighbour of the deceased made a telephone call to Mr David Sanders, expressing concern about the welfare of the deceased on account of the deceased's relationship with Catherine and Catherine's behaviour towards the deceased. The neighbour asked Mr Sanders to contact the deceased. Mr Sanders called the deceased on the telephone and learned that she was a patient at Singleton Hospital. The deceased told Mr Sanders that she wanted to change her will, and he agreed to visit her at the hospital. In the course of the telephone conversation, he formed the opinion that she was confused. She cannot have been so confused that Mr Sanders saw no purpose in visiting her, because he did so and spoke to her at her hospital bedside. His witness statement said:

> "It quickly became apparent to me the deceased did not have the mental capacity to make any Will. I recall her making disparaging remarks about one of her daughters, whose name again I cannot recall, and throughout she seemed to be completely incapable of coherent thought or providing clear instructions at all. I did try my best but could not proceed. I therefore politely left the deceased who even at that moment I believe did not fully understand my reason for seeing her."

When he was questioned about this in cross-examination, Mr Sanders said that it was quickly apparent to him that the deceased was incapable of making a will: she was "not making sense at all." For this reason, and as he realised that the matter was "going nowhere", he made no notes of the conversation. As he was leaving the ward, he spoke briefly to the Ward Sister and expressed his view of the deceased's mental state. The Sister did not reply but his clear impression was that, by a shrug and a raising of her eyes, she expressed tacit agreement but an unwillingness to comment in terms. At the conclusion of his witness statement, and having mentioned what he now knows of the 2019 Will, Mr Sanders stated:

> "With over 50 years' experience of Will drafting and knowledge of the mandatory requirements for a valid Will, I am in no doubt that during the autumn of 2019 the deceased did not have the mental capacity to make one at all."

31. The neighbour mentioned by Mr Sanders was not called to give evidence. It is therefore relevant to note that paragraph 6 of Claire's particulars of claim avers that, on account of her dementia, from the beginning of 2019 the deceased "would confuse the names of her daughters and her granddaughter". It is also relevant to note that the deceased's existing will at the time to which Mr Sanders' evidence related—a time when the deceased is said to have been concerned about Catherine's behaviour—was the May 2012 Will in favour of Claire.

32. Matters in August 2019 are mentioned in Catherine's evidence and in the case-notes made by social workers who visited the deceased in hospital. Catherine stated:

> "53. On Tuesday 13 August 2019, I went to the Hospital for the meeting with my mother and the social worker Ms Whatty. On

> arrival I was informed that Claire and Hanns had been to visit. Hospital staff told me that they had witnessed Claire and Hanns bullying my mother to sign a £2,000 cheque over to Claire. When my mother refused to sign the cheque, Claire threatened to sell the furniture from my mother's house because she said that my mother owed her money for a phone bill even though my mother had been in hospital since May and had been paying for Claire's £5 Vodafone 'Friends and Family' package by Direct Debit. They also said that my mother had asked to see Claire's front door key to my mother's house so that she could compare it with her own. Claire had told my mother previously that she had changed the locks and she later supplied my mother with a new key. My mother suspected that the key Claire had previously given her was not the key to the new lock. However, when my mother asked to see Claire's key, Claire refused. My mother told them both that she wanted them to leave her house. Both Claire and Hanns laughed and Hanns said that he would leave when Claire told him to. My mother told me that under no circumstances was I to allow Claire to remove anything further from her house and that she didn't owe Claire a penny for anything."

The social worker's notes record that she saw the deceased on 9 August 2019, when the deceased said that she would not discuss anything without Catherine being present. It was therefore arranged that Catherine would attend on 13 August. The note for that date reads[1]:

> "Win wants to get Claire and her partner out of her house.
>
> Agreed a letter with Win that I would type up for her to sign and send to Claire to ask her to leave.
>
> We discussed the importance of setting up a POA [power of attorney] which Win has agreed to do although last time Catherine got a solicitor in Win refused to speak to him.
>
> Agreed with Win that I would take letters up tomorrow for her and she would sign them."

The social worker returned on 14 August 2019 and left the letters with the deceased, who was unwilling to sign them until Catherine had seen them. In the event, the deceased signed the letters at a further meeting on 20 August, when Catherine was present. The letter dated 20 August 2019 from the deceased to Claire stated:

> "I am writing this letter with the help of my social worker [name].

[1] Names have been redacted on the copy document in the trial bundle. It is easy enough to know what the underlying text is.

> 1 am writing to say that I want to move back into my home when I leave hospital and want you and Hann1to move out of the house.
>
> I am asking you to move out and to return all the keys to me by 2nd September
>
> Thank you"

One copy of the letter was sent to the House by registered post but was returned as undelivered. A second copy was to have been sent to Claire's London address, but Catherine could not find the full details of the address.

33. On 14 October 2019 Catherine made a telephone call to Red Kite Law, solicitors in Swansea. It was arranged that Mr Jeremy Sims, a solicitor and consultant with Red Kite Law, would attend on the deceased at hospital on 17 October in order to take her instructions for a will and a lasting power of attorney. Mr Sims was admitted as a solicitor in January 1983 and has prepared wills throughout most of his career. The relevant parts of his attendance note read:

> "I spoke to Miss Williams. Her mother is in hospital long term. She lives in the Uplands. Miss Williams has a younger sister who lives in London. When her mother was in hospital the younger sister returned home and is now living there with her boyfriend and refuses to move.
>
> Catherine Williams has visited the property although the locks had been changed and is in an absolute mess—'unbelievable squalor' were the words of Miss Williams. She would like me to go to visit her mother to take instructions. The doctor is preparing a letter of capacity.
>
> … I told Miss Williams I could go to see her mother in Ward 4 Singleton hospital to take instructions for the Will and LPA. I told her that I could make a note about the possession proceedings but it would be someone else to deal with it."

34. On 17 October 2019 Mr Sims attended at Singleton Hospital. He met Catherine outside the ward; she introduced him to the deceased and they went to a private room. Catherine gave to Mr Sims two letters, each dated 14 October 2019 and addressed "To whom it may concern", from Dr Praveen Pathmanaban, a Consultant Orthogeriatrician in the Department of Elderly Care at Singleton Hospital. One letter said:

> "I have done a capacity assessment on Mrs Williams, dated the 23rd July, but this was also done previously on the 18th July and there are many other incidences where we performed capacity assessments.
>
> I confirm that Mrs Williams has the ability to make a decision as to who will look after her affairs and she very clearly says that this is her daughter called Catherine as she trusts her and she

> lives locally, and therefore it will be easier for her daughter (Catherine) to handle her affairs. She has also done so in the past and she trusts her with her affairs.
>
> I think in the longer term, though, Mrs Williams in herself will find it difficult to attend to her own personal affairs, i.e. she is likely to miss bills or not understand why something might need to be paid for. Mrs Williams also has very poor short term memory and doesn't remember all that is said to her, therefore probably doesn't have enough capacity to make decisions about going back home as she is unable to weigh up all the different risks.
>
> Mrs Williams is insistent that she wants to return home. I do not think she is able to understand the various risks to this, therefore I confirm that she does not have the capacity to make this decision and we should be deciding in her best interests."

The other letter said:

> "This is to confirm that in the time since her last assessment, Mrs Williams hasn't changed apart from perhaps becoming physically more frail. Her capacity for making decisions about self care is still not present and more importantly, from the point of view of handling her own affairs, she has consistently said she wants her daughter Catherine, who she trusts and lives locally, to handle her affairs."

35. Catherine then left the deceased and Mr Sims alone. Mr Sims' attendance note reads, so far as material, as follows:

> "[The deceased] was very frail and had been brought from her bed in a wheelchair.
>
> We had a discussion so that I could assess her. She told me that her name was Winifred Bernadette Williams and she was born on 4 February 1941. I asked her whether she was born in Swansea (Feb 1941 being the three days blitz) but she told me she was born in Dublin and I noticed she had an Irish accent. She told me that she was brought up in Dun Laoghaire, being the old Irish ferry port. She told me that now there was a different ferry port on the other side of the river. She told me that she still loved Dublin very much. She said she had come to Swansea with her ex-husband. He had found a terrible flat and she had found a better one. I asked her how long she had lived in 26 Mirador Crescent and she said it was many years. She thought 1979 or 1989 (she remembered it was the last year of the decade but could not remember which one). I asked her about her children. She had a daughter Catherine and a daughter Claire. Catherine had a daughter Kate who had two children of her own. Claire had no children.

> The LPAs: We talked about the LPAs and it was confirmed that she wished Catherine alone to be attorney. I did suggest Kate as a backup or replacement but she was not interest[ed]. Catherine dealt with her affairs.
>
> The Will: She wanted Catherine to be the sole executor. Claire had removed many of her items so she wanted to have all her personal possessions being the contents of the house. Everything else she wanted split equally between Catherine and Claire. I asked her to confirm whether that was to include the house itself (not as Catherine's note) and she told me that the house was to be included and split 1/1. If something was to happen to Catherine then Kate was to have Catherine's share.
>
> Possession: Originally she told me that she thought it was all sorted out and Catherine had got back into the house. I told her that Catherine had told me that Claire was still in there. She asked me to bring Catherine back in. Catherine explained to her that Claire had got back in and was in residence. Mrs Williams therefore told me that we were to write to Claire to get her to leave."

36. In his witness statement dated 1 December 2021 Mr Sims gave further information concerning his conversation with the deceased on 17 October 2019:

> "7. … I read the two letters from Dr Pathmanaban and I considered that they indicated that the deceased had the necessary capacity to make an LPA but that I would need to conduct my own assessment to satisfy myself that the deceased had the capacity to make a will. In order to assess whether the deceased had testamentary capacity, I asked the deceased to talk me through her life history and she did so quite clearly. The deceased's replies were consistent and accurate. She had no difficulty in answering any questions about her past. The deceased told me that she had made an earlier will with solicitors in London a number of years ago in which she had left everything to the claimant [Claire] and nothing to the defendant [Catherine]. This turned out to be correct. I also remember asking the deceased about her house and its approximate value. I asked who owned it and she confirmed that she was the owner. She was also able to recollect how long she had lived there. [I observe that this sentence is not in perfect accord with the attendance note.]
>
> 8. I would have then changed the conversation to current events and asked if the deceased could tell me about something in the news or something that had happened to her in the last few days to test the deceased's short term memory. This is something that I always do when I assess whether someone has capacity to make a will. I remember that the deceased was very upset that her daughter Claire had recently caused damage to her house. I

> recall that after assessing the deceased, I was satisfied that she did have testamentary capacity. I considered that the deceased's impairments were physical rather than mental.
>
> 9. Regarding the earlier will made with solicitors in London, the deceased told me that she felt that it was wrong especially in view of the support that Catherine had given her recently and was continuing to give her since her stroke. The deceased said that she wished to be fair to her two daughters so that the estate was generally divided equally but, in view of what Claire had been doing at the deceased's home, she wanted Catherine to be the executor and specifically to deal with her own personal effects."

37. Mr Sims' evidence under cross-examination was materially unchanged and was to the following effect. As regards the conduct of her affairs during her lifetime, the deceased wanted Catherine to handle matters, because of her concern about what was happening with the House. As regards her will, she felt bad about the existing will that left everything to Claire and wanted to put things right by providing for Catherine, though she did not want to cut Claire out. She was clearly reconciled with Catherine. The deceased wanted Catherine to deal with the estate after her death and to receive the personal chattels, but otherwise she wanted the estate to be dealt with equally. She met the test for testamentary capacity: she knew the terms of her existing will, the identities of those she wished to benefit, the reasons for that wish, and the nature and extent of her estate. The instructions were clear and cogent and Mr Sims was happy with them. I note in passing that, although it appears that the deceased's account to Mr Sims of the nature and extent of her estate appears to have been materially accurate in fact, it is hard to see how he could have known that it was accurate, because he seems to have taken no steps to verify it. Nevertheless, I accept his evidence as to what he did and observed and as to the conclusions that he drew as to the deceased's capacity and understanding.

38. On 21 October 2019 the deceased was transferred from hospital to April Court Care Home for long-term care. I shall mention just a few of the records made by staff at the care home. An entry for 21 October shows that Catherine asked the staff to refuse entry to Claire, if she should visit, and showed them photographs of the state of the House. The response was that it was a matter for the deceased whether to let Claire visit and that the staff could not get involved regarding the House. Later that evening both sisters were present together in a situation obviously fraught with tension; the deceased asked Claire to leave, though I observe that the note records that she first asked Catherine what to do.

39. I have seen photographs of the House, and they are referred to in the care home records for 29 October, when a daughter (recorded as Claire, but it must be Catherine) visited and showed photographs to a member of staff, who recorded: "Claire [sic] showed me photographs of Winnie's house where her sister and her boyfriend have moved in and appear to be living in a filthy mess."

40. Entries for 24 and 27 October 2019 show that the deceased was undressing in the communal lounge at April Court. This undoubtedly manifested some disturbance of mind. However, there is evidence, which I accept, that even in her younger days the deceased was unconventional about such matters and would undress at home in front

of uncurtained windows. Strange behaviour is not necessarily due to age and confusion, though they do appear to have exacerbated it here.

41. A record for 31 October 2019 shows that in a telephone call Catherine expressed concern that the deceased had been sleepy when last she visited her and that conversation had been impossible. The carer informed her that one of the deceased's sleeping tablets had been discontinued and that the deceased "seems more alert and she is engaging in all kind of activities, dialogs with the staff and part of the residents."

42. On 3 November 2019 it was recorded, just after midnight, that the deceased was refusing to go to bed and was rude to the care home staff and that her mood was angry. Later that afternoon the deceased had a fall in the lounge and hit her head on a table, sustaining a small bruise on the back of her head. No other signs of injury were noted; in particular, on examination the deceased appeared alert, with no neurological changes.

43. In the early hours of 4 November 2019 the deceased was found undressing herself in the next-door bedroom; she said that she thought it was her room. The deceased appears to have been particularly disoriented that night, because there are two further records of her entering or trying to enter other rooms or trying to undress. At some time after 9 a.m. she was found on the floor, having apparently fallen, with bruises and abrasions to her head and elsewhere. On examination, however, she was found to be alert and responding, with no confusion or disorientation. A subsequent record shows that the deceased was alert throughout the rest of the day. Staff reported her fall to the deceased's GP. The note continues:

> "CPN [Community Psychiatric Nurse] referral requested as Winifred can be aggressive towards the staff, very unsettled and high risk of falls. The GP said will not send a referral as Winifred was like that most of her life and knows her for more than ten years, nothing will change the way she is and we have to expect to receive numerous accusations/allegations from her side."

This note provides another reminder that it should not too easily be assumed that the elderly were models of placid conventionalism in their younger days.

44. At around 6.30 p.m. on 4 November 2019 an incident occurred that is recorded as follows in the April Court notes (I shall reproduce them as they appear):

> "Wins daughter [i.e. Claire] and partner came into the building took Win into the dining room, verbally aggressive towards all staff members and nurses, wanted to take Win to the hospital for an x ray, very intimidating, maniplalative, rude, came into our faces almost started to fight with us, Sarah [a staff member] remained very professional and explained that she was not allowed to give any information out due to data protection and she was asking to take her mum to the hospital they wanted to take photos said we were hiding things partner stood up and became aggressive towards Sarah saying why cant we why cant we the daughter continued to shout then maria the nurse came in and started shouting at maria and wanted maria to write down

> what happened sarah explained once again that we were not able to give any information out she then got bank statements out and started to tell her mother how she needed to sort out money started to ask win questions about the place and twisting things win was getting distressed and told her to stop the daughter was then saying you've still got your mind see mum there quick are they about the stuff twisting every word that was coming out of wins mouth cosmin then came into the room and she started shouting at cosmin she said she was going to take things further and take things legally and that's how i work she said to win she was going to take her back home she then stood up to me in my face and started shouting at me police was called and arrived she was very manipulative and said that she was coming back tomorrow to see her she was saying to sarah stop talking i am talking to my mother sarah remained calm throughout nurses were very professional throughout incident."

45. In fairness to Claire, it should be mentioned here that her account of the incident gives a different perspective on matters: that when she arrived at the care home she found her mother with a swollen, battered and almost unrecognisable face and was "incandescent with rage" at what had happened and at the failure to take her mother to hospital. I find that a plausible explanation of Claire's behaviour.

46. Later that night, the deceased refused to have her vital signs checked and confirmed that she was all right. An ambulance was called and the crew decided that the deceased ought to be admitted to hospital, but she refused. The care home staff assisted her to bed and she was aggressive towards them.

47. At around midday on 5 November 2019 Catherine attended at April Court. The entry in the records is as follows:

> "Catherine called in today. Sarah and I briefly updated her about the previous nights incident with her sister Claire and her partner. She said that her sisters partner is a dangerous individual who she has only known a short while. She said that he has been in prison although she is unsure why and that the police are aware of him and her sister. She said that she is fed up with her mothers behaviour and feels that she is resorting to behaviours she had before this recent hospital admission and asked whether her mums antidepressant medication had been altered. She was informed that no medication has been stopped however there are some alterations that have been made. There were no concerns raised."

Shortly afterwards, Claire made a telephone call to April Court. The record states:

> "I received a call from Claire after I had contacted her Winifred's daughter. She was hostile from the beginning of the call. I tried to speak to her however she remained hostile and shouting at me. She said that she has reported the home to the police and

> although I tried to have a civil conversation she put the phone down on me."

48. On 6 November 2019 a care home record made at 10.40 a.m. reads:

> "Julia and I assisted Winnie with a wash (lower body) then she decided to stay in bed for a little while so we told her that we will come back again to get her up when she is ready, 15 minutes after her daughter came and she asked us if we can get her mother up for she is going to see someone @12, so Simona and I then assisted her with a full body wash. Comfortable clothes put on her today then brought her downstairs with a steddy."

An entry at about 1.30 p.m. reads:

> "I re-contacted Claire today and asked her if she would talk to me. I asked her if she wouldn't mind visiting her mother during office hours for the time being. She said that she didn't mind that at all and said that she wouldn't bring her partner either. She spoke at length about the problems between her and her sister. She said that she was applying for court appointed deputyship. She said that her sister has never been active in her mothers life and is only interested now in her money. She thanked me for the phone call and said that she will call to see her mother on Friday."

49. Entries at about 7 p.m. and 8 p.m. on 6 November 2019 read respectively:

> "This afternoon wini has been taking her clothes off and pulling her trousers down. Each time taken to the toilet full reassurance given. Very sleepy this evening."

> "No significant changes in clinical presentation, all care needs met and safety maintained."

50. It was on that day, 6 November, that the 2019 Will was executed. Mr Sims' evidence was as follows:

> "10. On 6 November 2019, I attended on the deceased at April Court care home, where the Deceased was resident. … My secretary, Glenys Birch came with me to witness the signing of the will. April Court looked as though it was once 4 individual houses that had been combined into one building. I was shown to the dining room where I met with the deceased and Catherine and we sat together at one of the tables. The dining room was a very large communal room which extended the whole length of the building. There were other people in the room who were also sat at tables but there was no one closer to us than say 6 or 7 metres or so.

> 11. I recall that the deceased had had a fall and she had dark bruises over both eyes. I was initially concerned that this might have affected her vision. I asked what had happened and she told me about her fall. I explained to the deceased that I could read the will to her but that she needed to be able to read it herself. As a matter of course, I always ask my clients to read the copy of the will that they are signing regardless of whether they have seen a copy previously. However, the deceased was still able to read the will.
>
> 12. Aside from the bruises, the deceased presented in the same way as she did when I took my Instructions from her on 17 October 2019 and I had no concerns regarding her testamentary capacity.
>
> 13. I recall turning to Catherine and explaining to her that we had come to the official part of the process and I asked her to leave. Catherine then went to the far end of the dining room where she would not have been able to hear what was being discussed.
>
> 14. After Catherine had left the table, the only other person in attendance was my secretary, Glenys Birch. Turning to the deceased, I explained that the will leaves her personal possessions to Catherine and everything else was to be split equally between Catherine and Claire. I asked the deceased to read the will to ensure that she understood the terms, and she did. I recall the deceased repeating that she did not want Claire to have any of her personal effects. The deceased then signed the will and the LPA. Catherine later returned to the table to sign the LPA. Once the meeting had concluded, I took the signed will and the signed LPA with me."

In oral evidence, Mr Sims confirmed this account. He said that he believed he had attended on the deceased before lunchtime on 6 November 2019 and had not stayed for more than an hour. He had a long conversation with the deceased and was quite satisfied that she had capacity to make a will; there were no "alarm bells".

51. Mr Sims' evidence was substantially corroborated by Catherine, so far as her evidence went. In cross-examination, Catherine said that she left April Court before 2 p.m. on 6 November 2019.

52. Claire's evidence concerning 6 November 2019 was as follows:

> "25. At approximately 19:30 on 6 November 2019, I turned up to see my mother. My sister was present with my mother at her bedside. The usual practice was that Cath would attend in the afternoon and then leave and I would go in the evening and she would not be there. This was to avoid any incident or unpleasantness between us. However, when I arrived Cath would not leave and refused to even though it was my window. I waited an hour and a half in the waiting/dining room. The staff tried to

> encourage Cath to leave but she would not and refused. Sarah, the deputy manager, came to me and said words to effect of 'Rise above and be the bigger person, your sister is determined not to leave. Come back tomorrow.' I now realise why my sister behaved in such a way because it was completely out of character. This was the day that she had arranged for a new will to be made. My mother was clearly in no fit state to make such a will due to such a horrific head/facial injury.
>
> 26. She would not leave. …"

53. Claire's evidence concerning 6 November is clearly incorrect. The care home records show that she spoke to staff by telephone on that day and said that she would visit on Friday 8 November. There is no record of her visiting on 6 November and the evidence establishes that Catherine was not there in the late afternoon or early evening.

Testamentary capacity

The law

54. The test for whether a testator has sufficient testamentary capacity to execute a will was set out by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 (the letters [a] etc were proposed for ease of reference by the Court of Appeal, approving the test, in *Sharp v Adam* [2006] EWCA Civ 449):

> "It is essential to the exercise of such a power that a testator [a] shall understand the nature of the Act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, [d] 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 the mind had been sound, would not have been made.
>
> Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a pray to insane delusions calculated to interfere with and disturb its function, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."

55. In the common run of cases the important question is simply whether the testator had testamentary capacity at the time of execution of the will. However,

> "a testator who lacks testamentary capacity at the time of the execution of the will may make a valid will, nevertheless, if: he or she had testamentary capacity at the time when he/she gave instructions to a solicitor for the preparation of the will; the will is prepared so as to give effect to the instructions; the will continues to reflect the testator's intentions; and at the time of execution, the testator is capable of understanding, and does understand, that he is executing a will for which he has given instructions":

Hughes v Pritchard [2022] EWCA Civ 386, *per* Asplin LJ at [69], citing *Parker v Felgate* (1883) 8 PD 171 and *Perrins v Holland* [2010] EWCA Civ 840, [2011] Ch 270.

56. "[T]he burden of proof in relation to testamentary capacity is on the person propounding the will. Where the will is duly executed and appears rational on its face, the court will presume capacity, in which case the evidential burden shifts back to the objector to raise a real doubt as to capacity. If a real doubt is raised, the burden shifts back to the person propounding the will to establish capacity": *Hughes v Pritchard,* at [64].

57. The question of the existence or absence of testamentary capacity is one of fact for the court, to be considered in relation to the particular transaction and its nature and complexity, and to be answered on the basis of the judge's evaluation of the evidence as a whole. No particular category or kind of evidence is, in principle, definitive. Of course: "Where the will is explicable and rational on its face, the conclusion reached by an independent lawyer who is aware of the relevant surrounding circumstances, has taken instructions for the will and produced a draft, has met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity": *Hughes v Pritchard* at [79]. In such circumstances, the court ought to be cautious before finding a lack of capacity on the basis of expert medical evidence given after the event, especially if the expert did not meet or examine the testator. Nevertheless, the evidence of the solicitor, though of considerable importance, is not definitive. Similarly, the medical evidence of a practitioner who assesses capacity after meeting the testator should be given considerable weight, though it is not definitive. Further, neither compliance nor non-compliance with the so-called "golden rule"—the rule of solicitors' good practice, to the effect that the will of an aged testator or a testator who has suffered serious illness should be witnessed and approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator and records and preserves his findings—is not definitive of the validity or invalidity of the will. See generally *Hughes v Pritchard,* especially at [64]-[66] and [75]-[89].

Discussion

58. Claire's particulars of claim rely on the following matters in support of the contention that the deceased lacked testamentary capacity to make the 2019 Will:

    1) Mr Sanders' observations and conclusions when he attended upon the deceased at Singleton Hospital (paras 13 and 14);

2) The evidence of the deceased's mental condition in the period from July 2019 onwards, as contained in the medical records (paras 15, 16, 17 and 19);

3) Her own observation that there was no improvement in the deceased's condition during 2019 (para 18);

4) Expert medical opinion (para 18).

59. Expert medical evidence on the deceased's capacity was given by Dr Gabra Hanna, a consultant in old-age psychiatry. He never met the deceased; his report dated 11 February 2022 and subsequent comments were based on his inspection and interpretation of the medical records and the witness statements. After referring to the medical records, Dr Hanna expressed his views:

> "8.1 Mrs Williams scored 18/30 on the Montreal Cognitive Assessment Tool (MOCA) when this was undertaken on 4 April 2017. The MOCA is a short but well validated cognitive assessment tool. It assesses different areas of cognitive ability for a maximal score of 30 points. A score below 27 is indicative of Mild Cognitive Impairment; 20 to 24 indicates mild dementia; 13 to 20 indicates moderate dementia; and less than 12 indicates severe dementia. It is more likely than not that Mrs Williams' cognition would have deteriorated further by the time her last will and testament was written in November 2019.
>
> 8.2 In my opinion it is likely that Mrs Williams was living with vascular dementia in the months leading up to her death and around the time her last will and testament was written in November 2019. From the information available it appears that her dementia was in the relatively advanced stages.
>
> 8.3 Vascular dementia is caused by reduced blood flow to the brain. It can be a result of a stroke or the narrowing of the blood vessels in the brain. It is characterised by fluctuations in cognition and a step-wise pattern of decline. (WHO, 1992 [Classifications of Mental and Behavioural Disorder]). This condition presents with patchy impairment and can be associated with a rapid decline over a short period of time.
>
> 9.1 It is my conclusion that, on the balance of probability, there is sufficient evidence to raise real doubt that Mrs Williams had testamentary capacity at the time of writing her last will and testament on 6 November 2019."

60. In written response to questions put to him by Catherine's solicitors, Dr Hanna provided clarification to the following effect:

1) The medical records did not enable him to say whether the deceased's prescribed medication or her physical injuries had affected her cognitive ability and capacity. "However, sedition [sic] is a recognised side effect of some of her medications."

2) There was insufficient direct evidence to enable him to say (a) whether the deceased's dementia affected her capacity to understand the general nature and consequence of the act of instructing a solicitor to prepare a will and to execute it, (b) whether the deceased appreciated the extent of her estate, (c) whether the deceased fully appreciated the moral claims of her family, (d) whether her dementia poisoned her affects, perverted her sense of right, or prevented the exercise of her natural faculties, (e) whether the deceased had any insane delusions at the time she made the 2019 Will.

3) In answer to the question whether in his opinion, on the balance of probabilities, the deceased had testamentary capacity when she made the 2019 Will:

> "It is clear from the evidence available that the deceased was living with a relatively advanced dementia at the time the final last will and testament was written. Her cognitive impairment was to a degree that there are numerous references by several health care professionals to her being confused and disorientated to her environment to the degree that she even undressed in front of others in communal areas of the home on a number of occasions. These observations were made over a relatively prolonged period of time and were evident throughout the time the deceased lived in the care home. However, it is worth mentioning that cognitive functions in dementia tend to fluctuate with relative lucid periods and periods of increased confusion compared to the average for the person living with dementia.
>
> Neither Mr Simms' witness statement nor his attendance notes provide sufficient evidence of questions put to the deceased and her answers to be able to determine whether she retained or lacked testamentary capacity at the time her final will was signed.
>
> As stated in my original report, it is my opinion that there is sufficient evidence to raise real doubt that the deceased had testamentary capacity at the time of writing her last will and testament on 6 November 2019. However, there is insufficient evidence for me to be more specific than that. It is ultimately for the court to determine whether, on the balance of probability, the deceased had testamentary capacity at this time."

61. One week before trial, Catherine gave disclosure of social care records that had originally been provided to her by the local authority in late 2021. I permitted Claire to seek any further comments that Dr Hanna might have on those documents and agreed to receive further written submissions from the parties in the light of those further comments after the conclusion of the trial. Having reviewed the further records, Dr Hanna did not find it necessary to describe the particulars of their contents. Nor do I.

In response to the question how the records might affect the conclusions drawn in his previous reports, he replied:

> "Conclusions from review of the above records suggest a milder degree of Dementia than previously suggested. However this is complicated by intermittent delirium during which period the degree of impairment is quite advanced.
>
> My final opinion remains the same as per my original report that 'on the balance of probability there is sufficient evidence to raise real doubt that Mrs Williams had testamentary capacity at the time of writing her Last Will and Testament on 6th November 2019."

62. On behalf of Catherine, Mr James filed a very brief further submission in the light of Dr Hanna's comments. On behalf of Claire, Mr Johns did not do so; indeed, he did not communicate with the court or, apparently, with Catherine's representatives in that regard.

63. In his closing oral submissions, Mr Johns accepted that Mr Sims' evidence ought to be given proper weight. However, he submitted that the weight properly to be given to his evidence was reduced by Mr Sims' failure to observe the so-called Golden Rule. To this, I add that the reliability of Mr Sims' assessment is put further in question by the fact, already noted and admitted by Mr Sims in answer to questions by me, that he did not take steps to verify what the deceased told him about the nature and extent of her estate, though in fact what she told him was accurate. I have regard to these criticisms. Nevertheless, Mr Sims' evidence was clear, consistent and, as I find, truthful. He is an experienced solicitor and the judgement that he formed at the time carries significant weight.

64. Mr Johns relied on the medical assessments and records, as well as the evidence of Mr David Sanders. These do indeed give cause for concern and for careful consideration of the deceased's testamentary capacity. However, I have not found them compelling. First, the records include the two letters from Dr Pathmanaban; these do not show that the deceased had capacity at all times, but they are evidence tending to show that she had capacity at least at some of the time and they are thus consistent with Mr Sims' evidence. Second, my own examination of the medical records cannot lead to any more definite conclusion than was reached by Dr Hanna, namely, that they give rise to a real doubt (for my purposes, I should say a serious question) whether the deceased had capacity but that there is insufficient evidence in the records to say whether or not she did in fact have capacity when she gave instructions for the 2019 Will, and that the question has to be answered by an assessment of the evidence as a whole. In the formation of that assessment, Mr Sims' evidence is, in my judgment, a significant matter. So too are the terms of the 2019 Will itself.

65. Mr Johns submitted that, although the 2019 Will had "a veneer of fairness", yet the more or less equal provision to Claire and Catherine and the decision to appoint Catherine as executrix, coupled with the absence of any letter of wishes or explanation in respect of her decisions, showed that there had been a failure of moral judgement on the part of the deceased; this in turn showed that she had been unable to make a rational assessment of the claims upon her: that her affections were poisoned or her sense of

right perverted. However, two obvious problems with that submission were pointed out by Mr James. First, the 2019 Will is rational and sensible on its face; its terms do not call for explanation. Second, equal division of the estate was a natural consequence of the reconciliation that the deceased herself had initiated.

66. It appeared in the end, from the oral evidence at trial, that Claire's chief professed unhappiness with the terms of the 2019 Will has to do with the appointment of Catherine as executrix. This seems to me to be a rather strange cause for concern. Further, while the deceased could no doubt have made a different decision, I cannot see that there was anything untoward in appointing Catherine rather than Claire. It would not have been a good idea to appoint them jointly.

67. Claire's contention, articulated also by Mr Johns in his closing submissions, was that the choice of executrix specifically and the terms of the 2019 Will generally resulted from Catherine poisoning the deceased's mind against Claire: that Catherine was manipulative, intimidating and coercive, as Claire maintained in cross-examination. Insofar as this is an allegation that Catherine obtained an advantage for herself by using her position to pressurize or mislead the deceased, rather than an allegation that an incapacity of mind poisoned the deceased's affections, it may more conveniently be discussed in connection with the allegation of undue influence. At this point it suffices to say that, although in her latter days the deceased necessarily relied on others for information concerning what was happening outside the hospital or the care home, I find that she did not at the material times lack the capacity to make rational judgements concerning the disposition of her property and the persons with a claim to her attention. Nor, incidentally, do I see any reason to conclude that the deceased had a poisoned attitude towards Claire, whether for good reason or ill. It may be noted that Claire's own evidence is that, when she attended at April Court on 4 November 2019 after her mother's fall, all the deceased would say was, "Isn't she beautiful! Look at her, my beautiful daughter!"

68. In conclusion, I find on the balance of probabilities that the deceased had testamentary capacity both when she gave instructions for the 2019 Will and when she executed it. The conclusion is particularly strong in respect of the former occasion but is firm in respect of the latter occasion also. For the avoidance of doubt, I am also satisfied that she knew and approved the contents of the 2019 Will and that it was duly executed and attested in accordance with the provisions of the Wills Act 1837.

Undue influence

The law

69. The law relating to the equitable doctrine of undue influence is found principally in the judgments of the Court of Appeal in *Allcard v Skinner* (1887) 36 Ch D 145 and the speeches, in particular that of Lord Nicholls of Birkenhead, in the House of Lords in *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773. The doctrine is conventionally analysed in two parts, representing two ways in which the existence of undue influence may be established, namely actual undue influence and presumed undue influence. As for actual undue influence, in *Etridge* Lord Hobhouse said at [103]:

> "103. Actual undue influence presents no relevant problem. It is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct which might give a defence at law, for example, duress and misrepresentation … Actual undue influence does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship. He who alleges actual undue influence must prove it."

Presumed undue influence exists where there is a relationship of trust and confidence between donor and donee and a gift is made that cannot be explained satisfactorily in terms of ordinary human motivation, unless the donee can prove that the gift was not procured by an abuse of her position but represented the free exercise of the donor's will.

70. However, although the point was almost entirely overlooked in the written and oral submissions before me, the equitable doctrine applies only to *inter vivos* transactions. The present case properly concerns the fairly similar but importantly different doctrine of undue influence as it affects wills. This is explained in *Snell's Equity*, 34th edition, at para 8-012 (citations omitted):

> "The exercise of undue influence on a testator is also one of the grounds on which the admittance of a will to probate may be challenged. The probate doctrine must, however, be carefully distinguished from the availability of equitable relief: indeed, it has been suggested that the 'only common characteristic with the equitable doctrine is the name". The probate doctrine applies where such pressure has been placed on the testator as to 'overpower the volition without convincing the judgment' and it does not permit the party challenging the will to take advantage of any evidential presumption when seeking to prove such pressure. The probate doctrine can be invoked by any party with standing to challenge the will, as it identifies 'a species of restraint under which no valid will can be made'. The equitable doctrine, by contrast, does not operate so as to render a transaction invalid: a gift or contract entered into by undue influence is valid and so takes effect unless or until B exercises his or her power to rescind the transaction. The equitable doctrine, it is submitted, is based rather on the idea that, as a result of the undue influence, it would be unconscionable, in a broad sense, for A, as against B, to take advantage of the right acquired by A under the impugned transaction."

71. Thus, in *Re Edwards (deceased)* [2007] EWHC 1119 (Ch), Lewison J directed himself in accordance with the doctrine applying to wills:

> "47. There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:

(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 judgment 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."

Discussion

72. Claire's case on undue influence, as set out in the particulars of claim, is to the following effect:

1) There was a long history of estrangement between the deceased and Catherine, whereas there was a good relationship between the deceased and Claire (paras 21 to 25);

2) In 2019 Catherine began visiting the deceased but showed hostility towards Claire (paras 26 and 27);

3) In late October 2019 Catherine forced entry into the House and took the deceased's copy of the May 2012 Will. "It is alleged that [Catherine] took the copy of the will in preparation for coercing the deceased to prepare another will in the hope that a challenge would be more difficult for [Claire]" (para 28).

4) On the day when the 2019 Will was executed, Catherine sat with the deceased all day and would not leave in order to allow Claire to see her mother. "[Claire] alleges, with hindsight, that this was because [Catherine] had arranged for the deceased to change her will that day and did not want the deceased informing [Claire] nor revealing that she was coerced into doing so by [Catherine]." Further, the deceased had suffered a head injury two days previously but had refused hospital care (the apparent implication being that she was more vulnerable when she executed her will) (paras 29 to 31).

5) The deceased's complaint to Dr Pathmanaban that she did not trust the people with whom Claire associated, together with her apparent concern not to allow those people to have any control over the administration of her estate, can only have originated with Catherine, because the deceased did not know anything about Claire's friends. Her belief was irrational, "unless the deceased was coerced into believing it to have any basis. [Claire] alleges the deceased was coerced by [Catherine]" (paras 32 to 34).

6) "The deceased was clearly physically and mentally vulnerable. Her understanding was limited. She was previously a lady with strong understanding and wishes, and she was losing the ability to understand. [Claire] alleges that the deceased was vulnerable to being frightened by [Catherine], whose opinions she had no cause or ability to distrust. She had suffered a head injury in the days before making her second will" (para 35).

7) The exercise of actual undue influence is to be inferred from a number of matters, including (i) Catherine's animus towards Claire, (ii) Catherine's unusually regular attendance upon the deceased, (iii) the deceased's vulnerability, and (iv) the deceased's expression of concerns regarding Claire

and those around her—concerns that can only have originated with Catherine (para 37).

8) A presumption of undue influence arises from the relationship of parent and child and from facts that call for an explanation (para 38).

73. In his closing submissions, Mr Johns put Claire's case on alternative bases.

1) First, although he accepted that the relationship of a child with her parent does not in itself give rise to a presumption that the child exercises influence over the parent by virtue of the degree of control which is conventionally assumed to exist in such a relationship, on the particular facts of the case that there was at a relationship of trust and confidence between them, from which undue influence could be presumed in the light of a transaction between them which could not be readily explained by normal human motivation. In this regard, he pointed to the deceased's dementia, her lack of visitors, the frequent visits from Catherine after she had been out of the deceased's life for a long time, and the change of testamentary disposition to Catherine's advantage.

2) Second, he alleged actual undue influence, on the basis that it was to be inferred that the deceased's change of testamentary intention and her desire to commence possession proceedings against Claire in respect of the House can only have resulted from lies and misinformation fed to her by Catherine.

74. I reject the case in undue influence.

75. First, as is apparent both from the particulars of claim and from Mr John's written and oral submissions, reliance was being placed on the equitable doctrine of undue influence. That doctrine does not apply in this case.

76. Second, accordingly, "presumed undue influence" has no relevance to the validity of a will, as Lewison J pointed out in *Re Edwards (deceased).*

77. It is, therefore, unnecessary to observe (as I nevertheless do observe) that the case resting on presumed undue influence would have had no merit under the equitable doctrine. The primary reason for this is that the provisions of the 2019 Will do not call for explanation. There was an inequality between the gifts to the daughters only to the extent that Catherine was to receive the deceased's personal possessions. No significance has been attached in these proceedings to the gift of the personal possessions; so far as I am aware they have no special financial or other value, and Claire has approached the matter on the basis that equal provision was made. As I have observed, the appointment of one daughter rather than both daughters as executrix was inevitable. The choice of Catherine no more calls for explanation than the choice of Claire would have done. The deceased might have chosen Claire on the grounds that they had enjoyed a longer unbroken relationship. Equally, however, she might have chosen Catherine because she lived locally and because the deceased mistrusted Claire's partner. A second reason why, even if the equitable doctrine applied, presumed undue influence would not have been established is that there was no sufficient relationship of trust and confidence (in the relevant sense, as explained in the cases) between Catherine and the deceased. Of course, the deceased was old and vulnerable and looked to Catherine to see to her affairs while she was in hospital and later in April

Court. That by itself does not turn an unexceptional mother-daughter relationship into one of trust and confidence. There is no evidence that the deceased, though incapable of attending to the practicalities of her affairs, was unable to form her own opinions, know her own mind and assert her own will. The matter that is pointed to as demonstrating that Catherine exploited her own position for her own advantage is the terms of the 2019 Will. Yet Claire herself acknowledged that the equality of provision for the sisters was a natural consequence of the reconciliation that she had previously sought to encourage.

78. Third, as for the doctrine that does apply to this case, Claire has the burden of showing that the facts are inconsistent with any conclusion other than that the 2019 Will resulted from the exercise of undue influence by Catherine. For this purpose, undue influence must have been exercised by coercion, in the sense that the deceased's will was overborne by pressure that overpowered her volition without convincing her judgment, or by fraud. Claire has come nowhere near making out such a case.

79. The deceased was certainly a vulnerable person, in that her physical and mental powers were failing when she made the 2019 Will and she was dependent on others for her personal care and the discharge of her affairs. Nevertheless, the evidence does not support the conclusion that she had ceased to be a woman who knew her own mind and insisted on her own will. For reasons I have already mentioned, there is no basis for taking the terms of the 2019 Will as themselves an indication that the deceased's will had been overborne. Beyond that, Claire's case relies on the argument that Catherine turned the deceased against Claire by speaking against Mr Webber and encouraging the deceased to take possession proceedings in respect of the House. However, the medical records show that as early as December 2018 the deceased was expressing disapproval of Mr Webber, and I am satisfied that her negative view of him did not change and that she regarded him as a negative influence on Claire and as someone not to be trusted with any potential involvement in her affairs. These were not views instilled into the deceased by Catherine, who nevertheless doubtless shared and confirmed them. As I have already observed, Claire's own evidence is inconsistent with the conclusion that the deceased's attitude towards her was "poisoned". The deceased simply believed that Claire had "taken up" with an unsuitable and untrustworthy man. She also did not want Claire and Mr Webber to remain at the House, partly because she did not like Mr Webber but at least in part because she believed that Claire might dispose of her possessions.

Conclusions

80. The deceased had testamentary capacity both when she gave instructions for the 2019 Will and when she executed it. She did not make the 2019 Will on account of any undue influence by Catherine. As the deceased had knowledge and approval of its contents and it was duly signed and attested, it should be admitted to probate.

81. Accordingly, Claire's probate claims fails and Catherine's possession claim succeeds.

82. Since receiving this judgment in draft, counsel have informed me of some issues that arise in respect of the terms of the order and consequential matters. I shall deal with these at a short hearing via the Cloud Video Platform at 2 p.m. on 16 June 2022.