Neutral Citation Number [2024] EWHC 2105 (Ch)

Case No. PT-2022-BRS-000018

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY
BUSINESS AND PROPERTY COURTS
PROPERTY TRUSTS AND PROBATE LIST (ChD)

In the estate of MICHELLE ROSEMARY WILLIAMS (deceased)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Before:

HHJ MICHAEL BERKLEY
(sitting as a Judge of the High Court)

- -

Between :

CORINNE DUNSTAN
(in her personal capacity and as executrix of the estate of Michelle Rosemary Wilkins Deceased)

Claimant

-and-

ANDREA BALL

Defendant

Mr Adam Stewart-Wallace (instructed by **Nalders LLP**) for the Claimant
Mr James McKean (instructed by **Coodes LLP**) for the Defendant

Hearing date: 28th 29th 30th June 30th November 2023

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JUDGMENT

This judgment was handed down remotely at 2pm on 9 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Berkley:

Introduction

1. This matter concerns the estate of Michelle Wilkins ('the Deceased') who died on 2 February 2021. The Claimant and the Defendant are the Deceased's daughters. The Deceased left a will dated 15 June 2016 ('the Will') which names the Claimant as executrix and residuary beneficiary. Should the Will be set aside, it is common ground that the Deceased will have died intestate.

2. The Defendant alleges that the Will should be set aside for want of knowledge and approval, undue influence, and/or by reason of a fraudulent calumny. The Defendant did, but no longer does, allege a lack of testamentary capacity.

3. The Claimant was represented by Mr Adam Stewart-Wallace of Counsel and the Defendant by Mr James McKean of Counsel. I am grateful to them both for their assistance, both written and oral.

Dramatis personae

4. Michelle Wilkins, the Deceased, who died on 2 February 2021.

5. Raymond Wilkins ('Ray'), the Deceased's ex-husband and the Claimant and Defendant's father, who died on 20 November 2015.

6. Margaret Martin ('Nan'), the Deceased's mother who died on 31 August 2018.

7. The Claimant called, in addition to herself, three witnesses:

    a) Kayleigh Wilkins, the Claimant's daughter;
    b) David Guy, the Deceased's neighbour and a witness to the Will; and
    c) Patricia Mallett, an employee of *Forget-Me-Not* ("FMN") carers who attended upon the Deceased, and the Deceased's friend.

8. The Defendant called, in addition to herself, three witnesses:

    a) Jeremy Ball, the Defendant's husband;
    b) Peter Wilkins, the Deceased's brother-in-law; and
    c) Christine Low, the Deceased's friend.

9. The Will was drafted and/or its execution was witnessed by the following employees of Stephens Scown LLP:

    a) Frederick Michael Robinson, a chartered legal executive; and

b) Megan Powell, a deeds administrator.

Factual Background and Common Ground

(i) The Family

10. The Deceased was born on 21 October 1947 and died on 2 February 2021, aged 73.

11. The Deceased was married to Ray Wilkins ("Ray"), who is the father of the parties. The Deceased and Ray divorced but continued to live together until Ray's death in 2015. This was not because they had a rapprochement, but it was a practical step in order to house themselves. This is apparent from later medical records. The relationship between Ray and the Deceased seems to have been somewhat turbulent, and he spent a quite a lot of time with friends and family away from the house.

12. The relations and personalities of the parties is a matter of factual dispute. The Defendant characterises her relationship with her mother up until November 2015 as being "close and loving". The Claimant characterises the Defendant as lacking affection for her parents or for the Claimant, both as child and as an adult.

13. There was an unfortunate development in or around 2011 when Kayleigh (presumably on some suspicion) took it upon herself to interrogate Ray's laptop and she discovered that he had joined, and had been actively participating in, a website called "Plenty of Fish", a dating site. This caused deep ructions in the house, and Corinne in particular (and possibly Michelle) seem to have taken great exception to it. A number of repercussions ensued, not least the following Christmas when Ray was allegedly made to eat his Christmas lunch alone. Kayleigh's actions have been universally referred to as "hacking" in the Defendants' witnesses' statements, but the use of that word was disavowed by those witnesses in oral testimony.

14. It is common ground that from November 2015, the Defendant did not visit the Deceased. According to the Claimant, this was a source of at first sorrow, and ultimately anger and disappointment, and it was for this reason that the Deceased made the Will leaving nothing to the Defendant. At the heart of the dispute is whether the Claimant chose to stay away from the Deceased or whether she was prevented from doing so by the Claimant by, essentially, making her feel so unwelcoming and, over time, poisoning the Deceased's mind and thereby exerting undue influence over her.

15. There are numerous statements by the Defendant to the effect that the Claimant somehow prevented her from seeing her mother. The Claimant's case is that this was not the case. At no point did the Claimant prevent the Defendant from seeing her mother and nor could she.

16. It is also common ground that the Claimant and the Defendant hardly spoke to each other after May 2012. The Claimant described this as a deliberate but neutral act on her part: there was no falling-out as such, but she felt that the Defendant was hostile and negative and, following the Claimant's daughter deciding to take this step following a disagreement with the Defendant, the Claimant followed suit and "stepped back", to use her words.

(ii) The Deceased's Health

17. The Deceased's long history of ill health is well-documented. She was diagnosed with depression in 1977 following a nervous breakdown.

18. In 2001 the Deceased nearly died from a heart attack following bowel surgery. She was put into an induced coma. As a result of the treatment, it is common ground that her personality changed for approximately 18 months. During this time, she suffered mood swings, aggression, and short-term memory loss. She was prescribed many drugs and also caught MRSA.

19. Following this period of approximately 18 months, the Claimant's case is that the Deceased returned to her normal mental faculties, though she was physically weaker and never fully recovered physically. The Defendant's position is that the Deceased's mental health was deteriorating from that point, and she suffered several small strokes and was on a lot of medication which further affected her. The Claimant's response to that is set out in detail in her Defence to Counterclaim, but in summary, the Deceased's cognitive abilities were largely intact until the last two to three years, and any references to dementia being raised by the Claimant in the medical records were merely normal concerns of a daughter. It is common ground that the Deceased scored 76 in a memory test in July 2016.

20. It transpired that the Deceased was allergic to morphine which she had hitherto been taking when it was required. This was following her admission to Fowey Hospital in 2014. The hospital advised that if a person takes morphine when they are allergic to it, it causes hallucinations and confusion. The Deceased was not permitted morphine after this diagnosis of the allergy.

21. The Deceased was diagnosed with dementia in November 2017.

22. In March 2019, following advice by health officials, the Deceased executed a lasting power of attorney with the assistance of Michael Robinson naming the Claimant and Kayleigh as her attorneys.

23. From June 2019, the Deceased further declined in health. She was diagnosed with ovarian cancer in January 2020 and died on 2 February 2020.

(iii) Ray

24. In September 2015, Ray became very ill. The Claimant took on caring responsibilities for him as well as the Deceased. She moved in temporarily to the Deceased's and Ray's house to nurse Ray in the lounge in a hospital bed, caring also for the Deceased in her sitting room, also in a hospital bed. It is common ground that Andrea visited the family home infrequently but was not involved in Ray's care. Andrea visited several times once Ray had moved into Mount Edgcumbe Hospice.

25. In November 2015, Ray made a will (which is not the subject of the present dispute). This was prepared by Helen Keeping of Charles French & Co Solicitors and witnessed by David Guy. It was later varied by deed which was executed by the Deceased and the parties in August 2016.

26. Ray died on 20 November 2015. The Defendant visited the Deceased on either 21 or 22 November 2015. It is common ground that this was the first contact she made with the Deceased after the death of Ray. It is common ground that this is the last occasion on which the Defendant saw the Deceased.

(iv) The Claimant's aneurysm and brain surgery

27. In February 2016, the Claimant was diagnosed with an aneurysm and required brain surgery. She and the Deceased then agreed to engage a care agency, FMN, to assist the Deceased with daily tasks, personal care, catheter care, medication, meal preparation etc. whilst the Claimant recuperated.

28. Following the Claimant's surgery and during her recuperation period, she was advised by medical professionals she had to take some time off from caring for the Deceased. During this period the carers visited the Deceased every day at tea-time, and three times on Wednesdays.

(v) Nan's will change and sale of house

29. Prior to June 2016, during the Claimant's period of recuperation, Nan took a fall whilst in hospital and the Defendant arranged for her to be moved into Old Roselyn Nursing Home.

30. In June 2016, the Claimant received a call from the matron of the nursing home stating that Nan's will had been changed. The Claimant had previously been the executrix. It later transpired that the new will made Andrea the sole executrix and beneficiary. A neighbour also informed the Claimant that Nan's house had been put up for sale and the Deceased saw the details in the property pages of the Cornish Guardian, which caused her great distress.

31. The Defendant avers that these events are suspiciously close to the making of the Will, and alleges that they were the catalyst in provoking the Claimant to persuade the Deceased into making the Will. The Claimant says that she did not know *how* the will had been changed until after Nan's death.

32. Nan died in August 2018.

(vi) Making of the Will

33. The Claimant's case is that the solicitors Stephens Scown LLP were recommended to the Deceased by her hairdresser and that the Deceased thereafter asked the Claimant to contact them. The Defendant alleges that Stephens Scown LLP were chosen by the Claimant deliberately so that the Deceased's family and chequered medical history would not be known to them, whereas Charles French & Co (who had been used for Ray's will) would have been more attuned to those matters. The Claimant contacted Stephens Scown and Michael Robinson of Stephens Scown LLP visited and took

instructions from the Deceased on 2 June 2016. It appears from the attendance note that there were also discussions pertaining to Ray's estate, as further described below.

34. The attendance note states that:

> *"Mrs Wilkins [the Deceased] quite upset throughout and explains that since Mr Wilkins died she has not seen her other daughter. This has upset her. She has not made a Will and I explained under the intestacy rules the two daughters would inherit. She does not want this. She wanted to give me instructions for her Will and I took some details. They are as follows:-*
>
> *1. She wishes to be cremated. Before her husband died he sorted out pre-payment plans through Paul Wharton which covers this.*
>
> *2. On her death she wants to appoint her daughter Karine Lisa Dunston [sic] as sole Executor.*
>
> *3. She would like some items of jewellery to pass to the granddaughter Kayleigh […]*
>
> *4. Subject to this the whole of her estate which includes her share of the property will pass to Corinne? 02:55 and if she does predecease down to her daughter Kayleigh […]"*

35. On 8 June 2016 Mr Robinson sent a draft will and terms and conditions to the Deceased.

36. On 10 June 2016 the Claimant telephoned Stephens Scown LLP to state that the Deceased was happy with the will as drafted. A signed authority was also returned.

37. On 15 June 2016, the solicitor, along with a Deeds Administrator Megan Powell, attended the Deceased to execute the Will. The attendance note states:

> *"[The Deceased's] daughter Corinne was there and she left the room and I then showed Mrs Wilkins the Will which she approved and I explained it to her in detail. She was happy with it and signed in the presence of myself and Megan."*

38. It is a highly contentious issue that neither Mr Robinson nor Ms Powell were called by the Claimant as attesting witnesses to the execution of the Will. Mr McKean submitted in his closing submissions (but not before) that this is in fact a "threshold" or "gateway" issue, and in the absence of at least one attesting witness, the Claimant cannot satisfy the statutory and legal requirements of proving the Will in solemn form.

(vii) Deeds of Trust and Variation

39. On 19 August 2016, the Claimant, the Defendant and the Deceased entered into a Deed of Trust and Deed of Variation to the provisions of Ray's Will. These were prepared by the Defendant's then solicitors, Charles French & Co. There is no dispute between the parties about this variation which was to correct an obvious mistake, but the Claimant

relies on it as evidence of the Defendant's belief that the Deceased was able to read and understand such a document which was executed by the Deceased within two months of the Will.

Pleaded Case

40. The Defence and Counterclaim in a rolled-up pleading denies the claim and counterclaims for the pronouncement against solemn form on the following three grounds, namely (i) want of knowledge and approval; (ii) undue influence and (iii) calumny.

41. The Particulars of want of knowledge and approval were pleaded as:-

(a) The Deceased's age and poor physical and mental health as set out in paragraphs 10 and 23 – 27 hereinabove [a list of alleged health issues];
(b) The effect of fatigue, drugs and pain on the Deceased's mind and reasoning;
(c) The terms of the Will were irrational on their face as set out in paragraph 36(e) hereinabove [the history and strength of the relationship between the Deceased and the Defendant]
(d) The Deceased's poor hearing and eyesight;
(e) The manner in which instructions were given in respect of the Will, and in which the Will was purportedly executed, denied the Deceased an opportunity to know and approve the contents of the Will. Paragraph 36(f) hereinabove is repeated. It is further averred that, in light of her fatigue, medication, pain, and poor general health:
    (i) The Deceased was in no fit state to know or approve the contents of the Will, especially where the contents of the Will derived from instructions given by the Claimant;
    (ii) The Deceased would have struggled to read any draft of the Will or other written explanation presented to her;
    (iii) The Deceased would have struggled to hear or understand any explanation of the Will given to her orally; and
    (iv) The Deceased would have been distracted and disorientated as a result of her fatigue, medication, pain, and poor general health.

42. The Particulars of Undue Influence run to nearly 3 pages, but can be summarised as a combination of the following:-

(a) the Deceased's medical conditions, mental health and medication;
(b) her fatigue and tiredness;
(c) her physical and social isolation;
(d) her reliance on the Claimant for care;
(e) the Claimant's positive actions in isolating her;
(f) the Deceased reposed trust and confidence and was reliant on the Claimant because of her complete and dominant position and control of her life, finances, legal attendance and socialising;
(g) the influence exercised by the Claimant was evidenced by and/or inferred from the steps taken by the Claimant to disrupt the Deceased's relationship with the

Defendant and other members of the family and isolate her from the same; and her ability to monitor telephone calls and her input into the creation of the Will;
(h) the favourable terms of the Will;
(i) the poor relationship between the parties;
(j) the fraudulent calumny;
(k) the unlikelihood that the Deceased would have cut her daughter out of the Will.

43. The Particulars of Fraudulent Calumny cite many of the above issues as giving the Claimant an opportunity to commit the same and set out the representations made by the Claimant to the Deceased which were false and dishonest and which motivated the Deceased to make the Will in the terms that she did as follows:-

(a) That the Defendant did not love or care for the Deceased;
(b) That the Defendant was indifferent to the Deceased's health and welfare;
(c) That the Defendant was indifferent or unsympathetic to the Deceased's grief following Mr Wilkins' death;
(d) That the Defendant did not attempt to visit, make contact with, or communicate with the Deceased; and / or
(e) That the Defendant knew the Deceased was in hospital but chose not to visit.

Legal Framework

44. Section 9 of the Wills Act 1837 , as substituted by section 17 of the Administration of Justice Act 1982 in relation to wills taking effect after that year, provides as follows:

> *Signing and attestation of wills*
>
> *No will shall be valid unless— (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and (b) it appears that the testator intended by his signature to give effect to the will; and (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either— (i) attests and signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.*

45. CPR Rule 57.7 provides as follows:

> *Contents of statements of case*
>
> *(1) The claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate.*
>
> *(2) If a party disputes another party's interest in the estate he must state this in his statement of case and set out his reasons.*

(3) Any party who contends that at the time when a will was executed the testator did not know of and approve its contents must give particulars of the facts and matters relied on.

(4) Any party who wishes to contend that—

(a) a will was not duly executed;

(b) at the time of the execution of a will the testator [lacked testamentary capacity] ; or

(c) the execution of a will was obtained by undue influence or fraud,

must set out the contention specifically and give particulars of the facts and matters relied on.

(5) (a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross- examine the witnesses who attested the will.

(b) If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will.

Want of Knowledge and Approval

46. Counsel were agreed on the principles of this head of claim. It is common ground that the leading authority remains *Gill v Woodall* [2010] EWCA Civ 1430. At paragraphs 14-17 and paragraph 22 of *Gill*, Lord Neuberger made some observations on the principles of the test of knowledge and approval:

> *"14. Knowing and approving of the contents of one's will is traditional language for saying that the will "represented [one's] testamentary intentions" see per Chadwick LJ in* Fuller v Strum *[2002] 1 WLR 1097 , para 59. The proposition that Mrs Gill knew and approved of the contents of the will appears, at first sight, very hard indeed to resist. As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will.*
>
> *15. In* Fulton v Andrew *(1875) LR 7 HL 448 , 469, Lord Hatherley said that*
>
> > *"*when you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it … those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator …*"*
>
> *This view was effectively repeated and followed by Hill J in* Gregson v Taylor *[1917] P 256 , 261, whose approach was referred to with approval by Latey J in* In re Morris, decd. *[1971] P 62 , 77 f —78 b . Hill J said that "*when it is proved

that a will has been read over to or by a capable testator, and he then executes it*", the "*grave and strong presumption*" of knowledge and approval "*can be rebutted only by the clearest evidence*". This approach was adopted in this court in* Fuller v Strum *[2002] 1 WLR 1097 , para 33 and in* Perrins v Holland *[2011] Ch 270 , para 28.*

16. There is also a policy argument, rightly mentioned by Mrs Talbot Rice, which reinforces the proposition that a court should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.

17. Further, such disputes will almost always arise when the desires, personality and state of mind of the central character, namely the testatrix herself, cannot be examined other than in a second hand way, and where much of the useful potential second hand evidence will often be partisan, and will be unavailable or far less reliable due to the passage of time. As Scarman J put it graphically in In the Estate of Fuld, decd *(No 3) [1968] P 675 , 714 e : "*When all is dark, it is dangerous for a court to claim that it can see the light.*" That observation applies with almost equal force when all is murky and uncertain.*

[…]

22… In my view, the approach which it would, at least generally, be better to adopt is that summarised by Sachs J in In re Crerar *(unreported) but see (1956) 106 LJ 694 , 695, cited and followed by Latey J in* In re Morris, decd *[1971] P 62 , 78, namely that the court should*

> "consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption.""

47. Norris J in *Wharton v Bancroft* [2011] EWHC 3250 (Ch) reminded himself of the need to focus on the ambit, role, and purpose of a probate court:

> "*9. The task of the probate court is to ascertain what (if anything) was the last true will of a free and capable testator. The focus of the enquiry is upon the process by which the document which it is sought to admit to proof was produced. Other matters are relevant only insofar as they illuminate some material part of that process. Probate actions become unnecessarily discursive and expensive and absorb disproportionate resources if this focus is lost.*"

48. The older, stricter view that want of knowledge and approval could only be proved by evidence relating to the preparation and execution of the will (see e.g. *Re R (Deceased)* [1950] P 10) is, in light of more recent authorities, no longer applied. For example, Lewison LJ *in Simon v Byford* [2014] EWCA Civ 280, having cited *Gill* with approval went on to say that the judge is engaged in "*a holistic exercise based on the evaluation of all the evidence both factual and expert*". Always bearing in mind Norris J's warning in *Wharton v Bancroft* set out above, later or earlier events can be 'relevant' to knowledge and approval if they assist in the inherent probabilities as to whether or not the testator did know and approve the terms of their will.

49. In that case Lewison LJ also explained at [47], that *"Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed."*

50. The question before the Court is about establishing that the testamentary requirements are satisfied, it is not about assessing the desirability of the result and is not a discretion upon the Court to depart from a valid will. As Lord Neuberger pithily said in the leading case *Gill v Woodall* [2011] Ch 380 at paragraphs 26-27:

> "*… a court should be very slow to find that a will does not represent the genuine wishes of the testatrix simply because its terms are surprising, inconsistent with what she said during her lifetime, unfair, or even vindictive or perverse"*
>
> *Having said that, it is only right to emphasise there is no doubt that the sort of factors which the Judge set out in grounds 1 to 8 may properly be added into the balance to support other factors, where they exist, which call into question whether the testatrix knew and approved of what was in her will. In a number of cases, the court has relied on the surprising (or unsurprising) provisions of a will to support (or undermine) other grounds for thinking that the testatrix did not know or approve of its terms — see e.g. Butlin 2 Moo PC 480 , 487–488, Tyrrell [1894] P 151, 156 and Sherrington v Sherrington [2005] EWCA Civ , paras 73-75 and 84.*"

The Court of Appeal in *Sherrington* was at pains to make clear (twice) that it thought that the morally correct result would have been to revoke the will and yet they still applied the law to overturn the trial judge's decision to do so because it could not seriously be suggested that the testator had not understood.

51. *Williams, Mortimer & Sunnucks – Executors, Administration and Probate* 21st Ed ("WSM") paragraphs 10-28 – 10-42 extract a number of principles from the authorities. The proponent of the will bears the burden of proof. The scale is a sliding one (see WSM paragraph 10-30) depending on the factors at play and the time-honoured phrase "the extent to which the suspicion of the court has been excited". The proponent must simply provide sufficient evidence of knowledge and approval to address any suspicion aroused by the circumstances of its execution (*Fuller v Strum* [2002] 1 WLR 1097 *per* Chadwick LJ at paragraphs 67-72).

52. Once the suspicion of the court is aroused the court is 'vigilant and jealous' in examining the evidence in support of the will – see *Fuller v Strum* [2002] 1 WLR 1097, Peter Gibson LJ at 1107E-F.

53. Where a party writes a will under which they take a benefit, that is a circumstance that excites the suspicion of the court (see per Viscount Simonds in *Wintle v Nye* [1959] 1 All ER 522 at 557) and WMS paragraph 10-34. Other matters which arouse suspicion include (i) the beneficiary preparing the Will; (ii) the deceased being without legal advice; (iii) the Will being a radical departure from previous instructions, and the Testator 'feebleness of body or mind' – WMS paragraph 10-36.

54. Equally, there are accepted grounds on which suspicions are dispelled. "*As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to a testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time*." (*Gill v Woodall* [at paragraph 14]).

55. The fact that the effect of a will is to exclude entirely the deceased's children is not sufficient *in itself* to overturn knowledge and approval, even if there is clear evidence of a strong relationship and other concerning factors about the will's execution: *Sherrington* at paragraph 74 and *McCabe v McCabe* [2015] EWHC 1591 (Ch), but each case will depend on its own facts. In the case of *Reeves v Drew* [2022] EWHC 153 (Ch) there being no adequate explanation for a dramatic change in testamentary wishes was an important factor in the court not being satisfied that the Deceased knew and approved of the terms of the last Will (paragraphs 367 – 379, 406, 413). The explanations put forward were analysed and rejected by the court.

56. It is also the case that, as Mann J held in *Schrader v Schrader* [2013] EWHC 466 (Ch):

> "*proof of the reading over of a will does not necessarily establish "knowledge and approval". Whether more is required in a particular case depends upon the circumstances in which the vigilance of the Court is aroused and the terms (including the complexity) of the Will itself*' (at paragraph 86, citing *Wharton v Bancroft* [2011] EWHC 3250 (Ch)); and

"*where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will — the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will – that is to say, that he did understand what he was doing and its effect — it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents – in the wider sense to which I have referred*" (at paragraph 88, citing *Hoff v Atherton*).

Undue Influence and Fraudulent Calumny

57. As Mr McKean said in his skeleton argument, these causes of action overlap and can be considered together.

58. The leading case is *Re Edwards* [2007] EWHC 1119 (Ch) in which Lewison J (as he then was) gave the following guidance at paragraph 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."

59. Although the standard is civil, the bar is high. In *Nesbitt v Nicholson* [2013] EWHC 4027 (Ch) at [113], Proudman J stated:

> "*Although the standard of proof is the civil standard, the balance of probabilities, and undue influence can be found by the court drawing inferences from all the circumstances, the cogency and strength of the evidence required to prove fraud is heightened by the nature and seriousness of the allegation."*

60. As to the evidential standard required, Master Pester said this in *Abdelnoor v Barker* [2022] EWHC 1468 (Ch) at 49:

> "*Whilst Lewison J stated that what must be shown is that the facts are "inconsistent with any other hypothesis" other than undue influence, this is to overstate the position. The standard of proof is the normal civil one of the balance of probabilities. As counsel for Mrs Dunstans pointed out, an allegation of undue influence is a most serious one to make: see* Re Good (deceased)

> Carapeto v Good *[2002] EWHC 640 (Ch). It is a species of fraud, which requires strong and cogent evidence to prove* […]".

61. As acknowledged by both Counsel, undue influence is typically established by way of inference. As HHJ Jarman KC, sitting as a Judge of the High Court, said in *Jones v Jones* [2023] EWHC 1457 (Ch) at paragraph 59:

> *"Finally, I turn to consider whether the will was the product of undue influence exerted by Ceri Jones on her mother. There is no direct evidence of such influence in the present case, but as Mann J observed in* Schrader v Schrader *[2013] EWHC 466 (Ch) , there rarely is. Undue influence is more usually established by inference."*

The Evidence

62. I shall refer to the witnesses and the Deceased by their first names when they are referred to in evidence, as that is how they referred to one another. No disrespect is intended.

The Claimant's Evidence

The Claimant – Mrs Dunstan / Corinne

63. The Claimant's evidence was in a statement of 6 pages in total in which she detailed her sister's deteriorating relationship with Kayleigh, then herself, and then her mother. She set out how she had cared for Ray and her mother and the Defendant's daughter for 12 years. She said that Michelle had been very distressed that Nan had not left anything to her (Michelle). She describes how Michelle's physical health declined from 2015-2016 as she developed leg ulcers although she was able to walk around the garden. Her mental health did not deteriorate until much later she said. She also describes how Michelle expressed her upset at how she felt that Andrea had abandoned her.

64. The Claimant was first cross-examined about Michelle's health. This was extensive. The Claimant was taken to her proposition at ¶21 of her statement that she had had no reason to question Michelle's memory before she had been diagnosed with dementia in late 2017. She confirmed this evidence. She was then taken through several medical records recorded at the following dates:

64.1. 10 July 2014 – GP [202] It is clear that someone had reported that Michelle was confused. The Claimant could not remember who, but said it was probably not her. She recalled that this was a period when Michelle was on morphine which led to hallucinations and aggravation and was subsequently found by Fowey to be allergic to it from when on she was banned from taking it.

64.2. 20 August 2014 – GP [201] The Claimant accepted that she had reported that Michelle was suffering some short-term memory loss concerns, but she said that she did not mention the word "dementia". There were minor blips, nothing substantial, she said. This was happening at the same time as leg ulcers. The GP

made a referral to the memory clinic, and it was suggested that this meant that the GP thought this was serious, to which the Claimant replied no – it was just an enquiry.

64.3. 8 September 2016 [143] – "Summary of Medical History" A note of a memory assessment having been offered and refused. Mrs Dunstan said that it was not her and not Andrea – she thought it may have been the doctor's own idea.

64.4. 9 June 2015 [351] – Texts from Ray to Andrea referring to Michelle becoming more difficult due to vascular dementia. Mrs Dunstan said that Ray always thought Michelle was "mental". The Deceased was never diagnosed with *vascular* dementia, she said, and that Ray always elaborated stories.

64.5. 7 September 2016 GP [196] – these notes referred to Mrs Dunstan's concerns with the Deceased's memory, and the GP's discussions with Michelle about that and her poor diet and low iron. The Deceased did not feel that she had any such problems, and the GP noted her ability to recall and relay with clarity issues of repayment of benefits. She scored Michelle on the 6CITS test for capacity as 3 – normal. Mrs Dunstan said that she had just had some slight concerns with everyday memory and forgetfulness, but nothing serious. I note here that the next entry refers to the declined memory test which is obviously what is reflected in the summary notes set out above.

65. Mrs Dunstan candidly accepted that as at around September 2016 Michelle had fallen asleep at night with lit cigarettes. She said she had been a chain smoker probably since 1980s. She was on "loads of medication", she said, and this sudden sleepiness only really became a problem in her in later years. She did occasionally fall asleep mid conversation, but this was only occasional. She was not a well woman, she said.

66. Mrs Dunstan was taken to a consultant's letter to Michelle's GP dated 30 July 2008 at [234] in which the consultant had noted that Michelle had been sleepy during her consultation. Mrs Dunstan said that she only recalls sleepiness being a problem in the much later years. I note here that the consultant seems to put this down to her "medication load" and her distress at living with Ray, and could "see no way out of that difficult relationship", which Mrs Dunstan confirmed was correct when I asked her.

67. 6 December 2016 GP – [195]. These notes record Mrs Dunstan expressing concern at Michelle's low mood and quite serious sleepiness. Mrs Dunstan accepted that she had concern about mental state, noting that she'd lost Ray; Mrs Dunstan had been through serious brain surgery and in much less contact; there had been no contact with Andrea and Nan had been acting strangely at that time.

68. Mrs Dunstan accepted that in early 2017, there was some deterioration in Michelle's condition of sleepiness. She denied that she had raised any issue of capacity with the medics.

69. Mrs Dunstan was taken to [172], a letter from Michelle's GP referring her to the memory clinic. This was undated but was established by reference to other

correspondence to have been written after 26 June 2017, and probably July 2017. She was asked whether Michelle was housebound, to which she replied, "yes, largely"; she said that Michelle wanted to move to a flatter area to be engaged with more people, by which I took to mean seeing more life going on around her. Mrs Dunstan said that Michelle had various people around her, including her (Mrs Dunstan), Kayleigh and the carers, as well as Mr Guy, plus other neighbours and another friend, Catherine Coombe.

70. The same letter went on to note that Michelle had said to the GP that the Defendant was estranged from her and she "has never known why". I note here that this is reflected in the GP notes at [190] in which the GP records "never got over [the Defendant] cutting off all contact". The letter went on to note that the GP had advised Mrs Dunstan to reduce her care of Michelle from 6 days per week, due to her own mental and physical health. The letter refers to Michelle's capacity in the context of her being able to make bad or unsafe decisions. Mrs Dunstan was asked whether she had raised that issue, and she said that she did not think that she had used that word. The GP was concerned to establish whether Michelle's problems were memory related or to do with personality/relationship issues or other mental health problems. Mrs Dunstan stated that Michelle had gone on to score 76 at the memory clinic that summer.

71. On being questioned about the report that was produced by the clinic [598-600] (which appears to be incomplete), Mrs Dunstan accepted that she had been present, but she said that the reference to a stroke in 2005 was not her input. She said that Michelle had had several small stokes since her heart attack. Even at the date of the assessment (July 2017), Mrs Dunstan said that there was still nothing major: it was just sometimes days and dates etc. caused a problem, and she had always been bad with names, just like her father. She accepted that Michelle slightly lacked the ability to retain some information and did have some thought blocks. She also accepted that Michelle had "reduced" hearing but stated that, had she been there, she could have heard and followed the court proceedings and had no hearing aid. She would only have difficulty using the telephone if the other person was softly spoken.

72. Mrs Dunstan accepted that the list of ailments contained in the memory assessment indicated that Michelle had had poor physical health since 2010.

73. It was put to Mrs Dunstan that in light of the foregoing, ¶21 of her witness statement (that she had had no previous concerns about Michelle's memory or capacity prior to her diagnosis of "unspecified dementia" in November 2017 was not true. Mrs Dunstan stated that she disagreed.

74. The Claimant accepted that Michelle had been adversely affected by Ray's death. There was a significant impact on her mood and function initially, she said, but this gradually wore off. She said that she was of course grieving for the rest of her life, but on a diminishing scale. She accepted that, after Ray's death, Michelle was a bit isolated, withdrawn and could not drive, but she had friends and neighbours, she said.

75. Mr Dunstan accepted that Andrea had once had a relationship with Michelle, but never on the same level as hers.

76. The carers firm FMN were first instructed in early 2016 Mrs Dunstan said – it was linked to her own brain surgery in February. At that time, Michelle was fully mobile (inside the house) and could make her own drinks and food. FMN were only instructed for assistance with her legs and catheter.

77. Mrs Dunstan said that she had encouraged her to do as much as possible by coaxing her and talking to her. She would promote her independence she said, e.g., she could wash herself if Mrs Dunstan supervised her. Mrs Dunstan then said, she would do "what I allowed her to do" which Mr McKean later drew on as an example of controlling behaviour, which was a limb of the Defendant's case, to which I shall return.

78. Mrs Dunstan was taken to an NHS Mental Health Team letter to Michelle's GP dated as long ago as18 November 2003 at [236] which stated that the impression was that Michelle was "*a woman who finds it difficult to manage others who interfere in her life and has always found it difficult to impose her own views*", and it was suggested to Mrs Dunstan that Michelle was not strong minded. The Claimant was clear that this was referring to Ray and Nan to whom Michelle did not feel able to stand up. Referring to the date, she said that no-one else was interfering in her life at that time. She was adamant that Michelle would be very strong with everyone else, and I found Mrs Dunstan's evidence was particularly convincing in this regard.

79. It was suggested that Michelle was extremely reliant on Mrs Dunstan, which Mrs Dunstan accepted. She did most things for her, and there was no-one else. She usually spent 6 days per week (taking Wednesdays off) between 2015 and 2018, usually from 8am – 5.30pm, though she took Monday afternoons off. Sometimes Michelle called her back afterwards, she said. Asked if she was therefore vulnerable, Mrs Dunstan accepted that, physically – yes; but mentally not, until her dementia really took hold from about late 2018/2019, she said.

80. The Claimant accepted that Michelle trusted her and was dependent on her: there was "no-one else", she said. She denied Michelle ever felt "trapped". It was suggested that Michelle was frightened of Mrs Dunstan withdrawing her care. The Claimant was adamant and firm that Michelle would never have felt that – it would never have occurred to her.

81. Parts of Andrea's witness statement were put to Mrs Dunstan (e.g., that Michelle was frightened of her) which she firmly denied. She accepted that there were of course disagreements between she and Michelle – and that Michelle would get upset on occasion. The Deceased was never ungrateful, she said, and she described their relationship as "amazing".

82. Mrs Dunstan was very firm in denying that Michelle was suggestible or found it difficult to form her own views: "My gosh, no; definitely not". These comments had a particular ring of truth about them.

83. Moving on to her relationship with Andrea, Mr McKean suggested to Mrs Dunstan that she did not like Andrea, which she accepted. She regarded her as aggressive and a bully, and there had never been a good relationship. It was "very true" that Andrea

preferred animals over human beings, she said. She'd observed this whilst looking after Andrea's daughter Rio for 11 years, which she had done out of love for Rio who she treated as her own.

84. The falling out between she and Andrea was described by Mrs Dunstan in a calm and unembellished way. She said that she had been in hospital with pneumonia and Andrea had refused to take Kayleigh to hospital to see her. This was the straw that broke the camel's back for Kayleigh, she said, and continued "*I thought that Kayleigh had been strong and made her choice and I decided to follow her because I had been told by medical professionals that I should remove people from my life that did not make me happy. My sister had always bullied me and been aggressive. So, I followed Kayleigh. I just decided not to have her in my life anymore. I did not have a falling-out as such. I just started ignoring her*".

85. The Claimant stated that she had not known of the texting system set up between Ray, Andrea and Kayleigh so that Andrea could attend Michelle when Mrs Dunstan was not there. But that was Andrea's choice said Mrs Dunstan. She added that Andrea knew that she was not there in the evenings; Wednesdays and Monday afternoons. In any event, had she visited, she would just have ignored Andrea and gone into a different room, she said. She was clear that the house was always open and there was nothing stopping Andrea visiting.

86. Mrs Dunstan had avoided Andrea from 2012 to 2015, but there came a low point in 2015 at Ray's hospice. It was suggested to Mrs Dunstan that she was very angry that day. The Claimant replied that she was under a lot of pressure, caring for two very sick parents and regularly visiting Nan. Andrea was not even aware that Ray was in the hospice because Ray did not want her to know, Mrs Dunstan said. It was again suggested to Mrs Dunstan that this had angered her, which she denied, stating that this just demonstrated what a cold-hearted person Andrea is. She was asked if she hated Andrea, to which Mrs Dunstan replied that she hated no-one but admitted that she had an intense dislike for her.

87. Turning to the incident in the hospice, Mrs Dunstan described how there were several family members in a private meeting room, and a nurse arrived who enquired about Michelle's care at home, to which Andrea had blurted out that Adult Social Care should be involved. When asked by me, Mrs Dunstan stated that she did not interpret this as an accusation of any wrongdoing, but as one of inadequate care, to which she took very strong exception when it had been her who had been doing all of the caring for both parents and Nan, and that Andrea would have had no idea how well Michelle was being looked after at home. She said that she was "breaking her heart every day", caring for two parents whilst one of them was passing away. She admitted rising to go over to Andrea, but stopped when Kayleigh told her not to. She emphatically denied that she had intended to strike her: she said that she had never struck anyone in her life. In a rather optimistic attempt to demonstrate Andrea's involvement in Michelle's care, which was denied by Mrs Dunstan, Mr McKean took her to the single GP entry in 2014 [202] in which it appeared that Andrea had suggested a memory problem (referred to above). The Claimant maintained that Andrea had had no involvement with Michelle's care.

88. Moving on, Mrs Dunstan was asked whether Andrea's instigation of moving Nan to a nursing home had angered her, which she denied. The Claimant was asked whether the fact that Nan's house had been put up for sale had angered her, and she said no, presuming that it had been necessary to pay for the nursing home. This was an opportunity for Mrs Dunstan to have criticised Andrea, but she was benign and practical in that explanation. She accepted that she had been upset that her sister had just stepped in and taken over, but she was recovering from her open-brain surgery at the time and couldn't do anything.

89. Mrs Dunstan accepted that she had been told by the matron at the nursing home that Nan had changed her will, but emphatically denied that she had been told about the *content* of the new will or who the new executrix was if there was one. She explained, and I accept, that ¶18 of her witness statement meant that he was surprised that *as the existing* executrix she had not been involved in the new will at all. She described how Nan had had a large brown envelope with Mrs Dunstan's photograph attached and her name and instructions to Mrs Dunstan written on it, stating that it should be passed to Mrs Dunstan upon Nan's death. She stated that she had not been concerned with the contents of Nan's new will once she had known of them.

90. Mr McKean put squarely the coincidence of the dates of Nan's new will and the creation and execution of Michelle's new will as being connected: that Mrs Dunstan had caused the new will to be executed because she knew about the contents of Nan's new will and wanted to balance things out. The Claimant was clear that that was not true – they were totally unconnected, she said: "We had no idea what was in Nan's will". It seems to me highly unlikely that the matron at the nursing home would have known about the contents of Nan's new will, still less divulged them to Mrs Dunstan.

91. Mrs Dunstan was then asked to focus on the period November 2015 to June 2016.

92. She denied disparaging her sister to her mother, stating that she was in no fit state (referring to her brain surgery in February 2016), from which it had taken her nearly two years to recover.

93. She stated that she had only called Stephens Scown LLP because the hairdresser had told Michelle about it, in particular that they offered home visits. Michelle had then asked her to call them.

94. Mrs Dunstan firmly denied discussing Andrea with Michelle, apart from when Michelle asked where Andrea was. She said Michelle could not believe that she was being treated like she was, or why she was being left alone. Pressed on this, Mrs Dunstan said that Michelle would ask such things as why Andrea had not phoned or visited, or where her grandchild (Rio) was. Mrs Dunstan would say that she must have had her own reasons but didn't disparage her. Apart from that, she said, she did not talk about Andrea at all. The Claimant denied suggesting to Michelle that Andrea had "abandoned her" or that this was a permanent choice on Andrea's part. She stated that she had never prevented Andrea from coming into the house or contacting Michelle. I remind myself here, that there were periods when Andrea knew that Mrs Dunstan would not be there, namely Wednesdays and half-Mondays and most evenings.

95. Mr McKean then took Mrs Dunstan through ¶39 of the Defence and Counterclaim referring to the alleged "representations" made by Mrs Dunstan to Michelle: (i) that Andrea did not love or care for Michelle; (ii) she was indifferent to Michelle's health and welfare; (iii) she was indifferent or unsympathetic to Michelle's grief arising out of Ray's death; (iv) that Andrea had not attempted to visit make contact with or communicate with Michelle; (v) that Andrea knew that Michelle was in hospital but chose not to visit. She denied poisoning Michelle's mind in that way on each allegation that was put to her. An overarching reason that Mrs Dunstan put forward was that she had no need to tell Michelle these things – she knew them already: in respect of (i) Mrs Dunstan said that Andrea had never shown any love; (ii) and (iv) were self-evident by Andrea's general behaviour; (iii) was self-evidenced by virtue of Andrea not calling or visiting until 2 days after Ray's death; (v) was not put.

96. Mrs Dunstan was asked whether she had described Andrea as having been "estranged" from Michelle, or that Andrea had "abandoned" Michelle. The Claimant denied doing so except where it had been appropriate for medical reasons, or she had been asked by third parties about Andrea. On being taken to a few medical records using the word "estranged", Mrs Dunstan said that she would not have used that word and that she had merely been assisting with background facts which were interpreted by the medical professionals. She did not consider referring to Andrea as next of kin because she and Kayleigh were named as such and were on hand.

97. Mrs Dunstan readily accepted that Michelle loved Andrea as her daughter and that they had shared some limited characteristics but denied their relationship had ever been close. She accepted that Andrea had sent flowers on Mother's Days and Michelle's birthday but said that it came to a point that Michelle decided that she did not want these gestures if Andrea could not be bothered to visit or call and so she took to returning them until they stopped coming.

98. Mr McKean turned to the production of the will. As to why Michelle would want a will, given that she had never mentioned it before, Mrs Dunstan stated that it was a combination of a few things: Ray's death; Mrs Dunstan's brain aneurysm, and her own deteriorating health. I note here that Rev. Low had thought that a will had been made many years before.

99. Mrs Dunstan gave a plausible and reasoned explanation for using Stephens Scown LLP and not using Charles French & Co who had taken care of Ray's emergency will. Asked why Michelle had not contacted Stephens Scown LLP herself, Mrs Dunstan said that she was not good with phones. I also consider that it is a natural thing for someone in Michelle's then position to ask for someone else to arrange the visit.

100. Stephens Scown LLP attended on 2 June 2016 and there is an attendance note in the Will file. Mrs Dunstan was clearly confused between this, the first meeting, and the second meeting which occurred upon the execution of the Will and, as suggested by Mr McKean, she seems to have conflated them in her mind to some extent. However, I accept Mrs Dunstan's evidence that she was there with her daughter on the first occasion and gave the solicitor the family background, whereas it was Michelle who then took over and gave the instructions for the will. The attendance note is also clear about this. She denied loading the family history in her favour and was merely setting it

out she said, without disparaging Andrea. The Claimant stated that she had no idea what Michelle was going to say about the terms of the will until she told them to Mr Robinson at the first meeting. She was carefully cross-examined about this but was consistent.

101. As to the second attendance of Stephens Scown LLP, when the Will was executed, Mrs Dunstan said she was not sure whether Kayleigh was there but recalled being told to leave the room and then to come back in again. She did not hear any of the explanation given to Michelle by Mr Robinson.

102. Finally, Mrs Dunstan stated that she was not aware of a letter/report from FMN produced in 2021 which was in the Trial Bundle at [309] until she read the bundle, and she presumed that her solicitors had requested it.

103. She did not know why Stephens Scown LLP employees had not been called to give evidence.

Patricia Mallett

104. Mrs Mallett had known Michelle since she was at school because Michelle had been her 'dinner lady'; she had known her when she worked at the supermarket and latterly, Mrs Mallett had been Michelle's carer as a member of FMN staff which she joined in 2018.

105. Mrs Mallett stated that Michelle was still able to move around and make drinks for herself at the time she joined, and FMN only attended then on Corinne's days off. This began to change in February 2019 because Corinne was "heading for a carer's breakdown" and Michelle's needs were increasing. She stated that from Christmas 2019, Michelle's health started seriously to decline, and in the last 12 months of Michelle's life she witnesses her changing "from a very switched on lady to one who was confused" but who still felt safety with Corinne and Kayleigh.

106. Apart from herself, Mrs Mallett stated that the other FMN staff (including her daughter) did not know that Michelle had another daughter, and she never saw her at the house.

107. In her witness statement, Mrs Mallett praised the love, care and devotion that she said she witnessed between Corinne and Michelle, as well as Kayleigh.

108. In cross-examination, she said that she would also see Michelle for a cup of tea (which Michelle would make), particularly on Wednesdays and Fridays. She would make Michelle her last call and could therefore stay 30-45 minutes with her.

109. Mrs Mallett denied that Michelle relied on Corinne for everything; she was not there 24 hours, she said. She accepted that she had not seen Michelle at all between 2015 and 2018. From her time in 2018, however, Mrs Mallett stated that Michelle would take her own medication (albeit using a dosette box) and answer the phone if it rang. When

asked whether it was Corinne who always answered the door, Mrs Mallett stated that the door was always open, and Michelle would always sit just inside the door.

110. When asked, Mrs Mallett accepted that Michelle would be anxious if Corinne was absent and that she only really felt safe when Corinne was around, However, she said that the thought of not having Corinne as a carer would only have "scared" her after about 2020 when she was deteriorating badly.

111. Mrs Mallett insisted that Michelle had had a bright wit and a good memory until the last year or so of her life. Her long-term memory was particularly good, she said. As for days and dates, she referred to a block calendar that Corinne turned for her every day and stated that she never forgot her name. She confirmed that at times Michelle was forgetful, but only in the way that many people are at that age. She denied that Michelle would lose her thought trail until the last year or so. Referred to the memory assessment which suggested some forgetfulness and thought blockage, Mrs Mallett agreed that that was suggested but said that she was not around then, and that when she was, Michelle had been chatty and knowledgeable.

112. When asked, Mrs Mallett was happy to state that Michelle loved Andrea. She said that she was not really discussed save for the occasional comment by Michelle that she never saw her. She would not be positive about her, she said, and thought that she had been abandoned by Andrea, and that Andrea did not care about her. She never heard Corinne or Kayleigh speak of Andrea, to Michelle or otherwise.

113. Mrs Mallett confirmed that the disputed document at [307-9] purporting to be a care report from FMN was signed by her managers, Nicky Gilbert and Jeanette Cook.

David Guy

114. David Guy was a long-standing neighbour of Michelle and Ray, and latterly Mrs Dunstan and Kayleigh – for over 40 years in total. He was a witness to Ray's will. He had walked his dog with Ray and his dog for many years. After Ray's death, he continued to walk Ray's dog. As such, he was regularly at Michelle's house. In his witness statement, he stated that he had overheard Andrea's husband say that, because Michelle had not attended Ray's funeral (which she had not done due to mobility issues), they would never speak to Michelle again. In cross-examination, he said that this had been outside amongst a group of people. Mr Guy denied that there had been hostility between Mrs Dunstan and Andrea at the funeral, it was just that they simply did not get on.

115. He also said that Michelle had been upset when Andrea had attended with (or sent (it is not clear because Michelle seems to have been inconsistent in expressing this event)) her husband to collect some of Ray's items when he understood that the estate had been left to Michelle.

116. He had witnessed Michelle turning away flowers sent by Andrea on Mothering Sunday because she had still not seen her daughter and wanted nothing more to do with her.

117. Mr Guy also paid testament to Corinne's care and devotion to Michelle over 20 years, and he understood that the Will was drafted as it was because of the love and care that Michelle had received from Mrs Dunstan. In cross-examination, he denied that this is what the Claimant had told him, but he said that this was an inference he had drawn on his part, presumably as part of his day to day contact with Michelle.

118. He stated that he had hardly ever heard Corinne or Kayleigh talk about Andrea, and that there was absolutely nothing stopping Andrea coming round as Michelle always had her back door open and she would sit just inside it.

119. I found both Mr Guy and Mrs Mallett, in particular, to be compelling witnesses. They did not set out to disparage the Defendant or overly talk-up the Claimant. Mrs Mallett was quick to point out where she could not give evidence and accept the inference to be drawn from documents where appropriate, even if it did not accord with her own experience.

Kayleigh Wilkins

120. Ms Wilkins gave evidence in support of her mother's evidence in relation to Michelle's health at various periods from 2001 until her death. Her cross-examination was largely along the same lines as her mother's and she maintained her position throughout. I will therefore refer to those matters which differed from or added to her mother's evidence. I mean no disrespect to Ms Wilkins, but proportionality dictates such an approach. This is particularly so given that there is no longer a plea of lack of capacity on Michelle's part by the Defendant.

121. When taken to any reference to poor or failing memory or other physical or mental deterioration, Ms Wilkins was consistent in saying that there had been no serious deterioration until about the end of 2017. Mr McKean put it to Ms Wilkins squarely that she was sticking to that time period because she knew that was a 'safe' period to accept a deterioration given the date of the Will. Ms Wilkins denied that, and said that these were her genuine recollections on her part. There had been thoughts and minor concerns about mild forgetfulness and the like prior to then, but it was only towards the end of 2017 that these became more serious, particularly with the generic diagnosis of "dementia" in November of that year. The Deceased had not begun to seriously deteriorate until 2019, though, said Ms Wilkins.

122. In relation to Andrea, Ms Wilkins denied that the relationship between them was poor; she said that she has no relationship with her. Asked whether she disliked Andrea, Ms Wilkins repeated that she had no relationship with her. She denied that she considered Andrea to be bullying and selfish. She also denied that her mother intensely disliked Andrea, despite having witnessed her mother say that in evidence. Ms Wilkins stated that she did not know how her mother felt: so far as she was concerned, there was simply nothing. She denied ever really discussing Andrea with her mother, except when it was relevant to a medical or legal situation. Referring to the hospice encounter between Andrea and Corinne, Ms Wilkins said that all she had done was to stand up and her mother had stopped in her tracks. She had never seen her be physically violent to anyone, she said.

123. Ms Wilkins was taken through the pleaded comments alleged to have been made by Andrea to Michelle, and she said that she had never heard her mother talk like that and neither had she said similar things herself.

124. Ms Wilkins gave evidence that at Christmas 2015, Michelle had sent a card to Andrea with money inside which had been returned with the words "thanks but no thanks" written on the envelope. It had not been opened. The implication being that this signalled Andrea's termination of her relationship with Michelle. When asked why Andrea had continued to send flowers to Michelle after that date, Ms Wilkins said she could not answer for her. The answer may be found in later evidence that the card had been written by Michelle, but the envelope by Corinne, suggesting that Andrea may have thought that it had been Corinne who had sent the card.

125. In terms of the preparation of the Will, Ms Wilkins had referred earlier to a conversation with Michelle in which she had intimated that she wanted to leave everything to her (Ms Wilkins' mother), but other than that she did not know what Michelle was going to tell the solicitor when he attended to take instructions. She thought that her mother had known nothing in advance.

The Defendant's Evidence
The Defendant – Mrs Ball / Andrea

126. Mrs Ball's witness statement was 10 pages long. She dealt with the largely uncontroversial family history. From Ray's death, she said that Michelle had felt alone, and she had wanted to help and comfort her, but it had been her sister's behaviour which had made this "impossible". Prior to Ray's death, she said that she and Michelle had had a normal mother/daughter relationship, but they shared a particular love of gardening, animals, birds and trees. Michelle's mental health had meant that, at times, it was difficult to be close to her, but the love remained, she said.

127. She set out the circumstances surrounding Corinne and Kayleigh's withdrawal from her, despite her efforts at reconciliation, she said. For example, she said she had been to a friend's funeral in 2014 and had visited Michelle's house in order to speak to Corinne. When she arrived, Corinne was hoovering and ignored her, going into the middle room. When she followed her to speak to her, Corinne moved to the next room.

128. Mrs Ball describes how she made arrangements with Ray to visit when Corinne was not there, and how it "broke [her] heart" not being able to visit as much as she wanted to.

129. The incident at Ray's hospice is described in different terms to those of Corinne who is described as having "flown at" Mrs Ball and, but for the table being between them, Corinne would have attacked her.

130. Mrs Ball stated in her witness statement that, "*As a result of this altercation, Corinne then prevented me from having any contact with my Mum. It was her unreasonable behaviour that had an impact on our relationship. She would make the atmosphere so hostile and uncomfortable that it was impossible to be in the same room. She would turn her back on me, she would not look me in the eye or she would leave the room. If*

she left the room she would hover listening to our conversations or make a noise in the next room. If she stayed in the room, she would make it very awkward by acting as if I wasn't there, talk across me, or butt in when I tried to make conversation with my Mum and left me feeling excluded".

131. I have set that paragraph out in full because it is about the high-water mark of Mrs Ball's evidence in relation to how Corinne allegedly prevented her from seeing Michelle.

132. There was an incident which featured in Mrs Ball's evidence which the parties agree happened but not on which day. Mrs Ball stated that it was the day after Ray's death that she turned up at Michelle's house to find Michelle, Corinne and her partner and Kayleigh and her partner having lunch together. They all made Mrs Ball feel very unwelcome she said, because "*they turned and stared at me nastily … Mum stared at me viciously without saying anything and I honestly believe that this was because Corinne and Kayleigh had poisoned Mum against me. This was different from my previous interactions I had with Mum, she had never looked at me that way before. It did not look like Mum, she looked at me with pure hatred. I felt like I had lost both my parents*". On this account, Mrs Ball is stating that Michelle's mind had been poisoned by 21 November 2015.

133. The Claimant's version of the event is that the Defendant did not contact Michelle regarding Ray's death on 20 November until 22 November, when she turned up unannounced when they were having a takeaway in the early evening. Only she, her partner and Michelle were there. Michelle had said to Mrs Ball that despite her having lost Ray, Mrs Ball had not phoned, to which Mrs Ball had replied "*you have not phoned me*".

134. Mrs Ball describes how she made an "extremely difficult" decision to stop visiting Michelle "*out of love for Mum, I did not want to jeopardise her health or her care, or upset her by continuing to have contact against Corinne's wishes*".

135. As to direct communications from Michelle, Mrs Ball admits that she did not see her from that event until her death. She states, "*Although I made a number of attempts to contact Mum after this, Corinne made matters extremely difficult as I have outlined above*". These attempts were not particularised. She states that she tried to call Michelle to inform her of Nan's death, but Corinne had answered the phone and immediately put it down on hearing that it was her. There was therefore no point in calling her, she said.

136. But prior to that she alleges that Michelle repeatedly told her from "approximately 2011" that she felt trapped by Corinne who "wasn't the nicest to her". She also said that Michelle had expressed a fear that Corinne would stop caring for her, and so did not want to upset her. From 2014 Mrs Ball said that she was keen to sort things out with Corinne, but Michelle had refused to get involved because she didn't want to upset Corinne.

137. Mrs Ball did not believe that Michelle would have sent the cards and flowers back to her without Corinne's intervention.

138. Mrs Ball believes that Corinne deliberately withheld details of Michelle's deteriorating health.

139. I have set out Mrs Ball's evidence from her statement in greater detail than the other witnesses because, as I have said above, it provides the high-water mark of her evidence in relation to the Claimant's efforts to prevent her from seeing Michelle and/or shutting her out of any sort of relationship.

140. In cross-examination, Mrs Ball said that the deterioration in her relationship with her mother started in 1976/77 when she had a nervous breakdown. Thereafter, it ebbed and flowed, but was still a normal mother/daughter relationship, she said.

141. Mrs Ball was cross-examined about the process of her falling out with Kayleigh and Corinne, which I do not find particularly relevant. She confirmed that it was "them not me" and she did not hold it against them.

142. She confirmed that Corinne had a policy of non-engagement and the post-funeral event as set out above was typical of the way she treated Mrs Ball. Mrs Ball stated that it was "*very, very awkward. She is very mean to turn her back, but that's who she is"*. She confirmed that this was the same event at ¶¶25 and 41 of her statement, and it was in the latter that she had alleged that Michelle had referred to losing her care if she intervened. Asked why she had asked Michelle to intervene, Mrs Ball said she had "exhausted all other avenues" of contacting Michelle. This was in 2014, really quite early on in Michelle's deterioration to being wholly dependent on Corinne, and Mrs Ball was asked how dependent she really was at that stage. She replied that she had leg ulcers and needed her shopping done for her.

143. When pressed, Mrs Ball said that Michelle was "totally reliant" on Corinne sooner, and brought in the concept that Corinne would not *allow* Michelle to do anything for herself and she was "de-skilling her" by e.g. pre-preparing soft drinks to put in the fridge for her, as set out in her witness statement. It was suggested that this (and going forward) was simply a case of Corinne caring for Michelle, but Mrs Ball said that this was a case of Corinne controlling her. I note here that as at 2014 Ray was still alive and Corinne was not living at the property.

144. It was put to Mrs Ball that having been told as she alleged that the Deceased had been complaining of being trapped in 2011, how was it that it was only in 2014 (post-funeral at ¶41 of her statement) that "this was when [she] realised" that Michelle was unable to challenge the Claimant because of her dependency. Mrs Ball said that it was not when she *first* realised*,* but when she realised – a rather incomprehensible comment.

145. There followed some cross-examination in which Mrs Ball was clearly resentful of the fact that the Claimant was given things over the years when she had not been, e.g., cars, cigarettes, money for meals and presents on what had been Mrs Ball's birthdays (i.e. in order to placate Corinne). It was suggested that the car was given to Corinne while Mrs Ball was alleging that Michelle had been complaining of being frightened of her, and it was suggested that Michelle was not in fact frightened, to which Mrs Ball said that "in a round-about way she did say that".

146. Asked about her decision to stop visiting Michelle (as set out above), Mrs Ball was asked when this was made. She thought it was prior to 2015. 2011-2015 was suggested, and Mrs Ball said that it might have been earlier than that, and then realised that they were not speaking after 2011, and so settled on 2011. She was asked whether the "animosity" mentioned in her statement was the same as "retreating", to which she replied "*I feel it is because it made me feel very awkward. Tense and horrible … [stepping away] is not very nice is it?*" She confirmed that this behaviour was the animosity to which she was referring.

147. Turning to the visit after Ray's death, Mrs Ball accepted that she had made no comment or attempt to engage Michelle, despite this certainty that Michelle's mind had been poisoned; nor had she tried to explain the delay in contacting Michelle. She accepted that her mother could have benefitted from her company but blamed it all on the reception.

148. Mrs Ball was cross-examined about Ray's alleged bad treatment after his internet dalliances had been discovered; she accepted that Michelle had been very upset, and that Ray was prone to telling untruths and exaggeration.

149. Much of the rest of the cross-examination went to meeting allegations of unpleasant behaviour which do not go to the issues in the case. However, Mrs Ball was asked why she felt able to enter into a deed of variation of Ray's will and a trust deed in connection with it, all of which had to be agreed to, and signed by Michelle in August 2016 if she felt, as she claims, that Michelle was well beyond understanding the concepts involved by that stage. Mrs Ball was not able to answer coherently beyond saying that she had not seen Michelle at this stage but knew that this was to correct an error in order to fulfil her father's wishes. When pressed on Michelle's capacity to do so in light of the allegations in the case, Mrs Ball said that Michelle "dipped in and out due to medication and sleep deprivation. Prior to this, she was lacking slightly."

150. Mrs Ball's evidence in the next passage of cross-examination was that by 2015, Michelle was "*very, very muddled and confused due to medication and sleep deprivation and mental health issues*". This evidence is clearly undermined by her willingness to enter into the Deed of Variation, even given the explanation she gave for that transaction, and suggests that Mrs Ball was willing to exaggerate Michelle's condition when it suited her.

Jeremy Ball

151. Mr Ball's evidence in his statement was that Andrea, Corinne and Kayleigh were very close at one point, but he considered Kayleigh to have been a very difficult child making Corinne's life a misery. He understood that Michelle suffered several mini strokes in the early 2000s and as a result was not able to recognise who he was. He said that "shortly after" Michelle came out of hospital, and whilst Kayleigh was organising her 21st birthday party, Andrea and Corinne fell out. That would put that event as about 2012. Mr Ball must be confused here as Michelle was not in hospital for 10 years.

152. "As time went on", Mr Ball says that Michelle had more and more 'bad days'. She would be verbally aggressive, though never physically. He commented on how Corinne would nearly always be there when they visited Michelle and how "sickly-sweet" she was with her, but also said that he could tell, however, that "*that was an act*", because her face was sullen when she thought no-one was looking at her. She also sometimes just got up and walked out of the room, he said.

153. Mr Ball considered that Corinne organised Michelle's day "for her own benefit" with a regular schedule for meals, which "*demonstrated Corinne's controlling personality*". He described a day when Corinne had visited him and Andrea for a barbeque but "*even then she was unable to relinquish control*" because she wanted to assist them with plates and cutlery.

154. Although Mr Ball is not psychologically qualified, he advanced his "*firm belief*" that Corinne had felt like a victim when she was younger; she struggled to maintain relationships, and wanted everyone to feel sorry for her, because "*none of this was (in her eyes) her own fault*". As a result, he said, when she was able to gain control of hers and others' lives, she did not want to relinquish it.

155. Mr Ball described how Corinne began to take control and it was then that he and Andrea felt that they could no longer have contact with Michelle, as Corinne began to cut her off from ties to other family members. He goes on to say at ¶28:

> *"As time went on, visits to Michelle became more and more difficult, and would often lead to confrontation. Corinne became verbally abusive, and Andrea and I felt that it was not worth us visiting as we were only putting Michelle under stress, upsetting her unduly because of Corinne's behaviour*."

This is in notable contradiction to Andrea's evidence that Corinne would simply ignore them, and it was that that was the problem.

156. Dealing with Corinne becoming Michelle's full-time carer Mr Ball states that she did this because she did not want to work now that Kayleigh was going to college.

157. Mr Ball stated that Andrea made "*numerous*" attempts to have contact with Michelle, directly and via friends. He said that each attempt was "*rebutted*" and "*it was impossible for Andrea to have any relationship with her mother*". He does not believe that this was Michelle's decision because it conflicted with their previous loving relationship.

158. In cross-examination, Mr Ball first accepted that Michelle would be hard to dominate on a 'bad day'.

159. Mr Ball contradicted his witness statement in which he had said Michelle would "*often*" fall asleep mid-sentence and "*frequently*" when smoking, when he said that it was not a regular occurrence and not "often".

160. He had commented on the amount of medication taken by Michelle and how she had become dependent on it but, because he "never takes medication", he could not identify what was prescribed. The medication would mean that she was "barely there" at times over the last 20 years of her life. When asked if he could be more specific, he said that he could not.

161. In relation to Andrea's relationship with Michelle, Mr Ball was asked when it started to go wrong, and he replied that after Ray's death "it got worse", saying that it was already strained because of the text system which could not operate after Ray had died (this had been a system whereby Ray, Kayleigh and Andrea would text each other to let Andrea know when Corinne was not at the house).

162. Mr Ball was cross-examined about his statement which said that before his death, Ray was "helped out" by Corinne as he was there 24 hours per day. He denied that that meant he was Michelle's primary carer because he was not getting paid like Corinne was. When asked why he had mentioned getting paid, he said that Andrea could not care for Michelle because she had a job and a child, whereas Corinne could because she had no job. He denied that he resented, or thought it unfair, that Corinne was paid, but said it was unfair that Andrea could not look after her mother. It was suggested that she could have done the same as Corinne, but he said that it would not be the same financially because he was in full-time work. Pressed on why it was unfair, he said it was unfair "emotionally".

163. In relation to his comments in his witness statement about how Corinne interacted with her mother, again Mr Ball candidly altered his position: he accepted that, although he found the interaction sickly-sweet and not to his taste, he was sure that Corinne loved Michelle and vice versa, and that this was genuinely the way that they interacted. In relation to his inference that Corinne was feigning this interaction (revealed by her sullen faces), he said that the work would take its toll and she would feel down about it. He confirmed that he did not mean to say that she resented it; nor that it would change when not being observed, nor that there was anything sinister or abnormal about it.

164. Turning to his comments about Corinne's routine for Michelle, he accepted that having such a routine was not unusual when caring for an elderly person; but he said that it was also the trait of a controlling personality. It was suggested that it was also the trait of an organised person, to which he said that it could be. He also accepted the suggestion put to him that Corinne's wish to assist with the plates at the barbeque was "helpful and organised".

165. Mr Ball described his statement in relation to Corinne's controlling personality as being "a bit harsh". He said, "she likes routine; schedules give you control". When asked whether he meant control in the sense of schedule and routine, or control of other people's lives, Mr Ball, again candidly, said the former.

166. Mr Ball was questioned about ¶27 of his statement where he had said that Corinne made it "impossible" for them to have a relationship with Michelle, and he said, "It didn't make it impossible; it made it difficult". He agreed that that difficulty was because Andrea and Corinne didn't get on.

167. When asked if he had ever seen Corinne be verbally abusive to Andrea, he candidly said, "No because I was not at the hospice", which is in direct contradiction to ¶28 of his statement set out above. When that was put to him, he agreed that he was referring to Corinne ignoring Andrea; and when he was asked whether the person being put under stress when they visited was Andrea and not Michelle, and he said that it "could be".

168. Turning to the decision that Corinne would become full-time carer for Michelle (which he accepted had been made in the early 2000s), Mr Ball agreed that it was a perfectly sensible one. Asked whether Andrea objected, Mr Ball merely said that she may have thought it was time for professional carers. He denied that he had implied in his statement that Corinne was doing it for the money; he accepted that she was doing it out of love but needed the financial "recourse".

169. Dealing with the visit to Michelle's after Ray's death, Mr Ball at first thought that this was after his funeral. After some questioning, Mr Ball accepted that it must have been after his death, but he could not say whether it was one or two days afterwards. He could not recall Andrea saying anything to anyone, and said that he "could not say yes or no" when asked whether Michelle had looked at Andrea with "hatred". He said, "we walked in and walked out again" and that they were there for perhaps less than a minute. He stated that Corinne did not say or do anything.

170. When Mr Ball had called later to collect things for the administration of the estate, he agreed that Corinne had merely been frosty – pointing out where the documents had been set aside for them. Michelle had been in the lavatory from where she called "bye", he said, but he did not wait to see her.

171. As regards attempts made by Andrea to make contact with Michelle, he was asked to describe them. He said that there were "a couple maybe – half a dozen phone calls; I saw a couple when at home." When asked what had happened, he said that there had been no answer; and asked if anything else, he said no. He did not mention Corinne answering the phone on any occasion.

172. In terms of others trying unsuccessfully to visit, Mr Ball knew only of one attempt by Truda when she had been told that Michelle was too unwell. Otherwise, he had simply heard of other attempts. He accepted that his statement that the decision had not been Michelle's was speculation because he did not know her mind at the time.

173. Mr Ball's statement referred to both Ray and Michelle having expressed a clear intention to leave their estates equally between Andrea and Corinne. In cross-examination, he candidly accepted that it was only Ray's wish to do so that he knew about. He volunteered that had never heard Michelle say that. He also stated that he didn't even know whether Ray had spoken to Michelle about it; he said it would be lying if he said otherwise.

Peter Le-Roy Wilkins

174. Mr Wilkins gave evidence remotely without the benefit of a trial bundle. He is Ray's brother.

175. His statement sets out his belief that Corinne is jealous of Andrea and her husband because "they work hard" and are much better off. He believes that Corinne therefore set out to secure Michelle's estate to rebalance this state of affairs. He thought that Corinne began exerting control over Michelle and manipulating Michelle in order to convince her that Andrea was a bad person.

176. He states that at ¶18,

> "*Andrea was always close to Michelle, and has always wanted to maintain a close relationship with her mother. Corinne has made this impossible over the years. Every time that I visited when Ray was alive, she was always there "caring for her mother". Every time I visited, Corinne and Michelle would be in the kitchen drinking coffee and Michelle would be smoking. She was able to capitalise on her control by becoming Michelle's carer and gradually making everything so awkward and uncomfortable that no-one wanted to or was able to visit. ... I gave up in the end too.*"

He gives the example of Truda's attempts to visit being thwarted by Corinne by saying that Michelle was too unwell, which attempts he numbers at three. He gave no examples of any attempts made by him. He did not visit the house after Ray's death.

177. In cross-examination, Mr Wilkins accepted that he had no idea why Ray had been unpopular at home. He did not know anything about the internet dating site or what had happened. He wasn't sure whether it was Corinne or Michelle who was being harsh as described, because Ray had said "*they* made me …". He had no examples of behaviour beyond a Christmas lunch incident in which Ray had been made to eat his on his own. When pressed on how he knew it was Corinne, he said that all Ray had said was things like "nobody's talking to me, it's hell", and confirmed that that was the same time as the laptop confiscation. This evidence was candidly contrasting to his witness statement at ¶12 which blamed Corinne entirely, and implied a long period of such behaviour by Corinne which broke both his and Ray's hearts.

178. When questioned about the frequency of his observations of Michelle's state of mind (which were that she was "barely there" mentally), Mr Wilkins said that he visited once or twice a year, and they only really applied leading up to Ray's illness. He would walk in the back door and have no conversation with Michelle, but walk through to see Ray, he said. He said that he was freely able to enter the house, and Michelle would tell him to go through to Ray.

179. Mr Wilkins accepted that his remarks as regards Corinne's jealousy and manipulation over Michelle were speculation. He could not explain the need for the inverted commas around "caring for her mother" in the cited passage above, and he accepted that that was in fact what Corinne was doing.

180. Asked why he said that it was "impossible" for Andrea to maintain a relationship with Michelle, Mr Wilkins stated that it was because she and Corinne did not get on. He also accepted that much of his understanding about Corinne came from Ray. He accepted, too, that he had never tried to visit after Ray's death, and that he could easily have entered the back door to visit. He was also unaware of Corinne stopping anyone from going in. This is all candidly contrary to the strong implications of ¶18 of his statement as set out above.

181. Mr Wilkins' statement referred to him having "smelt a rat" in relation to discussions about Ray's will that he had had with Corinne, which comment Corinne had overheard and challenged him about. After this he said that he had never heard from Corinne again, the implication being that Corinne had been shamed by his conclusions. This, combined with a feeling that Corinne's and Kayleigh's partners (not Corinne and Kayleigh themselves) had come across as "money grabbing" when he met them at the funeral, meant that there was "turmoil" with Ray's will, he said. Mr Wilkins confirmed that this was merely his opinion. Of course, Ray's will was later altered by a deed of variation with the consent of all beneficiaries which is likely to have been the subject of the discussion about Ray's will. This passage of his evidence does disclose a suspicious approach to Corinne by Mr Wilkins.

Reverend Mabel Lowe

182. Rev. Lowe had been a very close friend of Michelle's, having gone to school together from the age of 5. She is Andrea's godmother. At 16, Michelle had left school and married Ray at about the same time as Rev. Lowe went to teacher training college in London in about 1966. Thereafter she had moved to North Devon and lived there for 31 years, visiting Michelle regularly. She then moved to Yorkshire and inevitably saw less of Michelle, though she had family in Cornwall and would combine visits.

183. She describes in her statement how Corinne was bitterly opposed to the "reconciliation" that had occurred after Michelle and Ray had divorced, and how that had been made worse after Corinne had "hacked into" Ray's computer to find he had been contacting women online. Ray had told her that Corinne wanted nothing more to do with him. She states that Corinne was upset that Andrea, who was "always the peacemaker", wanted to maintain contact with Ray. Where she got that knowledge from is not clear. Rev. Lowe was clear, however, that Michelle never mentioned anything about any bad behaviour by Corinne towards Ray.

184. Rev. Lowe describes in her statement how Corinne had had to take over matters for Michelle after Ray's death, and as a result. Michelle became wholly dependent on her and this "frightened" Michelle.

185. When Rev. Lowe visited Michelle, she set out that she was always with her own mother, and so she felt Michelle would not open up about her mental health. A "*further barrier to open conversation*" was Corinne's constant presence when she visited. This prevented her from discussing changes in Michelle's mental well-being. She describes how Corinne was firmly in control and would "jump in" and answer for Michelle or correct her. However, Rev. Lowe felt unable to say anything with Corinne present.

186. After Ray's death, she and Michelle had spoken on the phone and Michelle had sounded down. She asked if she could do anything and Michelle had replied that she had Corinne there looking after her, and without her she could not cope.

187. Rev. Lowe last saw Michelle in September 2019. She thought that Corinne was manipulating Michelle and so did her husband. She was torn about raising it but is now very regretful that she did not. She asked Corinne whether she had seen her sister to which she replied that "*Oh she doesn't come. Mum doesn't want to see her anyway*" and Rev. Lowe interpreted that as making it clear that Andrea was not welcome to visit Michelle.

188. Rev. Lowe stated that she was extremely surprised that Michelle had excluded Andrea in her will: it "*was not commensurate with the attitudes and character of my dear friend Michelle.*"

189. In cross-examination, Rev. Lowe accepted that she had got the "hacking" story from Andrea who had obviously been upset with Corrine's treatment of Ray. Similarly, the Christmas day story also came from Ray. All of Rev. Lowe's evidence about the rebuttal of Andrea's offers of assistance with care had come from Andrea. Rev. Lowe accepted that Andrea had a good career in 2002, and it made sense for Corinne to take the care role.

190. Rev. Lowe saw Michelle once or twice a year after Ray's death. When asked when it was that she felt that Michelle had become completely dependent on Corinne, Rev. Lowe said 2019, though she said that her evidence of Michelle being frightened of upsetting Corinne in case she stopped caring was around 2017 or 2018. But there was no suggestion of bad behaviour from Corinne from Rev. Lowe, nor did Michelle ever say there was a threat, she said. She said Michelle was very conscious of her dependence but had never used the word "frightened".

191. Rev. Lowe's evidence was that Michelle had said that it was best that Andrea didn't visit because it would cause upset and that Corinne wouldn't like it. In answering questions from me, Rev. Lowe stated that Michelle had never said that Corinne had told her that Andrea could not come, nor that she had told Andrea that she could not come, nor that Corinne was preventing Andrea from visiting.

192. Quite importantly, Rev. Lowe said that Andrea had never raised any issue with her (Rev. Lowe) of Corinne preventing her vising Michelle or otherwise interfering with their relationship, and she (Rev. Lowe) had never discussed it with anyone else. She confirmed that no-one had ever stopped her talking to Michelle on the phone.

193. Rev. Lowe was particularly concerned that it had been said that Andrea could not attend her mother's funeral. Michelle was a particularly forgiving woman, and she had forgiven Ray, she said. It was most unlike her. She said that Corinne had denied her request to provide a video link to the funeral which she had offered to pay for and suspected that this was to prevent Andrea from being able to watch it. Of course, by this time, Michelle was both physically and mentally very unwell and her instructions to Corinne to exclude Andrea may well have been affected by that.

194. In replying to questions about her evidence of there having been discussions between she and Ray and Michelle about the daughters being equally provided for, most of the conclusions were inferences drawn from general conversations, and mostly with Ray. The only specific words said to have been used by Michelle were "*it is all sorted out*" when they had had a discussion about making wills. In fact, it is common ground that Michelle had made no will until after Ray's death, so any reference to beneficiaries can only have been in relation to Ray's will.

195. Finally, Rev. Lowe was adamant that Michelle would never have left Andrea out of her will. In light of Corinne's care for her, Michelle might have favoured Corinne, but never to the complete exclusion of Andrea she said. She went on: "*It is not a question of what I think, it's about what I know about her as a friend*".

Counsel's Closing Submissions

Mr McKean - Defendant

196. Mr McKean provided written closing submissions after oral submissions had been delivered and the matter adjourned. They did expand slightly on his oral submissions. I draw gratefully from those below, and I take them all into account.

197. As referred to above, Mr McKean submitted that the failure to call an attesting witness when they were both known and available was a threshold or "gateway" failure, and the claim was thus doomed. He cited *Belbin v Skeats* (1858) 1 Sw & Tr 148 and *Phipson on Evidence* (20th edition) at 40-24 – 40-25.

> *Documents required by law to be attested are (subject to the exceptions mentioned below) provable by calling the attesting witness. The rule is now imperative only in the case of wills and other testamentary instruments. The witness, in the case of wills, etc. is the witness of the court and can be cross-examined by the party calling him as to any evidence he gives tending to negative execution, or on other relevant issues.*
>
> *(i) Principle*
>
> *The reason is not (as is sometimes supposed) that proof by the attesting witness is the best evidence, but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, an agreement which may be waived for the purposes of dispensing with proof at the trial, but cannot be broken.*

198. He developed his initial submission and suggested that this principle is better described as a sliding scale than a gateway: it applies with more or less force depending on the reason for the absence of the witness, and if the witness is deceased, cannot be traced, or refuses to attend, it may not apply at all ((Theobald on Wills (19th edition, 2021) at 14-011; *Winwood v Lemon* (1961) 105 S.J. 1107).

199. The effect of the Claimant's oral evidence (that she did not know such a witness had to be called) and of the Claimant's solicitors' letter of 27 June 2023 offering to call Mr Robinson is that the Claimant "simply forgot" to call him. This, he submitted was a fatal error. That the Claimant *could* have called Mr Robinson but forgot does not satisfy the test, he wrote. Referring to Mr Stewart-Wallace's offer to call Mr Robinson, Mr McKean stated that the Defendant had not formally declined to cross-examine Mr Robinson, but rather, unsurprisingly, the Defendant would not call him as a witness.

200. The Court of Appeal did not in *Re Payne* [2018] EWCA Civ 985 (cited by Mr Stewart-Wallace in his oral closing submissions) lay down a general rule that adjournment is the answer in such a case. That was an application for permission to adduce further evidence on appeal. Each application must be decided on its merits and the Claimant (a party with specialist solicitors, unlike the litigant-in-person in *Re Payne*) has neglected to make an application for relief from sanctions, despite being aware of the point since the Defendant's skeleton argument (as *per* the letter of 27 June).

201. Mr McKean submitted that if the Will would be propounded *but for* this rule then the Court may give a provisional judgment and the Claimant can apply for relief from sanctions. If that application is strong, he wrote, it may not be proportionate for the Defendant to take the point any further.

202. Mr McKean went on to submit that, even if the Court was not with him on that, it should draw an adverse inference in accordance with *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 598 and reconsidered by the Supreme Court in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33. In the latter case, Lord Leggatt said at paragraph 41:

> '[…] *tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.'*

203. The submission from Mr McKean was that, as a result of failing to call Mr Robinson, no weight can be placed on his attendance notes.

204. Mr McKean made submissions on the credibility of each witness. He accepted that Mrs Mallett was credible, but not particularly relevant given her arrival on the scene was not until 2018. He gave 10 examples of why the Claimant was wholly unbelievable. He submitted that Kayleigh was a clever witness who knew her case, but would not make concessions where appropriate. He described the Defendant as a passionate but honest witness; Rev. Lowe as a compelling one who had known Michelle the longest and Peter Ball as a forthright witness who could be trusted implicitly.

205. As to knowledge and approval, Mr McKean submitted that the Claimant cannot discharge the burden which is upon her. There was no evidence of knowledge and approval of the terms of the Will prior to 2 June 2016; the evidence was that Corinne had done all the talking at that meeting and probably dictated the terms, and it was "clear" that Michelle was very ill, fatigued and had hearing problems. There was no evidence that Michelle ever saw the draft will or sought Michelle's approval of its terms, he said.

206. As to the 15 June 2016, Mr McKean submitted that the Court cannot find that an explanation was given to Michelle or heard or understood by her. The attendance note is insufficient in light of the failure to call Mr Robinson to give evidence and in light of the very clear evidence of Michelle's hearing and health problems.

207. Even if the Court finds that Mr Robinson did read over the will, '*proof of the reading over of a will does not necessarily establish "knowledge and approval"'* (*Wharton v Bancroft* [2011] EWHC 3250 (Ch) at paragraph 28(e), approved in *Schrader v Schrader* [2013] EWHC 466 at paragraph 86).

208. In terms of exciting the suspicion of the Court, Mr McKean relied on three matters, in particular. He submitted that:

    208.1. There was clear evidence of mental problems: fatigue, forgetfulness, falling asleep (during medical appointments, conversations, while eating a lamb curry), confusion, medication and hearing loss. These would have made it considerably more difficult for Michelle to know and approve even a simple document.

    208.2. The Claimant's role in the creation of the will. She was instrumental in creating it, dictating its terms, and approving them.

    208.3. The Will was a radical shift from decades of testamentary intention to rely on the laws of intestacy to inherit both girls equally. The Court should accept Reverend Low's evidence that Michelle knew about wills at a very early period. She assumed that everything would go to both daughters. In light of this sudden change, the will is irrational on its face. Reverend Low made clear: it was not Michelle: Michelle forgave; she forgave Ray.

Undue Influence

209. Mr McKean's written submissions expanded considerably on his oral submissions, and I have taken those into account.

210. He submitted that although this cause of action is usually proved by inference, this is an unusual case where there was strong direct evidence of that influence. Michelle was a "textbook" victim of undue influence, he said: after Ray's death, she was weak, grief stricken, easily confused, physically immobile, isolated both in fact and by persuasion. She was suggestible, referring to the psychiatric note from 2003 [237]. This was in accord with Rev. Lowe's evidence that Michelle hated discord and that she had given

evidence of Michelle's total dependency in 2001 and 2015. Two witnesses had said Michelle was frightened of losing Corinne and that she therefore had a hold over her. Corinne's own evidence about "allowing her" to do things, "coaxing her" and "encouraging her" was all controlling behaviour.

211. The fact that Corinne's behaviour might have been well-meaning was not important: see *Jones v Jones* [2023] EWHC 1457 (Ch) at ¶61.

212. Turning to the evidential picture, Mr McKean submitted that it was one of Michelle being gradually cut off from Andrea, e.g. how Andrea had been deprived of information about Michelle's health from 2015 when even Corinne's evidence had been that Michelle had only asked for this to happen in 2019.

213. Mr McKean accepted that there was no allegation of Andrea being physically prevented from visiting Michelle, but that was not necessary, he said: there were 11 people who felt unwelcome, including Ray, Rev. Lowe, Truda, and Peter and his wife. Corinne operated in a more insidious way, he submitted, such as lurking in adjacent rooms when people visited; hovering and listening in. He emphasised three things: first, that Michelle felt a fear of having her care withdrawn – the fear was enough; it did not need for Corine to threaten it. Secondly, Corinne would answer the phone when it rang, and thirdly how Corinne had controlled Michelle's death: the funeral notices and preventing Rev. Lowe and Andrea from attending the funeral.

214. The control need not be total, Mr McKean submitted: see ¶55 of *Schrader*; and *Edwards v Edwards* emphasises the need to take into account the frailty of the victim of the undue influence: the frailer they were, the less influence would be needed to remove their free will.

215. A further highly suspicious fact, said Mr McKean, was the timing of the making of the Will being so close to Corinne having been told by the matron at Nan's care home that her will had been changed. It strained credulity to suggest that the two were not connected, as suggested by Corinne, he averred.

216. The solicitor's attendance was insufficient, Mr McKean added: the fact that his meeting with Michelle was allowed to take place with Corinne and Kayleigh present indicates that he did not give any thought to the prospect of undue influence.

217. In conclusion on undue influence, Mr McKean submitted that the facts of this case were so close to those in *Schrader* and *Jones* one could almost simply substitute their names for those Michelle and Corinne.

Fraudulent Calumny

218. Mr McKean submitted that it was clear that Corinne had told third parties that Michelle had been "abandoned" and told doctors that Andrea was "estranged" from Michelle. Whilst he accepted that the burden was on the Defendant to show that Corinne had said those things and that they were lies, Corinne had almost admitted the former, he said,

and the continued cards, flowers and trinkets was good evidence of the latter. Michelle had been calling out for Andrea at the end – and the reason was that Corinne had persuaded her that she had been abandoned by Andrea.

The Claimant's Submissions - Mr Stewart-Wallace

219. Mr Stewart-Wallace had first to deal with the submission that the lack of a testamentary witness was a "gateway" issue which, he reminded the Court, was a new point raised only in closing submissions. Hitherto, the Defendant's position had been simply that an adverse inference should be drawn. Mr Stewart-Wallace relied on *Re Payne*, in particular paragraphs 33 and 43-49, to which I shall return below. The solution suggested by the Court of Appeal in that case, namely an adjournment to allow the proponent of the will to call the attesting witness would be the just and proportionate way of dealing with the matter (if the Court agreed with proposition that this was a "gateway" issue), he submitted.

220. Turning to the pleaded issues, Mr Stewart-Wallace reminded the Court that the issue of capacity had been abandoned by the Defendant, and yet much of the Defendant's evidence seems to have been directed at that issue.

Want of Knowledge and Approval

221. In terms of want of knowledge and approval, Mr Stewart-Wallace accepted the principles as set out by Mr McKean but disputed the application of the law to the facts. Dealing with Corinne's alleged involvement with the Will preparation, he relied on the attendance notes from the Will file which, he submitted, made Corinne's case quite clearly. That of 2 June 2016 showed clearly who was giving instructions, who was talking, and on which subject, he said. There was nothing to suggest any concerns about an inability to hear and/or capacity. There was no heavy weather to be made regarding the fact that Corinne contacted Stephens Scown LLP – she had never made a secret of it, and she was, after all, her mother's carer, he submitted. The wording of the attendance note of 15 June 2016 showed clearly who was there and why; it showed that Corinne had left the room; that Michelle had been shown the Will and had it explained to her in detail. There was no reason to think that Mr Robinson had not done what he'd said he'd done, Mr Stewart-Wallace submitted. Further, if there had been any suggestion that Michelle could not engage because of hearing or capacity difficulties, he and Ms Powell would have noticed and recorded it: that was partly what they were there for. The evidence about Michelle being significantly hard of hearing was sparse, Mr Stewart-Wallace suggested: there being one reference to "great difficulty hearing" when she had a boil in her ear at a different time, and one to "reduced hearing" which was in 2017.

222. Applying the test for want of knowledge and approval, Mr Stewart-Wallace submitted that any suspicions that had been raised were mild, and they were far outweighed by the fact that the Will was prepared and executed by a solicitor, and the beneficiary was a loving daughter with many years of devoted care to her mother which was rational on its face.

Undue Influence

223. Mr Stewart-Wallace framed the Defendant's case under three broad headings: (i) isolation; (ii) "de-skilling" and (iii) Michelle's fear of Corinne abandoning her.

224. Regarding (i), Mr Stewart-Wallace reminded the Court that there was no suggestion of any physical prevention of Andrea visiting Michelle by Corinne. Nor was there evidence of Corinne telling people that they could not visit except for one or two incidents reported to one or two witnesses, and they all cited ill-health as the reason, he said.

225. Andrea's written suggestion that Corinne had made it "impossible" for her to visit was not only unsustainable in light of her own oral evidence, but it disclosed her willingness to exaggerate which had to be withdrawn when confronted, he said. The same applied to her allegations of hostility. Corinne's position has always been that she wanted to disengage with Andrea and that was all. Mr Stewart-Wallace submitted that the root of all of this is that Andrea did not want to visit Michelle because she did not want to be around Corinne: there was no question of prevention by Corinne, physical or otherwise.

226. There was no evidence of Corinne answering the phone, and Jeremy had confirmed that he had not witnessed that, said Mr Stewart-Wallace. In any event, there was no need to call: she could just visit. All the evidence was that Michelle was almost permanently stationed by the back door during waking hours which was always open (by which I take it to mean unlocked), he said. Any concerns that Andrea had about the effect of her visiting Michelle on Michelle were of Andrea's construct, and could not reflect on Corinne, he submitted; and the evidence only disclosed Andrea's concern about how *she* felt when she visited. The highest it had been put by Jeremy was that he had felt unwelcome when he had visited that once following Ray's death, which had been a visit of 1-2 minutes and they had left of their own volition.

227. Turning to the allegation of "de-skilling", Mr Stewart-Wallace submitted that this was an inappropriate construction of such acts as preparing drinks of squash for Michelle and leaving them in the fridge; or cooking meals for her. These were simply the acts of a good carer, he said. He reminded the Court of Andrea's evidence that Michelle liked to be helped, and that Michelle had been really quite a sick woman at times, particularly towards the end. This interpretation was another example of Andrea twisting facts to suit her case, he said.

228. As regards Michelle being "frightened", Mr Stewart-Wallace averred that all witnesses had shied away from using that word in their oral evidence: even Andrea had modified her description that Michelle had been "upset or worried" about Corinne not being there to care for her. In Andrea's witness statement at ¶39, she had said in 2011 that Michelle had told her that she felt trapped by the Claimant who "wasn't the nicest", but Mr Stewart-Wallace said that this was contrary to her evidence that in 2014 Andrea had asked Michelle to help build bridges with Michelle, which she couldn't have done if she had been trapped and unable to challenge Corinne. Even Rev. Lowe had altered the use of the word "frightened" from ¶22 of her witness statement when giving evidence and had said that Michelle had not wanted to cause upset or difficulties with Corinne.

229. The evidence fell far short of undue influence having been made out, submitted Mr Stewart-Wallace.

Fraudulent Calumny

230. Mr Stewart-Wallace submitted that although the standard of proof was the civil one, a "high degree of proof was required to meet that standard" (see *Re Hayward (dec'd)* 2016] EWHC 3199 (Ch). He contrasted the facts of *Re Hayward* in which the express use of the words to the testator that a sibling was "*a bit of a chancer who, given the opportunity, may take more than he is entitled to*" (which was held not to be fraudulent calumny) and *Christoulides v Marcou* [2017] EWHC 2632 (Ch) in which the testator had been persuaded (wrongly) that one of her children had stolen €500,000 from her (which was so held).

231. Mr Stewart-Wallace submitted that there was simply no evidence that the Claimant had made the alleged statements to Michelle. The evidence was that Andrea was not discussed with Michelle unless she brought it up, and Corinne shied away from it, explaining that it was Andrea's decision to stay away. Corinne accepted that she had described the situation to medics, but that was not a basis for a finding of fraudulent calumny, Mr Stewart-Wallace said. Further and in any event, he went on, it is irrelevant because it is *true* that Andrea made no attempt to contact Michelle after the very short visit following Ray's death, save for a card and flowers once or twice per year.

232. In summary, Mr Stewart-Wallace submitted that the fact is that this is a case of Andrea simply thinking that the Will was not fair and trying to blame Corinne's influence and Michelle's ill-health. And yet as regards the latter, she was happy to allow Michelle to enter into a deed of variation favouring her own position. He submitted that this view of unfairness has coloured her judgment in retrospect. If the Will is unfair, Mr Stewart-Wallace said, it is Michelle to whom Andrea should look, and not project a "domineering monster" onto Corinne's role as a long-standing carer. The only evidence against Corinne has been formed entirely from Andrea's own views which do not stand up to scrutiny, Mr Stewart-Wallace submitted.

Witnesses

233. I have given some indications as to my assessments of the witnesses above but shall expand on them here.

234. The Defendant and her witnesses were candidly willing to depart from what I find to have been exaggerated language used in their witness statements. I have highlighted some examples above. But the overall impression given by the statements was wholly different to the impression given after having heard the witnesses give their evidence orally and be cross-examined. I do not know whether this was over-enthusiasm in the drafting and interpretation of the language used in delivering the instructions for those statements, or the reality of the Court setting casting a colder light on the recollections of the witnesses. However, the emphatic nature of the language used was consistently tempered by much less insistent language when the oral evidence was given in cross-examination. I must, however, take into account that the Defendant and her witnesses

all signed their statements which contained the language so often disavowed in the witness box. This suggests a willingness to take sides.

235. In contrast, the consistency of the language and history of the matters set out in the Claimant's and her witnesses' statements suggests a more balanced approach. This did not amount to a dogged adherence to the written word because concessions were made where appropriate. Furthermore, the explanations given by, in particular, the Claimant were convincing when evidence was challenged by reference to documents. Mrs Dunstan dealt with all references to the medical notes in a candid and open way. She admitted to not knowing where certain entries may have come from; she was convincing in her explanation as to the use of the word "estranged" as not being a word she would have naturally used, and suggested it was a shorthand by the medics making notes. She does not seem to be the sort of person to use such formal language. Her explanation of the references to concerns about Michelle's memory were convincing in their spontaneity and context, and she was able to readily distinguish between periods where Michelle may have been affected by her "drug load" (a phrase used by Michelle's consultant) and when it was more of a day-to-day concern. The general public is much more aware of the possibility of dementia these days, and it is therefore not suspicious that concerns about that condition are expressed, even at a stage where the memory glitches are few and far between and/or unremarkable.

236. Mr McKean suggested that Mrs Dunstan's evidence about whether she discussed Andrea with anyone was an example of her unreliability. I reject that criticism. I took Mrs Dunstan's initial evidence that she did not do so as referring to discussions with Michelle or 'gossip' to third parties. It was obvious that Mrs Dunstan would have discussed the family situation with medics and with Mr Robinson.

237. Mr McKean seized on Mrs Dunstan's evidence that she would encourage Michelle to do what she "allowed her to do" as being evidence of her controlling behaviour. This was a mischaracterisation of that evidence which, in context, I have no doubt in concluding, meant that she would encourage Michelle to do things that she was capable of doing, provided they were not dangerous, such as make tea and coffee and prepare simple meals; but she would not have "allowed" Michelle to have deep-fried a pan of chips, for example. As the GP notes suggested, people are prone to do dangerous things if left to their own devices when in Michelle's position. However, I also accept Mrs Dunstan's evidence that she would not have forced Michelle to have done anything that she did not want to do.

238. I reject Mr McKean's other criticisms of Mrs Dunstan's evidence, even if I have not dealt with each individually in these paragraphs.

239. Individually, I found Kayleigh Wilkins to be an honest and straightforward witness. It is no concern of mine whether Ms Wilkins was a difficult child, or indeed adult. The reasons for both she and Mrs Dunstan deciding to cease their relationship with Mrs Ball in 2012 are also irrelevant to these proceedings, save insofar as it could be construed as a premeditated decision to commence a campaign of isolating Michelle from Mrs Ball, which would be far-fetched in its advanced planning and Machiavellian nature. For the avoidance of doubt, I do not so find. It may well have been uncomfortable and unpleasant for Mrs Ball (and Mr Ball) to have to have coped with this development, but

it does not reflect on Ms Wilkins' credibility. I accept that Ms Wilkins was consistent in identifying late 2017 as the period during which Michelle's mental, and to some extent physical, health deteriorated, but these are matters of individual perception and she was not as involved in Michelle's care as Mrs Dunstan was. Mr McKean suggested that this was suspicious and that Ms Wilkins "knew the Claimant's case" which suggests that she was deliberately making up her observations about Michelle. I do not accept that criticism or suggestion. "Late 2017" is not so close to the date that the Will was executed to be suspiciously convenient, and Ms Wilkins' other evidence was clear, consistent and straightforward. Her description of the hospice incident was balanced, as was her account of the parting of the ways from Mrs Ball, as well as her evidence in relation to whether Mrs Ball was denigrated by she and Mrs Dunstan to Michelle.

240. As Mr McKean acknowledged, Mrs Mallett was a straightforward witness. He described her evidence as limited. This may be true in respect of Michelle's mental and physical health prior to 2018, but her description of that health as at 2018 is relevant given that there is no suggestion that Michelle's conditions undulated at this stage of her life: there was gradual decline. Her evidence as to Michelle's relationship with Mrs Dunstan are also informative, and counters those who suggested that Michelle was frightened of Mrs Dunstan, or that she was frightened she would abandon her.

241. Similar observations can be made about Mr Guy's evidence who was also clearly an honest and straightforward witness.

242. Mrs Ball's evidence turned out to be limited in its relevance. She had accepted that she was not physically prevented from visiting Michelle and gave no convincing evidence of trying to otherwise contact her after 2015, whether by phone or letter or otherwise. Mr Ball's evidence confirmed this. I do not consider that a card and flowers once or twice a year reflect a real attempt to maintain contact in the face of an alleged determination by Mrs Dunstan to prevent access to Michelle. There were ample opportunities to do so. For example, the text arrangement could have been continued in a modified way after Ray's death: Kayleigh had been willing to assist at that time and she could have been approached to continue in some form or other. I have no hesitation in concluding that Mrs Ball did not visit Michelle because she found it uncomfortable to have to encounter her sister. It had nothing to do with Michelle getting upset. Her description of how Mrs Dunstan behaved when she did visit prior to 2015 was anything *but* Mrs Dunstan making it "impossible" for her to visit: Mrs Dunstan, on both parties' evidence would make herself scarce when Mrs Ball turned up. Mrs Ball's interpretation of that behaviour as "hovering" or eavesdropping reflects her tendency to paranoia and conjecture when it comes to her sister. This applies to her comments summarised by Mr McKean as "de-skilling".

243. Mr Ball was largely an honest witness. His oral evidence directed me to the same conclusions as Mrs Ball's: that it was Mrs Ball's choice not to visit Michelle, but not because of Michelle's potential discomfort, rather her own. Likewise, his written evidence about Mrs Dunstan's alleged controlling behaviour was significantly modified in the witness box where he conceded that she was in fact well-organised and trying to be helpful.

244. Mr Ball had several theories which may have been honestly held (e.g. about Corinne's childhood; the state of Michelle's health for the previous 20 years) but they were unsupported by medical qualification or specifics.

245. Peter Wilkins' evidence was largely irrelevant because it was heavily dependent on what he had been told by Ray during the difficult period following the discovery of his internet activity, and he knew nothing about that or the details of who had done what to Ray. His interaction with Michelle was minimal because his interest when visiting the house (which in itself was infrequent) was (not unnaturally) to see Ray. His own evidence was that he did not talk to Michelle beyond initial pleasantries as he went through to see Ray.

246. Rev. Lowe was clearly an honest and well-meaning witness. However, she was also prone to create and adopt psychological theses about Michelle's behaviour. I take into account her history of working with victims, but that does not qualify her to make quasi-medical diagnoses. I fully accept that she and Michelle had been the best of friends, but Rev. Lowe candidly admitted that, due to her own personal and geographical circumstances, whilst the friendship might have remained intact, the contact dwindled, particularly in the years after 2015. Her evidence about Michelle being very concerned not to upset Mrs Dunstan for fear of losing her related to 2017/2018 onwards, she said, which is long after the Will was executed. Whilst I accept that she was very surprised and even shocked to discover that Mrs Ball had not been a beneficiary of Michelle's will, she had been under the wrong impression that Michelle had made a will before, which she had *assumed* divided the estate equally, and so was clearly not in Michelle's confidence in this regard. Rev. Lowe did not discuss Michelle's decision to make a will with her. She did not know Michelle's state of mind regarding the lack of contact with Mrs Ball; and I find it curious that Mrs Ball had not discussed with Rev. Lowe (her godmother) the alleged difficulties and concerns she says that she had with the situation: that was Rev. Lowe's evidence.

247. I conclude that Rev. Lowe's evidence was of limited assistance in deciding the issues that I must decide.

248. I have made no reference to the "Care Report" at [307-309] of the bundle and place no weight on its contents. This is because it is, as Mr McKean suggested, a witness statement in disguise.

Findings of Fact

249. In addition to the findings of fact made above, I make the following findings on the balance of probabilities.

250. Michelle was not particularly hard of hearing in June 2016. Nor at that time was she suffering mental ill-health or memory deficiencies to prevent her deciding who she wanted to benefit from her will, and/or from being capable of giving instructions and understanding the effect of those instructions. She was able to conduct and follow a conversation about her will and its effect, and would have understood any explanation of the contents of the Will, particularly given its extremely straightforward nature.

251. Michelle's mental health did not materially deteriorate until late 2017 and thereafter there was a gradual decline to serious physical and mental ill-health in mid-late 2019.

252. The relationship between Mrs Dunstan and Michelle was a very loving and caring one. I accept Mrs Dunstan's evidence about the limited care that Michelle required up to 2015 when Ray died. I accept her evidence that there was a gradual increase in that need, particularly after November 2017 when Michelle was diagnosed with dementia. Insofar as Michelle developed a concern that she was wholly dependent on Mrs Dunstan which made her feel vulnerable, that did not develop until about 2018. This was caused by natural anxiety because of the dependency, and not from any threats, explicit or implicit, emanating from Mrs Dunstan.

253. Mrs Dunstan's care of Michelle was not intended by her to be controlling in nature. Mrs Dunstan was doing her devoted best to look after her mother. There is no convincing (or any real) evidence that Michelle considered Mrs Dunstan's care and behaviour to be controlling, or that she felt under her control. I accept Mrs Dunstan's evidence (corroborated by others) that Michelle was a strong character who would not lightly be crossed, save when it came to her own mother (Nan) and Ray.

254. Mrs Dunstan did not prevent Mrs Ball or anyone else visiting Michelle or contacting her by phone or other means save, perhaps, (as with Truda) when Michelle was too unwell to receive visitors. She wanted no interaction with Mrs Ball but took no active or passive steps to prevent contact with Michelle. Historically, she made herself absent (insofar as it was possible in the house) if Mrs Ball visited and would have done so after 2015. Further, she would not have prevented Mrs Ball from visiting Michelle whilst she was not there.

255. Mrs Dunstan did not discuss Mrs Ball with Michelle inappropriately. I accept her evidence that she limited her comments to fact-limited responses to Michelle's questions about why Mrs Ball was not in contact. I accept their evidence that neither Mrs Dunstan nor Ms Wilkins spoke to third parties inappropriately or maliciously about Mrs Ball.

256. I find that it is very unlikely that the matron of Nan's care home would have known or communicated the contents of Nan's new will when she telephoned Mrs Dunstan in 2016, and Mrs Dunstan had no reason to suppose that it had been changed in any way adverse to her or Michelle's interests. I find therefore that there was no connection between that call and the making of the Will. I accept that Mrs Dunstan did not know the contents of that will until after Nan's death.

257. I accept Mrs Dunstan's evidence that she did not know Michelle's intended instructions regarding the contents of the Will prior to Mr Robinson's visit on 2 June 2016. I accept that she left the room when Mr Robinson and Ms Powell visited on 15 June 2016.

258. Mr and Mrs Ball did not attend at Michelle's house until 2 November 2015, two days after Ray's death and Andrea had not been in touch prior to that visit. It is not therefore surprising that they received a frosty, even hostile, reception, even from Michelle

without any influence from Mrs Dunstan. That was the last contact Michelle had with Andrea and that must have played on her mind.

259. Finally, I do not find that the terms of the Will were irrational or require special justification. On the facts as I have found them in relation to Mrs Ball's absence from Michelle's life from 2015 and even before, and the history of care and devotion afforded by Mrs Dunstan to her mother, there was a perfectly rational reason for Michelle to have left everything to Mrs Dunstan. It must be borne in mind that half of the house had been left equally to the sisters in his will (subject to a life interest in favour of Michelle).

Conclusions

260. In light of Mr McKean's invitation to conclude on the facts and pleaded issues of undue influence and fraudulent calumny, I will do so before turning to whether, in light of those conclusions, the Court is able to propound the Will in solemn form, or it would have been so able had the testamentary witnesses been called and dispelled the adverse inferences he says should be drawn from their absence at trial.

Undue Influence and Fraudulent Calumny

261. I bear in mind the principles set out by Lewison J (as he then was) in *Re Edwards* [2007] as set out above.

262. There is no presumption of undue influence, and the burden lies upon Mrs Ball to prove it as a question of fact. Whilst I accept that the authorities acknowledge that this is often proved by way of inference, Lewison J's words that, *"[i]t 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*" still apply.

263. In light of my factual findings, there is almost no evidence upon which the Defendant can rely in support of this claim, even absent the testamentary witnesses. I reject Mr McKean's submission that Michelle's health was "in a terrible state after 2001". She suffered a terrible 18 months after her operation, plus the morphine episodes, but otherwise recovered until her gradual decline as set out above. Michelle was not malleable and suggestible. The psychiatric entry from 2003 was made during, or soon after, her very bad period and did not pertain in 2016 by which time Ray had died and her mother had lost all influence. Michelle was domestically partly independent until late 2017. I have rejected Mr McKean's submissions on the controlling nature of Mrs Dunstan's behaviour. I accept that Mrs Dunstan did potentially have power and some influence over Michelle, but my findings are that these were not exercised, even benevolently, so as to remove Michelle's volition. Mrs Dunstan did not cut Mrs Ball off: she did that herself and for her own reasons.

264. I have carefully considered the possibility that Michelle's volition was overcome for the sake of a quiet life, whether that operated to such an extent that it overbore Michelle's free judgment, discretion or wishes. I have no hesitation in concluding that it was not. It is true that Michelle would have liked to have seen Mrs Ball, but Mrs Dunstan did not

prevent her from doing so, directly or indirectly. There is no suggestion that Michelle communicated any reluctance to see Mrs Ball or communicate with her, which is something that might have been induced by undue influence. The refusal to receive the flowers came after a long period of absence of Mrs Ball from Michelle's life and Mr Guy's evidence is that Michelle expressed that as her reason for doing so; and not anything that could be construed as a fear of upsetting Mrs Dunstan.

265. Mr McKean suggested that Michelle's "bizarre" behaviour in being hostile to Mrs Ball's visit in November; the rejection of the flowers; in telling the doctors in the summer of 2017 that Mrs Ball was estranged from her and Michelle "never knew why", and that she "had never got over [Mrs Ball] cutting off all contact" despite flowers and cards being sent twice a year until 2020 is all explained by Mrs Dunstan's undue influence, alternatively poisoning Michelle's mind. I do not accept that: the alternative, and far more likely, explanation is that that is how Michelle genuinely felt. The sending of flowers twice a year from a locally resident daughter might well be seen by an elderly and sick mother as not constituting contact, and the doctors interpreted what they were told by her as estrangement, whether or not she would have used that word.

266. Michelle was not kept isolated by Mrs Dunstan nor did she "de-skill" her or exercise over-bearing behaviour – as I have already found.

267. I have taken account of all Mr McKean's submissions on the factual interpretation of the evidence and the application of the law thereto as set out at paragraphs 28-44 of his written closing submissions and reject them for the reasons set out above.

268. For all of these reasons, it follows that I reject the Defendant's counterclaims based on undue influence and fraudulent calumny.

The Absence of Testamentary Witnesses

269. Strictly speaking, this issue only needs to be resolved once the final limb of the Counterclaim, want of knowledge and approval, has been resolved. However, the testamentary witnesses are clearly pertinent to that issue, though Mr McKean does not suggest that they are a gateway to a finding of there having been no want of knowledge and approval.

270. It follows that I should first assess the position absent the testamentary witnesses in respect of the Counterclaim, including whether I should draw any adverse inferences from their absence.

Want of Knowledge and Approval

271. Part of the context in this case (though by no means decisive) is that each party was limited by an earlier Order to four witnesses. It is true that an application could have been made for an exception for the testamentary witnesses, but no doubt the Claimant had that limitation in mind when she, through her advisers, selected the four she would call.

272. In addition, and more importantly, the Defence does not challenge the due execution of the Will as required by CPR 57.7 as set out above. The Defendant was therefore accepting that, those parts at least of the attendance note of 15 June 2017 in the Will file which are relevant to that issue, are reliable. The Defendant thus accepts, and I so find, that Will was placed before Michelle and she signed it in the presence of witnesses. I have already noted that the terms of the Will are extremely straightforward. It is in the preceding sentence in the attendance note to that record that Mr Robinson records that he explained the will in detail to Michelle.

273. The pleaded Counterclaim dealing with want of knowledge and approval relies partly on a pleading of lack of capacity which was withdrawn. Its balance concentrates on the ill-health of Michelle which I have found was in a state far from extremes as there pleaded.

274. I have made my findings as to Michelle's mental and physical health above and have no doubt that she was capable of reading the Will and must have known that she was signing a Will based on those findings alone. It is highly unlikely in my judgment that she would have signed her first will without having read it or having had it read over to her, in which case she in all probability would have understood it, given its terms and her mental health.

275. I am asked to draw adverse inferences from the failure to call either of the attesting witnesses. I decline to do so for the following reasons.

276. Mr McKean submitted at paragraph 4 of his written closing submissions (and had done so before) that the Claimant had "forgotten" to call the attesting witnesses. That is not fertile ground for an adverse inference.

277. In any event, the attesting witnesses were both employees of Stephens Scown LLP, a reputable firm of solicitors. Mr Robinson is, without more, unlikely to have invented material or lied in his attendance note, and no such allegation is pleaded or was suggested in Court. Had that been an allegation, I have no doubt that Mr Robinson would have been called by the Claimant. I accept that that does not mean that he could not have been cross-examined about the *quality* of his observations or his explanations about the Will, but for the reasons stated, the facts set out in his attendance notes are likely to be true.

278. Some suggestion was made that Stephens Scown LLP may have been the imminent target of a professional negligence action, and that was the reason for not calling Mr Robinson, but that was not put to the Claimant and I do not accept the logic of the submission. It would have been an equally valid reason for calling him, and he would have been naturally keen to establish that he had carefully fulfilled his duties.

279. On the first day of the trial, when it became clear that the Defendant's position on the absence of the attesting witnesses was hardening, Mr Stewart-Wallace offered to call Mr Robinson. Importantly, the offer was not taken up by Mr McKean, no doubt for forensic reasons, but that offer strongly suggests a lack of reluctance on the Claimant's part to have Mr Robinson cross-examined. It is more in line with Mr McKean's

suggestion that the Claimant had forgotten to call an attesting witness. It is also in line with an understandable interpretation by the Claimant of the Defendant's case that the real issues in this case were the health of the Deceased and the Claimant's treatment of her. Whether or not there is a formal requirement for the attendance of an attesting witness for the purpose of admitting a will in solemn form, the pleadings and witness statements did all suggest that those issues were at the core of the dispute. True, Mr Robinson could, as a matter of fact, have attested to Michelle's health and capability of understanding as at the 15 June 2016, but I have been satisfied of those matters by other evidence.

280. For all of those reasons, I therefore reject Mr McKean's submission that I should place no weight on the attendance notes of Mr Robinson. I accord them the weight due as documents created by an employee of a reputable firm of solicitors against whom no allegations of fraud or mis-recording has been made, but who has not been called to allow cross-examination. I find on the balance of probabilities that they were an accurate record of the facts stated, even though I accept that the quality of the explanation cannot be tested, nor can Mr Robinson's obviously held opinion that no enquiry into undue influence or knowledge and understanding was required.

281. I am thus satisfied, over and above Mrs Dunstan's and Ms Wilkins' own evidence, that it was Michelle who gave the instructions for the Will on 2 June 2016 without intervention in the process from either. She must have clearly conveyed those instructions to Mr Robinson who raised no query either then or when drafting the Will.

282. From the 15 June attendance note, I am also satisfied that the Will was read over to Michelle before she signed it and some level of explanation was given to her about it. Tellingly, the attendance note clearly suggests that Michelle gave instructions for Stephens Scown LLP to retain the original of the Will and send her a copy. This was done before Mrs Dunstan came back into the room. This is evidence of engagement and understanding, as well as the probability that the copy was available for Michelle to read in the future should she so wish.

283. I am also satisfied from the 15 June attendance note that Mrs Dunstan was openly discussing Charles French & Co with Mr Robinson in some detail in respect of Ray's will with Michelle present, and she was not therefore trying to conceal that firm's existence from Michelle. Moreover, Michelle asked Mr Robinson, after a detailed discussion about Ray's will on 15 June 2016, if what had been discussed meant that she could sell the house and, using Ray's half of the proceeds, purchase a more suitable property for herself to which the answer was yes. That showed a level of alertness, comprehension and engagement which confirms my assessment of Michelle at the time, and no doubt would have done the same for Mr Robinson.

284. I therefore dismiss the Counterclaim for a want of knowledge and approval of the terms of the Will by Michelle, even absent the tested evidence of Mr Robinson.

285. The Counterclaim is therefore dismissed in its entirety.

Probate of the Will in Solemn Form

286. Whilst I accept that *Re Payne* was an application to adduce fresh evidence in an appeal by a litigant in person, some important points of principle were addressed by Henderson LJ. The facts are unusual. The headnote reads:

> *The claimants brought an action seeking proof in solemn form of a will purportedly made by the testator in 2012. The defendant counterclaimed for proof in solemn form of a will purportedly made by the testator in 1998. Although the 2012 will was lodged with the court, as required by CPR r 57.51, the original of the 1998 will was not and the photocopies produced for the hearing did not show the complete document. The judge dismissed both the claim and the counterclaim, finding that neither will had been validly executed. In relation to the 1998 will the judge held, without having heard oral evidence from either of the attesting witnesses, that the will had not been "signed" by the witnesses, as required by section 9 of the Wills Act 1872, as substituted, because the witnesses had inserted their names in capital letters on the will, rather than leaving their signatures. The defendant appealed against the dismissal of the counterclaim. The Court of Appeal directed that the original 1998 will be produced and heard oral evidence from one of the attesting witnesses.*

287. The Court of Appeal unusually allowed oral evidence from a live witness on the appeal. This was from an attesting witness which supported the proposition that the will had been duly executed.

288. Dealing with the concerns he had with the trial judge's approach, Henderson LJ said at ¶44-45:

> *44. … Thirdly, the judge knew that Mrs Payne belatedly wished to adduce written evidence from the two attesting witnesses, but she seems to have taken the view that this could not be permitted unless the claimants consented, which (through their counsel) they did not. Although Mrs Payne was a litigant in person, the judge does not seem to have considered, if necessary of her own motion, whether the interests of justice might have required an adjournment so that the original of the 1998 Will could be obtained, and arrangements could be made for the attesting witnesses (or at least one of them) to attend court and give oral evidence.*
>
> *45. A further very relevant consideration, which the judge appears to have completely ignored, is the strong public interest in valid testamentary dispositions being upheld. This public interest is reflected in many of the special procedural provisions which apply to contested probate proceedings, including those relating to the lodging in court of testamentary documents, and the early provision of written evidence about them, to which I have already referred*

His Lordship referred *inter alia* to CPR 57.11 and cited notes from the White Book:

> *"If the last will is not to be admitted to probate, but an earlier one is, the last will has to be pronounced against and the earlier will (if there is one) pronounced for*

> *in solemn form or (if there is no earlier will) an intestacy declared. Where genuine doubts exist as to the validity of a testamentary document, the court may be willing as part of a compromise to pronounce against that document, but the court will not as part of a compromise be willing to pass over a testamentary document (either a will or codicil) which is apparently a valid document and as to which there is no evidence of invalidity.*
>
> *Where the evidence filed is insufficient, the court may refuse to approve the compromise and instead direct a trial on written evidence, even where the matter is agreed or uncontested."*

And continued at ¶¶47-49:

> *... More generally, as Cairns J said in* In the Estate of Muirhead, decd *[1971] P 263 , 265E:*
>
> > *"*I approach the matter with the conviction that it is the duty of a Court of Probate to give effect, if it can, to the wishes of the testator as expressed in testamentary documents.*"*
>
> *48. If the judge had had these considerations in mind, as well as the unsatisfactory procedural history which I have related, she ought in my judgment to have concluded that she could not safely pronounce against the 1998 Will without it being produced to the court, and without an opportunity for evidence to be given by at least one of the attesting witnesses. The special importance of hearing evidence, if at all possible, from an attesting witness is reflected in the long-established rule that such a witness is treated as a witness of the court, whose duty it is to give to any party who asks for it an account of the circumstances in which the will was executed: see* Williams, Mortimer & Sunnucks, Executors, Administrators and Probate*, 21st ed (2018), para 32-10. Furthermore, the cases establish that at least one attesting witness must be called, if available, in a defended case:* Oakes v Uzzell *[1932] P 19,* Bowman v Hodgson *(1867) 1 P & D 362 and* Belbin v Skeats *(1858) 1 Sw & Tr 148 .*
>
> *49. In the light of these principles, the judge was in my respectful opinion wrong to pronounce against the 1998 Will on the basis of the evidence as it stood at the conclusion of the trial. She should have appreciated that the issue could not be justly resolved without production of the 1998 Will itself, and without hearing evidence from at least one of the attesting witnesses. This would have necessitated an adjournment, but there are occasions, of which this was one, when an adjournment is the price which has to be paid if justice is to be done. It also follows, in my view, that Mrs Payne's application to adduce fresh evidence on her appeal must be granted, because without the evidence of Mr Gordon the court is unable to pronounce on the validity of the 1998 Will, and the interests of justice require that it should be admitted to probate if it was validly executed.*

289. Henderson LJ (with whom Flaux LJ agreed) there reiterated the rule that an attesting witness must be called if available before a will can be pronounced in solemn form in the context of a case on due execution.

290. *Theobald on Wills* (19th Ed.) ¶14-011 reads as follows (without the citations and insofar as relevant):

> *The general rules of evidence apply in probate claims as they do in other claims. There are, however, a number of special rules as to the evidence which is admissible and the evidence which is required to prove special matters, e.g. due execution, revocation, testamentary capacity, knowledge and approval, undue influence and fraud. This evidence is considered where the various topics are discussed. In addition, there are a number of special points as to evidence which apply in all probate cases or in the greater part of them.*
>
> *At least one attesting witness must be called, if available, in a defended case.* ***In an undefended claim written evidence of due execution will usually be ordered to be given by affidavit or witness statement, particularly where the estate is small.*** *Written evidence proving due execution is also required on a summary judgment application if an order pronouncing for a will in solemn form is sought. A will has, however, been pronounced for without any evidence as to due execution where the attestation clause was in regular form, and a satisfactory reason had been given for the failure to trace the witnesses so that no adverse inference could be drawn from their absence. Affidavits originally sworn in support of grants in common form have been accepted in proof.*
>
> *Attesting witnesses are not the witnesses of any party, but of the court. In that capacity it is their duty to give to any party who asks for it an account of the circumstances in which the will was executed* [emphasis added].

291. Having made the findings that I have, this matter is now, essentially, an un-defended claim to propound the Will in solemn form, there having been no assertion that the Will was not duly executed, and the other objections having been found against the Defendant.

292. Mr McKean submitted in his written closing submissions that the rule that an attesting witnesses must attend Court to give evidence is more akin to a "sliding scale" than a gateway, applying with force depending on the reasons for the attesting witnesses not having been called. This was toned down from his oral closing submissions but remained more forceful than had been anticipated from his skeleton argument. Mr Stewart-Wallace was concerned that he had been taken by surprise by what he considered the newly enhanced force applied to this argument.

293. I do not criticise either Counsel for their adopted positions, but it does mean that I did not have the benefit of full argument and properly considered authority on the point, particularly in circumstances such as these in which I have been able to dismiss the counterclaims on sufficient evidence without having heard from the attesting witnesses, and am simply left the question of due execution, which has not been otherwise disputed.

294. I am not, therefore, prepared to express any opinion on whether it is still necessary to require an attesting witness to attend the hearing or require written evidence from one of them before admitting a will to probate in solemn form when there is no dispute as to

due execution and no other claim as to capacity, want of knowledge and approval, or undue influence. It may be arguable that it is not.

295. However, given the antiquity of the rule and its recent repetition in generalised form (albeit where due execution was in dispute), I will accede to Mr McKean's helpful and realistic invitation (as envisaged in *Re Payne*) to hand this judgment down as an interim judgment and adjourn the trial to make arrangements (to use Henderson LJ's words) for Mr Robinson to be called to give his attesting evidence in relation to the Will and be cross-examined. Because an attesting witness is a witness of the Court, it is open to the Court to call him itself and relief from sanctions for the Claimant is not required. If I am wrong about that, it seems to me that because the sole remaining question is one of due execution (which was never in issue) and bearing in mind the strong public policy consideration (as referred to in *Re Payne*) in having valid testamentary dispositions upheld and the issue of proportionality, I will offer the Claimant an opportunity to make such an application. In the further alternative, I will invite Mr McKean on the Defendant's behalf to consider whether he would be satisfied with an affidavit from Mr Robinson.

296. I initially provided this as a draft provisional Judgment on 3 October 2023. It was intended to be handed down as a provisional judgment pending resolution of the attesting witnesses issue. However, the parties commenced negotiations as to how to resolve that issue which became prolonged and somewhat attritional. An *impasse* developed which resulted in me listing a hearing on 30 November 2023. Following that hearing, an application was issued by the Claimant on 5 December 2023 which ultimately was unopposed by the Defendant. There has been a delay in listing the handing down and costs hearing. The position as at August 2024 is that, in light of this judgment having been circulated in draft, the parties are agreed that the Will should be pronounced in solemn form and the Claimant shall be granted probate as executrix thereunder. Costs remain in dispute and I shall hear Counsel on that issue.