Neutral Citation Number: [2024] EWHC 2289 (Ch)

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

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

Date: 9 September 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Case No: PT-2023-BRS-000039

Between :

JANE OLIVER — **Claimant**

- and -

RODNEY WILLIAM OLIVER — **Defendant**

Case No: PT-2023-BRS-000042

And between :

(1) JANE OLIVER

(2) KEVIN LEWIS OLIVER — **Claimants**

- and -

RODNEY WILLIAM OLIVER — **Defendant**

- -
- -

Joss Knight (instructed by **Wolferstans LLP**) for the **Claimants**
The Defendant did not appear and was not represented

Hearing dates: 10-11 July 2024

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This judgment will be handed down by the Judge to the parties or representatives at 4:30 pm on 9 September 2024, and released to The National Archives.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of two claims relating to the will of the late William Oliver, who died on 25 May 2018, at the age of 86 years. The first claim is brought by the youngest of his surviving children, Jane, against the eldest, Rodney. It seeks declarations that a purported will dated 14 September 2015 is invalid on several grounds, and that an earlier will dated 2 October 2009 should be admitted to probate in solemn form instead. The claim form was issued on 23 March 2023, with accompanying particulars of claim.

2. The second claim is brought by Jane and her older brother Kevin, also against Rodney, as executor of William's estate named in the 2015 will. It is brought under the Inheritance (Provision for Family and Dependants) Act 1975, for reasonable financial provision out of the testator's estate, on the footing that the will of 14 September 2015 is valid and does not make such provision. This second claim was made by claim form under Part 8 of the CPR dated 27 March 2023.

3. I should say that there is no alternative claim under the 1975 Act based on William's testamentary position if the 2015 will is held to be invalid. This means that, if the first claim succeeds, the second claim does not arise. Originally, a Mr Stephen Haggett (the 2015 will-maker) was named the second defendant in each claim, but he was later removed by order of the court. I will come back to his role in this matter in due course.

Background

4. Many of those who figure in this story are members of the same family, and have the same surname. I will, therefore, and without intending any disrespect, refer to them by their first names. At the time of his death, William was a widower. His wife June had died nearly three years earlier, on 15 October 2014. Together, they had six children in total. The eldest, Timothy, unfortunately suffered from Down's syndrome, and died in 2007 at the age of 49. The remaining five children survived them. Of these five, the defendant, Rodney, was the eldest, and is now aged 64. There then follow Andrew (now 63), Kevin (now 62), Gillian (now 59) and Jane (now 53). Although Rodney did originally instruct solicitors to advise him, he has taken no substantive part in the litigation. He did not appear at the trial, and neither was he represented. The claimants were however represented at trial by counsel and solicitors. As I shall explain in more detail shortly, in the absence of Rodney, and in light of the arguments put forward for the invalidity of the 2015 will, I decided that it was necessary to hear live evidence from the various witnesses, and I did so.

5. The evidence in this case satisfies me that William made three wills. The first was made on 19 November 1985, and was a mirror will with that of his wife June, made at the same time. After providing that the survivor of the two of them should be the universal legatee of the other, it provided that in the event of the prior death of the other spouse, the entire estate should be split equally between the five children, with a separate pecuniary legacy for Timothy. I have seen a copy of this will, which was obtained from the solicitors in whose custody it was, but who declined to disclose it until I had made a third-party disclosure order for that purpose. The second will was

made on 2 October 2009, after the death of Timothy in 2007. This will is apparently in the custody of Rodney, who has refused to disclose it. However, the evidence satisfies me that it was a mirror will with that of June of the same date, and I have evidence of June's will. Apart from the fact that the substitutionary gift between the children no longer included Timothy, the terms of the will were in substance the same as in the 1985 will. There is before me also an application under rule 54 of the Non-Contentious Probate Rules 1987 for an order reconstructing the 2009 will in the absence of the original.

6. The third will is dated 14 September 2015. It was drafted by Stephen Haggett of H & C Lawyers in Tavistock. It names Rodney and Mr Haggett as the executors and trustees of the will. However, by a renunciation in form PA15, dated 15 May 2023, Mr Haggett renounced probate of this will. By the orders of DJ Markland made on 13 July 2023, Mr Haggett was removed as second defendant to each claim. A copy of this will was in evidence before me. By its terms, it first of all makes a bequest of the testator's personal chattels to his trustees, requesting that they distribute them in accordance with any memorandum of wishes that either was communicated to them during his lifetime or might be found amongst his papers at the time of his death. This is a common enough provision in modern wills.

7. It then goes on by clause 3.3 to make a gift of the whole of the residue of the testator's estate to the trustees upon discretionary trusts for the benefit of "such one or more of the discretionary beneficiaries … as my trustees shall from time to time in their absolute discretion think fit … " The will by clause 3.1 defines "the discretionary beneficiaries" as meaning "such of the following primary and secondary beneficiaries". Secondary beneficiaries are defined by clause 3.1(b) as "such persons or charities or charitable objects or persons as my trustees may at any time add to the discretionary beneficiaries," subject to relevant perpetuities rules. The expression "primary beneficiary" by clause 3.1(a) means Rodney.

8. Accordingly, from the outset of the discretionary trust, there is only one object of the discretion, namely Rodney, although there is power to add to the class of objects in the future. However, that power is exercisable by the trustees, of whom Rodney is one. By the terms of the will, Rodney's surviving siblings (and indeed other relatives) take nothing as of right. It is unknown whether the power to add further objects has been exercised. However, no grant of probate has yet been made in relation to the testator's estate and so, more than six years after his death, the estate remains un-administered.

The procedural position of Rodney

9. As I have said, although Rodney did take some legal advice at an early stage, he did not appear at the trial, and neither was he represented. Although I am satisfied on the evidence that Rodney was properly served, he has not filed an acknowledgement of service in either claim. Julian Burrows, who is the solicitor for the claimants in the two actions, made a witness statement dated 28 June 2023, in which he explained his firm's attempts to engage with Rodney on their client's behalf. Between 15 February 2019 and 12 August 2019, there was a correspondence between the claimant's solicitors and Messrs Roythornes, who were originally instructed on behalf of Rodney.

10. By their letter of 12 August 2019, Roythornes told the claimant's solicitors that they had been unable to obtain any instructions from Rodney, and had therefore written to him indicating that they considered that they were no longer acting for him. They continued to act for Mr Haggett, although since he is no longer a defendant that is of little importance. (As it happens, Mr Haggett's own firm, H & C Lawyers, wrote to the claimants' solicitors on 27 August 2019 stating that Mr Haggett's position was one of neutrality, and that he was "fully prepared to submit to the directions of the court".) Accordingly, the claimants' solicitors sought to engage directly with Rodney, and wrote to him for this purpose on 11 October 2019, at Drakelands, the family home in Cornwall where he had lived with the testator until the testator's death. There was no reply to this letter.

11. On 7 July 2020 the claimant solicitors tried again, and sent a formal letter of claim to the same address, running to 15 single-spaced A4 pages. This letter was returned through the post to the claimants' solicitors, with an adhesive label stuck over the window panel marked as follows in typescript:

> "RETURN TO SENDER.
>
> I DO NOT RECOGNISE YOU.
>
> I DO NOT UNDERSTAND (STAND UNDER) YOUR INTENT.
>
> I DO NOT HAVE AN INTERNATIONAL TREATY WITH YOU.
>
> NO ASSURED VALUE.
>
> NO LIABILITY."

Underneath the adhesive label were the words in handwritten capitals: "ALL MAILINGS RECORDED". There was no other message.

12. The claimants' solicitors sent further letters to Rodney dated 6 August 2020, 22 September 2020, 10 September 2021, 13 January 2022, and two letters of 31 March 2023 (serving the present proceedings). All of them, with the exception of the letter of 22 September 2020 were returned through the postal service, with an adhesive label stuck over the window panel and marked as set out above. In addition, under the label added to the return letter of 10 September 2021 had been added the further words "CEASE AND DESIST", and to that on the letter of 13 January 2022, the words "FOR THE THIRD TIME CEASE AND DESIST". The labels on the two returned letters of 31 March 2023 equally had the words "CEASE AND DESIST" added underneath them. There were then two emails sent by the claimant's solicitors to Rodney, both dated 25 April 2023, and then a letter from them to Rodney dated 17 May 2023, which was returned with a label over the window panel identical to the earlier ones.

13. The correspondence bundle at trial shows that, after the date of 28 June 2023 (when Mr Burrows witness statement was made), further correspondence has been sent to Rodney at the same address. These include letters of 29 June 2023 (enclosing a copy of Mr Burrows' witness statement), 11 July 2023, 22 August 2023 (enclosing notice of the pre-trial review, two directions orders and a third-party disclosure order), 27

September 2023, 4 October 2023, 13 October 2023, 5 January 2024, 23 January 2024, 19 February 2024 22 February 2024, 28 February 2024 (enclosing notice of trial), 5 April 2024, 17 May 2024 (serving the expert's report of Dr Andrew Barker), 12 June 2024, 19 June 2024 and 27 June 2024. Some of these letters were also sent by email to Rodney's email address. Most of the letters were returned with an adhesive label stuck over the window panels marked in the same way as previously. That of 28 June 2023 contained the further manuscript additions:

> "THIS ADDRESS DOES NOT ACCEPT UNSOLICITED JUNK MAIL.
>
> CEASE AND DESIST.
>
> ALL MAILINGS RECORDED.
>
> FURTHER MAILINGS WILL BE HARASSMENT."

14. That sent on 5 January 2024 was returned with a similar label, underneath which had been written in handprinted capitals:

> "CEASE AND DESIST YOUR SOLICITATIONS & LETTERS TO THIS ADDRESS.
>
> THE NEXT LETTER RECEIVED AT THIS ADDRESS FROM YOUR COMPANY WILL ACTIVATE A FEE SCHEDULE OF £9,999.00 FOR ADMINISTRATION AND TERRORISM AND TRESPASS ON MY PROPERTY."

That sent on 23 January 2024 was returned with a label in the same form, underneath which had been written in handprinted capitals:

> "FEE SCHEDULE NOW ACTIVATED".

15. The 64 entries on the electronic court file for the probate claim show a considerable number of communications from the claimants' solicitors, but only one from Rodney. This was an envelope returned to the court through the post which had been sent to him on 21 August 2023 by the court enclosing the Notice of Trial. The envelope carried an adhesive label stuck to the window panel with the same six lines as are shown above (at [9]). The 44 entries on the electronic court file for the Inheritance Act claim similarly show many communications from the claimants' solicitors, but only one from Rodney. This was a separate envelope returned through the post which had been sent to him on 21 August 2023 by the court enclosing the Notice of Trial in the second claim. The envelope carried an adhesive label stuck to the window panel identical to that relating to the probate claim.

16. Despite Rodney's failure to engage with the process, I am satisfied on the evidence that the proceedings, disclosure, witness statements, expert evidence and all relevant correspondence have been served on him in accordance with the rules of court. However, Rodney's failure to file an acknowledgement of service in either claim has procedural consequences. In relation to the probate claim, CPR rule 57.10(1) provides that "A default judgment cannot be obtained in a probate claim and rule 10.2 and Part 12 do not apply". Instead, under rule 57.10(2), the claimant proceeds with the probate

claim as if that defendant had acknowledged service. The court may order (under rule 57.10(3)) that the case proceed to trial, as the court did on 13 July 2023. In that case, the court may also direct (under rule 57.10(5)) that the claim proceed on written evidence alone.

17. At the pre-trial review (which Rodney did not attend and at which he was not represented) the claimants' counsel raised the question whether the claim should proceed on written evidence. He referred me to some of this correspondence, and cited *Killick v Pountney* [1999] All ER (D) 365 (James Munby QC), *Devas v Mackay* [2009] EWHC 1951 (Ch) (Sarah Asplin QC), and *Harrison v Barrett (No.1)* [2023] WLUK 616 (Master McQuail). The approach taken in the first two cases was that, where a claimant argues that a will is invalid on the ground of undue influence, on which issue the burden lies on the claimant, but the defendant does not take part, it is generally inappropriate to try the case on written evidence alone. On the other hand, where the issue of invalidity depends on a matter on which the absent defendant bears the burden of proof (*eg* testamentary capacity) then it may be appropriate to do so. In the third case the master felt it was nevertheless appropriate to try a case of undue influence on the written evidence only.

18. I decided that this was a case where I would follow the usual approach and, if the undue influence allegation was to be pursued, I should hear from the witnesses and not merely read their statements. I therefore did so. I asked a number of questions of each witness, and counsel briefly re-examined him or her, which gave me the opportunity of assessing that witness's reliability, as well as of asking questions not dealt with in the witness statement.

19. In relation to the Inheritance Act claim, which is brought under CPR Part 8, the procedural consequences are different. Rodney's failure to file an acknowledgement of service means that, under CPR rule 8.4, although he may attend the hearing of the claim, he may not take part in it unless the court gives its permission. Since Rodney has not attended the trial or been represented at it, that question does not in fact arise. His failure to file evidence may have other implications for the Inheritance Act claims, especially in relation to his own needs. But I will return to those claims in due course.

The claims in more detail

20. As I have said, the first claim, made by Jane alone (though with the support of Kevin, Andrew, and Gillian), concerns a purported will dated 14 September 2015, on which (it appears) Rodney relies. Jane says that this is invalid on three separate grounds, any one of which would be sufficient. The first ground is that it does not comply with the rules for the due formality of a will, contained in section 9 of the Wills Act 1837. The second ground is that their father, William, did not have sufficient mental capacity to make a will at the time he executed it. The third ground is that the execution of the will by William was procured by either undue influence or fraudulent calumny. In short, this third ground of the claim is that *either* William's will was overborne by Rodney, *or* that William was deliberately persuaded by lies about others to make the will in the form he did, and to exclude Jane and her other siblings. Later on in this judgment, I will set out the relevant legal authorities containing the rules which I must apply in dealing with these various claims.

21. The second claim is quite different. It does not attack the 2015 will. Indeed, it is made only on the footing that the 2015 will is *valid*. So, if the first claim described above were to succeed, this second claim would not arise. The second claim is made by both Jane and Kevin, though each for his or her own account. What they both say is that, if the 2015 will is valid, it is not such as to make reasonable financial provision for them, given their own particular circumstances, both financial and personal. The concept of "reasonable financial provision" is a complex one, and depends on the terms of the Inheritance (Provision for Family and Dependants) Act 1975, and the subsequent cases which have interpreted it. Later in this judgment I set out the relevant terms of the 1975 Act, and refer to the relevant case law.

How judges decide cases

22. For the benefit of the lay parties concerned in this case I will say something about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. First of all, judges do not possess supernatural powers that enable them to divine when someone is mistaken, or not telling the truth. Instead, they take note of the witnesses giving live evidence before them, look carefully at all the material presented (witness statements and all the other documents), listen to the arguments made to them, and then make up their minds. But there are a number of important procedural rules which govern their decision-making, some of which I shall briefly mention here, because non-lawyer readers of this judgment may not be aware of them.

The burden of proof

23. The first is the question of the *burden* of proof. Where there is an issue in dispute between the parties in a civil case (like this one), one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. So, in relation to the Inheritance Act claim, the claimants must each prove their case, that the 2015 will (if valid) does not make reasonable financial provision for them. But, in relation to the probate claim, there are some special rules relating to the validity of wills. I will deal with these at the appropriate point in my judgment. For now, I will simply say this. A person who puts forward a will as valid must prove that it complies with the rules about formality, and that the testator had capacity to make it, and knew and approved its contents. Here the first claim is that the 2015 will is invalid. Rodney is the defendant to this claim. In substance, he is putting forward the 2015 will, and so the burden lies on him to show that it is valid. But in such cases there are certain presumptions that apply, and may assist him in doing so. I will explain these later. On the other hand, a person attacking a will on the grounds of undue influence (as the first claimant does here) must prove the undue influence. There is no relevant presumption to assist the first claimant.

24. The importance of the burden of proof is that, if the person who bears that burden satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen. The decision is binary. Either something happened, or it did not, and there is no room for 'maybe'. That may mean that, in some cases, the result depends on who has the burden of proof.

The standard of proof

25. Secondly, the *standard* of proof in a civil case is very different from that in a criminal case. In a civil case like this, it is merely the balance of probabilities. This means that, if the judge considers that a thing is *more likely to have happened than not*, then for the purposes of the decision it *did* happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did *not* happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical or scientific experts might be used to. However, the more serious the allegation, the more cogent must be the evidence needed to persuade the court that a thing is more likely than not to have happened.

Role of judges

26. Thirdly, in our system, judges are not investigators. They do not go looking for evidence. Instead, they decide cases on the basis of the material and arguments put before them *by the parties*. They are referees, not detectives. So, it is the responsibility of each party to find and put before the court the evidence and other material which each wishes to adduce, and formulate their legal arguments, in order to convince the judge to find in that party's favour. There are a few limited exceptions to this, but I need not deal with those here. In this case Rodney has chosen not to take part. That means that I cannot take into account anything which he might have wished to place before me, but has not done so.

The fallibility of memory

27. Fourthly, more is understood today than previously about the fallibility of memory. In commercial cases, at least, where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. This is not a commercial dispute, but a will and estate dispute. Nevertheless, it concerns money and property, in the way that many commercial disputes do, and there are a number of useful documents available. This is important in particular where, as here, the relevant facts occurred some years ago, and the memories of the witnesses available have been dimmed by the passage of time.

28. In deciding the facts of this case, I have therefore had regard to the more objective contents of the documents in the case. In addition to this, and as usual, in the present case I have heard witnesses (who made witness statements in advance) give oral evidence while they were subject to questioning. This process enables the court to reach a decision on questions such as who is telling the truth, who is trying to tell the truth but is mistaken, and (in an appropriate case) who is deliberately not telling the truth. I will therefore give appropriate weight to both the documentary evidence and the witness evidence, both oral and written, bearing in mind both the fallibility of memory and the relative objectivity of the documentary evidence available.

Reasons for judgment

29. Fifthly, a court must give reasons for its decisions. That is the point of this judgment. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. They deal with the points which matter most. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation. Put shortly, judgments do not explain all aspects of a judge's reasoning, and are always capable of being better expressed. But they should at least express the main points, and enable the parties to see how and why the judge reached the decision given.

Witnesses

30. In the present case I heard from the following witnesses: (1) Jane, (2) Kevin, (3) Robert Treve Temby (friend of Jane), (4) Gillian, (5) Andrew, (6) Gary Randall (the family company's accountant), and (7) Dr Andrew Barker (consultant old age psychiatrist). Obviously, I did not hear from Rodney himself, or from anyone called on his behalf. Having heard and seen these witnesses give evidence, I make these general comments. First of all, Mr Randall and Dr Barker were independent, professional witnesses, with no interest in the outcome of this case. They gave their evidence in a straightforward and open way. I accept entirely that they were telling me what they believed to be true, and were seeking to assist the court. Mr Temby is a friend of Jane's, and therefore less independent, but still without any financial interest in the outcome of the case. I found him to be an honest and completely transparent witness, who was telling me the truth as he understood it to be. Finally, although the remaining witnesses all stand to benefit if the probate claim succeeds, and are therefore very much not independent witnesses, I record that I consider that each of them was telling the truth so far as he or she knew it, and was trying to assist the court.

Facts found

31. On the basis of the evidence before me, I find the following facts. In 1958 William (who was born in 1932) and June (born in 1930) bought the property known as Drakelands, in Albaston, Gunnislake, Cornwall. This was a former mine captain's house with gardens, outbuildings and some five acres of arable land. I have seen photographs of the exterior of the property, and also some plans, which are in the bundle before the court. Originally, they bought it together with a friend called Tony Tremellen, but after a while they bought him out, and he moved to Wales.

32. Drakelands was William's and June's home thereafter, and the only home that their children would know before leaving to make their lives elsewhere. As I have said, William and June had six children, of whom the eldest, Timothy, unfortunately suffered from Down's syndrome. The evidence establishes that Rodney, the second-born, had a good relationship with his father, but a poor relationship with his mother, and they frequently clashed. As will appear from what follows, although Rodney moved away too, and married, he now lives at Drakelands.

33. William had been an officer in the British Army, serving in Eritrea, Suez and India. He attended university at the London School of Economics, and was articulate and

well able to reason and to express his own views. He was businesslike in dealings, and intended to start his own business. At the beginning, William and June grew fruit, vegetables and flowers on their smallholding. Then they moved on to growing mushrooms, using the outbuildings. Over time, that part of the business increased and eventually became its sole focus. By 1970, it employed 16 staff.

34. In April that year, however, William was involved in an incident at work in which he was seriously poisoned by organo-phosphorous compounds, and had to be admitted to hospital, where he remained for 14 months. In the meantime, June and the children had to carry on running the business. Although William's mental faculties were not damaged by this incident, and eventually he could walk and drive again, he never completely recovered physically. For the rest of his life he was physically frail, and needed regular medical attention, including frequent visits to hospital. I will deal in more detail with his health conditions later. In addition, he continued to look after himself, in particular by regular visits to the dentist, and regular home visits from a podiatrist and a hairdresser.

35. William's accident meant that his children had to take on greater roles within the business. Rodney helped to manage the business with William, Kevin looked after the paperwork and accounting functions, Andrew ran the composting yard and drove the lorry, Gillian was involved in marketing, packing and delivering mushrooms, but also arranging the weekly wages, invoicing customers and preparing monthly returns. Jane was involved in picking, packing and some deliveries. In 1974, William became a founder member of what later became the Federation of Small Businesses. He played a part in it at all levels for the next 36 years. As a result, he came into contact with politicians and civil servants, not only in the UK but also abroad.

36. Rodney left the business in 1982, though he returned in 1984. During his absence, Andrew took over his role. When Rodney returned, he took back his former position, and Andrew returned to his. On 19 November 1985, William and June instructed solicitors in Tavistock, and made mirror wills, whereby the first to die left everything to the survivor, subject to an IHT nil rate band gift to all the children except Timothy, but the second to die left everything to those five children in equal shares, and gave a pecuniary legacy to Timothy of a size intended not to interfere with his entitlement to social security benefits. William had been one of six children, and when his own father died he left his estate to his eldest son (not William), and this made William angry, so that he told Kevin that he would never do anything other than deal equally between his children. I note that, although Rodney had left the business for his own purposes, and then returned, he was treated in the mirror wills in the same way as the siblings who had continued to work in the business.

37. In 1986, Kevin ceased to work full-time for the business (though continuing part-time), branching out into property and financial services businesses. In 1997 Rodney left the business abruptly, after being discovered in an affair with one of the business's employees. In order to placate his wife and her family, he cut almost all contact with his own family for over 10 years. Andrew once again took over his role in the business.

38. Following these changes, Drakelands Produce Ltd was incorporated, and took over the business previously carried on by William and June in partnership with their

children. William, Kevin and Andrew were made directors of the company. Rodney was not. The shares in the company were held by William as to 26%, and as to 14.8% for each of the children except Timothy (so the absent Rodney was included). At about the same time, the business moved premises to a new business unit called Verbena which the family had bought in order to move to full-scale, industrial production. This involved the purchase of new equipment with concomitant financial obligations.

39. In 1999, Gary Randall became the company's accountant. He was introduced to William by Kevin. He got to know William well. He became involved with the Federation of Small Businesses at William's request. Although 1997 to 1999 were good years for production and profits, in 2000 crops were reduced because of competitive fungi. In 2001 pressure from an important customer persuaded the family to buy new specialist equipment to become a food processor rather than simply a grower. However, competition from overseas producers with lower overheads meant that the business lost customers and eventually began to incur losses. Ultimately the company was advised to and did stop trading. In December 2001, 53 staff were made redundant. In 2002, Verbena was sold, as were other fixed assets. At about the same time, William transferred his 26% shareholding to his five younger children, so that thereafter each of them owned 20% of the company's shares.

40. The company was left with the proceeds of these sales, but also creditors to pay. After debts were paid, the resulting balance was used to make loans to family members or their companies. One such was to KJR Synergy Ltd (a company which Kevin had set up with others in 1998), which was repaid with interest. Another was to a partnership of William, June, Andrew and his wife to enable a barn to be converted to residential accommodation. This loan too was repaid with interest.

41. In 2001, Jane moved back to live at the family home. Originally this was in a touring caravan parked at the site, but her parents subsequently suggested that she move into the barn opposite the back door of the house, which was then adapted for the purpose. She lived there until her father died in 2018. In 2003 Kevin and his then wife divorced. In 2007, Kevin and Andrew, together with a friend, set up South West Property Developments Ltd to take advantage of a planning opportunity. Drakelands Produce Ltd lent £100,000 to that company interest free. This loan was properly recorded in the accounts for Drakelands Produce Ltd, where it appeared as an asset of that company. Also in 2007, William's and June's eldest child Timothy, who as I have said suffered from Down's syndrome, tragically died.

42. In 2008, William asked Kevin to become involved with the Federation of Small Businesses. By 2010, Kevin had become Cornwall Regional Chairman. In 2009, Kevin remarried. The whole family attended except Rodney, who chose instead to attend the wedding of one of his wife's relatives. The same year, Rodney left his wife, and returned to his own family. At first, he moved in with Andrew and his wife for a short period. But, after they asked him to leave, he moved back into the family home with his parents (where he remains today). Initially, at least, Jane was pleased, because it meant that there was someone besides herself who was on hand to help with their parents if needed. Rodney then went through a divorce and hotly contested financial relief proceedings in which the court found in favour of his former wife.

43. On 2 October 2009, William and June once again made mirror wills, whereby the first to die left everything to the survivor, but the second to die left everything to the five surviving children in equal shares. This time solicitors were not involved. Kevin helped his parents with the preparation of these wills, by downloading a suitable precedent from a website. The will of June was in evidence before me. That of William was not, being in Rodney's possession, and he, taking no part in these proceedings, has refused to disclose it. But the evidence satisfied me as to its terms, and that it was properly executed. Again, I note that Rodney, though he had been absent from most of family life for more than a decade, and from the family business during its last five or so, was to be given an equal share with each of his other siblings. He already had an equal share of the company itself.

44. Given the allegations made in this case, it is necessary to say something more at this stage about Rodney. I had considerable evidence about him at trial, both from his siblings and from the other witnesses. However, as Rodney chose not to attend the trial, I had no opportunity to see him in person, and, as he chose not even to put in any evidence of his own, even in written form, no opportunity to hear his own views directly. On the basis of the material before me, I find that Rodney has an obsessive personality. He focuses on a single route and outcome in what he does. He thinks he is different from other people. He believes that his views are objectively correct, and is unable to accept any other point of view but his own.

45. He can be aggressive when he does not get his own way. I find, for example, that he shouted and swore violently at both June and William at various times in his life. He rejects authority, and asserts that no-one can tell him what to do. He claims to be "a freeman of the land", and is governed only by the contracts to which he consents. In particular, he asserts that he is not bound by civil law imposed from above. I assume that this is at least part of why he has taken no part in this litigation. Rodney is a constant You-Tube viewer (which is apparently where he came across the sticker that he now uses to return post). He believes in various "conspiracy" theories, such as that land fires in California were deliberate, intended to eliminate specific people, that the 9/11 terrorist attack was arranged by the United States government, that governments used aeroplanes to spread chemicals to control the civilian population, and that doctors were a scam and told lies to make money for themselves and the pharmaceutical companies. He once proudly told Treve Temby that he had refused to pull over for an ambulance flashing lights behind his car, in order to allow it to overtake.

46. June was two years older than William. She died first, on 15 October 2014. Her death had a profound effect on William. He struggled with both grief and depression. Even a year after her death, Jane found him holding a copy of the order of service for June's funeral and sobbing. Since Rodney was living in the house, he looked after William on a daily basis. He put William on the "Hay" diet, developed by the New York physician William Hay in the 1920s. He also started to wean William off the medication prescribed by his doctors for his various medical conditions. One of these drugs was omeprazole, a proton pump inhibitor, to prevent stomach acid reflux into the oesophagus. In 2015 Rodney persuaded his father to try drinking his own urine, and to purge himself with hydrogen peroxide. He stopped his father's podiatrist and hairdresser visiting the house, and stopped his father visiting the dentist.

47. He also used his father's money to buy a new car and a new television set for them, and other equipment and gadgets, such as two greenhouses, a tractor, chain harrows, a hedge cutter, two mobility scooters (the smaller of which William did use), a trailer, a massage chair, two laptops and an iPhone. In addition, on Jane's birthday in 2015 he bought a heat exchanger for the converted barn, and told her it was a gift from her father.

48. After June's death, William's personality changed. Instead of planning and organising everything, voicing his opinions and making decisions, he retreated into himself. He was June's executor, but made no decisions, leaving everything to Rodney. Kevin, who was named in June's will as substitute executor, was excluded. William became almost completely dependent upon Rodney, who controlled what he ate and drank, what medicines he took, and who had access to him. His dependency was such that, when Rodney was not present, he asked continually to know where Rodney was, and appeared lost if he did not know.

49. I should refer further to William's own health. The trial bundle contained a very large number of medical records, in addition to the expert report of Dr Andrew Barker, who reviewed them in preparing his report. William's long-term physical frailty, perhaps caused by the organophosphate poisoning in 1970, led to further health problems. He suffered from achalasia, a condition in which the lower oesophagus is too tense to allow food and fluid easily into the stomach. He had an operation to relieve this in 1989. He suffered from high cholesterol, high blood pressure, anaemia, atrial fibrillation and heart failure (which means only that the heart does not work efficiently, rather than that it does not work at all). These may have caused the cardiovascular problems which resulted in a heart attack in 2005, and following which he had two coronary artery stents implanted. He was diagnosed in 2010 with extensive small vessel arterial disease in the brain.

50. In 2014 he suffered a haemorrhage of unknown cause in the upper gastro-intestinal tract (*ie* the oesophagus). Endoscopies performed at that time showed oesophagitis (inflammation of the oesophagus lining) and Barrett's oesophagus (abnormal cell growth in the oesophagus), because of gastro-oesophageal reflux disease (GORD). In late 2014 William was concerned about his cognition. In April 2015 his gait had deteriorated. This may have been the result of a small stroke. In June 2015 he was anxious and emotional, and was still anaemic when he made his will in September. All this time, William was frequently in pain, kept under control by opiate analgesia (morphine sulphate), which can affect concentration. On post-mortem examination in 2018 there was evidence of several small strokes that had occurred some time earlier, but without indicating when.

51. Returning to the narrative, Rodney became very interested in what had happened to family assets during the years that he had exiled himself from his family. This manifested itself, for example, in an interest in what June had done with her own money. In 2005 June had given £15,000 to each of Kevin, Andrew, Gillian and Jane, as she understood that lifetime gifts were a way of avoiding inheritance tax if the payer survived sufficiently long. At that time Rodney, being estranged, had refused June's Christmas presents for his own children. Now, however, he was angry that he personally had not received what he referred to as a "payout" when his siblings did. He was also very interested in the family company and what had happened to its

assets after it ceased trading. He pored through the company's accounts. He began to make allegations against Kevin and Andrew about financial mismanagement of company assets.

52. Rodney was convinced that Kevin and Andrew had been guilty of fraud and embezzlement of company funds, and appeared to have persuaded William of this too. He spent considerable time questioning the company's accountants This cost the company money in professional fees. He closed the company's bank account, and transferred the funds to an account in William's name. He tried, unsuccessfully, to remove Kevin and Andrew as directors of the company. His concerns appeared to be (1) the loan to KJR Synergy Ltd, (2) the loan to the partnership (including William and June) to convert the barn, (3) the 2008 loan to South West Property Development Ltd, (4) the general diminution of the proceeds of sale of the company's fixed assets.

53. These matters came to a head in the summer of 2015. A board meeting was arranged for 17 June 2015, at which Rodney was able to present his concerns. Before the meeting took place, Andrew spoke alone to his father about the loan to South West Property Development Ltd. William told him that, as long as the capital was repaid, "it won't be a problem, if you manage a little bit of interest on top that would be great". Andrew and Kevin then agreed with their sisters Gillian and Jane that they would between them pay £114,490 (*ie* including interest of £14,490) to the company under a revised agreement. Andrew then went back to William to explain the revised agreement. By now, however, William had reverted to supporting Rodney's views. He told Andrew "If I don't go along with it, Rodney will leave me".

54. The meeting of the board of directors duly took place on 17 June 2015. In addition to William, Kevin and Andrew (the three directors), Gary Randall, the company's accountant, was also present. The meeting lasted between two and three hours. Rodney was also present, and explained all his concerns. Gary Randall then took Rodney through the company's accounts to show where all the company's funds had gone. The proceeds of sale were diminished by paying the company's outstanding debts at the time. So, the company's net worth did not change, though the cash at bank obviously went down by the amount of the debts discharged. The loans to KJR Synergy Ltd and the barn partnership had been repaid. The loan to South West Property Development Ltd was shown in the company's accounts as an asset of the company, that is, a debt due to the company. (To anticipate, it was eventually repaid in 2022.)

55. But Rodney could not understand how the proceeds from the sale of the fixed assets did not reflect in the value of cash at bank. The idea that the funds had been used to settle the company's liabilities was dismissed as a smoke screen. It was apparent to Mr Randall that Rodney had very little understanding of how company accounts worked and should be read. Indeed, he was unable to understand how Rodney could not follow the explanations given. The explanation that the loan to South West Property Development Ltd was included as an asset on the company's balance sheet made him agitated. He questioned why such matters had been allowed and threatened take the matter to court for resolution. However, what really surprised Mr Randall was William himself. First of all, during the whole meeting, he sat very quietly with his head bowed. Whereas once he would have been eager to voice his opinion, or even lead the discussion, here he was simply a passenger. Second, at the end of the

meeting, although William had always understood company accounts, he now commented that he found the whole thing very odd, and that did not think that Rodney's concerns had been properly addressed. He said to Andew and Kevin, who were walking him back to Rodney's car "You haven't heard the last of this."

56. Having seen the accounts in question, and having heard from Mr Randall, as well as from Andrew and Kevin, I am satisfied that in fact (1) the company's financial records and accounts were intact, (2) there was no evidence of any fraud or embezzlement by Andrew or Kevin, (3) some assets of the company had been realised and the proceeds used to pay genuine debts owed by the company (so that the net worth of the company remained unchanged), (4) the remaining assets of the company were all properly accounted for, and (5) the loan to Andrew and Kevin, which had been properly made, and properly recorded in the company's accounts, was still outstanding, but they did not have the cash to repay it, and so the only problem was how the company should manage that situation. Everything else was the result of Rodney's failure to understand the accounts and his animosity towards his brothers.

57. On 19 June 2015, Andrew wrote a handwritten letter to his father, in which he said that "Rod's behaviour is so bad and strange that he might need psychiatric help." He also said, "You are getting dragged along the same path". In July 2015 William telephoned Kevin. He told him that Rodney was a highly-qualified accountant, and that he (Kevin) needed to admit to his wrongdoing. There was a threat to involve the Serious Fraud Office. That was the last time that Kevin spoke to his father before he visited him in hospital just before his death in 2018.

58. Thereafter, William became increasingly isolated from the rest of his children. Rodney changed William's telephone number, and introduced a call screening service that in effect prevented the other children from speaking to their father. In addition, Rodney fortified Drakelands with extra security measures, such as locks, bolts, and welded gates, so that his siblings were in effect unable to visit. (He refused to take the advice of Treve Temby, a carpenter by trade, that he needed to brace the fortified gate, and as a result it later failed.) He also installed doorbells that did not work, no doubt to put callers off. Even Jane, who still lived there in the barn, now found that it was hard to see her father, as he stopped going into the garden, or to the barn to see he, but instead stayed in the living room of the barricaded house. Rodney refused to pay (or allow William to pay) the council tax on Drakelands in 2014-15. He believed that local authorities were paid money for every person that was born, and that therefore the council had already been paid for them. The council took legal action against William, although it appears that that action did not bear fruit, as the bailiffs were unable to gain access. Rodney similarly sought to prevent South West Water from gaining access to the property.

59. William became increasingly dependent on Rodney. On the rare occasions that any of his other children saw him, usually because Rodney was not around, his conversation would centre on where Rodney was, and how long it would be before Rodney came back. Once when Gillian visited him in Rodney's temporary absence, William was unable to turn on the new state of the art television that Rodney had bought with William's money, and said he just wanted his old TV back. Jane and Gillian offered to look after William while Rodney took a break, but Rodney refused.

60. In September 2015 Rodney took William to make a new will with Stephen Haggett of H&C Lawyers in Tavistock, a firm of licensed conveyancers and will writers. Mr Haggett is a Fellow of the Chartered Institute of Legal executives. Later, after William had died, Rodney told Gillian that three or four solicitors' firms in Tavistock had previously declined to take on the instructions, but did not explain why. The terms of the new will, executed on 15 September 2015, are described at [6] and [7] above. In substance, by comparison with the earlier wills, it disinherits William's children other than Rodney, who is left in control of what happens to Willliam's estate.

61. The instructions for the new will were first given on 9 July 2015, when Rodney took William to see Mr Haggett at his office. Rodney was present at the interview. Mr Haggett created an attendance note, and wrote a letter dated the same day, summarising the instructions given to him. Both note and letter are detailed, and cover the sort of ground that one would expect to see. The letter states that William was "concerned about [Andrew's and Kevin's] management of the company assets and had not ruled out taking some form of legal action", and that he now wanted "Rodney to receive the benefit of Drakelands", as well as "to leave [his savings] to Rodney, with him having the freedom to distribute part, or all, of these monies at his absolute discretion to, perhaps," Gillian and Jane.

62. In his attendance note, Mr Haggett recorded that William had explained to him that the company had held substantial cash reserves which had been unlawfully extracted by Andrew and Kevin. In addition … both Kevin and Andrew owed £100,000 to the company, which they had borrowed but lost "on a failed development venture." William went on to state "that they had evidence of this". (The word "they" in context appears to refer to William and Rodney.) The note continues with Mr Haggett "asking Rodney [who was present] if this was true. Rodney confirming."

63. Mr Haggett's letter of 9 July 2015 confirms to William a suggestion made at the meeting, that William's GP be asked to confirm William's capacity and to act as a witness. Mr Haggett's initial impression, stated in the attendance note, was that William had capacity to make a will, but that the presence of Rodney throughout "creates some suspicion", and he thought it would be necessary to see William alone and to obtain a "medical capacity report". The letter went on to outline two possible options for the will. The first was one leaving everything to Rodney outright. The second was what Mr Haggett called "a flexible protective discretionary trust," together with a letter of wishes. On 15 July 2015 William wrote back to Mr Haggett, saying that, of the two options, he preferred the flexible one and that he would write a letter of wishes "[i]n due course". He also said he would contact his GP and ask him "to vouch for [his] state of mind". On 23 July 2015, Mr Haggett replied, saying it would be useful to meet further, this time in the absence of Rodney.

64. On 31 July 2015, the further meeting between William and Mr Haggett took place, in the absence of Rodney (who brought him to the meeting). The interview was recorded, with William's knowledge, and a transcript of the recording was in the trial bundle. In that interview, which lasted about 1.25 hours, Mr Haggett asked William a large number of questions, and William replied to them. In his attendance note made afterwards, Mr Haggett said that he was satisfied that William had testamentary capacity according to the decision in *Banks v Goodfellow* (which he referred to by

name) and the mental Capacity Act 2005. It is apparent from the transcript, as well as from a supplemental attendance note made afterwards, that the recording ended abruptly, some time before the meeting had concluded. The attendance note goes on to record the matters discussed after the end of the recording. These were the letter of wishes and a possible lasting power of attorney.

65. The transcript of the second meeting says Mr Haggett asked William to explain why he wished to change his previous will. According to the transcript, William said:

> "The reason I want to do so is that Rodney has to look after me and has done so for several years now and he had done a darn good job of it and he takes me everywhere he is with every consultation I have from a medical point of view and he has sufficient knowledge to take in whatever the medics have to say and therefore you know I have great faith in Rodney in that if I left him in completely in charge he would be very fair with the other members of the family taking into account the way that they have behaved ... "

66. Mr Haggett referred to William's previous explanation for excluding Andrew and Kevin as being the way that they had handled the assets of the company. In answer, William said:

> "Let me take it from all the accounts right … All the accounts have disappeared they have gone."

67. Mr Haggett asked whether he meant the accounts prepared by the accountants, and William answered:

> "Yes they have all vanished all bank accounts vanished disappeared cheque stubs all gone Rodney when he joined when he first joined us after being away for some time he said this is crazy we had 40 years or so of being highly profitable everything going fine and then all of a sudden we find that there is nothing in the pot. I was asked by Andy and Kevin Kevin asked me if I would lend them £100,000 … £50,000 to invest in another company another business in Plymouth where they had the opportunity to build on it if they got planning permission and they had what three houses I think there which they were able to let anyway that hasn't been successful they could not get the planning permission that they were hoping for and at the moment both of them still owe Drakelands Produce Limited which is the name of the company £50,000 each of them owe plus a signed agreement at 7% interest well we were almost agreed to waive the interest charge as the interest already gone up to £30,000 for each of them so you know they thought this was terrible you can't do this we are family huge sums of money all gone … "

68. A little later William said:

> "You should know that this problem with the company and the finances are the finances are after all are I mean Drakelands Produce Ltd finances hundreds of thousands of pounds I'm not going to pin it down but hundreds of thousands of pounds have disappeared … "

69. Subsequently, Mr Haggett asked William about the two daughters:

> " … there doesn't appear from what you are saying to be any culpability on the part of your two daughters but you are excluding them."

70. William replied:

> "Well partly because I am very satisfied in the fairness of Rodney to do whatever I wish I'm sure of that and Gillian the eldest of the girls. She has now had her eyes opened on what's been going on and she can hardly believe it you know it's like that but the proof is therefore anybody who can understand it the proof is there but Jane on the other hand has taken sides … with the boys … Andrew and Kevin and she just doesn't want to hear any explanations she doesn't want anything more to do with it but even that is softening now because Gillian has talked to her and Gillian is more au fait with this sort of thing she was more understanding that she has explained to Jane what's been going on that changes the complexion of how much they have had from the family shareholders those shareholders should have had that money and it's been taken away from them so they will suffer that gives me a problem you see …"

71. Later in the interview, and somewhat presciently, Mr Haggett said this:

> "Now although I don't have doubts about your capacity I do think that this is very much a risk management issue and wherever I feel there is a risk of potential future dispute which is obviously going to arise after you are no longer with us. … Yes, I have got this tape recording which I can produce and yes I can produce my file notes but I am not going to be able to put you in front of the judge so I do feel that it is important and my recommendation would be is that we use at least your GP … and get him to actually witness your will and to confirm your capacity".

William readily agreed to this.

72. Towards the end of the transcript, Mr Haggett was asking William what kind of will he would like (*ie* simple will for Rodney or flexible discretionary trust). He had already explained the difference in some detail at an earlier stage. William said "I can't remember what the difference is," and asked Mr Haggett to set out the differences for him in writing. Mr Haggett responded by saying he could draft both and send them to William together with an explanatory letter, which "would then give you the opportunity to sit down and consider that and discuss it with Rodney if you thought that was appropriate". According to the transcript, William's reply was "Yep". And that is what Mr Haggett did.

73. On 7 August 2015, Mr Haggett wrote once again to William, enclosing a simple form of will, a flexible discretionary trust will, a draft letter to William's GP, and a draft property and financial affairs lasting property of attorney. The letter explained all these documents to William. There was then a further letter from Mr Haggett to William dated 20 August 2015, thanking him for confirming that he (William) wished to adopt the flexible discretionary trust will. Mr Haggett confirmed that he had written to William's GP, and that William should now make an appointment to see him to discuss mental capacity.

74. On 14 September 2015 William saw his GP, Dr Michael Iain Chorlton, who dictated a letter which was typed and sent the following day. The entry for that day on the GP record says:

> "Assess of mental capacity in accord Mental Capacity Act 2005 demonstrates see report".

The letter confirmed that in Dr Chorlton's opinion William had testamentary capacity. This letter stated his qualifications as the usual bachelor's degrees in medicine and surgery, and membership of the Royal College of General Practitioners, and his experience as a practising GP since 1997. He also had "past experience as a Section 12 approved Doctor with particular experience and expertise in mental health matters". He said that he assessed "mental states and mental capacity as part of [his] day-to-day work as a GP".

75. However, there was no evidence of any cognitive assessment having been undertaken, such as a mini-mental state examination (MMSE) or Addenbrooke's Cognitive Examination (ACE), and I find that none was. Nor was there any evidence of how William assessed the allegations against Andrew and Kevin, or how he justified excluding Gillian and Jane (against whom no allegations had been made) from benefit. I find that there was none. It appears that, on that day, 14 September 2015, the will was signed, at least by William. Dr Chorlton was one of the two witnesses whose signature appears on the will. The other was Mark Stone, a pharmacist. He gave the same address as Dr Chorlton, that is, the Gunnislake Health Centre (I may say that, to my untutored eye, the handwriting of the two addresses appears to have been made by the same person).

76. The testimonium (attestation) clause in the will, with William's signature on the right hand side, and under which the witnesses' signatures are placed, reads:

> "SIGNED by the said William Michael Lewis Oliver as his last Will and testament in the presence of us both present at the same time who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses".

As I know from my own professional experience, this is a fairly standard form of such a clause.

77. There is a puzzling note on the GP file, dated 18 September 2015 and made by Dr Chorlton, although it refers to "Telephone", so it is not clear whether it was made by him in person, or remotely, or by someone else at his direction. The note reads:

> "Administration NOS need signature on original to be signed will drop off needs same witness who is not in until Monday".

The claimants suggest that this refers to Mr Stone, and means that he did not sign the will at the same time as William and Dr Chorlton. There is no explanation of the abbreviation "NOS". Whilst I agree that it is clear enough that something needs a signature, and that it cannot be signed until the following Monday, *ie* 21 September 2015, it is not clear what the something is, or whose signature is needed. Given the use of the word "witness", I am prepared to infer that it is more likely than not the

will which is being referred to, as there is no other document which requires a witness which can plausibly be suggested in this context. That means that there is some evidence that one or other of the witnesses to the will did not sign the will on 14 September 2015.

78. (For completeness in relation to Dr Chorlton's letter of 14 September, I add that the reference to "a Section 12 approved Doctor" is one to a registered medical practitioner who is approved under section 12 of the Mental Health Act 1983, as having special experience in the diagnosis or treatment of mental disorder, for the purpose of making a medical recommendation for the compulsory admission of a patient under Part II of that Act. That is not, of course, experience in relation to testamentary capacity, and the deterioration of mental capacity over time, such as an old-age psychiatrist deals with. If Dr Chorlton also had that experience, he does not say so in terms.)

79. I should refer also to the letter of wishes addressed to the trustees of the will, which is also dated 14 September 2015, and which William signed in connection with the will. It is clear that the original draft of Mr Haggett, based on what he had been told by William in the interview with him, was significantly amended before the final version was produced, in particular by removing some of the allegations made against Andrew and Kevin. I cannot believe that William would have done this without Rodney's knowledge and consent. In all the circumstances, it seems to me more likely than not that Rodney decided what amendments should be made.

80. At all events the letter refers to all of William's five surviving children, including Rodney "who lives with me at home and does everything for me". It says that William wishes to change his existing will "leaving everything to Rodney", and that he has "no doubt that June would have fully supported this decision" (even though, as I have held, June and Rodney had had a poor relationship). He goes on to say that this "results from wider tensions and disharmony within the family." He then explains that the business he founded and the company which took it on "over time … ceased to be financially viable owing to overseas competition".

81. The letter then says that

> "Over the last few years serious misgivings have arisen concerning the handling of the company's assets. I have been unable to obtain from Andrew and Kevin satisfactory answers to these misgivings. The financial loss to the company can be measured in many thousands of pounds.
>
> This has also caused disquiet with my daughters.
>
> It is therefore my wish to leave the whole estate to Rodney with considerable flexibility to do what he feels right. This may include the flexibility to make some limited provision for, perhaps, my daughters, but equally I would be totally happy for him to receive everything outright."

82. On 16 September 2015, two days after making the will, William, Rodney, Gillian and Jane signed a typewritten letter to Andrew, referring to the loan of £100,000 that the company had made to Andrew and Kevin, though it treated this as a loan of £50,000 to each of them. It said:

"We would be prepared to settle this by you relinquishing your shares to W Oliver as part payment and the balance outstanding to be paid from the sale of your properties in Plymouth or by other means.

We estimate that each shareholding value to be £20,000.00 based on Kivells valuation market appraised and expected return in the event of a sale, after costs.

The loan value of £30,000 plus interest from February 2008 to the date of acceptance of this offer will be applied and then interest on any balance outstanding to be applied until the loan is repaid.

At the date of acceptance of this offer and transfer of shares a reduction of £20,000 would be applied to the balance outstanding to take into account the shareholding handed over to W Oliver.

The original terms of the loan signed up to by you was 7% annual interest. As a gesture of good will we would be prepared to substantially reduce this to 4% for the period of the outstanding loan to date of acceptance of this offer.

From the acceptance of this agreement the loan will be subject to a variable interest rate and initially set at 4%. Any increase in the rate will be a reflection of changes to bank rates or breach of contract. From October 2017 the interest rate will revert back to 7% variable, the same terms.

From the date of acceptance, monthly interest payments are to be made by direct debit to cover the interest charges in advance. This agreement would also need to include Kevin and therefore the same terms would have to be applied.

As you are aware there is an outstanding bill from Prydis for which is enclosed their demand for payment.

You should also be aware that in accordance with your original loan contract any expenses related to this loan agreement date are yours and Kevin's personal responsibility. On acceptance of this offer we would assume responsibility for this.

In the light of all that has transpired this is a very fair offer giving you substantially cheaper borrowing than any other source, and in the hope of restoring valuable family unity, integrity and self-respect it is essential that this offer is accepted and fulfilled.

Below is a summary of the approximate figures based on acceptance of this offer by October 2015.

Total amount of loan	£100,000
Loan amount plus compound interest at 4% to October 2015	£134,663.67
Less shareholding value	£40,000
Balance	£94,663.67

> The monthly interest charge at 4% will be set at £315.55
>
> A new contract will be drawn up with terms similar to the original contract to be signed by you and Kevin and witnessed by all members of the family.
>
> We have discussed this offer and the content of this letter with Gillian and Jane and they have both endorsed it in full.
>
> We trust you will accept and embrace this offer wholeheartedly for the good of us all.
>
> If for some obscure reason this offer is not adopted than the original agreement still stands and we demand monthly interest payments to be paid on the calculated balance with immediate effect. Also a timeframe for repayment of the loan in full will be set as October 2017.
>
> This is the decision of the members as witnessed below.
>
> We look forward to your agreeable reply.
>
> Yours truly
>
> WML Oliver
>
> RW Oliver
>
> GL Oliver
>
> J Oliver
>
> Please reply by Monday 21st September or attend emergency meeting of members to be held at Drakelands on Monday 21st September at 7 pm to remove A Oliver and K Oliver as directors as their positions and are redundant and untenable."

83. I accept the evidence of Gillian and Jane that at the time of this letter they did not know of the will of 15 September. Indeed, they did not know of it until after William's death, some years later. It is also clear from the letter itself that they did not draft this letter, but rather were presented with it and were asked to sign it. As between William and Rodney I am in no doubt, from the way it is drafted, that it was written by Rodney. It is an extraordinarily formal, *faux*-legal, but ungrammatical document, which I cannot accept that William would ever have wished to send to two of his children. It smacks of self-righteous retribution, which was simply not him. The Prydis invoice, for example, was always the company's responsibility. But the need for the work was caused by Rodney's own unmeritorious complaints. How Andrew's and Kevin's accepting this offer would restore "valuable family unity, integrity and self-respect" when William had just made a new will disinheriting four of his five remaining children was not explained.

84. It is however very telling that, despite the terms of the letter, and of all the suggestions made of legal action and criminal investigation, once the will was made nothing further happened. In 2022 the outstanding loan was finally repaid.

85. On 15 April 2018, William had a fall at home. Rodney found him on the floor, and shouted for Jane, who responded. William told Jane "I'm in bed," which puzzled her. They helped him up to an armchair. William was disoriented, and Jane would have called a doctor, but Rodney said not to, but instead to see how he went. In fact, the next day Rodney himself called William's GP, Dr Buxton, who attended. The doctor said he could not understand why an ambulance, or at least a doctor, had not been called the previous day. William was diagnosed as suffering from bronchopneumonia and possible metabolic disturbance, and was taken by ambulance to Derriford Hospital in Plymouth, where he was admitted, being subsequently transferred into a ward on 19 April 2018. He remained there until his death on 25 May 2018.

86. In the period from William's admission on 17 April 2018 until 22 April 2018 Rodney was with William in hospital almost constantly, staying all hours, and indeed overnight. Jane and Gillian visited least every other day. Kevin was reluctant to visit William in the early part of his stay in hospital, because he (Kevin) then had a heavy cold. Instead, he telephoned the nurses daily for information. Andrew visited every day. Rodney would be present at William's bedside when Andrew arrived, but would leave Andrew alone with their father.

87. Rodney was aggressive and obstructive towards the staff, particularly the nurses. He insisted on interrupting the nurses in their care of other patients to discuss William. He complained about the administration to William of a laxative for constipation. He tried to prevent the hospital from giving William an echocardiogram to check heart function. He tried to prevent a nurse called Sadie (who provided a detailed statement to the inquest covering some of William's stay) from administering ranitidine, also known as Zantac, which, like omeprazole, reduces stomach acid production, and also intravenous antibiotics. He refused to allow night staff to reposition William, so that he lay in his bed in one position for prolonged periods. On one occasion he refused to allow staff to take clinical observations. He tried to prevent them from giving William anything to drink. William would accept drinks from the nurses (and his other children) and drink happily, when Rodney was not there, but refuse when he was.

88. There was a safeguarding alert in place, on the basis that a "relative" (unnamed) was giving hydrogen peroxide and urine to William to drink. The clinical staff became aware from early on that Rodney was doing this. They found urine in containers in a bag on the ground next to William's bed. Nurse Sadie also found that William's urine output was unusually low and asked Rodney if he had taken any. Rodney said No. On 19 April 2018 William was assessed as having capacity to make decisions. Andrew also realised that Rodney was giving William urine to drink, and told the nurses. They said that since William had capacity and agreed to it there was not much they could do. The skin on William's heels was found to be necrotic. It appeared to the nurses to have been cut. On being asked how he acquired the wounds on his feet, William told a nurse (Florencia) that they were done on purpose.

89. On 22 April, Rodney was arrested by police after admitting that he had administered hydrogen peroxide to William, and injected urine into William's catheter. As a result

he was barred from the hospital. Because Gillian and Jane had been seen by the nurses talking to Rodney (and were his sisters), they were treated with some suspicion, and were allowed to visit William only under the supervision of a security guard. They resented this, but in the circumstances I do not think the hospital was wrong to put William's interests first when the full facts were not yet known. Rodney tried to persuade his sisters to take hydrogen peroxide in to the hospital, with which to dose their father. To keep him quiet, they took it to the hospital, but left it in the car. Once Rodney was no longer allowed to visit, Andrew and Kevin visited more easily. The evidence shows that William's mood improved in the absence of Rodney. Unfortunately, his health deteriorated, and he died on 25 May 2018.

90. The unusual, even chaotic circumstances of William's admission to, and Rodney's being barred from, the hospital led to a referral of his death to the coroner. As a result, there was an inquest into William's death, following a "special" post-mortem examination of his body and a separate examination by a neuropathologist of his brain, and a toxicological analysis of blood and vitreous humour. The toxicology was limited and unremarkable, save for a slightly raised paracetamol level in the blood, which was not considered relevant to the cause of death. The brain examination produced neuropathological findings (in summary) of

> "1) Moderate Alzheimers' disease pathology.
>
> 2) Old ischaemic injury to right cerebral hemisphere.
>
> 3) Evidence of old subdural haemorrhage."

91. The body autopsy lasted about three hours (far longer than an ordinary post-mortem examination). It included both a detailed examination of the exterior of the body, and an internal examination of the major body cavities and the major organs. It revealed a number of matters. One was that the hair on William's head measured approximately 14.5 cm, long for an elderly Englishman. Another was that William's natural teeth were in poor condition. A third was that William's fingernails were long and a little dirty, but neatly trimmed. Internally, William's oesophagus was markedly dilated, and there was extensive ulceration in the lower oesophagus, with a central full thickness perforation into the right pleural cavity (the space between the right lung and the chest wall). An examination of tissue samples from his lungs showed the presence of bronchopneumonia (as originally diagnosed by the GP, and which led to his removal to hospital). There was however no evidence of septicaemia, despite a number of blood cultures being performed, and so there was no unequivocal evidence that the imbibing or injection of urine played any role in the death.

92. The conclusion of the forensic pathologist after taking into account her own examination of the body, that of the brain by the neuropathologist, and the toxicology and microbiological reports, was:

> "1a Complications of perforated oesophageal ulcer
>
> 2 Ischaemic heart disease."

The conclusion of the coroner as to the medical cause of death, after hearing the evidence at the inquest, followed that of the forensic pathologist. As a former coroner,

I know that this conclusion means that William died from the consequences of a perforated ulcer in the oesophagus, the feeding tube that leads from the throat to the stomach, but that his ischaemic heart disease *contributed* to the death, whilst not forming part of the sequence of events that led directly to the death.

93. Ischaemic heart disease (sometimes called coronary heart disease) is the name for the medical condition caused by narrowed heart arteries, which prevent the heart getting enough blood and therefore oxygen to work properly. The narrowing is usually caused by the build-up over time of atherosclerotic plaque in the arteries. This would have made William less able to cope with the effects of a perforated ulcer in the oesophagus (or indeed any other medical emergency). I have already found that one of the medicines which Rodney stopped William from taking some years earlier was designed to prevent stomach acid reflux into the oesophagus. Such reflux can lead to an ulcer in the oesophagus, just as acid leaking down into the duodenum (the first part of the intestine) can cause a duodenal ulcer. However, there is no sufficient evidence before me to enable me to make a finding as to the cause of the oesophageal ulcer that caused William's death.

94. However, the coroner added to this conclusion a short narrative (as she was entitled to) stating that William

> "died from complications arising from a perforated oesophageal ulcer where the full circumstances surrounding this remain unclear".

I can well understand that the coroner, having reached the conclusion that she had on the medical cause of death, should have wished to point out that the circumstances surrounding what happened in hospital were then unclear. She would have been concerned not to prejudice any criminal proceedings that might have been considered. As it happens, no such proceedings were ever instituted. One thing that is odd is that, so far as I can see, none of the hospital clinical records or statements (including the statement of nurse Sadie) refers to the possibility of an oesophageal ulcer, though Sadie *does* refer to William's gastro-oesophageal reflux disease. They were treating him in hospital for pneumonia and hyponatremia (low level of sodium in the blood). He certainly had both of these on admission (the sodium level found on post-mortem toxicology was slightly below normal, but levels may fall after death). But I have not heard from any hospital witnesses who could have been asked about this, and it is not necessary for the purposes of this litigation that I deal with it.

95. For the purposes of the present probate claim, Dr Andrew Barker was asked to review the medical records available in relation to William (which fill a separate volume in the trial bundle before me), as well as the witness statements, and to prepare a report on William's capacity to make a will in September 2015. He did so. It is dated 16 May 2024, and I have read it. I have already summarised his views in dealing with William's general state of health, above. I also had the benefit of hearing from him at the trial, and of questioning him upon it. As frequently happens in these cases, Dr Barker did not examine William in life, and he is relying on the records of others. Everything is done at one remove. But we must all do the best we can in the circumstances. The indirect nature of the evidence goes to its weight, and not to its admissibility.

96. Before me, Dr Barker's evidence was that, on reviewing the available material (including the witness statements as well as the medical records), at the time of making the 14 September 2015 will, in his opinion, William would have been able to understand the nature of making a will and its effects, and in broad terms the extent of the property of which he was disposing. However, it was doubtful that he would have been able to understand and appreciate the claims to which he ought to give effect. This is because his own views about the potential beneficiaries (his children) were poorly reasoned and could not be challenged. His reasoning was inadequate because he was unable to weigh relevant information, that would have affected his decision-making process.

97. In his view this was probably the result of vascular cognitive impairment. Brain arterial disease can affect so-called "executive functioning", carried out in the front part of the brain, that is, the ability to organise and co-ordinate different cognitive abilities, such as planning, organisation and social engagement. This is quite different from language and memory functions, which are typically those affected by dementia, such as Alzheimer's disease. According to Dr Barker, executive functioning is notoriously difficult to assess, especially with someone as well-presented and well-spoken as William. The medical evidence in the present case is not enough by itself. It is therefore necessary to take account of the other evidence, such as when Gary Randall referred to William as "a shadow of his former self".

98. His opinion also was that William would have been vulnerable to influence from third parties (*eg* Rodney), because of his physical frailty, emotional vulnerability, cognitive impairment, social isolation, and physical and mental dependence on the primary beneficiary of the new will.

Law

Probate claim

99. Section 9 of the Wills Act 1837, as amended in 1982, provides as follows:

> "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."

100. It is clear that the witnesses must be both present when the testator signs or acknowledges his or her signature, and the testator must be present when each of the witnesses signs or acknowledges his or her signature. Of course, where there is an attestation clause, that may state the order in which events are said to have occurred. But, as the section itself expressly says, no form of attestation is actually *necessary*.

101. A leading practitioner textbook on this area of the law, *Theobald on Wills*, 19th ed, [3-033], states:

> "The presumption that everything was properly done (*omnia rite et solemniter esse acta*), arises whenever a will, regular on the face of it and apparently duly executed, is before the court, and amounts to an inference, in the absence of evidence to the contrary, that the requirements of the statute have been duly complied with."

102. Even where there is evidence to the contrary, the presumption may still prevail. In *Wright v Rogers* (1869) LR 1 PD 678, Lord Penzance said (at 682)

> "The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed."

103. A more modern decision to the same effect is that in *Sherrington v Sherrington* [2005] EWCA Civ 326. There, Peter Gibson LJ, giving the judgment of the court (himself, Waller and Neuberger LJJ) said:

> "42. It is not in dispute that if the witnesses are dead, the presumption of due execution will prevail. Evidence that the witnesses have no recollection of having witnessed the deceased sign will not be enough to rebut the presumption. Positive evidence that the witness did not see the testator sign may not be enough to rebut the presumption unless the court is satisfied that it has 'the strongest evidence', in Lord Penzance's words. The same approach should, in our judgment, be adopted towards evidence that the witness did not intend to attest that he saw the deceased sign when the will contains the signatures of the deceased and the witness and an attestation clause. That is because of the same policy reason, that otherwise the greatest uncertainty would arise in the proving of wills. In general, if a witness has the capacity to understand, he should be taken to have done what the attestation clause and the signatures of the testator and the witness indicated, viz. that the testator has signed in their presence and they have signed in his presence. In the absence of the strongest evidence, the intention of the witness to attest is inferred from the presence of the testator's signature on the will (particularly

where, as in the present case, it is expressly stated that in witness of the will, the testator has signed), the attestation clause and, underneath that clause, the signature of the witness."

104. It may also be noted that, at [67], the Court of Appeal accepted that, where the presumption of due execution applied, it would presume the signature (or acknowledgment of the signature) of the testator and the attestation of the witnesses to have taken place in the correct order.

Testamentary capacity

105. In *Hughes v Pritchard* [2022] EWCA Civ 386, Asplin LJ (with whom Moylan and Elisabeth Laing LJJ agreed) said

> "62. Both the trial and the appeal before us proceeded on the basis that the test for whether a testator has sufficient testamentary capacity to execute a will remains that set out in *Banks v Goodfellow* (1870) LR 5 QB 549, per Cockburn CJ at [565], which is as follows:
>
> > "It is essential … that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison his affections, avert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made."
>
> It was not suggested either by Miss Reed, on behalf of Gareth, or by Mr Troup, for Gwen and her sons, that that test does not survive the Mental Capacity Act 2005 and we did not hear any substantive submissions on that issue."

I will proceed on the same basis.

106. As for the burden of proof, I was referred to the decision of HHJ Norris QC (as he then was) in *Ledger v Wootton* [2007] EWHC 90 (Ch), [2008] WTLR 235, where he said:

> "5. The principles of law which underlie my approach to the question of capacity may be stated as follows:-
>
> (a) The burden is on the propounder of the Will to establish capacity;
>
> (b) This remains the case even if the propounder has already obtained a grant in common form: see *Halsbury's Laws of England* (4th ed) Vol 17(2) paragraph 269 n.6;
>
> (c) Where a Will is duly executed and appears rational on its face, then the Court will presume capacity;

(d) An evidential burden then lies on the objector to raise a real doubt about capacity;

(e) Once a real doubt arises there is a positive burden on the propounder to establish capacity … "

107. The judge considered the evidence in the case, and concluded:

"12. Accordingly the Claimant's factual and expert evidence as a whole has in my judgement raised a sufficiently substantial objection to throw upon those who propound the Will the burden of adducing evidence positively to establish capacity. As Mr Burton correctly submitted, the Defendants have pleaded no affirmative case as to the validity of the Will and have adduced no evidence …

13. On this state of the evidence I am compelled to hold that the Deceased lacked capacity at the date of the Will. It follows that I must pronounce against the Will … "

108. In *Clitheroe v Bond* [2021] EWHC 1102 (Ch), Falk J dealt with the question of what amounted to an insane delusion within the third limb of the *Banks v Goodfellow* test. She said:

"102. I agree that, for a delusion to exist, the relevant false belief must not be a simple mistake which could be corrected. It must be irrational and fixed in nature. I also agree that it should be out of keeping with the person's background. Where the belief is as obviously extreme and irrational as the kind in question in *Smith v Tebbitt* it is unlikely to be difficult to demonstrate that it amounts to a delusion. Where a belief does not fall into that category, one way of demonstrating that it amounts to a delusion – and indeed the obvious way in many cases – is to show by evidence that the individual could not in fact be reasoned out of it. It is not surprising that the clinical test focuses on this for that reason, and also because it is a matter which can be tested with a live patient. However, as *Smith v Tebbitt* shows it is not an essential ingredient of the test. Rather, it is a means of demonstrating evidentially that the test is satisfied. Another way, which is relevant in this case, would be if it could be shown that the belief was formed and maintained in the face of clear evidence to the contrary of which the individual was plainly aware (the 'proof' referred to in the Haggard report of *Dew v Clark*), such that there is no sensible basis on which to conclude that the individual was simply mistaken or had forgotten the true position, as opposed to being delusional. A further alternative would be to demonstrate that the individual had no basis on which they could rationally have formed and maintained the mistaken belief. The key question in each case is whether the relevant irrational belief is fixed."

Undue influence and fraudulent calumny

109. In *Edwards v Edwards* [2007] EWHC 1119 (Ch), the claimant alleged that his late mother changed her will because of undue influence exerted upon her by the first defendant. Lewison J said:

"42. 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."

110. In *Rea v Rea* [2024] EWCA Civ 169, the judge at first instance had set aside the will of the testatrix, on the grounds of undue influence practised by her daughter. She appealed to the Court of Appeal, which allowed the appeal. Newey LJ (with whom Moylan and Arnold LJJ agreed), without referring to the judgment of Lewison J in *Edwards v Edwards*, said:

> "32. … I would accept that undue influence can be proved without demonstrating that the circumstances are necessarily inconsistent with any alternative hypothesis. On the other hand, the circumstances must be such that undue influence is more probable than any other hypothesis. If another possibility is just as likely, undue influence will not have been established. When making that assessment, moreover, it may well be appropriate to proceed on the basis that undue influence is inherently improbable."

111. At first sight, this appears to be inconsistent with point (iii) of the summary of the law given by Lewison J. I respectfully doubt that that was the intention of Newey LJ. If a matter is shown on the evidence to be more likely than not, then for the purposes of the decision it is a fact, even though there is a significant possibility (but not probability) that it never happened. That necessarily follows from the standard of proof in civil cases. When Lewison J said "What must be shown is that the facts are inconsistent with any other hypothesis" he was speaking of showing something on the balance of probabilities. That is why I understand Newey LJ to have said "the circumstances must be such that undue influence is more probable than any other hypothesis". If undue influence is more probable than any other hypothesis, then it is the fact, and it is necessarily inconsistent with any other hypothesis, since that other hypothesis cannot be "more probable". I do not think it is necessary to deal with this point any further for the purposes of this case.

112. Finally, in *Schrader v Schrader* [2013] WTLR 701, Mann J said:

> "96. It will be a common feature of a large number of undue influence cases that there is no direct evidence of the application of influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop its being proved. The proof has to come, if at all, from more circumstantial evidence … "

Inheritance Act claim

113. The relevant provisions of the Inheritance (Provision for Family and Dependants) Act 1975 are as follows:

> "1. (1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons:—
>
> […]
>
> (c) a child of the deceased;

> […]
>
> (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

(2) In this Act 'reasonable financial provision'—

> […]
>
> (b) in the case of any other application [i.e. other than by a spouse or civil partner] made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

2. (1) Subject to the provisions of this Act, where an application is made for an order under this section, the court may, if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders:—

> (a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;
>
> (b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;

3. (1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say—

> (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
>
> (b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;
>
> (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

> (d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;
>
> (e) the size and nature of the net estate of the deceased;
>
> (f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;
>
> (g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.
>
> […]
>
> (3) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) or 1(1)(d) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained…
>
> (4) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(e) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard—
>
> (a) to the length of time for which and basis on which the deceased maintained the applicant, and to the extent of the contribution made by way of maintenance;
>
> (b) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant.
>
> (5) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.
>
> (6) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities."

114. In the recent decision of *Miles v Shearer* [2021] EWHC 1000 (Ch), claims were made by emancipated adult daughters of a testator who after divorcing their mother had remarried and left his estate to his second wife. He said he was doing this because he had made provision for them in his lifetime. Sir Julian Flaux C said:

> "76. The statutory framework thus involves two questions: (1) has there been a failure to make reasonable financial provision and, if so, (2) what order ought to be made? However, there is in most cases, including this one, a very large degree

> of overlap between the two questions, not least because, in setting out the factors to be considered by the Court, section 3(1) of the 1975 Act makes them applicable equally to both questions. The correct approach is set out by Lord Hughes JSC giving the leading judgment in the Supreme Court in *Ilott v Mitson (No 2)* [2017] UKSC 17; [2018] AC 545 at [23]-[24] … "

115. In the old case of *Re Dennis* [1981] 2 All ER 140, 145-146, Browne-Wilkinson J said:

> "The applicant has to show that the will fails to make provision for his maintenance: see *In re Coventry* [1980] Ch 461. In that case both Oliver J at first instance and Goff LJ in the Court of Appeal disapproved of the decision in *In re Christie* [1979] Ch 168, in which the judge had treated maintenance as being equivalent to providing for the well-being or benefit of the applicant. The word 'maintenance' is not as wide as that. The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach. But in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure. Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable him to continue to carry on a profit-making business or profession may well be for his maintenance."

116. That statement was approved by Lord Hughes (with whom the other six judges agreed) in *Ilott v Mitson (No 2)* [2018] AC 545, [14], and cited with approval by Sir Julian Flaux C in *Miles v Shearer* [2021] EWHC 1000 (Ch), [79].

117. So far as concerns the position of an emancipated adult child of the deceased, living away from home in his own establishment, in *Re Coventry* [1980] Ch 461, 475, Oliver J (as he then was) said:

> "It cannot be enough to say 'here is a son of the deceased; he is in necessitous circumstances; there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant.' There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made."

118. In *Ilott v Mitson (No 2)* [2018] AC 545, Lord Hughes quoted this passage, and said:

> "20. Oliver J's reference to moral claim must be understood as explained by the Court of Appeal in both *In re Coventry* itself and subsequently in *In re Hancock*, where the judge had held that there was no moral claim on the part of the

> claimant daughter. There is no requirement for a moral claim as a sine qua non for all applications under the 1975 Act, and Oliver J did not impose one. He meant no more, but no less, than that in the case of a claimant adult son well capable of living independently, something more than the qualifying relationship is needed to found a claim, and that in the case before him the additional something could only be a moral claim. That will be true of a number of cases. Clearly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act."

Application of law to facts

Probate claim

119. First of all, there is the question whether the 2015 will was properly executed in accordance with the statutory formalities. I have found that the 2015 will contains the usual testimonium clause, and that it appears to be regularly signed by William and the two witnesses. The clause says that both witnesses signed in William's presence and in the presence of each other. As against that, there is the puzzling note on the GP file of 18 September 2015, referring to the need for a witness to sign an unspecified document, which I infer was this will. The note suggests therefore that the will was not signed by both witnesses on 14 September.

120. I referred above to section 9 of the Wills Act 1837, the textbook *Theobald on Wills*, the decisions of Lord Penzance in *Wright v Rogers* (1869) LR 1 PD 678 and of the Court of Appeal in *Sherrington v Sherrington* [2005] EWCA Civ 326. The two court decisions make clear that, where there is a properly drafted testimonium clause (as there is here) and the will appears regular on the face of it (as it does here), there arises a presumption of due execution, which can be rebutted only where the court is satisfied that it has 'the strongest evidence' that what is stated in the clause to have happened did not in fact happen. That is far from the case here. This rule is required because, as the Court of Appeal said, "otherwise the greatest uncertainty would arise in the proving of wills". In my judgment, the presumption of due execution does arise here, and, because I do not have sufficient evidence of what happened, it is not rebutted. Accordingly, I proceed on the basis that the will was duly executed in accordance with the law.

121. On the other hand, in my judgment, on the evidence in the present case, on 15 September 2015 William did not have testamentary capacity. The claimants accept that he satisfied the first two limbs of the test of *Banks v Goodfellow* which, compared to the third and fourth, are not that demanding. The contest is as to the third and fourth. As stated by HHJ Norris QC in *Ledger v Wootton* [2008] WTLR 235, [5], the burden of proving the substantive validity of the 2015 will lies on Rodney. But capacity will be presumed in the case of a properly executed will which is rational on the face of it, unless the claimants raise a real doubt about capacity. If they do, then Rodney must prove capacity.

122. In my judgment, as to the third limb, the claimants have raised more than a real doubt. Indeed, I am satisfied that William was in no position to understand and appreciate the claims to which he ought to give effect. This was because he had real cognitive problems. Firstly, he was unable properly to weigh relevant information that would have affected his decision-making process. Secondly, he understood everything only

through the prism of Rodney's point of view. Consequently, his own views about his children (who were the potential beneficiaries) were ill-reasoned. Thirdly, he ceded (or attempted to cede) all decision-making to Rodney.

123. He was thus unable to see, as once he would have been able to see, and even despite the copious assistance of Mr Randall, who after all was *the company's* accountant, that Rodney's complaints about the company's accounts, and about Andrew's and Kevin's actions, were (as I have held) fantasy and nonsense. His explanation to Mr Haggett as to why he should depart from his wish previously expressed (in strong terms) to leave his estate to his children in equal shares was that he was "concerned about [Andrew's and Kevin's] management of the company assets and had not ruled out taking some form of legal action". That is predicated entirely on his failure, despite considerable explanation of what, after all, was very simple accounting, to understand what in fact *had* happened.

124. Moreover, he was blinded by his reliance on Rodney to the claims of his daughters, who had even not been part of the (imaginary) wrong done by Andrew and Kevin, but (as shown by the letter of 16 September 2015) had actually been dragooned into Rodney's camp. Indeed, in his interview with Mr Haggett on 31 July, William had actually distinguished Gillian and Jane from each other, on the basis that Gillian now understood and agreed with Rodney's complaints, whilst Jane sided with Andrew and Kevin. Nevertheless, he excluded the claims of both. He also appears not to have recognised that Jane was then and had for many years been dependent upon him at least for her accommodation. These are not the actions of a man who is able to appreciate the claims of his children to inherit from him.

125. In my judgment, William also fails the test for testamentary capacity under the fourth limb in *Banks v Goodfellow*. This is

> "that no disorder of the mind shall poison [the testator's] affections, avert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made."

Whereas the first three limbs are concerned with the natural abilities which a testator possesses, the fourth is concerned with mental disorder, *ie* illness affecting a person who otherwise would have sufficient capacity.

126. I have found that William had long been suffering from ischaemic heart disease, resulting to a reduction in oxygen available to his organs, including the brain. The post-mortem examination of his brain showed "Moderate Alzheimers' disease pathology" and "Old ischaemic injury to right cerebral hemisphere" (in layman's terms a stroke). In addition to strokes and brain arterial disease, his records show a long history of various conditions, including high cholesterol, high blood pressure, anaemia, atrial fibrillation and heart failure, as well as reliance on opiate analgesia. Putting on one side the existence of moderate Alzheimer's disease (which bears more on memory loss and language), the product of all of these physical conditions in my judgment was a significant reduction in his "executive functioning", which is a disorder of the mind for the purposes of testamentary capacity, sufficient to prevent the exercise of his natural faculties. Had William had his natural faculties, I am sure he would not have made this disposition.

127. In addition, William's false beliefs about Andrew and Kevin were not based on any solid evidence, and not shaken by explanation by an appropriate expert (Mr Randall, the company's own accountant). They were delusions brought about by a combination of Rodney's statements and his own mental disorder. They were not, as Falk J put it in *Clitheroe v Bond* [2021] EWHC 1102 (Ch), [102], "a simple mistake which could be corrected." Instead, they were, in the words of Falk J, "irrational and fixed in nature", and William "could not in fact be reasoned out of" them.

128. But, even if I were wrong, and William had capacity to make a will, then in my view his will was entirely overborne by Rodney. Undue influence is for the claimants to prove. However, on the facts of this case, I am satisfied that William was so under Rodney's thumb, and so in fear of Rodney's leaving him, by the time that he made the will, that he could not have done otherwise than go along with Rodney's wishes. And William was intelligent enough to realise that he *had* to do this, even in Rodney's absence. Rodney overpowered William's volition without convincing his judgment. There was no way in which Rodney would not see the will that William made with Mr Haggett, and William knew that. He could not just slip out at night, or conversely call in his neighbours, and make a new will. He was dependent on Rodney to help him make a will.

129. The standard protections against overbearing relatives (that is, see the prospective testator/testatrix on his/her own, have separate witnesses for execution) are really not much protection at all in a case of this kind. There may be rare cases where a person knows that his or her will is being overborne, but somehow manages to make a further, later (quite different) will, which *is* kept secret until after death, and so trumps the earlier one, but, so far as I know, this is not that case. And, in any event, this will is not that will. (Dorothy L Sayers once wrote an entertaining short story based loosely on this kind of will-trumping, called *Mr Meleager's Will*, published in a collection called *Lord Peter Views the Body*, 1928.)

130. In my judgment, even if William had had capacity to make it, the 2015 will would be tainted by undue influence, and would have to be set aside. It is thus unnecessary to consider fraudulent calumny.

131. That conclusion means I must look to William's earlier wills. Notwithstanding that I have not seen the will of 2009, I am satisfied that it was properly made, and that I know all its terms. The question arises whether William had capacity in 2009 to make that will. Although the burden is on the claimants (who put it forward) to establish capacity, the will was duly executed and appears rational on its face, and so, in accordance with the rules already set out, the Court will presume capacity. This is subject to objection by another person with a sufficient interest, here, Rodney. But he has made none, and so William is presumed to have had capacity to make the will of 2009. In my judgment, the will of 2015 being invalid, the will of 2009 is valid and effective, and I shall order that it be admitted to probate in solemn form. That will require an order for the reconstitution of the will, under rule 54 of the Non-Contentious Probate Rules 1987, in the form set out in the Documents volume of the trial bundle, at pages 71-73. I shall make that order also.

Inheritance Act claims

132. In these circumstances, the Inheritance Act claims by Jane and Kevin fall away, and I need not consider them further.

Conclusion

133. The probate claim relating to the 2015 will succeeds. The 2015 will is invalid, and the court grants probate in solemn form to the 2009 will, as reconstituted.