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*Scammell and another v Farmer

[2008] EWHC 1100 (Ch)

Chancery Division

Stephen Smith QC

22 May 2008

Probate - Will - Validity - Testatrix suffering from Alzeihmer's disease - Testatrix executing will primarily in favour of defendant - Claimant grandchildren challenging validity of will - Whether will invalid - Mental Capacity Act 2005.

Abstract

While ss 16 to 18 of the Mental Capacity Act 2005 concerned the power of the court to authorise the making of wills on behalf of people who lacked capacity, the question of whether a particular testator had capacity when a will was made did not fall within the scope of the 2005 Act. The question of capacity at the time a will was made fell to be determined under existing common law principles.

Digest

The claimants were the grandchildren of the testatrix. Their father, her son, had died when they were young. The testatrix had always expressed an intention to provide for the claimants, on account of the premature death of their father and to ensure that they had a good start in life. The defendant was the sole surviving child of the testatrix. In 1995, unbeknown to her family, the testatrix executed a will. Under the terms of that will, the home of the testatrix (the property) was devised to the claimants in equal shares. The defendant had purchased the property in her own name with her own funds, but had transferred the property to the testatrix in about 1995 for no consideration other than 'natural love and affection'. The remainder of the testatrix's estate, at that stage approximately equal in value to the property, was devised equally between the defendant and the claimants' mother. The testatrix was diagnosed with Alzeihmer's disease in September 2001, for which she was prescribed (and took) medication. The defendant became aware of the 1995 will in about May 2002. The contents of the will upset the defendant, and she informed the testatrix of that fact. The defendant felt that it was right that the bulk of the estate be left to her in the light of the facts that she was the sole surviving child of the testatrix and that she had purchased the property before transferring it to her mother. Following discussions and correspondence on the issue, the testatrix and the defendant attended on a solicitor in January 2003. The solicitor was not informed that the testatrix suffered from Alzeihmer's, nor of the fact of the 1995 will. A list of the Testatrix's wishes was handed to the solicitor in the handwriting of the defendant. Under the terms of the 2003 will, the majority of the testatrix's estate was left to the defendant. The 1995 will was subsequently destroyed by the defendant. The testatrix died on 3 July 2003. The defendant obtained a grant of probate of the new will in September 2003. The claimants issued the instant proceedings, whereby they challenged the 2003 will.

The 2003 will was challenged on the bases of: (i) a lack of the requisite testamentary capacity on the part of the testatrix; (ii) want of knowledge and approval of the contents of the will; and (iii) undue influence. A further issue arose as to whether the determination of the testatrix's mental capacity fell to be conducted

under the Mental Capacity Act 2005.

The claim would be dismissed.

(1) While ss 16 to 18 of the Mental Capacity Act 2005 concerned the power of the court to authorise the making of wills on behalf of people who lacked capacity, the question of whether a particular testator had capacity when a will was made did not fall within the scope of the 2005 Act. The question of capacity at the time a will was made fell to be determined under existing common law principles.

On the evidence, the claimants had failed to demonstrate that the 2003 will fell to be set aside on the grounds of incapacity, want of knowledge and approval or undue influence.

Giovanni D'Avola Barrister.

Judgment

[2008] EWHC 1100 (Ch)

CHANCERY DIVISION

22 May 2008

MR STEPHEN SMITH QC

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR STEPHEN SMITH Q.C.

1. In these proceedings, the Claimants, Emma Jane Scammell and Sarah Anne Scammell, challenge the will of their late grandmother, Irene Daisy Scammell. Irene Scammell's only son, the Claimant's father, Roger Scammell, died in 1986 when the Claimants were aged respectively 10 and 7. Irene Scammell's only other child, Lynda Farmer, is the Defendant. Lynda Farmer has no children. Lynda Farmer is the main beneficiary under the will, which was made by Irene less than 6 months before she died.

Background

2. Irene Daisy Scammell was born on 7th May 1921. She died aged 82 on 3rd July 2003. Her husband, Charlie, as well as her son, Roger, predeceased her. In addition to the Claimants and Lynda Farmer, other relations close to Irene who survived her were the Claimants' mother, Roger's widow, Jane, and Irene's own sister Min Hempstead (Min has since died).

3. During the later years of her life Irene considered her daughter Lynda to be considerably better off than Roger's family. Lynda gave evidence that she jointly owns 4 residential properties with her husband, David Farmer, all unencumbered and worth in total, she estimated, £900,000. Lynda lived close by her mother and

visited her daily when they were both in England. Jane and the Claimants lived further away and visited much less frequently.

4. Irene made a Will in 1995. The circumstances in which the 1995 Will were made are not known; it is no longer available because it was collected by Lynda after Irene's death from the solicitors where it was held for safekeeping, and destroyed.

5. Lynda says that under the 1995 Will Irene's home was left to the Claimants in equal shares; and Irene's investments were left to herself and Jane in equal shares. As the home and the investments are believed to have been of approximately equal value when the Will was made in 1995, the effect of the 1995 Will was to divide Irene's estate in roughly equal proportions amongst the four relations closest to her (excluding her sister).

6. Although Irene's 1995 Will was kept confidential, Irene made no secret of her desire that the Claimants should benefit substantially from her estate after her death, since they had lost their father at such a relatively young age and she wanted to help them to have a sound start in their adult lives.

7. Irene was diagnosed with early onset Alzheimer's Disease in September 2001, for which she was prescribed (and took) medication. She was diagnosed with cancer of the oesophagus in April 2003, from which she died in July 2003. She had been suffering with the symptoms of the cancer for some time before the diagnosis, possibly since as early as October 2002 when it was discovered that she had lost a significant amount of weight.

8. Lynda says she knew nothing of the 1995 Will until May 2002. When she learned of it, she was very upset and let her mother know her feelings. Lynda asked her mother to reconsider her Will. At first Irene refused to do so. After some months, however, Irene changed her mind and asked Lynda to arrange an appointment with a solicitor.

9. Irene and Lynda attended on the solicitor in January 2003. The solicitor was given a piece of paper on which were written the intended bequests. The writing on the piece of paper was Lynda's. Specific bequests were to be made of £2000 to each of the Claimants, and £5000 to Jane; the house, investments and jewellery were all to go to Lynda herself. The solicitor was not told that there was already a Will in existence (of which Lynda had a copy), nor was he told that Irene suffered from Alzheimer's (a circumstance which he said would have put him "on his guard"). He duly prepared a Will giving effect to his instructions. Lynda Farmer paid the firm's bill.

10. The effect of the new Will was that instead of the house (which by 2003 had increased in value to some £165,000) being divided equally between Emma Jane and Sarah Anne, the granddaughters were now to share only £4000. And instead of Jane sharing equally with Lynda investments worth some £60,000, she was now to receive only £5000. Lynda, however, was to receive approximately £215,000 instead of £30,000 under the terms of the 1995 Will as she has described them.

11. There is no suggestion that Irene's affection for any of Jane, Emma Jane or Sarah Anne had diminished since 1995, still less that they had had any disagreements with Irene, or that their financial circumstances had taken a significant turn for the better. The catalyst for the new Will appears to have been simply Lynda's complaint that the terms of the 1995 Will were not fair to her.

12. Neither Lynda nor Irene told anyone about the new Will once it had been executed.

13. Lynda obtained a grant of probate of the new Will in September 2003.

14. After Irene's death Lynda endeavoured to obstruct the attempts of Jane and the Claimants to obtain information concerning Irene and her testaments, which was not limited to her deliberate destruction of the 1995 Will (and all copies of that Will). Information has emerged piecemeal over the ensuing years. Indeed, several important documents emerged only during the course of the trial, including the piece of paper in Lynda's handwriting which was given to the solicitor in January 2003. A further late document - a letter written by Irene herself in July 2002 - was produced only following a discussion with Lynda's counsel during his closing submissions (there is no suggestion that counsel had any knowledge of the continued existence of that document until that moment).

15. Against that background, it is perhaps not very surprising that Emma Jane and Sarah Anne challenge the 2003 Will, with the support of their mother.

16. The Claimants also have the support of Raymond Hayes, whose position is an important one in these proceedings. Mr. Hayes has known the family for some 47 years. Several years after Charlie Scammell's death, in 1996, he began to live with Irene. Raymond Hayes and Irene became very close. Raymond asked Irene to marry him, but she declined because she did not want to become a widow for a second time. But otherwise they were as man and wife. Raymond Hayes describes their closeness thus (albeit in an account with which Lynda Farmer does not entirely agree):

> "This arrangement worked very well for both of us and we had a happy time together for seven years. We were best friends, companions and partners and in her later years I was her carer. Save that we had not had a marriage ceremony we were as man and wife. Irene and I were together constantly. She might be away briefly from the house to take her dog to the Green, which was about 200 yards away, or to visit a neighbour or the shop at the top of the road. If she went any further we would be together, probably in the car, which I would drive."

17. Lynda had the support of Min, Irene's sister, who signed a witness statement before she died.

18. Irene's Wills have thus been the cause of deep division in a family which had already experienced tragedy through the premature death of Roger. They have also caused the two factions to incur what are doubtless large legal bills in pursuit of a relatively modest estate. Those consequences are doubtless very far from what Irene, or indeed anyone in her position, would have wanted.

The basis of the challenge

19. The Court has no jurisdiction to remodel Irene's 2003 Will in the event that it considers that it makes inappropriate or even unfair provision:

> "The question is not whether the court approves of the circumstances in which the document was executed or of its contents. The question is whether the court is satisfied that the contents do truly represent the testator's testamentary intentions."

(*Fuller v. Strum* 12002] 2 All ER 87, para. 65)

The inroads into freedom of testamentary disposition made by the family provision legislation are limited to claims by defined categories of people into which only Mr. Hayes possibly falls. Mr. Hayes, however, has his own assets and means, and he and Irene decided early in their relationship that they would each retain their own wealth to pass on to their respective families.

20. The Claimants are therefore compelled to mount their challenge by asserting that Irene (a) lacked the appropriate mental capacity to make the 2003 Will and/ or (b) lacked knowledge and approval of the contents of the 2003 Will and/or (c) was labouring under the undue influence of Lynda when she made the 2003 Will.

Lack of capacity

21. The first question which was raised was whether my assessment of Irene's capacity to make a Will should proceed under common law principles or under the Mental Capacity Act 2005. Mr. Waterworth for the Claimants contended for the common law; Mr. Pugh for the Defendant said that I should proceed under the Act.

(a) Mental Capacity Act 2005

22. The provisions of the Mental Capacity Act which are most pertinent are contained in Sections 1-3.

23. The relevant parts of those Sections are:

> "1 The principles
>
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> ...
>
> 2 People who lack capacity
>
> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or the brain.
>
> ....
>
> 3 Inability to make decisions
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means)

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means)

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of -

(a) deciding one way or another, or

(b) failing to make the decision."

24. There was a large measure of agreement between counsel that the test of mental capacity under Section 3 of the 2005 Act is a modern restatement of the test propounded in *Banks v. Goodfellow* (1870) 5 QB 549, to which I shall turn below. There is, however, an obvious difference between the position at common law and the position under the 2005 Act, in that the onus of proof of incapacity under the 2005 Act (Section 1(2)) is from the outset, and remains, on the complainant. At common law, the position is different.

25. I do not consider that the 2005 Act applies in this case, for either (or both) of two reasons. First, this is not a case within the purposes of the 2005 Act, as required by section 1(1). I was referred by Mr. Pugh to Sections 16-18 of the 2005 Act, but those provisions concern the power of the Court to make or authorise the making of Wills on behalf of persons who lack capacity, not the ascertainment of whether a particular testatator had capacity when a Will was made.

26. I was also referred to the Code of Practice under the Mental Capacity Act issued by the Lord Chancellor on 23rd April 2007, and it was suggested that parts of that Code of Practice suggest that the Act was intended to apply in a case such as this. Even if that was a correct reading of the Code of Practice, it would not change my interpretation of the 2005 Act. But I do not think that it is a correct reading of the Code of Practice at all, see especially paragraphs 4.31 to 4.33. The latter paragraph actually states that when cases concerning, eg, a testator's capacity to make a will come before the court, "judges can adopt the new definition if they think it is appropriate".

27. I certainly do not think it would be appropriate for me to adopt any provision in the 2005 Act in this case. This case concerns a death in July 2003 where the Claim Form was issued on 18th February 2004. It should have been concluded long before now, and certainly before the relevant provisions of the 2005 Act were

brought generally into force (1st October 2007).

28. This brings me to the additional or alternative reason for my decision. To apply the 2005 Act to the disposition of the estate in this case would be to give it retrospective effect. There are presumptions against the retrospective operation of statutes and against the interference by statutes with vested interests. In *Wilson v. First County Trust Ltd* [2003] 4 All ER 97, at para. 19, Lord Nicholls approved the following description of the underlying rationale of these presumptions given by Staughton LJ in *Secretary of State for Social Security v. Tunnicliffe* [1991] 2 All ER 712 at p. 724:

> "... the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

See too Lord Hope at para. 98, Lord Scott at para. 161 and Lord Rodger at paras. 186-202, especially at para. 198 concerning the "further presumption, that legislation does not apply to actions which are pending at the time when it comes into force".

29. In this case, to the extent that any relevant changes brought about by the 2005 Act improve the position of one of the parties, they would do so contrary to the presumption against retrospectivity, the presumption against the interference with vested interests, and the presumption against application to actions which are pending. It would also in my judgment be unfair, particularly if and to the extent that delays in getting this case on for trial have been caused by the Court, or the dilatoriness of the party who may be better placed under the Act.

30. I shall therefore decide this case without recourse to the Mental Capacity Act 2005 and the Code of Practice promulgated under it.

(b) Common law

31. *Banks v. Goodfellow* was a case of a testator, John Banks, who suffered from insane delusions, but the wisdom and guidance contained in the judgment of Cockburn CJ extend beyond cases of delusions. As was recently observed by His Honour Judge Norris in *Cattermole v. Prisk* [2006] 1 FLR at para. 10(g), despite the steady accretion of authority, *Banks v. Goodfellow* is the starting-point and so often the finishing point for the ascertainment of testamentary capacity. Before I come to the passage which is most commonly cited from the judgment, I should recount a little about the background to that decision.

32. Two earlier cases, *Waring v. Waring* 6 Moo.P.C. 341 and *Smith v. Tebbit* Law Rep. 1 P. & M. 398, had laid down the following doctrine (p. 559):

> "To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties, if it labours under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence."

33. The Court debunked that doctrine and upheld Banks' Will. It is illuminating to consider the nature of Banks' delusions as established in that case (pp. 551-2):

> "It is a fact beyond dispute that the testator ... had at former times been of unsound mind. He had been confined, as far back as the year 1841, in the county lunatic asylum; discharged, after a time, from the asylum, he remained subject to certain fixed delusions. He had conceived a violent aversion towards a man named Featherstone Alexander, and notwithstanding the death of the latter some years ago, he continued to believe that this man still pursued and molested him; and the mere mention of Featherstone Alexander's name was sufficient to throw him into a state of violent excitement. He frequently believed that he was pursued and molested by devils or evil spirits, whom he believed to be visibly present."

It was established that Banks' delusions continued after he had made his Will (p..555). The jury at trial had found in favour of upholding the Will, so the Court had to assume that the delusions did not have any influence on Banks in the disposal of his property and that, irrespective of the delusions, the state of Banks' mental faculties was such as to render him capable of making a Will.

34. At p. 560 Cockburn CJ said this:

> "It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed."

35. As regards the function of memory referred to in that passage, Cockburn CJ cited with apparent approval (at p. 568) the following passage from the judgment of in *Stevens v. Vancleve* 4 Washington 267:

> "The testator must ... be possessed of sound and disposing mind and memory. He must have a memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; he may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. ... The question is not so much what was the degree of memory possessed by the testator? As this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will?"

36. Turning now to the passage most frequently cited from the judgment of Cockburn CJ, it is helpful to start at p. 563:

> "The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are nearest to them in kindred and who in life have been the objects of their affection."

At p. 565 the Chief Justice continued thus:

> "It is obvious ... that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his mental faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

37. The Court approved an observation in *Den v. Vancleve* (1819) 2 Southard 660, however, that these qualities do not have to be possessed "in the highest degree".

(c) Relevant facts in greater detail

38. In about 2000, Irene Scammell underwent an operation on her hands at the Bloomfield Hospital in Chelmsford, under general anaesthetic. Following that operation (whether independently of it or not does not matter), those close to Irene started to notice that Irene was suffering from memory loss.

39. It is the Claimants' case that Irene's memory loss may have been associated with the onset of dementia and that it was "serious and incapacitating". The Particulars of Claim give the following examples:

> "1. Mr. Hayes would have to count out the number of pills that the deceased took several times a day, as she would always have forgotten whether she had taken them or not.
>
> 2. The deceased, who had a pet dog of whom she was very fond, was always over-feeding it, having forgotten that she had fed it already, or she would ask visitors to get the dog's food from the fridge, even if it was not mealtime or the dog had recently been fed.
>
> 3. The deceased would frequently ask "What day is it?" despite having been told more than once over a short period of time.
>
> 4. The deceased was visited fortnightly by a Community Psychiatric Nurse ... who would conduct a memory test during each visit. She would rarely be able to accomplish the task given.

> 5. After Mr. Hayes had taken the deceased to a family funeral in December 2002, at which she had been greeted by a number of her relations, the deceased could not name one person she had met.
>
> 6. Over the Christmas period in 2002 the deceased had very little memory at all, and Mr. Hayes was struggling to look after her.
>
> 7. The deceased had no idea of the cost of living, and regularly drew out only E10 spending money to last for a week."

40. I shall start by considering the medical evidence.

The medical evidence

41 The memory tests referred to in example 4 set out above were administered in the main by Steve Lincoln, the Community Mental Health Nurse of the North Essex Mental Health Partnership, though prior to his involvement 2 such tests had been administered by a consultant psychiatrist at the same NHS Trust, Dr. K. Seneviratna. Although neither Dr. Seneviratna nor Mr. Lincoln was called to give evidence at the trial, Dr. Seneviratna was asked to and did provide a report to the Court on the joint instructions of the parties' solicitors.

42. Irene Scammell had been referred to Dr Seneviratna by her GP, Dr. Pandya in June 2001. Dr. Pandya expressed the reason for the referral as follows:

> "She has been forgetful. She keeps forgetting dinner on the table since the last year. According to her daughter, she is more forgetful now than as before [sic], and she has problems in orientation. She cannot remember day or date.
>
> She went with a friend the day before yesterday to Cambridge and cannot remember this and cannot remember her address.
>
> Her general condition is quite unremarkable."

43. Dr. Seneviratna saw Irene at his Outpatients Clinic on 25th September 2001, in the company of Linda Farmer. Included in the trial bundle is the letter Dr. Seneviratna wrote to Dr. Pandya reporting on the consultation. In that letter, Dr. Seneviratna said this:

> "She is largely independent in personal care ...
>
> She is supported by her daughter who has daily contact with her.
>
> On examination I found her to be alert, co-operative, fluently spoken without any evidence of

> emotional disorder or paranoid psychotic or excessive features. She ... has a fair insight into her predicament."

44. Following a further consultation on 27th November 2001 (when the results of a CT scan were available), Dr. Seneviratna concluded that Irene Scammell was probably "in the early stages of Alzheimer's disease of late onset", and prescribed 4mg of Reminyl twice daily (subsequently increased to 8mg and later 12mg, but then reduced at Irene Scammell's own request). Reminyl is a drug prescribed to slow down the rate of deterioration of memory and functional abilities in dementia due to Alzheimers's disease, but it can cause a side effect of urinary infections (which Irene Scammell suffered from as the dosage strengthened).

45. Mr. Lincoln also wrote to Dr. Pandya, on 11th January 2002. The text of the letter suggests that he had recently met Irene for the first time.

46. In his letter Mr. Lincoln recorded that Irene was experiencing a lot of short term memory loss which was causing her distress. He noted that Irene spent her time doing crosswords, watching the television and walking her dog; she had no home care, she cooked and cleaned and was fully self caring; she had no previous psychiatric history and no paranoid or delusional ideation.

47. The full name of the memory test which Dr. Seneviratna and Mr. Lincoln administered to Irene Scammell was a "Mini Mental State Examination", frequently abbreviated to "MMSE". Irene was asked a series of questions designed to test orientation, eg "what is the (year) (season) (date) (day) (month)?"; registration, eg "name 3 common objects"; attention, eg "spell 'world' backwards"; recall, ask for the 3 common objects to be repeated; and language, eg "write a sentence". A total of 30 marks were available. A score of 27 or more is acceptable; a score of 20-26 is in the mild range for dementia.

48. In the two MMSEs administered by Dr Seneviratna in the latter part of 2001, Irene Scammell scored 22/30 and 21/30. Thereafter (and following the Reminyl prescription) her scores documented in the Court bundles were:

7.1.02	24/30
19.2.02	26/30
12.3.02	26/30
2.4.02	27/ 30
22.10.02	23/30
8.4.03	23/30

49. I should also refer to the text of a letter written by Dr. Seneviratna to Dr. Pandya, copied to Mr. Lincoln, on 11th November 2002:

> "I reviewed her progress with her daughter and partner Raymond at the clinic on 22.10.02. Her short-term memory remains affected, possibly worse than before. She is often repetitive with poor recall. On the other hand she is said to be less confused and muddled than before and does not pose any risks, such as wandering."

50. In his report to the Court, Dr. Seneviratna says this:

> "I wish to make the following observations regarding the assessment of the mental capacity in people with memory disorder. Alzheimer's disease is the commonest type of dementia. People

> in the early stages of or with a mild degree of dementia of Alzheimer's disease of late onset type, are able to make choices and decisions. This would depend on the complexity of the information to be grasped and retained in memory, in arriving at an informed decision. Mrs. Scammell was able to make an informed decision regarding receiving treatment with Reminyl, accepting professional help such as community nursing input, and attending psychiatric outpatient's clinic."

I also note from para. 28 of the judgment of the Court of Appeal in *Hoff v. Atherton* [2005] WTLR 99 that both experts called at the trial in that case accepted that it is possible for a particular individual to have testamentary capacity despite suffering from mild to moderate dementia.

51. Dr. Seneviratna's conclusion is:

> "... my study of documentation does not yield sufficient information to enable me to form an opinion with regard to Mrs. Scammell's mental capacity to make a Will."

However, Dr Seneviratna also makes the following observation in the context of considering the allegation of undue influence exercised over Irene Scammell by Linda Farmer:

> "Mrs. Scammell did display a degree of strength of mind and decision-making ability in demanding a reduction of the dosage of Reminyl in March 2003."

March 2003 was of course several weeks after Irene made her 2003 Will.

52. Before I look more closely at the circumstances in which the new Will came to be made, I need to record one significant fact and also to consider the right approach to Linda Farmer's evidence. For convenience I shall also make observations at this stage about the evidence of the four other witnesses called at the trial.

13 Collingwood Road

53. The significant fact concerns Irene Scammell's home, 13 Collingwood Road, South Woodham Ferrers, Essex. Before Irene returned to England from Ireland after the death of Charlie, Lynda Farmer purchased 13 Collingwood Road in her own name with her own funds. When Irene returned to England in 1995, Lynda allowed Irene to move into 13 Collingwood Road as a tenant paying rent. Irene resented paying rent and in consequence before long Lynda transferred the property to Irene, apparently for no consideration other than "natural love and affection".

54. This aspect of the history was not seriously challenged in the light of the Land Registry documents made available to the Claimants, but I confess I was surprised when it emerged and it did not easily fit into the story. The reason for my surprise was that the allegation that Irene Scammell had purchased 13 Collingwood Road was made in the Particulars of Claim and admitted in the Defence. The reason it did not seem to fit easily into the story was because on Lynda Farmer's account of the 1995 Will, Irene gave 13 Collingwood Road to the Claimants equally, which if it had been a very recent gift from Lynda was not what one might have expected Irene to do.

55. Whether Lynda was partly motivated to give the property to her mother by tax considerations was not

explored with her and I shall not speculate. The fact is that the asset which caused Irene's estate to inflate so considerably in value was a gift from Lynda to Irene some 8 years before Irene's death. In her witness statement, Lynda says that she had assumed that the property would be left to her on Irene's death.

Lynda Farmer

56. Lynda Farmer gave her evidence in a precise and measured way, without emotion, and was not shaken in cross examination (Counsel for the Claimants described her in his closing submissions as "well-anchored as a witness"). She came across as meticulous and focused. As I have already recorded, however, it is the fact that she obtained and destroyed Irene's 1995 Will after Irene's death (and any copies of it), and she also obstructed the Claimants and their mother in their investigations into Irene's estate and its disposition.

57. Courts do not look favourably on those who destroy relevant documents. The maxim omnia praesumuntur contra spoliatorem may have fallen out of use, but the premise underlying it, that those who destroy evidence cannot be trusted, remains. Lynda Farmer says that she was advised to destroy the earlier will by someone she consulted at a Citizen's Advice Bureau. If that advice was indeed given it was in my judgment misguided, and one wonders whether the advisor was fully acquainted with the circumstance; but the fact that the advice was even sought is significant. It suited Lynda's cause to obliterate the record of Irene's previous intentions so soon after her death.

58. Lynda Farmer's obstruction of the investigations of the Claimants and their mother was not limited to writing to Dr Seneviratna in December 2003 requesting him to deny the grandchildren all access to Irene's medical records (on the stated ground that Irene was "a very private person and had expressed her wish to me that her records be kept confidential").

59. At about the same time, Lynda Farmer approached the solicitor who had been instrumental in the preparation of the 2003 Will, Timothy Steele of Palmers in South Woodham Ferrers, and got him to reply to a letter which she had recently received from the Claimants' solicitors. In Mr. Steele's letter, dated 23rd December 2003, he said:

> "Mrs. Farmer confirms that she does not have either the original or copy 1995 Will and is unable to assist with its content."

60. I have no doubt that Mr. Steele was truthful when he said that Lynda Farmer had given that confirmation; but I am also in no doubt that Lynda Farmer was not truthful when she gave it. She was indeed able to assist with the content of the 1995 Will, even though by then, according to her, she had already destroyed it.

61. I must therefore approach Lynda Farmer's evidence with caution on any contentious points.

Raymond Hayes

62. Mr. Hayes is now aged 88. He is extremely hard of hearing. On occasion, he completely failed to hear the question put to him. On other occasions, he failed to understand the question, I think because he had not heard it correctly. Cross examination was thus not easy, and some of his answers were not of assistance.

63. I do believe that Mr. Hayes' evidence contained the truth as he saw or understood it, but I also believe that his account was at times exaggerated, especially as regards Irene Scammell's forgetfulness. As I have

already set out, there is a reasonably clear picture on that topic from the medical evidence. I did form the impression during the trial that Mr. Hayes did not regard Lynda Farmer with much affection, though I do not understand what, if anything, had brought this about. He expressly acknowledged that he did not have a good relationship with Lynda's husband, David. Mr. Hayes said that David Farmer was someone he could not "weigh up ... He didn't talk my sort of language."

64. What is noticeable about Mr. Hayes' evidence is that he does not suggest that Irene Scammell was not in a position in January 2003 to understand the extent of her estate or to remember those she had a moral responsibility to consider; nor does he say that he believes, or that Irene at any time complained, that Lynda Farmer was putting pressure on her to do something she did not want to do.

Mary Skeates

65. Mary Skeates is a neighbour of Mr. Hayes in Stapleford in Cambridge. She got to know Irene Scammell when Irene and Mr. Hayes spent time at Mr. Hayes' home as an alternative to South Woodham Ferrers.

66. Mrs. Skeates' evidence is mainly directed at the deterioration in Irene Scammell's short term memory after the operation on her hands. Her conclusion that Mrs Scammell would not have been able to understand a Will nor the value of her assets in January 2003 is not one which is based on any sound foundation, and her further assertion that Lynda and David Farmer began to take more interest in Irene after she became physically ill and was diagnosed with cancer, is not only not supported by the evidence of any other witness, it is in my judgment clearly wrong so far as Lynda Farmer is concerned.

67. I do not feel I can place any reliance on Mrs. Skeates' evidence, save where it is corroborated by other evidence available to me.

Jane Scammell

68. Jane Scammell gives evidence of Irene's oft-stated intention to leave a significant proportion of her estate to her grandchildren, the Claimants. Jane Scammell had no knowledge of the 1995 Will, however. She gives general evidence of Irene's memory loss and the concern that it caused Irene, Mr. Hayes and herself.

69. I have no doubt that Jane Scammell sought to tell the truth as she sees it when giving evidence, but she lived a considerable distance away from Irene and she and the Claimants visited Irene infrequently. In the result, she was not able to give any meaningful assistance on the key questions I have to decide.

70. Neither of the Claimants gave evidence.

Timothy Steele

71. Mr. Steele frankly acknowledged that he had no genuine recollection of the two short meetings he had with Irene Scammell and Lynda Farmer 5 years ago in 2003. His evidence was very much dependent on the information contained in his file.

The new Will

72. Lynda Farmer says that the first she knew about the 1995 Will was some time in May 2002, when she was alerted to its existence and the gift of 13 Collingwood Road to the Claimants during a telephone conversation with Mr. Hayes. Mr. Hayes accepted in cross examination that he had had such a telephone conversation with Lynda Farmer about that time.

73. Lynda Farmer says that she was shocked and upset at Mr. Hayes' news. Given the close relationship Lynda Farmer had with Irene - and had had for many years - and the fact that 13 Collingwood Road had been a gift from Lynda to Irene just 7 years previously, which she had expected would be returned on Irene's death, her reaction is perhaps understandable.

74. Lynda raised the matter of the 1995 Will with Irene in a discussion early in June 2002. Mr. Hayes was present and participated. Lynda said that Mr. Hayes made contributions to the discussion which appeared to support her cause. Mr. Hayes accepted in cross examination that he said that he was intending to leave all his own estate to his two children.

75. It appears that during the discussion with Lynda Farmer, Irene Scammell led Lynda to believe that she was minded to change her Will. Lynda left for her summer holiday in Ireland not long afterwards and correspondence ensued between the two.

76. The Claimants suggest that the discussion that day in June was heated and emotional, and that Irene was very upset by it. They say that it was because of this that Irene and Mr. Hayes decided not to go to Ireland on holiday themselves, as had previously been intended, at least provisionally; some of the evidence, however, suggests that the holiday was not proceeded with for other reasons.

77. Lynda Farmer told me that she is in the habit of destroying correspondence when she has read it. That habit explained why there were no letters from Irene to her in the bundles prepared for the trial. There was, however, a letter from Lynda Farmer to Irene dated 3rd July 2002 which had come into the Claimants' possession. For reasons which will shortly become clear this letter has been referred to as "the Queen Mother letter".

78. The Queen Mother letter begins by referring to a letter from Irene received "a few days ago". Much to my surprise having learned of Lynda Farmer's destruction policy, and having noticed the gaps in the trial bundle, when I asked a question during counsel's closing submissions concerning the fact that Irene had obviously written a letter to Lynda around this time, Lynda was able to produce one such letter, though it is not, it seems, the letter from Irene to which the Queen Mother letter is a reply.

79. I believe that Irene's letter is sufficiently important to justify citing most of it in full. Trixie was Irene's dog.

> " Ray's House 21st June
>
> Dear Lynda,
>
> Thanks for your letter received this week about the holidays. Ray says he thinks he is too old to take on a journey, like that, at this time of life. He wouldn't mind flying, but I would not like to put Trixie in that position either. So, if we have a holiday at all, it will have to be in the caravan, nearer to home.

This is all disappointing, but, I can't argue about it, if that is the way he feels. Thank you for the offer of having us.

I think Min has got over her problems ...

I've done all her shopping for these last two weeks, but think that she should be o.k. now.

Ray wanted to come to his house, so we have been here for a couple of days. I hope you understand, we will probably be here for another week or so. Lots of love

From

Mum

xxxxx

PS I thought I had posted this letter a few days ago, but it got stuffed away with all the other things. Sorry about that.

Mum xxxx"

80. Lynda Farmer says that there then followed a letter from Irene saying that she was not going to change her Will, and it was in response to this that she says she wrote the Queen Mother letter. The Queen Mother letter is also important; the relevant part of it reads as follows:

"Dear Mum,

I received your letter a few days ago saying you are not changing your will and it has really saddened me. I am so upset and hurt that you could treat me this way. That afternoon when we first discussed your will you promised me that you would change it, now you have gone back on your word.

....

You think you want to help the grandchildren. Yes they lost their dad, but they are adults now aged 24 and 27. Both of them are making their way in life with their partners. They are not little children who need help.

Every person I know whose parent has died has always left their estate to their children. Min & Ray are doing so, even the Queen Mother left hers to the Queen. I expect when you see Jane next she will tell you that her father has left his estate to his 3 children, Jane, Douglas and Anne because that is what parents do. They don't miss out their own child and leave it to grandchildren.

Have another think about all this, you can't imagine how much its upsetting me.

Love,

Lynda.

xx"

81. According to Lynda Farmer, on her return from Ireland in September, Irene informed her that she had been thinking about her Will and did intend to change it; Irene told her that she would do it before Christmas but wanted to talk it over with her sister Min first. In the light of the correspondence and the evidence of what ensued, I have no reason to disbelieve Lynda Farmer on this point.

82. Sadly, by the time of the trial Min Hempstead had also died. She had, however, given a witness statement to Lynda Farmer's solicitors before her death. In that statement she says that some time in September or October 2002, Irene Scammell explained to her that she had originally been concerned that her grandchildren were young and had needed financial security but she now appreciated that they were no longer children and were either married or in long term relationships, so that the need was no longer there and that "she felt that it was appropriate that her daughter should inherit". Min agreed with this approach.

83. Irene Scammell did not get round to changing her Will before Christmas. She and Lynda Farmer attended on Mr. Steele in his offices on 14th January. Lynda Farmer said in the witness box that it was whilst they were waiting to leave for Mr. Steele's offices that Irene told her what she desired the new Will to say. Lynda wrote down Irene's wishes and that became the piece of paper which was handed to Mr. Steele. At the top of that piece of paper Irene Scammell's assets were described, namely her house and belongings, money and jewellery.

84. When cross examined, Mr Hayes said he just wanted to see fair play. He acknowledged that Irene Scammell "knew her own mind" and said that she did not discuss with him changing her Will. He was, however, aware that Irene had an appointment to see a solicitor to make a new Will.

85. Mr. Steele is a member of the Society of Trusts and Estates Practitioners (commonly referred to as "STEP"). He qualified as a solicitor in 1993. At the time of acting for Irene Scammell he had 10 years' post qualification experience. He had throughout those 10 years worked in trusts, estates and other private client work.

86. Mr. Steele prepared an attendance note of the meeting on 14th January. The total time taken, including dictation of the note, was 4 units of Mr. Steele's time, which equated to between 19 and 24 minutes.

87. The attendance note records that whilst Lynda Farmer was present at the meeting "she did not involve herself in the discussions in any way". Mr. Steele asked who was to be the executor and was told it was to be Lynda, and failing her Jane Scammell. Irene said she had no preference as between burial or cremation. Irene described the members of her close family. She told Mr. Steele that she did not know the precise size or extent of her estate but did indicate that it would not be of such an extent that would generate a tax liability (which to Mr. Steele meant that it would be less than £200,000). The piece of paper in Lynda's handwriting

was handed to Mr. Steele, and he put it on his file. Mr. Steele said the charge for his services would be £85 plus VAT.

88. Lynda Farmer chased Mr. Steele for the draft Will on 16th January 2003. Mr. Steele sent the draft to Irene under cover of a letter dated 17th January, along with his bill. On 20th January Lynda Farmer called Mr. Steele's secretary to confirm that Irene was happy with the terms of the draft Will and arranged an appointment to execute the Will on 21st January.

89. Mr. Steele was in attendance on 21st January. His note of that meeting records that Irene Scammell read through the Will and confirmed that she was happy with its contents. Irene Scammell then signed the Will in the presence of Mr. Steele and Mr. Steele's secretary.

90. In the second paragraph of his attendance note of the 21st January meeting, Mr. Steele said this:

> "She clearly had the necessary capacity and understanding to fully appreciate the nature and affects of her acts, the moral claims and obligations that she ought to consider and the size and nature of her estate."

91 In his witness statement Mr. Steele said that it is his practice when he attends upon a client who does not appear to have sufficient mental capacity to give instructions for a Will, to seek "a specific representation from the client's general practitioner or other appropriately qualified medical representative upon the client's mental capacity". He did not make such an enquiry in this case, because he felt that Irene Scammell clearly had the necessary capacity. He also told me that he had referred the question of the capacity of an intending testator to a general practitioner on only 4 or 5 occasions during his career, and that he never found it easy to get a report from a general practitioner, still less to get a general practitioner to witness a Will.

92. Mr. Steele's bill was paid by Lynda Farmer under cover of a letter dated 24th January 2003.

(d) Conclusions

93. My conclusion on the medical evidence available to me is that Irene Scammell's performance on the MMSE tests was never poor, and in the first part of 2002 it was actually good. She rarely achieved a mark below the mid range of mild dementia. It is not accurate to assert, as the Claimants plead, that "she would rarely be able to accomplish the task given". So far as I can see she always finished the task, but with varying degrees of accuracy and never in a way to cause alarm, or even particular concern.

94. In any event, the tests administered were directed at assessing a different capability than the capacity to make a Will. They were largely directed at memory and Irene's powers of recall. As was pointed out in *Banks v. Goodfellow*, the possession of an imperfect memory is not to be equated with an absence of testamentary capacity. The professionals never tested Irene Scammell's ability to recollect the names of her immediate family, in other words those she had a "moral responsibility" at least to consider as objects of her bounty; nor - as one would expect - did they examine her ability to comprehend the extent of her estate.

95. The impression I get from studying the medical records, the correspondence and reading Dr. Seneviratna's report is that Irene Scammell was a woman who in the last two years or so of her life understood that her memory was not functioning as well as it had done previously and was frustrated and concerned that it was not doing; but she retained sufficient presence of mind to want to do something to try

to improve the position. In the end she was able to weigh up the disadvantages of her prescription (in terms of the uncomfortable side effects it was causing) and decide to reduce it. In short, far from the medical evidence suggesting that Irene lacked capacity to make a Will, in my judgment if anything it tends to support the opposite conclusion.

96. The other pleaded examples of Mrs. Scammell's alleged "serious and incapacitating dementia" are in the main further examples of short term memory loss. As regards the example (if such it be) that Irene Scammell had "no idea of the cost of living", I received no significant evidence in support of the allegation, and it did not fit easily with the indication in Irene's own letter to Lynda Farmer of 21st June 2002 that she had been doing her sister Min's shopping for two weeks.

97. The related suggestion pressed at trial that Irene Scammell did not know the extent of her estate because she could only give a general indication to Mr. Steele, is in my judgment unfair. The general indication was not very wide of the mark. And as the estate comprised principally a house, in a thriving property market its value would be difficult to state with any precision.

98. It follows that I do not find the allegation that Irene Scammell was suffering from serious and incapacitating dementia at the time she made her will made out as pleaded.

99. Quite apart from the way in which the case is pleaded, however, having studied the material available to me and heard the respective witnesses, I am in no doubt that when she made her Will Irene Scammell was possessed of testamentary capacity. I have referred to the medical evidence which in my view tends to support rather than detract from that conclusion. I have also drawn attention to the history of the deliberations concerning the new Will which went on for over 6 months and involved consultation by Irene with her sister Min. I have set out the text of a letter which Irene herself wrote to Lynda Farmer towards the beginning of this period (and after the first discussion with Lynda) which, whilst not addressing the question of a new Will, is nonetheless a well written letter. And I have also highlighted Mr. Hayes' acknowledgement that Irene "knew her own mind".

100. But on top of all of this I have the unchallenged evidence of an experienced solicitor who witnessed the new Will and, appreciative of the need to ascertain that Irene Scammell had testamentary capacity, satisfied himself that she clearly did have capacity. It would require some persuasive evidence to the contrary to undermine that opinion, but I have none.

101. For all these reasons I therefore conclude that when she executed her Will on 21st January 2003 Irene Scammell had the necessary capacity to do so.

Want of knowledge and approval

102. The second basis of the Claimants' challenge to Irene Scammell's 2003 Will is a claim that Irene lacked knowledge and approval of the terms of the Will: in short, that although she signed the Will, she did not understand its effect and did not intend it to have that effect.

103. In *Re Good* (2002) All ER (D) 141, Rimer J said this at para. 107 about this type of challange:

> "The burden of proving that a testator knew and approved of the contents of his will lies on the party propounding the will. In the ordinary course, the burden will be discharged by proving the due execution of the will and that the testatator had testamentary capacity. Where, however,

> the will was prepared in circumstances exciting suspicion, something more may be required from those propounding the will by way of proof of knowledge and approval of its contents. The relevant standard of proof is, however, simply by reference to the balance of probability: see *Fuller v. Strum* ..."

104. The Claimants' case is pleaded thus:

> "The Claimants contend that:
>
> 1. The provision made by the 2003 Will is so contrary to the view expressed consistently by the deceased to a number of independent persons over a prolonged period of time
>
> 2. Such provision is so directly contrary to the deceased's refusal, as recently as summer 2002, to change her 1995 Will in favour of the Defendant
>
> 3. The secretive circumstances in which the Will was made excite such suspicion, and
>
> 4. The contemporaneous evidence of the deceased's mental health is such, that at the material time the deceased lacked knowledge and approval of its contents and/or the righteousness of the transaction is open to challenge."
>
> (By a late amendment at the outset of the trial, the words "lacked testamentary capacity and/or" were inserted before the words "lacked knowledge and approval".)

105. Do the circumstances in which Irene Scammell's 2003 Will were prepared excite the requisite degree of suspicion to require Lynda Farmer to prove more than just that Irene had capacity and that the Will was duly executed? In my judgment they do. There is not just Irene's change of mind since 1995 and indeed the early summer of 2002 referred to in sub-paras. 1 and 2 of the pleading, there is also the very close involvement of Lynda Farmer. Lynda Farmer conceived the idea of a new Will, she wrote out its principal terms, she arranged for a solicitor to prepare it, she was present when the solicitor was instructed, she chased the solicitor for the draft, she attended the Will's execution, she paid the solicitors' bill, she is the principal beneficiary under the new Will and she is the clear winner under the changes to the disposition of Irene Scammell's estate. Those circumstances are not denied and in my judgment they certainly generate suspicion.

106. Nonetheless, having carefully considered all the evidence and arguments, I am satisfied that Lynda Farmer has discharged the burden of showing that Irene Scammell knew and approved of the contents of her 2003 Will. I have already referred to the facts which have convinced me that Irene Scammell had testamentary capacity at the relevant time, which I rely on generally in this regard as well. At the risk of some duplication, I mention the following particular points:

> (1) I do not regard the making of the 2003 Will as having been especially secretive. Mr. Hayes knew what was going on. MM Hempstead knew of her sister's plans. The 2003 Will was not drawn up at home around the kitchen table in the dead of night: its terms were discussed in advance and it was the product of two visits to a solicitor a week apart. It was witnessed by two non-family members.

> (2) The medical evidence suggests that Irene Scammell was sufficiently well aware of what was going on around her in late 2002 and early 2003, though she had problems retaining some of the details in her memory for long.
>
> (3) There is no evidence from those around the deceased in those months, particularly Mr. Hayes, that Irene Scammell was not capable of understanding what was written in a document concerning her family which comprised just three pages of typescript (which was not closely spaced). The dispositions effected could hardly be described as complicated.
>
> (4) The evidence is that Irene Scammell's intention was formed before she saw Mr. Steele for the first time, she informed Mr. Steele of it at the first meeting, and she confirmed that that was her intention a week later when she attended to execute the Will. It was one of Mr. Steele's principal duties, as with any other solicitor in his situation, to ascertain that his client understood the effect of the document he had drawn up for her to sign, and there is no basis on which I can find that he did not carry out that duty.
>
> (5) That Irene Scammell changed a long-standing wish to help her grandchildren get a good start in life, formed when her late husband was still alive and shared by him until his death, is undeniable, but she did not rush into that decision. It took her over 4 months to implement it from the time when she first told Lynda Farmer that she would do so, and in the meantime she consulted her sister about it, who supported it.

107. For all these reasons in my judgment Irene Scammell did know and approve of the terms of her 2003 Will when she executed it.

Undue influence

108. The third and final basis of challenge to Irene Scammell's 2003 Will is that she executed it under the undue influence of Lynda Farmer.

109. In this instance, the burden of proof is squarely on the accusers. It is not sufficient to prove that a testator was persuaded to take a particular course; what must be established is that the testator's own free will was overborne.

110. In *Hall v. Hall* (1868) LR 481, Sir J P Wilde gave the following direction to the jury:

> "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, - these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's."

111. Not long afterwards, in *Wingrove v. Wingrove* (1885) 1 PD 81, Sir James Hannen P said in his address to the jury (at p. 82):

> "To be undue influence in the eyes of the law there must be - to sum it up in a word - coercion ... if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.
>
> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would be equally be coercion, though not actual violence.
>
> These illustrations will sufficiently bring home to your minds that even very immoral considerations on the part of the testator, or of someone else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, 'this is not my wish, but I must do it'..."

112. The *Privy Council in Craig v. Lamoureax* [1920] AC 349 approved Sir James Hannen's address. At p. 357 Viscount Haldane said this:

> "... in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean."

113. More recently, in *Governor & Company of the Bank of Scotland v. Bennett* [1997] 1 FLR 801, James Munby QC said at pp. 822E-826F:

> "Not all influence is undue influence. Even very strong persuasion and 'heavy family pressures' are not, of themselves, sufficient ..."

114. The Claimants rely in support of this part of their case on the same facts as they relied on for the purposes of the other two challenges. In my judgment, none of those facts comes close to establishing that the Will prepared by Mr. Steele on instructions given to him by Irene Scammell and signed a week later in his office, did not express Irene Scammell's intentions.

115. Again, I refer generally to the reasons for my conclusions on the earlier two challenges. But I also refer generally to the evidence of Mr. Hayes. I do not get from that evidence a picture of Lynda Farmer having

repeatedly pestered or badgered her mother into making a new Will, in the Summer of 2002, or at any other time. The evidence I have is that Irene Scammell announced her intention to change her Will in September 2002, and then the next relevant event was a request by her to Lynda to arrange a visit to a solicitor in January 2003. Nor do I get a picture from Mr. Hayes' evidence of Irene Scammell having appeared at all troubled or weighed down by the question of her Will in the latter part of 2002. Mr. Hayes does not say that she even mentioned the point to him at that time. What Mr. Hayes did say was that in his opinion Irene Scammell "knew her own mind".

116. I cannot therefore conclude that Irene Scammell was coerced into making her 2003 Will, and in my judgment this challenge also fails.

The "Golden Rule"

117. I was pressed by counsel for the Claimants with the so-called 'golden rule' for the execution of a Will by an old or infirm testator, and how that rule had not been complied with in this case because Mr. Steele had not insisted on the assessment by a general medical practitioner of Irene Scammell's mental state before she executed the 2003 Will.

118. *Kenward v. Adams* was a decision of Templeman J in November 1975. I have been provided only with a copy of a 2 paragraph report in the Times Law Report for 28th November 1975 (which does not disclose the date of the judgment). The relevant part of the short report reads as follows:

> "When a solicitor is drawing up a will for an aged testatator or one who has been seriously ill it should be witnessed or approved by a medical practitioner, who ought to record his examination of the testator and his findings. That was the golden if tactless rule ... Other precautions were that if there was an earlier will it should be examined, and any proposed alterations should be discussed with the testator."

119. Templeman J returned to the point early in 1977 when giving judgment in the case of *Re Simpson* 121 So Jo 224. The relevant part of this short report states:

> "The events of this case, which involved the disputed will of an old and infirm testator, constrained him to repeat the warning he had given in *Kenward v. Adams* (1975) The Times, 29 November, that the making of a will by such a testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings."

120. In *Buckenham v. Dickinson* [2000] WTLR 1083, Judge Roger Cooke was also pressed with the observations of Templeman J, and himself observed:

> "Now of course what Simpson does not say, although counsel tries to submit that it does, is that a failure to observe the golden rule will invalidate the will; it says nothing of the kind, but it points very starkly to the problems that professionals face when they are drawing wills and they do not take these precautions or precautions as near to them as the practicalities require."

121. In *Hoff v. Atherton* (loc cit) Peter Gibson LJ observed that the *Kenward* case:

> "... which is too briefly reported to be of much assistance, contains prudent guidance for solicitors and does not purport to lay down the law."

122. In *Cattermole v. Prisk* (loc cit) Judge Norris observed:

> "This 'golden rule' provides clear guidance as to how, in relevant cases, disputes can be avoided, or minimised (with the material relevant to the determination of the dispute contemporaneously recorded and preserved). The 'golden rule' is not itself a touchstone of validity and is not a substitute for the established tests of capacity and of knowledge and approval that I have summarised in the two preceding paragraphs."

123. In the light of this more recent guidance, I have therefore applied the established tests to the three challenges made without regard to the 'golden rule'.

124. It follows that I am not required to speculate what might have transpired had Irene Scammell had a private discussion with Mr. Steele of the sort contemplated in the last sentence of the report of the judgment of Templeman J in *Kenward v. Adams*. I have found that Irene Scammell was capable of making a will on 21st January 2003, she was not coerced by Lynda Farmer into making the provision she made, and she knew and approved of that provision. In the event, although the Claimants were not overlooked, their voices went unheard in Irene Scammell's decision-making processes because they were unaware of what was happening, and because Irene was subjected to the persuasion of their aunt who in fighting her own corner had scant regard for theirs.

125. I should emphasise that it has not been suggested that Mr. Steele acted in breach of any duty he owed to Irene Scammell, or to anyone else. He was instructed to assist Irene Scammell to make a Will; he agreed to do so for £75 plus VAT, which is scarcely a King's ransom for what must have occupied more than 1 hour of his time. He was not instructed to advise Irene Scammell on how to dispose of her estate on her death. He was not told that there was a Will already in existence, and he did not consider it important to enquire whether there was.

126. For the reasons I have given I dismiss the Claimants' claim.

127. I would appreciate receiving written submissions from both parties at least 24 hours before the formal handing down of this judgment on the question of costs, especially if there is to be any suggestion that Lynda Farmer should bear some or all of her own legal costs because of the way she conducted herself after Irene Scammell's death; or any suggestion that any part of the Claimants' costs should be borne by Irene Scammell's estate because of the (in the event false but uncorrected) expectation of benefit generated by Irene Scammell's representations over the years, that the Claimants were to benefit substantially upon her death. It would be helpful if any such submissions also included an indication of the extent of the costs incurred.