SHERIFFDOM OF TAYSDIE CENTRAL AND FIFE AT DUNFERMLINE

JUDGEMENT

of

SHERIFF CHARLES N. MACNAIR Q. C.

in the case of

ISABELLA DICKSON JEFFREY, residing at 394 Househillmuir Road, Glasgow, G53 6SQ

PURSUER

against

LORNA BROWN, Caritas Legal Limited, Unit 10 Dunfermline Business Centre, Izatt Avenue, Dunfermline, KY11 3BZ the EXECUTOR NOMINATE OF THE LATE RICHARD JOHN MALONEY, an individual latterly residing at 11 Normandy Place, Rosyth, KY11 2HJ.

FIRST DEFENDER

and

MARGARET ANN REILLY MORAN ANDERSON, an individual residing at 11 Normandy Place, Rosyth, KY11 2HJ

SECOND DEFENDER

and

RICHARD JOHN MALONEY (JUNIOR), an individual residing at 67 Martin Brae, Livingston, EH54 6UT

THIRD DEFENDER

and

ALISON BARR MALONEY, an individual residing at 2/2, 52 Crebar Street, Glasgow, G46 8ES

FOURTH DEFENDER

The Sheriff having resumed consideration of the case Finds in Fact as follows:

1. The pursuer is the daughter of the late Richard John Maloney ("the deceased") who died on 16 December 2018. The first defender is a solicitor and is the executor appointed in a will executed by the deceased on 26 February 2018. The second defender is the former domestic partner of the deceased and a beneficiary of the will. The third and fourth defenders are children of the deceased and are beneficiaries of the will.
2. The deceased was born on 30 March 1936.
3. The deceased married Isabella Dickson Rooney on 7 December 1963. They had three children together namely the pursuer born 22 August 1964; the third defender born 1st July 1965 and the fourth defender born 5th September 1966. The deceased and said Isabella Rooney separated and divorced in about 1975.
4. The deceased had owned a taxi business in West Lothian. At the date of his death he owned a house at 22 Eden Drive, Craigshill, Livingston and a lock up garage.
5. The second defender is a widow. She owns a house in Rosyth and is a retired nurse. She receives a pension from this employment.
6. The deceased and the second defender met through an online dating site in about 2006. After some time the second defender would spend some days with the deceased in his house and he would spend some days with her in her house.
7. The second defender and the deceased had a close and loving relationship. They went on holiday together both in the United Kingdom and overseas and went on cruises together. These were paid for by the second defender. They attended functions together such as weddings, dances and funerals. At at least some of these events the second defender would be dressed in a more formal manner than the deceased.
8. The relationship between the second defender and the deceased's family was strained.
9. During the course of 2016 the deceased moved to Rosyth to live with the second defender.

10. On 17 January 2018 the deceased was admitted to the Royal Victoria Hospital, Kirkcaldy. He was discharged on 12 February 2018. He died on or about 15 December 2018.

11. Until 2018 the deceased had never made a will. On a number of occasions he expressed the view that he was content with the rules of intestacy.

12. During the deceased's stay in hospital there were concerns about his capacity. The second defender considered that it might be necessary to apply to the Court for an order appointing a welfare guardian in order that a decision could be made about where the deceased would reside on his discharge. The Second Defender and the deceased's family were not in agreement about this.

13. At one point during the deceased's stay in hospital police officers arrived at the second defender's house, following a report by a member of the deceased's family. During the visit they said that the complaint involved a will. Following the visit the second defender telephoned the deceased. During the conversation she asked if he had made a will. During the conversation her voice was raised. This was in part because the deceased was hard of hearing and in part because the second defender has a naturally loud speaking voice. The deceased appeared distressed by the call.

14. The first defender is a practitioner who specialises in adults with incapacity, in particular with those suffering for dementia including those suffering from Alzheimer's Disease.

15. There was a meeting at the hospital involving clinical staff, the deceased's children and the second defender on 7 or 8 February 2018. At that meeting the view that was expressed by the hospital staff was that the deceased lacked capacity.

16. At the end of the meeting a member of the hospital staff suggested that the first defender would be well able to apply for a guardianship. That person was aware that the first defender specialised in cases of adults with incapacity.

17. When it came to discharging the deceased the clinical decision made by the staff at the Hospital was that the deceased had capacity and did not require a guardian. The deceased decided that he wished to reside with the second defender and he was discharged to her address.

18. After he was discharged the second defender asked the first defender to see the deceased in relation to a Power of Attorney. She did not say anything to the first defender regarding a will.
19. The first defender consulted with the deceased on 13 February 2018. After a short meeting with the second defender which did not involve any legal issues, the second defender withdrew to another part of the house. The first defender discussed with the deceased the grant of a power of attorney in favour of the second defender. The first defender took steps to confirm that the deceased had capacity. She had some social conversation and then offered advice. Later she confirmed that the deceased retained a memory of and understood the advice.
20. The deceased told the first defender that he wished to make a will in favour of the second defender. He did not want to leave anything to his children. He was advised about the children's legal rights to a portion of the moveable estate. The first defender satisfied herself that he comprehended her advice.
21. The first defender returned the following day with a draft will. She confirmed the instructions from the day before and that the deceased understood the advice that he had been given. She left the draft will with the deceased.
22. The first defender returned to see the deceased on 26 February 2018. She confirmed with him that he could recall the advice she had tendered at their previous meetings. He was able to do so. The deceased executed the will and his signature was witnessed by the first defender.
23. At all times the first defender acted for the deceased and on his instructions. She never acted for the second defender.
24. The second defender had not asked the deceased to make a will in her favour.

Finds in Fact and Law

1. That the deceased had capacity on the date that he executed the will.
2. That the deceased was in a weakend state of mind at the time that he executed the will.
3. That the second defender did not use force or circumvention or coercion to obtain the deceased's execution of the will.

4. The second defender did not use any undue influence on the deceased to obtain his execution of the will.
5. The will was executed when the deceased was in receipt of independent legal advice.

Finds in law

That the will executed by the deceased on 26 February 2018 is valid.

ACCORDINGLY repels the pursuer's pleas in law; sustains the second defender's pleas in law and grants decree of absolvitor; reserves all questions of expenses and assigns 31 March 2022 at 2pm as a date of hearing theron.

NOTE

Background

[1] The pursuer and the third and fourth defenders are the children of the late Richard John Maloney ("the deceased") who died on 16 December 2018. Prior to his death the deceased had been in a relationship with the second defender, Margaret Anderson. On 26 February 2018 the deceased executed a will in favour of the second defender. Prior to this will he had never had a will. The pursuer, Isabella Jeffrey with the support of her siblings, who are nominally the third and fourth defenders contests the will on three grounds, namely (1) the deceased lacked capacity when he signed the will; (2) the will should be reduced on the ground of facility, circumvention and lesion; and (3) that the will was signed as a result of undue influence by the second defender.

[2] The will was executed shortly after the deceased had spent a period in hospital. The pursuer's position is that he lost the capacity to make a will during his stay in hospital and remained incapacitated following his release and had not regained capacity when he made the will. The second defender on the other hand maintains that he had capacity. As far as the other two grounds are concerned the pursuer says that the second defender put pressure on the deceased to make a will in her favour. She says in her pleadings that the solicitor who

drew up the will was the second defender's solicitor although she did not maintain this position by the end of the proof. The pursuer's essential case was that the second defender had a coercive and controlling relationship with the deceased and as a result of that relationship the deceased signed the will when his mind was weak, assuming that he had capacity.

Medical Records

[3] Before I turn to the evidence I will deal with one discreet evidential issue. The pursuer lodged copies of the medical records relating to the deceased from the Royal Victoria Hospital, Kirkcaldy. At a procedural hearing I enquired of parties whether any treating doctor would be attending the Proof. I was advised that no such Doctor would be in attendance. The pursuer led as an expert witness Professor Carson who had carried out a "desk top" analysis of the records. He was an extremely impressive witness and nothing I say should detract from his obvious expertise and the care that he devoted to the task that was set. During the proof I asked if the records were agreed and Counsel for the first defender advised that he was prepared to agree that the copies were accurate but that he was not prepared to agree that they were accurate. After an adjournment to allow a further witness for the pursuer and submissions a Joint Minute was lodged which agreed:

> *"That 5/1/1 and 5/2/02 are copy medical records of Richard Maloney (Deceased) from Victoria Hospital covering the period December 2017 – February 2018"*

During the course of submissions I drew Counsel's attention to *McHugh v Leslie* 1961 SLT (Notes) 65 and *Leneghan v Ayrshire and Arran Health Board* 1994 SLT 765. I allowed Counsel an opportunity to consider these cases. On his return he moved to adjourn the proof to enable him to cite the authors of some of the records. That motion was opposed. I refused the motion. It was clear from the outset of this litigation that the deceased's state of health when he was in hospital in early 2018 was crucial. Unless the records were agreed as accurate that was a matter on which the pursuer was bound to lead evidence. Even after the matter was raised during the evidence by me no steps were taken to obtain further evidence until the last day of proof. Any further continued diet would have involved significant further delay having

regard to Court's diary. The main asset in the estate was a house in Livingston and it was vital in my view that the fate of that property was decided before its condition deteriorated through lack of care. Furthermore the second defender is aged 81 years. I took the view that she was entitled to a reasonably early answer to the dispute. There was modified motion to the effect that the pursuer should be allowed to docquet certain records in terms of Rule of Court 29.3. I did not consider that such a docquet would enable the proof to conclude on that date. There was a seemingly a difference of opinion between the doctors involve (a matter commented upon by Professor Carson). Without oral evidence it seemed to me that merely docquetting certain pages of the records would not enable me to make the necessary findings in fact. The defender's counsel made it clear that he was not agreeing the records as there had been evidence led by his witnesses which indicated that they may not be correct. I(n any event the pursuer had had plenty of time to consider this matter.

[4] Having refused the motion to adjourn I consider that on the authority of the cases referred to. *McHugh* and *Leneghan* that I would not be entitled to have regard to the material contained in the records as factually accurate. For the reasons I discuss later this does not allow me to accept much of the evidence of Professor Carson.

Evidence

[5] All witnesses gave evidence in chief by way of affidavits and were cross examined and re-examined. Apart from the last witness, Donna McPherson all evidence was taken by webex. Mrs McPherson gave evidence in person as she had been unable to connect using webex. The witnesses gave evidence in chief by affidavits or, in the case of Professor Carson by way of written report. The witnesses were cross examined and re-examined online. In light of the parties not asking supplementary questions in examination in chief, I allowed counsel some latitude during re-examination when questions were asked that did not arise from cross examination.

[6] The issue of the deceased's relationship with the second defender and his family was hotly disputed. The evidence of the pursuer and her factual witnesses were in stark contrast with the evidence of the second defender and her factual witnesses. The evidence was lengthy

and covered the whole period of the second defender's relationship with the deceased. Some of the evidence was of doubtful relevance to the issues in the case but did go some way to explain why the pursuer and her family did not like the second defender. An example of this is to be found in the pursuer's affidavit at paragraph 20 where she describes the second defender acting inappropriately by calling the witness's niece "fat". Had the case proceeded in person, it is very doubtful that any question would have been asked that would have prompted that evidence. Antagonism on the part of a witness however does not mean that the witness is not telling the truth about matters which are relevant. I do not intend to rehears the evidence of the various witnesses about the relationship in detail. I find that from an early stage in the relationship between the deceased and the second defender, the deceased's children did not get on with the second defender and vice versa. This appeared to have an impact on the relationship between the deceased and his children. I consider that the attitude of the second defender did not help but I do not accept having read or heard all the evidence that the second defender deliberately alienated the deceased from his children. Some of the allegations made by the family was in my view demonstrably exaggerated. For example the pursuer said that the second defender made the deceased wear formal clothes when he preferred to wear informal clothes. There were in process a number of photographs taken on cruises where formal attire might have been expected where the second defender was dressed smartly and the deceased casually. There was also evidence that the second defender shouted on a number of occasions. That was certainly confirmed by a recording and by an independent witness Donna McPherson, a nurse. I however listened to the second defender and throughout her evidence she spoke in a loud voice. She denied shouting and that denial was given in a voice which could have been described as shouting. I asked her if she thought that she was then shouting and she said "No." I consider that the second defender is one of those people have a naturally loud voice. Donna McPherson spoke of a telephone conversation between the deceased and the second defender where the question of the deceased making a will came up. The deceased was upset by that. I am content to accept that Ms McPherson was telling the truth about this event. The second defender said that she had been approached by police officers who were asked by one of the children to look into the deceased's admission to hospital. According to the second defender the officer had said that it was reported that the deceased may have made a will. This came as a surprise to the second defender as she knew

that he had never before made a will and she asked him about it. I do not believe that she was somehow challenging him about this or that she was annoyed. It was suggested that this passage of the second defender's evidence was incredible. I do not accept that. Richard Maloney said that he had telephoned the police and I consider it very likely that he would have mentioned a will as this seemed to be at the forefront of the minds of the children if not at all times, certainly at times when the deceased was ill.

[7] I am of the view that the evidence pointed to the second defender being in a loving and supportive relationship with the deceased. The evidence pointed to her the dominant party in that relationship however many relationships have a similar balance and that alone does not seem to me to show that she was exercising influence over him when it came to his financial affairs. According to the second defender she had no interest in his money and she was happy to support him. Richard Maloney said that at one point during the February meeting in the hospital the second defender shouted "I don't need his money". I consider this reflects the feelings of the second defender.

[8] On the question of capacity there was no dispute that at one point during the deceased's stay in hospital prior to the execution of the will, he lacked capacity. I also heard evidence from Professor Carson who it was agreed was a highly qualified and impressive witness. He did not see the deceased and his evidence, in so far as dealing directly with the deceased was based on the hospital notes. For the reasons I have already given this evidence is of little use. He also gave evidence of a more general nature dealing with the nature of Alzheimer's disease. It was accepted that when the deceased died he was suffering from Alzheimer's. Professor Carson explained that any person suffering from Alzheimer's shows no symptoms for a significant period, running into years before his capacity is affected. He could therefore be confident that the deceased was suffering from Alzheimer's at the time of his discharge from hospital. That of itself did not mean that the deceased lacked capacity. Professor Carson noted that on his discharge the consultant in charge expressed the opinion that he did have capacity. Professor Carson did not dispute that decision, so that even if I am wrong about the limitation of the Joint Minute, the only medical expert evidence points to the deceased having capacity.

[9] In the lead up to the deceased discharge from hospital in February 2018 there was a meeting held on 7 or 8 February in a side room off the deceased's ward. The deceased's children were present along with the second defender and her nephew's partner, Jaqui Gordon who is a psychiatric nurse at the Royal Edinburgh Hospital. At that first meeting it was thought by the medical staff that the deceased lacked capacity and that a guardianship would be necessary. At the end of the meeting the second defender was advised that the first defender was an expert in this field. It would appear that shortly after the meeting a further meeting was held at which it was decided that the deceased did have capacity. The first meeting appears to have been acrimonious as it was called at the request of the children as they had complaints about the second defender's treatment of the deceased. At the first meeting the deceased said that he wanted to return home with "his wife". In context I consider that he must have meant the second defender and not, as was suggested by Richard Maloney, his house in Livingston. The children were against him staying with the second defender. I accept that he did want to return to the second defender's house. This after all had been where he had been living for about two years. He was thereafter discharged into the care of the second defender. The medical records appear to suggest that he did have capacity but for the reasons I have given I cannot rely on those. Richard Maloney's affidavit however speaks of having heard of the second meeting and in any event had he lacked capacity I do not consider that he would have been discharged. Furthermore it appears to me highly unlikely that he would have been discharged had the treating physicians and nurses had any substantial doubt about the second defender's ability to properly look after the deceased.

[10] A witness whose evidence I find critical in relation to this matter is the solicitor who drew up the will and witnessed' the deceased's signature and I consider it appropriate to consider her evidence in some detail. She is a very experienced solicitor specialising in cases involving adults suffering from dementia. At the initial discussions about the deceased's discharge it was thought that a welfare guardian would be required. Lorna Brown's name was suggested by one of the hospital staff as someone who did that type of work. When the advice changed to the deceased having capacity it was suggested that the deceased should sign a power of attorney. As the second defender had the name of Lorna Brown she arranged for her to visit the deceased regarding a power of attorney. Despite the allegation in the pursuer's pleadings, Lorna Brown was never the second defender's solicitor. Lorna Brown

attended the second defender's house and after a few pleasantries the second defender left Lorna Brown and the deceased together. When the appointment was made there was never any suggestion that a will would be drafted. Lorna Brown met with the deceased on his own outwith the hearing of the second defender. He told her that he had hardly seen his children in recent years. He had brought them up on his own but they did not like him having a life on his own. He thought they were worried about not getting what they were due. He said that his son had previously threatened Mrs Anderson and he did not want him to visit. He spoke of his house in Livingston and his previous taxi business. He also showed the witness photographs of cruises he had been on with Mrs Anderson. He told Lorna Brown of his recent hospital admission and that he wanted to get his affairs in order and to make sure that Mrs Anderson was protected. He asked the witness to prepare a will as well as a power of attorney. Lorna Brown had regard to the discharge letter saying that the deceased had capacity but she did not rely on it. She set out her practice when dealing with adults who may not have capacity and at paragraph 8 of her affidavit she sets out her process to assess capacity. That mirrors the practice recommended by Professor Carson and in evidence Professor Carson said that if she followed that practice it would confirm that the client had capacity. She was satisfied that the deceased did have capacity before she had him execute the will. Had she not been so satisfied she would not have proceeded. She also said that she was alive to the possibility of undue influence or abuse. During her conversations with the deceased she could see no signs of abuse. On the contrary it appeared to her that the deceased enjoyed a very good and loving life with the second defender. He explained that he wanted to make sure that the second defender was not cast aside and that he did not want his children to inherit. When discussing his will he said that the second defender had shared everything with him but that he had not done the same. He was advised that he could not completely disinherit his children which appeared upset him. All this happened on 13 and 14 February. Lorna Brown advised him not to sign the will. She did have him execute the power of attorney and on 28 February she returned to update him on the power of attorney. She again talked to him about the will. He understood the will and he again expressed upset that he had to leave anything to his children. After further discussion he signed his will and that signature was witnessed by Lorna Brown. I found her evidence entirely credible and despite the pursuer's brother saying that he thought she was lying, the pursuer's counsel accepted that her evidence could be accepted. Certainly

I accept that her evidence about what happened and what the deceased said to her in its entirety. The evidence of what the deceased said is of course admissible in terms of section 2 of the *Civil Evidence (Scotland) Act 1988*. The fact that it is admissible does not make it true however it does appear to me to represent the feelings of the deceased at the time that he signed the will. The issue is whether those feelings resulted from improper pressure from the second defender.

LAW

[11] The pursuer seeks reduction on three separate grounds, namely first lack of capacity; second facility, circumvention and; and lesion; and third undue influence.

Capacity

[12] Counsel for the pursuer cited *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 as outlining the classic statement of the law. Cockburn CJ said:

> "It is essential.... That a testator shall understand the nature of the act and its effect; 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 and prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

[13] He also submitted under reference to *Smyth v John Rafferty and Others* [2014] CSOH 150 that it is for the person seeking to uphold the will to prove capacity. Lord Glennie did indeed say that but he went on to say:

> "Few cases nowadays turn on the burden of proof, but it is useful as a point of departure. In many cases little is required to displace the initial burden. If, on the other hand, the testator appears to have behaved in a confused manner, or the content of the will excites "a suspicion of the court" (see *Gill v Woodall* [2011] Ch 380 at para 13), a more detailed examination in which it was made may be necessary. It has been

observed that if a properly executed will has been professionally prepared and then explained to the maker by an independent and experienced solicitor, it will be markedly more difficult to challenge its validity on the grounds of lack of capacity than in a case where those prudent procedures have not been followed: *Burgess v Hawes* [2013] WLTR 453."

[14] His Lordship also quoted from the Judgement of Lord Neuberger MR in *Gill v Woodall* where his Lordship referred to a policy argument:

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

[15] The submissions in this case and Lord Glennie's opinion relied quite heavily on English authority. I do not understand, and certainly it was not suggested to me that there is any material difference in the law on any of the grounds of challenge between the two jurisdictions. It is also clear that capacity is not a fixed concept. An individual's capacity can come and go. Lord Haldane said in *Sivewright v Sievewright's Trustees* 1920 SC (HL) 63:

"The question whether there is such unsoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act. But, he is not required to be highly intelligent. He may be stupid, or he may even be improperly, as far as ethics go, actuated by ill-feeling. He may, again, make

his will only in the lucid intervals between two periods of insanity. The question is simply whether he understands what he is about. On the other hand, if his act is the outcome of delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficient to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But in that case if the testator is not generally insane, the will must be shown to have been the outcome of the special delusion. It is not sufficient that the man who disposes of his property should be occasionally the subject of delusion. The delusion must be shown to have been an actual and impelling influence."

[16] On the question of onus I did not receive full submissions on this issue. The pursuer rested his submission on the opinion of Lord Glennie who provided no authority for that *dicta*. It may be said that such an onus is contrary to the general presumption of capacity found in, for example the *Adults with Incapacity (Scotland) Act 2000* which places an onus on an applicant in any application for a guardian, welfare or financial. Furthermore it is arguably inconsistent with the speech of Lord Haldane in *Sivewright*. I will however proceed on the basis that Lord Glennie was correct and the second defender has the onus of establishing capacity.

Facility and Circumvention

[18] In order to establish a case on this ground the pursuer must show (a) facility; (b) circumvention; and (c) lesion. If she fails on any one of these heads, she fails.

[19] Faciilty arises where there the testator suffers from weakness of mind falling short of lack of capacity. It must be shown that the testator is susceptible to the improper practices and solicitation of interested parties (*Morrison v Morrison's Trustees* (1862) 24D 625). Facility may arise from a general weakness from age or illness. If there is a general lack of will power, specific instances of facility need not be proved (*Gibson's Executor v Anderson* 1925 SC 774). The mind must be so weak or pliable so that he is unlikely to be able to resist pressure applied by another (*Pascoe-Watson v Brock's Executor* 1998 SLT 40 at 47F-G). Circumvention is pressure placed upon the testator, which, because of the testator's state mind he is unable to resist. A robust individual may be able to resist the pressure, a facile person may not. Facility is a matter of degree. In any particular case it is necessary to determine whether there is any facility and if so whether it is established that there is any pressure, direct or indirect that overcomes the

will of the testator so that he does what he would otherwise have resisted doing. If so the will can be reduced. The third element, namely lesion can be assumed by the making of the will.

Undue influence

[20] The law was summarised by Lord Macfadyen in *Broadway v Clydesdale Bank* 2003 SLT 707 and by Lord Glennie in *Smyth.* There must first be a relationship of trust and confidence. There is no limit to the types of relationship before the doctrine can apply. One party must be in a position to exert a strong influence on the other. There must also be evidence of abuse. There must be no coercion, inappropriate acting or concealment. The coercion need not be overt or blatant. Other, more subtle means of abusing the relationship may be employed by the other party. What is required is evidence of such pressure having overpowered the will or freedom of action of the testator. Mere persuasion of a testator who is capable of resisting and able to express his own wishes is insufficient (*Wharton v Bancroft* [2011] EHWC 3250 (Ch) cited by Lord Glennie in *Smyth* at para. 45.) Where the testator has obtained independent legal advice prior to signing the will, there will be no reduction (*Grey v Binny* (1879) 7R 332 and *Smyth* para 47).

Discussion

[21] Each ground has to be looked at separately although there is an overlap between the various grounds advanced by the pursuer.

Capacity

[22] I am satisfied that the relationship between the deceased and his children became very difficult over the years prior to his death. His children did not get on with the second defender and the second defender did not get on with them. I am satisfied that until quite late in his life the deceased had said that he was content to die intestate. He also expressed a desire to be buried in the family plot. I am also satisfied that at some point during his admission to hospital at the beginning of 2018 he was suffering from an infection that caused him to lack capacity. I am also satisfied that the second defender's relationship with the deceased was not always perfect. However I consider that the pursuer and the other witnesses exaggerated supposed difficulties between the two of them. Much was made of the second defender shouting at him. I consider that she may have been perceived to have done so, in particular by Donna

McPherson. It was noticeable however that the second defender had a naturally loud voice. When giving evidence she was speaking in a manner which could easily be mistaken for shouting. Indeed at one point I asked her if she thought she was shouting. Without lowering her voice she said that she was not. It was also alleged that the second defender insisted on him wearing formal clothing when he preferred to be casually dressed. A number of photographs were lodged in process showing the deceased at events where it might be expected that a man would be quite formally dressed. The photographs showed him in the company of the second defender in informal attire wearing, for example t shirts.

[23] By the time of his discharge from hospital I consider that the evidence demonstrates that he had capacity. That was discussed at the meeting with medical staff and the family prior to discharge. Prior to that meeting it was thought that he still lacked capacity and the second defender was advised that she would need to seek a welfare guardianship. It was in this context that she was advised that Lorna Brown was an expert in this area of law. Once Lorna Brown was engaged it was understood that the deceased did have capacity. There was a very acrimonious dispute about where the deceased would live on his discharge and once the advice was given that he had capacity, he chose to live with the second defender, with whom of course he had been living for many years.

[24] When Lorna Brown attended at the second defender's address I am satisfied that the appointment had not been arranged for the deceased to make a will. It had been arranged for him to grant a power of attorney. The second defender absented herself during the discussions between Lorna Brown and the deceased. I accept Lorna Brown's evidence that it was the deceased that brought up the subject of a will and said who he wanted to leave his estate to and indeed who he did not want to leave his estate to. I accept that Lorna Brown is an expert in the field of adults with incapacity and indeed this was not disputed by Counsel for the pursuer. I consider that she made a thorough and careful assessment of the deceased's understanding of the advice that she had tendered prior to having him sign the will. She gave advice to the deceased and took instructions. When she next saw him she confirmed that he had remembered her advice and confirmed his instructions. Only then did he execute the will. Her procedure matched, in all material respects, the advice given by Professor Carson. I am also satisfied that there was no discussion between the deceased and the second defender

about the preparation of a will when Lorna Brown was instructed. I accept the second defender's evidence that she was not interested in whether the deceased made a will or not. She did ask him on one occasion when he was in hospital whether he had made a will however I accept her evidence that this was in response to something said to her by the police. The police had been contacted by the deceased's family about her hospital admission and in light of the family dynamics I do not find it surprising that there was an allegation that the second defender was pressurising the deceased into making a will. I also accept that prior to her discharge there was a meeting at which the deceased's capacity was discussed. At that meeting the advice from the medical practitioners was that the deceased did have capacity.

[25] If I am wrong about the use of the medical records, this would not affect my decision. The records, according to Dr Carson demonstrate that the deceased had some cognitive impairment, however he did not dispute the decision taken by the treating staff that he retained capacity. He said that on the basis of the records that he had seen, including the cognitive test, he would probably have reached the same conclusion. I accept that at one stage during his admission he did not have capacity, however as noted above capacity is not fixed and can vary over time. Based on Professor Carson's desk top analysis together with the other evidence I am not persuaded that the analysis of Lorna Brown, who saw him at the time that the will was executed was incorrect. Furthermore if I am entitled to have regard to the records I am also entitled to have regard to the discharge letter that states that the deceased had capacity.

[26] In all the circumstances I reject the pursuer's first ground.

Facility and Circumvention

[27] I have already pointed out that where there is a weakness of mind, whether that amounts to facility may well depend on the level of any circumvention. It may be that an individual with some weakness of mind may be able to stand up to considerable pressure in circumstances where another individual with the same weakness would not. I therefore have to decide (first) whether the deceased suffered from a weakness of mind short of incapacity; (second) whether he was put under any improper pressure to execute the will in favour of the second defender; and (third) whether that pressure did in fact induce the deceased to make the will.

[28] As far as the deceased's state of mind is concerned I consider that the evidence does demonstrate that he suffered some weakness of mind. Professor Carson explained that a person will suffer from Alzheimer's Disease for a long time before it is finally diagnosed. There is no doubt that he was diagnosed with Alzheimer's prior to his death and accordingly I can draw the inference that he was doing so at the time of execution of the will. The fact that someone has early stage Alzheimer's does not in itself mean that the individual either lacks capacity or is unable to stand up to pressure. In this case there is also the evidence that for a time during his admission to hospital he had lost capacity and in all the circumstances I am of the view that he did suffer some weakness of mind.

[29] The next question is whether the deceased did in fact put pressure on him to write a will in her favour. There is no direct evidence of this which is to be expected in a case such as this. I do not consider that the overheard conversation during which the second defender asked him if he had written a will, whatever the circumstances of that conversation is indicative of pressure. As I have already held it was in response to the second defender hearing that he had made a will. In light of his previously having made clear that he did not want to make a will, it is not in the least surprising that such a question was asked. The deceased's family also gave evidence of threats made by the second defender that they would receive nothing. This was denied by the second defender who repeatedly said that she was not interested in receiving his estate as she had a house and money of her own. I am not prepared to accept the evidence that any such threat was made. As I have already held I consider that the pursuer and her witnesses did, at least to a degree exaggerate their evidence. The evidence surrounding the signing of the will does not point to any coercion. As I have already said, the appointment with the solicitor was made for the purpose of obtaining a power of attorney. The whole question of a will was raised by the deceased. The second defender showed no interest in the meeting apart from the issue of a power of attorney. In order to find any coercion or circumvention I would have to rely on drawing inferences from other evidence spoken to by witnesses. I decline to do so. I believe the second defender when she said that she was no interested in the deceased's estate. She had for some years provided him with a home together and had largely funded their lifestyle, including holidays and cruises. She was proud of the fact that she was self-sufficient and I do not believe that she would have exerted pressure on the deceased. Having regard to the circumstances of the

signing of the will it would need to have been very subtle pressure. The pursuer's position was that he had a poor memory. She would somehow have to have primed him to raise the issue of a will with Lorna Brown who did not expect or anticipate any such instructions. She is a very experienced solicitor in this field and I consider that she would have been alert to any signs of coercion. She saw no such signs.

[30] Having made that determination I do not need to consider the third question. I will however address it briefly. In my view the evidence showed that at the time that the deceased was discharged from hospital he was able to make up his own mind. It was clear that he was aware that the second defender wanted him to return home with her, whereas his family, who of course outnumbered the second defender was against that course. He did make up his mind and returned home with the second defender. I do not consider that this decision resulted from coercion or circumvention, it was his decision about which the second defender was ignorant. The family no doubt thought it to be the wrong decision but that is not the point. Equally they thought the making of the will was out of character and wrong. But again that is not the point. Unless there is circumvention a person with capacity is entitled to make a wrong decision even one which may be perceived to be irrational. From the discussion with Lorna Brown when he gave instructions for the will it would appear that he had fallen out in a major way with his children as he asked that they be written out of the will completely. That relationship never recovered. There was no direct evidence of why that split came about but in the circumstances I draw the inference that it arose from the deceased perceiving that his children were so antagonistic towards his partner that they were wishing to stop him living with her as he wished. I accordingly reject the second ground of challenge.

Undue Influence

[31] I can deal with his ground quite shortly. Foe the same reasons that have for rejecting the submission that there was circumvention, I also reject the idea that he was subject to undue influence. Professor Carson was of the opinion that he was susceptible to undue influence but he also said that that does not mean that he was subjected to such undue influence. I accept that he may well have been susceptible but in not find there was any influence from the second defender to write the will that the deceased made. Also if there had been any such influence I

consider that it would have not invalidated the will as the will had been drawn up and signed following independent legal advice (*Grey* and *Smyth).* I also reject this ground.

Conclusion

[32] My decision will no doubt come as a disappointment to the pursuer and her siblings. It may be thought that the deceased was not acting fairly towards his children. On the other hand had he made no will he may have been thought to have been acting unfairly towards his partner of many years. Where the balance lies is one of judgement and the only person who could have made that judgement was the deceased. As I find that he was not influenced in his decision making by the second defender and that he had capacity to make that decision, the challenges to the will fail.

[33] Having rejected all three grounds for the reasons I have given I will assoilzie the second defender from the craves of the Initial Writ. I will fix a hearing on expenses. Parties should lodge written submission on the question of expenses in advance of the hearing. If there is no dispute I will pronounce an interlocutor without the need for a hearing.

16 March 2022