Neutral Citation Number: [2023] EWHC 1901 (Ch)

Case No: HC-2017-001938

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

Royal Courts of Justice,
Rolls Building.
Fetter Lane,
London
EC4A 1NL

Date: Wednesday, 26 July 2023

Before :

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

- -

IN THE MATTER OF THE ESTATE OF ANNA REA, Deceased

Between :

RITA REA

Claimant

- and -
(1) REMO REA
(2) NINO REA
(3) DAVID REA

Defendants

- -
- -

Mr Robert Deacon (instructed by **Britton & Time**, Hove) for the **Claimant**
Mr Graeme Wood (instructed under the **Bar Direct Access Scheme**) for the **Defendants**

Hearing dates: 4-7 July 2023
Draft judgment circulated: 24 July 2023
Judgment handed down: 26 July 2023

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HODGE KC

- -

Hand-down: This judgment was handed down at a remote hearing by Teams at 10.30 am on Wednesday 26 July 2023. It has been circulated to the parties or their representatives by email and will be released to The National Archives.

Will *– Contested Probate claim – Retrial ordered by Court of Appeal – Dispute between the only daughter and the three sons of the testatrix – Whether 2015 Will should be admitted to probate instead of 1986 Will – Later will disputed on grounds of want of testamentary capacity, want of knowledge and approval, undue influence and fraudulent calumny –*

The following cases are referred to in the judgment:

Andrews v Styrap (1872) 26 LT 704
Ashkettle v Gwinnett [2013] EWHC 2125 (Ch)
Banks v Goodfellow (1870) LR 5 QB 549
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152
Gill v Woodall [2010] EWCA Civ 1430, [2011] Ch 380
Re Edwards [2007] EWHC 1119 (Ch)
Hawes v Burgess [2013] EWCA Civ 74
Henein v Laffa [2015] EWCA Civ 700
Hughes v Pritchard [2022] EWCA Civ 386, [2022] Ch 339
Jones v National Coal Board [1957] 2 QB 55
Nutt v Nutt [2018] EWHC 851 (Ch)
Rea v Rea [2019] EWHC 2434 (Ch), [2021] EWHC 893 (Ch), [2022] EWCA Civ 195
Schomberg v Taylor [2013] EWHC 2269 (Ch), [2013] WTLR 1413
Schrader v Schrader [2013] EWHC 466 (Ch)
Simon v Byford [2014] EWCA Civ 280
Spiers v English [1907] P 122

His Honour Judge Hodge KC:

I: Introduction

1. This is my reserved judgment following the retrial, over four days from 4 to 7 July 2023, of this contested probate claim, which was issued as long ago as 5 July 2017. The claimant is represented by Mr Robert Deacon (of counsel), instructed by Britton & Time Solicitors; and the defendants are represented by Mr Graeme Wood (also of counsel), who is instructed directly by the defendants. Neither counsel was involved in the original trial before Deputy Master Arkush. Since all of the parties to this litigation bear the same surname (**Rea**), in this judgment I shall, without intending any discourtesy to any of them, adopt their first names.

2. For structural reasons only, this judgment is divided into the following parts (although these are not self-contained, and the contents of any one part have informed other parts):

   I: Introduction

   II: Background

   III: Procedural history

   IV: Applicable law

   V: The retrial

   VI: Witness evidence

   VII: Submissions

   VIII: Analysis and conclusions

II: Background

3. The parties to this probate claim are the four adult children of the late Mrs Anna Rea (**Anna**) who passed away, aged 85, on 26 July 2016. Anna was divorced from her husband, Mr Huda, many years ago. There were three sons and one daughter of the marriage, namely (and in order of their dates of birth) the first defendant (**Remo**), the second defendant (**Nino**), the claimant (**Rita**), and the third defendant (**David**). They are all now in their late fifties and early sixties.

4. Anna was born and grew up in a small village in Italy in 1930, moving to England at the age of 19 and later marrying the father of the four siblings. There is an issue between the parties as to Anna's understanding of, and ability to communicate in, the English language. The defendants assert that this was very poor whereas Rita's evidence is that she, her siblings (none of whom spoke Italian) and her father always communicated with Anna in English. Rita says that her brothers' suggestion that their mother did not speak English does not make sense given that she had lived here since 1949 and they spoke to her in English for their whole lives. In opening, Mr Wood also refers to evidence that by February 2015, Anna's cognitive functioning was *"significantly impaired"*.

5. There is also an issue concerning Anna's care. It is common ground that Anna suffered from a number of health conditions. She was deaf in one ear and had poor hearing in the other, necessitating the use of a hearing aid. Anna was affected by diabetes for about the last 20 years of her life. She had suffered a serious heart attack in 2009. She was afflicted by chronic kidney disease, and bilateral cataracts. From about 2014, she suffered from sciatica and was wheelchair bound. It is common ground that Rita, who lived with her mother from 2009, was her principal carer; but there are issues as to the extent to which Nino and David assisted with the care for their mother up to November 2015, and as to Anna's perception of this. There is also an issue as to whether Rita changed the locks to the home at about that time, thereby preventing david and Nino from visiting Anna thereafter. Finally, there are issues as to whether Rita's evidence and case are compromised by a lack of candour on her part towards the solicitor who prepared a will for Anna in November 2015, towards her brothers in concealing the existence and the terms of that will during Anna's lifetime, and towards the court in this litigation.

6. Anna made her first will (**the 1986 Will**) on 29 May 1986. It was a simple, one-page document, apparently prepared by a solicitor shortly after Anna's divorce. Having revoked all previous wills, it appointed Remo as the sole executor. It gave all of Anna's property to such of her four children as should survive her, if more than one in equal shares absolutely, subject to them surviving Anna by 28 days. There was no substitutionary gift in favour of the issue of any pre-deceasing child.

7. The defendants rely, by way of hearsay evidence, upon a witness statement, dated 23 June 2018, and signed, on her instructions, by her daughter, from Mrs Giustina Dutta, an Italian, then aged 84 and since deceased, who was a good friend of Anna for almost 60 years. Mrs Dutta asserts that Anna's English was not very good; and she confirms that she acted as translator (from English to Italian) for Anna when she executed her 1986 Will (although the attestation clause contains no reference to this).

8. Anna made her second, and purported last, will on 7 December 2015 (**the 2015 Will**). It was prepared by a qualified, and experienced, solicitor, Mrs Savita Sukul (of SJS Solicitors, of Balham High Road SW12), who witnessed the will together with Anna's general practitioner, Dr Sajid Abdul Qaiyum (of Trinity Medical Centre, Balham High Road SW17). The 2015 Will was a much more elaborate document, extending to six pages. Clause 1 revokes all previous wills. By clause 2 Anna appoints Rita and Anna's niece, Angela Contucci (who formally renounced probate in August 2016), to be her executors and trustees. Clause 3 provides for the burden of inheritance tax. By cause 4 (headed *'Funeral Directions'*) Anna expresses the wish for Rita *"to decide the directions of my funeral"*. Clause 5 defines the expression *'my Estate'*. Clause 6 provides for Anna's trustees to hold the residue of Anna's estate upon trust to retain, postpone or sell it, and to pay any debts, funeral and testamentary expense, satisfy all the specific gifts referred to in the will, and deal with the residue of the estate as the will directed. Clause 7 contains a specific gift of Anna's house at 5 Brenda Road, Tooting Bec, London SW17 7DD (**5 Brenda Road**) to Rita absolutely *"as she has taken care of me for all these years"*, subject to the payment of any inheritance tax thereon. Clause 8 provides for the gifts of residue. Effectively, the residue of Anna's estate is to be divided into four equal shares, with each quarter share being paid to one of Anna's four children, with substitutionary gifts to issue in equal shares per stirpes,

and with any failed share returning to residue and being distributed to the other beneficiaries pro rata according to their shares.

9. Clause 9 (headed *'Trustee Powers'*), and extending to six sub-clauses, contains (a) extended powers of maintenance and advancement, (b) a power of investment, (c) a power of appropriation, (d) a power of insurance, (e) a minor's receipt clause, and (f) a power to delegate. Clause 10 (headed *'Technical Clause'*) (a) incorporates the STEP standard and special provisions (2nd edn) and (b) requires the estate to be divided as if any person who should die within one month of Anna's death had predeceased her. Finally, clause 11 (headed *'Declaration'*) provides as follows:

> I DECLARE that my sons do not help with my care and there has been numerous calls for help from me but they are not engaging with any help or assistance. My sons have not taken care of me and my daughter Rita Rea has been my sole carer for many years. Hence should any of my sons challenge my estate I wish my executors to defend any such claim as they are not dependent on me and I do not wish for them to share in my estate save what 1 have stated in this Will.

10. The defendants challenge the validity of the 2015 Will on the grounds of want of testamentary capacity, want of knowledge and approval, undue influence and fraudulent calumny practised by Rita on Anna. Since none of the defendants was present when instructions were given for the drafting of the 2015 Will to Mrs Sukul on 17 November 2015, or when it was duly executed on 7 December 2015, inevitably their case is largely based on inference from the circumstantial evidence.

11. In his written skeleton argument for the claimant, Mr Deacon points out that at paragraph 55 of his judgment Deputy Master Arkush recorded that: *"In David's closing submissions on behalf of the defendants, he made it clear that they did not pursue their case that Mrs Rea lacked testamentary capacity. He submitted that it was never their case to question her mental competence but claimed that they were ignored by their previous legal team."* Mr Deacon points to two exchanges in closing between the Deputy Master and David (who was presenting the case for the defendants), at pages 9 A-E and 10 A-B of the transcript of the original trial on 11 September 2019, in which, as I accept, David made it *"crystal clear"* that the issue of testamentary capacity was not being pursued (although David disputed this in cross-examination at this retrial). However, Mr Deacon accepts that the issue of testamentary capacity remains live at this retrial, as confirmed by the defendants (then acting in person) at the pre-trial review before Mr David Mohyuddin KC on 5 May 2023.

12. In his written skeleton argument for the defendants, Mr Wood helpfully summarises the parties' competing cases: Rita's evidence and case as to the making of the 2015 Will (which is set out at paragraphs 40 to 48 of her witness statement for this retrial, dated 9 May 2023) is that she had absolutely no involvement in how Anna distributed her estate. Rita asserts that at the start of November 2015, Anna told her that she wished to change her will, having read an article which said you should renew your will every five years. Rita asserts that the only change communicated to her by Anna was her wish to be cremated. On 16 November 2015, Rita made an appointment for Anna to see Mrs Sukul, having found her name from a referral by the Law Society. On 17 November 2015, Anna and Rita attended the offices of SJS solicitors. Rita

states that it was at that meeting she first appreciated the changes that her mother wished to make to her will, and that Anna *"did not want the defendants getting"* 5 Brenda Road. The will was executed on 7 December 2015, and was witnessed by Mrs Sukul and by Anna's general practitioner, Dr Qaiyum.

13. The defendants' case is that for several reasons the 2015 Will does not represent Anna's final settled testamentary intentions. Its terms represent a *'volte face'* from the intentions expressed by Anna in the 1986 Will, and which she had maintained for a period of almost 30 years. The reversal of that settled intention, in a short period between the start of November 2015 and 17 November 2015, when Anna gave instructions to the solicitor, cause concern on the part of the defendants as to the reasons for it, and particularly the involvement which Rita may have had in causing Anna so fundamentally to change her intentions. The pleadings, in the form of the Defence and Counterclaim, assert that Anna lacked testamentary capacity, did not know and approve the contents of the 2015 Will, and exerted undue influence over Anna, and that the 2015 Will is invalid by reason of fraudulent calumny.

III: Procedural history

14. Rita applied for a grant of probate of the 2015 Will but was prevented from extracting this because the defendants had entered a caveat against the estate. The defendants were duly warned, and they entered an appearance on 2 November 2016. As a result, Rita was forced to bring this claim seeking orders that: (1) the court shall decree probate of the 2015 Will in solemn form of law, and (2) the grant of probate of the 2015 Will be issued to Rita as the remaining named executor in that will. Acting by solicitors (SSB Law), the defendants filed a defence and counterclaim for orders pronouncing against the 2015 Will and in favour of the 1986 Will.

15. The dispute proceeded to trial which took place before Deputy Master Arkush over three days between 9 and 11 September 2019, with judgment (bearing the neutral citation number *[2019] EWHC 2434 (Ch)*) being handed down on 13 September 2019. At trial, Rita was represented by Mr John Ward-Prowse (of counsel) whilst the defendants, who had dispensed with their legal representatives shortly before the trial, represented themselves as litigants in person. The Deputy Master admitted the 2015 Will to probate in solemn form of law, and he dismissed the counterclaim.

16. An application by the defendants for permission to appeal was refused on the papers by Birss J but was granted on a renewed application by Nugee J, limited to one ground only, namely whether the trial before the Deputy Master had been unfair. The appeal was heard by Adam Johnson J on 20 January 2021, with both parties being represented by counsel newly instructed under the Bar Direct Access Scheme. On 14 April 2021 the judge handed down a written judgment which bears the neutral citation number *[2021] EWHC 893 (Ch)*. Although he dismissed the appeal, Adam Johnson J concluded that the Deputy Master had made a mistake in restricting the defendants from cross-examining Rita on certain key issues.

17. On 19 August 2021 Birss LJ (as he had by then become) granted permission for a second appeal. One might be tempted to recall the observation of Bramwell B during the course of argument in *Andrews v Styrap* (1872) 26 LT 704 at 706: *"The matter does not appear to me now as it appears to have appeared to me then."* However, in granting permission for this second appeal, Birss LJ identified the following point of

principle: whether it was necessary to show that the trial judge was hostile to or biased against one of the parties before it could be said that a trial was unfair.

18. The second appeal came on for hearing before Lewison, Newey and Snowden LJJ on 13 January 2022. On 21 February 2022 the Court of Appeal handed down judgment (with the neutral citation number *[2022] EWCA Civ 195*) allowing the appeal, setting aside the orders of the Deputy Master and Adam Johnson J, and ordering a new trial of the matter before a Judge or Master of the Chancery Division (other than Deputy Master Arkush). Snowden LJ concluded his leading judgment as follows (at [85-87]):

> For these reasons I conclude that the error by the Deputy Master in preventing cross-examination caused serious prejudice to the Appellants, which was not remedied by anything else which occurred at the trial. In my judgment, the trial was therefore unfair to the Appellants and the appeal must be allowed.
>
> The result is that the matter will have to be remitted to the High Court for a retrial. Without making any observations whatever on the merits, that is a most unfortunate result. Quite apart from the emotional stress for the parties of a retrial, when added to the irrecoverable costs incurred to date, the further irrecoverable legal costs which will inevitably be incurred will only serve to reduce the limited benefits available from Mrs. Rea's estate for the successful party or parties. The consequences for the loser(s) will inevitably be much worse.
>
> I would, therefore, strongly urge the parties to these proceedings to do everything possible to reach a consensual settlement of their differences rather than fight out a retrial. In particular, serious consideration ought to be given to mediation. In that regard, if the parties request it, I see no reason why this court cannot, as part of the exercise of its power to order a new trial pursuant to CPR 52.20(2)(c), direct that such trial should not take place for a specified period, and stay the proceedings in the interim to enable such mediation to occur.

19. In a short concurring judgment (at [89-92]), Lewison LJ made it clear that the point of principle identified by Birss LJ had been answered by the leading case of *Jones v National Coal Board* [1957] 2 QB 55, a case of excessive interference in evidence by the trial judge. Citing from the well-known judgment of Denning LJ, Lewison LJ observed that despite the judge's best of motives, the trial in that case had been unfair. Here too the Deputy Master had been actuated by the best of motives. But the brothers had been hampered by the extensive, and irregular, examination in chief of Rita, and by the Deputy Master's mistaken (and uncorrected) belief that their case had been adequately put to her. Lewison LJ was therefore reluctantly driven to the conclusion that, for the reasons given by Snowden LJ, the trial in the instant case was also unfair. Lewison LJ concluded:

> The outcome is a tragedy for the whole family. The tangible benefits deriving from the relatively modest estate will have been seriously depleted by the costs of the original trial and the appeal. A further trial may well exhaust them completely. Like Snowden LJ, I urge the family to do everything possible to arrive at a consensual solution.

20. Sadly, it has not proved possible for the family to arrive at any consensual resolution of their differences over the identity of their mother's true last Will. The Court of Appeal's order provided for Rita to pay: (1) the brothers' costs of the appeal, summarily assessed at £15,000 (including VAT); (2) the brothers' costs of the first appeal before Adam Johnson J, such costs to be assessed in detail if not agreed, with a payment on account of such costs of £10,000; and (3) the brothers' costs of the trial before Deputy Master Arkush, such costs to be assessed in detail if not agreed. In the absence of any supporting evidence, there was no order for any payment on account of such costs. For the avoidance of doubt, any outstanding costs of the proceedings prior to the trial before Deputy Master Arkush were reserved to the Judge or the Master hearing the retrial.

21. On 9 November 2022 Master Kaye directed that the retrial should be heard by a High Court Judge or a Deputy High Court Judge rather than a Master. At a Pre-Trial Review on 5 May 2023, Mr David Mohyuddin KC gave various case management directions concerning witness statements and the oral evidence to be adduced at the retrial; and he also laid down a trial timetable.

IV: Applicable law

22. The legal principles applicable to this case are well-established and were not the subject of any real dispute although, inevitably, there were differences of emphasis between counsel.

Testamentary capacity

23. Mr Deacon points out that any allegations relating to the testator's capacity must be pleaded specifically, and particulars of the facts and matters relied on must be given: see *CPR 57.7.4 (b)*. He reminds the court of the classic test propounded by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 to the effect that it is essential to the exercise of a power of disposition by will that a testator: (1) shall understand the nature of the act and its effects; (2) shall understand the extent of the property of which he is disposing; (3) shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, (4) that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties.

24. Mr Deacon also cited from the leading judgment of Lewison LJ in *Simon v Byford* [2014] EWCA Civ 280 [at 39-46] in support of the propositions that: (1) Capacity depends on the potential to understand, and is a distinct concept from actual understanding. It is not to be equated with a test of memory. Nor is testamentary capacity to be conflated with knowledge and approval of the contents of the will, which requires actual knowledge and approval. (2) Nor does the law require the testator to understand not simply the direct, immediate, consequences, but also the collateral consequences, of disposing of their assets in one way rather than another.

25. Mr Deacon emphasises that if a will, rational on its face, is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. In *Hawes v Burgess* [2013] EWCA Civ 74, the Court of Appeal held that strong evidence was required to find that a testatrix lacked testamentary capacity

when an experienced solicitor has contemporaneously recorded their view that she had capacity. If the issue of the testator's capacity is raised, the burden of proof remains with those seeking to propound the will. Delivering the leading judgment, Mummery LJ said (at [13-14]) that when considering questions of testamentary capacity and knowledge and approval:

> … in a particular case the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed.
>
> I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law: the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.

26. In the course of his closing submissions, Mr Wood cited two passages from the judgment of Mr Christopher Pymont QC in *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch) at [43-44]. Mr Wood emphasised the passages I have reproduced in bold type. However, I should begin the citation with [42]:

> 42. As for the issue of testamentary capacity, I have been referred to the well-known statement of principle in *Banks v Goodfellow* (1870) LR 5 QB 549 and the more recent glosses on its application in cases such as *Key v Key* [2010] 1 WLR 2020 and *Cowderoy v Cranfield* [2011] EWHC 1616. In the latter case, Morgan J (at paras 130-137) summarised the relevant authorities in terms which I would gratefully adopt. As Morgan J emphasises, the question is not as to whether or not the will is a fair one in all the circumstances of the case because a valid will can be unfair, vindictive or perverse; but if the terms of a will are surprising, that may be material to the court's assessment of the testator's capacity (or indeed his knowledge and approval of the terms of the will). Morgan J also adopts what was said by Briggs J in *Key v Key*, above, as to the evidential burden shifting to the propounder if the objector raises a real doubt about capacity.
>
> 43. I have also been taken to *Hawes v Burgess* [2013] EWCA Civ 94, where the Court of Appeal recently expressed the view that it is 'a very strong thing' for a judge to find lack of testamentary capacity when the will has been prepared by an experienced and independent solicitor following a

> meeting with the testator, when it had been read through and explained to her and when the solicitor had formed the view that the testator was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational (see per Mummery LJ at paras 57 and 60 and per Scott Baker LJ at para 69). **I accept the wisdom of these comments though I observe that they do not go so far as to suggest that, in every case, the evidence of an experienced and independent solicitor will, without more, be conclusive. Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless; and (as Mummery LJ acknowledges) the terms of the will may themselves suggest that the solicitor's assessment was not soundly based.**
>
> 44. On my findings in this judgment, the evidence as a whole shows that, by 18 January 1999, Mrs Ashkettle had lost testamentary capacity. She had been suffering from a progressive form of dementia since at least 1997 (when it was diagnosed by Dr Gunawardena) and (from his notes) at least two years before. Other evidence suggests that the problem had emerged even earlier. By the end of 1998, Mrs Ashkettle was unable to communicate in any meaningful way, though she may have retained a sufficient 'social façade' to mask her mental deterioration from an incurious interlocutor. Mr Stanger's evidence does not contradict this conclusion because he does not say, and it is impossible to recover, how and from whom he took his instructions or what he relied upon in Mrs Ashkettle's demeanour or behaviour to satisfy the requirement of capacity; his contact with Mrs Ashkettle was extremely brief and, at least to some extent, filtered through Rosalind. There is no evidence as to what Mrs Ashkettle thought her property consisted of. **Perhaps above all, the terms of the will make no sense. There is no proper support or explanation for the expressed reasons for excluding Dennis and Robert: these reasons are irrational and inexplicable in the context of Mrs Ashkettle's family life and history. They are not even explicable as the product of caprice or vindictiveness on the part of Mrs Ashkettle. Applying the approach of Briggs J in *Key v Key* [2010] 1 WLR 2020 to the evidential burden in this case, I would conclude, at the least, that Dennis and Robert have raised a real doubt as to Mrs Ashkettle's capacity which has placed the evidential burden on Rosalind to prove it, a burden which she has failed to satisfy. I would indeed go further and say that the evidence shows that Mrs Ashkettle had no testamentary capacity at the relevant time.**

27. Mr Deacon also relies upon *Hughes v Pritchard* [2022] EWCA Civ 386, [2022] Ch 339. There the Court of Appeal overturned a decision to refuse to grant probate of a will for lack of testamentary capacity where the trial judge had imported an unwarranted requirement of fairness into the testator's dispositions between his beneficiaries. Giving proper weight to the evidence of the solicitor and the doctor, it was held that the judge's conclusion was outside the range of reasonable conclusions that was available upon the evidence. Delivering the leading judgment, Asplin LJ said this (at [1] and [79]:

> This appeal raises some important issues about the proper weight to be given to the drafting solicitor's evidence and a medical practitioner's assessment of a testator's testamentary capacity and the tasks which they need to undertake.
>
> …
>
> In my judgment, Miss Reed was right not to suggest in her oral submissions that Mummery LJ's dicta in *Hawes v Burgess* amounts to a true presumption. It seems to me to be no more than a statement of the obvious. Where the will is explicable and rational on its face, the conclusion reached by an independent lawyer who is aware of the relevant surrounding circumstances, has taken instructions for the will and produced a draft, has met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity. It is a very strong thing, as Mummery LJ described it, to find that such a testator was not mentally capable of making a will. It seems to me that Mummery LJ's use of 'presumption' was no more than a means of expressing the considerable importance of such evidence particularly in comparison with evidence from a medical expert who did not meet the testator and arrived at his conclusions on the basis of the papers only.

28. In *Nutt v Nutt* [2018] EWHC 851 (Ch) Master Clark summarised the law regarding the burden of proof (at [33]) thus:

(1) The burden is on the person seeking to establish the will ('the propounder') to establish capacity;

(2) Where a will is duly executed and appears rational on its face, then the court will presume capacity;

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

(4) Once a real doubt arises there is a positive burden on the propounder to establish capacity.

Knowledge and approval

29. Mr Deacon acknowledges that since the burden of proving the validity of a contested will lies in every case on the party who propounds it, they must satisfy the court that the instrument they are propounding is the true last will of a free and capable testator.

30. The legal principles applicable to the issue of whether Anna knew and approved of the contents of the 2015 Will are set out in the leading judgment of Lord Neuberger MR in *Gill v Woodall* [2010] EWCA Civ 1430, [2011] Ch 380 at [14-22]:

> Knowing and approving of the contents of one's will is traditional language for saying that the will 'represented [one's] testamentary intentions' – see per Chadwick LJ in *Fuller v. Strum* [2002] 1 WLR 1097, para 59. The

> proposition that Mrs Gill knew and approved of the contents of the Will appears, at first sight, very hard indeed to resist. As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will.

31. Previous case law (going back to the 19th century) had approached the issue of knowledge and approval on a two stage basis. The court first asked whether the person challenging the will had established sufficient facts to *"excite the suspicion of the court"*, which really amounted to establishing a prima facie case that the testator did not in fact know of and approve the contents of the will. Secondly, if the court held that the person challenging the will had excited the suspicion of the court, it then turned to consider whether or not those suspicions were allayed by the propounder of the will.

32. However, in Gill v Woodall, Lord Neuberger approved a one stage, or holistic, approach by which the court should

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

Undue influence

33. Mr Deacon points out that any allegation that the execution of a will was obtained by undue influence or fraud must be pleaded specifically, and particulars of the facts and matters relied on must be given: see *CPR 57.7.4 (c)*.

34. Where it is alleged that the testator executed an otherwise valid will as a result of some undue influence, the burden of proof shifts onto the person who makes that allegation. Mr Deacon submits that a plea of undue influence *"ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it"*, citing Sir Gorell Barnes P in *Spiers v English* [1907] P 122 at page 124. Mr Deacon also refers to observations of Sir James Munby P in *Henein v Laffa* [2015] EWCA Civ 700 at [9] when, in refusing a renewed application for permission to appeal, the President said this:

> It is important to understand that undue influence in the context of probate, the validity of wills, is an entirely different concept from the doctrine of undue influence in relation to lifetime transactions. In the case of a will, there is no presumption of undue influence. It is for the person, in this case the applicant, asserting undue influence to prove it and what has to be proved is coercion.

35. In *Re Edwards* [2007] EWHC 1119 (Ch) at [47] Lewison J summarised the law on undue influence as follows:

> i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
>
> ii) Whether undue influence has procured the execution of a will is therefore a question of fact;
>
> iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;
>
> iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.
>
> v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;
>
> vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A ‘drip drip’ approach may be highly effective in sapping the will;
>
> vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is ‘fraudulent calumny’. The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;
>
> viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;
>
> ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question,

> in the end, is whether in making his dispositions, the testator has acted as a free agent.

36. In closing, Mr Wood referred me to the judgment of Mann J in *Schrader v Schrader* [2013] EWHC 466 (Ch) at [96-98]. Having stated that the law could be taken as set out by Lewison J in *Re Edwards*, Mann J continued thus:

> It will be a common feature of a large number of undue influence cases that there is no direct evidence of the application of influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop its being proved. The proof has to come, if at all, from more circumstantial evidence. The present case has those characteristics. The allegation is a serious one, so the evidence necessary to make out the case has to be commensurately stronger, on normal principles.

37. Mann J proceeded (at [97]) to identify no less than ten items of circumstantial evidence from which undue influence was to be inferred. He concluded:

> In all those circumstances I find that undue influence has been proved. I think that they require the inference that Nick was instrumental in sowing in his mother's mind the desirability of his having the house, and in doing so he took advantage of her vulnerability. It is not possible to determine any more than that the precise form of the pressure, or its occasion or occasions, but it is not necessary to do so. I am satisfied that this will results from some form of undue influence.

38. Mr Wood also took me in closing to *Schomberg v Taylor* [2013] EWHC 2269 (Ch), [2013] WTLR 1413 where Mr Mark Cawson QC found that there was firm evidence that the effect of Mr Peskin's coercion had been that Mrs Taylor had made a will in 2008 that did not reflect her true will, which had been overborne. He emphasises that the deputy judge said, at [114], that could not ignore the shock and surprise as to what Mrs Taylor had done which had been expressed by those who were particularly close to her. That was said to provide further firm evidence that the 2008 will did not reflect her true will. At [115] the deputy judge also made the point that Mr Peskin had had a motive for seeking to coerce Mrs Taylor into doing what she did.

39. In his reply, Mr Deacon pointed out that the authorities referred to by Mr Wood were all decisions at first instance where the trial judge had simply applied established legal principles to the facts of the particular case as they had found them. He adverted to the clear dangers of seeking to cherry-pick decided cases without looking at all of their relevant facts and circumstances. Mr Wood's response was that these authorities illustrated the permissible range of factors to which a court might legitimately have regard when determining the validity of a disputed will, certain of which bore a resemblance to the instant case.

V: The retrial

40. The retrial took place before me as an attended hearing in court 30 of the Rolls Building between Tuesday 4 and Friday 7 July 2023, starting at 10 on the Tuesday morning. It was preceded by one day's judicial pre-reading. I had the benefit of written skeleton arguments from Mr Deacon and from Mr Wood, both dated 30 June

2023. The trial bundle extended to almost 1,300 pages; and there was a separate bundle containing the witness statements.

41. Mr Deacon was content to rely on his skeleton argument by way of opening but Mr Wood addressed me briefly. He emphasised that the ultimate issue was one of *"exquisite simplicity"* although there were numerous factual disputes between the parties. In essence, three of Anna's four children, who had all stood to take equally under the 1986 Will, had been disinherited after almost 30 years, yet no attempt had been made to communicate this change to any of them, even though it is common ground that both David and Nino had visited their mother after the new will was made. Rita's account of the making of the 2015 Will was so inherently unlikely that it could be discounted altogether. Although there was no direct evidence of undue influence, except in certain third party (and hearsay) text messages, the court should nevertheless find undue influence on the balance of probabilities because the terms of clause 11 of the 2015 Will were contrary to the historically verifiable fact that both David and Nino had been providing care to their mother until a matter of days before instructions had been given for the 2015 Will, and Anna had never communicated any sense of abandonment to them. The court should find that the 2015 Will was not the product of Anna's own independent instructions to her solicitor, but rather was the progeny of a process of undue influence whereby Rita had poisoned her mother's mind against her brothers.

42. Rita and her three witnesses gave evidence from about 10.35 on the morning of Day 1 to about 3.30 on the afternoon of Day 2. Rita gave evidence for a little over 3 hours, concluding at about 4.30 pm on Day 1. Her evidence was interrupted (after about an hour) by the evidence of the solicitor, Mrs Sukul, who gave evidence for just under 1 ½ hours before the luncheon adjournment. Rita was recalled on the morning of Day 2 to be cross-examined about a single manuscript document (at page 698) which Rita had created whilst her mother had still been alive, apparently in April 2016, and which Rita repeatedly described as a *"private document"* and her *"private notes"* concerning the possible sale of 5 Brenda Road, and the possibility of converting it into two flats. Rita's friend, Paula Batson (**Paula**), then gave evidence for about 1 ¼ hours before lunch; and the general practitioner, Dr Qaiyum, gave evidence for about 1 ½ hours on the afternoon of Day 2.

43. The remainder of the afternoon of Day 2 was taken up with the evidence, which lasted about 30 minutes of Larissa Rea (**Larissa**), who is Remo's adult daughter (and a qualified, but non-practising, solicitor). The morning of Day 3 began with the evidence of Phillip Rea **(Phillip**), who is Anna's nephew (for about 10 minutes) and Marco Rea (**Marco**), who is Nino's son (for about 5 minutes). I then heard (in this order) from David (for a little over two hours) and from Remo (for about 25 minutes); and, after lunch, from Nino (for about 55 minutes). The court adjourned overnight for closing speeches at about 3.15 on the afternoon of Day 3.

44. Mr Deacon addressed me orally in closing for about 1 hour 40 minutes on the morning of Day 4. After a short break, Mr Wood addressed me, in total, for about 1 ½ hours, either side of the luncheon adjournment. Mr Deacon then replied very briefly. The court adjourned to consider its judgment shortly before 3.00 pm on Day 4.

45. In the course of preparing this written judgment, I have re-read the witness statements and have read through my notes of the evidence and the submissions at trial. I have also looked again at the contemporaneous documents in the trial bundles.

VI: Witness evidence

46. I will consider the evidence of each of the witnesses in turn. In doing so, I have deliberately avoided placing any reliance on the judgment of the Deputy Master, whose views were based on the evidence that was before him at a trial where the defendants were not represented by counsel. In setting out my observations on the witness evidence, I have borne firmly in mind the closing submissions of counsel, which are recorded in the next part of this judgment. It is, however, important to bear in mind that, inevitably, I have not had the benefit of any live evidence from Anna, whose views have to be distilled from her 2015 Will and the notes that were made of her purported testamentary wishes by Mrs Sukul.

(i) Rita

47. Rita was visibly uncomfortable and stressed in the witness box, twice requiring a short break in her evidence, on the second occasion because she had been reduced to tears when describing her mother as her *"best friend"*. I find Rita to have an argumentative and forceful personality and a forceful physical presence. She is quick to get angry, easily wound up, and prone to expressions of irritation and frustration. The texts she sent to Nino, which he records at paragraph 36 of his witness statement, are illuminating as regards her character, personality and behaviour. Rita repeatedly emphasised the lack of positive evidence on the part of the defendants to contradict her own evidence and case. She repeatedly accused Mr Wood of going over the same ground in cross-examination. Rita had a clear tendency to exaggerate, to the extent of giving false evidence, to her own advantage, as is apparent from contrasting paragraph 27 of her witness statement, according to which, during the last year of her mother's life, Anna only saw Nino twice (on her 85th birthday - 27 September 2015 - and at Christmas that year), with paragraph 36, explaining that the rota, whereby both David and Nino had been assisting with Anna's care, but this had only lasted six weeks before they had stopped adhering to it, and it had broken down (in November 2015). Rita also criticises David and Nino (at paragraph 29 of her witness statement) for wanting to move Anna to Nino's house so that they could sell 5 Brenda Road and eventually move Anna to a nursing home; but she does not mention her own attempt to sell the property in April 2016, as evidenced by the private document at page 698 about which Rita was cross-examined when she was recalled at the start of Day 2 of the trial. Rita clearly had a poor relationship with her neighbours on both sides of 5 Brenda Road. I find that Rita was an unsatisfactory, and an unreliable, witness, whose evidence I cannot safely accept unless it is corroborated by other reliable evidence, or is contrary to her own interests. I also find that there was a complete lack of candour about Rita's evidence.

48. I am entirely satisfied that I cannot accept Rita's evidence as to the circumstances in which the 2015 Will came to be made. At paragraphs 40 to 42 of her witness statement, Rita said that:

> At the start of November 2015, my mother told me that she wanted to change her will. This came about because my mother had read an article

> which said you should renew your will every five years. My mother then started talking to me about how she wanted to make a new will.
>
> She told me that she wanted to be cremated. She did not provide any further details so I did not know what her intentions were and what changes she would make at first.
>
> My mother asked me to find a solicitor and told me again that she wanted to write a new will.

Rita reiterated this evidence in cross-examination, stating that her mother told her that she wanted to be cremated; she did not want to go under the ground. That was their only discussion about the new will. Anna did not provide Rita with any further details, and Rita suggested that that was why Anna had wanted Rita to be present at her meeting with the solicitor. Rita confirmed that the only communicated change to the 1986 Will was that Anna wanted to be cremated.

49. However, when Anna came to instruct Mrs Sukul about the contents of the new will, Mrs Sukul recorded (at page 573) that Anna left her funeral wishes to her daughter Rita to decide; and this was given effect in clause 4 of the 2015 Will. So, on Rita's evidence, her mother's only expressed reason for changing her will was never given effect in the 2015 Will. Moreover, Rita was adamant that nothing else had been discussed about Anna's estate; but according to Mrs Sokol's notes of the meeting on 17 November 2015 (at page 580), Anna *"says she knows Rita says they do not want to discuss"* inheritance tax. How did Anna know this if there had been no prior discussion about this with Rita? I have considered whether the reason for Rita's failure to give a true explanation as to the circumstances in which the 2015 Will came to be made is because: (1) Rita had been putting undue pressure upon her mother to change her 1986 Will so as to leave 5 Brenda Road to Rita, or (2) Rita is simply seeking to bolster her case by providing a false explanation for a change in her mother's testamentary intentions that Anna voluntarily chose to make when acting as a free agent, and of her own free will. I fear that, in the light of all the evidence in the case, I am driven to the conclusion that the former is the case.

50. In cross-examination, Rita stated that her mother had been firm at the meeting on 17 November and had told Mrs Sukul what she (Anna) wanted. The solicitor had taken her instructions from Anna and not from Rita, who had not been allowed to say anything. Indeed, Rita repeatedly used the solicitor's instruction that she should not say anything as a reason for not mentioning either the care that David and Nino had been providing until 7 and 14 November 2915 respectively, a matter of mere days before the meeting with the solicitor at which the instructions for the 2015 Will had been given, or Anna's previously expressed wish to be cremated; and also for the lack of any reaction from Rita to what (on Rita's evidence) was the revelation that she was being left 5 Brenda Road, her mother's only substantial asset.

51. However, it is clear from the solicitor's contemporaneous manuscript notes that Rita did intervene from time to time. She suggested that Anna should consider a gift of residue to Anna's grandchildren, but Anna was insistent that there should be no such gift because they did not see or care for her: pages 570 and 579. Rita suggested Paula Batson as a possible joint executrix but Anna rejected this on the grounds that she was not a relative: page 577. The solicitor's notes record that Anna and Rita discussed

whether the carer, Paula Batson, should receive a gift under the will but Anna was quite clear that she should not: page 580. Rita mentions the suggested gifts to the grandchildren and to Paula at paragraph 45 of her witness statement. As already mentioned, Anna also told Mrs Sukul that *"she knows Rita says they do not want to discuss"* the inheritance tax payable on the estate: page 580. I therefore find that there was no good reason why Rita should not draw any relevant matters to Mrs Sukul's attention. Although I find that Mrs Sukul is a confident, firm, brusque, and assertive individual, I do not consider that Rita would have allowed herself to be overborne by her into remaining silent at the meeting at which Mrs Sukul received Anna's testamentary instructions. I therefore find that Rita had no valid reason for not imparting relevant information to Mrs Sukul, or not correcting any mistaken information that Anna was conveying to Mrs Sukul. I note, however, that, in addition to references in the solicitor's notes to the fact that Anna felt *"abandoned"* by her sons, at page 569 Mrs Sukul recorded that: *"In the last 5 months David and Nino started to assist with my care and then abandon[ed] my care."*

52. I am also deeply concerned about Rita's motives in failing to suggest to her mother that she should communicate the changes she had made to her will to Nino or David, particularly since they spent time with Anna at Christmas 2015. Mrs Sukul had raised with Anna the possibility of a challenge to the 2015 Will yet, according to Rita, there had been no discussions about letting her brothers know about the changes, despite her assertions (at paragraph 69 of her witness statement) that David was *"obsessed"* about his inheritance to the point that he was talking about the will on the day that Anna died. During her cross-examination, I asked Rita whether Anna had ever said that she was concerned that it might cause a row or an upset if she told her sons about the new will and Rita answered in the negative. Mr Wood suggested that Rita had wished to ensure that the changes were only known to her brothers after Anna's death because it would be more difficult at that time for them to challenge the 2015 Will. Rita's answer was that this had not been in her mind. Curiously, she then added: *"Since the day my mother told me, I just carried on. I probably just forgot about it … We just went home and continued with our lives."* I cannot accept the truth of that answer.

(ii) Mrs Sukul

53. I find Mrs Sukul to be a confident, firm, brusque, fast-talking, and assertive individual. She is an experienced will writer who, in 2015, had been a member of the Society of Trust and Estate Practitioners for some 17 years, and a member of the Association of Contentious Trust and Probate Specialists for some seven years. Perhaps unsurprisingly, there was no direct challenge in cross-examination to the accuracy of either Mrs Sukul's witness statement (which dates back to 10 May 2017) or her detailed, contemporaneous, handwritten notes of her meetings with Anna and Rita on 17 November and 7 December 2015 and their related documents, many of which bear Anna's signature, and which extend from pages 558 to 585 of the trial bundle. Nor was there any challenge to Mrs Sukul's honesty or probity. I find Mrs Sukul to be a competent solicitor in the field of wills, probate, and the administration of estates and a reliable, honest, and satisfactory witness who, in cross-examination, declined to speculate about matters of which she had no personal knowledge. I accept her evidence entirely, as far as it goes.

54. Although Mrs Sukul's witness statement must be read as a whole, in closing Mr Deacon emphasised the following passages (correcting obvious errors):

> 3 The Will in issue was drafted by me. I did this work after I had taken instructions personally and directly from Anna Rea. Her mental capacity had been verified by her doctor Dr Sajid Abdul Qaiyum ...
>
> 7 … Anna Rea and I had no difficulties communicating with each other. Upon Anna Rea's request, Rita Rea was present throughout the meeting.
>
> 10 … I took instructions only from Anna Rea. At all times, I ensured that those instructions were only from Anna Rea. In fact, Anna Rea was quite firm about her testamentary instructions.
>
> 11 Anna Rea told me that she has a will which she made about 30 years ago. She said she would like to update that will. She said she had made that will at the time when she divorced her husband, Mr Huda. She stated that she would like to update her will to ensure that her assets were distributed in the manner she wanted. She said her sons do not care for her, or visit her. She said she wants to make sure that her well reflects her wishes.
>
> 15 Anna Rea stated that she has a son, Remo Rea, who lives in the USA. She said she knows nothing more about him and that he was rarely in touch with her. She said she does not know Remo Rea's address.
>
> 16 Anna Rea informed me that her son David Rea lives in Epsom. She thought Nino Rea lives in Wembley. She told me she would provide me with her sons' addresses. She stated that she hardly saw them and that they did not care for her.

I pause to record that Nino, in fact, lived in Wimbledon so Mrs Sukul must have misheard Anna. However, his address is correctly recorded at clause 8c of the 2015 Will.

> 18 During the appointment, Anna Rea made it clear to me that upon her death she wanted to ensure that her property at 5 Brenda Road, Tooting Bec London SW17 7DD goes to her daughter Rita Rea. She also made it clear to me that she wanted to ensure that her sons did not make her daughter homeless, and that her daughter takes care of her solely. I asked if she wanted her sons to inherit a share in her house at 5 Brenda Road. She said no. She said her sons had abandoned her.
>
> 20 Anna Rea was very firm and clear with her instructions. At one point during the meeting Rita Rea suggested that she could leave a legacy to her grandchildren or the social worker. Anna Rea rejected that suggestion.
>
> 21 Anna Rea described the manner in which she wished for her estate to be distributed. She stated that she wants her property at 5 Brenda Road … to go to her daughter Rita Rea absolutely. She was quite clear that she did not want her sons to have a share in this property. She said that they did not

> care about her and that she felt abandoned by them. Anna Rea's instructions are set out in her will exactly as she has provided them to me.
>
> 22 I am satisfied that Anna Rea understood the implications of making a will and that she understood the extent of her assets as she led the conversation as to why she was making a will. Anna's reasons were mainly due to the way in which her sons had treated her. She repeated that she felt abandoned by her sons.
>
> 23 I spent sufficient time with Anna Rea to be satisfied that she understood the implications of her instructions and the distribution of her estate. Anna Rea did not show any cause for me to be concerned about her capacity. However, out of an abundance of caution I advised that a mental capacity test be performed and she agreed.
>
> 24 To the extent of my knowledge, and from my meetings and discussions I have had with Anna Rea, I have no reason to believe Rita Rea or any other person has coerced or influenced Anna Rea to dispose of her estate in the manner in which she has instructed me to do so …
>
> 27 On 7 December 2015 I saw Anna Rea alone and explained her draft will to her, after which I spent a further 50 minutes with her and Dr Qaiyum. During this meeting my trainee solicitor … was present. I read the will to Anna Rea in the presence of Dr Qaiyum and explained every clause of the will to her.
>
> 28 At every meeting, I had with Anna Rea, she was clear and consistent about her intentions of leaving her property at 5 Brenda Road … to her daughter Anna Rea [sic] absolutely. Initially Anna Rea wanted to give her sons £1000 each and her car to David Rea. However, at our meeting of 7 December 2015, she changed her mind and said she wanted her residuary estate to be divided equally among her four children. She stated that she was not sure that there would be enough to pay the specific amounts to her sons.
>
> 29 … I am aware that extra care and caution should be exercised in the case of elderly patients to ensure that they fully understand my explanations and advice.
>
> 30 On 7 December 2015 Dr Qaiyum attended my office. He told me that Anna Rea has requested that he and I are the witnesses to her will. I explained Anna Rea's draft will to her in the presence of Dr Qaiyum. She confirmed that she agreed that the draft will carried out all her instructions. She approved the will. Dr Qaiyum and I witnessed the execution of that will. Dr Qaiyum verified Anna Rea's mental capacity at the time she executed her will dated 7 December 2015.

55. In her oral evidence, Mrs Sukul explained that she had had no involvement with Rita before she booked the appointment for her mother to make her will. Mrs Sukul confirmed that she had no reason to believe that Anna had any issues about speaking or understanding English. Mrs Sukul had spoken to Anna and had taken all her

instructions from her. Anna had spoken to her in English. Mrs Sukul had no recollection of being made aware that Anna was suffering from any hearing loss or whether she had been wearing her hearing aid. When asked whether she could recall Rita saying anything, Mrs Sukul replied that she had asked Rita not to say anything in the meeting. Mr Wood referred Mrs Sukul to a letter (at page 652), dated 23 February 2015, from a physiotherapist in the primary care therapy team at St George's Healthcare NHS Trust to another doctor at Dr Qaiyum's medical practice, which had flagged up certain issues concerning Anna: she had scored 24/28 on a six item cognitive test *"which indicates significant impairment"*, she had reported feeling *"low in mood"* and *"lost"* at times, and she had *"very poor hearing"*. Mrs Sukul did not recall being told anything about any of that. Mrs Sukul had no impression that Anna was physically frail. Mrs Sukul reiterated that she had no concerns that Anna could not hear or understand her. Anna had conversed with Mrs Sukul in English, and she had no reason to believe that Anna did not understand her. Anna had responded to the questions that Mrs Sukul had been asking her competently and coherently.

56. Mrs Sukul was clear that because Anna was departing from the terms of a previous will, made some 30 years earlier, at the time of her divorce, and was leaving little to any of her three sons, it was necessary to ensure that those were in fact Anna's true testamentary wishes. Mrs Sukul had explained all the clauses in the will to Anna in layman's terms, and to the best of Mrs Sukul's ability, and she had no reason to believe that Anna did not understand them. Some of the clauses were not particularly relevant to this particular will, and Mrs Sukul said that she had explained, and emphasised, that to Anna; but Mrs Sukul was clear that she had explained that, under the new will, Rita was to have Anna's house, and the terms of other gifts, and Anna had been very clear that those were her wishes. Mrs Sukul could not recall how many times Anna had asked her a question about Mrs Sukul's explanation; but Anna had never asked Mrs Sukul to repeat anything because she had not heard it. Anna had not signified her assent merely by nodding her head, but she had engaged verbally with Mrs Sukul.

57. Mrs Sukul accepted that she had been entirely reliant upon Anna telling her about her sons, but she had had no reason to dispute what she was being told. She had requested a capacity report from Anna's doctor, which had included a section confirming that there was no undue influence, as well as addressing Anna's mental capacity. Mrs Sukul accepted that the statements that Anna's sons did not care for her or visit her had set professional alarm bells ringing, and that is why Mr Sukul had asked for a mental capacity assessment. Mrs Sukul was asked why repeated references within her notes to her sons having *"abandoned"* Anna had not been replicated in clause 11 of the 2015 Will and her response was that that clause had explained what Anna had meant when she had referred to being *"abandoned"*. Mrs Sukul explained that the previous will had been made at the time of Anna's divorce 30 years previously, and that Anna had wanted to change the destination of her property. Mrs Sukul made it clear that she had explained to Anna that she was excluding her sons, in particular, from the property. Anna knew what she had: the property and a bank account. She wanted the property to go to Rita and the bank account to be distributed amongst her children. Mrs Sukul had explained that there was not much money in the bank account so the main asset in the estate would be the property. She had explained the possibility, or the probability, of a challenge to the will which is why Mrs Sukul had suggested a capacity assessment from Anna's doctor. She had not had the benefit of

any medical notes. Mrs Sukul had only requested a capacity assessment out of prudence, to ensure that Anna had capacity and that there was no undue influence. Mrs Sukul had had no real concerns herself about those matters. Mrs Sukul explained: *"I had the benefit of my client in front of me giving instructions one to one. I had no reason to believe that my client was not competent to give me instructions. She responded to me every time in English so I had no reason to question that she did not hear or understand me."*

58. Mrs Sukul accepted that her evidence was based on the meetings that she had had with Anna on 17 November and 7th December 2015. When asked if she had advised Anna that there would be an almighty row over the will after her death, which would end up in court, Mrs Sukul answered that it was no part of her retainer or her role to do so. Her role had been to implement her client's testamentary instructions, ensuring that her client's wishes were carried out, and that she had the necessary capacity to give Mrs Sukul those instructions. There had been no requirement upon Anna to inform her beneficiaries that she was changing her existing will so Mrs Sukul did not advise Anna to do so. Nor had she had any such discussion with Rita, who was not her client. Mrs Sukul had had no discussions at all with Rita.

59. Mrs Sukul was asked whether she had noted the difference in the formation of the letter *'N'* in Anne's name on different pages of the will. Mrs Sukul answered that she had not noticed that, and she made the point that Anna had been signing the will in front of her. At the end of his cross-examination, Mr Wood asked Mrs Sukul whether she had confirmed that the doctor had answered all of the relevant questions when she received the mental capacity assessment from him. Mrs Sukul indicated that there had been no requirement for her to question the doctor's auditing. He had been present at the execution meeting to confirm that Anna had capacity at the time of execution, and he had been prepared to witness the will. Mrs Sukul had checked the report that had been sent to her and she had had no reason to doubt it.

60. At the end of Mrs Wood's cross-examination, I asked Mrs Sukul whether she had asked Anna to summarise the effect of what Mrs Sukul had been explaining to her. Mrs Sukul said that she had sought no explanation in relation to the clauses concerning the trustees' powers, but she had asked Anna what she understood by the provisions relating to the appointment of executors and the destination of her estate. Anna had explained that her sister's daughter, who was one of the named executors, had been caring for her own mother. Mrs Sukul repeated that Anna knew that she had very little money so she had wanted the house to go to Rita. She confirmed that Anna had engaged about these significant parts of the will. Anna had identified her sons, referring to them by name, saying that one of them was in America, although she did not know where he was, and another son was involved in car or motorbike racing. When asked about paragraph 20 of her witness statement and Rita's suggestion that her mother should leave a legacy to her grandchildren or the social worker, Mrs Sukul was clear that Anna had rejected the suggestion even before Mrs Sukul had intervened to tell Rita that she was not to speak. Mrs Sukul explained that she had already had a draft of the will typed out, leaving Anna's car to David and pecuniary legacies of £1,000 to each of the three sons, with the residue going to Rita, when she had taken instructions from Anna alone, and before Dr Qaiyum had arrived at the solicitor's offices, on 7 December 2015. The will had therefore had to be redrafted when Anna changed her mind and specified that the residue was to be divided equally between all

four children because she was not sure that there would be enough money in her estate to satisfy the pecuniary legacies to the sons. I inquired whether Mrs Sukul had noticed at the time that Dr Qaiyum had not completed the box at the top of the second page of the capacity assessment (page 587) providing evidence in respect of Anna's ability in relation to each of the four elements of the two-stage test of mental capacity. Mrs Sukul's response was that she had not noticed that a particular section of the assessment had not been completed. So far as she was concerned, everything that was relevant to her had been completed. At the end of my questioning, Mr Wood asked what would have happened had Dr Qaiyum said that Anna did not have the necessary mental capacity. Mrs Sukul confirmed that, in that event, she would not have proceeded with the execution of the 2015 Will.

61. In re-examination, Mrs Sukul was asked about the meeting at which she had taken instructions for the will. She explained that her practice had a standard form questionnaire. The appointment had been to go through the will with Anna, explore why she would like to make a will, who she wanted to give her property to, and identify those to whom she owed any moral obligation. Mrs Sukul would then go through the questionnaire with Anna. Mrs Sukul described it as an engaging process in which she would ask questions and Anna would answer. Mrs Sukul described it as a two-way process in which Anna would engage with Mrs Sukul; everything was inter-active. Mrs Sukul said that Anna had answered all of her questions, explaining why she was doing what she was. The execution meeting had been in two parts: to confirm and correct the instructions for the will, and then for the will to be executed. It would probably have taken about an hour and a quarter, or more, in total but the meeting would have gone on as long as was required, and until everything had been completed.

62. Finally, I must refer to the contents of Mrs Sukul's file (pages 558-588 of the trial bundle). It is impossible to summarise these documents. It is sufficient to note that Mrs Sukul's detailed attendance notes and record of the process of taking Anna's instructions, and the terms of those instructions, amply confirm Mrs Sukul's witness evidence. In addition to signing the final page of Mrs Sukul's testamentary instruction booklet, Anna had also signed four manuscript sheets of paper setting out her detailed instructions (pages 563-574); and two forms authorising Dr Qaiyum to carry out an assessment to confirm that Anna has the requisite mental capacity to give instructions and to execute her will, and to sign the will as a witness confirming Anna's capacity at the time of the will's execution (pages 584-5).

63. Mrs Sukul's notes make it clear that Mrs Sukul was alive to the risk of pressure or undue influence on the part of Rita and had sought to exclude her from the meeting at which instructions were to be given for the will but that Anna had insisted upon Rita being present. Even before the meeting formally started with Rita present, Anna had made it clear that she *"wants her daughter to have her house"* (page 560). Anna attended the appointment with Mrs Sukul in a wheelchair (page 575). At the meeting, Mrs Sukul requested Rita not to interrupt. Rita did not do so, but only offered support to her mother and explained if her mother did not understand. Anna *"was firm with her instructions"* (page 561). Anna said that she was getting old and wanted to write a will. Rita confirmed that Anna could read English (page 562). Rita was asked not to answer but to let her mother answer (pages 563-4). Rita was leaving her property and the contents of 5 Brenda Road to her daughter, Rita, absolutely as she had taken care

of Anna all those years. Anna's sons did not help out with her care. There had been numerous calls for help, etc but they were not engaging with any help. The other children had *"abandoned"* Anna. Rita said – and her mother confirmed – that from 2009, when Anna had her heart attack, her daughter had been looking after her (page 568). Anna proposed making gifts of £1,000 to each of her three sons from the moneys in her bank account and giving her car to David because he was taking care of it. *"None of my children have not [sic] taken care of me except my daughter. In the last five months David and Nino started to assist with my care and then abandoned my care." (*page 569) When Anna proposed to give her residue to Rita absolutely, Rita asked her to consider her grandchildren but Anna said: No – they did not see or care for her. Anna insisted: No (page 570). Anna left her funeral wishes to her daughter, Rita, to decide (page 573).

64. Rita was able to identify her four children. She was hardly in touch with Remo, who was in the USA. Anna said that she *"hardly sees"* David and Nino *"and they do not care for her"*. Anna was making her will *"to ensure that her assets are distributed in the manner of which she wants"* (page 576). There was discussion about the executors. Initially Anna suggested Rita as her executrix. Rita said no and suggested Anna's niece and Paul Batson (whom Rita described as the *"social services carer"*) but Anna said not the carer because she was not a relative. Initially it was agreed that both Rita and the niece, Angela Contucci, should be the executors, with Anna saying that *"Angela can bring family together"* (pages 577-8). There was discussion about the extent of Anna's property and her insistence that Rita should have her property at 5 Brenda Road since she lived there and cared for Anna whilst her sons *"do not care for her"* and she felt abandoned by them (page 578). There was discussion about pecuniary legacies of £1,000 to all three sons and a gift of Anna's car to David (page 579). There was discussion about the residue. Anna wanted this to go to Rita, who appeared not to want this and suggested that it should go to the grandchildren; but Anna was insistent that it should go to Rita (pages 579-80). Rita suggested a gift to Paula Batson but Anna was quite clear that she did not want this because Paula did not need it (page 580). Mrs Sukul explained about the effect of inheritance tax but Anna told her that *"she knows Rita says they do not want to discuss"* inheritance tax (page 580). There was discussion about the lack of any financial dependents (with no reference to Rita) and the fact that Anna would leave it to Rita to decide about burial and cremation because "*they"* could not make a decision. In the discussion about capacity and illness, Anna said that she was *"fit and well"* but she agreed to Mrs Sukul obtaining a medical report *"bearing in mind we do not know her/her daughter being present, her age, etc"* (page 581).

65. The solicitors' file also contains Dr Qaiyum's capacity assessment dated 26 November 2015 (pages 586-8). The document expressly sets out the legal test for testamentary capacity, as formulated in Banks v Goodfellow. It makes it clear that this is the nature of the assessment that is being required: *"To give instructions for her Will and to execute same. To confirm the instructions are her wishes and that there is no undue influence or duress."* Under the heading *"Two-Stage Test of Mental Capacity"*, Dr Qaiyum wrote (in manuscript): *"Person named above does not have impairment or disturbance of mind or brain."* He ticked all of the four boxes confirming that Anna could (a) understand the information relevant to the decision, (b) retain that information, (c) use or weigh that information as part of the process of making the decision, and (d) communicate her decision (whether by talking or any

other means). Dr Qaiyum omitted to fill in the box at the top of the second page, providing evidence in respect of Anna's ability in relation to each of those four elements of the test. Under the heading *"Outcome of Mental Capacity Test"*, Dr Qaiyum ticked the box stating that on the balance of probabilities there was a reasonable belief that Anna had capacity to make this particular decision at that time. He noted that the section relating to power of attorney was not applicable. Under the heading *"Undue Influence"*, Dr Qaiyum ticked the box stating that Anna *"is acting of their own free will NO undue influence has occurred as the person is conveying their wishes to me now"*. In the box headed comments on undue influence/vulnerability, the doctor inserted *"not applicable"*.

66. Pages 558-9 of the bundle relate to the meeting on 7 December 2015. Page 558 records a time of 1.30 – 2.20. It reads:

> Ms Rea with Dr Qaiyum - Read + Discuss Draft Will and Changes - Changes made She confirms she understand He confirms capacity Will executed Other Will revoked – To be destroyed Storage at SJS

Page 559 records an end time of 2.14. It describes the changes made to the will, Anna's approval of them, and the finalisation of the 2015 Will. The note continues:

> Each clause explained to client Explained Mrs Sukul witnessing will as client's solicitor and Dr Qaiyum witnessing will as client's doctor Once will executed Rita comes into meeting Explained changes made to will to Rita.

These notes confirm that Rita was absent from the meetings on 7 December 2015 when the draft will was being explained to Anna, when she made her changes to the draft will, when the terms of the final will were explained to Anna, and when the 2015 Will was executed. In addition to signing all six pages of the executed will, on 7 December 2015 Anna also signed a document approving the draft will, stating that she had read and understood its contents, which reflected her intentions and the manner in which she would like her estate to be distributed; and confirming that Anna was of sound mind, was suffering from no illnesses that affected her writing and executing the will, and that she was making the will with no undue pressures from anyone (page 582). Anna also signed a form authorising SJS Solicitors to store her will in safe custody (page 583).

(iii) Paula Batson

67. I find that Paula was careful in her answers in response to questions in cross-examination. She was generally cool, calm, and collected when giving her evidence to the court, but Paula was tried twice reduced to tears during the course of her re-examination by Mr Deacon. The first occasion was when she was recalling the text messages that Nino had sent to Rita suggesting that David's real reason for withdrawing from the care rota had been because Anna had had enough money to pay for a carer; and, secondly, when recalling the occasion, after David and Nino had broken into 5 Brenda Road following their discovery of the terms of the 2015 Will, when they had collected Paula's clothes together with a view to throwing them out of the house. Paula was broadly corroborative of Rita's evidence and case; but there were certain areas, notably in relation the 2015 Will, where Paula made it clear that

she had no relevant knowledge, and thus no relevant evidence to give, even though she might have given evidence supportive of her friend Rita's case. For this reason, and because of her refusal to embroider her evidence, I regard Paula as an honest and truthful witness who was doing her best to assist the court. I accept her evidence.

68. In paragraph 8 of her witness statement, Paula describes Anna as *"strong-minded and stubborn at times … She was not a push-over and feisty at times, using colourful language if irritated. However, she had a lovely and sweet personality"*. Paula stated to the court that she could count on the fingers of one hand the occasions when the brothers had done any work to the property. She confirmed that Anna had loved David the most of her three sons; but she related that after David had disclosed, on 7 November 2015 that he could no longer return to complete the rota because he, and his partner, Elaine, were fully engaged on a new job, Anna had been upset and unhappy and had said: *"Let him go"*, using *"colourful language"*. Paula criticised Nino for having given up on the rota when, unlike David, he had no real reason for doing so. Paula said that Anna had not been confused about her sons' lack of care; she had been referring to the whole period from 2009 to 2015. Paula accepted that Anna had been a kind, loving, and nice person; but she said that she had reacted badly to Nino and David deciding to give up on her care. Paula said that she had not been surprised by the terms of clause 11 of the 2015 Will. Paula told the court that Anna had never mentioned her wish to be cremated at the time when the rota had broken down in 2015.

69. Paula had not been involved in the giving of instructions for the 2015 Will. Indeed, the first she had known about that will was after Anna had passed on. Rita had never mentioned the 2015 Will to Paula. Paula confirmed that when an offer had been made for the house in April 2016, Anna had refused to countenance selling it because she had wanted £1 million pounds for it. Paula confirmed that she spoke no Italian, and that Anna had communicated with her in English. She said that Anna had read the English newspapers every day. Paula told the court that Rita had never abused her mother at all, whether physically or verbally. Rita would have done anything to make her mother feel comfortable.

(iv) Dr Qaiyum

70. By the time he came to court to give his evidence, Dr Qaiyum had retired from practice as a general practitioner. He stated that he was hard of hearing. At the time he had been instructed to carry out the capacity assessment of Anna, he had been the general practitioner for both Anna and Rita for about five years. Anna had been his patient since December 2010 and, throughout his professional relationship with Anna, he had conducted his consultations in English. Rita would accompany Anna on these occasions and would *"translate"* if Anna had any difficulty in understanding. However, I understand that to mean that Rita would explain matters to Anna in English - not translating them into Italian, which Rita did not speak - if Anna found it difficult to hear, or to understand, what Dr Qaiyum, who was quite soft-spoken, was saying. Dr Qaiyum explained that having received Mrs Sukul's instructions to carry out a capacity assessment, he saw Anna on 24 November 2015; and he completed and signed the assessment form two days later, on 26 November 2015, after he had had the chance to go through all of Anna's available medical records.

71. Mr Deacon places particular reliance upon the following passages from Dr Qaiyum's witness statement (which was dated as long ago as 11 June 2018):

> 5 On 24 November 2015 Mrs Rea appeared mentally capable in signing her Power of Attorney during her assessment. She satisfied the ability to comprehend relevant information, retain this and weigh it up in her decision-making and thus satisfied my mental capacity assessment as set out in the Mental Capacity Act 2005.
>
> 6 From my knowledge of Mrs Rea and my assessment on 24 November 2015, I had no reason at all to believe that Mrs Rea was being coerced or that she was under any undue influence when I assessed her. On that day, I asked her if she had any other children. She mentioned that she had three sons, but that they were not involved in providing any care for her. In her words, *'They don't look after me.'*

At paragraph 7 of his witness statement Dr Qaiyum explains that he had left a box blank at the end of paragraph 3b of the assessment form. That was because he had ticked the proceeding four checkboxes for that question but, as the free-text evidence box was on the following page, it had been overlooked. Dr Qaiyum accepts that this should also have been filled in, and that he should have written to confirm that he had asked several questions to check the patient's comprehension, retention of information, ability to weigh up decision-making, and verbally communicate this process. Those questions form the *'mini mental test'* which doctors ask when assessing a patient's mental capacity. Then the doctor asks again how many children the patient has to see if she gives the same answer as a few minutes earlier. Dr Qaiyum goes on to explain that he duly attended the officers of SJS Solicitors on 7 December 2015 in order to witness Anna making her will. He had no reason to believe that she was being coerced or was under any pressure or influence to write a will.

> 10 I was present when the contents of her will were explained to Mrs Rea very clearly by her solicitor, Mrs Sukul. Mrs Rea appeared to understand the nature and extent of the will and to comprehend the impact of the effects of her decision. There was no evidence of any significant cognitive impairment and Mrs Rea thus satisfied my assessment of her testamentary capacity, indeed she was very much aware that she was signing her will and had the mental capacity to do it.

Dr Qaiyum confirms that he signed the document headed *'Approval of Draft Will'* to confirm that Anna had the necessary capacity to make her will.

72. In cross-examination, Dr Qaiyum stated that Anna's hearing loss was minor, and not severe, and would not have impacted upon her capacity. In re-examination, he confirmed that when he carried out his capacity assessment, Anna had had her hearing aid in and she had heard what he was saying. In cross-examination by Mr Wood, Dr Qaiyum agreed that a medical practitioner would not have regarded Anna as *"fit and well"*, but that was how Anna had described herself to the solicitor. Dr Qaiyum was referred to the letter (at page 652), dated 23 February 2015, from a physiotherapist in the primary care therapy team at St George's Healthcare NHS Trust to another doctor at Dr Qaiyum's medical practice, which had flagged up certain issues concerning

Anna and, in particular, the fact that she had scored 24/28 on a six item cognitive test, *"which indicates significant impairment"*. Dr Qaiyum disagreed that 24 out of 28 should be regarded as a *"significant impairment"*; and he pointed out that the writer of the letter was a physiotherapist who would not have been competent to carry out a mental capacity assessment. He could not recall having seen this letter when he had read through all of Anna's medical records after he had carried out his assessment of her; and he accepted that it might have been overlooked amongst the many letters that were received at his practice every day. Had he read this letter, he would not have contacted the physiotherapist to ask about the assessment, but he would have called Anna back for another assessment. Dr Qaiyum pointed out that a patient is more relaxed, and can speak more freely, when they have a relationship with their doctor. Anna had told Dr Qaiyum that she had been referred for an assessment because she wanted to make a will. Had she answered his questions incorrectly, he would have said that Anna needed a specialist to assess her.

73. Dr Qaiyum accepted that he had overlooked the free-text box at the top of page 587, and that his inadvertent failure to complete this box had made the assessment process deficient. In response to Mr Wood's objection that in paragraph 7 of his witness statement, Dr Qaiyum had set out his questions, but had failed to record Anna's answers, Dr Qaiyum replied that Anna had answered all his questions correctly; and he added that Anna had pointed out that his clock had been displaying the wrong time. Dr Qaiyum was referred to a letter he had written to Mrs Sukul on 26 June 2017 (at pages 825-6) in which he had referred to Anna attending on 24 November 2015 with a form regarding a power of attorney in favour of her daughter Rita. Dr Qaiyum was clear in his evidence that the instruction had been to assess whether Anna had been capable of making a will, as the two forms of authority (at pages 584-5) and the confirmation of assessment (at pages 586-8) all make clear. I am satisfied that in his 2017 letter, Dr Qaiyum had been confusing the assessment on 24 November 2015 with a later assessment he had carried out on 6 May 2016 (evidenced by a letter of that date at page 828) when Dr Qaiyum had confirmed that Anna was capable of understanding and signing a power of attorney. I am satisfied that the assessment that Dr Qaiyum carried out on 24 November was for the purpose of establishing Anna's capacity to make a will.

74. Dr Qaiyum confirmed that at the execution meeting, Mrs Sukul had asked Anna several questions about the contents of the will and her other children. Anna said that she had made the decision to give the house as a gift to her daughter. Dr Qaiyum had seen that Anna signed every page of the will but he had not looked at her signature. Had he noticed the different formation of the letters *"N"* in Anna, he would not have been concerned but would have probably concluded that she was signing in different ways. I note that Anna was required to sign her name no less than eight times on 7 December 2015.

75. In answer to questions from the court at the end of his cross-examination, Dr Qaiyum confirmed that he has been carrying out the assessment for the purpose of making a will. Anna had been explicit in her decision-making. She said that she had decided to make a gift to her daughter. Dr Qaiyum asked about her other children. Anna said that she had other children but that she was giving her house to her daughter. She said that her daughter had nowhere else to go. She had looked after Anna for years, caring for everything. Dr Qaiyum asked Anna if she had any other children and she said that she

had three sons. The doctor asked Anna whether she wanted to include any of them in her will and she said no.

76. Mr Deacon asked whether Dr Qaiyum had any impression that Anna was subject to any coercion or undue pressure in what she was saying to him. Dr Qaiyum said that he had specifically asked whether Anna was under any pressure or influence and Anna had said no. It was her house and she was doing it for her daughter. After she had answered all the doctor's questions, he did not believe that Anna was under any pressure or undue influence in writing the will but was doing so of her own volition. Anna had repeatedly said to Dr Qaiyum: This is my wish. This is my house. She has looked after me. My sons have their own homes and jobs. My daughter has nothing. I recall that Rita had told the court that at about this time she had been advised by David to sell her own flat in East Ham in order to repay some £33,000 in overpaid housing benefit to the Department for Work and Pensions, although Rita said that she had not told her mother about this. Rita had sold the flat in April 2016 and had been left with some £186,000.

77. There was no direct challenge to the accuracy or the probity of Dr Qaiyum's evidence. I accept him as a reliable and a truthful witness who was doing his best to assist the court.

78. I move then to the defendants and their witnesses. There is very little that I need to say about their evidence because none of the defendants or their witnesses are able to give any evidence about the circumstances surrounding the making of the 2015 Will. The first any of them knew anything about it was after Anna's death; and David, in particular, was very angry when he discovered about the new will. I accept that, historically, all three brothers had carried out some physical work to 5 Brenda Road, but the extent of this was very limited, much of it was historic, and it was no more than any son would do for an ageing mother, with no man living in her house to assist her with its maintenance and upkeep.

(v) Larissa

79. I have no doubt that Larissa was giving her evidence in good faith and telling things as she viewed them. However, she was clearly motivated by a deep dislike of Rita, and she had nothing good to say about her. I am satisfied that in her evidence, Larissa has exaggerated Anna's difficulties in understanding and communicating in English; and I cannot accept her evidence on this or other matters.

(vi) Phillip

80. The principal difficulty with Phillip's evidence is that the matters of which he speaks at paragraphs 17 to 22 of his witness statement were never put to Rita in cross-examination. I derive no assistance from Phillip's evidence.

(vii) Marco

81. Marco was also motivated by a deep dislike of Rita and I have no doubt that his mind had been poisoned against her. Marco went so far as to accuse both Mrs Sukul and Dr Qaiyum of lying. I cannot regard him as a reliable witness, although I note that in the fifth paragraph of his witness statement, when criticising Rita for yelling at Anna,

Marco appears to acknowledge that when Anna had her hearing aids in *"all anyone had to do was speak slowly and clearly"*.

(viii) David

82. David began his appearance in the witness box by asking (without any pre-warning) for a screen so that he and Rita were not able to view each other whilst he was giving his evidence. On a couple of occasions, he accused Rita, without any real justification, of intimidating him. I am satisfied that these were purely dramatic flourishes on the part of David, who had been sitting in court in fairly close proximity to Rita for the previous two court days. David neatly summarised the defendant's position when he responded to Mr Deacon's question: *"How was the solicitor able to draft the 2015 Will?: - Good question! I can't answer it because I wasn't there."*

83. I do not find David to be a particularly satisfactory, or a helpful, witness. Much of his evidence was a clear attempt to blacken Rita's character. I am satisfied that David has exaggerated Anna's difficulties in understanding and communicating in English, asserting that Anna's solicitor and doctor would have found it difficult to communicate with Anna, who had a limited vocabulary, when, on their evidence – which I accept – that was clearly not the case. I cannot accept this part of David's evidence. Although David disputed this in cross-examination at this retrial, I am satisfied that at the hearing before the Deputy Master, David had made it clear that defendants were not pursuing the issue of testamentary capacity. Throughout his evidence, David maintained that words had been put into his mother's mouth, and that the words attributed to her when giving instructions for her will were not his mother's own words because her sons had cared for Anna. David maintains that Anna had been a loving, caring person who had always wanted everything to go equally to her four children. There had been no question of Rita being homeless. She had a flat worth £350,000, which she had paid only £80,000 to purchase. David asserted that right up until the end of 2014, Anna had been able to care for herself, and until then it was she who had been looking after Rita, and not the other way around.

84. David asserts that he visited his mother regularly, once every week or every fortnight, when his world motorcycle racing championship competitions permitted. From the Google timeline records that David has produced, it would appear that between Sunday 5 April and Saturday 7 November 2015 he visited his mother 18 times, including an overnight stay on the weekend of 26-27 September. There were six visits between 5 and 15 April, and then nothing until Sunday 24 May, and then nothing again until Saturday 27 June. There were five visits in July, visits over the weekend of 1-8 August, and then the weekend of 26-27 September, and visits of 23 and 37 minutes each on Thursday 29 October and Saturday 7 November. David accepts that the last time he saw Anna before she made the 2015 Will was on 7 November. David has produced no similar records for the period from 7 November 2015 until Anna's death on 26 July 2016. David explains that this was because, after they fell out on 8 November 2015, when he made it clear that he was *"postponing looking after my mother at weekends"*, Rita had kicked him out of the house and had changed the locks. He says that he had visited Anna at Christmas 2017, and again in February 2016, when Rita had let him in, and every day during the two weeks that she was in hospital in 2016. David also says that he had gone round to 5 Brenda Road two or three times after 8 November 2015 but that he could not get into the house because the locks had been changed, although he said that he could not recall ever having

asked Rita for a new key. At paragraph 40 of his witness statement, Nino says that he went to his mother's house on 13 March 2016 and found that Rita had changed the locks, without telling Nino or giving him a key. If this evidence is correct, then, as Mr Deacon pointed out, either (1) the locks had not been changed soon after 7 November 2015 (as David claims) or (2) Nino had not been round to 5 Brenda Road to visit his mother for some months. Likewise, Remo's evidence that he had visited his mother in secret after November 2015 when Rita had been away is also not easy to reconcile with Rita having changed the locks to 5 Brenda Road soon after 7 November 2015.

85. Rita denies changing the locks soon after 7 November 2015. She accepts that she had previously threatened to do so in June 2015 but she had not implemented her threat. She points to a text message (at page 692) she had sent to David on 27 July 2016, the day after their mother's death, asking him to *"bring your key to get in"*. Whilst this was an emotionally charged time for Anna's children, and, if she had changed the locks, it is conceivable that Rita might have forgotten that David no longer had a key, if the locks had been changed, as David maintains, one would have expected a swift text response from David objecting that he could not use his key to get in to 5 Brenda Road because Rita had changed the locks. For his part, David points to Rita's evidence (at paragraph 51 of her witness statement) that after David's display of anger at the reading of the will, the defendants had gone round to 5 Brenda Road and *"had broken into the property by coming in through the back garden and breaking the patio door with an electric saw"*. However, I recognise that it is possible David, who lives in Epsom, may simply not have had his key with him on that day. I find the competing evidence about the changing of the locks to be equivocal.

86. On the balance of probabilities, I find that Rita did not change the locks to 5 Brenda Road. I do so because that is Paula's evidence, which I accept. At paragraph 29 of her witness statement, she says this:

> Another claim of controlling behaviour is that the defendants say Rita changed the locks to the property in November 2015 to prevent them from caring for Anna and to control her. Again, this is not true - she would have given me a new set of keys. Also, Nino kept coming to the property until 14 November 2015 and he would have needed a new set of keys as well, given that David's claim is that Rita locked him out after 7 November 2015. During my time of living at the property, the only time the locks were changed was after the funeral when the defendants broke in and Rita got a non-molestation order against them.

In any event, I consider that the dispute over the alleged changing of the locks to 5 Brenda Road is really irrelevant to any dispute about the amount of care that David and Nino were providing to Anna after 7 and 14 November 2015. This is because David's own evidence is that his contract to convert two Georgian houses into six flats before the end of the current tax year in April 2016 was what was preventing him (and his partner, Elaine) from continuing to assist with Anna's care before April 2016. On the evidence, I find that both David and Nino had effectively left Rita to care for Anna on her own by the time she came to give her instructions for her new will on 17 November 2015. David may well have viewed this as *"postponing"* his weekends spent helping to look after his mother until April 2016; but I find that that was not how this was viewed by Rita at the time.

(ix) Remo

87. Because of his long absence from the scene, between 2009 and 2015, Remo had very little evidence to give beyond engaging in another exercise in attempting to blacken Rita's character. However, Remo did accept that Anna would speak and would understand English, although he, too, was prone to exaggerate the limitations of this. I derive no real assistance from Remo's evidence.

(x) Nino

88. Nino's evidence was another attempt to blacken Rita's character. I accept that Nino firmly believes that Rita poisoned their mother's mind against her sons by lying to her and saying that they did not want to see her when, in reality, it was Rita who was stopping them from seeing Anna as much as she possibly could. Nino clearly believes that his mother was confused, and was pushed into making the 2015 Will, and just agreed with everything that was being said to her even though she was incapable of understanding it. However, Nino did accept that Rita was Anna's day to day carer, and that after her serious heart attack in 2009, Anna did need a lot of care and attention. In re-examination, Nino said that Anna had been confused from January 2015, and that colouring in her books was probably the only thing she had been capable of doing. I derive little real assistance from Nino's evidence.

89. In his written skeleton argument, Mr Deacon submits that the vast majority of the defendants' witness evidence is irrelevant or consists of speculation and conjecture and is therefore inadmissible. He cites *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169-170 where Lord Wright distinguished between inference and conjecture or speculation, observing that there could be no inference unless there were positive proved objective facts from which to infer the other facts which it was sought to establish. If there were no positive proved facts from which the inference could be made, the method of inference failed and what was left was mere speculation or conjecture. In that case, there were certain known facts which enabled certain inferences to be drawn; but beyond that point, the method of inference stopped, and what was suggested was conjecture. Mr Deacon also complains that much of the defendants' witness evidence also consists of statements of opinion, extending to matters which the court must decide; and that this is highly objectionable.

VII: Submissions

(i) The claimant

90. For Rita, Mr Deacon invites the court to uphold the validity of the 2015 Will and dismiss the defence and counterclaim by which the defendants seek to propound the 1986 Will. He submits that Anna reached her own independent decision in relation to the 2015 Will. She did not lack testamentary capacity at the time, and she knew and approved of the contents of the 2015 Will. Mr Deacon relies upon the evidence of Mrs Sukul and Dr Qaiyum, and the lack of any contrary evidence advanced by the defendants. There is no evidence to support any claim of undue influence. The defendants have unfairly, deliberately and relentlessly sought to blacken Rita's character in an endeavour to make a case in this regard. There is no evidence of Rita exerting any coercion or undue pressure upon Anna to change her will. Similarly, there is no evidence that Rita poisoned her mother's mind, either by casting dishonest

aspersions on the defendants' character, or otherwise. This baseless claim relies on unjustified inference and supposition, which, so the defendants say, is to be inferred from Rita's alleged bad character.

91. In closing, Mr Deacon maintained that, on the evidence, this case falls to be determined by the application of basic legal principles which are well-established. Objectively, the best evidence in the case has to be that of Mrs Sukul and Dr Qaiyum. Their evidence is utterly crucial; and they are independent witnesses, with no personal axes to grind. There were three weeks in November 2015 when Anna was considering making a new will and its terms when she did not waver at all. Anna saw Mrs Sukul once on 17 November, and twice on 7 December 2015, on the second occasion together with Dr Qaiyum, whom Anna had also seen on 24 November 2015.

92. Mr Deacon referred to Mrs Sukul's evidence as firm, conclusive, and unvarying. He emphasised the following key parts of Mrs Sukul's oral evidence:

(1) Mrs Sukul had had no cause for concern.

(2) Anna had spoken and conversed with Mrs Sukul in English.

(3) Anna had responded to the question Mrs Sukul was asking completely and coherently. That had satisfied Mrs Sukul.

(4) Mrs Sukul had been judging her client during the time Anna had been in front of her.

(5) Because Anna had been departing from her previous will, it had been prudent to advise Anna that her new will could be challenged by her sons (of whom Mrs Sukul had no knowledge). Mrs Sukul therefore asked for a capacity assessment.

(6) Mrs Sukul did not accept that the changes to Anna's previous will were dramatic. They were changes from a historic will.

(7) Anna had been very clear about the crux of the 2015 Will.

(8) Mrs Sukul recalled Anna engaging with her over the terms of the 2015 Will. Mrs Sukul would not accept the nodding of a head as a proper mode of taking instructions for a will.

(9) The capacity assessment questionnaire had been quite clear. The doctor had reported saying that there was no undue influence, and that Anna had mental capacity (although, as the court had pointed out, the report had not been completed in full, something that Mrs Sukul had not noticed).

(10) It was normal for elderly people to change their will if this was outdated; and Anna had given a proper explanation for her wish to change her will. The court pointed out that the difficulty with this was the reason that Rita had given for Anna wanting to change her will, which was that she wanted to be cremated, yet this change had not been reflected in either her instruction to the solicitor, or in the 2015 Will itself. Mr Deacon suggested that it was perfectly possible that Anna had changed her mind and had decided to leave it up to Rita to make the final decision. Mr Deacon pointed to the flow of instructions going back and forth, that Anna had had some time

to change her mind, and that it would be unusual if Anna's mind had not wavered from time to time. This was a point that had not been raised as a particular issue by the defendants, and it should have been mentioned specifically. However, Mr Deacon agreed that it was a matter that the court would have to bear in mind, amongst a myriad of other issues.

(11) Mrs Sukul had had the benefit of her client in front of her and had had no concerns as to Anna's testamentary capacity. She had had the benefit of seeing her client on a one-to-one basis.

(12) Mrs Sukul's role had been to ensure that her client's testamentary instructions were carried out competently, and that she had the capacity and the knowledge to make a will. Mrs Sukul considered that Anna had satisfied those requirements completely.

(13) In Mrs Sukul's view, Anna had understood what she had been doing.

(14) In response to a question from the court, Mrs Sukul had made it clear that if Dr Qaiyum had conducted all the appropriate tests and had reported that Anna had lacked testamentary capacity, then Mrs Sukul would not have proceeded with Anna's new will.

Mr Deacon drew attention to the solicitor's contemporaneous notes, which were said to be the best evidence the court would have of what Anna was saying at the relevant time: those notes were the equivalent of Anna speaking to the court.

93. Mr Deacon next turned to the independent evidence of Dr Qaiyum. He had said that he had specifically asked Anna if she had any other children for whom she should be providing and she had answered emphatically in the negative. The doctor had carried out a capacity assessment, and his evidence really could not be clearer. Mr Deacon emphasised the following key points in Dr Qaiyum's oral evidence:

(1) He did not consider that Anna's hearing issues were severe.

(2) A score of 24 out of 28 was not to be regarded as a significant mental impairment. The writer of this letter had been a physiotherapist, and it was not clear why she had been recording any findings about mental capacity.

(3) The patient herself had felt fit and well.

(4) There had been particular times when Rita would have had to translate for her mother, for example about the names of her medication, because she would have been nervous; but if Anna had not understood what Dr Qaiyum had been saying, the doctor would have repeated the question slowly.

(5) All the answers that Anna had given to the doctor during her capacity assessment were correct.

(6) Anna had pointed to the doctor's clock and had highlighted the fact that it was telling the wrong time.

(7) Anna had begun the interview by saying that she had come to make a will and that her solicitor had sent her to the doctor.

(8) In the solicitor's office, the doctor had been under no impression that there was any undue influence.

(9) Anna told the doctor that the house was hers and that it was her gift to Rita. Her sons owned their own houses, and they had their own jobs.

94. Mr Deacon emphasise that the 2015 Will itself, signed at the foot of each page by Anna, is also direct evidence of her wishes. On Mrs Sukul's evidence, Rita had not been involved in giving instructions for the 2015 Will. These had come entirely from Anna, and from no other source. These were Anna's instructions and effectively were her own words. The evidence of both Anna's solicitor and her doctor was that she had been engaging in the process of making the 2015 Will, and they had had no problems communicating with Anna.

95. Emotions were running high in the family. Everyone had been creating a story in their own minds, and the defence did not set out any coherent case at all. A series of false narratives had been placed before the court with the deliberate intention of blackening Rita's character and sanitising the defendants' failure properly to look after their mother during the last years of her life, following her serious heart attack in 2009. The lack of any substance to the defendants' case was demonstrated by their perceived need to drag up endless, disputed irrelevancies from the past, many of which were unpleaded. The true narrative in this case was to be found in the objective evidence of Anna's doctor and her solicitor, and in the evidence of Paula Batson, which supported Rita's evidence and case.

96. On any objective assessment of the evidence, there was nothing on which any claim in undue influence could be founded; but if there were, any whiff of undue influence had been dispelled by the advice received from Mrs Sukul at the three solicitors' meetings with Anna on 17 November and 7 December 2015.

97. In his reply to Mr Wood's closing submissions, Mr Deacon reiterated that this is a case where Anna had actually given the instructions to the solicitor for her new will. Anna was the person who had identified what she had wanted to happen to her estate. There were simply no objective facts to justify any finding of undue influence.

(ii) The defendants

98. For the defendants, Mr Wood submits that as Anna became increasingly frail, she became increasingly dependent upon Rita for her daily care needs. However, the declaration at clause 11 of the 2015 Will that *"my sons have not taken care of me"* is an historically inaccurate statement. Anna was both a vulnerable and a frail person at the time she gave instructions for the 2015 Will by reason of: (1) her age, (2) her difficulties with the English language, (3) her various medical conditions, (4) her hearing loss, and (5) her cognitive issues. Mr Wood invites the court to find that at all relevant times Anna came within the definition of a vulnerable person.

99. Mr Wood submits that the evidence before the court shows that as a matter of historical fact, the defendants did show concern for Anna and her needs throughout

the relevant period. Based on the available evidence, the defendants invite the court to conclude that there was no reason, objectively assessed, for Anna to have considered that the defendants had not cared for her, still less that they had abandoned her.

100. Mr Wood relies upon the decision to change the 1986 Will. Rita's evidence identifies the start of November 2015 as the date Anna communicated her desire to change that will. From that point, there was two-week period until Rita and Anna first attended at the solicitor's offices on 17 November. Rita's case is that she was unaware of the changes Anna was making until the meeting on 17 November. The defendants assert that this lacks credibility, and that it is inconceivable that Anna and Rita would not have discussed the proposed changes to her 1986 Will. The instructions given on 17 November represented a complete volte face by Anna. At no stage from the making of her will in 1986 until her death on 29 July 2016 did Anna ever communicate to the defendants any desire to change her will. Having given instructions on 17 November 2015, and having executed the will on 7 December 2015, Rita took the conscious decision to withhold information from the defendants as to the changes that Anna had made to her will. This was despite Rita having been appointed an executor of Anna's estate. Rita also failed to disclose anything about the 2015 Will to her co-executor (and cousin). It appears that Rita made a conscious and calculated decision to keep the changes her mother had made to the 1986 Will secret, and to prevent the defendants from having any knowledge about this, until after Anna's death. At no stage is there any evidence of Anna asserting that the defendants had not cared for her aside from what is recorded at the meeting on 17 November 2015 and in the 2015 Will. Mr Wood submits that the totality of the circumstances, including the supposed sudden volte face by Anna at the start of November 2015, indicate that Rita had exposed Anna to external influence and pressure to make the changes to her will.

101. At the instructions meeting on 17 November 2015, Anna was manifestly in a frail condition by reference to her medical history and the medical conditions referred to in her records but, despite this, she appears to have informed Mrs Sukul that she was *"fit and well"*. Although Rita was present throughout the meeting, she did not inform Mrs Sukul that Anna suffered from hearing loss. Nor did she inform Mrs Sukul of the difficulties that Anna had in communicating in English, or that she had regularly acted as Anna's translator during medical consultations. Indeed, Rita told Mrs Sukul that her mother could read English. Rita did not inform Mrs Sukul that in February 2015 Anna had been noted as having cognitive difficulties. The notes of the meeting made by Mrs Sukul record Anna as stating that *"she feels abandoned by her sons"*. This phrase does not appear in the body of the 2015 Will, but is a phrase used by Rita in communications with the defendants. Despite the evidence which exists of Anna's difficulties in communicating in the English language, and despite clear evidence that Anna suffered from hearing loss, Mrs Sukul appears to have accepted, without demur, statements made by Anna that her sons did not care for her without any attempt to extract any details or to verify the accuracy of her statements.

102. Mrs Sukul records explaining to Anna that *"I need to make sure she is acting and making her will without anyone forcing her to so do"*; but she appears to have made no enquiry of the circumstances in which Anna had decided to change her will. There is no detail either in Mrs Sukul's witness statement, or in any of her attendance notes, of the specific steps she had taken to explain the various highly technical clauses in the draft will to Anna. There is similarly no explanation as to how Anna indicated her

understanding of the various clauses. The defendants have also raised issue with the manner in which Dr Qaiyum carried out his mental capacity test on Rita

103. Based on these factors, the defendants raise issues as to whether Anna would have had effective knowledge, and approved the contents, of a will containing various highly technical clauses. Mrs Sukul twice asked Anna if they should start the meeting without Rita in attendance but, on both occasions, Anna refused. Mr Wood submits that this is indicative of the dependency which Anna had on Rita, due to her language and hearing issues, and that she and Rita had discussed the changes to the will prior to that meeting. Mrs Sukul had explained to Anna that it was unnecessary for Rita to be at the meeting because, were the will to be challenged, it might be seen as Rita *"forcing her"*. Despite this independent advice from the solicitor, Anna twice refused to allow the meeting to start without Rita being present. Mr Wood also notes that the signatures of Anna at the foot of some of the pages of the will are inconsistent with the signatures on other pages, with the letters *'N'* inverted in the name *'ANNA'*.

104. Mr Wood also relies upon the events leading up to Anna's death. After the execution of the 2015 Will on 7 December 2015, no steps were taken to inform any of the defendants of the new will despite Rita making requests to the defendants to care for Anna, and despite the fact that Nino and David both visited their mother over Christmas 2015 and David visited Anna shortly before her death. The defendants contend that Rita was purposely keeping the information secret so as to ensure that the defendants did not raise the changes to the will with Anna before her death. By purposely keeping the changes secret from the defendants until after Anna's death on 26 July 2016, a legal dispute of the type that is now taking place became almost inevitable. The declaration at clause 11 of the 2015 Will anticipated that the will might be disputed. There is no explanation in the evidence as to why Anna should have wished to conceal information from the defendants that would inevitably lead to a major dispute between her children after her death. In their witness evidence, both Rita and Paula assert that Rita was a strong-minded person with her own mind. If this is so, it follows that Anna would have had no concerns in informing her sons of her changed testamentary intentions during her lifetime or in asking Rita to do the same. Rita denied any such concerns in answer to a question from the court during the course of her oral evidence.

105. Mr Wood relies on other evidence in the hearing bundle which tends to show Rita dealing with Anna in an aggressive and bullying manner. In so far as that evidence is not contained within any witness statement bearing a statement of truth, Mr Wood acknowledges that it will be a matter for the court as to the weight it attaches to such evidence. Since this material is hearsay, and the defendants have elected not to call the author to give evidence at the retrial despite knowing that Rita challenges this evidence, I attach no weight to it and discount it from consideration. The defendants also rely on the text messages cited at paragraph 36 of Nino's witness statement, which are said to show that Rita is capable of oppressive and threatening language and has a forceful personality. Mr Wood submits that it is inherently unlikely that Rita would have adopted a different persona when in the company of Anna.

106. With respect to knowledge and approval of the contents of the 2015 Will, Mr Wood emphasises that it is for Rita to prove that Anna had knowledge of, and approved, the contents of the 2015 Will.

107. On undue influence, the defendants' case is that the evidence available to the court in this case enables it to conclude that, on a balance of probabilities, Anna was subject to pressure from Rita in the period from June to November 2015 to make her change her will in a manner that materially benefitted Rita, and which amounted to more than mere persuasion. There is evidence that Rita sold her flat in East London in the period before Anna's death which may have provided a motive to put pressure on Anna to leave 5 Brenda Road to her.

108. The defendants contend that Anna's advanced age, severe hearing loss, multiple medical conditions, and cognitive issues rendered her particularly vulnerable as she was under the care of Rita. The defendants rely, in particular, on the previously cited extract from the judgment of Lewison J in *Re Edwards* at [47 (vi)] that the physical and mental strength of the testator are relevant factors in determining how much pressure is necessary to overbear the will of a testator. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one.

109. In the instant case, there is no evidence of any falling out between Anna and the defendants, and no factual evidence of their not caring for her, or having abandoned her, such as might give rise to any desire on Anna's part to change her will.

110. In a powerful closing speech, Mr Wood submitted that this is a case which bristles with suspicion, and should lead the court to pronounce against the 2015 Will and admit the 1986 Will to probate. A review of the authorities makes it clear that a particular factor may be relevant to one or more legal issues. The facts that a will has been read to a testator in the presence of a solicitor, and has been duly executed, are not, by themselves, conclusive of any of the legal issues engaged in these proceedings, nor do they raise any legal presumption in favour of the validity of the will.

111. Mr Wood began by identifying eight key factors at the root of this case:

(1) The nature of the decision Anna is said to have taken is at odds with her character and her relationship with the defendants. It is important to focus on the decision at the heart of Anna's 2015 Will, which was to exclude her three sons from virtually all of their inheritance. This is referenced in the wording of clause 11. Anna's primary, and overarching, intention was that her sons should not have any means to seek to maintain their inheritance. There is no legal requirement upon any testator to explain the reasons for the manner in which they wish to distribute their estate. Anna could have made a simple, uncomplicated provision in her new will, replicating the simplicity of the 1986 Will. Instead, there are a number of pages containing unnecessary statements. Rita accepted that Anna had loved her sons. Yet the court is being asked to accept that she went out of her way to include in her new will the statement that her sons did not care for her. The reasons stated in the will were entirely unnecessary to achieve Anna's asserted purpose. The wording is capricious, and is at odds with the description of Anna by various witnesses as a gentle, sweet-natured lady, friendly and kind, with a lovely and sweet personality: compare Paula at paragraph 8 of her witness statement. Anna was not someone who would be likely to include an unnecessary, and damning, indictment of her sons in her will, particularly since those statements had no basis in historical reality. The inclusion of clause 11 in the 2015 Will is consistent with the nature of a person who at times was angry or frustrated. One can imagine the venom oozing from a person who uses those words.

Mr. Wood says that that is consistent with the anger that Rita could display from time to time. There is absolutely no evidence that Anna herself ever felt any anger towards any of her sons. There is nothing to show the court how Anna was thinking before she entered the solicitors' office on 17 November 2015. Prior to that, the voice that comes through again and again is Rita's voice. Clause 11 of the 2015 Will is a spiteful, venomous declaration completely at odds with all the evidence of Anna's own character.

(2) Anna had held a settled testamentary intention as set out in the 1986 Will which had endured for about 30 years and evaporated entirely over a matter of days in November 2015. From 1986 until 17 November 2015 Anna's intention had been to divide her estate equally between her four children. That intention had been expressed in simple and clear terms in a one page will, bearing a clear and confident signature by Anna, which contrasts completely with the varying signatures of Anna on the 2015 Will. The contents of the 1986 Will are entirely consistent with a loving and affectionate mother who regarded all her four children equally. That should be contrasted with the language of the 2015 Will in which Anna's sons are described as unloving and any challenge to the will is to be resisted by her executors. How did such a change of testamentary intention come about? According to Rita, Anna communicated her decision to change her will so as to be cremated. According to Rita, that was the only express change that she wished to make to her will. That change was announced a matter of days before going to see the solicitor on 17 November 2015. That conversation with Rita had been Anna's golden opportunity to make clear to at least one of her children what her new testamentary wishes and intentions were, yet she is said to have said nothing to the effect that her sons no longer cared for her, or had abandoned her. The only reasonable objective analysis is that Anna wanted to update the 1986 Will so to provide for her cremation, yet she makes no provision in her new will for her cremation or even for her burial. On Rita's evidence, Anna indicated no other changes to her 1986 Will. Contrary to Mrs Sukul's expressed view that Anna was making no major changes to her 1986 Will, she was in fact cutting three of her four children out from virtually any share in her estate. It is incredible to believe that, from the start of November until 17 November 2015, no further discussions took place between Anna and Rita about the changes to Anna's will, despite the fact that, according to paragraph 71 of Rita's witness statement, her mother was her *"best friend"*. Why should Anna have felt at all uncomfortable, or unwilling, about announcing any further changes to her testamentary intentions to her daughter? Why should Anna wait to communicate those changes to Rita until she was in a meeting with a solicitor whom she had never met before? Anna found communication with professionals in a professional setting difficult, yet she does not tell Rita what she is doing with her estate until they are in a professional setting. Mr Wood invites the court to find that 17 November was not the first occasion on which Rita knew what her mother intended to do with her estate because, in fact, Rita had been instrumental in securing the change to her mother's testamentary intentions. In short, Mr Wood submits that Rita's version of events leading to the making of the 2015 Will simply does not make any sense.

(3) Anna was vulnerable at the time she made the decision to make her 2015 Will. She was vulnerable by reason of her age, her hearing loss, her difficulty in communicating, especially to professional people, and a combination of her debilitating illnesses and medical conditions. Anna 's description of herself as *"fit and*

well" is completely at odds with Anna's documented medical history. She was a sick and frail person when she executed the 2015 Will; yet Rita made no reference to any of these conditions when she attended before Mrs Sukul, or in her evidence for this court. That is not an accidental omission but an attempt to avoid Anna's vulnerability from being flagged up.

(4) At the time she made her 2015 Will, Anna was wholly dependent upon the person with a vested interest in securing the admission of the 2015 Will to probate. A picture was painted of Anna spending all her days sitting at a table colouring in children's books. She was not a person at the height of her mental powers.

(5) Anna's express reasons for excluding her sons collectively from any substantial benefit from the 2015 Will do not have any sound basis in reality. There was no rational basis for clause 11 of the will since David had continued to visit his mother until 7 November 2015 and Nino until 14 November 2015. David could not continue assisting Rita with her care for their mother after 7 November 2015 due to work commitments; but he was not *"abandoning"* his mother: he was simply *"postponing"* his assistance because he had to go away for work until April 2016. The proposition that Anna should have felt *"abandoned"*, and should have excluded all three of her sons from virtually all benefit under her will, does not withstand scrutiny. Why should the right to inherit depend entirely upon a cold-hearted, mathematical calculation about the amount of the care her sons had given to Anna. There is no evidence of Anna having ever expressed the sentiment that her sons did not care for her, or had abandoned her, before the meeting at the solicitors' office on 17 November 2015. The notion that in the three days between 14 and 17 November 2015, Anna, of her own volition, had convinced herself that she had been abandoned by her sons is so improbable that the court may discount it. The concept that Anna was, collectively, effectively disinheriting all three of her sons should give the court considerable pause for thought. The 2015 Will accuses all Anna's sons of not caring for her, and stands as a public indictment of them. The defendants accept that the issue is not whether the will was fair but whether the decision to exclude all of her sons from virtually any benefit in such a short period of time, and for the reasons Anna expresses in her new will, can be said to be a rational decision. Mr Wood submits that Anna had been deluded by the narrative that all three of her sons had abandoned her and did not care for her. That delusion had, he says, no basis in fact, and had been induced either by some form of misrepresentation or undue influence. The exclusion of all three of her sons from all benefit under the 2015 Will is consistent with the hypothesis that Anna had been subject to undue influence.

(6) The changes made to Anne's will were kept secret from the defendants until after Anna's death. That is entirely inconsistent with Anna's character. These were changes with profound consequences for Anna's three sons. After the 2015 Will was executed, a conscious decision was made not to inform her sons. Why did Anna decide not to inform any of the defendants? Why should Anna not want to leave anything to her grandchildren, let alone her sons? The most probable explanation is that Rita decided to conceal the changes because it was she who was in control of the destination of her mother's estate. There was no obligation to inform her sons of the changes to her will, but there is a natural expectation that any mother would wish to do so.

(7) Mr Wood submits that, unusually in the present case, there is direct evidence of undue influence and pressure being applied by Rita to Anna in the form of text

messages sent by a former neighbour, Veronica Fidler, who had lived at 7 Brenda Road (at pages 695-7). Mr Wood accepts that there is no formal evidence from Mrs Fidler, and that the probative weight to be attached to this evidence is a matter for the court.

(8) There is evidence that Rita was experiencing financial difficulties at about the time Anna is said to have made the decision to change her will. She was being required to sell her flat in order to repay some £33,000 to the Department for Work and Pensions. This issue is raised not to seek to blacken Rita's character but rather to explain why Rita had a motive to compel her mother to leave her property to her.

112. Mr Wood submits that the meetings with Mrs Sukul on 17 November and 7 December 2015 also raise various concerns:

(1) Mrs Sukul's notes make it clear that Anna twice refused to have the meeting with the solicitor alone and insisted that Rita should be there. This demonstrates reliance on Rita when meeting with professional people.

(2) The assertion that there were no communication difficulties with Anna is completely at odds with other professionals who did experience difficulties communicating with Anna.

(3) Mrs Sukul made no inquiries of Anna as to why she thought her sons did not care for her or had abandoned her.

(4) Mrs Sukul allowed Rita to intervene and dictate to her, as Anna's instructed solicitor, that Anna and Rita did not want to discuss inheritance tax issues.

(5) Even though Rita's evidence is that in early November 2015 Anna had communicated her clear wish to be cremated, Mrs Sukul's notes state that they could not make a decision about this, even though Mrs Sukul professed to be taking her instructions exclusively from Anna.

(6) Mrs Sukul decided that a capacity report should be obtained because of Anna's age. The form returned by the general practitioner was deficient because there was no evidence in support of the answer concerning the four key functional elements set out on the form. There was no evidence supplied to support the absence of any undue influence. When Mrs Sukul reviewed the form, she should have returned it to the doctor for him to complete it properly so as to evidence the fact that the capacity assessment had been properly completed. The execution of the 2015 Will should not have gone ahead without this evidence. It is not for the general practitioner to say, eight years later, what he would have done if he had spotted that he had not completed the form properly. He said that he would have asked six basic questions, but that would not be enough to do a mental capacity assessment for the purposes of executing a will. In fact, the doctor appears to have thought that he was making an assessment in connection with the execution of a power of attorney. Only some nine months previously, a physiotherapist had flagged up significant mental impairment on the part of Anna. Any presumption of testamentary capacity raised by the due execution of the 2015 Will is diluted, in the present case, because of the failure to undertake a proper capacity assessment prior to the execution of the will. Doctor Qaiyum's assessment form should have been rejected, and returned with the instruction to repeat the

assessment and complete the form properly. On Mrs Sukul's evidence, the execution of the 2015 Will should not have taken place on 7 December. One cannot rewrite history.

(7) The use of the word *"abandon"* appears repeatedly in the solicitor's notes. The same word appears in text messages from Rita, reproduced at paragraph 36 of Nino's witness statement. Yet, despite the repeated use of the word *"abandon"* in the solicitor's notes, for some inexplicable reason it does not feature in the 2015 Will. Mr Wood submits that it is too much of a coincidence that a word that appears in the solicitor's notes is the same as a word repeated in Rita's text messages.

113. Mr Wood relies upon the many similarities between features of the present case and the material which led Mann J in *Schrader v Schrader* [2013] EWHC 466 (Ch) at [97] to the conclusion that undue influence had been established in that case: Anna's frailty; her dependency upon Rita; Rita's forceful personality and physical presence; the reasons Anna gave for excluding all three of her sons from almost all benefit under her will were inaccurate and devoid of reality; Rita's anger with her brothers about their lack of any effective contribution towards her mother's care and Nino's mistake in June 2015 in failing to close the curtains, which had led to Anna's fall and the night of acute discomfort spent lying on her bedroom floor; Rita's attempts in evidence to distance herself from her mother's decision to change her will, and her professed ignorance of any of the substantive changes until the meeting at Mrs Sukul's office, when she displayed no reaction to the alleged news that she would inherit the substantial asset in her mother's estate; Rita's role in failing to disclose the changes made to the will to any of her brothers until after her mother's death; and the lack of any record within Mrs Sukul's attendance notes of any attempt by the solicitor to ascertain whether any pressure had been applied to Anna to change her will. Relying on the observations of Mann J at [98], Mr Wood submits that it is not necessary to determine the precise form of the pressure, or its occasion or occasions. In all the circumstances of the present case, the court can draw the reasonable inference that Rita was instrumental in sowing in her mother's mind the desirability of her having the house, and in doing so she took advantage of Anna's vulnerability.

114. Mr Wood likened the shock and surprise at what Anna had done, which was expressed by David and other family members, with that adverted to by Mr Mark Cawson QC in *Schomberg v Taylor* [2013] EWHC 2269 (Ch) at [114]. He also invited the court to bear in mind that Rita's need, at around the time the 2015 Will was made, to sell her flat to raise money to repay a debt of some £33,000 to the Department for Work and Pensions afforded a clear motive for Rita to seek to coerce her mother into making a will leaving her home to Rita, just as Mr Cawson QC had done at [115] of his judgment in that case.

115. Mr Wood also likened the present case to *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch), where (at [44]), Mr Christopher Pymont QC had emphasised, in the context of want of testamentary capacity, that the terms of the will in that case made no sense. There had been no proper support or explanation for the reasons the testatrix had expressed for excluding her two sons from any benefit under her will, those reasons being irrational and inexplicable in the context of her family life and history. Just as in that case the sons had raised a real doubt as to their mother's capacity, which had placed the evidential burden upon her daughter to prove her alleged last will, a burden which she had failed to satisfy, so here the burden was upon Rita to prove that Anna

had possessed testamentary capacity. Mr Wood also referred to the reasons which the deputy judge had given at [45] for concluding that, if he were wrong on the issue of testamentary capacity, he would still have concluded, for similar reasons, that the deceased did not know and approve the terms of the will. Here Anna did not read the 2015 Will herself, and she would have found it difficult to concentrate when it was read to her, or to absorb what was being said to her. The terms of the 2015 Will as regards the defendants were irrational and inexplicable, and indicate that Anna did not understand what she was doing. There was no clear evidence as to how Anna had indicated her understanding of the will given her hearing and communication difficulties. But even if Anna had known and approved of the contents of the 2015 Will, it was the product of Rita's undue influence.

116. For these reasons, Mr Wood invites the court to pronounce against the 2015 Will and in favour of the 1986 Will.

VIII: Analysis and conclusions

117. On the evidence, I am entirely satisfied that Rita has demonstrated that her mother had the required testamentary capacity at the time she gave instructions for, and executed, the 2015 Will. In my judgment, the fact that Dr Qaiyum admittedly failed to complete all the relevant parts of Mrs Sukul's standard form *'Confirmation of Assessment'*, is a matter of form rather than substance, and does not vitiate the assessment which he undertook. Although the relevant form also addressed the test for mental capacity under the 2005 Act, Dr Qaiyum's assessment was appropriately directed to the three elements of testamentary capacity identified by Cockburn CJ in the leading case of *Banks v Goodfellow* (1870) LR 5 QB 549 at 565. From the evidence of Mrs Sukul and Dr Qaiyum, I am satisfied that Anna: (1) understood the nature of the act of making the 2015 Will and its effects; (2) understood the extent of the property of which she was disposing by that will; and (3) was able to comprehend and appreciate the claims of her four children and their children, who were the only persons with claims to her estate to which, potentially, she ought to give effect. I have already found that Dr Qaiyum was not mistaken as to the nature, and purpose, of the capacity assessment he had been undertaking. I also note that Anna not only answered Dr Qaiyum's questions correctly, but she pointed out to him that his clock had been telling the wrong time.

118. I am also satisfied, notwithstanding Mr Wood's arguments to the contrary, that Anna was suffering from no disorder of the mind which had poisoned her affections, perverted her sense of right and wrong, or prevented the proper exercise of her natural faculties. I regard this as an entirely separate, and discrete, issue from whether Anna's mind had been poisoned by Rita, which goes to the question of undue influence rather than testamentary capacity.

119. Mr Wood rightly places great reliance on the declaration at clause 11 of the 2015 Will, which I have quoted at paragraph 9 of this judgment. However, that declaration must be viewed in the context of what Mrs Sukul recorded, and Anna signed, when noting Anna's instructions in relation to the gifts from Anna's bank account (at page 569): *"None of my children have [not] taken care of me except my daughter. In the last 5 months David and Nino started to assist with my care and then abandon[ed] my care."* That is how Anna is recorded as having expressed her views as to the recent

conduct of David and Nino; and however harsh they may regard that view, I find that it was an assessment that was open to Anna as a matter of historical fact.

120. I have no doubt that Rita has demonstrated that Anna both knew, and approved, of the terms of the 2015 Will. That is entirely clear from the uncontradicted evidence of both Mrs Sukul and Dr Qaiyum, supported by the former's detailed, and contemporaneous handwritten notes. Anna well knew and understood what she was doing with her estate. She was leaving her principal, asset – her home at 5 Brenda Road – to her only daughter, Rita. Anna also knew that that meant that her three sons would receive very little from her estate, represented by the paltry sum she had standing to the credit of her bank account. Anna was firm in rejecting any suggestion that she should make any gift to her grandchildren or to Paula. In my judgment, on a dispassionate analysis of the evidence in this case, any challenge to the validity of the 2015 Will stands or falls on the sole ground of undue influence; and the burden rests squarely upon the defendants to make out a proper challenge under that head.

121. In an interesting case note written in October 1970 (at 86 LQR 447-9), against the background of the transfer of contentious probate work from the probate courts to the Chancery Division, the assistant editor of the Law Quarterly Review (P. V. Baker) contrasted the strictness of the traditional approach of courts of probate to allegations that a will had been procured by undue influence with the more conscionable approach taken by the courts of equity to allegations of undue influence in the context of a lifetime disposition. He observed that it would be interesting to see what decision the Chancery judges might reach when a will, rather than a lifetime gift, was challenged on the grounds of undue influence. Fifty years on, it has long been clear that there has been no muddying of the waters, and that the two streams of jurisprudential learning continue to flow in their separate channels. I therefore approach this case on the footing that the burden of proving undue influence in relation to the making of the 2015 Will rests firmly upon the defendants.

122. In the present case, where I have considerable evidence as to the circumstances in which the 2015 Will was prepared and executed, I consider that the appropriate inquiry is whether the defendants have satisfied me, to the requisite standard, that the will was executed as a result of undue influence on the part of Rita. The requisite standard is the civil standard of proof on the balance of probabilities; but, as the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the court that the explanation for what has occurred is that Anna's will was overborne by coercion rather than there being some other explanation. For a case of undue influence to be proved to the requisite standard of proof, so far as the making of the 2015 Will is concerned, the defendants must prove that Rita so coerced Anna that she overpowered her volition without convincing her judgment.

123. I bear in mind that the court may find undue influence by drawing appropriate inferences from all the circumstances of the case, even in the absence of direct evidence of undue influence. It is a common feature of many undue influence cases that there is no direct evidence of the application of such influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop it being proved; but such proof has to come, if at all, from more circumstantial evidence. In my judgment, the present case bears these characteristics. The allegation of undue influence is a serious one so, on normal principles, the evidence necessary to make out a case of undue influence has to be commensurately strong. I recognise, however,

that one can never know, with absolute certainty, what went on behind closed doors. Nevertheless, it is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis.

124. On the basis of the evidence before me, in my judgment, the defendants have established undue influence to the required standard in the present case. I recognise that, at first sight, that may seem a surprising conclusion, given the involvement of Mrs Sukul and Dr Qaiyum. Nevertheless, I am satisfied that the facts are consistent only with Rita having procured the making and execution of the 2015 Will by the exercise of undue influence over her mother, which overpowered Anna's volition without convincing her judgment. The following key factors lead me to this conclusion:

125. First, there is Anna's frailty and vulnerability. Wheelchair-bound, hard of hearing, and requiring constant care and attention, Anna's quality of life was limited. She seemed to spend much of her life colouring in children's books. This is to be contrasted with what I find to be Rita's argumentative and forceful personality, and her forceful physical presence.

126. Second, there is Anna's dependency upon Rita. Apart from the assistance rendered by Paula, Anna was entirely dependent upon Rita. Anna's predominant expressed state of mind was a sense of total abandonment by her three sons. The degree of Anna's dependency upon Rita is evidenced by Anna's refusal to accept her solicitor's explanation that Rita should not be present at the meeting on 17 November 2015 since Mrs Sukul needed to take instructions from Anna alone, and despite her further warning that that if the will were to be challenged, Rita's presence at the instructions meeting might be seen as *"forcing"* Anna. Anna's reported reply is instructive: *"She said her daughter really looks after her and she wants her daughter to know exactly what she is doing."* I detect in that a sense that Anna was in thrall to her only daughter, and carer.

127. Third, there is Rita's evidence about how Anna communicated her wish to change her 1986 Will. I have already indicated, when reviewing Rita's evidence, at paragraphs 48 and 49 above, that I cannot accept Rita's evidence as to the circumstances in which Anna came to ask Rita to make the arrangements for the 2015 Will to be drawn up and executed. Rita's expressed reason for Anna's wish to change her will is not consistent with her failure to give any directions for her remains to be cremated, and her express abdication of all responsibility for her funeral arrangements to Rita. I accept Mr Wood's submission that Rita's evidence that she was unaware of the other changes that her mother, and best friend, was proposing to make to her will until the meeting with Mrs Sukul on 17 November is lacking in all credibility; and that it is inconceivable that Anna and Rita would not have discussed the proposed changes to Anna's previous will in the two or three week interval after Rita claims that this was first raised at the beginning of November. This is supported by Mrs Sukul's note which records Anna *"says she knows Rita says they do not want to discuss"* the inheritance tax that will have to be paid on the estate. How did Anna know that unless they had previously been discussing the new will?

128. Fourth, there is the timing of the making of the new will, a matter of days after first David, and then Nino, withdraw their assistance to Rita in caring for their mother, and following almost 30 years during which the 1986 Will had stood unaltered.

129. Fifth, there is the fact that Rita made the arrangements for Anna to make the 2015 Will, albeit with a solicitor previously unconnected with Rita; and Anna insisted that Rita should be present at the meeting at which the instructions for the 2015 Will were given.

130. Sixth, there are the terms of the 2015 Will. This effected a major change in Anna's testamentary wishes from her previous will, which had stood for nearly 30 years, by substantially disinheriting all of Anna's three sons, leaving the only substantial asset in Anna's estate to her daughter. There is also the language of clause 11 of the 2015 Will. The final sentence, purporting to express Anna's wish that, should her sons advance any challenge to the distribution of Anna's estate, her executors were to defend any such claim *"as they are not dependent on me and I do not wish for them to share in my estate"*, is not language that I consider that Anna would ever have used: rather it is Rita speaking through Anna. I recognise that Mrs Sukul's notes record that Rita made some suggested changes to Anna's expressed testamentary wishes that Anna peremptorily rejected. However, these show, first, that Rita was prepared to make suggestions to her mother concerning the disposition of her estate, despite having been told to keep quiet by Mrs Sukul; and, second, none of these changes impacted upon the gift of Anna's principal asset, the house, to Rita.

131. Seventh, I have serious concerns about the motivations underlying the specific devise of 5 Brenda Road to Rita. First, as regards Anna, at the end of his oral evidence, in answer to questions in re-examination from Mr Deacon, Dr Qaiyum stated that Anna had repeatedly said to him that this was Anna's wish. It was her house. Rita had looked after her. Anna's sons had their own homes and jobs. Her daughter had nothing. Yet, in fact, Rita still owned a flat in East Ham which, even after repaying the debt to the Department for Work and Pensions, had equity worth some £186,000. I note that Mrs Sukul's notes (at page 576) record that Anna instructed her solicitor that Rita *"used to live in East Ham and moved to live with"* Anna, although she could not recall when. There is no reference to Rita having retained her flat, and let it out. This suggests that Anna may not have appreciated that Rita actually retained a property asset of some value; and there is no suggestion that Rita ever intervened to point this out, either to Mrs Sukul or to her mother. Second, as regards Rita, she told the court that at about this time she had been advised by David to sell her own flat in East Ham in order to repay some £33,000 in overpaid housing benefit, although Rita said that she had not told her mother about this. In the event, Rita proceeded to sell the flat in April 2016 and was left with some £186,000. So, in November 2015, Rita had good reason to wish to secure the ownership of 5 Brenda Road to ensure that she would retain a roof over her head.

132. Eighth, there is the failure of both Anna (as testatrix) and Rita (as the only named executrix who knew anything about the 2015 Will) to disclose its existence to anyone before Anna's death, not even to Paula, who said that she had known nothing about it. I have already expressed (at paragraph 52 above) my deep concern about Rita's motives in failing to suggest to her mother that she should communicate the changes she had made to her will to Nino or to David, particularly since they both spent time with Anna at Christmas 2015. During the course of Rita's cross-examination, I specifically asked her whether Anna had ever said that she was concerned that it might cause a row or an upset if she were to tell her sons about the new will, and Rita answered in the negative. The only conceivable explanation for the omission to

disclose the changes to the 1986 Will is that Rita wished to ensure that those changes should only become known to her brothers after Anna's death because that would make it more difficult for them to challenge the 2015 Will. Rita stated that this had not been in her mind; but she then added: *"Since the day my mother told me, I just carried on. I probably just forgot about it … We just went home and continued with our lives."* I find that answer does not ring true; and I cannot accept Rita's evidence. Why should she lie about it? Nor can I ignore the shock and the surprise expressed by David and Nino, and Anna's other relations, when, after her death, they first discovered the changes that Anna had made to the 1986 Will, which they considered to be totally out of character.

133. When viewed in combination, in my judgment these factors all point inexorably to the conclusion that Rita had pressured Anna into making a new will, leaving the house to Rita, not by convincing her mother that this was the right thing to do, but by applying some form of improper influence over her to procure the testamentary gift of the house in her favour, cutting out the sons who had stood to share equally in the estate for almost 30 years. Why else did Rita feel it appropriate to lie about the circumstances in which the 2015 Will had come to be made? Why else should Rita have kept quiet about it, even to her friend Paula, who shared the house with Rita and Anna, until after Anna's death?

134. In my judgment, these factors all provide solid, and reliable, evidence that the effect of Rita's coercion was that Anna made a will that did not reflect her true testamentary intentions, which Rita had overborne.

135. In my judgment, this is a case of undue influence exercised by coercion, in the sense that the Anna's true will was overborne by Rita, but not by fraud. The essence of a case of *'fraudulent calumny'* is that the person who is alleged to have been poisoning the testator's mind must either know that the aspersions are false, or must not care whether they are true or false. If a person believes that they are telling the truth about a potential beneficiary, then, even if what they tell the testator is objectively untrue, the will is not liable to be set aside on that ground alone. In the present case, I am left in no doubt that Rita genuinely believed that after 7 and 14 November 2015, her brothers, David and Nino respectively, had *"abandoned"* the care of their mother, something Remo had done many years before. This is not, in my judgment, a case of fraudulent calumny.

136. In my judgment, the involvement of Mrs Sukul did nothing to counteract, or dispel, the undue influence exercised by Rita over her mother. Neither Mrs Sukul nor Dr Qaiyum took any effective steps to ensure that Anna had been subjected to no undue pressure from Rita. Mrs Sukul was not even aware that Rita still retained her flat in East Ham. Effectively, Anna was left to self-certify that she was making the 2015 Will *"with no undue pressures from anyone"*.

137. In all these circumstances, by way of conclusion, I find that the case as to undue influence in respect of the 2015 Will is made out; and I would, therefore, pronounce against the 2015 Will, and in favour of the 1986 Will, in solemn form of law. The existing grant of probate in respect of the later (2015) testamentary instrument, will be revoked.