[2022] EWHC 1468 (Ch)

Case No: PT-2020-001027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Property, Trusts and Probate List (ChD)

In the Estate of PAMELA MAVIS ANNE ABDELNOOR

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

Date: 14 June 2022

Before :

MASTER PESTER

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Between :

(1) RAMZY EDMUND JASON ABDELNOOR **(2) GILLIAN NELLIE STELLA GIBSON** **(As Executors of the estate of Pamela Mavis Anne Abdelnoor deceased)**	**Claimants**
- and –	
(1) ELTEN HERBERT BARKER **(2) SHELLEY BARKER** **(3) SARAH BROWN** **(4) DANIEL ABDELNOOR** **(5) REBECCA BROWN** **(6) BENJAMIN ABDELNOOR** **(7) NICHOLAS GIBSON** **(8) AMY DOUST** **(9) ALEXANDER GIBSON** **(10) ELANOR CAUNT** **(11) ANNA ABDELNOOR** **(12) ADAM ABDELNOOR** **(13) FABIOLA KASUME** **(14) SALLYANN BRODIE**	**Defendants**

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MR JAMES POOLE (instructed by Ashfords LLP) for the Claimants
MS FRANCESCA LEVETT (instructed by Bark & Co Solicitors) for the First Defendant

Hearing dates: 15 to 17 March 2022

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APPROVED JUDGMENT

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archive. The date and time for hand-down is deemed to be at 2.30pm on 14 June 2022.

MASTER PESTER:

Introduction

1. These proceedings concern the validity of a will dated 26 January 2018 ("the 2018 Will") of Pamela Mavis Anne Abdelnoor ("Pamela"). Pamela was born on 31 October 1921. She was thus 96 when the 2018 Will was made. Throughout this judgment, I will refer to members of Pamela's immediate family, to her children and grandchildren, by their first names, solely for reasons of clarity and without intending any disrespect.

2. The Claimants, Ramzy Edmund Jason Abdelnoor ("Jason") and Gillian Gibson ("Gillian"), are the two executors appointed pursuant to the 2018 Will, and are two of the four children of Pamela. Jason and Gillian are also beneficiaries under the 2018 Will, together with sixteen other beneficiaries. They began these proceedings by Part 8 Claim form, dated 21 December 2020, seeking an order that the Court pronounce for the force and validity of the 2018 Will in solemn form.

3. The First Defendant ("Elten") is one Pamela's eleven grandchildren, a beneficiary under the 2018 Will, and a beneficiary of Pamela's estate pursuant to the previous will dated 14 February 2012 ("the 2012 Will"). Elten disputes the validity of the 2018 Will on two grounds: lack of knowledge and approval and undue influence. He has entered a caveat and an appearance, which prevented probate from being obtained.

4. As to the position of the other defendants, the Second Defendant and the Eleventh Defendant failed to acknowledge service of the claim. The Third to Tenth Defendants, and the Twelfth and Fourteenth Defendants, indicated that they did not intend to defend the claim. The Thirteenth Defendant acknowledged service, without however indicating whether she intended to defend the claim. Elten is therefore the only defendant who formally contests the validity of the 2018 Will.

The evidence

5. I heard from five witnesses over the course of a three day trial. I heard from both claimants, Jason and his sister Gillian. I heard from Karen Braddel, a will draftsman who prepared both the 2012 Will and the 2018 Will.

6. I also heard from Elten, and the Fourteenth Defendant ("Miss Brodie"), who is Elten's former romantic partner. It was stressed to me that Miss Brodie attended the trial as a witness in order to give evidence on certain issues between the parties, but that although she was a party to the proceedings, she was not herself contesting the validity of the 2018 Will.

Background

7. Pamela had four children with Munir Ibrahim Abdelnoor: Carolyn (who apparently spelled her name "Caroline", as reflected in many of the documents before me), Jason, Gillian, and the Twelfth Defendant ("Adam"). Elten and the Second Defendant ("Shelley") are the two children of Carolyn and two of the grandchildren of Pamela.

8. Munir Abdelnoor died on 26 December 2004, at the age of 89. Prior to his death, in 1993, he had agreed with his four children that he would leave them each £50,000, but stipulated that he expected them to invest that money to generate an income for Pamela during her lifetime, in the event that he predeceased her. Munir Abdelnoor also indicated that if any of the children departed from that agreement then he had instructed Pamela to alter her will so as to deprive such child of any share in her will.

9. In June 2005, a trust was created ("the MIA Trust"), to give effect to the agreement reached between Munir Abdelnoor and his children. Carolyn, Jason and Gillian each paid their £50,000 into the MIA Trust, but Adam appears to have reneged on this agreement. The trust funds were invested in various property companies, run by a friend of Munir Abdelnoor.

10. In 2005, Pamela went to Rix & Kay, a local firm of solicitors, to update her will following Munir Abdelnoor's death. On 10 October 2005, Pamela made a will ("the 2005 Will") which divided her residual estate into five equal parts. The first part was to be divided equally between her eleven grandchildren. The second part was to be paid to Jason, or to his wife Jeannie Abdelnoor, if Jason were to predecease Pamela. The third part was for Gillian, or to her husband Peter Gibson, if Gillian were to predecease Pamela. The fourth part was to be paid to Carolyn, or to her issue (Elten and his sister Shelley) if Carolyn predeceased Pamela. Finally, the fifth part, was to be shared equally between Adam, his wife Christine Abdelnoor, and their two daughters.

11. In December 2006, Pamela made a further will ("the 2006 Will"). The key change was that the residual estate was divided into 100 shares, to be apportioned as follows:

    (1) Each of the eleven grandchildren were to receive 2 shares each, in other words, a total of 22 shares;

    (2) Jason was to receive 25 shares (or his wife, should he predecease Pamela);

    (3) Gillian was to receive 25 shares (or her husband, should she predecease Pamela);

(4) Carolyn was to receive 25 shares (or her children, Elten and Shelley, if Carolyn were to predecease Pamela); and

(5) Adam Abdelnoor was to receive 3 shares.

12. The 2006 Will also gave a specific legacy to Elten, a parcel of land ("the Triangle"), which was a field adjoining the property on which she lived. The Triangle was described as one acre of scrubland which Elten says he was promised by his grandfather, Munir Abdelnoor.

13. Very shortly after signing the 2006 Will, Pamela changed her mind, and made a new will on 14 February 2007 ("the 2007 Will"). In summary, the effect of the 2007 Will was to reinstate Adam on an equal footing to his three other siblings.

14. In 2007, Elten and Miss Brodie moved into a property known as "the Gables", which was a converted building within the grounds of the property, known as Millview, where Pamela lived. Of all the grandchildren, Elten lived closest to Pamela. I accept that Elten of all the grandchildren saw more of his grandmother in the last decade or so of her life than the others. Miss Brodie's evidence, which was not really challenged, was that she helped care for Pamela up until about 2010, when Pamela's needs changed, and she required a full-time carer.

15. On 12 January 2010, Carolyn died.

16. On 25 January 2012, Pamela met with Ms Braddel, the will drafter, in order to create a new will. Pamela was then 90 years old. She signed the new will on 14 February 2012. The key provision of the 2012 Will is that the residuary estate was to be divided into the following portions:

(1) 20% was to be divided equally between the eleven grandchildren;

(2) 20% was to go to Jason, or to his wife, if Jason were to predecease his mother Pamela or to their issue if both were to predecease Pamela;

(3) 20% was to go to Gillian, or to her issue if Gillian were to predecease her mother, Pamela (Gillian's husband, Peter Gibson, had died since the 2007 Will);

(4) 20% was to be paid to Adam, or to his issue if Adam were to predecease his mother, Pamela (Adam had divorced or separated from his wife since the 2007 Will);

(5) 10% was to be paid to Shelley, and if Shelley failed to survive Pamela by 30 days, to any issue of Shelley who reached the age of 25;

(6) 10% was to be paid to Elten, or to Elten's partner, Ms Brodie, if Elten were to predecease his grandmother, Pamela;

17. Thus, the effect of the 2012 Will, in broad terms, is to divide Pamela's residuary estate equally between the four "branches" of the family (Jason, Gillian, Adam and Carolyn's offspring, Shelley and Elten) and then to leave a further share to be divided among the grandchildren, including Shelley and Elten.

18. There were also some comparatively small specific monetary legacies. The specific bequest to Elten of the Triangle, found in the earlier 2006 Will and 2007 Will, was removed. There is documentary evidence, in the form of a letter dated 12 February 2012 from Ms Braddel to Pamela, showing that the removal of this specific bequest came via Pamela's instructions in a telephone conversation.

19. Pamela executed two codicils to the 2012 Will, one in 2012 and one in 2014. The effect of these codicils is to remove specific money bequests. Elten does not challenge the validity of these codicils. Therefore, should I find that the 2018 Will is invalid, I would pronounce in favour of the 2012 Will, together with the two codicils.

20. In the years following the making of the 2012 Will, Pamela became increasingly physically frail. As can be seen from her medical records, which were in evidence, Pamela suffered from recurrent urinary tract infections, which were treated with antibiotics. These urinary tract infections left her very confused. She had a 24 hour live-in carer, the Thirteenth Defendant, Ms Kasume, but continued to live in her home, Millview.

21. On 25 July 2014, Pamela executed a Lasting Power of Attorney ("the LPA") for property and financial affairs, appointing Jason and Gillian as her attorneys.

22. On 2 July 2017, Pamela had another suspected urinary tract infection and was confused. Records kept by her carer indicate that she told her carer, Ms Kasume, that Elten was no relation to her and that she could not recall what occurred the day before. Her general practitioner indicated, in August 2017, that Pamela was "severely frail" on the Frailty Index. By this stage, Pamela suffered from a range of health conditions, including: glaucoma, osteoarthritis, falls, anxiety, age-related macular degeneration, hypertension, osteoporosis, and a previous fracture. She had hearing difficulties, at least when her hearing aids were not working properly. She also had tremor since at least 2013, which made it difficult for her to dial a telephone.

23. However, Pamela's capacity, at the time of making the 2018 Will, is not in issue. Elten's Defence and Counterclaim (which was settled by Counsel) made it clear that, while referring to Pamela's physical frailty, the grounds for challenging the 2018 Will were confined to lack of knowledge and approval, and undue

influence. All of the procedural hearings in the proceedings proceeded on the basis that capacity was not in issue. No permission to adduce expert medical evidence was sought at the Costs and Case Management Conference, for example.

24. With regard to the recurrent bouts of urinary tract infections, whilst these certainly led to periods of severe confusion, they appear to have been successfully treated with antibiotics. Unless a particular period of infection can be linked to the actual period when a document was executed, I should not simply assume that Pamela was confused or could not understand what she was signing.

25. In her skeleton argument, and in submissions on the first day of trial, Counsel for Elten sought to raise a separate challenge to the validity of the 2018 Will based on Pamela's capacity. I refused the (very late) informal application to amend, not least because were it to have been granted, it would inevitably have triggered an adjournment of the trial.

The making of the 2018 Will

26. In November 2017, Ms Braddel received a call from Jason asking her to visit Pamela to take instructions from Pamela to revise the 2012 Will. On 24 November 2017, Ms Braddel attended Pamela at 2pm at Millview. In her evidence, Ms Braddel explained that Pamela had said that she wanted to treat the grandchildren the same, and then gave a card with her wishes set out in writing. She confirmed that Jason had written the card for her as Pamela herself was unable to do this herself anymore. Pamela nevertheless confirmed that the changes detailed on the card were those that she wanted to make.

27. Ms Braddel made careful notes of that meeting. The notes record that Ms Braddel went through the existing will (that is, the 2012 Will) and the two subsequent codicils, dated 18 June 2012 and 14 September 2015. Ms Braddel noted that Elten had split up from Miss Brodie (this was, I believe, sometime in 2017, possibly May 2017). However, Miss Brodie remained friends with Pamela. Therefore, Pamela wanted to remove Miss Brodie from clause 7.6 (which in the event of Elten's predeceasing Pamela would have left Elten's 10% share of the residue to Miss Brodie) and instead leave a legacy of £5,000 free of tax to Miss Brodie. That suggested change appears to me to be entirely rational and readily explicable by the changed living arrangement between Elten and Miss Brodie.

28. Ms Braddel's notes go on to record that Jason had prepared a written note for his mother, which indicated that the residue was to be divided into four parts. The destination of those parts was to be as follows: one part going to Jason

(alternatively, to his wife, in the event Jason predeceased Pamela), one part going to Gillian (alternatively, to her three children, in the event Gillian predeceased Pamela), one part to Adam (alternatively, to his two children, in the event Adam predeceased Pamela), and the fourth and final part to be divided equally between the surviving grandchildren.

29. Ms Braddel's note then records this:

"Pamela's wish was to treat all grandchildren the same, but I pointed out that the children of her predeceased daughter Caroline (sic) namely, Elten and Shelley would only be sharing from the grandchildren 'pot' and not if their parent preceased (sic) as well as is the case for say the children of Gilli & Adam.

I pointed out that was the reason why Elten & Shelley had 20% in the existing will, with her remaining 3 children also having 20% and all the grandchildren having 20%.

If we change to 25%, Elten & Shelley effectively receive less than what the other grandchildren would receive on death of their parents."

30. I have found those notes very helpful. The notes clearly show that Ms Braddel, who had prepared the 2012 Will, was alive to the effect the proposed changes would have on Carolyn's children, and that those changes would result in Elten and Shelley being disadvantaged, compared to the other grandchildren.

31. Following the meeting, on 27 November 2017, Jason emailed Ms Braddel, thanking her for visiting Pamela. The email continues "… I spoke to her on Saturday and she thought it went well but was not sure that she made herself understood!"

32. Ms Braddel replied, to Jason, on 28 November 2017:

"It was nice to see your mother again an[d] in fact I thought she looked very well, better than when I first saw her in 2012!

Unfortunately, your mother was very confused and was unable to understand or convey what she wanted so I could not proceed to draft the Will. I therefore agreed to write to her and set out the effect of the current Will and the effect of what I was presume was required from the notes that had been made as I do not think it results in what she wanted. I do need to be happy that she understands. I may need to visit her again to follow up on my letter to see if there is an improvement in her understanding before I can proceed."

33. In her evidence, Ms Braddel explained that Pamela was not initially confused, but grew more confused as Ms Braddel sought to explore the ramifications of the proposed changes from the 2012 Will.

34. Indeed, on 28 November 2017, Ms Braddel did write a letter to Pamela. The key paragraphs of that letter are as follows:

"My understanding from our original meeting in 2012 and from my telephone discussion with Jason prior to our meeting last week, is that you wanted to treat the grandchildren equally.

Your existing Will dated 13 February 2012 divided the estate, after payment of legacies:-

20% - Jason

20% - Gilli

20% - Adam

10% - Shelley

10% – Elten

20% - All grandchildren

This was done originally so that your predeceased child, Caroline's children Shelley and Elten, effectively receive Caroline's 20%. They also receive a share of the grandchildren's pot so, yes, on the face of it they receive more in advance. However, the other grandchildren will eventually inherit their parent's 20% so, in the end, it equalises. For example, if Adam were to predecease you, his 20% would go to his children, Elanor and Anna who would also receive a share of the grandchildren's pot as well.

The proposed changes:

25% - Jason

25% - Gilli

25% - Adam

25% - All grandchildren

If you proceed with the above proposal, Elten and Shelley unfortunately receive less than the other grandchildren as they will not inherit their predeceased

parent's share. Therefore, I do not think this proposed change effectively keeps everything "equal"."

35. There followed a further email exchange between Jason and Ms Braddel. In summary, Jason indicated in those emails that, as far as he was concerned, the 2012 Will did not treat all the grandchildren the same, as Elten and Shelley would receive the same portion as the other nine grandchildren "plus a large extra chunk".

36. Ms Braddel said to me in evidence that she did not care for Jason's tone in the communications to her. She spoke on the telephone to Jason on 21 December 2017. Again, she made a note of that telephone conversation, writing that "appointment made on 12/1/18 10am to see Mother again explained that whatever change mother wants has to be conveyed by her to me and not through son".

37. On 12 January 2018, Ms Braddel returned to see Pamela at her home. Jason was in attendance. There is a conflict between Ms Braddel and Jason as to what happened then. Ms Braddel's evidence is that she asked Jason to leave the room, and Jason did so, before Ms Braddel discussed the proposed revisions to the Pamela's will. Jason's recollection is that he offered to leave, but that to the best of his recollection, both Ms Braddel and Pamela were content for him to remain. It may not matter much, but I prefer Ms Braddel's evidence on this point. Ms Braddel's recollection is supported by her note of the meeting, which indicates that "Jason was present but was asked to leave room after initial discussion".

38. Ms Braddel's evidence is that she took Pamela through her letter of 28 November 2017, and specifically raised the issue as to what Elten's and Shelley's entitlement should be. There is another contemporaneous attendance note, prepared by Ms Braddel, which again I found helpful. The note records that the letter dated 28 November 2017 was discussed, and Pamela confirmed her wishes to divide the residue of her estate in four parts, three going to her surviving children, and the final share going to her grandchildren living at her death. The attendance note concludes by stating

"Mrs Abdelnoor was fully understanding what was said but her hearing wasn't too good as her hearing aid had failed in her right ear. However, she was bright and not confused like she was in November. Jason was present but was asked to leave the room after initial discussion."

39. On 17 January 2018, Ms Braddel sent a draft of the proposed 2018 Will to Pamela.

40. On 18 January 2018, Ms Braddel attended Pamela together with a colleague from Deeks Evans, Maureen Avis, a receptionist, to witness the signing of the

2018 Will. Ms Braddel explained that she read out to Pamela the operative provisions of each part of the 2018 Will, and Pamela nodded and confirmed after each clause that those were her wishes. There is no suggestion that anyone else was present at that meeting. Once again, Ms Braddel made an attendance note, which confirms that "ran through contents again and she was happy Pamela on good form and on her own at time of signing".

41. The key provisions of the 2018 Will are therefore that the residuary estate is divided into four, with one quarter going to each of the surviving children (Jason, Gillian and Adam) and another quarter being divided equally between the eleven grandchildren.

42. Pamela died on 10 September 2019.

43. I was not given precise figures for the value of Pamela's estate. This is because valuations for the properties comprised in the estate have still to be obtained. However, based upon an estimated figure of £1,200,000 million for the estate, Elten and Shelley would each receive £27,272 under the 2018 Will. On the other hand, were the 2018 Will to be set aside, and the estate be divided under the provisions of the 2012 Will, Elten and Shelley would each receive £141,818. Jason and Gillian would each receive £300,000 under the 2018 Will, while receiving £240,000 each under the 2012 Will. It is obvious therefore that the 2018 Will financially disadvantages Elten and Shelley, and financially benefits Jason and Gillian.

Legal principles

44. The parties were agreed on the legal principles I am to apply.

(1) Knowledge and approval

45. In relation to knowledge and approval, it was common ground that, as the Claimants were propounding the 2018 Will, they bear the burden of proving that Pamela knew and approved her will. The principles governing the test for knowledge and approval were laid out by Lord Neuberger of Abbotsbury MR (as he then was) in *Gill v Woodall* [2011] Ch 380, at [14] – [17] and [22]. In summary:

(1) 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: at [14].

(2) When it is proved that a will has been read over to or by a capable testator, and he then executes it, the "grave and strong presumption" of knowledge and approval "can be rebutted only by the clearest evidence": at [15].

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

(4) Such disputes will almost always arise when the desires, personality and state of mind of the central character, namely the testatrix herself, cannot be examined otherwise than in a second hand way, and where much of the useful potential second hand evidence will often be partisan, and will be unavailable or far less reliable due to the passage of time: at [17].

(5) At least generally, the Court should avoid adopting a "two-stage approach", but consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, consider 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 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: at [22].

46. In the subsequent Court of Appeal decision of *Simon v Byford* [2014] EWCA Civ 280, Lewison LJ explained, at [47], that "Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed." Lewison LJ went on to say that the correct approach to be adopted by the trial judge is set out in *Gill v Woodall* (cited above) and that the judge is engaged in

"a holistic exercise based on the evaluation of all the evidence both factual and expert".

(2) Undue influence

47. As to undue influence, there are no presumptions of undue influence in a probate context. On the facts of this case, Elten bears the burden of providing that Pamela was coerced into making the 2018 Will against her own volition.

48. The relevant principles are concisely summarised in the decision of Lewison J (as he then was) in *Edwards v Edwards* [2007] EWHC 1119 (Ch) at [47]:

"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;

… …

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."

49. Whilst Lewison J stated that what must be shown is that the facts are "inconsistent with any other hypothesis" other than undue influence, this is to overstate the position. The standard of proof is the normal civil one of the balance of probabilities. As counsel for the Claimants pointed out, an allegation of undue influence is a most serious one to make: see *Re Good (deceased) Carapeto v Good* [2002] EWHC 640 (Ch). It is a species of fraud, which requires strong and cogent evidence to prove, citing *Re H (Minors)* [1996] AC 563, in the well-known speech of Lord Nicholls, at p. 586:

> *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*
>
> *Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."*

Analysis and discussion

50. I would stress two points at the outset.

51. First, as Lewison J said in *Edwards v Edwards*, **"***the question is not whether the court considers that the testator's testamentary disposition is fair, because … 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."*

52. Second, as I have already explained, but it is worth re-emphasising, Pamela's capacity is not in issue. The only pleaded grounds for challenging the validity of the 2018 Will are lack of knowledge and approval, and undue influence. That does not mean that Pamela's frailty in 2017 and 2018 is irrelevant to the issues

I must decide. The cases on undue influence show that the physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will, and the will of a weak and ill person may be more easily overborne than a "hale and hearty" one.

53. I should now say a few words about the witnesses. I found Jason to be an opinionated witness, who held a firm and genuinely held view that the provisions for the grandchildren in the 2012 Will were unfair and did not treat the grandchildren equally. Jason made various accusations against Elten in his witness statement, in particular the suggestion that Elten was a "bully" and had "no respect for his grandmother". In cross-examination, however, he rather rowed back from these attacks on Elten's character. I consider that it would have been better had these points not been raised by Jason in the first place. Jason also chose to mention that Elten was the subject of an investigation by the Serious Fraud Office, and involved in related civil proceedings. That investigation, and those proceedings, have nothing to do with the proceedings before me, and Elten has not been charged with any offence. I do not consider that those proceedings have any bearing on the issues which I have to determine.

54. Despite these criticisms, it seems to me that Jason was genuinely trying dutifully to carry out his mother's wishes, as he understood them to be, when it came to the preparation of the 2018 Will.

55. Gillian also gave evidence. She supported her brother Jason's account, but had fairly limited direct evidence to give.

56. The evidence of the will drafter, Ms Braddel, is obviously important in this case. She was cross-examined extensively, but fairly, by Elten's Counsel. Ms Braddel gave her evidence clearly. She could fairly be described as the only witness who had no direct financial interest in the outcome of the proceedings.

57. As to Elten, what came through was his strong sense of grievance and what he perceived as the unfairness of the will, together with the considerable animosity he felt towards Jason. In his witness statement, he said that Pamela, his grandmother, would "… have never knowingly written me out of her will". But Elten was not "written out of the will". The more accurate description is that he received considerably less than what he was hoping for, and what he felt that his actions in caring for Pamela in the last years of her life deserved. I accept that, of all the grandchildren, he did spend more, and possibly considerably more, time with Pamela in the last years of her life. It will be recalled that he lived very close to her, living in the Gables, which is located on land on which Pamela's own home, Millview, also stood. The other grandchildren, and Pamela's children, all lived further away.

58. I also heard from Elten's partner, Miss Brodie. She too had comparatively little direct evidence to give. While clearly an honest witness who was trying to assist the court, she told me that she was not very good with dates, which somewhat undermined the weight I felt I could place on her evidence. However, she was clear that Elten did not show Pamela any lack of respect nor bully her, which I accept.

59. In closing, Counsel for the Claimants submitted that all the witnesses were honest, and were trying to tell the truth as they saw it. I accept this as a general description, subject to the caveats I have set out above.

60. Turning to my findings on knowledge and approval, I find as a fact that Pamela did know and approve the 2018 Will. Here, the evidence of Ms Braddel is key. I take note of the following:

(1) Elten's evidence was that Pamela would not have appreciated the effect of the changes made in the 2018 Will. However, he is hardly an impartial witness and I cannot place much weight on that view, given Elten's obvious disappointment with what he would receive under the 2018 Will. Importantly, Elten did not claim to have any direct evidence of Pamela's wishes.

(2) Similarly, I do not place a great deal of weight on Jason's and Gillian's evidence as to Pamela's views.

(3) Ms Braddel, on the other hand, was a disinterested witness. She was closely cross-examined. She came across as a person who was keenly aware of her responsibilities, particularly when faced with an elderly person. She explained that she had numerous clients who were elderly (of 400 – 500 clients, she said that about 25% were elderly), many of whom suffered from health issues, including degrees of cognitive impairment, so she was alive to issues of capacity and frailty more generally.

(4) The notes she prepared in connection with the making of Pamela's will were careful and methodical.

(5) She had occasion to meet with Pamela three times in the process of preparing the 2018 Will, having also previously met with her before the making of the 2012 Will.

(6) The contemporaneous evidence plainly shows that Ms Braddel was very alive to the fact that the proposed changes from the 2012 Will to the 2018 Will would have the effect of diminishing the amount that Elten and Shelley would receive. She was therefore keen that Pamela appreciated the arguably inequitable effect that the proposed changes would have. Her evidence was

that at the meeting in November 2017 she "… subjected [Pamela] to a fair amount of questioning concerning this proposed change".

(7) This was followed up by Ms Braddel writing a letter, explaining the effect that the proposed change would have. Ms Braddel's letter, dated 28 November 2017, clearly highlighted this point. To repeat, Ms Braddel wrote that "If you proceed with the above proposal, Elten and Shelley unfortunately receive less than the other grandchildren as they will not inherit their deceased parent's share. Therefore, I do not think this proposed change effectively keeps everything 'equal'". Ms Braddel did not simply send this letter to Pamela and leave it at that. She returned for a further visit on 12 January 2018. Ms Braddel's notes of that meeting show that the 28 November 2017 letter was discussed, and that Pamela confirmed the specific entitlements with respect to the residue. Elten's Counsel accepted in closing that Ms Braddel sought to put "an opposing view" (that is, opposed to Jason's view) but that Ms Braddel's efforts were somehow insufficient. Having heard Ms Braddel's evidence, I am unable to accept this.

(8) Ms Braddel's evidence was also clear as to the meeting on 18 January 2018 when the 2018 Will was executed. She said that she read out each clause and asked Pamela to confirm that each reflected her wishes. There are no grounds for this court to reject that evidence. Elten's Counsel submitted in closing that this process of asking leading questions was plainly insufficient, as it did "nothing to test and inform". But it is incorrect to say that there was no process of "testing and informing". Ms Braddel's efforts to ensure that Pamela knew and approve the contents of the 2018 Will did not start with the visit on 26 January 2018, when the 2018 Will was executed. Ms Braddel had already taken several steps to ensure that Pamela appreciated the significance of the changes from the 2012 Will to the 2018 Will, particularly with regard to the impact that they would have on Elten and Shelley. In the end, I do not see what else Ms Braddel could reasonably have done.

(9) It also seems to me significant that, as the contemporaneous evidence shows, Pamela specifically considered what should happen to Elten's share of the residue, in the unlikely event that he predeceased Pamela. In that case, she wanted the residue to go to two children of a good friend of Elten's, Spencer Golding. Pamela could not recall the names of the children, and asked Jason to supply the names, the two children being Lewis and Anna. (Jason's evidence on this point was that he could only recall one of the names, and texted Elten for the name of the other child). What this reveals to me is that Pamela considered details, such as what should happen to Elten's share, and knew her own mind.

(10)I do not think that the fact that Pamela could not recall the names of the two children of Spencer Golding in any way undermines the conclusion that she knew and approved the contents of the 2018 Will.

61. In summary, Ms Braddel's evidence was clear that Pamela wanted all the grandchildren to receive the same. There can be reasonable disagreement as to what treating the grandchildren equally in circumstances where Carolyn had died actually involved. But Ms Braddel's evidence was that Pamela wanted Elten and Shelley to receive their share from the same "pot" as the other grandchildren, without receiving any of their late mother's share.

62. In all the circumstances, I am satisfied that the Claimants have discharged the burden, which lies on them, to show that Pamela knew and approved the contents of the 2018 Will.

63. As to undue influence, I remind myself that where undue influence is alleged, the burden of proving it lies on the person who asserts it, in this case Elten. Undue influence means influence exercised by coercion, in the sense that the testator's will must be overborne. Whilst the standard of proof is the ordinary civil standard of the balance of probabilities, the court bears in mind that the wholesale overbearing of a testator's will by coercion is an inherently more improbable event than, for example, the bringing to bear on the testator of legitimate persuasion: see *Carapeto v Good*, at [125]. This is a high evidentiary bar. Of course, the physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will.

64. Pamela was a woman who made five different wills since the death of her husband Munir Abdelnoor in late 2004. Counsel for Elten's "theory of the case" was that the making of the 2018 Will was in effect an example of history repeating itself. She submitted that it could be shown that Jason was the driving force behind the 2006 Will, which drastically reduced the share of the residue which would have gone to Adam's branch of the family. But just a few months later, in February 2007, Pamela changed her mind and reinstated the principle of equality for all four children, including Adam. She submitted to me that that was because at that time, in 2007, Pamela could stand up to Jason. However, she submitted that by 2018, when (on Elten's case) Jason put pressure on her to change her will so as to reduce significantly what was left to Elten and Shelley, Pamela no longer had the strength to stand up to him. I did not derive much assistance from the parallels sought to be drawn between the making of the 2006 Will, and the 2018 Will, and the role which Jason was said to have played in both. It seems to me better to focus on the entirety of the evidence relating to the 2018 Will, and ask whether that evidence supports a finding of coercion by Jason of his mother.

65. There is here no direct evidence of coercion. I therefore need to consider whether there are sufficient facts to support a proper finding that Pamela was coerced by Jason to make the 2018 Will. The precise particulars of undue influence, as pleaded in Elten's Defence and Counterclaim, are set out at paragraph 12, as summarised conveniently at paragraph 12.9:

(1) Pamela's vulnerable position;

(2) Jason's position of influence over her;

(3) Pamela's reliance on Jason;

(4) Jason's taking of active steps to prejudice Elten with respect to his entitlement from Pamela's estate;

(5) Jason arranging the changes made to the 2018 Will;

(6) The alleged fact that the change to the entitlements effected by the 2018 Will were inconsistent with Pamela's previously-expressed wishes to treat all the grand-children equally;

(7) The fact that the change materially advantaged Jason at the expense of Elten and Shelley.

66. It is said therefore that "there is no other reasonable explanation for [Pamela]'s execution of the 2018 Will but that her signature was obtained under Jason's undue influence".

67. I have carefully considered the position. In the end, I reject the allegation of undue influence. As I have said, there is no direct evidence of coercion, and I do not accept that there is no other reasonable explanation for Pamela's execution of the 2018 Will other than the exercise of undue influence by Jason. Addressing the matters on which Elten relies:

(1) It is quite true that Jason was in a position of influence in respect of Pamela. He was her eldest son, she trusted him, and it is not disputed that he had oversight of her finances and affairs from around 2013 or 2014 onward. (In 2014, Pamela executed a lasting power of attorney appointing Jason and Gillian as her attorneys). Pamela was physically frail by 2018. It is not, however, surprising that an elderly testatrix would rely on her eldest son. Jason was frank and candid about his role in his evidence before me.

(2) There was certainly ill-feeling between Jason and Elten. Part of the reason for their falling out seems to have been a dispute over the Triangle. Elten was adamant that the Triangle had been promised to him by his grandfather. While there is a specific bequest of this land to Elten in the 2006 Will and

the 2007 Will, this bequest was removed in the 2012 Will. That change appears to have come directly from Pamela. In any event, Elten is not challenging the validity of the 2012 Will. Elten's evidence was that Jason promised that the Triangle would be transferred to Elten at Pamela's death, something which Elten says in his witness evidence "seemed sensible". Counsel for the Claimants pointed out to me that, even if that had been said (which Jason denied), the Triangle belonged to Pamela and it was for Pamela to decide to whom it went. Ultimately, I do not need to resolve the question of what may have been said about the Triangle, because I do not think that the animosity between Jason and Elten, whether on its own or together with the other factors, supports the allegation of coercion.

(3) It is true that Jason was the person who first contacted Ms Braddel to arrange the drafting and execution of the 2018 Will. By this stage, Pamela could not use the telephone unaided. However, Ms Braddel took her role seriously. Her evidence was clear that she saw nothing that gave rise to suspicions of any coercion. Of course, it can always be said that coercion within a family may take place out of sight of outsiders. However, Ms Braddel took steps to satisfy herself that the 2018 Will reflected Pamela's wishes, and no one else's.

(4) It is also true that Jason was involved in the preparation of the 2018 Will (in the sense that he contacted Ms Braddel to arrange the drafting of the new will, and prepared notes and a chart setting out how the division would be effected), and did benefit from the changes to it. However, Jason's evidence, which I accept on this point, is that it was Pamela who decided to make a new will in 2017 – 2018. Pamela wanted to make three principal changes from the 2012 Will to the 2018 Will. She wanted all eleven grandchildren to receive a legacy from the same "pot", rather than have Elten and Shelley also receive their late mother's share, for Miss Brodie to receive an individual bequest (rather than take only in the event of Elten's death) and to give Ms Kasume a specific bequest. No one has suggested that those latter two changes were not rational and indeed readily understandable given the fact that Miss Brodie had separated from Elten (earlier in 2017) and Ms Kasume had been looking after Pamela for a number of years by that time.

(5) As to the point about treating all her grandchildren equally, the court needs to be very careful about itself deciding what equality in this context means. The court's role is not to substitute its view for that of what Pamela intended.

(6) Having heard Jason's evidence, I do not accept that he coerced Pamela into making the 2018 Will. I have been critical of Jason's evidence in certain respects, in particular the attacks he made in his witness evidence on Elten's

character. However, it would be an unwarranted leap from that to a finding that he coerced his mother into making the 2018 Will.

68. One further point is significant. In his letter dated 4 December 2017 to Ms Braddel, Jason wrote that Ms Braddel could "explore" with Pamela whether a greater share should be left to the grandchildren, such as 40% or 70% with a consequent diminution in what would be available to Jason, Gillian and Adam. If Jason's aim was to disadvantage Elten (and Shelley) to his own financial benefit then it would be surprising to see Jason suggesting that Ms Braddel could explore the option of having the grandchildren receive a larger "pot".

69. In closing, I remind myself of the observation of Scarman J in *In the Estate of Fuld, decd (No 3)* [1968] P 675, at 714E: "When all is dark, it is dangerous for a court to claim that it can see the light." This was quoted with approval by Lord Neuberger MR in *Gill v Woodall*, in the context of a knowledge and approval case, who added that the observation of Scarman J applied with "almost equal force when all is murky and uncertain." Pamela wanted all the grandchildren to be treated equally. On one view, the 2018 Will does not treat the grandchildren equally, as it provides that should Jason or Gillian or Adam predecease Pamela, then their share would pass to their respective children (in Jason's case, only if his wife Jeannie Abdelnoor also predeceased Pamela). That the proposed changes in the 2018 Will did not treat the grandchildren equally was certainly Ms Braddel's view in November 2017. However, her evidence, which I accept, was that she pointed this out to Pamela who nevertheless chose to make the 2018 Will. Were the court to pronounce against the validity of the 2018 Will, it would have the effect of substituting one view of what equality requires for what Pamela ultimately wanted. It would be wrong to do so.

70. Standing back from the individual particulars of undue influence, and looking at matters in the round, I remind myself that what must be shown is that Jason unduly exercised his power to overbear Pamela's will, and that it was by means of the exercise of that power that the 2018 Will was obtained. I am unable, on the basis of the evidence before me, to draw that inference. I therefore reject the allegation of undue influence.

Conclusion

71. For the reasons set out above, I propose to pronounce in favour of the validity of the 2018 Will and to dismiss the counterclaim.