Case No: A3/2005/1846

Neutral Citation Number: [2006] EWCA Civ 449
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
MR N STRAUSS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
[2005] EWHC 1806 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 28th April 2006

Before :

THE MASTER OF THE ROLLS
THE RT HON LORD JUSTICE MAY
and
THE RT HON LORD JUSTICE JACOB

- -

Between :

ROBIN SHARP and MALCOLM BRYSON	**Appellants**
- and -	
GRACE COLLIN ADAM and EMMA ADAM & Ors	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Gilead Cooper (instructed by **Messrs. Greene & Greene**) for the claimants
Mr Mark Simeon Jones (instructed by **Messrs. Abbot Beresford**) for the respondents

- -

Judgment

Lord Justice May:

Introduction

1. This is the judgment of the Court

2. Mr Neil Marshall Adam died on 21st August 2002, aged 70. He executed a will on 1st June 2001. The question which Mr Nicholas Strauss QC, sitting as a Deputy Judge of the Chancery Division, had to decide was whether Mr Adam then had testamentary capacity. In a very full and careful judgment dated 27th July 2005, the deputy judge decided that Mr Adam did not have testamentary capacity on 1st June 2001. He decided that an earlier will dated 6th February 1997, which the 2001 will had revoked, was Mr Adam's last and valid will.

3. The claimants, Robin Sharp and Malcolm Bryson, who would be the principal beneficiaries under the 2001 will, appeal against the deputy judge's decision with his permission. The first and second defendants, Grace and Emma Adam, Mr Adam's daughters, are the principal beneficiaries under the 1997 will. The third and fourth defendants are executors.

4. Mr Adam suffered from secondary progressive multiple sclerosis. This was first diagnosed in 1980. By 2001, it had progressed to a point of extreme physical debilitation. There was a clash of evidence as to the extent to which the disease had affected Mr Adam's mind. Those who had seen and communicated with him regularly – some of them daily – in the time leading up to the making of the 2001 will were convinced that he had sufficient understanding to make a valid will and to communicate his instructions for it. These people included, but were not limited to, two solicitors and a general practitioner, all of whom attended Mr Adam when he made the disputed will. Professor Maria Ron PhD. FRCP FRC Psych, a pre-eminently experienced and qualified Professor of Neuropsychiatry, expressed the opinion that Mr Adam probably did not have testamentary capacity in June 2001. Dr C.H. Hawkes DSc. MD. FRCP. FRCP Ed., a highly qualified Neurologist, expressed the somewhat qualified opinion that he did have testamentary capacity. Neither expert had seen Mr Adam. They had had to proceed on reported information. The deputy judge preferred the evidence and opinion of Professor Ron.

5. The deputy judge was right to give permission to appeal. The appeal has caused us considerable judicial anxiety and is finely balanced. This court has to tread very cautiously with questions of evidential evaluation. For this common place and uncontroversial proposition, Jacob LJ has pointed us to what Lord Hoffmann said in *Biogen Inc. v Medeva plc* [1997] RPC 1 at 45:

> "Where the application of a legal standard … involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

Facts

6. The deputy judge's judgment, to be found at [2005] EWHC 1806 (Ch), has a complete account of the facts. we will summarise them only.

7. Mr Adam was forceful and forthright and remained so despite his disability. He inspired affection and respect in all who knew him. Initially a veterinary surgeon, he became a successful racehorse trainer and then, when his health began to decline, bought a substantial stud near Newmarket which he restored and opened in 1982. A new house was built there for him in 1995.

8. His elder daughter, Grace Adam, born in 1964, is an artist and lecturer who organises artistic events. She lives in London. His younger daughter, Emma Adam, born in 1967, is a qualified vet. Since 1998 she has lived and practised in the United States. The deputy judge had no doubt but that they both loved their father and were greatly distressed by his decline. Grace visited him every two or three weeks; Emma infrequently, because she was in the United States. They both communicated with him very frequently by telephone and e-mail. Emma spoke of a common understanding that she would in due course return from the United States to take over the running of the stud, for which her training would be a huge advantage.

9. Robin Sharp was born in 1960. He started working for Mr Adam in 1975 as a stable lad, his first job. He stayed with Mr Adam till his death. Malcolm Bryson was born in 1965. He began working for Mr Adam in 1982 when he was 16. He also stayed with Mr Adam till his death. They both had great respect and affection for him and were completely loyal. In the later years, they successfully managed the stud under Mr Adam's instruction. The debt on the stud reduced substantially and the business generated enough money to pay for Mr Adam's no doubt increasingly expensive care.

10. Mr and Mrs Adam's marriage ended acrimoniously in 1992. The deputy judge found that Grace and Emma rather sided with their mother over this, but he rejected suggestions on behalf of the claimants that ill feeling resulting from this and other matters carried through to the time of the 2001 will. An American friend of Mr Adam called Charlene, of whom he was very fond, also featured in the narrative in 1992 and on occasions later until February 2001. But this relationship has no real bearing on the issue in this appeal.

11. By the time Mr and Mrs Adam separated, his mobility, vision and speech had become severely affected and he had begun to be incontinent. Mr Sharp and Mr Bryson had become quite close to him. In the several months between Mrs Adam leaving and a reliable carer arriving, it was Mr Bryson who put Mr Adam to bed at night and looked after him at weekends.

12. By late 1993 or 1994, Mr Adam could no longer speak nor read. He could still then use a wheel chair. There was however a large body of evidence, accepted by the deputy judge, that he continued to be able to communicate – by a spelling board, by thumbs up or thumbs down movements, by nodding or shaking his head, by rolling his eyes, and latterly by blinking. Those with whom he communicated became accustomed to these means of communication and kept a sharp eye on him for indications that he wanted to communicate something. They then in the later stages had to ask closed questions which could be answered "yes" or "no", covering various options, until they had identified what he wanted to say. All the evidence, apart from some of that of Grace and Emma, was that this means of communication worked. It became almost second nature to those in day to day contact with Mr Adam. In the words of Anna Hall, who was Mr Adam's solicitor from about 1988 until his death, anyone who made the mistake of assuming that lack of speech equalled lack of

understanding was soon put right very quickly. Mr Adam could and did get very cross with anyone who did not follow his instructions or treated him in a way which suggested a lack of respect.

13. Between 1994 and 1996, Mr Adam employed a nephew to manage the stud. He was discovered to have defrauded his uncle and dismissed. Mr Sharp was promoted to stud manager and Mr Bryson to stud groom. They worked very closely with Mr Adam, consulting him about most major decisions. They visited him daily. Mr Sharp needed and sought Mr Adam's approval for expenditure over a certain level and Mr Bryson sought Mr Adam's decisions on business matters once or twice a week. They were paid less than the going rate for their jobs. When, in 1995 or 1996, Miss Hall suggested that their salaries might be increased, Mr Adam refused. But that did not affect their relationship with him.

14. In 1996, Mr Adam travelled to Germany to be medically assessed to see whether different treatment might be effective. He was in hospital there between 22nd August and 2nd September 1996. A team of three doctors produced a report, which we shall consider in detail later in this judgment.

15. Between 1996 and 2001, Mr Adam became increasingly debilitated. By 1999, he was more or less completely paralysed from the neck downwards most of the time. Nevertheless he was able to continue to communicate with those around him. The evidence here varied somewhat between witnesses. Grace Adam, for instance, said that in the last couple of years before his death, his communication was virtually non-existent. But the judge accepted evidence that Mr Adam was able to communicate sufficiently to be able to give instructions for the preparation of the 2001 will.

Mr Adam's wills

16. Details of Mr Adam's wills and codicils are given in paragraphs 20 and 21 of the judgment. He made wills in May and November 1993. The first of these left specific legacies, including legacies to Mr Sharp and Mr Bryson – the choice of a horse and a painting (Mr Sharp) and the gun traps (Mr Bryson) – and the residue of the estate to Grace and Emma Adam in equal shares. The second also left the residue to Grace and Emma. By October 1994, the specific legacies to Mr Sharp and Mr Bryson had been revoked. By a will of 6th February 1997, Mr Adam again left the residue of his estate to Grace and Emma in equal shares. It is agreed that Mr Adam had testamentary capacity in February 1997.

17. By the 2001 will, Mr Adam left pecuniary legacies of £25,000 to Kelly Neville, one of his carers, and £4,000 to Mr Hancock, a long standing friend, and the residue to Mr Sharp and Mr Bryson in equal shares. He left nothing to his daughters. To include Mr Sharp and Mr Bryson as beneficiaries under the 2001 will is readily explicable as Mr Adam's gratitude for their devotion, care and loyalty over many years. To exclude Grace and Emma completely is not readily explicable on the deputy judge's now unchallenged finding that there was enduring mutual affection and no significant family rift.

18. We are told that the estate may be worth something in excess of £1m. It is sad that it will have been diminished by costs of this litigation, which nevertheless seems to us to have been conducted without obvious acrimony or exaggeration. The main asset of

the estate is the stud farm and business. There are also household goods, including paintings and antique furniture and a part share of a house in Middlesex.

Evidence

19. There was a substantial body of evidence from various witnesses. The deputy judge summarised the evidence of Grace and Emma Adam and of Mr Sharp and Mr Bryson in paragraphs 23 to 47 of his judgment. In the main, it was uncontroversial narrative with some understandable slant towards the point of view of the witness. In paragraph 25 of the judgment, there is reference to a loan which Mr Adam made to Grace in April 2001. There was correspondence about this with Mr Sharp and Mr Hancock, who held Mr Adam's power of attorney. Grace was unsure whether Mr Adam had understood or in fact approved the loan. But the correspondence and the later evidence relating to the making of the 2001 will convinced the deputy judge that Mr Adam would have been well able to understand that his daughter was asking for a loan and to have agreed to make the loan.

20. Mr Hancock, the fourth defendant and one of the executors under both the 1997 and 2001 wills, is a bloodstock insurer. Mr Adam was a client and friend for over 20 years. The judge summarised his evidence in paragraphs 48 to 53 of his judgment. Mr Hancock visited Mr Adam at least once a week. He communicated with him by asking questions to which he could respond "yes" or "no". They enjoyed jokes, as about Mr Adam leaving Mr Hancock a picture which Mr Hancock disliked and about Mr Adam's dog, Gnasher.

21. Mrs Clarke was one of Mr Adam's carers from 1998 until his death. In 2000, she became care co-ordinator. She gave evidence (summarised in paragraphs 54 to 61 of the judgment) of Mr Adam's increasing disability, of medication to control painful muscular spasm and of his decreasing means of communication. When she first arrived he was able to take liquid foods with difficulty, but this was no longer possible after a year or two. She said that it was difficult to assess how much he understood, particularly in the later stages of his illness. She spoke of ill-natured gossip at the stud and in the town about Mr Adam's daughters.

22. Mr Kelly Neville was one of Mr Adam's carers from about April 1998. The deputy judge summarised his evidence in paragraphs 74 to 87 of the judgment. Mr Neville was very effective and Mr Adam greatly appreciated his services. Mr Adam left him a substantial legacy in the 2001 will. There is no suggestion that Mr Neville sought this. Miss Hall's evidence was that, on the contrary, Mr Neville tried to persuade Mr Adam to leave the money to his daughters.

23. Mr Neville gave evidence of Mr Adam's decreasing powers of concentration, understanding and communication – use of the letter board; reading to him; playing cards with him; writing short letters for him. He gave evidence of the frequency and nature of Grace and Emma Adam's contact with their father. Both girls were caring daughters who were reaching out towards him. He never said anything to Mr Neville about his relationship with his daughters. Emma used to telephone regularly and Mr Neville facilitated three way conversations – skilfully, as Emma testified. Grace was concerned whether her e-mails were getting through. Mr Neville also gave evidence about Mr Adam's relationship with Charlene.

24. In about March 2001, Mr Adam told Mr Neville by means of the letter board that he wanted to alter his will. Mr Neville initially did nothing about this. But when Mr Adam had brought it up several times over a period of about a month, Mr Neville told Mr Hancock, who contacted Anna Hall. Mr Neville had on one occasion asked Mr Adam what his intentions were. Mr Adam had indicated that he wanted to leave the stud in four equal shares to his daughters and Mr Sharp and Mr Bryson. The deputy judge concluded that this curious part of the story was true, and that what Mr Adam then communicated was at the time genuine.

25. Miss Hall is a partner in the Newmarket firm of solicitors, Edmondson Hall. She first acted for Mr Adam in about 1988. She gave evidence of his physical and mental condition at various stages in his illness, for instance when she drew up his two 1993 wills, for which he was able to give detailed instructions. She made meticulous attendance notes throughout. She advised him to execute an enduring power of attorney which he did. It is a feature of the appellants' case that Miss Hall did not think it necessary up to the making of the 2001 will and beyond to register the power of attorney. She recorded Mr Adam on a number of occasions in 1993 as being mentally aware and lucid. Her evidence was, that despite his lack of speech, he was still "totally mentally able". She recorded in July 1995 that he was apparently in better shape following new treatment and more aware of what was going on. She advised Mr Adam in the main in relation to stallion agreements, employment disputes and unpaid bills.

26. Dr White is a well qualified general practitioner, whom the deputy judge found an impressive witness. Mr Adam joined his surgery in September 1997. He was taking a large cocktail of drugs to relieve pain and depression. Dr White said that no general practitioner is an expert on multiple sclerosis, but he knew that the disease could in some cases affect a patient's cognitive abilities and impair his judgment. In his view, Mr Adam had no impairment of judgment or cognition. The deputy judge's summary of his evidence included the following:

> "70. Dr White said that, when he visited, he would normally speak first to whoever was caring for Mr Adam to see how he was. He accepted that his direct communication with Mr Adam would normally be limited to medical issues, whether he felt well, whether he was in pain, whether he wanted to go to hospital, as well as occasional small talk designed to put the patient at his ease. However he had also seen that Mr Adam was able to indicate his taste in music and enjoyed it and that his carers read to him and that he had noticed his interaction with Mrs Clarke's children. He was also aware that he was involved in decision-making at the stud; on occasions he was present in the room. He said that Mr Adam was well able to show what pleased him and what didn't. He agreed that Mr Adam was very frail physically; by 1999 had lost the use of his arms, and over the years his ability to use gestures such as the thumbs up sign left him. Nevertheless, he did not agree with the suggestion that Mr Adam was unable to communicate effectively. He was able to communicate effectively, albeit with difficulty, with answers to closed questions.

> 71. Dr White said that his assessment that there was no impairment of Mr Adam's cognitive powers was based on seeing the patient. Although he accepted that the anti-depressant and pain relieving drugs taken by Mr Adam were capable of affecting a patient's cognitive powers, in his view the balance of the drugs taken by Mr Adam was stable and had been so for some time, and he was aware of many patients on similar cocktails and would not say that all had significantly impaired cognitive powers.
>
> 72. Dr White was not aware of any test which could assess the reasoning powers of somebody in Mr Adam's situation, given his inability to speak and, asked if he was able to say how good Mr Adam's reasoning powers were, he said that he was not. This is an important piece of evidence, as both Miss Hall and Dr Hawkes relied on his view as to Mr Adam's testamentary capacity."

The execution of the 2001 will

27. Miss Hall took instructions for and saw to Mr Adam's execution of the 2001 will in a quite exemplary fashion. There is a so called "golden rule" that the making of a will by an old and infirm testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings – see *In re Simpson* (1997) S.J. vol 121 page 224 and *Kenward v Adams* The Times, 29th November 1975. Miss Hall not only fully complied with this, but did everything conceivably possible, short of submitting Mr Adam to a wholly impracticable full scale series of neuro-physiological tests and examinations, to satisfy herself that Mr Adam had testamentary capacity. Mr Cooper, on behalf of the appellants, came quite close to submitting that such meticulous compliance with the golden rule should in principle be determinative. In our view, this would go too far. The opinion of a general practitioner, unimpeachable in itself and supported by that of one or more solicitors, may nevertheless very occasionally be shown by other evidence to be wrong. The golden rule is a rule of solicitors' good practice, not a rule of law giving conclusive status to evidence obtained in compliance with the rule. Nevertheless, where a testator's apparent mental state is observed and recorded at the time when he actually executes the will in complete compliance with the rule and with the care with which it was in the present case; and where professional people concerned reached a properly informed and recorded conclusion that the testator does have testamentary capacity, it will require very persuasive evidence to enable the court to dislodge that conclusion.

28. The deputy judge recorded the evidence relating to the execution of Mr Adam's 2001 will in paragraphs 89 to 111 of the judgment. What follows is a bare bones account.

29. Mr Adam had communicated his wish to make a new will to Mr Neville. Mr Neville contacted Mr Hancock, who himself contacted Miss Hall. Mr Neville also contacted her on 30th April 2001. No one else knew about this, including Mr Sharp and Mr Bryson, to whom the contents of the eventual will came as a surprise.

30. Miss Hall went to the stud on 1st May 2001. She satisfied herself that Mr Adam was mentally in a position to give instructions. The deputy judge recorded that the carers' diary for 1st May did not suggest otherwise. The meeting was pre-announced. The process by which Miss Hall took instructions was very clearly and fully set out in her witness statement, which closely followed her contemporary attendance notes. The deputy judge reproduced the relevant extended passage in full in paragraph 92 of the judgment. The import of Mr Adam's instructions, which Miss Hall elicited painstakingly and meticulously, was that Mr Adam wanted to bequeath his residuary estate, including the stud, to Mr Sharp and Mr Bryson equally; that he did not want to leave the estate, the stud, the furniture or anything to his daughters; that he had not fallen out with his daughters; that he emphatically wanted to recognise Mr Sharp's and Mr Bryson's contribution to the stud over the years; and that Miss Hall told him several times how hurt his daughters would be, if he made a new will to this effect. At this he had closed his eyes. He knew what she was saying.

31. Mr Neville was present to help Miss Hall put the questions. When the pecuniary legacy to him was suggested, his reaction was that he did not want it and that Mr Adam should leave his money to his daughters. He said that he did not need the money, at which Mr Adam laughed.

32. On 3rd May 2001, Miss Hall telephoned Dr White. They each agreed from their respective knowledge of Mr Adam that he was completely lucid and perfectly capable of giving instructions and of understanding what he was doing. There had been periods in the past when he had not been entirely rational, but this was, said Dr White, mainly due to heavy sedation and he was now virtually off sedatives.

33. On 4th May 2001, Miss Hall went to the stud with Dr White and a senior solicitor colleague, Mr Melvin Skelton. Miss Hall produced a replacement draft will. The deputy judge reproduced her attendance note for this meeting in paragraph 97 of the judgment. Mr Adam confirmed on several occasions with lots of nods that he did not want his daughters to inherit anything; and he shook his head when Miss Hall suggested that he would be better leaving pecuniary legacies to Mr Sharp and Mr Bryson and everything else to his daughters. Nevertheless, those present were not 100% certain that Mr Adam was giving clear and unambiguous instructions that he was fully capable of understanding. He said that he had fallen out with his daughters, which was the opposite of what he had said on the previous occasion and which was, as the deputy judge found, incorrect. They were concerned about his lack of memory retention from one day to the next. So, although Miss Hall personally felt that Mr Adam did understand what he was communicating, they erred on the safe side and decided to come back on another day. Mr Adam understood the reason for this and agreed.

34. Mr Skelton had encountered similar situations before in his professional experience of drawing up 4,000 wills and as a hospital chaplain. He reckoned that Mr Adam was taken off guard when they trooped in en masse unannounced. Mr Skelton had had a lot of experience of people in a similar condition. The deputy judge recorded his evidence as including:

> "Mr Adam was upright, not in anyway slumped and "could look you in the eye". There was a person there behind the eye and there was communication going on. There was no lack of

> clarity on the residuary bequest, but they got bogged down on the pecuniary legacies, and there were conflicting messages coming from him. He was not aware of involuntary spasms either on this or on the subsequent occasion when he attended, and he said that he could tell an involuntary spasm from a nod or shake of the head. In the end, Dr White, Miss Hall and he had a quick consultation and decided to come back again on a later date. Mr Skelton's main concern was the lack of clarity on the pecuniary bequests. He was not concerned about the lack of memory as to the earlier occasion."

35. The will was not executed until 1st June 2001. In the meantime, Mr Neville had telephoned to say that Mr Adam still wanted to leave the stud to Mr Bryson and Mr Sharp, but had changed his mind to the extent of now wanting to leave the house contents to Grace and Emma. On 30th May 2001, Miss Hall made enquiries of the Court of Protection who advised as to the stringency of the test for testamentary capacity. What mattered was Mr Adam's capacity on the day. They suggested the possibility of a psychiatrist attending, but this was not practical, and the deputy judge thought that Miss Hall was quite right not to take this further. She did, however, ask Mr Hancock to attend.

36. Sunday 27th May 2001 was Mr Adam's birthday. There were cards and enlargements of pictures taken at Christmas. Grace visited bringing a rather noisy canary and Emma called. The carers' diary recorded Mr Adam as "quite alert and aware of conversation". There was nothing remarkable in the subsequent entries in the diary until 1st June.

37. The deputy judge reproduced Miss Hall's attendance note for the 1st June visit in paragraph 104 of the judgment. Those present were Miss Hall, Mr Skelton, Dr White, Mr Hancock, Mr Neville and (to witness the will) Mrs Clarke. The attendance note included:

> "AH had expressed a concern to Neil on one occasion when she had been to the Stud at the fact that he was not leaving anything to his daughters. She had reminded him and reminded him again today 1st June 2001 that his property consisted of not only the business and the house but also the contents, personal possessions, paintings etc. She also said to him today that she felt his daughters would be very hurt if he were not to leave them anything even if it was only a token gift given that they had been visiting him and clearly were on good terms. However today NA refused on each occasion that he was asked to agree to leave his daughters anything. He was clear by shaking his head that he did not want to include them. AH reminded him of his previous intention to leave them the contents but again by shaking his head he indicated that he did not want to do it."
>
> "His residuary estate he wanted split equally. AH repeated this to him on 12 or more occasions. She read out the final Will to him appointing JH and AH as Executors, gift to Kelly Neville

> of £25,000, gift to John Hancock of £4,000.00 and residuary estate to Malcolm and Robin in equal shares absolutely. This was read over to him he then agreed."
>
> "In conclusion AH at the time that his will was made on the 1st July 2001 was fully of the opinion that Neil Adam knew what he was doing. It was consistent with the instructions he had given on previous occasions. Despite his limited communication with nods and shakes of his head AH was happy that he understood what he was doing and in particular the fact that he was able to participate in a joke with John Hancock halfway through indicated that he was fully aware what was going on and he also quite clearly had considered his daughters and had chosen not to include them."

38. Mr Skelton had no doubt but that Mr Adam was fully mentally capable and aware of what he was doing in giving his instructions. Dr White confirmed the accuracy of Miss Hall's attendance note. He gave evidence that at all times before his final illness, which began at the end of June 2002, Mr Adam appeared to be in control of his faculties and was clearly able to indicate his likes and dislikes. He was fully aware of what he was doing on 1st June 2001.

39. The deputy judge recorded that Mr Hancock confirmed that Miss Hall's attendance note accorded with his recollection and said that it was absolutely clear to everybody in the room that he was adamant that he had decided to cut his daughters out completely. He was given innumerable opportunities to change his mind but did not, and there was no possibility of a misunderstanding. In his oral evidence he said that Anna Hall had done a very effective job, leaving no stone unturned.

40. The will was duly executed.

41. The deputy judge was satisfied that the account given of the taking of instructions and execution of the will by Miss Hall, Dr White and Mr Skelton, all of whom were most impressive witnesses, was entirely accurate. The deputy judge said:

> "I cannot see how their conduct of a very difficult situation could have been improved on. It is clear from their evidence that Mr Adam knew what he was doing and its effect."

42. The deputy judge then made factual findings, resolving issues of somewhat conflicting evidence, about the relationship between Mr Adam and his daughters. The upshot was that, although the daughters had sided with their mother for a few months when and after she left him in August 1992, this had no significance after that. Mr Adam had left his residuary estate to his daughters in his 1993 and 1997 wills. Their mutual relationship was good and loving so far as his physical state permitted. There was no falling out, nor anything apparently sufficient to explain Mr Adam's decision to cut them entirely from his 2001 will.

Expert evidence

43. Neither Dr Hawkes nor Professor Ron had ever seen Mr Adam. The material available to enable them to express a secure opinion was necessarily limited. They had the detailed report written by the team of doctors who examined Mr Adam in Germany in August and September 1996. They had the general practitioner's notes and correspondence included in them. They had, in advance of the trial, written witness statements which gave varying accounts of the progression of Mr Adam's physical and mental state. They had, of course and importantly, their own enormous experience of the common characteristics of multiple sclerosis. They acknowledged - Professor Ron explicitly so in her written report – that factual matters were ultimately for the judge, and that opinions dependent on factual evaluation from the witness statements might need to be reconsidered.

44. The 1996 report from Germany is something of an evidential anchor. It is signed by a team of 3 doctors headed by a consultant. It reports the results of a large number of tests. It gives a drugs history. It records that Mr Adam had suffered from disseminated encephalomyelitis since 1977. It reported that the disease was "advanced", but "there is no evidence of disease activity". One of the tests was a MRI head scan. This "revealed widespread decreased signals in the periventricular areas compatible with long standing disseminated encephalomyelitis". The scan and lumber puncture had confirmed the diagnosis. The report has this passage:

> "**MRI head** demonstrates extensive decreased signals in the periventricular areas especially near anterior and posterior horns but also in the basal ganglia and the brainstem. Noted also advanced supratentorial atrophy. All this is in keeping with the diagnosis of longstanding disseminated encephalomyelitis."

We would reject the submission that this short description of a scan which the experts had not themselves seen was an insecure basis for so much of their opinion as depended on it. It is, we think, a sufficient technical description for the purpose of experts knowing, so far as was possible, the observable state of Mr Adam's brain in 1996. Dr Ron reported that the scan report showed the type of lesions and brain atrophy one would expect in patients who had severe multiple sclerosis.

45. The 1996 report also stated that Mr Adam was "fully orientated" and that there was no "psychiatrically abnormal thought processes". As part of a series of "Neurological Examinations", under the sub-heading "Higher Mental Functions", he was said to be "orientated, no disturbance of form or content of thought processes". It is a forensic criticism of Dr Ron's report that she does not specifically mention these positive findings. She and Dr Hawkes appear to have agreed that these findings did not result from specific cognitive tests. But the neurological examination, of which this was but part, was obviously thorough. More generally, the product of 10 days expert observation and examination in hospital in 1996 must, in our view, be taken as an evidential anchor in this case.

46. This means that Mr Adam undoubtedly had testamentary capacity in mid-1996, having mental faculties such as the report described. In so far as it was necessary so to find, this remained broadly the position in July 1997, when Dr Hughes, Director of

the Pain Relief Service at Addenbrooke's Hospital, noted that it was obvious that Mr Adam understood all that was being said and that some clear face to face communication was possible. As we have said, it is agreed that Mr Adam had testamentary capacity at the time he made the 1997 will.

47. Professor Ron noted and discussed evidence of Mr Adam's increasing problems in communication. She said that cognitive impairment is a well documented feature of multiple sclerosis, present in 40-60% of patients attending hospital outpatient services. Cognitive impairment becomes more severe as the disease progresses, although there is some significant individual variation as to its extent and severity. Memory deficits and executive functions commonly bear the brunt. Cognitive deficits may be overlooked in patients with preserved social graces and where detailed examination of the cognitive state is not performed. Cognitive testing was not done on Mr Adam, so that the severity of the impairment had to be deduced from the various available documents.

48. Professor Ron considered the witness statements, concluding that they were to some extent contradictory. None of those who described Mr Adam as cognitively well preserved in the last 3 to 4 years before his death gave any details of how they arrived at that conclusion. Descriptions by Emma and Grace Adam of his inability to initiate conversation, poor concentration, variable moods and fatigability were more in keeping with the cognitive impairment expected in someone with very severe multiple sclerosis. Professor Ron considered that Dr White's opinion that the level and amount of drugs that Mr Adam was receiving at the time of making his 2001 will did not impair his judgment was likely to be incorrect.

49. Professor Ron specifically considered Mr Adam's cognitive state on 1st June 2001, when he executed his 2001 will. She interpreted the statements of Miss Hall and Dr White as saying that they felt Mr Adam did not have testamentary capacity on 4th May 2001, when they first attended for him to make his will. She said that Dr White did not, on 1st June 2001, ask specific questions to reach a conclusion that Mr Adam had testamentary capacity. There was no information as to whether he was orientated in time and place nor whether he understood the extent of his assets or the consequences of his actions. Moreover, there was no evidence to suggest any reason why Mr Adam's condition should be different on the two occasions given that his neurological condition was unchanged and he was receiving the same cocktail of drugs. Some of this turned out to be mistaken. Miss Hall said and the judge found that they did not withdraw from executing the will on 4th May because they felt Mr Adam lacked testamentary capacity, but because they were unsure of some of his instructions. Further, the deputy judge held that Mr Adam did on 1st June 2001 sufficiently understand the extent of his assets and the consequences of his actions.

50. In paragraph 5 of her report, Professor Ron drew together her conclusions from the evidence she had reviewed. In essence, she said that the severity of brain damage would increase as the disease progressed. The brain damage in 2001 would have been worse than that found in 1996. Cognitive abnormalities affecting memory and executive functions would have been more severe in 2001 than in 1996. The combination of drugs was likely to have affected a person whose brain was already damaged. Under the heading "testamentary capacity", Professor Ron wrote:

> "I understand that the criteria for testamentary capacity require that the person drawing up the Will must (1) understand the nature of the act and its effects; (2) understand the extent of the property of which he or she is disposing; (3) understand the nature and extent of the claims on him/her, both of those whom he/she is including in the Will, and of those excluded; (4) have no mental disorder directly affecting (1) to (3) above; (5) not be subject to undue influence by one or more third parties. In my opinion the cognitive deficits that Mr Adam had in all probability at the time of the Will are likely to have interfered with his testamentary capacity. In particular the memory and executive function deficits are likely to interfere with the comprehension and encoding of information and with the ability to understand a situation and the available choices. It is also worth noting that Mr Adam did not appear to be able to explain the reason for his change in his Will i.e. was unable to provide a rational reason for a change in his intentions."

51. Professor Ron's summary and conclusions restate her view that profound cognitive abnormalities were likely to have affected memory and executive functions; that Mr Adam's ability to understand the nature of the act and its consequences would have been impaired; and that the same applied to his understanding of the extent of his property and the nature and extent of the claims on him of those whom he was including or excluding from his will.

52. Dr Hawkes to some extent in his oral evidence modestly deferred to Professor Ron's experience and standing. In his written report, he noted that the 1996 German Report had stated that Mr Adam had no psychiatrically abnormal thought processes. He reviewed the written material provided to him. He said that there was no doubt but that the disease had affected Mr Adam's brain. The best evidence for this was the 1996 MRI scan. The areas of the brain affected included those concerned with higher level function, particularly cognition. But apart from depression and the effects of drugs on his speech and speed of thought,

> "…there is no evidence in the file of any form of cognitive impairment. It must be admitted there has never been any formal assessment of that and all evaluations seem to have been by bedside conversation, limited as that would be. Nevertheless the evidence we have is that his cognitive function was, for the most part, reasonably intact, excluding the times when he experienced side effects from medication.
>
> I do have concerns that this man has clear evidence of extensive damage to most of the brain and one would expect some impairment of higher mental function. This would particularly be the case if there was damage to the frontal lobes as in this case. I am also concerned that there appears to have been an abrupt change of plan one year before his death. This might be considered irrational conduct and indeed I am sure his daughters would believe that to be the case. As a lay observer I do find it odd that he did not leave a penny to his two

> daughters. There is nothing in the evidence in front of me that gives a reason for this apparent inconsistent behaviour. However, it is quite likely there is much more information in the background about which I am not aware. I am also very impressed with the quality of evidence from his solicitor, Anna Hall, and his GP, Dr White, who had first hand evidence of his desire to change the Will. …
>
> I have no doubt the medication he was receiving would have affected his testamentary capacity from time to time, but it is clear from the witness statements of his solicitor and general practitioner that they were very much aware of this possibility and, as far as I can tell, their conduct medico legally was immaculate.
>
> I am satisfied from the evidence provided to me, particularly that of Dr White and Anna Hall, and despite the presence of MS, that at the time he gave instructions for the Will (1 May 2001) and at the time of final execution of the Will (1 June 2001), he was of testamentary capacity as defined by *Banks v Goodfellow* (the nature of which has been explained to me by my instructing solicitor) and understood the content and consequences of his final Will. ”

53. The written expert evidence may be summarised as follows. Mr Adam suffered from progressive multiple sclerosis. By 1996, he had suffered damage to his brain as described in the 1996 German report. The damage was likely to impair his cognitive functions, in particular his memory and executive functions. His cognitive functions were nevertheless reasonably intact in 1996 (as described in the 1996 report), and he had testamentary capacity then and at the time of the making of the 1997 will. His brain was likely to have been more severely affected in June 2001 than it was in 1996. In the absence of specific cognitive testing, it was a matter of deduction from other available evidence whether or not the deterioration was such that by June 2001 he had ceased to have testamentary capacity. Each expert addressed Mr Adam’s cognitive functions. They reached opposite conclusions, because they took a different view of the other available evidence, especially that of Miss Hall and Dr White. Dr Hawkes expressed some hesitation because there was clear evidence of extensive damage to most of Mr Adam’s brain, and because there was no explanation why Mr Adam disinherited his daughters completely. This latter point he made “as a lay observer”. Ultimately the evaluation of the evidence upon which the expert issue turned was for the court.

54. The experts had discussions before the trial and produced a joint written statement. Points of agreement included that in all probability Mr Adam’s brain damage would have been more severe by 2001 in keeping with the progressive nature of the disease; and that he would have had cognitive impairment, but that this was never formally assessed. Dr Hawkes maintained his opinion, influenced by the quality of the evidence of Anna Hall and Dr White, and despite Dr White’s more limited training in neurology and experience in multiple sclerosis, that Mr Adam had testamentary capacity in June 2001. Professor Ron in effect, though not in terms, maintained her opposite view. She emphasised the probable severity of cognitive impairment; the

lack of specific cognitive testing; the probable effect of drugs; and her understanding that Dr White and Miss Hall had considered that Mr Adam's testamentary capacity was impaired on 4th May 2001.

55. The Deputy Judge carefully considered the expert evidence, including of course their oral evidence. He noted Dr Hawkes' view that Dr White's qualifications were well above the level of the average general practitioner, and that this showed in the quality of his report. He recorded that Dr Hawkes considered that the issue was borderline, and that his own view might be affected if there was no family rift. He considered the rationality or irrationality of the testator's decision would be relevant to the assessment of testamentary capacity.

56. The deputy judge recorded the main points of Professor Ron's opinion, but said that cross-examination resulted in some modification of her position. Her final position was less dogmatic and not dissimilar from that of Dr Hawkes. She said that it was extremely difficult to say whether the disease had affected Mr Adam's thought processes in reaching the decisions reflected in his will. On the balance of probabilities, the damage was sufficiently severe to impair his testamentary capacity. For her, the facts relating to the family relationship did not affect the conclusion as to the extent of Mr Adam's cognitive abilities and the contents of the will were therefore "to some extent" irrelevant. Even if the contents of the will had been totally normal, she would still have said that on the balance of probabilities Mr Adam did not have testamentary capacity. As to what level of impairment was acceptable, she said that testamentary capacity to her meant the ability to take into account all the various facts relating to the relevant persons and assets.

57. Mr Cooper, for the claimants, had criticised Professor Ron's evidence, saying that her account of the witnesses was unbalanced and selective. In particular, she had wrongly supposed that Dr White and Miss Hall had concluded that Mr Adam lacked testamentary capacity on 4th May 2001. Mr Cooper supported these criticisms with a schedule of what he submitted were Professor Ron's errors. Mr Cooper referred to the schedule in his submissions to this court. The deputy judge said (paragraph 129):

> "There is much force in this criticism, although I do not agree with all the points made in the schedule. I do not think that Professor Ron's opinion as to Mr Adam's mental condition is supported by her analysis of the evidence in paras. 3 and 4 of her report taken as a whole; although some of the points she makes are valid, others are inaccurate and much is omitted. Like the experts in *Hoff v Atherton* [2004] EWHC 177 para. 23, Professor Ron has made her selection of facts without knowing what I would ultimately find the facts to be".

58. Mr Cooper had submitted (as he did to this court) that Professor Ron had not followed advice given by the BMA's Guidance for Lawyers and Doctors that no assumptions should be made about capacity just on the basis of the person's known diagnosis. What matters is how the medical condition affects the particular person and his capacity, not the diagnosed medical condition itself. The deputy judge did not think that this criticism was justified, being largely inconsistent with Mr Cooper's first submission.

59. The deputy judge's conclusions on the expert evidence (paragraph 134) included:

> "(4) insofar as there was any difference of view between Professor Ron and Dr Hawkes as to the probable severity of the damage – and the difference was not great – I prefer the view of Professor Ron. My reasons for preferring her view, even though I did not accept her analysis of the factual evidence are (a) her great experience and acknowledged expertise in her field, (b) the more detailed explanation of the implications of the MRI scan which she gave and (c) the fact that Dr Hawkes placed great reliance on the opinion of Dr White, who was only able to say that Mr Adam understood what he was doing and its effect; he was able to express a view as to how good Mr Adam's reasoning powers were or why he omitted his daughters from his will.
>
> (5) the expert evidence establishes that it is more likely than not that impairment of Mr Adam's cognitive abilities was so severe as to deprive him of testamentary capacity, but it is far from conclusive. This is because (a) as the BMA Guidance emphasises capacity depends not only on the medical diagnosis but on evidence as to the testator's actual capacity, (b) whether a person has testamentary capacity depends partly upon the complexity of the decision he has to make and (c) it also depends on whether there is evidence suggesting that his natural feelings or sense of right have been affected by mental disorder.
>
> (6) On the question whether the apparent rationality or irrationality of the decision not to leave anything to his daughters is relevant to Mr Adam's testamentary capacity, that is principally a matter of law, but to the extent that it is a matter of medical expertise, I agree with Dr Hawkes' view that it is relevant for the reasons already given."

60. The deputy judge then considered at great length the law about testamentary capacity. We will return to this later in this judgment. We now go to the deputy judge's decision on testamentary capacity, which is to be found in paragraphs 165ff of the judgment.

61. The deputy judge had no hesitation in finding that Mr Adam knew that he was giving instructions for and executing a will, and that he understood the details of its provisions and their effect. He was completely satisfied (paragraph 135) that Mr Adam understood the terms of the will, approved them and authorised Mr Skelton to sign on his behalf. As the deputy judge said in paragraph 170(2):

> "The evidence relating to the execution of the will establishes beyond doubt that Mr Adam was able to appreciate the nature of the act of executing a will and the effect of the will which was executed. To the extent that this is inconsistent with the expert evidence (in particular para.1.4 of Professor Ron's

> report), the latter is negatived: the evidence on the ground is to be preferred."

He further found, in short summary, that Mr Adam had sufficient understanding for testamentary purposes of the nature and extent of his property. There are some qualifications as to the extent of his understanding here (see paragraphs 166-169, but see paragraph 174 for this part of the deputy judge's overall conclusion). He further found (paragraph 170(3)):

> "The evidence as to Mr Adam's activities and relations with those around him is entirely consistent with his having the ability to make and communicate decisions, but it does not help much one way or the other on the question of whether he was able to exercise a rational judgment. Certainly there is nothing in the evidence to suggest irrationality, but I can see nothing in it to establish the relevant degree of rationality either, and given his inability to speak this is not surprising. The evidence would have been very relevant, if it had been necessary to support the view that he was capable of giving instructions for a will and understanding its effect, and it establishes that Mr Adam's determination and force of character remained intact, but it does not demonstrate that he retained the power of judgment necessary to make a rational will, nor does it help on the question of whether mental disorders affected his feelings for his daughters or his sense of right."

62. The deputy judge noted that Dr White's relevant conversation was limited to routine medical matters and small talk. He made no attempt to discover the extent of Mr Adam's powers of reasoning because he did not have the special expertise to do so.

63. The deputy judge considered (paragraph 171) the terms of the will to see if a logical explanation could be found for Mr Adam's decision to leave nothing to his daughters, or whether this was evidence of a lack of testamentary capacity.

64. There was nothing surprising in Mr Adam's decision to leave the stud to Mr Sharp and Mr Bryson. They had run the stud successfully for a long period and Mr Adam must have been grateful to them for fulfilling their promise to make enough profit from the stud to keep him out of a residential care home. He may have felt that the stud would in the future be more secure in their hands than in the untried hands of his daughters. Nor was there anything surprising in the bequests to Mr Neville and Mr Hancock. But it was very surprising – as it had appeared at the time – that he left nothing at all to his daughters. Leaving them nothing could only be interpreted as an act of rejection. No reasonable testator would do this, unless that was indeed how he felt. It was extremely unlikely that the explanation was to be found in events nine years or so earlier at the time of Mr Adam's divorce. There had been two intervening wills leaving the residuary estate to his daughters. Further, it would have been possible to leave to his daughters substantial pecuniary legacies or the contents of the house without compromising the financial viability of the stud. The deputy judge also dismissed the possibility that an explanation lay somewhere in the Charlene story. In summary, he said (paragraph 172):

> "So the position is that, having considered all the possibilities which have been suggested to me, or which have occurred to me, I do not know the reason for Mr Adam's decision. There are a number of possibilities, but none of them is more than a possibility, or comes anywhere near providing a rational explanation for Mr Adam's decision to leave nothing to his daughters, with whom on all the evidence he had been on close and affectionate terms throughout his life, except for a few months at the time of an acrimonious divorce for which they were in no way responsible."

65. The deputy judge did not find it an easy case to decide. He expressed his decision as follows (paragraphs 174, 175):

> "My overall conclusion is that Mr Adam did not have testamentary capacity. He was able to understand the nature of the fact of making a will, he knew the identity of the persons on whom he should confer his benefits, he probably understood sufficiently the nature and extent of his property… and he understood the effects of the will he made. What he lacked however was the capacity to arrive at a rational judgment taking into account all the circumstances, and in my judgment it is likely that there was a temporary poisoning of his natural affection for his daughters, or a perversion of his sense of right, the nature of which nobody can satisfactorily explain. As I have said above, much of the evidence I have heard has provided me with a full and rounded picture of the last few years of Mr Adam's life, but ultimately neutral on the elements of testamentary capacity which are in doubt. The following matters have being decisive:-
>
> (1) The expert evidence as to the severity of the damage to Mr Adam's mental faculties.
>
> (2) The fact that Mr Adam left nothing to his two daughters, whose love he seemed, so far as he was able, always to have reciprocated.
>
> (3) The absence of any rational explanation for this; there is a complete inconsistency between his apparent affection for his daughters and his flat rejection of all the suggestions made to him by Miss Hall that they would be deeply hurt if he omitted them entirely from his will.
>
> (4) Mr Adam's inconsistency around the time of the will as regards his instructions towards his daughters evidenced by (a) his original decision to split the estate into four (b) the decision sometime in May to leave the house contents to his daughters (c) the reversal of both and (d) his inconsistent answers to the question whether there had been

> a falling out, when on all the evidence plainly there had been none.
>
> For these reasons, I must dismiss the claim. I recognise that it is a very hard decision from the claimants' point of view, because there is every likelihood that the decision to benefit them resulted from rational thought, in which Mr Adam recognised his considerable debt of gratitude to them. The same is true of the pecuniary legacies. Nevertheless, I cannot conclude that the will as a whole was rationally made, or that Mr Adams natural feelings for his daughters, or his sense of right, were unaffected by disorder of the mind. I must therefore pronounce against the will executed on 1 June 2001."

The authorities

66. The leading authority on testamentary capacity is *Banks v Goodfellow* (1870) L.R. 5 QB 549, a decision which has withstood the test of time. The testator suffered from delusions, but not such as exercised or were calculated to exercise any influence on his testamentary disposition. His last will was upheld.

67. The trial judge had directed the jury that:

> "The question is whether … the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it."

The direction was held to be practically correct. The judgment of the Court of Queen's Bench was delivered by Cockburn CJ. English law, in contrast with that of some jurisdictions gives testators "absolute freedom" in the disposal of their property. Yet the judgment recognises "a moral responsibility of no ordinary importance" because "the instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection." To disappoint reasonable expectation of this kind is to "shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law" (page 563). English law "leaves everything to the unfettered discretion of the testator" on the assumption that "the instincts, affections and common sentiments of mankind may safely be trusted to secure, on the whole, a better disposition of the property of the dead" than stereotyped and inflexible rules (page 564).

68. Thus the judgment recognises a moral responsibility, which is nevertheless not translated into a requirement of the law. The classic passage in the judgment is as follows (page 565):

> "It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and

> moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator [a] shall understand the nature of the Act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, [d] that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
>
> Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a pray to insane delusions calculated to interfere with and disturb its function, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."

We have inserted [a] etc. into the first paragraph of this passage for ease of reference.

69. In the present case, the deputy judge found that, for Mr Adam at the time he made his 2001 will, elements [a], [b] and [c] were satisfied but that element [d] was not. He could equally have asked, with reference to this passage, whether Mr Adam's human instincts and affections, or his moral sense, had been perverted by mental disease.

70. As the immediately following passage in the judgment and the case as a whole show, the discussion is in the context of a testator who suffered from "delusions". It is said that, if mental disease "presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property", why should it be held to take away the right to do so? And there is an apparent contrast between a testator suffering from "delusions" and one who may be of unsound mind from "another cause". There is this passage on page 566:

> "It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause – namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is enough if, to use the words of Sir Edward Williams, in his work

> on Executors, "the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.""

71. Certain cases are cited including *Den v Vancleve* 2 Southard, at page 660, where the law was thus stated:

> "By the terms "a sound and disposing mind and memory" it has not been understood that a testator must posses these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must posses them in as great a degree as he may have formally done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

And there is an extended quotation from *Harwood v Baker* 3 Moo. PC 282, which includes at page 291:

> "Their Lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, who by his will he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one; and more especially, when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration."

72. The deputy judge referred to the passage in *Banks v Goodfellow* which speaks of "an obligation of the moral law" as remaining essentially true today. Its relevance was that the total exclusion of Grace and Emma Adam from the will of itself raised an issue whether the damage to Mr Adam's mind resulting from multiple sclerosis deprived him of the necessary clarity of thought to enable him to make a rational decision or affected his natural feelings for his daughters or his sense of right. Dr White's observations were not necessarily enough. There was the much more difficult question of trying to ascertain whether the thought processes leading to the decision were affected by disorder of the mind.

73. There was discussion before the deputy judge and before us about the burden of proof. Reference was made to paragraph 13-19 of *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (2000). The legal burden of showing that a testator is of a sound disposing mind is on those propounding the will, which in many

cases will be readily discharged. The deputy judge said that, where real doubt arises from other significant evidence tending to disprove testamentary capacity, the burden of proof remains on those who seek to establish it. In any other case, the burden of proof may shift from one party to the other in the course of the case. He considered that the expert evidence, and the fact that Mr Adam's 2001 will left nothing to his daughters for no clear reason, left the burden of proof squarely on the claimants.

74. Cases are only decided on the burden of proof if, exceptionally, the court is unable to reach an evaluative decision on the evidence taken as a whole. This is not such a case. The decision may be difficult, but it is neither necessary nor satisfactory to resort to the burden of proof. The deputy judge did not in the end do so. That said, upon the deputy judge's unchallenged primary findings of fact, we do not evaluate the evidence as raising the question whether the contemporary observations and views of those who lived with and saw Mr Adam at the time of the making of his 2001 will outweighed the balance of the expert evidence, so much as whether the balance of the evidence from experts who did not see Mr Adam outweighed the contemporary observations. We say this, not as a covert statement about a burden of proof; but because the evidence of contemporary observation was meticulous and, so far as it went, accepted by the deputy judge; and because much of the factual premise and derivative opinion of Professor Ron in particular was, on close examination, rejected by the deputy judge. The question for this court is, we think, whether what remained of the expert opinion to the effect that Mr Adam did not have testamentary capacity was sufficient to sustain the deputy judge's conclusion. We shall enlarge on this later in this judgment.

75. The deputy judge discussed the extent to which a testator needs to retain an understanding of the nature and extent of his estate with or without assisting explanation. Definition may be difficult in borderline cases, especially if the details of the estate are not straightforward. We do not, we think, have to go into this in the present case, since the deputy judge's decision that on balance Mr Adam did have sufficient understanding is not challenged.

76. The deputy judge rejected Mr Cooper's submission that the court should not be looking for a justification for Mr Adam's decision to change his will. What Mr Adam did was very surprising. If there were no rational explanation, that was capable of showing inferentially that his mind was impaired to an extent that he did not have testamentary capacity.

77. *Boughton v Knight* (1873) L.R. 3 P. & D. 64 is a case which contrasts a person of "sound mind" with one suffering from "delusions". Sir John Hannen, whose summing up to a special jury is reported, was a member of the court in *Banks v Goodfellow*. He said at page 67 that the amount and quantity of intellect which is requisite to constitute testamentary capacity is eminently a practical question that does not depend solely on scientific or legal definition. That works both ways in the present appeal. On the one hand, Miss Hall, Dr White and those who observed Mr Adam around the time of the making of his 2001 will may be intrinsically more persuasive witnesses than experts who never saw him. On the other hand, it is a jury question, and this court should be slow to disturb the "jury" decision of the deputy judge.

78. The deputy judge quoted at length at page 66 from Sir John Hannen's summing up. The heart of the quotation, which repays reading in full, is as follows:

> "Accordingly, by the law of England everyone is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued. In this respect the law of England differs from that of other countries. It is thought better to risk the chance of an abuse of the power arising from such liberty than to deprive men of the right to make such a selection as their knowledge of the characters, of the past history, and future prospects of their children or other relatives may demand …"

Mr Cooper relied on this passage. Mr Jones, by contrast, referred us to a passage in Sir John Hannen's summing up at page 69, where he said:

> "It is unfortunately not a thing unknown that parents – and in justice to women I am bound to say it is more frequently the case with fathers than mothers, - that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. … … there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind."

79. Mr Cooper had submitted that, since a testator might make a valid will disinheriting his children out of capricious, frivolous, mean or even bad motives, it was not the function of the court to substitute its own view of what Mr Adam should have done. The deputy judge agreed with this proposition. But it did not follow that the court should not look for a justification for the change in the will or inquire why Mr Adam disinherited his daughters. An irrational, unjust and unfair will must be upheld if the testator had the capacity to make a rational, just and fair one, but it could not be upheld if he did not. It followed that the court must inquire why a testator has disinherited his children where there is a possibility that it is due to disease of the mind. In a later passage, the deputy judge said, with reference to *Harwood v Baker*, that the justice or otherwise of Mr Adam excluding his daughters must as a matter of common sense have a bearing and cannot be excluded from consideration. We agree with this, provided that the inquiry is directed to the testator's soundness of mind, and not to general questions of perceived morality.

Submissions

80. Mr Cooper's core submissions were that the deputy judge misinterpreted or misapplied the test in *Banks v Goodfellow* and in effect changed the law. He gave a

new meaning or prominence to that part of the passage which postulates poisoning of affections. He speculated without evidence about the reasons why Mr Adam made the testamentary dispositions which he did. He took too high a standard for testamentary capacity. He gave undue weight to unreliable expert evidence, and too little weight to the overwhelming preponderance of direct evidence all to the effect that Mr Adam's cognitive faculties were sufficiently unimpaired in June 2001 for testamentary purposes. The deputy judge wrongly looked for a "King Lear" moment which would explain why Mr Adam disinherited his daughters. He wrongly saw the terms of the will as retributive against Grace and Emma Adam rather than as a reward to the primary beneficiaries. He should have asked what prompted Mr Adam to make his will in favour of the claimants. There was a ready answer to that question.

81. Mr Cooper submitted that the deputy judge made errors of fact on the evidence. We found this unpersuasive when the evidence and main issues are taken as a whole. One such point was that the deputy judge misunderstood Mr Neville's evidence about Mr Adam's ability to play a card game. Properly understood, the evidence was that Mr Adam's thought processes were sufficient to understand and play a quite sophisticated card game, which required him to be able to add up to 21.

82. Mr Cooper kindly drafted at our request what he suggested should be a modern version of the *Banks v Goodfellow* formulation for testamentary capacity. We do not reproduce the draft, because we do not consider on reflection that the *Banks v Goodfellow* formulation needs to be reformulated, nor is it perhaps open to this court to do so; but also because reproducing a suggested draft and then commenting on it is an unhelpful way to clarify the application of a durable formulation to marginal facts.

83. Mr Jones, for the respondents, submitted that, if the deputy judge's conclusion in paragraph 160 of the judgment is sustainable, that is a complete answer to the appeal. The conclusion there was that:

> "… neither Dr White nor Miss Hall had any real insight into the capacity of Mr Adam's mind to think rationally about complex problems, and neither could then, or can now, understand his reasons for excluding his daughters entirely from the will; nor had they had any practical means of finding out because the ability to question Mr Adam was so limited."

Mr Jones further submitted that the MRI scan in 1996 showed diffuse brain damage. It was of a kind likely to cause cognitive impairment. This was likely to have become more advanced by June 2001. There was no formal cognitive testing. Mr Adam's physical abilities and his ability to communicate undoubtedly deteriorated between 1996 and 2001. The deputy judge largely accepted the criticisms of Professor Ron's evidence, but resolved such issues as there were between the experts in favour of the opinion of the more expert Professor Ron. It was not unreasonable to have placed weight on her evidence, despite the criticisms. He did not hold the expert opinion to be by itself determinative. The deputy judge very carefully analysed the relevant evidence. He applied correct principles to it. The claimants' case that there had been a rift between Mr Adam and his daughters was rejected. The determinative finding was one of fact and his conclusions should be unassailable. There was no revision of the law.

Discussion

84. During the oral submissions to this court, there became apparent a problem with Professor Ron's evidence and the deputy judge's qualified acceptance of her essential opinion. We have already summarised her written evidence. We have, since the hearing, read the full transcript of her oral evidence. Her written evidence was to the effect that multiple sclerosis of the kind and severity suffered by Mr Adam was highly likely to have resulted in cognitive impairment affecting memory, executive functions, attention and processing of information. The 1996 MRI scan report showed the types of lesion and brain atrophy which would be expected. His cognitive condition was likely to have deteriorated between 1996 and 2001, as had his physical condition. The drugs which he was taking would further have affected his cognitive powers. No formal cognitive testing was undertaken. The extent of his cognitive impairment in 2001 had to be deduced from the evidence of witnesses, whose statements Professor Ron had assessed. Based on that assessment including her understanding of the written evidence of what had happened on 4th May 2001, when she understood that the view of those present was that Mr Adam did not then have testamentary capacity, she expressed the opinion that he did not have testamentary capacity on 1st June 2001. She gave this opinion with reference to her understanding of a version of the test in *Banks v Goodfellow*, which she divided into four elements. The first three of these closely followed the parts which we have marked [a], [b] and [c] in the quotation in paragraph 68 above. The fourth she expressed as that the testator must "have no mental disorder directly affecting (1) to (3) above". This does not correspond with the fourth element, [d], in *Banks v Goodfellow*. There is a final throw away line that "it is also worth noting that Mr Adam did not appear to be able to explain the reason for his change in his Will i.e. was unable to provide a rational reason for a change in his intentions". But Professor Ron confirmed in her cross examination that she did not base her opinion on any poisoning of affections or perversion of Mr Adam's sense of right. She was asked (page 52 line 24) whether "what actually went into the will, the actual disposition of the will, is from your point of view completely irrelevant". Her eventual answer was (page 53 line 2) "if you are referring to family relationships, I think that would be irrelevant to my conclusions". The essence of her written evidence was that "the cognitive deficits that Mr Adam had in all probability at the time of the Will are likely to have interfered with his testamentary capacity". Her conclusions show that in her opinion some or all of the first three *Banks v Goodfellow* elements were not met. She expressed no opinion about the fourth element. Her cross examination confirms that her opinion was based on her view about the likely extent of Mr Adam's *cognitive* impairment.

85. The difficulty is that the deputy judge rejected in large measure the factual premises upon which she based her opinion, and found, contrary to her opinion that the first three elements of *Banks v Goodfellow* were satisfied in Mr Adam's case. His rejection of her factual premises is in paragraph 129 of the judgment:

> "I do not think that Professor Ron's opinion as to Mr Adam's mental condition is supported by her analysis of the evidence in paras. 3 and 4 of her report, taken as a whole; although some of the points she makes are valid, others are inaccurate and much is omitted."

Paragraph 3 is where Professor Ron discussed witness statement evidence generally. Paragraph 4 is where she mistakenly, as it turned out, supposed that the view of those present was that Mr Adam did not have testamentary capacity on 4th May 2001. Our reading of the transcript of Professor Ron's cross examination shows that the deputy judge's rejection of these paragraphs was justified. The cross examination is extensive. Part of it is perhaps exemplified by this passage on page 35 line 13:

> "Q I suggest to you that what is happening in your report is that you have reviewed all the witness evidence, you have formed your own view on the basis of the medical information available to you as to how severe Mr Adam's mental state was likely to have been, how severely it was likely to decline, and taken the view that the descriptions given by Grace and Emma accord more closely with what you would have expected to find, and for that reason you have preferred their evidence over the evidence of all other witnesses. You are nodding your head. Is that correct? A. Yes, that is correct, yes."

and on page 38 line 12:

> "Q So let me [see] if I have understood exactly what your evidence is on this. It is possible that the descriptions given by Dr White, Mrs Hall, Kelly Neville, Mr Sharp, Mr Bryson, Mr Hancock, Mrs Smith, are all accurate descriptions of what they saw and observed – you are nodding. Do you agree with me so far? A. Yes.
>
> Q But there may have been a degree of impairment, cognitive impairment, that passed unnoticed by them? A. Correct.
>
> Q So we come back to this fundamental question: If there was a degree of impairment how severe was it. What I am asking you to focus on at the moment is how you can interpret the non-expert and, in Dr White's case, partly expert observations to inform your own conclusions. I do not think you are saying that you can put no weight on them? A. No, I am not saying that."

Another flavour is that she accepted (page 37 line 35) that Mr Adam's decision making processes were apparently consistent on 1st May 2001, an occasion which she had not considered in her report, on 4th May and 1st June 2001. And she tended to concentrate on the likelihood of cognitive impairment, but was challenged about its severity with reference to testamentary capacity. It is also interesting that, although Professor Ron emphasised that there was no formal cognitive testing and that Dr White's questioning did not have that character, the extent to which cognitive testing might have been possible was limited. She also said that people who were not parties to a conflict would give a lot of information.

> "A carer who is able to give you information about what a person can do and is obviously not involved in any process of – has not got any other interests, would be a very, very good guide as to what a person is able to understand and to do over a period of time."

It would seem, therefore, that the absence of cognitive testing was tempered by the evidence, for example, of Mr Neville.

86. The deputy judge found, contrary to Professor Ron's opinion, that the first three elements of the *Banks v Goodfellow* formulation were met in paragraphs 135, 165, 169, 170(2), the first part of 170(3) and the second and third sentences of paragraph 174. Insofar as it is not explicit, it is quite plain from Miss Hall's evidence that Mr Adam understood that everyone would expect him to include his daughters as beneficiaries under the will; that they would be disappointed and hurt if he did not; that people would find this surprising; and that with this understanding he clearly communicated a decision not to include them as beneficiaries.

87. Thus, the deputy judge rejected Professor Ron's conclusion entirely, this depending, as it did, exclusively on her opinion of the extent of Mr Adam's degenerating cognitive impairment. It was agreed that Mr Adam had some degree of cognitive impairment, but the deputy judge's finding has to carry with it a finding that it was not as severe as Professor Ron had considered. She expressed no opinion on the *Banks v Goodfellow* element on which the deputy judge's decision turned – that is, the poisoning of affections. It is on the face of it strange, therefore, that the deputy judge found in paragraph 134(4) that he preferred the evidence of Professor Ron, when on analysis he rejected most of this; that he found in paragraph 134(5) that the expert evidence established that it was more likely than not that the impairment of Mr Adam's cognitive abilities was so severe as to deprive him of testamentary capacity (although not conclusively), when on analysis he found that Mr Adam's cognitive impairment did not deprive him of those elements of testamentary capacity to which alone Professor Ron's evidence was directed; that he found in paragraph 170(1) that the expert evidence established in all probability that Mr Adam lacked testamentary capacity, or at least in the sense that he was not able to exercise the balance to judgment required for a "rational, fair and just testament", when the expert whose evidence he preferred expressed no such opinion; and that the first reason in paragraph 174(1) for his overall conclusion that Mr Adam did not have testamentary capacity was the expert evidence as to the severity of the damage to his mental faculties, when he had inferentially rejected the degree of severity which was the basis of Professor Ron's opinion.

88. We have summarised Dr Hawkes' written evidence to the effect that although he was concerned at Mr Adam's unexplained decision to leave nothing to his daughters, he was satisfied on the evidence of Dr White and Anna Hall that Mr Adam did have testamentary capacity when he made his 2001 will. We have now read the transcript of Dr Hawkes' oral evidence.

89. Professor Ron had expressed the view (paragraph 3 of her report) that Dr White was likely to have been incorrect in his opinion that the level and amount of drugs that Mr Adam was receiving at the time he made the will did not impair his judgment.

Several of the drugs were psycho-active drugs that could cause drowsiness, mood change and confusion when used individually and more so when used in combination.

90. In his oral evidence, Dr Hawkes expressed his view about the effect of Mr Adam's drug treatment (page 36/37). The drugs would produce a fairly generalised blunting of his awareness. For the most part, he was tolerating his medication fairly well. The whole of his drugs regime might have made him drowsy, irritable, confused, but not malicious. It would be very difficult to explain the apparently out of character change in his will to omit his daughters as a "drugs based effect" (page 36 line 5). There was no evidence of psychosis (page 39 line 26). One drug was intended to be a mood stabiliser and at least two others could have had a mood altering effect (page 39/41). All anti-depressant medication and indeed depression itself can affect cognitive behaviour. Dr Hawkes' understanding was that the drugs in general would produce a widespread dampening down of alertness, but only occasionally a specific change in mood (page 42 line 28).

91. Dr Hawkes' general opinion is, we think, reflected in summary in this passage (page 47 line 30):

> "and this is an important point that the GP picked up on as well, that he could, he seemed to, when the drugs were not doping him too much, he seemed to be able to grasp what was going on extremely well. I fully accept that this, you know, is a very finely balanced debate, and I am putting all emphasis on the GP's report, but I think to be able to provide a will of that complexity doesn't match with the inferences you make from the MRI and the shrinkage of the brain and the pseudo-bulbar palsy all that. It does not stack up completely. The way the picture is being painted at the moment is that the man would just be there like a vegetable and not making any contact. But manifestly that was wrong. He was able to communicate to Kelly his carer, he enjoyed books and seemed to know what was going on in the stud farm. So you have to balance these two apparently conflicting pieces of evidence, and all I am saying is that I am tipped slightly towards Dr White's view of this. I endorse that, but I would not say this is a black and white, open and shut case at all."

92. This passage mainly concerned Mr Adam's cognitive powers, as is confirmed by subsequent answers. Much of the rest of Dr Hawkes' evidence was mainly concerned with Mr Adam's cognitive abilities (see, for example, page 53). But there was no cognitive problem in giving instructions for this relatively simple will, and "it is hard to think of any drug that can cause a specific change in that alteration of thought, and it is far more likely that there had been some family or emotional conflict" (page 51 line 9). If Mr Adam was on perfectly good terms with his daughters, that would "push me much nearer to the 50/50 position. My understanding is that you are entitled to change your will at almost any time, if you can show people you know what you are doing" (page 52 line 4). But "irrational decision making would then more easily fit into the whole picture of drugs and cognitive decline" (page 52 line 17 – see also page 54 line 16-33). There is then this passage (page 55 line 23):

"Q Are you able to express any view as to that part of the process? Not the decision, but whether the decision is affected by … A. It is very difficult. It just takes, you just – I think the only way you can approach this is to judge it in the context. If indeed there was evidence of a very good relationship between him and his daughters and then, paradoxically, he decided to do something differently, I would have no problem with that. I'd say that's drugs, disease or whatever. That is OK, but I am conscious of the fact that there are undercurrents of family conflicts.

Q Yes. A. And that there may well be some evidence there. I mean, if there isn't I'm on shaky ground.

Q You really take the view that the rationality or irrationality of the decision is quite an important factor in deciding … A. Yes, it is …

Q .. whether his … A. .. dependent upon the background to that decision, and if the decision, reviewing all the information, seems to be condonable, then I think he had enough mental capacity to execute the will. If there was a very happy family situation, then it would be irresponsible and not sensible at all.

Q And evidence that his judgment was impaired? A. Yes, it would, that, yes."

93. In our judgment, the correctness of the deputy judge's decision that Mr Adam did not have testamentary capacity hangs on the tenuous thread of that passage. Without it, we would allow the appeal. For in our view, the fourth element in *Banks v Goodfellow* – "poison his affections, pervert his sense of right or prevent the exercise of his natural faculties", "no insane delusions …" – is concerned as much with mood as with cognition. Almost all Professor Ron's evidence and much of Dr Hawkes' was concerned with cognition, and the deputy judge found sufficient cognition for testamentary purposes. Our general understanding is that modern neurology and neuro-psychology is capable of addressing affections of mood in scientific terms. For practical purposes Professor Ron did not do so in this case. She concentrated rather on cognitive impairment. She positively disavowed deductions from the contents of the will. The deputy judge generally preferred her evidence to that of Dr Hawkes. Yet Dr Hawkes provided the evidential lifeline for Grace and Emma Adams' case. Although Dr Hawkes had referred to himself in his written report in this respect as a lay observer, the deputy judge was, we think, entitled to take this part of his cross-examination as expert opinion.

94. We have concluded, just, that this appeal should be dismissed. We do not think that the deputy judge misunderstood or changed the law. We do not think that the decision would result in any altered approach by solicitors or the court to the question of testamentary capacity. This case in the end turns entirely on its own facts. We think that there is much to be said analytically as to the relevant persuasiveness of

Professor Ron's opinion. The contemporary evidence of Miss Hall, Dr White, Mr Skelton and all those, including importantly Mr Bryson and Mr Sharp, who observed Mr Adam in his sadly declining years and at the time of the making of his 2001 will was meticulous and strong. Mr Adam was, however, in the final stages of severely debilitating progressive multiple sclerosis, whose agreed effect was to have impaired his cognitive functions. The question was whether by the summer of 2001 he had crossed an imprecise divide. Those most closely associated with caring for him and those who prepared and attended the execution of his will firmly believed that he had not. Miss Hall observed the golden rule in every particular and beyond. Yet Mr Adam made a will which was in part irrational. Leaving the residuary estate to Mr Sharp and Mr Bryson was entirely understandable. Leaving nothing at all to his daughters was not. The question did not relate exclusively to his *cognitive* powers.

95. We are not a court of first instance. Our task is to review the deputy judge's decision. (see CPR 52.11(1)) His decision was in the end a decision of fact based upon all the evidence he heard. We can only allow on appeal if we are satisfied he was wrong ((CPR 42.11(3)). We are not so satisfied. There was good evidence to support his finding – that of Dr Hawkes – which in the light of the expert evidence as a whole was capable of outweighing contemporary observations. Mr Cooper accepted that Mr Sharp's and Mr Bryson's case had to be that no reasonable jury could have reached the deputy judge's conclusion. We are in the end not persuaded that this is so.

96. As Lord Cranworth said long ago in *Boyse v Rossborough* 6 H.L.C. at page 45:

> "There is no possibility of mistaking midnight from noon, but at what precise moment twilight becomes darkness is hard to determine."

So it was with Mr Adam on 1st June 2001. So it has been for us with the deputy judge's decision in the present appeal.