Neutral Citation Number: [2023] EWHC 1457 (Ch)

Case No: PT-2022-CDF-000061

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

In the estate of Daphne Penelope Jones deceased

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 16/06/2023

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

(1) CATHERINE JONES	**Claimants**
(2) JACQUELINE JONES	
(3) STACEY O'GARA	
(4) ROBERT O'GARA	
(5) JOHN O'GARA	
(6) BETHAN O'GARA	
- and -	
CERI JONES	**Defendant**

Mr Graham Smith (instructed on direct access) for the **claimants**
The defendant appeared in person

Hearing dates: 5-6 June 2023
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This judgment was handed down remotely at 11am on 16 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. On the 4 July 2021, the late Daphne Jones (Mrs Jones) signed what purported to be her last will and testament (the will). She had not executed a previous will. It was witnessed by a neighbour Pauline Evans, and by a chartered accountant, Neil Bevan. It was a short document, typed by Mr Bevan, which appointed Mrs Jones's daughter Ceri Jones to be her executor. After settlement of liabilities, it gave to Ceri Jones all "real and personal property whatsoever and wheresoever situated." This consisted of her home and contents, modest savings, and personal effects. On the same day, Mrs Jones signed a lasting power of attorney (LPA) for property and financial affairs, appointing Ceri Jones and Pauline Evans to be her attorneys. This was also witnessed by Mr Bevan, who certified that as far as he was aware, Mrs Jones understood the purpose and scope of it and that no fraud or undue pressure was being applied to Mrs Jones to create the LPA.

2. Mrs Jones passed away in hospital on 16 September 2021. The death certificate recorded several causes of death, including Covid-19 Infection, stroke, vascular dementia, and heart failure. The LPA had not been registered by then. Mr Bevan, on behalf of Ceri Jones, applied for probate of the will, but a caveat was filed. By letter dated 19 May 2022, solicitors instructed by Mrs Jones' other surviving children, Catherine Jones and Jacky Jones, and the children of another daughter, Vicky O'Gara, who had passed away on 2 February 2021, wrote to Ceri Jones. The letter indicated that the will was challenged on the grounds that Mrs Jones lacked testamentary capacity at the time when she signed the will, or that she lacked knowledge and approval of it, or that it was the result of undue influence by Ceri Jones over her mother. Ceri Jones was invited to accept that the will was invalid and other consequential proposals. This was not done, and so by a claim form issued on 5 October 2022 against Ceri Jones, the clients mentioned in that letter claim the relief referred to therein and consequential relief. Ceri Jones has maintained that the will is valid.

3. Each of the parties gave oral evidence, apart from Robert O'Gara, although he signed a joint witness statement with his siblings. On behalf of the claimants, four other witnesses gave oral evidence, namely Mrs Jones' brother Edwin Naylor, his daughter Francine Naylor, and Catherine Jones' children, Zane and Zara Thorne. Ceri Jones called Neil Bevan and a friend, Adam Miller, to give evidence. In the hearing bundle, there were also several short statements relied on by Ceri Jones. Some of these were signed and some were anonymous. One of them purports to be signed by Pauline Evans, although there is no statement of truth. I can only give limited weight to those not called to give evidence, and little if any to the anonymous statements.

4. In addition, at Ceri Jones' invitation, I watched a video which she took on her mobile phone of her mother walking for a few minutes near to her home in April 2021. She walked slowly with a wheeled waking aid, and spoke quietly, mostly about the views. Ceri Jones says that this was taken spontaneously. She was talking to her mother throughout the clip in a strong assertive voice.

Background

5. The main relevant background facts are uncontroversial. As is often the case in sad family disputes such as this one, there is now much bitterness and emotion between the two sides. Many issues were canvassed in evidence, which although may be important to the witnesses, are not relevant to the issues I have to decide, and I only deal with those which are. Despite the present situation, it was not in dispute before me, and indeed clear from all I heard and saw, that prior to 2021 the family, although having issues from time to time as most families do, remained a very close and loving one.

6. Mrs Jones was born in November 1938, and accordingly was 82 years of age at the time she executed the will and at the time of her passing less than three months later. She and her late husband had four daughters referred to above, and by 2021 there were eight grandchildren, and seven great grandchildren. Vicky O' Gara's four children are claimants in these proceedings. Catherine Jones, as well as having two children as mentioned above, has one grandchild. Jacky Jones has two children, and five grandchildren. Ceri Jones has not married and has no children.

7. Mrs Jones had her own two storey terraced home at 37 Brynheulog Rd Cymmer, Port Talbot, and for some years until 2021 lived there alone. Her daughters Vicky and Catherine lived nearby, as did her brother and niece and some of her grandchildren. Her daughters Jacky and Ceri lived in London, as did Stacey and Bethan O'Gara, but they all visited her from time to time. She maintained independent living into her seventies, but needed support following surgery after a fall in 2004. Her daughters Vicky and Catherine helped with such matters as shopping and driving her, and her niece Francine helped with the cleaning.

8. However, from about 2018 her medical issues, and her need for support, increased. In that year, she suffered sudden onset dysphasia with left facial droop. A CT scan showed no acute intracranial pathology. She had further scans in 2019 after episodes of slurred speech and dysphasia, which showed small vessel disease and old left basal infarct. In August 2019 she suffered a transient ischaemic attack (TIA). She underwent a cognitive assessment known as MOCA, which put her in the bottom 10% of people of her age, namely 80 at that time. Later that year, her general practitioner, Dr Drury, referred her for a further assessment due to memory loss and cognitive decline, noting that she lived alone but had a caring and supportive family. This assessment, known as ACE-III, showed a score associated with a diagnoses of dementia.

9. She was referred to social services. She told social workers that she was struggling to mobilise, and that she had a lot of support from her two daughters who lived locally, who had noticed that her memory had been declining since the previous year. She explained that her physical health was poor. Both she and her daughters felt she would benefit from occupational therapy support, and from some aides in the home. Unfortunately, occupational therapy did not proceed because of the Covid-19 lockdown which came into effect in Wales the following month.

10. Another brain scan in February 2020 led to the diagnosis of early mixed dementia and an application was made for council tax discount on the basis of severe mental impairment. The application was signed by another doctor on the basis of the early

stage mixed dementia diagnosis. Edwin Naylor says that when his sister received a letter referring to such impairment, she became upset and thought she had been tricked into signing the form. He added that Ceri Jones thought that this may affect her mother's ability to make a will, and asked him to phone the doctor to try to get it removed from file (this must have been later on). He did so, but it was explained to him in respect of the application that dementia falls within such an impairment. I accept that evidence.

11. The lockdown meant that those members of the family living outside Wales could not visit, but contact was kept up by telephone. As restrictions eased, visits resumed. Various family members in their witness statements give many examples of Mrs Jones' forgetfulness. Towards the end of 2020, her daughter Vicky was diagnosed with a terminal illness, and died in February of the following year. Zane Thorne thought that his grandmother took time to process this event, but in her own words in notes she made from April 2021 onwards, unsurprisingly she said that the felt devastated by the loss of her daughter.

Events in 2021 leading to the making of the will

12. Edwin Naylor says that just after his niece Vicky died, his sister phoned him and asked if he would help her to write a will. He visited, and she told him she would like to leave her estate equally between her four daughters, but wanted the share of Vicky to go to her four children. This was in keeping with what other members of the family say she had told them over time, which I deal with in more detail below. When his sister told him this, Edwin Naylor says that replied that she had more than four grandchildren, and that Ceri did not have children. He suggested leaving the will until after the funeral, to which she agreed. In cross examination it was put to him that he had phoned his sister about a will and not the other way round, but he maintained his version. I accept his evidence on these points.

13. Shortly afterwards, Ceri Jones went to stay with her mother, and stayed until her death, and remains there. The evidence of Edwin Naylor, which I accept in this regard, is that about a month after his niece's funeral, he visited his sister. Whilst there, Ceri Jones told him that her sister Catherine had taken £3000 of her mother's money and Vicky had taken £10,000. His daughter Francine also said that her aunt said this to her many times on her visits, and also that her sister Vicky had taken her mother's credit cards behind her back. Catherine denies taking that amount but accepts that her mother gave her smaller amounts of money from time to time, and accepts that during the Covid lockdown her mother gave her credit cards to shop for her and pay bills. Some of the grandchildren who gave evidence say that their grandmother gave them similar gifts from time to time. The children of Vicky O'Gara who gave evidence readily accept that after their mother's death two credit cards in their grandmother's name were found in their mothers home. Without knowing of any arrangement which might have accounted for this (and now no-one knows the precise arrangement) but not wishing to cause stress to their grandmother, they settled the balances outstanding on these cards. I accept the claimants' evidence in this regard, and that of Edwin and Francine Naylor as to what they were told. However, in my judgment it is unlikely that such loving and supportive daughters would take their mother's money without her knowledge or consent.

14. Edwin Naylor also says, and again I accept, that the will issue was again raised by his sister at about this time and he arranged for a local solicitor to visit at her house, which he did. It was not clear what she wanted to do. The solicitor suggested giving a percentage of the estate to each daughter. Edwin Naylor then discussed this with Ceri Jones who replied that she did not have enough money to "buy them out."

15. The fact that by then Mrs Jones was unsure what to do is borne out by the evidence of Stacey O'Gara. She recalls a conversation with her grandmother at about this time, or shortly before, during a car journey, when her grandmother raised the issue and seemed stressed about what to do, saying that people were pressurising her about a will. She said to her grandmother that it was her choice to do what she wanted. This evidence was given in a straightforward and vivid way, as was all of her evidence and that of her siblings, and I accept her evidence on this point. Catherine Jones noticed that her mother had become stressed at this time, and again I accept that evidence.

16. The solicitor who was engaged following Edwin Naylor's involvement told him that he needed a capacity assessment from her general practitioner before he could proceed. It was arranged that Dr Drury should visit her at her home, which he did. Edwin Naylor arrived when the two of them were alone and the doctor asked Mr Jones if she was happy with his being there, to which she said she was as he was dealing with her affairs. The doctor asked him when the will would be done and was told that the solicitor was doing the paperwork and they just need a letter as to her capacity. The doctor said to get it done as soon as possible.

17. Dr Drury produced a short letter dated 15 April saying that in his view Mrs Jones had the capacity to make a will, without any indication of how long she may continue to have such capacity. The letter included this passage:

> "Whilst she has a diagnosis of early Vascular Dementia I did not feel that cognitive ability was impaired to the degree that it affected her ability to make decisions. I felt that she understood the implications of the decision she was going to make and was able to make these decisions herself and communicate them effectively. In my opinion, when assessed Daphne Jones had the capacity to make her own decisions about her will and appointing a Power of Attorney for when her vascular dementia deteriorates in the future to the point she is no longer able to make these decisions for herself."

18. Despite that, the solicitor did not proceed to carry out instructions to prepare a will. Edwin Naylor says that the next time he visited his sister, she told him that "they" had cancelled the solicitor's appointment and that her daughter Ceri had found someone else because it was a woman she knew. I accept that evidence. By letter dated 8 June to her, the solicitor thanked her for her letter dated 4 June enclosing a cheque to pay his bill. He pointed out the consequences of not making a will or signing an LPA. Another telling piece of evidence from Edwin Naylor is that that when he was again discussing the will with her sister at her home, her daughter Ceri came into the room shouting at him not to tell her mother what to do. He replied that she should not speak to him like that and got up and left.

19. She denies that this happened, but in her oral evidence said that Edwin was telling her mother what to do, and that her mother didn't like it and so "went on her own." In my judgment he had nothing to gain from what was being discussed. There was no suggestion of his benefiting from a will, and I prefer his evidence on this point. It is unlikely that as a caring brother, his involvement went any further than assisting his sister and expressing his views when requested.

20. It was about this time that tensions began to arise between Ceri Jones and her mother on the one hand, and other family members on the other. Catherine and Jacky Jones say that it became awkward to visit their mother, who would look to her daughter Ceri as if for approval before she said anything. They both say that their sister was controlling what their mother was eating. Jacky Jones recalls visits at this time when her sister Ceri began arguments and started shouting in front of their mother, and on one occasion told her sister Ceri that she was upsetting their mother. Her sister Ceri replied "I don't care who I upset." Jacky Jones says that on one occasion she left her two teenage grandsons at her mother's home whilst she visited elsewhere and received texts, which are in evidence, asking her to come back as they were scared of Ceri Jones.

21. Stacey and Bethan O'Gara say that at about this time it became more difficult to speak with their grandmother on the telephone. Their Aunt Ceri would say that their grandmother was sleeping or tired. On the rare occasions they did speak, their grandmother was monosyllabic. Bethan O'Gara recalls one occasion when her grandmother did answer the phone, she heard her asking Ceri Jones who was it and whether she should answer.

22. John O'Gara says that he had secured work in Germany starting in August 2021 in dance theatre, a lifelong passion of his, in which his grandmother had taken great pride and interest. She told him she would give him some money to help him. However, in his last telephone conversation with his grandmother, she told him she did not want to see him before he went to Germany, something she had never done before, saying that it was not a good time. He asked why, but she didn't answer, and so the conversation ended by the two saying goodbye to one another. He did not receive money from her. He thought that the only explanation for this behaviour of his grandmother, was because his Aunt Ceri, whom he said he had loved, "was there."

23. Zane and Zara Thorne also say that at around this time, they were made to feel unwelcome at the house. His sister, who had had a close relationship with her Aunt Ceri, sent a text message to her asking why she was stopping them seeing her grandmother, but received no reply. When she had visited, she heard her aunt telling her grandmother that they had all fallen out with her, Ceri Jones, and that they were visiting another relative instead.

24. Francine Naylor also heard Ceri Jones tell her mother that the family were visiting other relatives, and that her sisters had taken money from their mother. Francine Naylor lived in the same road as Mrs Jones and up until this point visited frequently. In her last visits she noticed that Mrs Jones gradually stopped speaking for herself and let her daughter Ceri speak instead. She noticed that from being a happy outgoing person, Mrs Jones appeared increasingly stressed. Francine Naylor also observed that Ceri Jones was at times jotting things down in a notebook, and her aunt said to her

that this was to remind her mother of happenings later on when she could write them down.

25. Ceri Jones accepts that at this time her mother's contact with other members of the family tailed off and says that this is what her mother wanted. She accepts also that she started to discourage such contact, she said to "protect" her mother. She accepts that she took notes to remind her mother of certain matters and that this was for her diary. There was no diary as such in evidence, but there were hand written notes of Mrs Jones, between April and July, some dated and some not.

26. When asked in the course of her oral evidence why her mother wanted less contact with her family, Ceri Jones said that before her sister Vicky's death her mother told her "something was going on" and when she asked what, her mother replied that she did not know. Eventually however, her mother told her that she had loaned Vicky and Catherine a lot of money and had not had it back.

27. I have already made a finding in relation to this. This is something which is also mentioned in Mrs Jones' notes. In a note bearing the date 8 April, she said that she didn't know why her daughter Catherine was being so nasty and that she had loaned £10,000 between her and her daughter Vicky. She refers to the council tax form referring to her as being severely mentally impaired. She said that she knew she was going to get a lot worse in time but that she had "not lost it yet." She continued that that is why she wanted to make a will as soon as possible and referred to the doctor coming to assess her.

28. In another note bearing the date 12 April, Mrs Jones refers to the visit to her brother Edwin's house to speak to the solicitor. She said that they made her welcome and it was "so nice to be out." She continued that she believed that it was her daughter Catherine who had called social workers to check on her. In another note with the date 17 April, she said that the doctor had called and said that she was capable of making a will and was waiting for a letter from him.

29. In my judgment, the evidence of the claimants and their witnesses shows a vivid picture of Mrs Jones becoming increasingly isolated from them soon after Ceri Jones went to stay with her, and of Ceri Jones saying things to her which were not true. I accept all of this evidence. I have already accepted Edwin and Francine Naylor's evidence that they was told by Ceri Jones that her sisters had taken money from their mother, and I have also found that no money was taken without Mrs Jones' knowledge or consent. In my judgment it is likely that as well as saying this to her uncle and niece, Ceri Jones also repeated it to her mother at around the same time, and that in doing so, she laid the foundation for her mother's belief that what she was told was true.

30. It is clear, however, that the isolation went beyond isolation from her other daughters, and extended to her brother and her niece. Each of these received a letter in early July asking that they and their family should only contact her by letter until they hear that she was well enough to have personal contact with "you all." Francine Naylor says she went to see her aunt after that letter, who happened on that occasion to open the door. She asked her aunt why it had been sent and she replied "because you are on their side." I accept that evidence and it is clear that Mrs Jones then saw the situation as one of sides- namely herself and her daughter Ceri on one side and other family

members on the other side. The evidence of John O'Gara, referred to above, is particularly telling in this regard also.

31. In another note with the date 17 May, Mrs Jones acknowledged that she had vascular dementia which would eventually get worse but again said that at that time she still "had her wits about her." She said she wanted to disinherit her daughters Jacky and Catherine from her estate. She said that the latter had made "so much trouble" and that she had loaned money to her and not got it back. She continued that the amount she had given would "easily be more than a share of the house." She said she had also been generous to Jacky and her family over the years and that could be her inheritance, and that Ceri had very little and gave her "more than what she had from me." Yet another note said that her husband had always said that house was for Ceri, that at first she thought she should give her house to her four daughters but at the back of her mind was her husband's wishes. She added that when her daughter Vicky died she was devastated and wanted her share of the house to go to her children as she felt bad that they had lost their mother, but then thought about her husband wishes. She said she had phoned Catherine and Jacky to ask what they would think if she did this, and she records that each said it would be unfair but it was up to her. She added that Jacky had a house and her family in London and Catherine had her house in Swansea and her family, but Ceri had a "small flat in London" and no family.

32. In his oral evidence, Zane Thorne said that neither his mother or his aunt Jacky owned their own homes. That was not challenged and I accept that evidence. Moreover, in my judgment there was no basis for the belief that she had given her daughter Catherine more than a share of the house, or that her daughter Ceri had given her more that she had had from her mother.

33. On 9 June, the doctor's notes show that Ceri Jones rang the surgery reporting that her mother was confused in the morning but that had resolved in the afternoon. There is also a reference to Mrs Jones not remembering her daughter's name, being delirious and stating that something was wrong. The next relevant entry is on 2 July, when the doctor records that he spoke to Mrs Jones and then to her daughter Ceri. It was recorded that he suspected a stroke. Mrs Jones had slurred speech the day before which was better but there was a slight facial drop and right sided weakness. The doctor records that Mrs Jones did not want to go into hospital as she was worried she might not come out, but that he explained that it was imperative to get admitted as soon as possible. The note ends "agree to call 999." However, an ambulance was refused, it being noted that Mrs Jones didn't want to go into hospital.

The making of the will

34. There was little evidence as to how the will came to be executed two days later. Ceri Jones in her oral evidence said that she was not present when it was and that it had "nothing to do with her." This part of her evidence does not sit easily with her case that she had duty of care towards her mother at the time. Knowing of her diagnosis and suspected stroke two days earlier, it might have been expected that she would have been involved to make sure that the will fulfilled her mother's wishes.

35. In the trial bundle there is a pro-forma will planner, which is filled in by handwriting, but is unsigned and undated. It gives details of Mrs Jones' property. A value of £60,000 is given for the house, and £11,688 as monies in the back. The names and

addresses and dates of birth of her three surviving daughters are set out. Under the heading of bequests, it indicates that two rings and the house should go to her daughter Ceri. The circumstances in which this was completed are not clear.

36. The neighbour Pauline Evans who witnessed the will was not called to give evidence. There was a short statement from her in the trial bundle purporting to be signed by her, saying that she was asked by Mrs Jones to witness her signature when they were completing the forms for the LPA. There is no statement of truth and she was not called to give evidence, so I give little weight if any to that.

37. Ceri Jones wished to call the other witness, Neil Bevan, who was present in court, and who had made a similar statement. There was no objection and so he was called to give evidence. He said that he was first asked by Mrs Jones to look at bank statements about concerns that her daughters Vicky and Catherine and her granddaughter Zara were controlling her bank statements. He became involved in May 2021, and met Ceri Jones and Pauline Evans at the same time as meeting Mrs Jones. In his statement he said Mrs Jones told him that she was under pressure from her brother Edwin to sign a will, but did not want to sign the will that he was recommending. She told him that she wanted a will appointing her daughter Ceri as her executor and sole beneficiary. In his oral evidence he added that he typed out the will and some letters for her. She told him what to say. He accepted that he has no legal or medical expertise. He put the will in his brief case and took it home, where it remained until after her days when he submitted it to probate. By a typed letter, bearing the date 4 July, Mrs Jones informed her daughter Catherine of the will. He said he was also present on 15 July when a social worker phoned and assessed her capacity over the phone, when Ceri Jones and Pauline Evans were also present.

Events after the making of the will

38. Zane Thorne tried to see his grandmother on 7 July. Ceri Jones did not answer the door and called the police. The note of their attendance records that she told them of missing money and that doctors had assessed her mother "this week" to confirm capacity, and that she had legally signed documents in the presence of a solicitor. There is no record of such an assessment and no document in evidence having been signed in presence of a solicitor. In my judgment this was misleading on the part of Ceri Jones, which lead the officer to conclude that Mrs Jones was capable of making her own decisions.

39. Shortly thereafter, her children reported to social workers their concerns of coercive and controlling behaviour by their Aunt Ceri over their grandmother. A social worker paid a visit and found that despite the diagnosis of dementia, she appeared fit and well and engaged in conversation. Ceri Jones was spoken to separately, who stated that the reporting was malicious as the family are trying to "get their hands on the deeds and the will." She said she believed her sister Catherine and her daughter Zara had withdrawn a lot of money from Mrs Jones' account. The social worker's note of this visit dated 9 July ends with this observation:

> "No concerns about the wellbeing of Daphne-able to engage fully in conversation and give her point of view. House was clean and tidy. I believe this is a civil issue over money. I

> believe that Daphne currently is capable of making her own decisions."

40. On 12 July, there is a note in the medical records that Mrs Jones had woken up unable to get her words out. The episode lasted about 15 minutes. A doctor paid a home visit that day when he found her to be lucid and fine in herself, but stressed by what was noted to be a family feud. There were further reports to doctors and social workers by family members during that month, and the following month, on similar lines. On 19 July, because of such concerns Dr Drury made a referral to old age psychiatry for a capacity assessment. On 29 July, a social worker visited to carry out a sensory support assessment. Mrs Jones told her of difficulties with mobility and with hearing. Hearing equipment was provided and advice given on telephone devices.

41. On 5 August 2021, Ceri Jones rang the surgery, saying that her mother was really worried that the social worker might not be impartial and believed that money had been stolen "by distant family too." By the middle of August 2021, Mrs Jones was being treated for a urinary tract infection. Her daughter Ceri rang the surgery on 23 August saying that her mother was confused and not taking her medication. She was taken by ambulance to the local emergency department, where she was assessed as being unable to speak on waking for about an hour. She was admitted to the ward. On 31 August a social worker visited her in the ward, and said that she had sent Mrs Jones three typed letters. Mrs Jones said that she was not aware of this. The social worker asked if she was aware of the LPA, to which Mrs Jones replied that she was, but preferred to "leave that for the time being." The social worker noted some indications of auditory delusion.

42. The hospital clinician spoke to the social worker on 2 September. The social worker said that Ceri Jones had put up several barriers to her assessing Mrs Jones' capacity after Ceri Jones had requested a power of attorney in relation to her mother's finances, and further, that Ceri Jones had informed the doctor that she, the social worker, was in a relationship with Edwin Naylor, which was untrue. In her oral evidence, Ceri Jones denied saying this, although she accepted that she had relayed her mother's concerns about the two being "good friends."

43. On the same date there was a hospital note that Dr James had reviewed Mrs Jones and agreed that she lacked capacity, which was likely to be in the context of her care at the hospital. The same conclusion was arrived on 6 September when a discussion about cardo-pulmonary resuscitation took place and it was recorded that she did not have the capacity to make and communicate decisions on that topic. By this time Mrs Jones had tested positive for Covid, and she passed away in hospital on 16 September.

Testamentary capacity

44. The classic principles to be applied in determining whether someone has testamentary capacity have been well established for over 150 years. Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 held that it is essential to the exercise of a power of disposition by will 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…"

45. That remains the test despite the coming into force of the Mental Capacity Act 2005. That act sets out in sections 2 and 3 a test for capacity "for the purposes of this Act," which is concerned with decision-making for living persons who cannot make decisions for themselves. The extent, if any, to which that effects testamentary capacity was fully examined by HHJ Matthews KC, sitting as a judge of the High Court, in *James v James* [2018] EWHC 43 (Ch), and by Falk J, as she then was, in *Clitheroe v Bond* [2021] EWHC 1102 (Ch). They both concluded that the test in *Banks* remains the appropriate test for testamentary capacity. That is what Mr Smith submitted on behalf of the claimants, and Ceri Jones took no issue with that. I accept that the test in *Banks* is the test which I should apply in the present case.

46. In *Symon v Byford* [2012] EWCA Civ 280, the Court of Appeal upheld a finding that a testator with mild to moderate dementia nevertheless had testamentary capacity. In paragraph 39 of the lead judgment of Lewison LJ, he emphasised that what is important is capacity, that is, potential. He cited Peter Gibson LJ in *Hoff v Atherton* [2004] EWCA Civ 1554 at [34]:

> "If there is evidence of actual understanding, then that would prove the requisite capacity, but there will often be no such evidence, and the court must then look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the Will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution."

47. Lewison LJ observed that, in other words, capacity depends on the potential to understand. It is not to be equated with a test of memory. At [45], he said this:

> "I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. "

48. In order to avoid disputes on such capacity, where an elderly or seriously ill person wants to make a will, a solicitor should follow what has become known as the "golden rule." It has been emphasised that this is not a rule of law but rather a guide to avoiding disputes; see *Burns v Burns* [2016] EWCA Civ 37 at [47]. The rule was summarised by Briggs J, as he then was, in *Key v Key* [2010] 1 WLR 2020 as follows:

> "The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings…"

49. In the present case, the claimants in the course of the proceedings instructed Dr Hugh Series, a consultant old age psychiatrist, who produced a report and gave oral evidence. He did not examine Mrs Jones, but based his report on medical records, social services records, Mrs Jones' note with the date 17 May 2021, the copy of her will, and Dr Drury's letter of April 2021, amongst other documents.

50. Dr Series in his summary of conclusions noted that the will was signed two days after Mrs Jones had a small stroke, one of a series of strokes or TIAs which she experienced. He concluded that the medical evidence of cognitive impairment due to vascular dementia is sufficient to raise a doubt about testamentary capacity which is not adequately dispelled by Dr Drury's letter. It does not set out the test of capacity, or the questions asked, or the answers given.

51. I accept those conclusions of Dr Series. However, in my judgment, it does not follow that no weight at all should be given to Dr Drury's assessment. He had been Mrs Jones' general practitioner for some years, and did carry out an examination. I accept the criticisms of Dr Series about the letter. I also accept his evidence that since the assessments in 2019, there was almost certainly substantial deterioration in her cognitive impairment. These factors mean that only limited weight can be attached to Dr Drury's letter, nevertheless it is appropriate to attach some, albeit little, weight.

52. The medical notes show several issues of slurred speech and facial drops, but then records recovery shortly after. Such was the note on 2 July, when the doctor spoke to Mrs Jones. Some 10 days later Ceri Jones rang the surgery saying that her mother was confused and could not get words out. These and other entries show episodic confusion, and difficulties of speech. However, such symptoms at this stage were episodic. The notes show that when they occurred, the surgery would be contacted. The notes of the visit after the episode on 12 July suggest that by the time of visit the symptoms had passed. The notes on the sensory assessment undertaken on 29 July, show particular insight and verbalisation on the part of Mrs Jones of her mobility and hearing issues and needs.

53. The medical notes in August and September show increasing confusion and capacity issues, but in my judgment it is important to focus on her capacity at the time she signed the will. Her handwritten notes before and after that day, have some relevance, but for reasons I shall come on to explain, in my judgment little weight should be attached to those in respect of her capacity.

54. The will itself was very short and straightforward. So too was her property. Moreover, despite later on having a memory lapse in respect of her daughter's name, there was no suggestion that at the time of making the will she did not have the capacity to understand the claims to which she ought to give effect, in other words, of her children and grandchildren. The evidence of Mr Bevan that Mrs Jones told him what to put in the will, was not challenged, and I accept it.

55. Accordingly, notwithstanding the doubts about Mrs Jones' testamentary capacity which have properly been raised, in my judgment on the totality of the evidence the appropriate inference is that she did have such capacity when signing the will.

Knowledge and approval

56. I now turn to the issue of whether Mrs Jones knew and approved of the contents of the will when she signed it. The correct approach is to consider whether Mrs Jones understood what was in the will when she signed it and what its affect would be, per Lord Neuberger MR in *Gill v Woodall* [2010] EWCA Civ 1430 at [22].

57. In *Symons,* Lewison LJ said this at [47]:

> "The reason for this requirement is the need for evidence to rebut suspicious circumstances: *Perrins v Holland [2010] EWCA Civ 840; [2011] Ch 270* at [25]. Normally proof of instructions and reading over the will will suffice: ibid at [25]. The correct approach for the trial judge is clearly set out in *Gill v Woodall [2010] EWCA Civ 1430; [2011] Ch 380* . It is a holistic exercise based on the evaluation of all the evidence both factual and expert. The judge's starting point in our case was one of "initial suspicion", given that the disputed will was prepared and executed without a solicitor and without Mrs Simon having been medically examined: see [11]. But having heard the evidence he held that his initial suspicion had been dispelled. He found it clear that Mrs Simon knew that she was making a will, took a conscious decision to make it and approved its terms. This conclusion was, in my judgment, fully supported by the evidence that the judge accepted."

58. In my judgment in the present case there are suspicious circumstances, in that the will was prepared and executed without a solicitor and without Mrs Jones being medically examined at that time. However having regard to all of the evidence, that suspicion is dispelled. Again, the will was short and straightforward, and the evidence of Mr Bevan, which I have accepted, is that Mrs Jones told him what to put into it.

Undue influence

59. Finally, I turn to consider whether the will was the product of undue influence exerted by Ceri Jones on her mother. There is no direct evidence of such influence in the present case, but as Mann J observed in ***Schrader v Schrader*** [2013] EWHC 466 (Ch), there rarely is. Undue influence is more usually established by inference from all the circumstances.

60. In that case Mann J referred to a summary of the law on undue influence by Lewison J, as he then was, in ***Edwards v Edwards*** [2007] EWHC 1119 (Ch) as follows:

> "i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
>
> ii) Whether undue influence has procured the execution of a will is therefore a question of fact;

> iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps, no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;
>
> iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;
>
> v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;
>
> vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to 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.”

61. Notwithstanding the high burden that the claimants have in proving that Mrs Jones was coerced into making her will by her daughter Ceri Jones, in my judgment the facts point inevitably to that conclusion. The facts are inconsistent with any other conclusion. It may be that all Ceri Jones thought she was doing was persuading her mother to do what she, Ceri Jones, believed was the appropriate thing to do. The combination of all the circumstances were such that the only conclusion is that what occurred went far beyond persuasion. I set out below the facts, as I find them or are not in dispute, which lead to that conclusion.

62. First, I am satisfied that from the time of her sister Vicky’s terminal diagnosis, Ceri Jones believed that she should inherit her mother’s house. Zara Thorne exhibits to her statement text messages which she had with her aunt on 11 January 2021, in which I accept that her aunt said:

> "If I don't get the house, then I will never step foot in Wales again…My father wanted to leave the house to me. It was Vicky who said it was unfair…The money means nothing to me. I was born in the house, I'd like to die here and if I can't then I won't be returning to Wales…When nan goes, there's no reason to return here unless I bought the house."

63. Second, prior to her daughter Vicky's death, it was Mrs Jones' settled intention to leave her house between her four daughters, and thereafter that Vicky's share should pass to her children The above messages were interspersed with Zara Thorne replying that her grandmother had said that the house was for the four girls and it was her decision. That is supported by the evidence of Vicky Jones' children, who say in their witness statement that their grandmother told them that she wanted to share the house between her four children equally, as this was only fair. Catherine Jones gives similar evidence in her witness statement. Jacky Jones in hers, says that she spoke to her mother after her sister Vicky's death to say that her fourth share would pass to her children, and her mother replied that that is what she wanted. I accept the claimants' evidence on this point.

64. Third, Mrs Jones was devasted by her daughter's death, and was probably still deeply in the grieving process when she signed the will. This is the daughter, who together with her sister Catherine, had provided loving and supportive care to their mother up until that point.

65. Fourth, from the time that Ceri Jones moved in with her mother, she increasingly isolated her mother from other members of the family, even her daughter Catherine who had up until then provided loving care. By the time that the will was signed, that isolation was substantially complete. I do not accept Ceri Jones' explanation that this was what her mother freely wanted, or that there was a need to "protect" her mother, from what was clearly a hitherto close and loving family.

66. Fifth, Ceri Jones reacted angrily and in front of her mother when her uncle was discussing with his sister making a will which shared the house. As already indicated, I am satisfied he was doing so only to the extent requested and only to help his sister.

67. Sixth, it is likely that Ceri Jones repeated to her mother what she had said to her uncle and her niece about her sisters Vicky and Catherine taking their mother's money and Vicky taking her credit cards, and I have found this was untrue. It is also likely that the notes which she was taking in her notebook were for the purpose of passing onto her mother, and that these prompted and formed the basis of the handwritten notes which her mother started making. These are useful in showing what Mrs Jones mistakenly believed, but in so far as they purport to record her wishes, in my judgment they are likely to be a product of prompting on the part of Ceri Jones as part of the pressure. Dr Series in his evidence said that dementia means a person is more likely, because of cognitive impairment, to accept what they are told. I accept that evidence.

68. Seventh, by the time the will was signed, and at least for some two to three months beforehand, Mrs Jones was very vulnerable physically as well as mentally, and dependant to a substantial extent solely upon her daughter Ceri, because of the isolation. Her cognitive impairment was likely to be increasing and she suffered

TIAs. She was also stressed about making a will. Her physical vulnerabilities included serious mobility and hearing issues. In my judgment, in those circumstances, it would take little on the part of Ceri Jones to induce her mother to benefit only her, to the exclusion of her sisters and her sister Vicky's children.

69. Eighth, Ceri Jones' attempts in evidence to distance herself from the making of the will are inconsistent with the evidence of Edwin Naylor, that the solicitor which he engaged had instructions terminated, as his sister told him that her daughter Ceri knew someone else. Moreover, Neil Bevan says that she was present when he first met Mrs Jones in May. Her assertion that she had nothing to do with the making of the will is also inherently unlikely, and is likely to have been made because she thought that would help her case. I do not accept it. It is likely that she was involved in the termination of the solicitor's instructions, because she knew that Edwin Naylor was discussing a will in which the house would be shared, something which caused her to shout at her uncle and him to leave the house. It is likely that she was involved in the instructions for the will which was subsequently signed.

70. Ninth, the will was signed without any involvement of a solicitor or without a further medical examination. This absence is particularly surprising, given that both a solicitor and a doctor had been involved in instructions for a will only three or so months beforehand. In my judgment the explanation is likely to be that Ceri Jones did not want such involvement as that might jeopardise her chances of securing her mother's estate.

71. Tenth, after the will was signed, in my judgment it is likely that Ceri Jones was involved in her mother's writing to other members of the family limiting contact to written communication. It is also likely that she sought to put barriers to access by the social worker to her mother, as the notes suggest, and to raise unfounded concerns about that worker's relationship with Edwin Naylor, however those concerns were phrased. I am satisfied that she did so in the hope that this might avoid any inquiry into the making of the will. This is also likely to be the reason she told police officers just after the making of the will that her mother had been assessed "this week" as having capacity and had signed documents in front of a solicitor.

Conclusions

72. Only Ceri Jones now knows what happened day to day between her and her mother during the period April to July 2021. For the reasons given above, in my judgment she has not been frank or open with the court as to how the will came about. Notwithstanding the high burden referred to above, I am satisfied that Mrs Jones signed her will not as a free agent, but because her volition had been overcome, without convincing her judgment, by the undue influence of Ceri Jones as summarised in the preceding paragraphs. It is invalid, and Mrs Jones' estate is thus held on intestacy.

73. Ceri Jones accepted in cross examination that she had spent some of her mother's money, she said on keeping her cat and paying bills in respect of the house. She said that there is £8,000 odd left in her mother's account and accepted that that belongs to the estate. As I understood Mr Smith for the claimants, he was content that the remaining amount should be held for the estate.

74. There was also a claim against Ceri Jones in respect of her occupation of the house since her mother's death, but no valuation evidence as to an occupation rent. This was not an issue which was explored in any detail in evidence or in submissions. Notwithstanding the invalidity of the will, Ceri Jones is upon intestacy entitled to a share of the estate, and the general rule is that occupation rent is not payable as between beneficiaries unless there is some conduct on the part of the occupier which makes this fair (see *Ali v Khatib* [2022] EWCA Civ 481). In the absence of detailed evidence or submissions on this point, it is not appropriate to make any order.

75. I invite the parties to attempt to agree a draft order to put the result of this judgment into effect, and to agree consequential matters such as costs. The parties should file the draft, agreed as far as possible, within 14 days of handing down of this judgment, together with written submissions on any matters which cannot be agreed. These will then be dealt with on the basis of the written submissions, unless within the same 14 day timescale, one or more party requires an oral hearing to consider those matters. In that event the appropriate way to proceed is likely to be by a short CVP hearing, the time and date of which will be notified to the parties.