



Neutral Citation Number: [2023] EWHC 147 (Ch)

Case No: PT-2021-CDF-000046

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

IN THE ESTATE OF TILLY CLARKE DECEASED (PROBATE)

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

Date: 26 January 2023

Before :

MR JUSTICE ZACAROLI

Between :

MYRANNA BOULT

Claimant

- and -

MONICA REES

Defendant

Oliver Wooding (instructed by **Gomer Williams & Co Ltd**) for the **Claimant**
Kate Parker (instructed by **DJM Law Ltd**) for the **Defendant**

Hearing dates: 23, 24 and 26 January 2023

JUDGMENT

Mr Justice Zacaroli :

Introduction

1. Tilly Clarke (“Tilly”) died on 18 March 2019, aged 90. By then she had developed very severe vascular dementia.
2. On 17 May 2013 she made a will (the “2013 Will”).
3. The issue in this case is whether Tilly had capacity to make the 2013 Will. The claimant, Myranna Boulton (“Myranna”) is the daughter of Tilly’s sister Dolly (who died in 2003). Myranna contends that Tilly lacked capacity to make the 2013 Will. She seeks a declaration that Tilly died intestate.
4. The defendant, Monica Rees (“Monica”) is the widow of Danny Rees (“Danny”), the son of Tilly’s sister Eva. She was Danny’s second wife. They met in 1999 and were married in 2004. Monica contends that the 2013 Will is valid, Tilly having had capacity at the time she made it.

Background

5. Tilly had six siblings, Joey, Eva, Alfie, Maggie, Dolly and one other who died in infancy. At the time she made the 2013 Will, her surviving relatives, including blood relatives and relatives by marriage, included:
 - (1) Her only child, Roger born in 1949. In 1967 he had left home to work in the Middle East. He returned home to live with Tilly in 1999. He remained living with her for the rest of his life. By 2013 he was suffering from terminal cancer. He died on 30 April 2015.
 - (2) Four children of her late sister Dolly: Myranna, Patrick Roffi, Paul Roffi and Maria (who has not featured in the evidence at all);
 - (3) Myranna’s two daughters: Julia Reynolds (“Julia”) and Louise Chappell (“Louise”);
 - (4) Danny, born in 1943. It is common ground that he was Eva’s son. Myranna claims that his father was Joey (Eva’s brother). Monica denies this and says that his father was an unknown Italian man. Danny died in September 2015;
 - (5) Monica, and Monica’s daughter from her first marriage, Sian Sloan (“Sian”).
6. Aside from a small cash balance of around £6,000, Tilly’s property in 2013 consisted of the house in which she lived, valued at £225,000 for probate purposes.
7. The 2013 Will appointed Roger as her executor and sole beneficiary. In the event that Roger pre-deceased Tilly, it appointed a partner at Whittinghams Solicitors to act as an executor and trustee. The residuary estate was left “for such of my nephew Danny Rees and Monica Rees... as shall survive me and if

more than one, in equal shares.” If the gift failed, there was to be a gift to charity instead.

8. The only evidence as to the making of the 2013 Will is provided by the solicitor who prepared it, Mr Michael Greenway of Whittinghams in Porthcawl. He qualified in 1980 and has specialised for the whole of his career in wills, probate and conveyancing. He estimates that he has prepared a few thousand wills over the course of his career.
9. He met Tilly, together with Roger, at his offices on 17 May 2013. Neither he nor his firm had acted for her previously. He had not met her before, and did not meet her again. Mr Greenway’s practice was to use will drafting software, which effectively drafted the will from the information he inputted during his discussions. That enabled him to print off the will and have it executed and witnessed at the same meeting. This is what he believes occurred here, the will being dated 17 May 2013 and countersigned by him and a secretary, Lorraine Jeffreys.
10. Mr Greenway otherwise kept no attendance note and no file was created. As to Tilly’s mental capacity, he said in his witness statement:

“I had no reason to request a medical report or even consider it as I had no doubt as to Mrs Clarke’s capacity. I would not suggest a medical report unless there was a reason to do so.”

The law

11. The test for establishing mental capacity sufficient to make a will is that adopted by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549, at p.565:

“It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, 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.”
12. It is the first three parts of this test that are relevant here. It is not suggested that Tilly suffered from any delusions.
13. As Lewison LJ pointed out in *Simon v Byford* [2014] EWCA Civ 280, at §40, capacity depends upon the potential to understand, and is not to be equated with a test of memory. The test is not pitched so high as to prevent the elderly and those with imperfect memories from making a will: see *Stevens v Vancleve* 4 Washington, at p.267, cited with approval in *Banks v Goodfellow* at p.568.

14. The initial burden of proving that Tilly had capacity to make the 2013 Will lies with Monica, as the propounder of the will. The court will, however, presume capacity if the will is duly executed and appears rational on its face. In such a case, the evidential burden shifts to Myranna to raise a real doubt about capacity. If such a doubt is raised, then the evidential burden shifts back to Monica to establish capacity none the less: see *Key v Key* [2010] EWHC 408 (Ch) per Briggs J at §97.
15. The essential question remains whether on the balance of probabilities, taking into account all the evidence available at trial, Tilly had the necessary capacity when she executed the 2013 Will: Theobald on Wills, 19th ed., at §4-020; *Goss-Custard v Templeman* [2020] EWHC 632 (Ch), per Fancourt J at §16.

The sources of evidence in this case

16. There are four potential sources of evidence in this case: (1) some, albeit limited, contemporaneous medical records; (2) an expert medical opinion; (3) the evidence of Mr Greenway as to the execution of the 2013 Will; (4) evidence of relatives (including relatives by marriage) of their interactions with Tilly at the relevant time.
17. I will address each of these in turn.

Contemporaneous medical evidence

18. There is limited contemporaneous evidence as to Tilly's mental capacity at the relevant time. Only three pages of GP records have been located, although there is in evidence a list of the issues raised with her GP between 2001 and 2018. The following is a chronological summary of the available contemporaneous records.
19. The first indication of there being any problems with Tilly's mental health is in January 2013 when she was referred by her GP to the Porthcawl Community Mental Health Team. There is in evidence the records of two home visits by Tilly's GP in November and December 2012, but without a transcription these are difficult to read, and neither side has placed any reliance on them.
20. The referral was accepted on 11 January 2013 by Selina Jones, the Referral Pathway Co-ordinator for Mental Health Wellbeing & Outpatients. The following were identified as "presenting problems", presumably by the GP: longstanding memory loss; episodic confusion and confabulation with moments of lucidity; disorientated to time and place; disturbed sleep; agoraphobic for last 6-7 months, "will not go outside at all because she feels that people are stealing from her"; and "complains of having a headache for the last 12 weeks – refuses blood tests."
21. An initial assessment at home was carried out by a community mental health nurse, Andrew Morgan, on 5 February 2013. His report described her as suffering with "mild cognitive impairment". He reported her as saying that she had not gone out for over 12 months, and when questioned about this she said: "all the old ones have gone". I do not read anything particular into her use of

that phrase: it is not unusual for elderly people to bemoan the loss of older friends. She had no previous psychiatric history. His report of a mental health examination included the following:

Appearance and behaviour: “pleasant and sociable lady – appropriate behaviour”

Speech: “coherent, confabulating on occasions. Normal rate, tone and volume.”

Mood: “Subjectively – ‘fine’; Objectively – euthymic”

Insight: “Limited insight into current problems”

Cognition: “Short term memory impairment. Disorientated to time. Occasional episodes of confusion.”

He recorded as a summary of identified needs: “(1) Mild cognitive impairment; (2) 3 months history of headaches; (3) Limited insight into current level of need.” He recommended a CT scan of the head. It is apparent from the accompanying letter that this was prompted by the concern expressed by Roger at the constant headaches his mother was suffering from. He recommended no further mental health intervention at that stage.

22. A CT scan was undertaken on 25 March 2013. The radiology report stated: “There is generalised cerebral atrophy and quite marked deep white matter ischaemic changes bilaterally.” I address the interpretation of these findings by Dr Series below.
23. There is no record of any further contact with any doctor until the beginning of 2014, when a Dr Timothy Chan, consultant psychiatrist met with Roger, at least, on 22 January 2014. This appears to have been a home visit, though it is unclear from the text of Dr Chan’s letter of that date whether he actually saw Tilly. Dr Chan referred to the previous assessment by Andrew Morgan, which found that Tilly had cognitive impairment, and continues: “Over the last six weeks Mrs Clarke has had periods of increased agitation. She also has day/night reversal in that she will sleep in the day, but will be awake at night.” It referred to her being unsteady on her feet. He recommended referral to social services.
24. A “request for review” form dated 22 January 2014 recorded: “Diagnosis: Cognitive impairment.” It referred to her being “...awake most nights, confused, at times does not recognise [Roger] and is talking to dead people.”
25. It appears that as a result of this review, Tilly was admitted to Danygraig House, a care home. There is no contemporaneous evidence of her mental condition when she entered the home, but a year later Dr Hannah Maxwell, a foundation stage doctor, who had examined Tilly on 19 May 2015, wrote: “Tilly has been a resident at the home for one year and has physically deteriorated over this time. When she was initially admitted she was mobile, continent and could communicate easily, however, now she is able to stand but often uses a hoist, is doubly incontinent and is unable to answer questions appropriately.” In

reporting on her mental health examination at this time (in 2015), Dr Maxwell said that Tilly was “fully disorientated to time and place, stating that she has just been to the cinema but disoriented to time.”

26. The remaining medical records demonstrate a continuing mental decline.
27. In a liaison review dated 17 June 2014, from a liaison nurse, Margaret Matthews, to Tilly’s GP, it was reported that Tilly “...requires assistance with all aspects of personal care and can become aggressive on intervention at times (recently bit a member of staff)”. Her speech was said to be “muddled and repetitive”.
28. The claimant places reliance on forms from December 2018 and January 2019 relating to deprivation of liberty safeguards (“DOLS”). These concluded that Tilly was then unable to make her own decision about whether she should be accommodated in the care home.
29. Mr Wooding, for the claimant, relies on a passage in the DOLS forms that refers to Tilly having been deprived of her liberty, and not free to leave the care home, since 2014. He submitted that this demonstrates a severe level of mental incapacity from the time she entered the care home. I disagree. As this DOLS form indicates, the care home doors are locked for the safety of all residents. As a result, none of the residents is able to leave. The DOLS procedure is there only for those residents who are unable to decide for themselves to remain in the care home. Where a resident is unable to make that decision, it is necessary to carry out an assessment that the deprivation of their liberty is in their best interests. Accordingly, I do not draw any adverse inference as to Tilly’s mental capacity in 2014 from the DOLS forms completed in 2019. In fact, the absence of any similar DOLS form from any earlier period might indicate that it was not until late 2018 that there was sufficient concern over Tilly’s capacity that it was necessary to go through the DOLS procedure. I do not place any significant weight on this, however, without a fuller investigation into the processes followed at relevant times in Danygraig House in this respect.

Expert medical evidence

30. I have the benefit of a report dated 25 September 2022 from a single joint expert, Dr Hugh Series, a very experienced consultant old age psychiatrist. Dr Series has not seen Tilly himself. His opinion is based only on the medical evidence provided to him. In the summary of his conclusions in his report, having noted that at the time Tilly made the 2013 Will such diagnosis as there was at that time was of mild cognitive impairment, he stated:

“In my opinion, it is not possible to give a firmly grounded opinion based on the very limited medical evidence before me as to the Deceased’s testamentary capacity when she signed that 2013 will, but on this information I think that it is entirely possible that she had testamentary capacity at that time.”

31. In response to subsequent questions, he clarified that on the evidence before him it was also “entirely possible” that Tilly lacked testamentary capacity at the time

of the 2013 Will, and that the evidence before him was insufficient to reach a well-grounded opinion either way.

32. According to Dr Series, dementia is a clinical syndrome whose characteristic features are impairment of multiple cognitive functions which usually, but not always, begin with impairment in memory. He considered that the long-term memory loss noted in January 2013 was due to dementia, but that it was difficult to know from the records when the symptoms of dementia first appeared.
33. Having quoted the *Banks* test of capacity, at §8.1.3 Dr Series commented that in his experience people with relatively mild degrees of cognitive impairment very often have a sufficient level of understanding to be able to make a will, while those with severe degrees of cognitive impairment generally do not. At §8.1.4 he said that given the paucity of assessment of Tilly's cognitive function near the time she executed the 2013 Will it was difficult for him to give any firmly grounded opinion. As to the descriptions of Tilly's condition shortly before she executed the will (long-standing memory loss, episodic confusion confabulation, and mild cognitive impairment) he concluded: "In my opinion it is entirely possible for a person meeting those descriptions to have testamentary capacity." At §8.1.5 he said: "In my opinion the medical disclosure provided is not sufficient to displace a presumption of capacity, but neither is it sufficient to establish it."
34. In answer to further questioning based on the elements of the *Banks* test, he said:
 - (1) The impression given by the records he had seen (largely based on Mr Morgan's assessment) was that at the time that Tilly signed the 2013 Will she had only a mild impairment of cognitive function. Based on his clinical experience he thought it more likely than not that a person with mild impairment of cognitive function would be able to understand the nature of the act of making a will and its effect.
 - (2) It was more likely than not that Tilly understood that she owned a house, but he was unable to offer an opinion on whether she had any idea as to its value or the extent of any other assets she had.
 - (3) He could not offer a soundly based opinion on whether Tilly would have been able to recall the nature and extent of claims upon her, or to weigh up these matters.
 - (4) He had not seen anything to suggest that Tilly was influenced by any delusion.
35. In considering Dr Series' report, I bear in mind that less weight is to be attached to a medical expert who has not personally examined the deceased, and whose opinion is therefore based only on existing medical records: see for example *Burgess v Hawes* [2013] EWCA Civ 94, at §60. That is particularly so where, as here, only limited medical records were available to him.

The evidence of Tilly's relatives

36. It is a perhaps surprising feature of this case that there is no contemporaneous evidence, such as any letters or postcards written by Tilly, which might assist in shedding light on her mental state.
37. For the claimant, in addition to Myranna, I heard evidence from her two brothers, Patrick Roffi and Paul Roffi, and from one of her daughters, Louise. Each of these provided a witness statement. Her other daughter, Julia, provided a witness statement but was too unwell to attend court to be cross-examined.
38. Most of the evidence provided by these witnesses related to events of long ago, in support of a case that Tilly had always been opposed to Danny, and that there had been no real connection between Tilly and Danny and Monica. This evidence is said to be relevant to the question of whether the 2013 Will is rational on its face, it being said that it was irrational for Tilly to leave her estate to Danny and Monica. Alternatively, it is said to be a circumstance which contributes to the circumstances of the 2013 Will being sufficiently suspicious to ensure that the evidential burden falls on Monica.
39. I have no doubt, however, that the 2013 Will is rational on its face. It is a professionally drawn up will. It is coherent and easily understandable. Tilly had only one son. It was rational to leave her estate to him. As to the secondary gift to Danny and Monica, there are any number of reasons why Tilly may have decided to benefit them in 2013, even if (as to which I need make no finding) she had in the past been opposed to Danny. The rationality of that part of the 2013 Will is supported by the fact that Roger himself left his estate to Danny and Monica, when he made his will a year later.
40. I reach this conclusion notwithstanding that Tilly does appear to have made an earlier will in 1993, in which she left her estate, in the event that Roger died before she did, to Myranna (although that will has not been found). A lot can happen in 20 years. If it was rational for Roger himself to leave his own estate to Danny and Monica, then I do not think it can be said to be irrational for Tilly to do the same with her estate – primarily left to Roger – in the event that Roger died first, even if twenty years previously she had decided to leave it to Myranna. For similar reasons, I do not think there is anything suspicious in the circumstance that Danny and Monica were identified as beneficiaries in the 2013 Will.
41. Accordingly, I do not need to resolve the disputes between the parties relating to matters that long pre-dated the execution of the 2013 Will. What matters is evidence that the witnesses can give as to their knowledge and experiences of Tilly in the relevant period. On this point, none of the claimant's witnesses apart from Myranna give any evidence at all.
42. Neither Patrick Roffi nor Paul Roffi gave any evidence of contact with Tilly at any point close to the time of execution of the 2013 Will.
43. Louise's account of her contact with Tilly given in her witness statement relates to a time long before 2013. In her oral evidence, she said that she saw Tilly after the time mentioned in her witness statement, and that she would have seen her approximately 3 to 4 times a year since 2005. She said that this was not

included in her statement because she only put down in her statement what she thought had to be put down. In the event, however, the last contact she recalls having with Tilly was around the beginning of 2012, well over a year before there is any evidence of cognitive impairment on the part of Tilly.

44. Julia's witness statement recounts many visits to her aunt Tilly, but these were all long in the past. There is no reference to any contact around the time of the 2013 Will.
45. As to Myranna herself, while she did give some evidence as to Tilly's mental state, it is extremely limited.
46. The first question to resolve in relation to Myranna's evidence is the extent to which she had any contact with Tilly in the relevant period. Her witness statement recounts a close relationship with Tilly while she was growing up, but as to the period after about 2005, when Myranna was diagnosed with pernicious anaemia (which has caused her to suffer serious illness ever since) she says only that this meant that she saw Tilly "less than usual". She provides no details in her statement of the nature or extent of any contact she had with Tilly thereafter.
47. In the witness box, she said that she did continue to see Tilly after 2005, and that she would make day-visits about 5 or 6 times a year. She also accepted, however, that the last time she made such a visit was in about November or December 2012. Thereafter, she did not see her, or have any contact with her at all, until late 2015, after learning that Danny had died. It was only at this point that she became aware that Tilly had moved into a nursing home in February 2014 and that Roger had died in April 2015.
48. There is no suggestion that any rift occurred in or around November or December 2012 to cause Myranna to cease communications with Tilly.
49. In my judgment, the evidence (particularly the accepted fact that there was no contact at all with Tilly after November or December 2012 for nearly three years) is most consistent with Myranna having had intermittent contact with Tilly after 2005, with such contact as there was tailing off until it ceased altogether towards the end of 2012.
50. On Myranna's own evidence, she is unable to give any evidence of Tilly's mental state at any time within six months of the execution of the 2013 Will. The only evidence she provided in her witness statement that has any bearing on Tilly's mental capacity is the following:

"From before 2010, Tilly's health was beginning to deteriorate significantly. The most notable aspect of her health was the development of vascular dementia. Following Tilly's CT scan, it was determined that her dementia diagnosis was on 25 March 2013. However, Tilly showed recorded cognitive decline from December 2012. I was not surprised to see that Tilly's medical records showed cognitive impairment. During that time, she frequently suffered headaches and was often confused."

51. This evidence is presented as if it is based on Myranna's own recollection. In light of other evidence, however, I am satisfied that it is not, and that it is based on the medical records which Myranna has since seen. The statement that Tilly's "health" began to deteriorate from 2010 is not expressly linked to her mental health and is in any event not corroborated by the chronology of her contact with her GP between 2001 and 2018 set out in her medical records. Since Myranna had not had any contact at all with Tilly since late 2012, she knew nothing at the time about any diagnosis of dementia or cognitive decline or about the CT scan.
52. In her oral evidence, Myranna suggested that Tilly had been quite confused and unsteady on her feet the last time she saw her in 2012, such that you could not really have a conversation with her by that time. I do not accept that this is an accurate recollection. Given that this case is all about Tilly's mental capacity in 2013, if Myranna had witnessed impairment in Tilly's mental capabilities at the end of 2012 it was something that certainly should, and I infer would, have appeared in her witness statement.
53. While I accept that Myranna was doing her best to give honest evidence, I consider that this evidence, given for the first time in the witness box, was influenced both by her very strongly held belief that Tilly would not have left her estate to a non-blood relative and her knowledge, acquired since the time, of Tilly's diagnosis of cognitive impairment in 2013.
54. The suggestion that it was not really possible to have a conversation with Tilly is not consistent with the assessment of only mild cognitive impairment in February 2013. Nor is it consistent with the fact, as recorded by Dr Maxwell in 2015, that on entry into the care home Tilly was able to communicate easily. Moreover, had Myranna really witnessed such a serious decline in Tilly when visiting her in late 2012, I do not think it is credible that neither she nor any member of her family would then have made no effort thereafter to contact either her or Roger thereafter for nearly three years, if only to see how she was.
55. Accordingly, there is no reliable evidence from any family member on the claimant's side to indicate that Tilly lacked testamentary capacity when she executed the 2013 Will.
56. On the defendant's side, I heard evidence from Monica and from Sian.
57. Monica's evidence is that she was first introduced to Tilly in about 2000. She says that from then on she and Danny were heavily involved in Tilly's and Roger's lives. She said that she often cared for her, and would visit her at home two to three times a week. She also said in her witness statement that she would bath her, cut her nails and brush her hair, although in the witness box she said that this was only in the couple of months before Tilly went into the nursing home. She said that she, Roger and Danny all took Tilly to visit the nursing home in 2014, and helped her to move in there.
58. Monica said that so far as she was aware neither Myranna nor any of her side of the family had any contact with Tilly until long after Tilly went into the care home.

59. This evidence is largely corroborated by Sian, who said that she also enjoyed a close relationship with Tilly, particularly after 2004 when Monica married Danny. She visited Tilly less than her mother, due to her work commitments. She said that as Roger's health deteriorated, her mother helped more with Tilly's personal care. Both she and Monica said that they continued to visit Tilly when she was in the care home.
60. Myranna disputes that Danny and Monica were ever in contact with Tilly, until they appeared somewhat out of the blue in about 2012.
61. While I consider that the evidence of Monica and Sian as to Tilly's mental health must be treated with caution, for reasons I develop below, I consider that they were generally honestly trying to assist the Court. I accept their evidence that they were in contact with Tilly for some time prior to 2012. That conclusion is consistent with the fact that Danny had lived in relatively close proximity to Tilly for many years: it is common ground that in the 25 or 30 years prior to 2005 he lived in the same town, and that he thereafter moved with Monica to Port Talbot, which was only a 25-30 minute drive away. I have already concluded that there was a gradual tailing off in Myranna's visits to Tilly from around the mid-2000s, so it is not necessarily surprising that Myranna did not meet Monica or Danny on any visits that she may have made to Tilly in that period.
62. Ultimately, it is not necessary to resolve precisely how much contact there was between Tilly and Monica and Sian before 2012, because I am satisfied that they *were* in contact with Tilly around the time that she made the 2013 Will. The most powerful piece of evidence that indicates they were in contact during this period is that they are named as beneficiaries. I do not think it is a realistic possibility that Tilly was suffering from such unsoundness of mind that they were included without her knowledge. This is reinforced by the fact that Roger was with her when she made the 2013 Will and by the fact that when he made his own will a year later, he left his estate to Danny and Monica. There is also no doubt that Monica and her daughter Sian were involved with Tilly in the period after she went into the care home, and I think it is more likely than not that this contact did not come out of the blue, but was a continuation of their involvement with Tilly before she went into the home.
63. Both Monica and Sian gave evidence as to their perception of Tilly's mental health. In her witness statement, Monica said that Tilly retained capacity, and there were no real concerns about her health. In the witness box she was adamant that she saw nothing wrong with Tilly's mental state before she entered the care home. When faced with the contemporaneous records showing at least some impairment in Tilly's condition, Monica's response was to say that she never saw any of that. Sian's evidence is that she had "no real concerns" in relation to Tilly's capacity, that her condition deteriorated only some years later, and that she regarded her as "sharp as a tack".
64. I do not regard this as reliable evidence as to Tilly's mental state at the relevant time. It is given at a high level of generality. There is no evidence of specific encounters where they observed Tilly saying or doing something that might have revealed her cognitive powers at the time. Nor is it specific as to time.

The medical evidence I have referred to demonstrates at least some decline in cognitive abilities in early 2013, and a more severe decline in early 2014. Those symptoms, certainly in early 2014, are inconsistent with there being “no concerns” about Tilly’s mental health, or a description of her as “sharp as a tack”. The failure to acknowledge that there were obvious concerns in the first months of 2014 undermines the broad assertions made by Monica and Sian as to Tilly’s state of health at other times.

65. In Monica’s case, I consider it likely that she has conflated her recollections of Tilly at different time periods and been led to double down on her assertions as to Tilly’s mental capabilities in light of the attack on them by the claimant. This was demonstrated in my view by her blanket refusal to countenance the accuracy of the medical records put to her. In Sian’s case, I think she too has conflated her recollections of Tilly at different time periods, exacerbated in her case by the fact that her contact with Tilly was less often and more sporadic.
66. For these reasons, I do not attach much weight to their recollection of their general impression of Tilly’s mental health, certainly as it applies to the critical time in May 2013.
67. There were a number of additional reasons advanced for why I should treat the evidence of Monica and Sian with caution. It is unnecessary to consider these in detail, since I have already concluded I should not attach much weight to the evidence. For completeness, though, I will briefly address them.
68. It was suggested that Monica’s evidence that at least prior to going into the care home Tilly did not wear glasses and did not need a stick to walk with was wrong and demonstrated her lack of knowledge of Tilly. I do not think anything turns on this. In fact, the contemporaneous records suggest that Tilly did not wear glasses, although those records indicate that she was using a stick at some point. Monica’s and Myranna’s respective recollections appear therefore to be both half-right.
69. As to the other reasons advanced in relation to Monica, these concerned her refusal to accept that Danny had children by his first marriage, as opposed to step-children, or that she had met Myranna on two occasions in 2012, or that Danny was the product of an incestuous relationship. Even assuming these matters were true, in themselves they have no bearing on the only question of importance in this case, namely Tilly’s mental capacity. In the context of what is clearly a bitter family dispute, even if Monica’s evidence was wrong on all these points I do not think it is a reason to believe that in giving evidence as to Tilly’s health at the relevant time she was doing otherwise than trying to assist the Court.
70. So far as Sian is concerned, she was criticised for having been described as a “niece” of Tilly or the “remaining relative” of Tilly on the death certificate and DOLS forms. I find nothing suspicious in either of these matters. While Sian is not a blood relative of Tilly, it is within the broad usage of the word “niece” to include someone who is a niece only through marriage. Nothing turns in my view on the distinction between “niece” and the more accurate “great niece”, particularly as Sian is described as the latter in at least one place in the forms.

“Remaining relative” was a phrase written by someone else in a form which there is no reason to believe was seen by Sian at the time. If Sian had said anything which led to that phrase being used, it is highly unlikely that she said she was the sole remaining relative, since (as the care home must have known) her own mother was still alive.

71. A significant part of the evidence was directed at the conduct of the parties themselves after Tilly went into the care home, including Monica having moved into Tilly’s home and the application by Myranna, supported by her two brothers, in seeking to be appointed as Tilly’s deputies. While these events have undoubtedly contributed to the antipathy between the two sides, they have no bearing on the only issue I need to decide.

Mr Greenway’s evidence

72. The evidence of an independent lawyer, who is aware of the relevant surrounding circumstances, has taken instructions for the will, produced a draft, and met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity: *Hughes v Pritchard* [2022] EWCA Civ 386, at 79.
73. That is not the case here. Mr Greenway’s evidence, given some nine years after the event, that he had “no doubt” as to Tilly’s capacity, is given in circumstances where, contrary to the “golden rule” (see *Re Simpson* (1977) 121 Sol Jo 224, per Templeman J) he took no steps to satisfy himself as to Tilly’s mental capacity at all. There is no evidence that he was aware of any of the surrounding circumstances, including Tilly’s diagnosis of cognitive impairment.
74. In the absence of any attendance note, or any other aid to memory other than the 2013 Will itself, and in circumstances where he met Tilly only once and her will was one of many thousands he drafted over his career, he says that he nevertheless recalls the meeting with Tilly because she was adamant that in the event of Roger’s death her estate should go to *both* Danny and Monica. I accept that this was evidence honestly given, but this appears to be the only thing he remembers about the meeting. He did not give any details as to Tilly’s demeanour, or any aspect of her behaviour that might bear on her ability to understand what she was doing, the extent of her assets or the extent of claims upon her.
75. The most that can be said is that nothing alerted Mr Greenway to the need to take steps to satisfy himself of Tilly’s mental capacity. That is at least some evidence in support of the conclusion that Tilly had testamentary capacity, but in the absence of any evidence as to his observations of Tilly on the day, it provides only limited support.

Discussion

76. As I have already indicated, I am satisfied that the 2013 Will is rational on its face. Accordingly, the evidential burden lies initially on Myranna to establish

a real doubt as to Tilly's capacity when executing the 2013 Will. If there is such doubt, then the question is whether Monica can establish, on the basis of the available evidence at trial, that on the balance of probabilities Tilly had sufficient capacity.

77. For the reasons I develop below, while I accept that there is at least some doubt as to her capacity, I do not consider it is sufficient to shift the evidential burden onto Monica but that, in any event, on the balance of probabilities taking into account all the evidence available at trial, I consider that Tilly did have sufficient capacity in executing the 2013 Will.
78. My conclusion is based principally on the limited level of capacity required in view of the simplicity of the 2013 Will and the contemporaneous medical evidence as interpreted by Dr Series.
79. As to the first point, it is important to bear in mind that her estate, the potential claims on her, and the contents of the 2013 Will itself were each very simple matters. Aside from a small cash balance, her estate consisted only of her unmortgaged home. Her only close relative was her son, who lived with her and cared for her. The will left her whole estate to him.
80. The only feature which involved any potential complexity at all was the secondary gift in case Roger died before her. I accept that this would have been a real possibility, given that he was then suffering from cancer which had been described in at least one of the medical records as "terminal". As to this, the only more distant relatives who on the evidence had any presence in her life at all, were Myranna (and her daughters) and Danny and Monica (and Monica's daughter Sian). While that involves a choice being made, it is again not something which required any particularly high degree of mental capacity. For the reasons I have given above, I find that in the critical period of 2012-2013 leading up to the execution of the 2013 Will, it was Danny and Monica who were in contact with Tilly, and that contact with Myranna (and her side of the family) was very limited, and ceased altogether by November or December 2012.
81. Second, while the medical evidence demonstrates a decline in cognitive powers leading to severe incapacity by late 2018, that evidence as a whole demonstrates only mild cognitive impairment at the time of the 2013 Will which does not in the circumstances of this case create sufficient concern as to her testamentary capacity. The following evidence is of particular relevance in this regard:
 - (1) The first indication of any issue with Tilly's mental health is in January 2013 which led to the assessment of "mild cognitive impairment" in February 2013. That assessment also concluded that she was capable of managing her finances. While the test for managing her own affairs is different from that for establishing testamentary capacity, the fact that she was viewed as having sufficient capacity in that first sense is nevertheless some support that she had sufficient capacity to make the 2013 Will in circumstances where there was no real complexity to the matters she needed to understand in order to do so.

- (2) The lack of any reference to any cognitive issues prior to that in the summary of contact with her GP between 2001 and 2018 suggests that February 2013 was towards the beginning of the decline in her cognitive powers.
 - (3) Dr Series' opinion is that people diagnosed with relatively mild degrees of cognitive impairment very often have a sufficient level of understanding to be able to make a will.
 - (4) While the CT scan undertaken in March 2013 revealed "quite marked ischaemic changes", Dr Series' view was that this "could account for the cognitive impairment which had been identified". The cognitive impairment that had been identified was nevertheless mild. There is nothing in Dr Series' evidence as to the import of the CT scan to suggest that it contradicted the diagnosis of mild cognitive impairment.
 - (5) The recommendation, following the assessment of Tilly in February 2013, was that no further mental health intervention was then required. I note that the reason for the CT scan was Tilly's headaches, and was not part of any further investigation into her mental health.
 - (6) That is consistent with the fact that there is no further contact recorded with any medical professional until a year later, in January 2014, and that the trigger for that contact was periods of increased agitation "over the last six weeks", and an inability to sleep at night. The fact that in January 2014 Dr Chan referred, for Tilly's history, to the assessment by Andrew Morgan in February 2013 supports the view that there had been no serious concerns over Tilly's mental health in the intervening period.
 - (7) In January 2014, the referral made to social services was considered an appropriate starting point for a carer assessment. That was prompted by the fact that Roger himself was not well, and was likely to have further problems with his physical health.
 - (8) Although by June 2014, when Tilly had been in the care home for a few months, her speech was reported as muddled and repetitive, according to Dr Maxwell Tilly had been mobile, continent and able to communicate easily when she entered the home, and that she had physically deteriorated over the year since her arrival.
82. The progress of dementia, from the first signs to serious cognitive impairment, differs from patient to patient. The picture painted by the above evidence is that, once the diagnosis of mild cognitive impairment was made in February 2013, the progress of any decline thereafter was not significant until a few weeks before contact was made with doctors again in early 2014, and then accelerated significantly after she entered the home. I consider it more likely than not that as at May 2013 Tilly was still in the early stages of decline. I note Dr Series' evidence that dementia typically starts with memory loss, and that – as indicated by Lewison LJ in the *Simon v Byford* case – capacity is not to be equated with a test of memory, but with the capacity to understand. The available medical records point, in my judgment, to it being more likely than

not that Tilly retained that capacity, to an extent sufficient for the purposes of executing the (very simple) 2013 Will.

83. So far as the remainder of the evidence is concerned, I have already noted that there is nothing in the evidence of the claimant's witnesses to indicate that Tilly *lacked* testamentary capacity in May 2013.
84. As to the evidence of Monica and Sian, while it does purport to demonstrate that Tilly did have capacity at the relevant time, and does constitute *some* evidence in favour of that conclusion, for the reasons I have given above, I place very little weight on it. Finally, the fact that Mr Greenway was not alerted, from anything in Tilly's behaviour at the time she gave instructions for, and executed, the 2013 Will, to the possibility that she lacked testamentary capacity is again at least *some*, albeit limited, evidence that she did have capacity.
85. In all these circumstances, but principally in light of the medical records that are available, supplemented by the opinion of Dr Series, I do not consider that sufficient doubt has been raised to shift the burden onto Monica. In any event, even if the burden lies on Monica, for the same reasons given above at §78 to §84, I conclude that it is more likely than not that Tilly had capacity to make the 2013 Will. In particular, I consider that:
- (1) Tilly was able to understand the nature of making the 2013 Will and its effect. It is Dr Series' view that a person with mild cognitive impairment would be able to do so, and I consider – for the above reasons – that the extent of Tilly's cognitive impairment by May 2013 would not have prevented her from doing so.
 - (2) Tilly was able to understand and recollect the extent of her property, given that it consisted almost exclusively of the home where she lived.
 - (3) Tilly was able to understand the nature and extent of the claims upon her estate. As I have noted above, that is in circumstances where the potential claims on her estate, in the event that Roger died before she did, were in reality limited to a simple choice between her niece, on the one hand, and her nephew and his wife on the other.
86. For these reasons, I find in favour of the Defendant and will pronounce for the 2013 Will in solemn form.

Addendum: application to adduce new evidence

87. A day after the hearing in this matter finished, the claimant applied to re-open the trial for the purpose of adducing new evidence, namely two birth certificates of Danny Rees' children, which showed Danny as their natural father.
88. Mr Wooding contended that they were relevant to an issue raised in Monica's evidence as to whether, as she said, Danny had step-children from his first marriage, or whether he had natural children. In itself that has no relevance to any issue in the case. He submitted, however, that the evidence is relevant to the issue of Monica's credibility.

89. It is Monica's position that she understood them to be step-children. This new evidence would undermine her credibility if combined with evidence that she knew, contrary to what she says was her understanding, that Danny had natural children. There is no evidence of that, so at the very least this is something which would have to be put to her in cross-examination (for which she would need to be recalled), and her answers may or may not provide ammunition to attack her credibility on other issues.
90. Mr Wooding submitted that the jurisdiction to re-open the trial is found in the Court's inherent jurisdiction to control evidence. The question is whether it would be an affront to justice and common sense not to re-open the trial, and this involves in every case a question of discretion and degree: *Vernon v Bosley (No.2)* [1999] QB 18, per Stuart-Smith LJ at p.30.
91. In that case, which involved an application to the Court of Appeal, it was accepted that the defendant could not by the exercise of reasonable diligence have obtained the fresh evidence before the judge below gave judgment. It was also a case where the evidence was of central relevance to the case.
92. In this case, in contrast, there is no reason why the birth certificates could not have been obtained long before trial. Mr Wooding relied on the fact that the issue was not raised on the pleadings. That, however, was because it is not an issue of any relevance to the case. The question whether Danny had children was squarely raised by Monica in her witness statement, dated 22 August, and no step was taken to try and locate these birth certificates until during the second day of the trial.
93. It is difficult to characterise as an affront to justice precluding a party from adducing new evidence after the end of the trial, which is not directly relevant to any issue in the case and which could have been obtained long before trial.
94. While it is true that there would be only minimal disruption caused by re-opening the trial, the fact remains that the claimant's case closed on Monday, and the court was otherwise poised to give judgment. The need for finality in litigation is a clearly relevant factor: *Vernon v Bosley* (above).
95. If this evidence had been critical to my decision, then I might have taken a different view but, as I have noted, it is peripheral. Moreover, for reasons which I have set out in the main body of this judgment, in reaching my conclusion in this case I have placed very little weight on Monica's evidence in any event. In short, even if the new evidence were to be admitted, it is not something which would have caused me to reach any different conclusion to the one which, having reflected on this case for intervening day, I have come to. I therefore refused the application to re-open the trial.