In The Supreme Court of Bermuda

PROBATE JURISDICTION

2009: No 29

IN THE ESTATE OF JOHN HOWARD FUBLER TAYLOR (DECEASED)

BETWEEN:-

ELAINE CHARLES

Plaintiff

-and-

RODERIC ETHELBERT PEARMAN
IRIS ALMEIRA DAVIS

First Defendants

DR CLARENCE ELDRIDGE JAMES
ALBERT HOWARD TUCKER TAYLOR

Second Defendants

JUDGMENT

(In Court)

Date of hearing: 25th – 29th November 2013, 26th February 2014
Date of judgment: 24th April 2014

Mr Gordon Woolridge Jr, Phoenix Law Chambers, for the Plaintiff

Mr Delroy Duncan and Ms Nicole Tovey, Trott & Duncan, for the First Defendants and the Second Named Second Defendant

Mr Paul Harshaw, Canterbury Law Limited, for the First Named Second Defendant

Introduction

1. By a writ dated 6th February 2009 the Plaintiff, Elaine Charles ("Mrs Charles") seeks a decree pronouncing against the validity of two purported wills executed by her late father, John Howard Fubler Taylor ("Mr Taylor"), dated 8th June 1999 ("the First Will") and 31st July 2002 ("the Second Will") respectively. She alleges that he was suffering from dementia and lacked the mental capacity to execute either Will.

2. If both Wills are invalid, then Mr Taylor will have died intestate. In that case, under the Succession Act 1974, his estate will revert to his surviving children, ie Mrs Charles and two sons – Albert Taylor, who is one of the Second Defendants, and Coolridge Taylor. The relationship between Mrs Charles and her brothers is one of mutual hostility. However, if either Will is valid, neither Mrs Charles nor her children will inherit anything from Mr Taylor as neither Will made any provision for them.

3. Mr Taylor had another son, John Taylor, who died in May 2003. He was Mr Taylor's eldest child.

4. The First Defendants, Roderic Pearman ("Mr Pearman") and Iris Davis ("Ms Davis"), are the executors of the Second Will. Mr Pearman is the nephew by marriage of Mr Taylor, having married his niece, Shirley Pearman. Ms Davis was an old friend of Mr Taylor, with whom he had a romantic relationship.

5. The Second Defendants, Dr Clarence James and Albert Taylor, are the executors of the First Will. Dr James is a medical doctor and the former Deputy Premier of Bermuda. He was an old friend of Mr Taylor and both men were senior members of the Masonic Abercorn Lodge ("the Lodge").

6. Mr Taylor's principal assets were three properties: (i) Channel View Cottage, 131 North Shore Road, Hamilton; (ii) Flamingo Walk, Laffan Street, Hamilton; and (iii) Fubler Villa, 26 Cedar Avenue, Hamilton (together, "the Properties"). Channel View Cottage lies next door to a property known as El Boro, 129 North Shore Road, which belongs to Mrs Charles.

7. El Boro was conveyed to Mrs Charles by her late mother, Inez Elaine Taylor ("Mrs Taylor"). This was by way of a deed of conveyance dated 18th September 1991. Under the deed, Mrs Taylor retained a life interest in the property. It passed to Mrs Charles upon her mother's death in June 1997.

8. The First Will disposed of the Properties as follows:

   (1) Channel View: life interest to Albert Taylor, with the remainder interest to Noel Taylor, the son of Coolridge Taylor.

   (2) Flamingo Walk: life interest to Coolridge Taylor and his wife Deborah Taylor, with the remainder interest in equal shares to Coolridge Taylor's surviving daughters.

   (3) Fubler Villa: to the Lodge.

9. The Second Will disposed of the Properties differently:

   (1) Channel View: life interest to Coolridge Taylor, with the remainder interest in equal shares to his surviving daughters.

   (2) Flamingo Walk: (i) If Mr Taylor's debts, funeral and testamentary expenses cannot be met from his personal estate, then this property is to be sold to meet them. Any remaining proceeds will go to John

Taylor, then on his death to Coolridge Taylor's surviving daughters. (ii) If Mr Taylor's debts, funeral and testamentary expenses can be met from his personal estate, then there is a life interest in the property to John Taylor, with the remainder interest in equal shares to Coolridge Taylor's surviving daughters. There is what appears to be a drafting error in the relevant clause of the Second Will such that these provisions are elided, but what I have set out is my understanding of Mr Taylor's intent.

(3) Fubler Villa: to Albert Taylor for life, with the remainder interest in equal shares to the two sons of Roderic Pearman. Albert was to collect all rents and pay all rates, taxes and other outgoings payable in respect of the property and keep it in good repair and condition (reasonable wear and tear excepted) and insure it to its full value against loss or damage by fire and such other risks as the executors from time to time shall direct.

10. The Second Will expressly stated that Mr Taylor made no provision for his daughter because he had made provision for her during his life time.

The law

11. Disposition of property by will is governed by the Wills Act 1988 ("the 1988 Act"). Section 5 provides that, subject to the 1988 Act, every person may dispose by will of all real estate and all personal estate owned by him at the time of his death. Section 7 sets out the formalities required for the execution of a valid will. It is common ground that these have been complied with. However section 6 provides that, to be valid, a will shall be made by a person who "*is of sound disposing mind*". The issue in this case is whether, when he made each Will, the late Mr Charles satisfied that requirement.

12. There was no dispute about the relevant legal principles. The leading case is Banks v Goodfellow (1870) LR 5 QB 549, in which at page 565 Cockburn CJ said:—

"*It is essential …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 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*".

13. As Vos J stated at para 210 of his judgment in Jeffrey v Jeffrey [2013] EWHC 1942 (Ch):

"*More recent cases have modernised these formulations so as to be clear that a competent testator must be able to understand the effect of his wishes being carried out at his death, the extent of the property of which he is disposing, and the nature of the claims upon him.*"

14. The need for the testator to understand the claims of others upon him was emphasised by the Privy Council some 30 years prior to Banks v Goodfellow in Harwood v Baker (1840) 3 Moo PC 282 at pages 290 – 291:

"*But their Lordships are of opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective*

claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property."

15. However the observation of Mummery LJ at para 14 of his judgment in Hawes v Burgess [2013] EWCA Civ 74, with whose statement of the relevant legal principles Patten LJ and Sir Scott Baker both agreed, is also apposite:

"*I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law: the freedom of testation allowed by English [and Bermudian] Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.*"

16. Turning to proof of capacity, HH Judge Norris QC (as he then was) summarised the relevant principles at para 5 of his judgment in Ledger v. Wootton [2007] EWHC 2599 (Ch):

"*(a) The burden is on the propounder of the Will to establish capacity;*

(b) This remains the case even if the propounder has already obtained a grant in common form: see Halsbury's Laws of England (4th ed) Vol 17(2) paragraph 269 n.6;

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

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

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

17. In Hawes v Burgess Mummery LJ at para 13 of his judgment provided a helpful gloss:

"*In answering those questions in a particular case the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed.*"

Was the First Will duly executed?

18. The First Will was drafted by the attorney Michael Smith. At the time he was a partner in the now defunct firm of Smith & Scott. His evidence, which I accept, was as follows.

19. Mr Taylor attended Mr Smith's office on or about Wednesday 2nd June 1999 with his friend Dr James, who introduced Mr Taylor to Mr Smith. Dr James took no part in the conversation between the other two men. Mr Taylor gave Mr Smith instructions as to how he wanted to dispose of his property upon his death, which Mr Smith wrote down. Mr Smith's assistant later drafted the Will based on Mr Smith's notes and instructions.

20. Mr Smith provided a draft of the Will to Mr Taylor on Friday 4th June 1999. He asked Mr Taylor to consider it over the weekend and return the draft with any corrections by Monday 7th June 1999, so that it would be ready for execution at a further conference at Mr Smith's offices that was scheduled for Tuesday 8th June 1999 at 12 noon.

21. Mr Taylor later approved and executed the Will that Mr Smith had drafted. He did so in Mr Smith's presence.

22. Mr Smith stated that Mr Taylor appeared quite lucid to him at all times in June 1999. Mr Smith recalled that, in common with many elderly people, Mr Taylor talked quite a lot about his life experiences. He stated that there

was nothing in what Mr Taylor said to him that he found to be different from what a typical man in his 80s who wanted to have a will prepared would say and nothing to raise any suspicion as to his mental capacity at the time. Doubtless for this reason he did not probe or document Mr Taylor's reasons for the specific distributions in the will.

23. I am therefore satisfied that the First Will was duly executed.

Does the First Will appear rational on its face?

24. The First Will makes no provision for Mrs Charles or John Taylor, or for Mrs Charles' children. That may be hurtful, ungrateful or unfair – I express no view on the point – but it is not on the face of it irrational.

25. On Mrs Charles' evidence, the father's relationship with both children could fairly be described as fraught and complicated. Moreover, Mrs Charles had been left El Boro by her late mother. Indeed in an affidavit sworn on 15th March 1999 in previous proceedings between Mrs Charles and John Taylor, which concerned a dispute as to whether John had any interest in that property, Mrs Charles stated:

"*There were four homes held collectively by my parents and my mother made it abundantly clear that she would care for me and my father would have to care for his sons.*"

26. In a memorandum dated 9th February 1999, prepared in connection with the litigation against her brother, Mrs Charles had described this arrangement as "*common knowledge*".

27. Mr Taylor, in not leaving any property to Mrs Charles, was therefore acting consistently with an arrangement about which she had given evidence in earlier proceedings. I found Mrs Charles' attempts to resile from this position when giving oral evidence, saying that the arrangement was merely "*family folklore*", unconvincing.

28. In the circumstances, Mr Taylor could not be said to be acting irrationally by not leaving anything to Mrs Charles' children. As to any other grandchildren who were not provided for, he could rationally have taken the view that any testamentary provision for them should be made by their parents in the parents' wills.

29. As to John Taylor, Mrs Charles stated in her evidence in chief that their parents were constantly providing financial assistance to any one of a great number of his get rich quick schemes, and that, if funds were not forthcoming, John would use all manner of bullying and abusive tactics to break their resolve and spirit. In those circumstances, Mr Taylor could reasonably have concluded that John was undeserving of his largesse.

30. Mr Taylor left Fubler Villa, which was the most valuable part of his estate, to the Lodge rather than his family. As stated above, he was a senior member of the Lodge. Ms Davis gave evidence that it was very important to him at that time. Mrs Charles, in her affidavit, accepted that he had a genuine attachment to the Lodge. That he should wish to make a substantial bequest to an organisation to which he was thus bound by strong ties of personal history and affection is readily understandable.

31. In the First Will the name of Mr Taylor's son "*Coolridge*" was misspelled as "*Coleridge*" – as it was in Mrs Charles affidavit that was before the Court. However a typographical error is not *prima facie* evidence of lack of mental capacity.

32. I am therefore satisfied that the First Will appears rational on its face.

Was the Second Will duly executed?

33. The attorney responsible for the preparation of the Second Will was Kim Wilson, who was formerly Attorney General and is now a Senator. At the date of the Second Will she was managing partner of the law firm Trott &

Duncan. Her evidence, which save for a few minor details, I accept, was as follows.

34. Ms Wilson first met Mr Taylor when he came to her offices in July 2002 for the purposes of having a will drafted. She stated that prior to the meeting she would have been in possession of a completed Trott & Duncan will questionnaire. I note from the coversheet that Mr Pearman had faxed the questionnaire to her offices on 23rd July 2002. It set out the proposed dispositions in the Will.

35. Mr Taylor was accompanied by a man whom Ms Wilson thought was his son. Mr Pearman stated that he and Ms Davis accompanied Mr Taylor. Ms Davis stated, and I accept, that she did not. As Mr Pearman had faxed the questionnaire and was named as an executor in the Will, however, I think that he probably was the man who accompanied Mr Taylor. However I am satisfied that nothing turns on this. Ms Wilson stated that the man remained downstairs while she took Mr Taylor upstairs to her office.

36. Once Mr Taylor was in her office, Ms Wilson took instructions from him regarding the will. She wanted to satisfy herself that he understood the purpose of his visit, especially as he was of more senior years. She asked him if he knew why he was seeing her and he said that he wanted to draft a will. There was a general conversation for a few minutes. Ms Wilson recalled that Mr Taylor was "*a charmer*" and "*a little fresh in a good way*".

37. Ms Wilson stated that, based on their conversation, she had no reason to doubt that Mr Taylor was *compos mentis*. She said that he had his wits about him. She asked him some general questions for her file note, such as his name and address, and then proceeded to take instructions from him as to the disposition of his assets. He sat at her desk and she talked as normal. There was no sign of any hearing impairment. She didn't think that he looked frail. She may have asked his birth date – he was 88 years old – but she couldn't remember. She was less concerned about age than mental impairment.

38. Ms Wilson was asked what she considered her obligations to be when assisting individuals to execute a will. She stated that first and foremost she would assess whether they were mentally capable of providing instructions. She would engage them in conversation and ask if they knew why they were with her. That is what she did in this and every other case. As people got older she was a little more chatty in her conversation with them so that she could be absolutely satisfied that they knew why they were there and that there was "*no duress, nothing*". If she had any doubts she would not take instructions.

39. Ms Wilson said that she would have given her assistant her notes and the questionnaire and given her instructions to type up the Will.

40. Several drafts of the Will were adduced in evidence as well as the executed copy. Ms Wilson stated that she had no knowledge of the drafts. I infer that they were most likely prepared by her assistant. One can see from the drafts how the final document evolved. They bear manuscript comments and amendments. One of the comments states: "*R.E.P. suggests that this clause should remain*". Those are Mr Pearman's initials. I infer from this that he provided input on the drafts. I flag this up now as Mr Woolridge, who appeared for Mrs Charles, submitted that it was significant. But Mr Pearman's involvement does not suggest that the Second Will was not duly executed.

41. Mr Taylor returned to the office at a later date to execute the Second Will. I conclude that this was on 31st July 2002 as that is the date given in the executed copy. Ms Wilson thought that the man who was with him previously accompanied him on this occasion, but wasn't sure. But she saw Mr Taylor alone in her office upstairs.

42. Ms Wilson stated that upon meeting with a testator to sign a will it was her usual practice to ascertain their mental competence in much the same way as she would when meeting with them to take instructions about preparing a will. She would ask them to recall their previous visit to see her, the reasons

for that visit, and explain why they were visiting her again. Having received satisfactory answers to those questions she would give the testator a copy of the will. She would read it aloud with them and ask them if they were satisfied with the content, whether they had any final changes, and whether it accurately reflected their wishes. She stated that she followed this procedure with Mr Taylor. Although her recollection of the subsequent meeting was not as clear as her recollection of the first meeting, I accept that she did.

43. I am therefore satisfied that the Second Will was duly executed.

Does the Second Will appear rational on its face?

44. Unlike the First Will, the Second Will does make provision for John Taylor. Like the First Will, it makes no provision for Mrs Charles or her children. Fubler Villa remains in the family, but, after Albert Taylor's death, not the immediate family.

45. Ms Wilson gave evidence that, when taking instructions from Mr Taylor, she asked whether he had any children, or a spouse, or any other relatives to whom he wanted to make bequests. She specifically recalled having ascertained who were his children and what were his assets. She said that she explained that there were certain provisions in law that would enable a child to make an application to the court if they felt that no reasonable provision was made for them.

46. Mr Taylor said that he was happy with his instructions as to how the property was to be disposed of as his daughter had already been taken care of in her lifetime with another property. Ms Wilson stated that she knew who his daughter was and was particularly alert to the point as she was involved in a litigation matter in which Mrs Charles was involved.

47. Mr Woolridge questioned Ms Wilson about clause 7 of the Second Will, which provided:

"*I make no provisions for my daughter INEZ ELAINE TUCKER TAYLOR as I provided for her during my life time.*"

48. Inez Elaine Tucker Taylor was not the name of Mrs Charles but of Mr Taylor's late wife. I note that the wife's name appears on the first page of the will questionnaire in the form "*INEZ ELAINE TAYLOR TUCKER*". The daughter's name appears in this form in an early draft of the Second Will. This has been corrected in manuscript and in subsequent typed drafts, including the executed copy, so that "*TAYLOR*" and "*TUCKER*" are inverted.

49. It is probable that the name of the mother was mistakenly transposed from the questionnaire into the Will as the name of the daughter, doubtless because both names include "*Elaine*". It is curious that the error was not picked up, particularly as the name was amended once it had been included in the Will. However, as Ms Wilson pointed out, it is clear from the wording of clause 7 that it was intended to refer to Mr Taylor's daughter.

50. As to Fubler Villa, in her statement of claim Mrs Charles alleged that Albert Taylor wold not have been capable of carrying out the responsibilities imposed on him under the Second Will and that, had he been of sound disposing mind, Mr Taylor would have appreciated this. It was not in my judgment irrational for Mr Taylor to take a different view. Indeed, when giving oral evidence, Mrs Charles stated that she had no problem with Albert having a life interest in the property.

51. It was not on the face of it irrational for Mr Taylor to leave a remainder interest in Fubler Villa to Mr Pearman's sons. Mr Pearman, who did not give oral evidence due to ill health, said in his witness statement that he was Mr Taylor's nephew by marriage. As he is an interested party I treat his account of his relationship with Mr Taylor with caution. Nevertheless, I accept that the two men had known each other for many years and that by the date of the Second Will the relationship between them was sufficiently close for Mr Taylor to name Mr Pearman as one of his executors.

52. As at the date of trial, Mrs Charles' statement of claim did not allege that Mr Pearman had exerted undue influence over her father. If it had done, I would have set considerable store by the fact that Ms Wilson, who struck me as an acute observer of human nature, was alert to that possibility but was satisfied that Mr Taylor was acting from his own free will and that there was "*no duress*".

53. As to the provision for the sale of Flamingo Walk, Ms Wilson said that she had told Mr Taylor that estate duty got paid first and that they had discussed how he wished those payments to be made. Mr Taylor had said that if they could not be borne by the estate then he wished one of his properties to be sold to cover outstanding costs.

54. In the Second Will, Mr Taylor gave all his tools and workshop materials to Mr Pearman. Mrs Charles stated in her affidavit that Mr Pearman had not acquired the plumbing skills to have any use for the tools and that in any event they were no longer in her father's possession. Mr Pearman stated in his witness statement that he used to work as a carpenter and that he and Mr Taylor used to assist one another in carrying out repairs and improvements to the various family properties. I have no reason to doubt this.

55. In the circumstances it was perfectly natural that Mr Taylor should wish to leave Mr Pearman his tools, perhaps as a tangible memento of the time that they had spent together. It is not clear to me on what basis Mrs Charles was able to assert that Mr Taylor no longer had any of his tools. The fact of the bequest is prima facie evidence that he did. Even if Mr Taylor were mistaken on this point, that would not render the Second Will, considered as a whole, on the face of it irrational.

56. In her Statement of Claim, Mrs Charles stated that Ms Davis had refused in the past to act as executor for Mr Taylor for reasons of ill health, her old age, her relationship with him, and her reluctance to become embroiled in a family matter. She stated that if Mr Taylor were of sound disposing mind he would have respected her wishes. But he did respect her wishes: Ms Davis

gave evidence that he asked her if she would be his executor and she agreed, provided that he appointed someone else to help her with this task. I conclude that her appointment was not irrational.

57. I am satisfied that in the circumstances the Second Will appears rational on its face.

Mrs Charles' case

58. As both Wills were properly executed and appear rational on their face, the Court will presume capacity. There is therefore an evidential burden upon Mrs Charles to raise a real doubt about capacity.

The terms of the Wills

59. Mrs Charles' case fell into two parts. First, she argued that the dispositions in the Wills were themselves proof that when Mr Taylor executed them he was not of sound disposing mind. For the reasons given above I have rejected that aspect of her case. I shall nevertheless briefly explore it further.

60. When giving oral evidence, Mrs Charles said that Mr Taylor had made it clear to her over a 60 year period that he wanted his property to remain within his "*direct bloodline*". She stated that the children grew up knowing that their father put a high value on property ownership and that he wanted to see his property remain with his children and grandchildren. She had expected his will to reflect this.

61. Indeed, Mrs Charles stated in re-examination that her only objection to the Second Will was that Mr Pearman's sons would inherit Fubler Villa after Albert died. She said that had they been excluded in favour of his direct bloodline she would never have challenged the Second Will.

62. I am sceptical on this point. Mrs Charles stated in oral evidence that she thought that she would get Channel View because it was in her mother's

estate from the beginning and was adjacent to El Boro, with which it shared a cesspit that was on the latter property. In her affidavit evidence she stated that in 1995 her father took it upon himself to approach an attorney to convey Fubler Villa to her. As she was undergoing a divorce at the time she had thought it best to advise the attorney to put the conveyance on hold until her divorce proceedings were completed. In her statement of Claim, Mrs Charles stated that her father had a relationship with her children, and that had he been of sound disposing mind he would have left them something. In oral evidence she stated that she and her father had a very strong attachment, although it was not one of loving tenderness.

63. Despite all this, Mr Taylor left Mrs Charles and her children nothing. I am satisfied that, for the reasons given earlier, his failure to do so was not, on the face of it, evidence of lack of testamentary capacity. I am also satisfied that Mrs Charles' disappointed expectations go a long way towards explaining why she has challenged the validity of both Wills.

Direct observations of Mr Taylor's behaviour

64. Second, Mrs Charles argued that lack of capacity at the relevant times could be inferred from direct observations of Mr Taylor's behaviour. Mrs Charles stated in affidavit evidence:

> "*One of the causes of the Deceased's death was dementia as stated on the death certificate … I believe that the Deceased was not of sound disposing mind when he made the Second Will. The death of John on 19 May 2003 had caused considerable anxiety to the Deceased and had a tremendous emotional impact on the Deceased. The Deceased's mental and physical health had been on the decline for the past five years, however; with the unexpected death of his eldest son there was a noticeable and rapid decline in his physical and mental state exacerbated by his almost daily consumption of alcohol.*"

65. The death of John may well have had a tremendous impact on the deceased. But as it did not take place until after both Wills were executed it is not relevant to his state of mind at the dates of their execution.

66. Mrs Charles gave oral evidence about Mr Taylor's state of mind prior to 1999. She noted that Mrs Taylor died on 6th June 1997 and spoke about the period 1995 – 1997, when his wife was in her last illness. She stated that he was depressed, and had been described anti-depressants by his general practitioner, Dr McPhee. She said that he had a lot of guilt about his marriage, and that this contributed to him mixing alcohol with the prescribed medication. She added that he would go into a stupor, and that when he was up and about he was groggy. She said that he paid no attention to his personal hygiene, and that she found this alarming as her father had always prided himself on being a fastidious, well-dressed man.

67. Mrs Charles was asked in cross-examination why, if she was so concerned about her father's condition, she had not confronted Dr McPhee or taken her father to see another doctor. She stated that with hindsight she wished that she had been more proactive with Dr McPhee, but that she did not want to offend him. Moreover, she said that her father was not suffering from any organic disease – it was just the effects of old age, depression and medication – and that he did not present any other symptomology or pathology.

68. Mrs Charles' case, as neatly summarised by Mr Woolridge, was that during 1999 through 2002 Mr Taylor exhibited social graces but lacked mental capacity. Thus his lack of mental capacity would not necessarily have been apparent to all those interacting with him.

69. When considering whether Mrs Charles has raised a real doubt as to capacity it is helpful to consider the other evidence on this point that was placed before the Court.

Defendants' evidence as to mental capacity

Lay evidence

70. The Defendants adduced evidence from several witnesses who knew Mr Taylor personally.

71. Ms Davis, who was a former nurse, gave evidence that she had known Mr Taylor very well since the late 1940s or early 1950s. Asked about his state of mind in 1999 she said that he seemed to know what he wanted to do and proceeded to do it. She said that in 2002 his state of mind was still good. She said that she didn't have any concerns about his mental condition, although she noted that his hearing was not good and that sometimes things had to be repeated.

72. Mr Pearman, in his witness statement, and his wife, Shirley Pearman, who gave oral evidence, both stated that in 2002 Mr Taylor appeared to them to be in full possession of his faculties. I bear in mind, of course, that their children stood to benefit under the Second Will. Moreover, I inferred from the demeanour of Mrs Pearman and her tone of voice that she was not well disposed towards Mrs Charles.

73. Dr James gave written evidence in which he disputed Mrs Charles' written evidence that Mr Taylor routinely exhibited signs of mental confusion prior to and at the time of executing the First Will. Dr James accepted that Mr Taylor drank heavily, but said that was all. He stated, and I accept, that had he had any inkling that Mr Taylor was mentally confused or otherwise not competent to execute his Will he would have declined to accept appointment as his executor.

74. However Dr James did give evidence of an occasion subsequent to the making of the First Will on which he accompanied Mr Taylor to Mr Smith's offices, which I shall deal with below. He stated that it was at about this time that Mr Taylor would more often ramble on incoherently for periods of time. He stated that the rambling was a frequent feature of Mr Taylor's

behaviour, but that it got worse at about this time and continued to get worse as time went on.

75. Mr James stated that in the years following 2000 Mr Taylor became more and more erratic in his behaviour. As time progressed, Mr James stated that he became increasingly apprehensive about being alone with Mr Taylor, who would become abusive and confused more often. The more confused Mr Taylor became the more abusive he would become. Dr James' impression was that Mr Taylor's heavy drinking contributed to his confusion. Mr James stated that he could not say precisely when Mr Taylor went from being mentally competent to make life choices to being incompetent to do so, but that it was certainly prior to June 2003.

76. Whereas it was helpful to hear from people who knew Mr Taylor, I am alive to the possibility that their recollections and understanding may have been shaped in part by their personal interests and allegiances. The same, of course, applies to the evidence of Mrs Charles. In view of Dr James' distinguished record of public service and the fact that he was qualified as a medical practitioner, however, I attach greater weight to his observations, although I bear in mind that he was not cross-examined upon them.

Evidence of legal professionals

77. The evidence of the attorneys who witnessed the execution of the Wills is set out above. However there was one curious sequel to the execution of the First Will. Mr Smith gave evidence that Mr Taylor attended his office in or after September 1999. He wanted to change his Will, and had marked up a copy showing the changes that he wished to make. Mr Smith stated that Mr Taylor was talking to him but after a while was not making any sense. The more Mr Smith tried to understand what Mr Taylor was saying to him the more frustrated and abusive Mr Taylor became. Eventually the conference ended because Mr Smith couldn't understand what Mr Taylor was saying to

him and Mr Taylor's attitude towards him was clearly hostile. Dr James, who was also present, corroborated that account of the meeting.

78. A similar incident took place at the offices of the attorney Lynda Milligan-Whyte in or about May 2003. She gave evidence that at some point in 2002 prior to October Mr Taylor had attended at her offices with his son John about an unrelated matter. As instructed, she had prepared a power of attorney of Mr Taylor in favour of John and a third party businessman. This was so that Mr Taylor could pursue a business venture with the businessman. Mr Taylor had appeared lucid to her and there was nothing in the demeanour of either of them which gave her any cause for concern. Mr Taylor had left some deeds with her.

79. In May 2003, Mr Taylor returned to Ms Milligan-Whyte's offices with Mrs Charles and demanded the return of the deeds. Ms Milligan-Whyte duly returned them. Mr Taylor was quite agitated, to the point where Ms Milligan-Whyte called her legal consultant Arthur Hodgson and asked him for his suggestion as to how best to deal with the situation. Mr Hodgson suggested that she call the police. That of course was subsequent to the execution of the Second Will.

Evidence of medical professionals

80. I heard evidence from Dr McPhee, who was Mr Taylor's physician from February 1991 until January 2005. Over the period 1999 to 2002 he used to see Mr Taylor on average once every few months or so. Dr McPhee stated that based on his relationship with Mr Taylor and Mr Taylor's medical history, Mr Taylor did not during the time that Dr McPhee treated him have any mental impairment.

81. In October 1999 Dr McPhee diagnosed Mr Taylor as having depression. He stated that Mr Taylor was entirely lucid during the visit and that, according to his notes, there was no sign of dementia. He prescribed Mr Taylor with anti-depressants. He stated that he did not know the medication in question,

which was marketed under the names Lustral and Zoloft, to have any negative effect on the cognitive functions of patients taking it, although he acknowledged that if mixed with alcohol it may increase drowsiness. Dr McPhee, who did not have the benefit of Dr James' knowledge of Mr Taylor's drinking habits, stated that according to his notes of Mr Taylors's medical history his alcohol consumption was not excessive.

82. On 21st February 2000 Dr McPhee had one of a number of follow up appointments with Mr Taylor. He made a note that Mr Taylor was "*cerebrating more slowly*", meaning that his responsiveness was slower, and followed this note with a comment, "*a bit hard of hearing*". Dr McPhee stated that he attributed Mr Taylor's slower responsiveness to his decline in hearing ability, not to any concerns or observations of dementia or decreased mental capacity.

83. Dr McPhee's notes recorded that on 24th January 2002 he received a call from Dr James to make an appointment for Mr Taylor. The appointment was scheduled and he saw Mr Taylor on 31st January 2002. The top of his note read: *"(Call from Dr CE James – re patients behaviour – attributed to 'Dementia')*". His note then read "*Office Visit*" and under that "*In conversation – quite lucid – no evidence of dementia*". The note reflected the fact that Dr McPhee, in his conversation with Mr Taylor on that occasion, found no evidence of dementia and held no such concerns.

84. This was the first time that Dr McPhee had heard anyone express a concern as to Mr Taylor's mental capacity. During the consultation he spoke with Mr Taylor alone and engaged in what he described as "*relevant and appropriate*" general conversation about how he was feeling. As a result of the conversation he thought it unnecessary to conduct a Mini-Mental State Examination ("MMSE") and did not do so.

85. Dr McPhee noted that Mr Taylor had been off his anti-depressant medication and determined that there was no need for him to continue with it. In his opinion, Mr Taylor was in good health, and he had no concerns about his

mental capacity or previous depression. Dr Mc Phee did not see Mr Taylor again until May 2003, when he noted that Mr Taylor was experiencing: "*Deafness – but ok if talking directly looking at him*".

86. When cross-examined, Dr McPhee accepted that the onset of dementia has the appearance of depression at times, and that it was possible that Mr Taylor had been suffering from dementia in 2002 although this had not appeared from his examination of Mr Taylor. Dr McPhee also accepted that as Dr James knew Mr Taylor better than he did, Dr James might have observed something in Mr Taylor that Dr McPhee did not have the opportunity to observe. However, Dr McPhee stated that he had not heard anything in court which caused him to doubt Mr Taylor's mental capacity at any relevant time.

87. Mr Taylor's medical records included a discharge summary from King Edward VII Memorial Hospital on 19th September 2006. The summary stated "*He does have a history of Alzheimer's disease*", although the basis for that statement is not clear. The summary noted that Mr Taylor was "*Awake and confused. Speech irrational.*" He had to be restrained in hospital and given medication because of disorientation and inappropriate behaviour. This was the first time that Mr Taylor's medical records state that he was suffering from Alzheimer's disease.

88. I heard from just one expert witness, Dr Kenneth Shulman, who is a Professor in the Department of Psychiatry at Sunnybrook Health Sciences Centre in Toronto, where he holds the Richard Lewar Chair in Geriatric Psychiatry.

89. Professor Shulman stated that the material provided to him, which included all the witness statements and affidavit evidence before the Court and Mr Taylor's medical records, gave him an opportunity to form a reasonable opinion as to the clinical status of Mr Taylor in 1999 and 2002 when the Wills were executed. Based on his review, his clinical opinion was that in

1999 and 2002 Mr Taylor appeared to be grossly cognitively intact and probably met the test for cognitive capacity.

90. In Professor Shulman's opinion Mr Taylor did develop a dementia, by which he meant a brain syndrome where there is a deterioration of cognitive functioning involving a loss of ability to function independently, in or after 2003. But in his opinion there was no material to suggest that dementia was present to any significant degree in 1999 or 2002.

91. When cross-examined, Professor Shulman raised the September 1999 incident when Mr Taylor attended the offices of Mr Smith. He stated that it was the only incident in 1999 or 2002 where he saw anything of significant concern about Mr Taylor's mental state. However it appeared to be an isolated incident and was consistent with alcohol consumption – although he accepted that neither Dr James not Mr Smith mentioned the smell of liquor. It was not consistent with the level of depression mentioned in Dr McPhee's notes.

92. Professor Shulman stated that the incident left him somewhat perplexed. But he noted that it was subsequent to the execution of the First Will and not close in time to the execution of the Second Will. Hence he adopted the maxim "*einmal ist keinmal*" ("*one time is no time*"). Ie an isolated incident that is not replicated does not carry the same significance as an incident repeated over a period of time.

93. Professor Shulman further stated that he had looked very carefully for evidence of dementia or other cognitive impairment before 2003. The evidence of Dr McPhee and Ms Wilson led him to form the clinical opinion that if there was any pre-2003 cognitive impairment it was mild.

94. Professor Shulman added that he was not in complete agreement with Dr McPhee's decision not to do a MMSE. However he stated that a MMSE was not a substitute for a capacity assessment and would not have enlightened as to the question of capacity. It might have shown an inconsistency between Mr Taylor's actual mental state and his apparent

mental state as exhibited through his behaviour. But it would at most have put the physician on inquiry to do more tests.

95. Professor Shulman was cross-examined about the inconsistency between Dr McPhee's evidence as to Mr Taylor's capacity on the one hand and the observations of Dr James and Mrs Charles on the other. He expressed caution about the weight he could attach to Mrs Charles' evidence, as it was unsupported by medical records or any independently verified incidents other than the one incident at Mr Smith's offices. He stated that Dr James and Mrs Charles might have been picking up early signs of cognitive change – although that was speculation – but the probing that was done by Dr McPhee did not pick up any cognitive impairment. Notwithstanding the absence of a MMSE, he was satisfied that Dr McPhee's testimony provided some evidence of critical appraisal.

96. Professor Shulman impressed me as the very model of an expert witness: fair-minded, even-handed, and with no axe to grind. When Mr Woolridge, in his skilful cross-examination, made a good point, Professor Shulman would acknowledge it as such. I attach considerable weight to his evidence.

Conclusion

97. I must focus on Mr Taylor's mental capacity as of the date on which each Will was executed. He may well have been undergoing mental changes over the period 1999 through 2002 which culminated in his eventual dementia, sometime in or after 2003. The death of his son John, which took place after the Second Will was executed, may well have played some part in his mental decline. But I am satisfied from the evidence of Mr Smith and Ms Wilson that Mr Taylor was of sound disposing mind when each Will was drawn up and executed.

98. In making that finding, I attach weight to the absence of any medical evidence of lack of capacity prior to the execution of either Will. The incident at Mr Smith's offices was an isolated one. Dr James' concerns that

Mr Taylor was exhibiting signs of dementia were not borne out by the evidence of Mr Taylor's physician, Dr McPhee. I place reliance on the expert opinion of Professor Shulman. Mrs Charles did not call any expert witness to express a contrary view. Whereas I also take into account the evidence of the various people who knew Mr Taylor personally, for the reasons which I gave earlier I must treat this category of evidence with a degree of caution.

99. In conclusion, Mrs Charles has failed to raise any real doubt about Mr Taylor's mental capacity on the date of execution of either Will. Even if she had done so, the Defendants have satisfied me that Mr Taylor was of sound disposing mind when both Wills were executed.

100. I shall hear the parties as to costs.

DATED this 24th day of April, 2014

_____

Hellman J