In The Supreme Court of Bermuda

PROBATE JURISDICTION

2013: No 362

IN THE MATTER OF THE ESTATE OF DR PAUL ALEXANDER DE LA CHEVOTIERE (DECEASED)

BETWEEN:-

(1) GWENDOLYN CREARY
(2) DUANE DE LA CHEVOTIERE

Plaintiffs

-and-

MARVLYN PAULA DE LA CHEVOTIERE

Defendant

JUDGMENT

(In Court)

Date of hearing: 19th and 20th May 2014
Date of judgment: 15th July 2014

Mr Jai Pachai, Wakefield Quin, for the First and Second Plaintiffs
Ms Lauren Sadler-Best, Trott & Duncan, for the Defendant

Introduction

1. Dr Paul De La Chevotiere ("the Testator") died on 7th February 2012. By a will dated 14th May 2004 he appointed the Defendant, his daughter Marvlyn De La Chevotiere ("Marvlyn"), to be the executor and trustee of his estate. By paragraph 5 of his will he left his estate to Marvlyn and another daughter, Adora De La Chevotiere ("Adora"), in equal shares. Adora has played no part in these proceedings. Marvlyn and Adora are the Testator's eldest children.

2. The Testator did not leave anything in his will to his daughter Gwendolyn Creary ("Gwendolyn") or his son Duane De La Chevotiere ("Duane"). They are the Testator's middle children, and their mother was his first wife. They are also the Plaintiffs. Neither did the Testator leave anything to a further daughter, Alesha. She is his youngest child and her mother was his second wife.

3. By a writ dated 3rd October 2013 the Plaintiffs seek a revocation of the grant of probate; a decree pronouncing against the validity of the will; and a grant to the Plaintiffs of letters of administration of the Testator's estate. They allege that when he made the will the Testator lacked testamentary capacity.

4. If the will is revoked then the Testator will have died intestate. In that case, under the Succession Act 1974, his estate will be divided equally among all five of his children.

The law

5. The relevant law was considered recently by this Court in Re Taylor; Charles v Pearman & Ors [2014] Bda LR 44 at paras 11 – 17. The applicable principles are as follows.

6. 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 his will, the Testator satisfied that requirement.

7. "*Sound disposing mind*" means that the 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. See Jeffrey v Jeffrey [2013] EWHC 1942 Ch *per* Vos J at para 210.

8. As to the nature of the claims of others upon the testator, it has been said that the court must be satisfied that no insane delusion is influencing him to dispose of his property in a way that he would not have done had his mind been sound. See the leading case of Banks v Goodfellow (1870) LR 5 QB 549, *per* Cockburn CJ at 565.

9. Thus, where a testator suffers from delusions, the court must be satisfied that they did not or were not likely to have an influence on the disposal of his property. This is because the rationale for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will. See Banks v Goodfellow, *per* Cockburn CJ at 561 and 566.

10. The court must also be satisfied that the testator's mind is not too enfeebled to comprehend more than one potential object of his largesse, especially when that one object has been so forced upon his attention as to shut out all others that might require consideration. See Harwood v Baker (1840) 3 Moo PC 282, *per* Erskine J at 290.

11. However a testator is free to dispose of his property as he sees fit, even if the terms of the will are hurtful, ungrateful, or unfair to those whose legitimate expectations of testamentary capacity are disappointed. See Hawes v Burgess [2013] EWCA Civ 74, *per* Mummery LJ at para 14.

12. Provided that the testator has the requisite understanding, he need not possess the faculties of mind and memory in as great a degree as he may have formally done. See Den v Vancleve 2 Southard at 660, to which I was referred in argument, cited with approval by Cockburn CJ in Banks v Goodfellow at 567.

13. The burden is on the propounder of the will to establish capacity. See Ledger v Wootton [2007] EWHC 2599 (Ch), *per* HH Judge Norris (as he then was) at para 5. Thus, where the testator suffers from delusions, the burden is on the propounder to show that they could not reasonably be supposed to affect the disposition of his property. See Smee v Smee (1879) 5 PD 84 at 91, *per* Sir James Hannen at 91.

14. However, where the will is duly executed and appears rational on its face, capacity will be presumed. An evidential burden then lies on the objector to raise a real doubt about capacity. Once a real doubt has been raised, the burden shifts back to the propounder to establish capacity. See Ledger v Wootton *ibid*.

15. It has been said that where a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor, it will be markedly more difficult to challenge its validity on the ground of lack of mental capacity than in a case where those prudent procedures have not been followed. See Hawes v Burgess, *per* Mummery LJ at para 13.

16. On the other hand, I was referred to a passage from Key v Key [2010] 1 WLR 20 Ch, *per* Briggs J at paras 7 and 8 dealing with what is known as the Golden Rule:

> 7 The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings: see Kenward v Adams, The Times, 28 November 1975 ; In re Simpson, decd (1977) 121

> SJ 224 , in both cases *per* Templeman J, and subsequently approved in Buckenham v Dickinson [2000] WTLR 1083 , Hoff v Atherton [2005] WTLR 99 , Cattermole v Prisk [2006] 1 FLR 693 and in Scammell v Farmer [2008] WTLR 1261 , paras 117–123.
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> 8 Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided.

Dementia

17. The Plaintiffs allege that when the Testator ostensibly made the will he lacked a sound disposing mind by reason of dementia. Although I heard no expert evidence on dementia, both parties referred me to a passage at para 13-09 of the eighteenth edition of Williams, Mortimer and Sunnucks on Executors, Administrators and Probate which I have found helpful. Although it was not the most recent edition of the textbook, which is now in its twentieth edition,[1] I accept the invitation of both parties that I should proceed on the basis that the passage remains accurate.

> Dementia is by far the most common cause of probate actions. It is predominantly a condition of older people. Cases below 60 are uncommon, and below 50 very rare, unless caused by brain damage from head injury … Dementia is a syndrome, not a specific disease, that is to say a group of clinical manifestations detectable by clinical examination

[1] The eighteenth edition was published in 2000 and the twentieth in January 2013. A twenty first edition is due to be published in December 2014.

in life, or inferred after death from clinical descriptions in medical case-notes, or even from descriptions by non-medical persons. In summary, dementia is a global impairment of higher cerebral function in clear consciousness.

. . . . .

Disorder of memory is the most common and frequently the first manifestation of dementia. However, without other clinical features, it is insufficient to permit a diagnosis of dementia. Furthermore, memory impairment is a complex phenomenon of which there are different types and gradations. For example, such impairment may be confined only to memory for recent events or the encoding of new information (episodic memory). In more advanced cases, retrieval of episodic memories from long term store may be affected, whereas semantic memory (memories which confer meaning) may remain intact. The significance of this is twofold: first, that memory impairment of itself may not necessarily result in loss of testamentary capacity; secondly, different types of memory disorder may affect different criteria for testamentary capacity. For example, a woman in her eighties with moderate dementia and episodic memory impairment might still be perfectly able to understand what a will is, to have sufficient overall grasp of the extent of her estate, and not to experience any problems in knowing and appreciating the subtleties of all the relative claims on her bounty.

. . . . .

Frontal lobe damage which occurs in many types of dementia, including Alzheimer's disease, impairs reasoned judgment, emotional control and social inhibition, and often results in an alteration of personality. This may reduce testamentary capacity by affecting a proper appreciation of those who might have a claim on the estate …

. . . . .

Sometimes, until quite late in the disease, many aspects of personality, and in particular the ability to display social graces are preserved. Doctors refer to this as "a good social façade". Essentially it is a manifestation of the longer retention of what cognitive psychologists term "over-learned material", than those more recently acquired, less frequently rehearsed, which disappear earlier in the disease. Demented

> persons with a good social façade may give every appearance of being capable of making a will although, in fact, they lack the necessary capacity.
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> Non-cognitive deficits commonly found in dementia include delusions (false beliefs) and hallucinations (false perceptions). … However, delusions in dementia are usually more evanescent or temporary than in schizophrenia and may, therefore, be of less importance. For example, a man with mild to moderate dementia may generally have testamentary capacity but on one day he believes, falsely, that his children have conspired to defraud him and he wishes to disinherit them. The next day the delusions have disappeared and he has regained the capacity to make a will.

18. The Plaintiffs allege that the Testator, while making his will, was able to conceal his alleged dementia from his attorney by displaying a good social façade.

Was the will duly executed and does it appear rational on its face?

19. In 2004 the Testator instructed Perry Trott, a director and attorney at what is now Trott & Duncan Limited ("Trott & Duncan"), to draw up his will. The two men had a professional relationship dating back to 1990, when the Testator had instructed Mr Trott's law firm on proceedings in the Court of Appeal, and were on friendly terms. The Testator subsequently consulted Mr Trott on a number of matters, and when he did so, they used to have discussions about a variety of topics, including politics and family.

20. Mr Trott opened a file on the Testator's will when the Testator came to see him at his office about estate planning in February 2003. Mr Trott completed a will questionnaire based on the Testator's instructions in the Testator's presence. In the questionnaire the Testator: (i) stated that he wished to leave his home at 22 Kilderry Lane in Smith's Parish to Marvlyn and (ii) expressed interest in a power of attorney. He left the questionnaire

at the office, but took the matter no further at the time. When giving details of his family the Testator omitted to mention Adora or his second wife.

21. In the latter part of April 2004 the Testator made an appointment to see Mr Trott. They met later that month. Mr Trott – who had only been asked to give evidence shortly before the trial – stated that he would probably have prepared a file note about the meeting but that the file was in storage. However he stated that he remembered the meeting very clearly.

22. Mr Trott stated that the Testator was decently dressed in a sleeveless shirt. He was not dishevelled or unkempt and there were no issues with his personal hygiene. There was, in short, nothing out of the ordinary about his appearance.

23. Mr Trott stated that when taking instructions from an elderly testator, he would generally ask them a series of questions, eg their understanding of where they were, things happening around them, and their reasons for seeking advice and assistance. If they were known to him he would discuss events which he knew that they would be aware of. He would try to keep a conversation going for a good twenty minutes or so. That is what he did in this case. He discussed a range of matters with the Testator, eg politics and fishing, although he tried to steer the conversation away from the Testator's family. Mr Trott stated that, based on those discussions, he had no reservations whatsoever about taking instructions from the Testator.

24. The Testator gave instructions that he wanted to leave his estate to Marvlyn and Adora and to appoint Marvlyn as his executor. Mr Trott asked him about his other three children. He was adamant that none of them should benefit from his estate.

25. Mr Trott explained that the Testator had a difficult relationship with Gwendolyn. In 1988 the Testator's first wife died and Gwendolyn alleged that he was complicit in her death. In 1989 the Testator was prosecuted on counts of incest and indecent assault where she was the complainant. The trial ended with a hung jury. The Crown sought a retrial but the court

quashed the indictment. In 1991 the Court of Appeal held that it had no jurisdiction to hear an appeal by the Crown. That decision brought the prosecution to an end. However the trial greatly impacted the Testator's financial and social life.

26. Gwendolyn confirmed when she gave evidence that she held the Testator responsible for her mother's death; that she had made allegations that he had abused her; and that she had made these views clear to him.

27. I should make clear that I am not concerned with the truth or falsity of the allegations made by Gwendolyn, about which I am not in any case in a position to form a view. Their relevance is that they go to the relationship between the Testator and Gwendolyn and hence to whether his decision not to leave anything to her in his will was on the face of it rational.

28. It was during the preparation of the criminal appeal that Mr Trott first met the Testator. Over the years, the Testator – who was a former member of the Legislative Assembly – expressed to Mr Trott his bitterness about the public humiliation of the trial and the things that Gwendolyn had said about him on the witness stand.

29. At the meeting in April 2004 the Testator showed Mr Trott a letter from Gwendolyn dated 11th May 2001 in which she had invited him to make restitution for the wrongs which he had allegedly done to her by signing over money and real property to her brother and her. The tone of the letter was very bitter. After handing a copy of the letter to Mr Trott, the testator said of Gwendolyn, "*I say no more*".

30. Mr Trott stated in his oral evidence that so far as he was aware, by the time of the meeting the Testator was no longer in communication with Gwendolyn.

31. Mr Trott stated in his oral evidence that, so far as he was aware, the Testator was still in communication with Duane up until 1996. Mr Trott stated that the Testator said in the meeting that he thought that Duane was unduly

influenced by Gwendolyn and that that was why he did not want to include Duane in his will. In his affidavit, Mr Trott tied these two ideas – adverse influence and break-down of communication – together:

> [The Testator] had long been estranged from [Gwendolyn] and he expressed the view that she had been exercising significant influence on her brother Duane who (likely as a result of this) also became estranged from his father.

32. However, Mr Trott stated in his affidavit that by the time of this meeting the Testator had informed him that both Plaintiffs had been making frequent attempts to contact him. The Testator expressed distrust of these overtures, which he considered a campaign of harassment to pry into his affairs which were in his view most likely motivated by the hope of financial gain.

33. The Testator wanted to omit Alesha from his will because he discovered that she was withdrawing funds from his bank account without authorisation. He said to Mr Trott that the very ones he thought he could trust, he could not trust.

34. Mr Trott said to The Testator "*You've got these children – you need to do right by them*", but the Testator was adamant that he wished to exclude them. In his view the Plaintiffs had abandoned him and treated him badly. He said that they were "*dead*" to him. Moreover, the Testator explained, he had made plenty of provision for the Plaintiffs during his lifetime as he had paid for their education and their comfort, including the home in which they had lived overseas.

35. Mr Trott asked the Testator why he wished to leave all his assets to Marvlyn and Adora. He replied that Marvlyn was based in Bermuda and was there for him by his side and was someone he could trust. The Testator stated that he felt that he had not done enough for Marvlyn and Adora during his lifetime – they had not grown up as part of his family – and that this was his opportunity to right that wrong.

36. Mr Trott stated that although he had had no doubt about the Testator's mental state, he had suggested that given his age he should seek an assessment from his doctor. However the Testator thought that this was unnecessary, and, bearing in mind that the Testator was himself a practising medical doctor, Mr Trott did not press the issue.

37. In summary, Mr Trott stated that during the meeting the Testator was able to answer the questions put to him clearly and rationally and to communicate clearly his wishes for the distribution of his assets and his reasons for excluding the Plaintiffs. There was no indication of mental incapacity. Mr Trott added that if he had had any doubt whatsoever about the Testator's mental capacity he would not have taken instructions from him unless provided with assurances as to his mental capacity from his doctor.

38. The will was executed at Mr Trott's offices on 14th May 2004. He stated that as at previous meetings there was a general discussion about how the Testator had been since their last meeting and about mutual acquaintances. The Testator answered the questions put to him clearly and rationally, and his conversation was consistently reasonable.

39. Mr Trott said that he gave the Testator a copy of the will to read and also read it aloud to him. Mr Trott asked the Testator if he was satisfied that the contents were consistent with his instructions and wishes. The Testator said that they were. Nothing in the Testator's behaviour gave Mr Trott any cause for concern as to his mental capacity. Once the two of them had gone over the will to the Testator's satisfaction, Mr Trott called in two members of staff to witness the Testator sign the will. Having done so, the staff signed as attesting witnesses.

40. In the circumstances, I am satisfied that the will was duly executed and appears rational on its face. This is sufficient to raise a presumption that the Testator was of sound disposing mind when executing the will. It is for the Plaintiffs to raise a real doubt about his capacity.

Have the Plaintiffs raised a real doubt about the Testator's mental capacity?

41. The core of the Plaintiffs' case is the evidence of Dr Femi Bada. He is a medical doctor in general practice. Dr Bada saw the Testator for a consultation on 7th October 2003. This was arranged by a friend and former patient of the Testator, Macquita Thorne, who was concerned at a deterioration in his mental and physical well-being which she had noticed when she saw him in September. She has no known connection with the Plaintiffs.

42. Dr Bada carried out a full physical examination from which he concluded that the Testator was showing early signs of dementia. He showed signs of gross self-neglect. He was showing some cognitive loss. Eg he was driving an unlicensed car, but was unable to engage with the question of his car being licensed. At times he did not understand who his children were, although there were periods of lucidity when he did. He was also suffering from memory loss, being able to remember the distant past, but not the very recent past – yesterday or that morning. Dr Bada stated that the Testator couched his answers in jocularity.

43. Dr Bada reviewed the results with the Testator "*with difficulty*" on 20th November 2003, and found him probably a little worse than previously. This was probably during the course of a home visit. He stated that the Testator was more confused and was forgetful of recent events, and that he spent the whole consultation talking about his childhood.

44. Dr Bada carried out a home visit in December 2003, which confirmed his opinion that the Testator hadn't been looking after himself or his surroundings.

45. Dr Bada arranged a CAT-scan of the Testator's brain. The CAT-scan was normal. He also referred the Testator to a consultant neurologist, Dr Didier Cros. Ms Thorne brought the Testator to see Dr Cros on 24th January 2004.

Dr Cros had known the Testator for many years. In a report to Dr Bada dated 9th February 2004 he noted:

> Paul has been living by himself for several years and his ability to care for himself seems to have deteriorated. He has obviously sustained marked weight loss, although he denies any loss of appetite. He used to be a sharp dresser, but appeared quite unkempt during this visit.
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> He acknowledged forgetfulness of late. On a limited examination of his cognitive function, it was quite obvious that his recent memory was severely altered, that he was unable to perform simple calculations, all of this being hidden behind the screen of jocularity.
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> A formal neurological examination revealed no abnormalities of his cranial nerves and no long tract signs.
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> From a medical and work standpoint I suggest a formal neuropsychological testing, which is indispensable to make decisions that will shortly be prompted by safety considerations. … He should also undergo an MRI of his head without contrast.
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> I am most concerned by the fact that he lives alone … clearly this is not in keeping with his present cognitive state and should not continue.

46. As a result of Dr Cros' report, on 6th February 2004 Dr Bada telephoned Dr John Cann, the Chief Medical Officer, who arranged for district nurses to visit the Testator on a regular basis to monitor his blood pressure.

47. On 13th February 2004 the Testator was rushed by ambulance to the ER department at the King Edward VII Memorial Hospital. His blood pressure was very high, but he refused admission to stabilise it and was discharged home, where he continued to receive visits from the district nurse. He was diagnosed at the hospital as having Alzheimer's disease.

48. Dr Bada contacted Gwendolyn and met the Plaintiffs on 7th May 2004. He sought their help in providing more care for the Testator. He also advised them to make an appointment to see Dr Cros.

49. The Plaintiffs saw Dr Cros the next day in the company of the Testator and the following day in his absence. Dr Cros stated:

> From these meetings it appears that … [the Testator's] dementia is worsening which in my opinion requires decisions to ensure his safety and that of others. Specifically, I believe that it is now unsafe for him to live alone.

50. He saw the Testator together with the Plaintiffs on 8th May 2004, and saw the Plaintiffs in the absence of the Testator the following day.

51. Dr Bada stated that he continued to provide medical care to the Testator until October 2004. He decided to stop doing so as he was concerned about threats made by the Testator of physical harm towards him. The Testator was accusing him of colluding with the Plaintiffs to try and wrest his property from him, and had warned that he would inflict severe injury with a machete should either the Plaintiffs or Dr Bada show up to visit.

52. I also heard evidence from both Plaintiffs. Gwendolyn stated that to the best of her recollection she had seen the Testator twice in 2003: once for a Sunday meal and once when she visited him at his home with her children. The visit did not go well: she asked him what he knew about her mother's death and he responded in what she described as a very threatening manner.

53. Duane gave evidence that – unlike Gwendolyn – he was never estranged from the Testator, although he was not always in touch as much as formerly, which I take to mean prior to the criminal proceedings. However he had visited Bermuda on a number of occasions with friends to stay at his father's house on vacations. He had stayed with him most recently in 2002. Duane said that during the Testator's divorce from his second wife in 1998 his father was very much seeking his ear.

54. Duane produced two letters to him written by the Testator. The first, date stamped "*March 13 2000*", was a short letter in which the Testator was expressing concern at some of the things that were happening in his, ie the Testator's, life. The second, dated 20th November 2001, was a request that

Duane help arrange a withdrawal or transfer of monies in a bank account, apparently pursuant to the ancillary relief proceedings in the Testator's divorce. The Testator also mentioned that Alesha had called, that they had had "*a nice chat*", and that he had sent her a four page letter. The tone of both letters was cordial.

55. Duane said that during 2003 most of his contact with the Testator was by telephone. He noticed that his father would have difficulty following the conversation. This was noticeable towards the end of 2003. The Testator would interject seemingly random statements. At the time Duane attributed this to the Testator's continuing issues with his former wife and their daughter, Alesha. He stated that the Testator expressed strong negative attitudes about them both. There were also times when the Testator seemed not to know who his son was, but then he would recover.

56. Gwendolyn saw the Testator more often in 2004 than in 2003, but not very often. Duane said that in 2004 his telephone conversations with the Testator became more difficult.

57. In May 2004, at Gwendolyn's invitation, Duane visited Bermuda for two weeks so that they could see Dr Bada about the Testator. So far as Gwendolyn was aware, it was a coincidence that this two week period coincided with the execution of the will and the Testator did not mention to her that he was shortly going to make a will.

58. During those two weeks, Duane spent time with the Testator. He stated in his affidavit that the Testator was aware of whom he was, but that upon Duane's return to Canada the Testator would demonstrate confusion on this point during telephone calls. When giving oral evidence Duane said that the Testator appeared confused during the visit and that he would show signs of greater understanding, but not for long. He said that in his presence the Testator would seem to know who Duane was, but that later, he wouldn't know who he was. Gwendolyn stated that during Duane's visit to the island the Testator was sometimes able to recognise the Plaintiffs but not always.

59. The Plaintiffs gave evidence that they met Dr Bada with the Testator. Dr Bada did not mention that when he met the Plaintiffs it was in the company of the Testator, but nothing turns on that. Gwendolyn said that she was not convinced that the Testator understood where they were going when they took him to see Dr Bada, but she thought that he probably recognised Dr Bada when they got there. Duane said that the Testator had appeared to recognise both Dr Bada and Dr Cros.

60. Duane confirmed that the Plaintiffs had met Dr Cros twice: once in the company of the Testator and once on their own. He said that on the latter occasion Dr Cros had advised that the Testator should be taken to Boston for some follow up tests, and offered to help with making arrangements. Duane said that he spoke to the Testator about this, but that his father was opposed to the idea, so the tests were never carried out. He said that the Testator was very focused on wanting to remain in the house. He tried to explain to the Testator that the Plaintiffs were interested in finding out about his long term care and that they weren't trying to move him, but the Testator did not appear to accept this.

61. During the two week period the Plaintiffs met Mr Trott to ask about their father's affairs. Mr Trott said that they wanted to know what provision the Testator had made for his estate. As these matters were confidential to his client, Mr Trott was unable to discuss them. The Plaintiffs told Mr Trott about their visit to Dr Bada and expressed concern as to their father's mental state. Mr Trott said that he was surprised to hear that because the Testator had appeared rational to him.

62. There is a dispute as to when the meeting took place. Mr Trott states that it took place after 14th May 2004 when the will was signed. That would be consistent with his evidence that when the will was executed he had no reason to be concerned about the Testator's mental capacity.

63. The Plaintiffs state that the meeting took place before 14th May 2004. Gwendolyn produced a copy of an entry in her diary showing that it was

scheduled for 11 am on 6th May 2004. The entry is *prima facie* evidence that the meeting took place on that date but is not conclusive. Eg, it could have been made in error or the meeting could have been rescheduled. Duane contradicted the entry by stating in his affidavit that they visited Dr Bada on 7th May 2004, and met Mr Trott afterwards. In his oral evidence he said that the meeting took place on around 6th May 2004, but that he called to make the appointment for the meeting after visiting Dr Cros.

64. Subsequently, Duane took the Testator to a meeting with Mr Trott. There is a dispute about the date of this meeting also. Mr Trott said that it took place after the will was executed. Indeed in his affidavit he stated that it took place several months afterwards. Duane stated in his affidavit that it took place following the appointment with Dr Cros on 9th May 2004. He said in oral evidence that he thought it took place on or before 12th May 2004.

65. Mr Trott stated that, as was his normal practice, he took the Testator aside in a separate room, and asked whether he wished to have anyone present at the meeting. The Testator said that he did not. Duane was therefore asked to wait in the reception area while the meeting took place. Mr Trott said that the Testator just wanted to make sure that everything was in order and whether he needed to sign any documentation. The meeting lasted a very short time.

66. Mr Trott stated that the Testator complained about being taken by the Plaintiffs to see Dr Bada. He said that he did not trust Dr Bada, and had heard them speaking to the Plaintiffs immediately after he had completed his examination. He said that he favoured Dr Subair as a physician but said that he went along to the examination just to go through the motions with the Plaintiffs. Mr Trott wasn't sure whether the conversation took place at that meeting or a subsequent one, but I am satisfied that it was probably that one – there was no evidence of any subsequent meeting at about that time and these comments would tie in with the Testator's behaviour later that evening.

67. Duane was frustrated by the episode as he had hoped that Mr Trott would discuss the Testator's future with them both. It appeared to him that upon leaving the meeting the Testator was agitated. He stated that the Testator's agitation culminated that evening when he armed himself with a machete and threatened anyone in general who tried to come to his house about his physical or mental state, and Dr Bada in particular. Although the threats might at first sight appear to be further evidence of dementia, the Testator's son Duane gave evidence that they were not in fact out of character.

68. Be that as it may, the evidence of Dr Bada, including the reports which he exhibited of Dr Cros, are compelling evidence that when he made the will the Testator was suffering from dementia. The evidence of the Plaintiffs tends to support the presence of dementia. I am satisfied that this is sufficient to raise a real doubt about the Testator's capacity.

Has the Defendant established capacity?

Evidence

69. The principal evidence upon which the Defendant relies to establish capacity is the evidence of Mr Trott, set out above, concerning the execution of the will. However she has also produced some medical evidence. This dates from several years later, in 2006, when the Testator instructed Mr Trott to draw up a power of attorney. Mindful of the concerns raised by the Plaintiffs in 2004 about the Testator's mental capacity, Mr Trott suggested that he should see a doctor so as to ascertain his mental and physical health.

70. The Testator saw two doctors, Dr Burton Butterfield and Dr Subair, both of whom were general practitioners. After the close of oral evidence, but with leave of the court, the Defendant filed affidavits from both doctors exhibiting their reports.

71. Dr Butterfield prepared a report dated 6th June 2006. This stated in material part:

> I saw and examined Dr De La Chevotierre (sic) on May 22, 2006 when he was brought in by his daughter [Marvlyn] for assessment … In casual conversation he was coherent, cooperative and I would not expect anything out of the ordinary. His daughter states that he still manages and signs his own checks. On further exam and questioning he does have some short term memory loss. He knows his address, but is unable to give me the correct date. In fact he was reluctant to answer some questions put to him – joking fashion. He may very well be in the early stages of senile dementia but seems to be functioning okay for the most part. If you would (sic) more intense assessment you may wish to request a valuation by a psychiatrist.

72. Dr Subair prepared a report dated 31st August 2006. This stated in material part:

> It is my opinion that apart from mild degree of hypertension, he is in good physical and mental state and very capable of making his own decisions.

73. As instructed by the Testator, Mr Trott drew up an enduring power of attorney in favour of Marvlyn, which the Testator signed on 5th October 2006.

74. In January 2008 Dr Subair was instructed by the attorneys Peniston & Associates to produce a further report on the Testator. They were instructed by Gwendolyn, who was concerned at the physical and mental deterioration of her father. The report referred back to the examination of the Testator which Dr Subair carried out in 2006. It stated in material part:

> His mental state has however deteriorated rather rapidly in the last eighteen months and I believe this is secondary to Alzheimer's disease.
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> . . . . .
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> In conclusion, this patient suffers from Alzheimer's Disease which is progressive and negatively impacts on his mental facilities (sic). He needs regular supervision at all times.

75. Dr Subair stated in his affidavit that when he examined the Testator in 2006 he was asked by Trott & Duncan to observe *inter alia* the Testator's mental capacity to make decisions concerning his own affairs. He stated that he engaged the Testator in general conversation and that the Testator was able to recall accurately the day of the week, his name, his address, the year, and the date when he stopped practising medicine. They spoke of their colleagues and the Testator asked after one of them. Dr Subair also asked other general questions which the Testator answered satisfactorily. The visit lasted around thirty minutes.

76. As stated in his report, Dr Subair concluded from his observations at this visit that the Testator was capable of conducting his own affairs. Dr Subair stated in his affidavit that he was confident in that assessment. He further stated that the signs of early dementia that the Testator began to exhibit in 2007 were not at all apparent in August 2006. He was not made aware at the time of any allegations concerning the Testator's mental health. Dr Subair stated:

> I would have rejected as nonsense any suggestion that he was unable to understand his affairs or make his own decisions at that time.

77. Because their affidavit evidence was not submitted until after the close of oral evidence, neither doctor was cross-examined. There was no application for them to be tendered for this purpose. However I have had the benefit of supplemental written submissions from the Plaintiffs addressing their evidence.

78. I heard evidence from Marvlyn. She stated that she used to visit the Testator every day, including during the period 2003 through 2004, sometimes more often, and that she saw no evidence of dementia or mental deterioration until around 2007 or 2008. However she did acknowledge that since his divorce in 1998 his personal hygiene was poor and agreed with Dr Bada's opinion, based on his examination carried out on 7th October 2003, that the Testator was suffering from gross self-neglect.

79. At Dr Bada's request she had gone to see him about the Testator, most probably in late 2003 or early 2004, but nothing had come of the meeting. She said that he had told her that all that the Testator wanted to talk about was his grandmother. She told him that due to the unhappiness in her father's adult life that was hardly surprising.

80. Marvlyn stated that she never saw evidence of mental confusion on the part of the Testator and that he would sit in front of the television and correct the English of those speaking on it. She said she didn't know that when he went to hospital in February 2004 he was diagnosed with Alzheimer's disease.

81. Marvlyn stated that the Testator had never mentioned Dr Cros to her. However he did say that the Plaintiffs were taking him to see "*all these doctors*" and that Dr Bada was helping them. He said that all the Plaintiffs wanted was to get him out of his house and take his property. She confirmed that the Testator had later threatened violence against Dr Bada, saying: "*I'll chop him up like cornbeef*".

82. Marvlyn stated that on the morning of 14th May 2004 the Testator left several telephone messages for her. When she called back, he asked her to take him to his lawyer that morning so that he could pick up some documents. As she had a busy day and this was inconvenient for her she asked why he couldn't ask Duane, but the Testator said that he didn't want Duane to take him.

83. Later that morning, Marvlyn drove to the Testator's house to collect him. Duane and Gwendolyn were there with Gwendolyn's car but the Testator came up to Marvlyn and said, "*Drive*". He said that he had told her that he didn't want Duane to take him and that he had locked Duane out of the house.

84. When Marvlyn drove into Hamilton she drove to what she thought was the location of Trott & Duncan's offices but the Testator was aware that the firm was now in a different building, which he identified to her. When they got there, Mr Trott took the Testator into a room while she stayed in reception

chatting to the receptionist. He came out from the meeting singing a patois song and dancing. Marvlyn asked if he had got what he came for. He said that he had made a mistake, and that he had come to sign something not to collect it. That was the end of the visit.

85. I was also referred to an affidavit of Patrick Hamlett, a retired police officer who was a friend of the Testator's. He said that he saw no sign of any mental impairment in the Testator in 2004. This affidavit was not submitted, albeit with leave of the court, until after the close of evidence. When assessing its weight I must take into account that it was not cross-examined upon. The plaintiffs would doubtless say that when in Mr Hamlett's company the Testator was putting on "*a good social façade*".

Discussion

86. I am satisfied from the evidence of Dr Bada that when the will was executed the Testator was suffering from dementia. His evidence in this regard was corroborated by the Plaintiffs and, perhaps unwittingly, Marvlyn. Does this mean that at the date of the will's execution he was not of sound disposing mind?

87. Dr Bada stated that in his opinion it was unlikely that the Testator understood his financial affairs or what he was doing when he was making his will. Dr Bada was not sure if the Testator was capable of understanding the competing claims to his estate. He was, however, giving evidence as a witness of fact and not as an independent expert. When cross-examined about the above passage from Williams, Mortimer and Sunnucks, he stated, quite properly, that as he was not a neurologist he was not competent to engage in a discussion about its merits.

88. When Dr Bada and Dr Cros examined the Testator they were focused on his mental capacity insofar as it related to his ability to cope with daily life rather than on the specific question of testamentary capacity. There is no evidence that a proper description of the legal test for testamentary capacity

had been provided to either of them, and no reason why it should have been. It is, however, fair to say that at the times when the Testator was unable to understand who his children were he would necessarily have been unable to understand the merits of their respective claims to his estate.

89. Mr Trott stated under cross-examination that, based on the evidence of Dr Bada and Dr Cros, he agreed that the Testator, when he made his will, would not have had testamentary capacity. But that is not something which he was able to say from personal observation. I attach more weight to what he saw and heard at the time than what he now thinks based on the observation of others. Nonetheless, the question remains as to whether, when presenting to Mr Trott, the Testator was simply displaying "*a good social façade*".

90. It is clear from comparing the evidence of Mr Trott and Dr Bada that in around May 2004 there were times when the Testator was lucid and times when he was confused. Thus I accept that he appeared lucid to Mr Trott and at least intermittently confused to Dr Bada. The limited evidence before me tends to suggest – and I put it no higher – that when in the presence of others he was more likely to be lucid if he was comfortable with those present – eg Marvlyn or Mr Trott – than if, as with the Plaintiffs during Duane's two week visit and, at least during and after that visit, Dr Bada, he felt suspicious or resentful towards them. However there is no evidence from which I can properly conclude that he felt resentful of Dr Bada initially.

91. I have insufficient evidence from which to conclude for how much of the time the Testator was lucid and for how much of the time he was confused. Thus I cannot say that he had in general lost testamentary capacity but had lucid intervals. However I am satisfied from the circumstances of his referral to Dr Bada and the evidence of Duane that his periods of confusion were not limited to isolated and infrequent episodes.

92. The evidence suggests that there was not always a clear-cut distinction between lucidity and confusion. Eg on 14th May 2004 the Testator was able to recognise that Marvlyn had gone to the wrong offices and direct her to the

right ones, but was apparently mistaken about the purpose of his visit, telling her that he needed to collect a document when in fact he needed to sign one. I am inclined to attribute the episode of locking Duane out of the house to the side of the Testator's nature that led him to make threats against Dr Bada – which Duane said were in keeping with his character – rather than to dementia. Although it may be, "*that he hath ever but slenderly known himself*".[2]

93. As to the Testator's meetings with Mr Trott to have his will drawn up and executed, I am satisfied that both meetings took place before Mr Trott met the Plaintiffs. Had it been otherwise, I am satisfied that, as he did in 2006 when instructed to prepare a general power of attorney, Mr Trott would have required the Testator to visit a medical doctor to assess his mental state before proceeding.

94. I am, however, satisfied that Mr Trott's meeting with the Plaintiffs and the subsequent occasion when Duane brought the Testator to see him both took place during Duane's two week visit to Bermuda – on Duane's evidence, there was no other period in which either meeting could have happened.

95. As to Mr Trott's affidavit evidence that in April 2004 the Testator said that both Plaintiffs had been making frequent attempts to contact him, I accept that the Testator said this. But I think it more likely that he did so during the period of the two week visit in May 2004, when the Plaintiffs were in more frequent contact with him. This would be consistent with Mr Trott's oral evidence that at the meeting in April 2004 the Testator told him that the Plaintiffs were no longer in communication with him.

96. Duane's evidence, which I accept on this point, is that he had remained in contact with the Testator up to May 2004. This suggests that when the Testator told Mr Trott that he had not been in contact with Duane since 1996 he was experiencing memory loss.

[2] King Lear, Act 1, Scene 1.

97. The evidence of Dr Butterfield and Dr Subair gives a snapshot as to the Testator's mental capacity on two occasions when he was examined in 2006. I accept their evidence, although I note that neither of them appears to have been aware of the Testators' history of dementia when they examined him.

98. As Dr Subair stated, dementia is progressive: ie it tends to worsen over time. Thus if, as I accept he did, the Testator had testamentary capacity in 2006 – at least at the times when he was examined – it is plausible that there were times during 2004 when he also had testamentary capacity.

99. Although I have found it helpful to hear from the Testator's children, the case turns on the evidence of the professional witnesses. I accept the first hand observations of the medical witnesses. Of these, Dr Bada's evidence is the most relevant as it was the closest in time to the date of execution of the will.

100. Mr Trott was an independent and experienced attorney. Although he did not have the advantage of referring to his file note, and was no doubt for that reason mistaken as to certain points of chronology, I accept the gist of his evidence. I do so having had the benefit of hearing oral evidence from him including evidence under cross-examination.

101. It would be open to me to conclude that there were times during the period 2003 to 2006 when the Testator was of sound disposing mind and times when he was not. For example, that he was of sound disposing mind during his visits to Dr Butterfield and Dr Subair but not, or only intermittently, during his consultations with Dr Bada.

102. However the question for me is whether I am satisfied that the Testator, was of sound disposing mind during his meetings with Mr Trott in April 2004 and on 14th May 2004. That is, whether I am satisfied that he understood the effect of his wishes being carried out at his death, the extent of the property of which he was disposing, and the nature of the claims upon him. The Testator's mental capacity on his visits to the various doctors is relevant only insofar as it throws light on this question.

103. Based upon Mr Trott's evidence, I am satisfied that, during their meetings in April and May 2004, the Testator did have the requisite understanding with respect to four of his children. In particular, I am satisfied that he was aware of their respective claims upon his estate – which were pressed upon him by Mr Trott – and that, as he explained to Mr Trott, he had a rational basis for making provision for some of them and excluding others.

104. The Testator excluded Gwendolyn, from whom he was estranged, because of the longstanding bitterness between them arising from her accusations against him and the effect that these had had upon his life. Again, I stress that I make no finding as to the merits of those accusations. Moreover, he had made financial provision for her during his lifetime.

105. The Testator excluded Alesha because he believed that she had stolen money from him. The court was not in a position to investigate that allegation, about which I make no findings. However I have heard no evidence to suggest that the Testator's belief was irrational. The reference in the November 2001 letter to Duane that he had chatted and written to her is therefore not sufficient to call into question the rationality of her exclusion. Neither is the mere fact of his dementia.

106. The Testator made provision for Marvlyn and Adora in his will because Marvlyn lived locally and was there for him and because he had provided very little financial support for either daughter during his lifetime.

107. However the position with respect to Duane is less clear cut. The Testator excluded him because (i) he thought that Duane was unduly influenced by Gwendolyn, which I take to mean that he thought that Duane was supportive of her with respect to her allegations against the Testator; (ii) that Duane had become estranged from him; and (iii) that during his lifetime he had made financial provision for Duane.

108. I have no basis on which to impugn the rationality of grounds (i) and (iii). However ground (ii) is based on a false premise, as I accept Duane's evidence, supported by correspondence, albeit dated several years prior to

the execution of the will, that he had kept in contact with the Testator and that relations between them had been amicable. Thus the Testator's decision to exclude Duane from his will appears to have been materially influenced by a mistaken belief that they were estranged. It is probable that this belief was attributable to the Testator's dementia, and that it was due to delusion or impaired memory or both.

109. I have considered whether in order for Marvlyn to satisfy the court that the Testator understood the nature of Duane's claims upon him it would be sufficient for her to show that irrespective of ground (ii) the Testator would have disposed of his property in the same way on the basis of grounds (i) and (iii). That is to say, whether it would be sufficient for Marvlyn to satisfy the court that the Testator had disposed of his property as he would have done had he not been suffering from dementia, notwithstanding that his reason for doing so was partly influenced by a mistaken belief deriving from his dementia.

110. I shall cut the Gordian knot by finding that Marvlyn has not so satisfied the court. This is because grounds (i) through (iii) were cumulative and also because I am not satisfied that grounds (i) and (ii) did not interact with each other. In other words, if the Testator had appreciated that Duane had remained in friendly contact with him, he might not have formed the view that his son was subject to Gwendolyn's undue influence. In the circumstances I am not satisfied that the Testator understood the nature of Duane's claims upon him.

111. A testator either has a sound disposing mind or he does not. The law does not recognise a situation where a testator has testamentary capacity with respect to some of the objects of his will but not others.

112. I remind myself that the burden to prove that the Testator was of sound disposing mind rests with Marvlyn as it is she who seeks to propound the will. She has failed to discharge this burden as she has not satisfied me that the Testator understood the nature of Duane's claims upon him. This is

notwithstanding that I am satisfied that the Testator understood the claims of his other children.

113. The grant of probate is therefore revoked and I declare the will invalid.

114. I shall hear the parties as to the consequential orders following from these findings, in particular as to the grant of letters of administration, and as to costs.

DATED this 15th day of July, 2014

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Hellman J