Neutral Citation Number: [2022] EWHC 233 (Ch)

Claim No: PT-2020-BRS000109

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD) (Bristol)
IN THE ESTATE OF CHARLES SKILLETT DECEASED (PROBATE)

Bristol Civil Justice Centre
2 Redcliff Street, BS1 6GR

Date: 8 February 2022

Before :

PHILIP MOTT Q.C.
Sitting as a Deputy High Court Judge

- -

Between :

STEPHEN EDWIN SKILLETT	**Claimant**
- and -	
GARY CHARLES SKILLETT	**Defendant**

- -
- -

Mark Davies (instructed by Kingsfords) for the **Claimant**
The **Defendant** in person

Hearing dates: 1, 2 February 2022

- -

Approved Judgment

Philip Mott Q.C. :

1. The Claimant brings these proceedings to ask the court to propound in solemn form the will executed by his late father, Charles Skillett ("the Testator"), on 19 May 2011. The Defendant, his brother, objects on the grounds that their father lacked testamentary capacity and/or did not know and approve the contents of his will at the time of execution.

2. This is not a claim in which undue influence is alleged. It is not a claim against the solicitor acting for the Testator, alleging that when the will was made he gave advice which was negligent, or failed to give advice that he should have given. It is not a claim that the informal valuation of land shortly before the will was made was negligently too low. Nor is it a claim which gives me discretion to rewrite a valid will to better reflect what I think the Testator might have wanted if he could save foreseen the situation at his death.

3. The Claimant was ably represented by counsel, Mark Davies. The Defendant represented himself. It was apparent that he had spent a lot of time researching the law and the evidence. He cross-examined with skill and courtesy, and made his submissions to me with clarity and thoroughness. I thank him for that.

4. In the end I have concluded that this claim must succeed, that the Testator had testamentary capacity and knowledge and approval of the will he signed on 19 May 2011. Therefore that will is valid, and should proceed to probate in solemn form. This judgment explains why I have come to those conclusions.

Background

5. The Testator was born on 26 February 1933. He died on 18 July 2017 at the age of 84. His wife, Joyce Skillett, died just over a month earlier, on 13 June 2017. They left four children, the Claimant Stephen (b.1957), the Defendant Gary (b.1958), and two daughters, Jane (b.1962) and Lisa (b.1964).

6. In 1972 the Testator bought a smallholding off Poundhurst Road, Upper Ruckinge, near Ashford, Kent. He named it "LisaJane" after his two daughters.

7. By February 2002 the Testator had developed idiopathic Parkinson's Disease. In February 2008 he was admitted to hospital after a small heart attack.

8. On 7 December 2010 Mr Hirst, a surveyor, addressed a letter to the Testator containing what he described as a "marketing appraisal value" of £50,000 for the vacant freehold of "LisaJane". It was not a formal valuation, he stressed.

9. On 11 January 2011 the Testator was informed by his GP that he was in the "terminal phase of his illness".

10. On 19 May 2011 the Testator and his wife each executed a new will in the presence of their solicitor, Jonathan Hudson. These wills were "mirror" wills, in the sense that each set out the same provisions:

    a) On the death of the first spouse, the surviving spouse would take everything absolutely.

b) On the death of the surviving spouse:

i) The smallholding known as "LisaJane" would be given to Stephen.

ii) The remaining three children would be given £50,000 each.

iii) The remainder of the estate would be divided equally between the four children.

c) If Stephen, Jane or Lisa should die before the surviving spouse, their interest would go to their living children in equal shares. However, Gary's children should not take their father's share if he predeceased the surviving spouse.

11. On 19 September 2013 the Testator's medical notes record for the first time a diagnosis of Alzheimer's Disease. In November 2013 the Testator was moved to Ashminster Nursing Home, where he stayed until his death in 2017.

The Law

12. The legal principles to be applied are not in dispute. As a result I can set them out shortly. It is not in dispute that the will in question complies with the formalities required by section 9 of the Wills Act 1837.

13. The test of testamentary capacity derives from the judgment of Lord Cockburn CJ in *Banks v Goodfellow* (1869-70) LR 5 QB 549. The Testator must have understood the nature of his act, and its broad effects; the extent of his property (without necessarily recollecting every item); any moral claims he ought to have considered; and "no disorder of the mind shall have perverted his sense of right or prevented the exercise of his natural facilities".

14. The Defendant draws my attention to the comment on those tests by Vos J (as he then was) in *Jeffery v Jeffery* [2012] EWHC 4013 (Ch), at [38]:

> "This in recent cases has been modernised so as to be clear that a competent testator must be able to understand, firstly, 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."

15. It is accepted on both sides that this test survives the coming into force of the Mental Capacity Act 2005.

16. Mr Davies relies on authorities showing that a testator need not have a perfectly balanced mind to have testamentary capacity (*Ball v Ball* [2017] EWHC 1750 (Ch); *Sutton v Sadler* (1857) 3 CB (NS) 87), and need not understand the significance of his assets to other people (*Simon v Byford* [2014] EWCA Civ 280).

17. A number of other authorities were included in the agreed bundle to the same effect.

18. The burden of proof in relation to testamentary capacity was explained by Briggs J (as he then was) in *Re Key* [2010] EWHC 408 (Ch) at [97]:

> "i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.
>
> ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.
>
> iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless."

He continued at [98]:

> "… the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insights into the workings of the mind otherwise entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges."

19. Knowledge and approval of a will is to be clearly distinguished from testamentary capacity. Of course, if a testator lacks testamentary capacity he will generally be unable to know and approve the contents of his will. But there may be other cases where a capacitous testator nevertheless is sufficiently unaware of the contents of his will that he cannot be taken by his signature to have approved it.

20. In normal circumstances, knowledge and approval is assumed where there is testamentary capacity and due execution of the will.

21. The questions to be asked were identified by the Court of Appeal in *Gill v Woodall* [2010] EWCA Civ 1430. They are whether the testator understood (a) what was in the will when it was signed; and (b) what its effect would be (see Lloyd LJ at [71]).

22. Lord Neuberger MR (as he then was) said at [14] that where a will has been professionally prepared by a solicitor, a very strong presumption arises that the will represents the testator's intentions at the relevant time, although this is not conclusive. Lord Neuberger continued:

> "16. There is also a policy argument, rightly mentioned by Mrs Talbot Rice, which reinforces the proposition that a court should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If

> judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.
>
> 17. Further, such disputes will almost always arise when the desires, personality and state of mind of the central character, namely the testatrix herself, cannot be examined other than in a second hand way, and where much of the useful potential second hand evidence will often be partisan, and will be unavailable or far less reliable due to the passage of time. As Scarman J put it graphically in *In the Estate of Fuld, deceased (No 3) [1968] P 675* , 714E; "when all is dark, it is dangerous for a court to claim that it can see the light." That observation applies with almost equal force when all is murky and uncertain."

23. And as Lewison LJ said in *Simon v Byford*, at [47]:

> "… it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made."

24. The Defendant draws my attention to a passage in Theobald on Wills, at 3-017:

> "A testator must know and approve of the contents of his will. This is because a will must be the result of the testator's own intelligence and volition, though its contents need not originate from the testator provided he understands and approves them. But a will is invalid if its contents originate from another person and the testator executes it in ignorance of its contents."

25. The Defendant also relies on the judgment of Chadwick LJ in *Hoff v Atherton* [2004] EWCA Civ 1554, at [64]:

> "Further, it may well be that where there is evidence of a failing mind — and, *a fortiori*, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will — the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will — that is to say, that he did understand what he was doing and its effect — it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts

> as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents — in the wider sense to which I have referred."

Evidence of the making of the will

26. I heard from Jonathan Hudson, a solicitor who attended the Testator and his wife at their home on 5 May 2011. The following matters emerged from his evidence:

a) The initial contact with his office was made by Mrs Joyce Skillett on 4 May 2011. An arrangement was made for him to visit their home the following day.

b) The Testator and his wife had made previous wills in 1994, which were held by Mr Hudson's firm.

c) Mr Hudson saw the Testator and his wife together. He has not recorded anyone else being present. If there had been anyone else, he would have recorded it.

d) He received instructions which he recorded in a contemporaneous note as follows:

On death of survivor:-		
Small holding @ Ruckinge	–	*currently in Mr Skillett's*
(value £50k)		*sole name*
"Lisa Jane" adj the Rambles		
Poundhurst Road Upper Ruckinge		*to go to yr son Stephen Edwin Skillett*

Other children to receive £50k each

Residue to be split between 4 children

[Stephen still at [address] *but Gary now lives in Bath]*

If Stephen predeceases then smallholding to his children

No gift over to children of Gary

Gift over to children of Jane & Lisa if either or both predecease the survivor of you

e) Mr Hudson said that he spoke to both the Testator and his wife. He could not say which of them said what, or even if Mrs Joyce Skillett spoke for both of them. But he was sure it was their joint instructions.

f) He was told of the valuation of the land at £50,000 (as he has recorded). He does not remember seeing the appraisal letter.

g) On the basis of these instructions he prepared two mirror wills, and drafts were sent by post on 12 May 2011 for their approval. His covering letter states *"...*

thank you for your instructions to act in connection with the preparation of new Wills". It continues later "*I would be happy to discuss any questions you may have either over the telephone or by way of a further meeting*".

h) Mr Hudson returned to visit them again at their home on 19 May 2011. His attendance note records: "*They both checked through these* [wills], *and confirmed that they were perfectly happy with them*". Mrs Joyce Skillett then arranged for a neighbour to come in to witness the wills. "*Mr Skillett apologised for the state of his signature, but he explained that he is suffering from Parkinson's Disease. Mr and Mrs Skillett thanked JDH for his assistance*".

27. Mr Hudson told me that the Testator spoke quite lucidly at the two meetings. His impression was that both the Testator and Mrs Joyce Skillett had capacity to make a will. If he had been in any doubt at the first meeting he would have asked for medical advice on capacity.

28. There is no suggestion that the terms of the wills were suggested by Mr Hudson, or that he was asked to advise on how to achieve a certain result. Clearly he was responsible for putting his instructions into legal language, but all the evidence supports the conclusion that he was being given instructions as to what should be included. Whichever spouse did the talking, it would have been expressed in layman's language, and the other was present to hear what was being said.

29. I accept Mr Hudson's evidence as to the way in which he received his instructions. He was criticised for not volunteering advice about the valuation of the land, and particularly the risk that over time the land would increase in value whereas the pecuniary legacies would not, thereby upsetting the apparent equality of the two types of gift. Whether he is open to such criticism or not does not affect my view of his evidence. This is not a solicitor's negligence action, and I need make no findings about that.

30. Mr Hudson was a country solicitor, dealing at the time with all non-contentious work. He was not a member of any specialist organisation such as STEP, and had no specific mental capacity training. But he had probably dealt with hundreds of wills over the years. His general practice was to start with general dialogue with a client, discussing mundane things like the weather, to get an idea of their ability to hold a lucid conversation. Nothing gave him any concern about the Testator's testamentary capacity.

31. Nevertheless, the Defendant submits that he should have followed the "Golden Rule", set out by Templeman J (as he then was) in *Re Simpson* (1977) 121 Sol.Jo. 224:

> "In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear and however difficult or tactless it may be to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding.

> There are other precautions which should be taken. If the testator has made an earlier will this should be discussed by the legal and medical advisers of the testator, and if appropriate, discussed with the testator. The instructions of the testator should be taken in the absence of anyone who may stand to benefit, or who may have influence over the testator. These are not counsels of perfection. If proper precautions are not taken injustice may result or be imagined and great expense and misery may be unnecessarily caused."

32. I do not think that the Testator's age alone called for the observation of this golden rule, but that coupled with his illness might well have made it advisable. Following the golden rule may have avoided this litigation. But it is not a rule of law, and it does not help to decide the issues in this case. Compliance with the golden rule is not proof of capacity; nor is non-compliance any proof of incapacity (see *Re Key* at [8]). It simply means that the observations at the time the will was executed were the observations of a layman, who may have missed matters which would have been apparent to a medical expert.

Family Evidence

33. Statements were filed from the Claimant and the Defendant, and their respective wives, Mary Skillett and Lynda Skillett. Each of these witnesses was present for cross-examination. In addition the Defendant had filed statements from his two sisters, Jane Clark and Lisa Kearney. On the second day of the trial it transpired that they would not be available for cross-examination. The Defendant applied for their statements to be admitted as hearsay, and this was not opposed by Mr Davies.

34. The Claimant's evidence on the two matters at issue was as follows:

    a) His father, the Testator, gave up driving in 2008. Prior to that he had reduced his activity at the smallholding, removing the animals and going less frequently. The Claimant and his family began to collect his parents at weekends and take them to the land when the weather was reasonable. They would help the Testator with repairs to the sheds, as well as cutting down brambles and nettles, and mowing the grass. As a result of this assistance, the Testator was able to resume growing vegetables and harvesting fruit.

    b) His siblings were not in the area during this period. The Defendant moved to Bristol after separating from his first wife. Jane divorced and moved to Deal with a new partner, visiting about once a week, but later moved to Portugal, visiting only once or twice a year. Lisa had moved to Ireland in about 1995, and returned two or three times a year for holidays or long weekends.

    c) Around the late summer of 2010, the Testator told the Claimant that he was thinking of selling the smallholding, as he felt it was becoming a bind to the Claimant and his family. The Claimant said that he would like to buy it off him. The Testator said no, he would leave it to the Claimant in his will. At about this time, the Testator obtained the valuation of the land at £50,000.

d) The visits to the land continued as before, even after the Testator was moved to Ashminster Care Home in late 2013. Between then and 2017 the Claimant arranged family parties on the smallholding. Sometimes they celebrated a big occasion, such as his parents' 60th wedding anniversary in 2016. The Testator's brother, his wife's sister, and various nieces and nephews were invited, as were Jane and Lisa. The Defendant was invited to the first party in 2013, but there was a falling out which meant that he did not attend future parties on the land.

e) The Claimant agreed that the Testator's mobility was poor by 2009, and this put a lot of strain on Mrs Joyce Skillett. The Testator also began to suffer from hallucinations, but these were immediately apparent and only lasted for a couple of minutes. In his normal state, the Testator never showed any signs of confusion. He was a chatty person, and particularly good at inventing games for the Claimant's children to play.

35. The Claimant agreed that his father wanted all his children to inherit equally. That is what he was doing when he made his new will in 2011. The Claimant did not arrange the valuation of the land, but met the valuer there when it was snowing. By the date of the Testator's death in 2017 the land was valued at £110,000.

36. The Claimant's wife, Mary Skillett, confirmed that the Testator's hallucinations were obvious and short-lived. In her opinion, his mental faculties were not in doubt at other times. She said he had a mobile phone, and would certainly speak to people on the telephone if it was handed to him.

37. The Defendant' main witness statement was extremely long. He also provided what he called "A short neutral background history" of the Testator. His evidence in relation to the two points in issue was as follows:

a) His father, the Testator, was born in the East End of London, in the Docklands area. His mother was an illiterate Romany street hawker, and his father a ship's stoker in the Merchant Navy. He was a bit of a street urchin, staying in London throughout the blitz.

b) Before his illness, the Testator was a formidable, eccentric character. He was always extremely fair and honest, but could be very forthright in his opinions, and would give his "pearls of wisdom" whether wanted or not.

c) The Testator left school at 14 with a very limited education, and relatively low literacy and numeracy skills. He worked latterly as an industrial painter. In his marriage to Joyce he dealt with all the finances. In 1972 he won about £4,800 as part of a football pools syndicate, and used it to buy the smallholding. It was registered in his name alone, and he visited it every day until he had to stop driving in 2007. He looked on it as "a bit of heaven on earth".

d) From 1983 to 2009 the Defendant lived about 200 yards away from his parents, and was in daily contact with them. After an acrimonious split with his wife in mid-2009, he moved to Bath. Thereafter he saw his parents less frequently, but for longer periods at a time.

e) He was very much involved in helping his father with the smallholding until 2009. He dealt with a boundary dispute in 1993. When he moved away, the Claimant took over his role of maintaining the land.

f) The physical effects of Parkinson's Disease were first apparent in around 2001. By around 2003 the Testator could hardly climb stairs, and his behaviour became increasingly erratic and aggressive. The Defendant organised a move to a bungalow in 2004.

g) Between 2004 and 2008 the Testator's physical condition became progressively worse, and in 2007 he stopped driving. By February 2008 his paranoia reached a climax when he was hospitalised with a suspected heart attack. On his return home, the Testator was completely housebound and spent considerable parts of the day in a dream state.

h) In 2010 the Defendant remembers his mother saying that the Testator was having more bad days than good ones. He records in his witness statement many accounts from his mother of his father's bizarre behaviour. He personally witnessed his father lashing out wildly with his walking sticks and swearing while having delusions.

i) In 2010 and 2011 the Defendant had his own health problems, undergoing an unsuccessful hip replacement and a further unsuccessful operation to release a trapped sciatic nerve.

j) Sometime in 2011 his mother went into hospital for cancer treatment.

k) In June 2013 his mother telephoned to say that she had changed both their wills to exclude the Defendant's children (which he 100% agreed with), that she had obtained a valuation of the land at £50,000 and was changing both of their wills to take this valuation into account, and that she intended to leave the entire smallholding to the Claimant. The Defendant told her that he had received previous offers of £150,000 for the land from a local landowner, and that the value of land was going up all the time. She refused point blank to discuss this any further, angrily stating "*I have fucking done it now and don't want to talk about it any more*". The Defendant never discussed this with his father.

l) In 2017, after the Testator's death, the Defendant was offered £200,000 by the same local landowner, who said he could easily sell it for £250,000 and it might even make £300,000 at auction.

38. In cross-examination, the Defendant accepted that both his parents would try to be even-handed. They argued like cats and dogs, but "*you would not get two people closer to each other*". He was not suggesting that his mother was doing something which she knew her husband would not approve of. The essence of the Defendant's approach was that, if the effect of the testamentary dispositions had been properly explained to him, his father would never have approved the will. If it had been explained, and he still executed the will, he would have no complaint. However, the provisions in the new will were quite complicated for his father to understand. They would have to be explained to him carefully. His mother had no mental capacity problems, but never dealt with legal or financial matters.

39. The Defendant was asked about emails which his sister Jane had sent to him in October 2017, after their father's death. She said "*The will is genuine but he did not realise or think about the value increasing …*". And then "*… in my opinion they wanted us to have the same not realising how much the land was going to increase. And if they had died within a year or so most prob would have been …*". The Defendant told me that he agreed in principle with what Jane said.

40. The Defendant's current wife, Lynda Skillett, first met the Testator in July 2009. By then he was elderly, frail and severely disabled due to Parkinson's Disease. He was also experiencing psychological symptoms, so that he would stare into space, not join in conversations, and offer only monosyllabic responses to questions. This fluctuated significantly, varying between coherent speech and relative mobility to confusion and rigidity of movement. Each time she and the Defendant visited over the next two years prior to the execution of the new will, she could see that the Testator's physical health was deteriorating, and his psychological symptoms were getting progressively worse. The incidence of delusions and hallucinations were increasing significantly, often manifesting themselves with no warning in psychotic behaviour. That was confirmed to her by Mrs Joyce Skillett. These psychological symptoms fluctuated in both frequency and intensity, being very dependent on the efficiency and timeliness of administration of his medication. This did control the hallucinations and delusions for much of the time. In between episodes the Testator "*could appear to an untrained observer to have capacity, often sitting quietly in a chair and responding appropriately with monosyllabic responses*".

41. Lynda Skillett is a senior nurse, Associate Director of Nursing at a hospital on the Isle of Wight. But she is not an expert in old age psychiatry. When cross-examined, she accepted that the delusions did not themselves cause the will to be invalid, and she was not asserting that the Testator lacked testamentary capacity at the time he made his will in 2011. His condition was fluctuating, and it was time and task-specific.

42. Jane Clark's statement recounts an argument in 2010 in which the Claimant said "*I will make sure none of you bastards get the land*". The Claimant denies this was said. Insofar as it is used to support an inference that the Claimant was instrumental in getting his parents to change their wills in 2011, I cannot rely on it.

43. Jane also recounts a telephone call from her mother in 2011 when she said that she and the Testator were changing their wills so that the Claimant would get the smallholding and the remaining children would get £50,000 each, which was then the value of the smallholding. She does not say that she objected that her father was not fit to execute a new will. She does suggest that the change was <u>mainly</u> down to her mother's instigation, but insofar as she suggests that this was without her husband's agreement, or against his wishes, I cannot accept it. The Defendant's own case is that their parents were as close as any couple could be, and the suggestion (if it is implied) that their mother was doing something which she knew her husband would not agree with is one I reject. It is also in conflict with the emails Jane sent to the Defendant in October 2017, noted above.

44. Lisa Kearney's statement adds little to the overall picture. She too says she was telephoned by her mother "*to say that Dad was changing his will and asked if I wanted the land as Steve wanted it*". Lisa says that in her opinion her father could not have understood the outcome of changing his will "*as he had always treated us all equally and treated us the same*".

45. Both Jane and Lisa say that shortly before she died, their mother said to them that changing the wills was wrong, but it was now too late to change them back, because of her father's condition. By then, of course, he had developed Alzheimer's Disease, and would not have had testamentary capacity.

46. In general, where they limited themselves to matters of fact within their own knowledge, I accept that the family witnesses were all doing their best to tell me the truth as they saw it. Inevitably in a case of this sort, this evidence was very subjective, and overlaid with a good deal of inference about the Testator's intentions (or what would have been his intentions if he had sufficient capacity), and about the motivations of the opposing party.

47. It is clear that, of all the four children of the Testator, the Claimant was the one best placed to observe his father's mental state in the period from 2009 to 2011. Where there is conflict between his evidence and the evidence of the Defendant as to this period, I prefer the evidence of the Claimant and his wife.

48. It is also clear that their mother spoke to all the other three children, who were living away, to tell them of the change in the wills. That would be an odd thing to do if she had known or believed that the Testator was mentally unfit to make a will at the time.

Medical Records

49. No direct medical evidence was called by either party. Thus I did not hear from the Testator's GP, Dr Jacobs. Nor did I hear from Dr Jonathon Hawkins, Consultant Physician dealing with the Health Care of Older People at the William Harvey Hospital, Ashford, who saw the Testator regularly in a clinic from 2003 To 2010. Nor did I hear from Michelle McHenry, a Parkinson's Disease Nurse Specialist at the same hospital, who likewise saw the Testator regularly.

50. The medical records were produced, but they are said by the Defendant to be incomplete. In particular there is only one letter from Michelle McHenry. The Defendant suggests that this was because of a change from paper to computer records. But this is all I have, and there was no oral evidence from Michelle McHenry to supplement her one letter.

51. The records disclose the following picture (taken from the expert report of Dr Series, the additional references relied on by the Defendant, and my own perusal of the documents in the Bundle). The relevant entries are summarised. Parkinson's Disease is abbreviated throughout to "PD".

14/01/2003	New patient. Suspects he is developing PD (GP Notes).
05/02/2004	Probable idiopathic PD (Dr Hawkins).
25/03/2004	CT brain scan. Findings of cerebral and cortical atrophy.

10/06/2004	Abbreviated mental test 9/10. Poor short-term memory (Dr Hawkins).
16/02/2006	DVLA report by Dr Hawkins. PD well controlled and without significant impairment of memory sufficient to cause disruption of normal daily activities or significant loss of judgment.
22/11/2007	Hallucinations. Particularly in the evenings for several hours (GP Notes).
23/11/2007	"His memory is becoming more of a problem but his mood is well maintained" (Dr Hawkins).
22/02/2008	Admission to hospital. Diagnosed with small heart attack. Aggressive behaviour and disorientated, particularly at night. Visual hallucinations and some paranoia.
13/04/2009	Hallucinations during day – confusion throughout day, usually on waking.
27/04/2009	Still plagued by persistent hallucinations, although these are not distressing him.
28/05/2009	Continues to hallucinate, particularly worse in the evenings and overnight with some disturbing sexual references (Dr Hawkins).
27/08/2009	Currently well. Hallucinations have virtually cleared. Very occasional visual hallucinations but this is non-threatening and brief (Dr Hawkins).
10/03/2010	Profound hallucinations now resolved following withdrawal of medication (Dr Hawkins).

21/06/2010	Has good days and bad days with PD, but wife feels it is gradually getting worse (GP Notes).
27/08/2010	Hallucinations present but not threatening and less frequent (Dr Hawkins).
18/10/2010	Hallucinations worsening in last 6-8 weeks since increase in medication (GP Notes).
26/10/2010	Profound hallucinations. Verbalising a strong belief that his wife is encouraging the affections of a gentleman neighbour (unfounded). Provoking quite a lot of aggression and anger. PS. Change in medication has been helpful. Neuro-psychiatric state has improved significantly with the abatement of the hallucinations and paranoid behaviour (Michelle McHenry).
06/12/2010	Decreased mobility. Had to have medication stopped as had hallucinations (GP Notes).
07/12/2010	Home visit Dr Jacobs. Neuropsychiatric symptoms improved since medication stopped, but motor symptoms significantly worse (GP Notes).
06/01/2011	Woke at 5am with hallucinations. Once medication taken, back to normal self – now well except ongoing constipation (GP Notes).
11/01/2011	Home visit Dr Jacobs. Long chat today to patient, wife and daughter. Struggling to gain control of PD. Significant on/off phenomena from day to day. Oral input is variable. Also significant problem with hallucinations. No warning of these symptoms. Discussed with family and patient that he is entering terminal phase of his illness. Patient

	understands this and does not wish to be admitted to hospital (GP Notes).
20/01/2011	Wife says he has been up and down at night (GP Notes).
21/01/2011	Depressed, loss of interest in previously enjoyable activity. Visual hallucinations, agitated, also falling now at home a few times recently (GP Notes).
25/01 2011	More visual hallucinations (GP Notes).
01/03/2011	Problems mainly at night. Paranoia is a problem just at night (GP Notes).
03/08/2011	Home visit Dr Jacobs. Long chat, tried to encourage patient to attend day centre to give wife a break, but not keen (GP Notes).
18/10/2011	The GP Notes make reference to a visit to the Speech and Language Centre at hospital, but there is no extant report back from the therapist there.

52. What is apparent from these records is firstly that the Testator had a very bad spell when he was admitted to hospital in 2008. I have not set out all the entries in the nursing notes, but they evidence very significant disturbance of thought. However, things seem to have improved after his discharge, so that he is described as "currently well" in August 2009.

53. Secondly, there is a clear tension between relief of physical symptoms and provocation of psychological symptoms in the choice and extent of medication. As time progressed, the decision seems to have been taken to reduce the medication, even though this adversely affected mobility, in order to relieve the hallucinations. That seems to have been very largely successful.

Expert Evidence

54. By order of the court, and the agreement of the parties, a single joint expert was instructed to consider the medical records and other evidence, and to provide an opinion on testamentary capacity and knowledge and approval. The instructions went to Dr Hugh Series, whose qualifications in old age psychiatry are impeccable. His report is dated 23 November 2021, and was followed by Answers to Questions from the parties, provided on 29 December 2021. The Defendant notified the court that he would not be

requesting permission to call Dr Series to give live evidence. He told me in his evidence that this was because he feared the trial date would be lost, and he did not want an adjournment. Whatever the reason, it means that Dr Series' opinions were not tested by cross-examination, although not accepted by the Defendant.

55. Dr Series reviewed all the medical records and the witness statements. He gives useful general evidence, as follows [*my comments are in italics*]:

a) The CT scan in March 2004 is not of particular diagnostic significance. The degree of atrophy is commonly found in the brains of older people.

b) Many PD patients develop hallucinations. Some also develop delusions. Very often the delusions arise out of hallucinations.

c) A substantial proportion of people with PD eventually develop a form of dementia known as Parkinson's disease dementia.

d) On/off effects are characteristic of PD, meaning that symptoms can switch suddenly from 'on' (symptoms troublesome) to 'off' (symptoms reduced or absent). They are sometimes linked to the cycle of medication.

e) The Testator had poor short-term memory in June 2004, with a very slight drop in his score on the abbreviated mental test to 9/10. But even in March 2006 Dr Hawkins reported to the DVLA that there was no medical reason for concern about his ability to drive.

f) In November 2007 the Testator's score on the Mini Mental State Examination ("MMSE") was 24/30 [*in fact the addition of individual scores is wrong, and the total should be 22/30*]. In April 2009 his score was 24/30, indicating no decline in the preceding 17 months.

g) The Kenny study shows that the average score for people aged 70 to 74 with primary or no education <u>without</u> known dementia, PD or severe cognitive impairment was 28/30. A score of 24/30 is within the range of results found in that cohort, but would be in the bottom 10%. [*In other words, in 2009 the Testator still scored as well as the bottom 10% of people of his age <u>without</u> PD etc*]. This indicates that he only had a mild degree of cognitive impairment at that time.

h) There is a letter from Dr Andrew describing the Testator having difficulties in expressing himself verbally, but the date is unclear. [*This relates to the time when he was in the Ashminster Care Home, where he was moved in November 2013. Since the letter speaks of an examination on 4 August, this must be in 2014 or later, when the Testator had a diagnosis of Alzheimer's Disease*].

i) It is likely that the Testator progressed from a mild degree of impairment to a moderate degree of impairment by 2011. [*It is not clear whether this opinion assumes that the undated letter from Dr Andrew relates to a time in or prior to 2011. I will assume that it does not*].

j) The diagnosis of depression from 2009 will have impaired the Testator's concentration to some extent.

56. Dr Series expressed his opinions as follows:

a) "8.1.3 In my opinion, although hallucinations were a very marked feature of the deceased's illness, there is nothing to suggest that they affected the testamentary disposition. They were unpleasant and intrusive, and at times they produced aggressive behaviour towards those close to him, but their content does not appear to have driven his decisions about the will … At times it was obvious to observers that he was hallucinating, but there is nothing in the attendance note to suggest that this was happening when he signed the will, and by their nature hallucinations are intermittent phenomena, not present all the time."

b) "8.1.4 In conclusion, although there is rather little contemporaneous medical evidence about capacity at the time that he signed the will, in my opinion, on the balance of probability, although he had a cognitive impairment which by then was probably moderate, it is entirely possible that he retained testamentary capacity. I do not think that the medical records provide evidence to suggest that he lacked it at that time. Although he suffered from intrusive hallucinations, these do not appear to have been obvious to Mr Hudson, who took instructions, and the content of the hallucinations reported does not appear to me to have been such as to have affected the testamentary disposition. For these reasons, my opinion is that on the balance of probability he had testamentary capacity when he signed the 2011 will."

57. In answer to questions posed to him by the parties, he elaborated as follows:

a) "3.1.12 In giving my opinion that on the balance of probability the deceased's impairment of cognitive function was not sufficient to have undermined the deceased's testamentary capacity at the time of the 2011 will, I am relying on my experience of assessing the effects of impaired cognitive function in what is probably several thousand patients whom I have assessed in the course of my professional career, and my experience, gained from many assessments of testamentary capacity in living people, of the degree of conscious thought required to make a valid will. Although based on considerable experience, given the lack of contemporaneous professional evidence about capacity in this case, this is inevitably a somewhat subjective judgment."

b) "3.3.1 In the absence of a detailed and competent assessment of testamentary capacity contemporaneous with the disputed will, it is difficult to be entirely sure about the deceased's testamentary capacity at that time … the deceased scored 24/30 on MMSE some 2 years before the 2011 will. In my experience, most people at that level of cognitive function would be capable of making a valid will … On average, most people with dementia lose about 3 to 4 points on MMSE each year, although the rate of decline is very variable indeed … If the deceased's cognitive function declined at an average rate after 2009 (which would mean an acceleration compared with the previous two years) then his MMSE score at the time of the will might have been around 17/30. The MMSE is not a test of capacity, it is a short test of cognitive function. When the MMSE score falls to very low levels (below approximately 10/30), in my opinion

testamentary capacity is unlikely because most people would lack the level of cognitive function required to make testamentary decisions, but in the middle range of scores many people retain capacity while others may not do so. In my opinion, even if his MMSE score had been 17/30 at the time of the 2011 will, while that would have been sufficient to raise a doubt about testamentary capacity, it would not be sufficient to establish that he lacked it. As stated previously, in my opinion, on the balance of probability he would have retained testamentary capacity."

c) "3.3.2 Although visual hallucinations are clearly recorded in the GP file, in my opinion, unless they are of a very specific nature and involve potential beneficiaries, they are unlikely to have an adverse effect on testamentary capacity."

58. The Defendant criticises Dr Series' reference to the Kenny study. Firstly, he relies on a paper by Burdbick et al (2014) which states that MMSE tests should not be used for testamentary capacity testing, particularly not in those with PD. The same conclusion is stated by Frost, Lawson and Jacoby (2015). Dr Jacoby gave evidence in *McCabe v McCabe* [2015] EWHC 1591 (Ch) and was described as an impressive witness.

59. But Dr Series is not using the MMSE tests to assess testamentary capacity. His assessment uses his long clinical experience, with a holistic appreciation of the medical records and the lay witness statements, to reach an opinion on the balance of probability about testamentary capacity. The MMSE scores, and the Kenny study, are merely a cross-check.

60. Secondly, the Defendant points out that the Kenny study specifically excludes those with PD. This misses the point. What Dr Series was doing was to compare the Testator's MMSE scores with the averages in the general population without PD, dementia or other cognitive deficits. The Testator would fall within the bottom 10% of these, but the fact that he was within range at all shows that his cognitive impairment was then only mild.

61. Beyond this, the Defendant challenges the opinion of Dr Series, and reminds me that the ultimate decision is for the court to make on all the evidence. I agree.

Testamentary Capacity

62. This is not a case where the evidence is so lacking that I need to decide it on the burden of proof. The accepted diagnosis of PD, together with the persistent hallucinations recorded in the medical records, as well as the descriptive evidence of family members, makes it necessary to scrutinise the evidence as a whole. I cannot simply presume capacity from the due execution of the will, even though it appears rational on its face.

63. I am satisfied on all the evidence that the Testator did have testamentary capacity at the time he executed his will on 19 May 2011. I have come to this conclusion principally for the following reasons:

a) Mr Hudson was an experienced solicitor, though a generalist not a specialist, and saw no reason to doubt his capacity. On the contrary, he viewed the instructions as being given jointly, with the Testator a full party to them. I accept

that on its own this view of capacity carries limited weight, but it does have some significance.

b) The medical records tend to show that the hallucinations had reduced with changes in medication, even though this led to greater mobility issues.

c) The GP, Dr Jacobs, was able to explain to the Testator on 11 January 2011 that he was entering the terminal phase of his illness. He understood this, and could express a rational wish not to be admitted to hospital.

d) On 3 August 2011 Dr Jacobs again had a long chat with the Testator, to try to persuade him to go to a day centre to give his wife some respite. The fact that the Testator is recorded as being not keen on this clearly suggests that he understood and could follow what the doctor was saying.

e) These two entries in the GP Notes come 4 months before and 3 months after the making of the new will. Although the matters being discussed were different, they do not suggest for a moment that there was doubt about the Testator's ability to understand and make valid decisions.

f) The Testator discussed with the Claimant in late 2010 about selling the land, and at some point there was reference to the appraisal figure of £50,000. Whether or not the Testator ever spoke to the surveyor, he was clearly aware of the contents and effect of the market appraisal. He could also make and express a rational decision that he would rather leave the land to the Claimant in a new will than sell it to him immediately.

g) Mrs Joyce Skillett told the three children who lived away (the Defendant, Jane and Lisa) about the making of the new will, which would have been an odd course to take if she thought the Testator no longer had capacity to understand what he was doing in that respect.

h) There is no suggestion that any of these three children challenged their father's testamentary capacity at the time their mother spoke to them. On the contrary, Jane's view in October 2017 was that the will was genuine. The fact that she says her father "*did not realise or think about the value increasing*" is an implied acceptance that he was capable of thinking about it at the time of the will.

i) Dr Series' opinion must carry substantial weight as a single joint expert, given his great experience in this area, although it is not determinative.

Knowledge and Approval

64. Putting aside testamentary capacity, the Defendant's separate attack under the head of knowledge and approval takes as its starting point the apparent inequality of the testamentary provisions as they appear at the date of death. He argues that his father could not have wanted this to happen, therefore he cannot have understood the provisions of his will sufficiently to be said to have knowledge and approval of them.

65. The Testator was a man of very limited education. But he had been used to dealing with all financial and legal matters throughout his married life. He had bought the

smallholding. He had bought a house, or perhaps more than one house. He had dealt with a boundary dispute, with the help of the Defendant. He had made a will before, in about 1994.

66. The Defendant says that this is a complex will. In legal terms it is not, though it may appear so to a layman. However, it would be wrong to start with the will when considering knowledge and approval. Mr Hudson was given specific instructions when he visited the Testator and his wife on 5 May 2011. No doubt they had discussed matters between them before his visit. The instructions, whoever articulated them, would have been explained in simple everyday terms. That is what Mr Hudson noted at the time.

67. Those simple provisions in everyday terms are not difficult to understand. They are what Mr Hudson converted into legal language in the will. It may be that the Testator (and his wife) would have presumed that their solicitor had got it right, rather than being able to follow the detailed wording. That would not be uncommon. In fact he did get it right, in the sense that the will faithfully follows the handwritten instructions. So what the Testator signed represents what he, with his wife, instructed Mr Hudson to include in their new wills.

68. It is correct to point out that the apparent mathematical equality in the provisions at the time of making the will no longer existed at the time of the Testator's death in 2017. Nor were they likely to remain equal. There are many possible reasons for the lack of any provision for this eventuality.

    a) The Testator could have looked on the Claimant's offer to buy the land for £50,000 in 2010 as crystallising the value, even though the payment would be deferred until his death.

    b) The Testator clearly loved the land, and would have been distraught at the prospect of not being able to visit it any more. He could have thought that the Claimant's willingness to maintain it, and to arrange regular visits for him, justified the Claimant having the benefit of any future increase in the value.

    c) The Testator could have thought that his death would come quite soon, as he had recently been told that he was in the terminal phase of his illness. His wife was diagnosed with cancer in 2011. They could have thought that future changes in value would not be significant.

    d) The Testator may simply have overlooked the probability of an increase in value of the land, and not had that brought to his attention by Mr Hudson or by any member of his family.

69. I do not claim to be able to see light in the darkness and uncertainty. I cannot read the mind of the Testator. I therefore do not make any findings about the reasons for the apparent unfairness. All that I do point out is that the judgment of equality and fairness has a strong subjective element, and may encompass other than purely mathematical considerations.

70. Complaint is made about alleged failings of the solicitor, Mr Hudson, but I am not asked to decide on a solicitor's negligence claim, and Mr Hudson has not been represented to answer such criticisms with evidence and argument.

71. I do not have to resolve these questions to decide on knowledge and approval. The only question that I have to decide on this issue is whether the Testator knew and approved the provisions which were in his will. In my judgment he did. The lack of mathematical equality at the time of death does nothing to undermine the rationality of the provisions which Mr Hudson was instructed to incorporate at the time of making the will.

72. An oversight, or a change in circumstances following the making of a will, would not be enough to invalidate the will. Since the Defendant is acting in person, it may help if I give a simple example. A widow has two adult daughters. One is married to a businessman, and they are comfortably off. The other is unmarried and living on a very small income with no savings. The widow decides to give her estate entirely to the poorer daughter. By the time she dies, the poorer daughter has married a rich man. The richer daughter's husband's business has collapsed, the marriage has ended, and that daughter is now impoverished. Sadly, the will has never been changed to accommodate these quite foreseeable changes in circumstance. If the widow had thought about it at the time of making her will, she might have included different provisions. Or she could have changed her will before she died. Yet on her death her will is still valid, and will govern what happens to her estate unless the daughters agree otherwise.

73. So here, with a will made by a Testator with testamentary capacity, which faithfully reflects his and his wife's joint instructions, changes since the will cannot invalidate it. He knew what was in his will, and approved it. The fact that its consequences following his death may not have been as he had expected them to be does not undermine that knowledge and approval.

Conclusions

74. As a result this claim must succeed. The will of Charles Skillet executed on 19 May 2011 shall be propounded in solemn form.

75. It is of course sad to see a family at odds. Being unaware of what may have happened outside court on a without prejudice basis, it would be wrong of me to suggest that one party or the other is to blame or being unreasonable. In these proceedings I have no power to rewrite the will, even if I thought it would be fairer to do so.

76. I have agreed to deal with any issues of costs on written submissions. The normal order would be for the Defendant to pay the Claimant's costs on the standard basis, to be subject to detailed assessment if not agreed. The costs in a dispute over a will like this would normally be paid out of the Defendant's interest in the Testator's estate. A reasonable sum may be ordered to be paid on account of costs, pending detailed assessment.

77. If the Defendant seeks to resist such an order, he should set out his reasons in written submissions within 7 days of this judgment. The Claimant should respond within 7 days thereafter. I will decide the question of costs on those written submissions without further hearing.

78. I shall invite the Claimant's legal team to draft the order required to give effect to this judgment. I hope it will be agreed by the Defendant. If not, I will receive written submissions at the same time, and with the same timetable, as submissions on costs.

79. This judgment has not been sent to the parties in draft, as the Defendant is acting in person. Any typographical or purely factual errors should be notified to me within 7 days.