

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 84

Case No: A633/16

JUDGMENT OF SHERIFF ROBERT D M FIFE

in the cause

KENNETH GEORGE HANTON

Pursuer

against

IAN DOWNIE as executor of the late KATHLEEN ANN LAIDLAW

Defender

Pursuer: Nicoll; McEwan Fraser Legal, Edinburgh
Defender: McHugh (sol adv); Harper Macleod, Edinburgh

Edinburgh, 28 October 2019

[1] A proof in this action proceeded on 20, 21, 22 and 23 August 2018, 25, 26, 27, 28

February, 1 March, 5, 6, 7 August 2019 with a hearing on submissions on 9 September 2019.

[2] The following authorities were referred to by parties:

1. *Smyth v Rafferty and others* 2014 WL 5311821;
2. *Sivewright v Sivewright's Trustees* 1920 SC (HL) 63;
3. *Banks v Goodfellow* (1870) LR QB 549;
4. *Broadway v Clydesdale Bank* 2000 SLT 707;
5. *Gill v Woodall & Ors* [2011] Ch 380;
6. *Simon v Byford* [2014] EWCA 280 (Civ);
7. *Gray v Binnie* 1879 7 R 332;
8. *Clark Taylor and Co Limited v Quality Site Development (Edinburgh) Limited* 1981 SC 111;
9. *Gordon Malcolm MacLure as Trustee on the Sequestrated Estate of David Johnston, Capelrig Limited v Andrew Baird* [2012] CSOH 117;
10. Requirements of Writing (Scotland) Act 1995 section 1;
11. *Longmuir v Moffat* 2009 SC 329 (Ex Div);
12. *Anderson v Beacon Fellowship* 1992 SLT 111;

13. Stair Memorial Encyclopaedia "Trusts, Trustees and Judicial Factors" paras 9,12,14,21, 22, 24, 26;
14. Civil Evidence (Scotland) Act 1988 Section 2;
15. Ordinary Cause Rule 29.3.

[3] The sheriff, having resumed consideration of the cause, finds the following facts to be admitted or proved.

Findings in fact

[4] The pursuer is Kenneth Hanton ("Mr Hanton"), residing at 31 Cameron Toll Gardens, Edinburgh. Mr Hanton was the husband of the late Kathleen Ann Laidlaw ("Mrs Laidlaw") who formerly resided at 31 Cameron Toll Gardens, Edinburgh.

[5] The defender is Ian Downie ("Mr Downie"), residing at Braecroft-Broomlea, Station Road, West Linton. Mr Downie was the brother of Mrs Laidlaw.

[6] Mrs Laidlaw was born on 16 November 1944 and died on 17 May 2016.

[7] Mrs Laidlaw was married to Norman Laidlaw from around 1971 until around 1997 when they were divorced. The divorce proceedings were acrimonious.

[8] Prior to the divorce Mrs Laidlaw had worked in the Laidlaw family business, James Erskine in Edinburgh. James Erskine traded as upholsterers. Mrs Laidlaw lost her job with James Erskine at the time of the divorce. Mrs Laidlaw received a financial settlement in the divorce proceedings.

[9] Mrs Laidlaw had two children from her marriage, Wendy Laidlaw ("Wendy") and Christopher Laidlaw ("Christopher"). Mrs Laidlaw was estranged from Wendy for many years prior to her death. Mrs Laidlaw and Christopher were not close. They would communicate by text message. They saw one another infrequently in the years before her death.

[10] Mr Hanton and Mrs Laidlaw were in a relationship and lived together for about 20 years until her death. They were married on 9 December 2015.

[11] Mr Hanton and Mrs Laidlaw first lived together in the back of rented shop premises at 16 Montrose Terrace, Edinburgh.

[12] Mrs Laidlaw purchased a flat at 9 Rossie Place, Edinburgh in 1997. That property was sold in 1999.

[13] Mrs Laidlaw and Mr Hanton then moved to 65/10 Holyrood Road, Edinburgh in 1999. That property was sold in 2005.

[14] Mrs Laidlaw and Mr Hanton moved to 1/5 Meggetland View, Edinburgh in 2006. That property was sold in 2012.

[15] Mrs Laidlaw and Mr Hanton moved to 31 Cameron Toll Gardens, Edinburgh in 2012.

[16] Mrs Laidlaw held the title to the properties at 9 Rossie Place, 65/10 Holyrood Road, 1/5 Meggetland View and 31 Cameron Toll Gardens in her sole name.

[17] Shop premises at 10 Montrose Terrace, Edinburgh were purchased in 1998. The property was sold in 2004. Shop premises at 6-8 Montrose Terrace were purchased in 2003. Mrs Laidlaw held the title to the properties at 10 Montrose Terrace and 6-8 Montrose Terrace in her sole name.

[18] Mortgages were secured over the various properties in the sole name of Mrs Laidlaw.

[19] The partnership accounts for Laidlaw & Hanton t/a Cameron All Trades for the period ended 31 October 1998 showed Mrs Laidlaw introduced capital of £22,803 and Mr Hanton capital of £1,500.

[20] The partnership accounts for Cameron All Trades for the year ending 31 October 2002 showed Mrs Laidlaw introduced further capital of £4,075. Mr Hanton did not introduce further capital. Mrs Laidlaw's capital account was in credit to the sum of £22,200. Mr Hanton's capital account was in debit with a negative balance of £14,817.

[21] The partnership accounts for Cameron Properties for the year ending 31 October 2014 showed total sales of £28,000 in 2013 and stock of £4,450. None of the accounts for Cameron Properties disclosed the introduction of any significant value by way of stock by Mr Hanton.

[22] Mr Hanton has owned a hairdressing salon at 25 London Road, Edinburgh in his sole name from before forming any relationship with Mrs Laidlaw.

[23] Mrs Laidlaw was a strong willed individual. Mr Hanton and Mrs Laidlaw had a volatile relationship. They separated on more than one occasion and then reconciled. Mr Hanton and Mrs Laidlaw maintained separate finances. They had no accounts in joint names.

[24] Mrs Laidlaw was diagnosed with terminal lung cancer in 2013. She was given a low life expectancy and a care package was provided by Western General. She had a course of chemotherapy and radiotherapy which reduced the tumour and the cancer went into remission for about 15 months. She made a good recovery and was able to return to work and lead a normal life.

[25] In 2014 Mrs Laidlaw consulted Mr Graeme Thomson ("Mr Thomson"), an associate with Boyd Legal Limited solicitors, Edinburgh ("Boyd Legal") about her personal affairs. Mr Thomson acted as Mrs Laidlaw's solicitor until her date of death and met with her on a number of occasions.

[26] The initial instructions from Mrs Laidlaw to Mr Thomson in 2014 were to check the titles for the house at 31 Cameron Toll Gardens and the shop at 6-8 Montrose Terrace to see if the properties were still registered in her name. Mrs Laidlaw was concerned title might have been transferred to Mr Hanton or a mortgage taken out by Mr Hanton on either or both of the properties without her knowledge. Mr Thomson checked the titles and confirmed the properties were still registered in her name and no mortgage had been added.

[27] Some weeks later in 2014 Mrs Laidlaw instructed Mr Thomson to prepare a will ("the 2014 will"). Mr Downie was asked by Mrs Laidlaw if he would be her executor in her will. Mr Downie agreed to be her executor. Mr Thomson prepared the will which was executed by Mrs Laidlaw. The 2014 will cannot be traced. Mrs Laidlaw had capacity to make the 2014 will.

[28] Mr Downie was appointed as Mrs Laidlaw's executors for all four wills prepared by Mr Thomson.

[29] In 2015 Mr Downie was asked by Mrs Laidlaw if he would act as her attorney for a Power of Attorney. Mr Downie agreed to be Mrs Laidlaw's attorney. Mrs Laidlaw then instructed Mr Thomson to prepare a Power of Attorney nominating Mr Downie. Mrs Laidlaw trusted Mr Downie to look after her affairs. Mrs Laidlaw signed a continuing financial and welfare Power of Attorney on 28 April 2015 which was witnessed by Mr Thomson. Mr Thomson completed and signed the statutory certificate that Mrs Laidlaw had capacity to sign the Power of Attorney and that she understood the nature and extent of the Power of Attorney when this was granted.

[30] In 2015 the cancer returned and had spread to Mrs Laidlaw's brain. As her health deteriorated Mrs Laidlaw advised Mr Hanton that she wished to marry him and they were married on 9 December 2015.

[31] In about March 2016 Mr Hanton was told by Mrs Laidlaw that she wished to put her affairs in order. Mrs Laidlaw attended the offices of Boyd Legal on or around 22 March 2016 with her neighbour Mrs Sanchez where she met with Mr Thomson on her own and gave instructions for a new will. Mrs Laidlaw executed the will, production 5/1/1 (“the will of 22 March 2016”). The will of 22 March 2016 was prepared by Mr Thomson and witnessed by him.

[32] The will of 22 March 2016 provided that 31 Cameron Toll Gardens was to be left to Mr Hanton; 6-8 Montrose Terrace was to be sold with £10,000 from the proceeds of sale to be given to Mr Downie and with the balance of the proceeds of sale to go to the children Wendy and Christopher. The residue was to be split equally among Mr Hanton and the two children. Mrs Laidlaw had capacity to make the will of 22 March 2016.

[33] On 11 April 2016 Mrs Laidlaw executed a further will, production 6/9 (“the will of 11 April 2016”). The will of 11 April 2016 was prepared by Mr Thomson on the instructions of Mrs Laidlaw and witnessed by him.

[34] The will of 11 April 2016 provided that 31 Cameron Toll Gardens was to be left to Mr Hanton; 6-8 Montrose Terrace was to be sold and £10,000 from the proceeds of sale to be given to Mr Downie with the balance of the proceeds to go to Wendy and Christopher; the residue of the estate was to go to Mr Hanton. Mrs Laidlaw had capacity to make the will of 11 April 2016.

[35] In mid to late April 2016 Mr Thomson was called by Mr Downie, at the request of Mrs Laidlaw, as Mrs Laidlaw wanted to make further changes to her will. A meeting was arranged for 2 May 2016 but that meeting was brought forward to 29 April 2016 as Mrs Laidlaw was in the Cancer Unit of the Western General hospital (“the Western General”), having collapsed on 27 April 2016.

[36] Mr Thomson attended a meeting with Mrs Laidlaw at about 10.30 am on 29 April 2016 accompanied by Claire Forrester (“Mrs Forrester”), another solicitor in Boyd Legal, in case there were any issues of capacity and, if necessary, to get a second opinion from another independent solicitor. Mr Downie was not present during the meeting. No one else was present during the meeting.

[37] On the instructions of Mrs Laidlaw at that meeting, Mr Thomson prepared a further will (“the will of 29 April 2016”) which was executed by Mrs Laidlaw later the same day and witnessed by a nurse, Mrs Martin, production 6/1. The will provided that her estate was to be left to Mr Downie and she disinherited Mr Hanton and her children. Mrs Laidlaw had capacity to make the will of 29 April 2016.

[38] During the meeting on 29 April 2016 Mrs Laidlaw gave clear instructions to change her will. She was lucid throughout the meeting. She was alert. She appeared to understand what was being said to her. She engaged in discussion with Mr Thomson. She responded to questions. She was able to see and read documents. Mr Thomson and Mrs Forrester had no concerns about Mrs Laidlaw’s capacity to make that will.

[39] During the day on 29 April 2016 Mrs Laidlaw said she wished to be discharged from hospital. Medical staff spoke with Mr Hanton who advised them there were no toilet facilities or beds at home on the ground floor.

[40] On the evening of 29 April 2016 Mr Hanton, Mr Downie and Mrs Downie were at the hospital. Mrs Laidlaw said she wished to be discharged from hospital that evening. A nurse attempted to persuade Mrs Laidlaw not to discharge herself as suitable arrangements were not in place at home. Mrs Laidlaw insisted she be discharged that evening.

[41] A doctor, Dr Beth Martin, spoke with Mrs Laidlaw and attempted to persuade her not to discharge herself. Mrs Laidlaw insisted on being discharged. Medical staff provided

Mrs Laidlaw with a Self-discharge Against Advice form which Mrs Laidlaw read, completed and signed. During her dealings with hospital staff Mrs Laidlaw was able to communicate clearly. No concerns were expressed by medical or nursing staff about her capacity to self-discharge against medical advice. At around 8.00 pm Mrs Laidlaw discharged herself from the hospital returning home with Mr Hanton, Mr Downie and Mrs Downie. Mrs Laidlaw continued to communicate clearly once back at home.

[42] Arrangements were put in place for the care of Mrs Laidlaw at home. Mrs Laidlaw remained at home until her death on 17 May 2016.

[43] On 29 April 2016, Mrs Laidlaw had metastases on the frontal lobe of her brain. During her stay in hospital at that time she was suffering from delirium. Delirium is a fluctuating condition. A person with delirium may be lucid at some points and delusional at other points over a 24 hour period.

[44] It would be readily apparent to a person having a detailed conversation with someone who had delirium whether they were lucid or experiencing a delirious episode. A person experiencing a delirious episode would be unable to hold a complex discussion on matters such as giving instructions for the making of a will.

[45] At the meeting on 29 April 2016 Mr Thomson and Mrs Forrester would have detected if Mrs Laidlaw had been experiencing a delirious episode. Mr Thomson and Mrs Forrester had no concerns about Mrs Laidlaw's capacity to make a will on 29 April 2016.

[46] The pursuer did not make the will of 29 April 2016 through undue influence, facility and circumvention on the part of the Mr Downie.

[47] The house at 31 Cameron Toll Gardens and the shop at 6-8 Montrose Terrace were owned by Mrs Laidlaw at the date of her death. Mrs Laidlaw made provision for these two properties in each of the wills, executed by her and as part of her estate.

[48] Mrs Laidlaw never indicated to any third party that any of her property was held in trust for the benefit of Mr Hanton.

[49] The house at 31 Cameron Toll Gardens was not a joint asset of Mr Hanton and Mrs Laidlaw.

[50] The shop at 6-8 Montrose Terrace was not a joint asset of Mr Hanton and Mrs Laidlaw.

Findings in fact and in law

[51] Mrs Laidlaw had capacity to make the will of 29 April 2016.

[52] Mrs Laidlaw did not make the will of 29 April 2016 through undue influence, facility and circumvention on the part of the Mr Downie.

[53] No property of the pursuer was subject to a trust for the benefit of Mr Hanton.

[54] The property at 31 Cameron Toll Gardens, Edinburgh registered in the name of Mrs Laidlaw was not a joint asset with Mr Hanton.

[55] The property at 6-8 Montrose Terrace, Edinburgh registered in the name of Mrs Laidlaw was not a joint asset with Mr Hanton.

[56] Sustains the second, third, fourth, fifth, sixth and seventh pleas in law for the defender.

[57] Repels the first, second, third, fourth, fifth, seventh and eighth pleas in law for the pursuer.

[58] Recalls the interim interdict granted by interlocutor of 2 March 2017.

[59] Grants decree of absolvitor in favour of the defender.

[60] Reserves all questions of expenses. The sheriff clerk will fix a hearing on expenses.

Introduction

[61] This is an action for reduction of a will dated 29 April 2016 and to declare properties at 31 Cameron Toll Gardens, Edinburgh and 6-8 Montrose, Edinburgh were joint assets of which Mr Hanton and Mrs Laidlaw were both the beneficial owners and accordingly that these properties did not fall into the estate of Mrs Laidlaw.

Witnesses

[62] This was a lengthy proof. The factual circumstances are of particular importance to the parties in this case. There was conflicting expert medical opinion. I have set out the witness evidence in some detail.

1. Kenneth Hanton

[63] Mr Hanton was aged 60 at the date of proof. Mr Hanton had a number of business interests, more recently as an upholsterer.

[64] Mr Hanton described when he first met Mrs Laidlaw around 1996-1997. At the time Mrs Laidlaw was going through challenging divorce proceedings following an acrimonious breakup from her husband. After a while Mrs Laidlaw had to move out of the former matrimonial home. Mr Hanton rented a shop at 16 Montrose Terrace, Edinburgh. There was a room at the back which was converted into a bedsit where the two of them moved in together.

[65] Mr Hanton had a hairdressing business at 25 London Road, Edinburgh. Mr Hanton owned the property. Mr Hanton described the hairdressing salon as a good business with good people working for him. Mr Hanton rented out a chair from the start of running that business.

[66] Mr Hanton and Mrs Laidlaw ran a business together from 16 Montrose Terrace selling antiques, bric a brac and carrying out small upholstery jobs initially.

[67] Mr Hanton rented out the hairdressing salon. The rental income was invested in the business at 16 Montrose Terrace which was a leased property.

[68] There were two aspects to the business at 16 Montrose Terrace: antiques and collectables but mainly furniture and upholstery. Mr Hanton did small upholstery jobs such as small seats and contracted out the larger jobs. Mrs Laidlaw did the paperwork for the business. Mrs Laidlaw had been in business with her husband. She had to leave that business following the break-up of her marriage. Mrs Laidlaw was under a restrictive covenant after she left the business. She had little income so she offered to do the books and help with customers. She had relevant experience from her previous employment.

[69] There was no formal lease for 16 Montrose Terrace. There was a casual arrangement. The property was leased for about 2 years.

[70] While the bedsit to the rear of the property was not the sort of accommodation Mrs Laidlaw had been used to (she had previously lived in a five bedroom house in Bonaly, Edinburgh) she had a lot of expenses with the divorce proceedings and staying at Montrose Terrace minimised her living expenses. According to Mr Hanton by the time the divorce proceedings were concluded Mrs Laidlaw "ended up with nothing".

Properties

[71] A number of properties were bought over the years, rolling over the profit from one property to invest in another property. There was quite a boom for property in Edinburgh at the time.

[72] A property at 9 Rossie Place, Edinburgh was purchased with a business loan. The property was purchased in 1997. This was a rundown property which they renovated in

two months. They had another business "All Trades" that carried out the work. That property was part of Cameron Properties as was the other business "All Trades".

Mr Hanton went to see the property with Mrs Laidlaw.

[73] Mrs Laidlaw opened the bank account for Cameron Properties and was the only signatory. Mrs Laidlaw opened the bank account at Mr Hanton's request. After the divorce settlement Mrs Laidlaw was brought in as a partner of Cameron Properties.

[74] As Mrs Laidlaw was the only signatory on the bank account she used to pay invoices for the business and would pay out drawings. Everything was equal between the two of them including payment of wages/drawings.

[75] Mr Hanton repeatedly stated in evidence that the bank account was in the name of Cameron Properties but that Mrs Laidlaw was the sole signatory.

[76] In the second half of 1997 they bought 9 Rossie Place as a project for Cameron Properties. The purchase price was about £31,000 all funded by a business loan. Title to 9 Rossie Place was taken in the name of Mrs Laidlaw. The property was sold for £40,093.67 in August 1999 through the solicitors Macadam's. It was Mrs Laidlaw who instructed Macadam's to sell the property.

[77] After 9 Rossie Place was sold they bought a shop at 10 Montrose Terrace for business purposes. The shop had been used as a newsagent's but had been closed. Mr Hanton knew the owner and went to speak with her. She intended to sell the property without putting the property on the market. Mr Hanton discussed this with Mrs Laidlaw. A purchase price of £20,000 was agreed and each of them put in £10,000. Under the umbrella of Cameron Properties the shop was used for a wood flooring business. Title to 10 Montrose Terrace was in the name of Mrs Laidlaw. Mr Hanton's £10,000 came from "money through my businesses". Mrs Laidlaw's £10,000 came from the Cameron Properties business. According

to Mr Hanton the business “started earning very quickly”. Mr Hanton assumed that was where her £10,000 came from. No loan was required for the purchase of 10 Montrose Terrace.

[78] The property at 10 Montrose Terrace was sold at the end of 2004. Mr Hanton and Mrs Laidlaw each received one half of the net sale proceeds, each receiving £21,000.

[79] Cameron Properties paid the rates and repairs/maintenance for 10 Montrose Terrace. As Mr Hanton repeatedly stated in the course of evidence Mrs Laidlaw took title to the property in her name “as the nominee for the business”.

65/10 Holyrood Road, Edinburgh

[80] The properties at 9 Rossie Place and 10 Montrose Terrace were used as securities to buy the flat at 65/10 Holyrood Road which was a new build. Mrs Laidlaw arranged a loan through The Royal Bank of Scotland to secure the purchase of the property at Holyrood Road. In addition to securities over 9 Rossie Place and 10 Montrose Terrace, Mrs Laidlaw granted an assignation of a life policy in her name. Mr Hanton recalled signing a letter saying the property was to be only in the name of Mrs Laidlaw. Mr Hanton saw the property at Holyrood Road as being a great opportunity both as an investment and as a residence. After the property in Holyrood Road was purchased, they moved out of the bedsit at 16 Montrose Terrace into Holyrood Road.

[81] According to Mr Hanton the two of them had to agree they could afford to make the monthly payments of £424. Mr Hanton described himself as being “totally in the firing line”; “I was dealing with all the subcontractors”; “I had responsibility for the repayments”; and “I put my shop on the line”.

[82] The two of them stayed at Holyrood Road for about 5-6 years making a profit on sale of around £100,000. The purchase price was around £100,000. The property doubled in value.

1/5 Meggetland View, Edinburgh

[83] The sale proceeds of Holyrood Road were invested in an off-plan property at Meggetland. They had to wait at least twelve months before completion by which time the property had gone up in value by about £40,000. They took entry in 2007. The purchase price was £206,508. They stayed there for over 5 years. It was a very good investment. They made a profit of about £40,000 when the property was sold. The property at Meggetland in Edinburgh was a joint venture, a joint asset with Mrs Laidlaw. The mortgage was £32,070. The mortgage was in the name of Mrs Laidlaw, but Mr Hanton “took responsibility with her” for the mortgage payments. As Mr Hanton explained: “we were earning good money by then”.

31 Cameron Toll Gardens, Edinburgh

[84] Mrs Laidlaw started slowing down a bit. She was getting more tired. She did not have the urge or the energy for further projects. At the time they did not realise she was ill. They decided to buy a smaller house with no mortgage. The property at Meggetland was sold and 31 Cameron Toll Gardens was bought with no mortgage. That was their last property transaction, a major downsizing. It was a good area for the two of them and still near the business in Montrose Terrace. As with the previous properties title was taken in the name of Mrs Laidlaw, but the two of them were paying for everything on a joint and equal basis.

6-8 Montrose Terrace, Edinburgh

[85] Mr Hanton had spoken to the owner then he spoke with Mrs Laidlaw and they agreed to purchase the property. They already had 10 Montrose Terrace. The idea was to buy 6-8 Montrose Terrace, and give up 16 Montrose Terrace which was on a lease and was “burning money”.

[86] While they were living at Holyrood Road, 10 Montrose Terrace was sold, and 6-8 Montrose Terrace was purchased in the name of Mrs Laidlaw and where they ran the business. The property at 6-8 Montrose Terrace was still owned by her when Mrs Laidlaw died.

[87] Mr Hanton still owned the London Road salon which was in his name and from which he continued to receive a regular rental income.

[88] Productions 5/4/1-10 were the partnership accounts for Cameron Properties. The accounts were prepared on the basis of joint responsibility as between Mr Hanton and Mrs Laidlaw.

[89] Mr Hanton and Mrs Laidlaw never discussed what would happen on her death with the business. Mr Hanton assumed he would take over the business as it was a joint business.

[90] Mr Hanton continued to reside at 31 Cameron Toll Gardens at the date of proof.

Mrs Laidlaw

[91] Mr Hanton gave a lengthy account of Mrs Laidlaw’s illness, ultimately leading to her death on 17 May 2016.

[92] While Mrs Laidlaw showed some signs of something being wrong with her while at Meggetland, it was not until 2013 that it was discovered she had a tumour. Mrs Laidlaw

was hospitalised with a prognosis of a short life expectancy, a matter of weeks, but she then went into remission for about 15 months.

[93] With a prognosis of a short life expectancy Mrs Laidlaw went to stay with her sister Sandra Laidlaw in West Linton after being discharged from hospital. Mrs Laidlaw stayed in West Linton for about six weeks. There was a fall-out between Mrs Laidlaw and her sister, so Mrs Laidlaw came back to Cameron Toll Gardens to stay with Mr Hanton when she was in the early stages of remission. Mr Hanton had been splitting his time between West Linton and Cameron Toll Gardens in order to keep the business running. Mrs Laidlaw subsequently confided in Mr Hanton that her sister Sandra had defrauded her to the sum of £10,000. Following Mrs Laidlaw's death Mr Hanton found a diary belonging to Mrs Laidlaw. At the back of the diary were some notes which suggested her sister Sandra had been abusive towards her both verbally and physically. Mr Hanton was not aware of any abuse until he read the diary.

[94] Mr Hanton gave evidence of their lifestyle while together, such as going on regular holidays. Mrs Laidlaw had 2 brothers and 2 sisters but over the 20 years or so that Mr Hanton had been in a relationship with Mrs Laidlaw it was only in the last few years Mr Downie "appeared" and had contact with Mrs Laidlaw. Mrs Laidlaw had little or no contact with her other siblings except for her sister Sandra with whom she had the fall-out.

[95] Mrs Laidlaw had 2 children from her previous marriage, Christopher and Wendy. Mrs Laidlaw had little contact with her daughter apart from a brief period of about six weeks some 10 years before her death. Christopher kept in regular contact, usually by phone, and he would drop into the shop every few weeks. Christopher was aware of Mrs Laidlaw's medical situation. He came to the house before she died when she was close to death. Mrs Laidlaw wanted to see her grandchildren (Wendy's children) but the contact

had been brief and Mr Hanton had an impression Wendy was using her mother and contact came to an end. There had been no contact between Mrs Laidlaw and the grandchildren for 7-8 years prior to her death in 2016.

[96] After Mrs Laidlaw went into remission she made a significant recovery, returning to work after about three months. Mrs Laidlaw had been significantly disabled prior to the remission, that is, close to death. Mrs Laidlaw had lost her hair. Her hair had always been immaculate. She bought a wig. Mrs Laidlaw also liked to dress well. It took a long time for her to adjust and have the confidence to go to the shops. Mrs Laidlaw looked a lot younger than her actual age. Mr Hanton said she looked 20 years younger than her actual age.

Appearance was important to Mrs Laidlaw.

[97] Mrs Laidlaw was in remission until April 2016 when she took a serious fit. She was admitted to Accident and Emergency at Edinburgh Royal Infirmary before being transferred to the Western General. An x-ray revealed Mrs Laidlaw had a brain tumour. This was a secondary tumour. The primary tumour was in the lungs. As described by Mr Hanton:

“It was like being hit with a sledgehammer but much worse”

[98] Mr Hanton gave a graphic description of events leading up to the death of Mrs Laidlaw including fitting, slurred speech, anxiety, being very infirm, very weak and blind in one eye following a herpes viral infection.

[99] Mr Hanton described the regular hospital transport for radiotherapy treatments, inpatient treatment at the Eye Pavilion, a rapid deterioration towards end of life and the significant support he provided to Mrs Laidlaw particularly in the final weeks until her death.

[100] Mr Hanton provided compassion and support to Mrs Laidlaw up to the point of death.

[101] The couple were married on 9 December 2015. Mrs Laidlaw knew she was going to die. She wanted to be married. She wanted “a Scottish wedding”. They got married on the Royal Mile. Mrs Laidlaw obtained a special licence to get married before Christmas 2015. Her last Christmas in 2015 was special for her.

Will - 22 March 2016

[102] Mrs Laidlaw told Mr Hanton she wanted to put her affairs in order. She did not tell him she was going to make a will. She went with a neighbour Mrs Sanchez into town. When she came back she told him she had made a new will and had put everything in order. Mrs Laidlaw did not tell Mr Hanton the provisions of the will dated 22 March 2016. All he was aware was that Mrs Laidlaw had made a new will and “had put everything in order”.

Cameron Properties

[103] The business known as Cameron Properties was set up by Mr Hanton as a sole trader. Initially Mrs Laidlaw was a helper who assisted with the books and she was the sole signatory for the new business. Production 5/4/15 was a letter from her solicitors Ketchen & Stevens dated 7 August 1997. The last paragraph of that letter recorded: “You (Mrs Laidlaw) are not a partner or a director of the new business”.

[104] It was the intention of Mr Hanton that Mrs Laidlaw would become a partner in the business once her divorce proceedings were concluded.

27 April 2016, 28 April 2016 and 29 April 2016

[105] Mrs Laidlaw was taken to hospital by ambulance on 27 April 2016 when she last had a fit. She collapsed and was unresponsive. Mr Downie appeared within minutes and shortly after the GP arrived and took over. Neighbours Mr and Mrs Sanchez appeared at the back of the ambulance to say goodbye to Mrs Laidlaw. There was a confrontation between Mr Downie and Mr Sanchez with Mr Downie saying:

“This is nothing fucking to do with you. This is family business”.

[106] Mr and Mrs Sanchez had been very supportive. Mrs Sanchez was a confidante of Mrs Laidlaw.

[107] In the assessment ward at Edinburgh Royal Infirmary (“ERI”) Mrs Laidlaw had come round a bit, but she was disorientated and although her speech had recovered it was not fully recovered. Mr Hanton stayed with Mrs Laidlaw until 12.30 am when he got a lift home from Mr and Mrs Sanchez. Mr Downie had stayed at the hospital for about an hour, leaving around 6.00-6.30 pm.

[108] On 28 April 2016 Mr Hanton came to the hospital before going to work at around 10.30 am. Mrs Laidlaw was transferred to the Cancer Unit of the Western General during the course of the day.

[109] Mr Hanton went to the Western General for about 6.00 pm. Mrs Laidlaw was not coherent. She was saying “phone no working” and “Ian said phone no working”.

[110] The battery was at zero. Mr Hanton charged the battery. Having a working phone was very important to Mrs Laidlaw.

[111] On the evening of 28 April 2016 Mr Hanton thought Mrs Laidlaw was still quite confused. He stayed at the hospital until the back of 9.00 pm. Mr Hanton did not see any other visitors for Mrs Laidlaw while he was there.

[112] On the morning of 29 April 2016 Mr Hanton tried to call Mrs Laidlaw about four times between 8.00 am and 9.00 am but they were just missed calls. By the time he made the fifth call he was at work. It was by then about 9.00-9.30 am. Mr Downie answered Mrs Laidlaw's phone. The call was "short and sweet". Mr Downie said:

"Don't worry Ken. You don't need to come. We are dealing with everything".

[113] Mr Hanton was fine with that and thought no more of it at the time.

[114] Mr Hanton saw Mrs Laidlaw again on the evening of 29 April 2016. She seemed "a bit better".

[115] It was only later Mr Hanton thought it was strange Mr Downie was at the Western General for about 8.00-9.00 am. What time did he have to leave his home in West Linton to be there?

[116] During the course of the day Mr Hanton received a number of calls from nursing staff asking what facilities there were at home as Mrs Laidlaw wanted to come home.

[117] On the evening of 29 April 2016 Mr Hanton went to visit Mrs Laidlaw. Mr and Mrs Downie were at her bedside. Mrs Laidlaw was in bed and very agitated, saying "home" "home". Her speech was unclear with the words sounding more like: "ome" "ome". Mrs Laidlaw became very distressed and frustrated. The nursing and medical advice was to try to persuade Mrs Laidlaw to stay but eventually it was agreed Mr Hanton could take Mrs Laidlaw home.

[118] Mrs Laidlaw was not able to walk as she was so weak and frail. She could not speak. Her speech had gone. There was no way she could do anything. Mr Hanton took her home as that was her wish.

Mrs Downie

[119] Mr Hanton said Mr Downie was only in regular contact with Mrs Laidlaw after the first diagnosis of cancer in 2013. The first time Mr Downie was in their house was after Mrs Laidlaw had stayed at West Linton and was in the early stages of remission.

[120] At the time Mr Downie had been made redundant and had started up a handyman business. Mrs Laidlaw wanted to help him. Mr Downie carried out various jobs at Cameron Toll Gardens which Mr Hanton believed were unnecessary (and for which it was Mr Hanton's view Mr Downie should not have charged as much as £15 per hour) and then persuaded Mrs Laidlaw to install a new kitchen. Yes, the property did need a new kitchen but Mr Hanton believed Mr Downie was taking advantage of Mrs Laidlaw's medical condition and at a time when she was still attending hospital regularly. In the event the kitchen was replaced. Mr Hanton and Mrs Laidlaw went to Howdens to select and pay for worktops. Mr Hanton did not know what Mrs Laidlaw paid Mr Downie for the cost of replacing the kitchen.

Note: Mr Hanton did not explain in evidence why the cost of installing the new kitchen was not shared equally with Mrs Laidlaw.

[121] Mr Hanton said that Mr Downie "had a wand over her (Mrs Laidlaw)". Mr Hanton believed Mr Downie had a serious influence over Mrs Laidlaw. After replacing the kitchen, Mr Downie then had a new patio installed at the property. Mrs Laidlaw was still very weak when the new patio was installed. Mr Hanton repeated in evidence he believed Mr Downie had a serious influence over Mrs Laidlaw.

Mrs Laidlaw 29 April 2016 – 18 May 2016

[122] Mrs Laidlaw returned home from the Western General on 29 April 2016. She was bedridden and had a morphine injection driver. Nurses from Marie Curie attended and assisted with her care. In addition, Mr Hanton had support and assistance from his sister, Mrs Sinclair, and the neighbours Mr and Mrs Sanchez. Occasionally the Marie Curie nurses stayed overnight as part of terminal care.

[123] Mr Hanton said Mrs Laidlaw could not speak from the day she came home. She was unable to communicate. She never ate anything. He just wet her lips. A neighbour who had worked for the NHS explained to Mr Hanton how this happened when the system was closing down. Mr Hanton could talk to Mrs Laidlaw but he had no response back.

Mrs Laidlaw could make sounds and mumblings but that was the limit of her speech. That was only in the first few days after coming home from the Western General, and then the morphine kicked in. In practical terms Mr Hanton was there for her 24/7 until the day she died.

[124] Before the emergency admission to hospital in April 2016 Mrs Laidlaw had told Mr Hanton she had sorted out all the papers for the 20 years of business and placed the papers in a cupboard. She had told Mr Hanton she had taken care of all the paperwork. As far as Mr Hanton was concerned she was telling him she was passing on the responsibility of the business to him while she was able to do so.

Will - 29 April 2016

[125] Mr Hanton was not aware of the will dated 29 April 2016 until he received a letter from Boyd Legal with a copy of the will.

[126] Mr Hanton was devastated when he read the terms of the will that Mrs Laidlaw had left the residue of her estate to Mr Downie. He was annoyed. He thought there was something “dodgy” about the will. Given their relationship for over 20 years and having married in December 2015 Mr Hanton believed Mrs Laidlaw would never write what was said in section 6 of the will. It made him ill. It took him a long time to digest what was said in the will. It was totally unbelievable. He could not actually believe what was said in the will. It was very hurtful. She had cut out the 3 people in her life closest to her, and her grandchildren. Although estranged from Wendy she still loved her daughter. She loved the grandchildren; they were part of her.

[127] Mr Hanton was not aware Boyd Legal had been involved in the making of the will on 29 April 2016 until later. It was only later Mr Hanton found out Mr Downie contacted Boyd Legal to come to the hospital on 29 April 2016 and he then arranged for the will to be signed. Mr Hanton believed Mr Downie would not have done that if Mr Hanton had been present. Mr Hanton would have insisted a doctor had made sure Mrs Laidlaw had the capacity to make a new will. As far as Mr Hanton was concerned Mr Downie took total control of the situation and prevented him from coming to the hospital on 29 April 2016.

[128] Mr Hanton was asked to comment on the attendance note of the solicitor from Boyd Legal on 29 April 2016, production 6/14. He stated it was “total rubbish” that he had been “completely useless” and that he had been “no support whatsoever over the past few weeks”. That was not correct as a matter of fact. Mrs Laidlaw must have been totally influenced by Mr Downie or totally confused. Mr Hanton agreed it was at best a wildly mistaken belief. Mrs Laidlaw had not been orientated to reality whatsoever. Mr Downie was not the only person helping Mrs Laidlaw. Mr Hanton was tending to all Mrs Laidlaw’s needs. Mr Hanton believed Mr and Mrs Downie had influenced Mrs Laidlaw to a major

extent when she was in a state of total confusion. Mr Hanton did not think Mrs Laidlaw knew where she was at the time she made the will on 29 April 2016.

[129] Mr Hanton denied spending all his time gambling. He was not a gambler. He would place a bet on the Grand National but nothing more than that. He was not in a betting shop on the evening of 28 April 2018. Mr Hanton believed Mr Downie had been bad mouthing him when speaking to Mrs Laidlaw that evening.

[130] Mr Hanton had no idea what provision Mrs Laidlaw had made in any will. She did not tell him her plans for any will. Neither of them discussed their financial affairs with the other. For example, Mr Hanton never discussed his personal finances or his will with Mrs Laidlaw. All that Mrs Laidlaw said after making a will in March 2016 was that “everything was in order”. Mr Hanton never asked Mrs Laidlaw about her personal finances. Each of them had their own bank accounts. There was no joint business account. Mrs Laidlaw was the signatory for the account in her name. She was the signatory for Cameron Properties.

Generally

[131] Mr Hanton explained why the account was not in his name. He described himself as having “difficulty in opening a bank account”. He had been made bankrupt at one stage in his life, round about 1990-1992. He had been discharged. He was getting back on his feet. He had a mortgage account. He had a shop. In his view the only person who could operate the account for Cameron Properties was Mrs Laidlaw.

[132] While Mr Hanton stated in examination in chief that Mrs Laidlaw was “financially bankrupt” when they met, he accepted Mrs Laidlaw was not actually bankrupt. She and her husband had a four bedroom house in Bonaly/Colinton and a villa in Spain. The business

James Erskine's was quite a substantial business in Edinburgh. The children had been educated at private school.

[133] In the course of cross examination Mr Hanton was referred to various trading accounts starting with the accounts for Laidlaw & Hanton t/a Cameron All Trades, being the accounts for the period ended 31 October 1998. This was the first set of accounts for the business. While Mr Hanton had given evidence that Mrs Laidlaw had no capital to invest in the business and that he invested £1,500, the capital accounts showed that Mrs Laidlaw had introduced £22,803.

[134] Mr Hanton was not able to assist the court on any of the figures in the trading accounts. His position, fairly, was that he did all the physical work and Mrs Laidlaw dealt with the books. Mr Hanton accepted that he was not very good at paperwork. His position was that while any property was in the name of Mrs Laidlaw it was truly in joint ownership.

[135] There was an inconsistency in Mr Hanton's evidence in chief when the trading accounts were put to him. His evidence was that the businesses were doing well or very well, generating a good income, but that was simply not borne out by the accounts. The trading accounts before the court showed very modest profits, year in and year out. In 2002 the profit was £12,980. Mr Hanton's tax return for the year to 5 April 2010 showed an income from the partnership of £4,154.

[136] In 2002 Mr Hanton received an inheritance of £50,000 following the death of his mother. It was the evidence of Mr Hanton that he used some of that inheritance to buy stock but that was not borne out by the trading accounts. The accounts for the year to 31 October 2013 showed stock of £4,450 and in 2014 stock of £4,000, production 5/3/5.

[137] In 2002 Mrs Laidlaw introduced additional capital of £4,000 whereas it was the evidence of Mr Hanton that Mrs Laidlaw had not introduced any further capital.

Mr Hanton was not able to challenge the accuracy of the accounts. He had to accept he had been wrong.

[138] While Mr Hanton accepted there had been some delay in making a claim that the properties were held in trust, separate from the earlier claim for reduction of the will dated 29 April 2016, Mr Hanton explained that following the death of Mrs Laidlaw he had suffered serious illness with serious depression and was not functioning properly. It was some time before Mr Hanton was well enough to look at all the paperwork again about the properties and pass on that information to his solicitors.

[139] Mr Hanton maintained he had introduced additional capital after the initial £1,500. There was some confusion about that evidence. Mr Hanton referred to the refurbishment when the shop was first acquired. He talked about cash being invested from the hairdresser shop but it was unclear whether that represented only the initial capital of £1,500 or some additional capital introduced at a later date. The trading accounts did not bear that out. When he gave evidence about the inheritance from his mother's estate and introducing capital by buying stock, Mr Hanton explained that was in the form of buying furniture, such as tables and chairs which were subsequently sold. The profit went into the business and Mr Hanton would get cash to buy more furniture for the business. The stock was recorded in a police book, which was not a production. The shop at 6-8 Montrose Terrace was sold by Mr Downie following the death of Mrs Laidlaw. Mr Hanton did not know what had happened to the stock or the safe where the police book was kept.

[140] The evidence from Mr Hanton that he had invested additional capital to the business after receiving his mother's inheritance was not reflected in the trading accounts. Any suggestion that regular income from the London Road salon was being paid into the business was not reflected in the accounts. Mr Hanton's position was that he would give

money to Mrs Laidlaw. Mrs Laidlaw would put a record of this into the cashbook and the money would be paid into the bank, as cash, over a period of 20 years. These transactions would be shown in the pay-in book and cheque stubs. The rental income from the London Road salon was not paid into the business every month as Mr Hanton also used that rental income for clothes, money for his son, Ian.

[141] Mr Hanton did not accept that it was Mrs Laidlaw who put up all the money for Cameron Properties, who injected all the capital, who controlled all the finances and who took responsibility for all the risks of the business.

[142] While Mr Hanton was not very happy about the work carried out by Mr Downie for Mrs Laidlaw – he could not understand why Mr Downie had come on the scene from around 2013 – he was not going so far as to say there was something sinister going on; he just could not understand why it was going on. Mr Hanton believed Mrs Laidlaw was being influenced by Mr Downie, influenced to get work done which was not necessary at a time when she was seriously ill.

[143] On the issue of undue influence, it was Mr Hanton's position that Mr Downie had control of Mrs Laidlaw's phone while she was at the Western General around 28 and 29 April 2016 and that is why he was not able to make contact with Mrs Laidlaw. There was no question of her phone not working. The phone was not charged. Mr Hanton charged the phone when he visited Mrs Laidlaw on the evening of 28 April 2016. Mr Hanton "surmised" that Mr Downie allowed Mrs Laidlaw's phone to be discharged although he could not say Mr Downie had discharged the phone. Mr Hanton could not recall any previous occasion when Mrs Laidlaw was in hospital and her phone had no battery charge. Mr Hanton then contradicted himself by stating he was not suggesting Mr Downie was to blame for the phone not working, having no battery charge.

[144] Mr Hanton was referred to his affidavit 5/2/1 of process (used for the purpose of the interim interdict hearing). At para 25 Mr Hanton described how Mrs Laidlaw's health deteriorated rapidly between 4 April 2016 and 25 April 2016. Mrs Laidlaw could still deal with her phone, that is send texts and make calls.

[145] While it was very difficult to say if Mrs Laidlaw could have used her phone on 28 and 29 April 2016 Mr Hanton was hoping to get a response from her.

[146] On 29 April 2016 when Mr Downie answered Mrs Laidlaw's phone around 9.00 am, all Mr Hanton could say was that he was surprised at Mr Downie answering the call.

[147] Mr Hanton did not know if Mr Downie knew Mrs Laidlaw had any intentions to change her will on the morning of 29 April 2016. The only discussion Mr Hanton had with Mrs Laidlaw about any will was after she made the will in March 2016. Mr Hanton was not aware of the will of 11 April 2016. It would not have been a surprise to him that she did not tell him of her intentions. It would not have been a surprise to him if Mrs Laidlaw did not want him to know about her intentions with any will.

[148] While Mr Hanton continued to criticise Mr Downie for the work carried out for Mrs Laidlaw and the hourly rate of £15 he was apparently charging, production 5/3/2 was a bundle of screenshots which included a text exchange between Mrs Laidlaw and Mr Downie on 25 February 2016, production 5/3/2/5, where she asked him to fit a lock and that she wanted him to do a couple of other jobs. Mr Hanton's position was that Mr Downie was influential in getting jobs from Mrs Laidlaw. He did not know what Mrs Laidlaw had paid Mr Downie for any of the work.

28 April 2016

[149] Mr Hanton confirmed he went to the hospital in the evening with Mrs Laidlaw's phone charger, and a small kit bag with toiletries and bits 'n bobs. Mrs Laidlaw told him her phone was not working, that there was something wrong with the phone. Mr Downie had said the phone was not working. It was put to Mr Hanton if the battery was discharged the phone would not be working. That was correct.

[150] Mr Hanton had been concerned during the course of the day as Mrs Laidlaw was not answering her phone, nor was he receiving any reply to his texts. Mr Hanton accepted Mrs Laidlaw might not have been able to respond to him, but he was hoping she would respond or one of the staff would help her to respond. Mr Hanton accepted her son Christopher had been texting Mrs Laidlaw in the weeks up to 28 April 2016 and that she had not replied. He accepted Mrs Laidlaw may have had a problem reading texts. She did have a problem with her eyes. She had lost sight in one of her eyes and she had contracted herpes, which may have impacted on the sight in her other eye. He was not sure of the condition of her other eye at the time.

[151] In an affidavit which Mr Hanton signed on 24 October 2016 at paragraph 25 he stated:

"Between 4 April and 25 April 2016, Kathleen Ann Laidlaw's health deteriorated rapidly. She had to use a magnifying lens on her glasses to read. In any event, I still do not think she was able to read properly. Her eyesight appeared to be non-existent, she could no longer walk unsupported, and she was weak, not eating properly or regularly. She was confused, would repeat herself and was very forgetful".

[152] On reflection Mr Hanton's position was that Mrs Laidlaw was blind in one eye and the other eye was in a very bad condition. Nobody could say if she could see out of the other eye.

29 April 2016

[153] Mrs Laidlaw had signed the self-discharge form on 29 April 2016. It was just a squiggle. The doctor had to print her name underneath. Mrs Laidlaw was in a hyper state. She was very, very uptight. She was screaming. She just wanted to go home. She was in a bad way that evening. She was shouting “ome” “ome”.

[154] Mr Hanton gave further evidence about the accounts for Cameron All Trades and Cameron Properties. The accounts for Cameron All Trades for the period ended 31 October 1998, production 5/4/124, showed capital introduced by Mrs Laidlaw of £22,803. It was Mr Hanton’s position that Mrs Laidlaw definitely did not have £22,000 to introduce as capital in 1998. Mr Hanton dismissed that figure as “an invention”.

Note: Mr Hanton repeatedly stated in evidence that he had no interest in the accounts and left these matters to Mrs Laidlaw. This passage of evidence from Mr Hanton was not credible or reliable and is rejected.

[155] The trading accounts over the years recorded expenditure including rent and rates, rates alone, and insurance, but there was no mention of any commercial property in the capital accounts. The two businesses Cameron All Trades and Cameron Properties co-existed for a while but Cameron All Trades, dealing in second hand furniture and antiques, then stopped trading.

[156] Mr Hanton’s evidence covered a period in excess of 20 years. At times Mr Hanton was unreliable about dates. Mr Hanton did not like Mr Downie and that impacted adversely on his credibility and reliability. His evidence had to be considered in that context. He had a tendency to exaggerate and speculate which also adversely impacted on his credibility and reliability. Mr Hanton was not reliable about financial matters relating to the business of Cameron Properties, at times inconsistent and contradictory with his own evidence.

2. Dr Christopher Derry

[157] Dr Derry was a consultant neurologist at the Western General. Dr Derry adopted the terms of his report and CV, productions 5/3/1 and 5/3/1A. Dr Derry had a speciality in epilepsy and sleep disorders but for the most part his work covered general neurology. There was a clear link between epilepsy and brain tumours. Dr Derry saw a significant number of patients with brain tumours.

[158] Dr Derry accepted there was an error in his report at para 1.2 reporting on the medical records. Mrs Laidlaw had had radiotherapy treatment on 28 April 2016 and 29 April 2016 confirmed at productions 6/18/24 and 6/18/128. Mrs Laidlaw had 10 fractions of radiotherapy treatment from 18 April 2016 to 29 April 2016.

[159] At para 3.1 of his report Dr Derry noted Dr Carson had reviewed a number of affidavits to which Dr Derry had not had access in the preparation of the report. On the morning of 21 August 2018, the date when Dr Derry gave evidence, he had sight of 3 affidavits being the affidavits of the solicitors Mr Thomson and Mrs Forrester and the staff nurse Mrs Martin, productions 6/4, 6/5 and 6/6. Dr Derry adhered to the terms of his report.

[160] A scrutiny of the medical records from Edinburgh Cancer Centre was covered at pages 3-6 of the report.

[161] There was an attendance note of 5 April 2016 which recorded that after cycle 4 of chemotherapy Mrs Laidlaw had been admitted to the Eye Pavilion with varicella zoster virus associated retinitis. The chemotherapy would have suppressed Mrs Laidlaw's immune system. In addition to the brain tumour Mrs Laidlaw had a diagnosis of severe retinitis which was caused by a severe infection in the eye. Chemotherapy treatment was discontinued. A recent MRI scan showed the spread of the cancer to the surface and lining of the brain.

Symptoms can vary:

1. headaches;
2. can disturb the brain function generally including causing confusion;
3. some individuals are asymptomatic at least initially.

[162] Accordingly, confusion was a possibility. On 7 April 2016 there was a note of Mrs Laidlaw being “slightly confused”.

[163] On 9 April 2016 and 10 April 2016 there were signs of improvement after starting Dexamethasone which can reduce swelling, resolve confusion and improve speech at least temporarily.

[164] On 27 April 2016 Mrs Laidlaw presented at the Emergency Department (ERI) with an acute shortage of breath and reduced responsiveness. The primary tumour was in the lung. A mini mental test (MMT) recorded 4/10. Mrs Laidlaw’s confusion at that time was substantial.

[165] On 20 April 2016, on general observation at 17:01 hours, Mrs Laidlaw knew where she was but could not give an approximate time of day.

[166] On 29 April 2016 Mrs Laidlaw was allowed to self-discharge on her husband agreeing to take her home.

[167] Dr Derry was referred to his opinion at para 4.2 of the report in answering the question:

“Is it possible that Mrs Laidlaw’s medical conditions could have affected her cognitive function and capacity to make decisions around her will?”

[168] There were 2 possible mechanisms whereby medical conditions could have affected Mrs Laidlaw’s capacity to make decisions around her will. These were delirium and a specific cognitive deficit because of the brain tumour.

[169] In the opinion of Mr Derry it was more likely than not, that is 51% or more, that her medical conditions affected Mrs Laidlaw's capacity to make decisions around her will. In coming to that opinion Dr Derry had taken into account Mrs Laidlaw's overall medical conditions, her impaired cognition previously and that she was dying.

[170] As set out at para 4.2.3 of the report an individual such as Mrs Laidlaw may seem to be apparently alert but not of sound mind in making decisions. That might be more apparent for someone who knew Mrs Laidlaw very well or if explored in more detail such as a cognitive assessment being carried out. That would be a formal assessment as opposed to a simple MMT which was a brief examination and observation. Dr Derry said the real limiting factor was that no attempt was made to assess Mrs Laidlaw's cognitive function around the time the will was made.

[171] Dr Derry recorded his opinion in the last sentence of para 4.2.3:

"In my opinion it is certainly possible that Mrs Laidlaw's judgement could have been significant(ly) impaired without appearing frankly confused and disorientated and without this impairment being immediately apparently to those around her."

[172] Further, at para 4.3.3 Dr Derry stated:

"...Moreover, there is an increasing body of medical evidence indicating that individuals with brain tumours often have impaired capacity to make decisions about important issues (such as their medical treatment) which is not appreciated by their treating doctors. Studies in this area have found that treating medical staff often overestimate the capacity and cognitive function of individuals with brain tumours. This is because impairments in the capacity to appreciate risk, judgement, and planning may not be obviously apparent in a conversation in individuals who are otherwise lucid, alert and oriented. In my opinion it seems likely that if clinicians who regularly treat individuals with brain tumours can fail to detect such cognitive deficits when consenting patients for surgery, that the solicitors and nurse present at the time Mrs Laidlaw signed her will could also have failed to appreciate such deficits were they present."

[173] Dr Derry was not able to go so far as to state it was more likely than not that

Mrs Laidlaw did not have capacity at the time she changed her will on 29 April 2016, but

that it was more likely than not she had a cognitive deficit and that her impaired capacity could easily have been missed by the two solicitors and the staff nurse on 29 April 2016 unless they had spent a great deal of time exploring those issues with her, which seemed unlikely.

[174] At para 4.4.1 Dr Derry expressed the opinion that on 29 April 2016 there must certainly have been very substantial doubt as to whether Mrs Laidlaw did have capacity at the time she changed her will. In his opinion it was most likely Mrs Laidlaw's capacity was impaired, based on her medical conditions at that time. It was more likely than not Mrs Laidlaw's capacity to instruct changes to her will on 29 April 2016 was impaired by the frontal lesion and on the basis of the information in the lead-up to that date.

[175] Dr Derry said Dr Carson had focussed his report on delirium and had not considered the effects the frontal lobe tumour would have had on her new baseline function. Her best baseline function was not full capacity on the balance of probability. That could have rendered Mrs Laidlaw somewhat impulsive and lacking in judgment.

[176] Dr Derry said he had particular expertise in the care of patients with brain tumours and that he was looking at the case of Mrs Laidlaw from a different viewpoint to Dr Carson. Dr Derry was a neurologist by training, training in medical organic neurology, whereas Dr Carson's training was in psychiatric disorders.

[177] The question of capacity was complex, part for medical opinion and part for the court to decide. It was ultimately a consideration for the court whether Mrs Laidlaw had capacity to change her will on 29 April 2016.

[178] Mrs Laidlaw was suffering from delirium but she also had dysphasia which was a specific problem due to a lesion in a part of the brain that was responsible for language. A

physical lesion could cause a disturbance with language function, which was called dysphasia. That was quite different to the global generalised confusional state with delirium.

[179] Mrs Laidlaw had a lot of problems, not just dysphasia, but the frustration of not being able to get words out. Potentially both problems were present, dysphasia and delirium. These could be difficult to distinguish especially for lay people, junior doctors and even for general doctors who did not deal in neurology.

[180] The dysphasia caused a gradual deterioration with occasional improvement through steroids, and on top of that Mrs Laidlaw had delirium fluctuating up and down. There might be subtle changes with the dysphasia. The steroids might bring down the swelling on a transient basis. As Dr Derry said: "these are difficult areas to pin down."

[181] On 29 April 2016 Mrs Laidlaw had self-discharged. The medical colleagues had been prepared to allow Mrs Laidlaw to self-discharge and there appeared to be no safety concerns. If a patient was broadly thought competent on an end of bed assessment then they would be allowed to go home. The medical staff may have been thinking this was a reasonable thing to do at end of life.

[182] When it came to questions of capacity doctors would usually refer the matter to a psychiatrist. If medical staff had concerns they would or could have sought psychiatric advice but this was not a case where there were gross problems or that Mrs Laidlaw was grossly confused. There may have been subtle degrees of confusion, subtle degrees of cognitive decision and planning and reasoning which may have been slightly impaired, which may not have been apparent in general conversation. There was no doubt that at the time of making the will Mrs Laidlaw would have seemed well enough to people to make a reasonable decision.

[183] Dr Derry noted that in the affidavits for the two solicitors who had attended Mrs Laidlaw on 29 April 2016 they had applied their minds to Mrs Laidlaw's capacity and resolved themselves that she had capacity to make a will. Dr Derry could not say definitely Mrs Laidlaw did not have capacity, but Mrs Laidlaw had a big frontal lobe deficit, and it remained his opinion it was more likely than not Mrs Laidlaw was not capable of thinking through the ramifications of what she was doing when she made the will on 29 April 2016.

[184] As stated in the report at para 4.3.3 there was research that experienced clinicians could miss impaired capacity and that impaired capacity may not be picked up in a short conversation. The two solicitors had been with Mrs Laidlaw for 30 minutes on 29 April 2016 taking instructions on the will. That would certainly be evidence to take into account but that would not convince him. Mrs Laidlaw was more than 51% more likely than not to have cognitive impairment. The making of a will required quite a sophisticated level of decision making in terms of the implications for family and children.

[185] All that Dr Derry could say was that Mrs Laidlaw would not be thinking in an entirely normal way. It was likely Mrs Laidlaw had a degree of cognitive impairment and that her thought processes were not entirely normal.

[186] It was put to Dr Derry that Mrs Laidlaw may have come to a fixed idea that no one was helping her apart from Mr Downie and she wanted to change her will in the context of that belief. Dr Derry explained that with organic lesions an individual could get a delusional belief. That could occur in individuals with front lobe deficits, not exclusively, as that could also occur in a delirium. They could occur in the context of an organic brain injury or an organic brain syndrome. If an individual had a fixed idea being a mistaken belief, that would or could appear normal unless they were aware that what was being said was not correct.

[187] Dr Derry recognised the limitations on his opinion. His evidence and opinion had a number of qualifications, properly made, which diluted the case for the pursuer on capacity. The court had the benefit of hearing and assessing the factual witnesses.

3. Mrs Matilda Sanchez

[188] Mrs Sanchez was aged 74 at the date of proof in February 2019. Mrs Sanchez and her husband Julian had been next door neighbours of Mr Hanton and Mrs Laidlaw for about 3 years prior to the death of Mrs Laidlaw in May 2016.

[189] Mr and Mrs Sanchez saw them on a regular basis including having meals together and going on a couple of short holidays together. Mrs Sanchez thought Mr Hanton and Mrs Laidlaw had a very good relationship. Mrs Sanchez became very good friends with Mrs Laidlaw, providing a lot of support when Mrs Laidlaw was unwell.

[190] Mrs Sanchez described how Mrs Laidlaw was unable to do housework when she came home from having chemotherapy. Mrs Sanchez used to do the housework for her. That was in the latter stages before Mrs Laidlaw passed away.

[191] Mrs Laidlaw had told her Mr Downie did work for her including painting and some other jobs. Mr Downie came to their house sometimes. Mr Downie came to the house on 27 April 2016 after Mrs Laidlaw had collapsed and had to be taken to hospital in an ambulance. It was Mr Downie who told Mr and Mrs Sanchez that Mrs Laidlaw had collapsed. Mr Downie was not rude and had not sworn at her.

[192] Mrs Sanchez used to go to appointments with Mrs Laidlaw. She recalled going to the Eye Pavilion when she required some surgery on her eye. That was a day visit. That happened after Mrs Laidlaw collapsed on 27 April 2016. On a previous occasion

Mrs Laidlaw was an in-patient at the Eye Pavilion. She was admitted to have her eyes tested. She was in hospital for 2 days. Mr and Mrs Sanchez went to visit her in hospital. Mr Hanton came later as he was working in the shop. They all came home together.

[193] When Mr Hanton went to work Mrs Sanchez regularly sat with Mrs Laidlaw.

[194] Mr and Mrs Sanchez were asked to be witnesses for them at their wedding on 9 December 2015. It was just the four of them at the wedding. That was what they wanted.

Asked why they got married Mrs Sanchez said: "they probably decided they wanted to have a wedding because they loved each other."

[195] Mrs Sanchez said Mrs Laidlaw's state of health when she got married was "okay then". They had had Christmas 2015 together. Mrs Laidlaw had said to Mrs Sanchez it was the best Christmas she had had.

[196] Mrs Sanchez knew Mrs Laidlaw had solicitors. Mrs Laidlaw had asked her to accompany her to the lawyers, Boyd Legal, in Queensferry Street, Edinburgh. Mrs Sanchez sat in reception while Mrs Laidlaw went to see the lawyer. Afterwards she said to Mrs Sanchez that she could sleep better at night and that "Kenny was provided for". Mrs Sanchez told Mrs Laidlaw that was good and said no more. At the time Mrs Laidlaw went to see the lawyers Mrs Sanchez said "she was alright then; she knew what she was doing; she knew what she was going for."

[197] At the time Mrs Laidlaw went to the Eye Pavilion and the days after that she seemed quite well. She was able to read. It was later on she used a magnifying glass to read small print. At the time Mrs Laidlaw collapsed on 27 April 2016 she was using the magnifying glass a lot. After Mrs Laidlaw had the operation at the Eye Pavilion she went downhill. Mrs Laidlaw used to scribble for writing. She would give Mrs Sanchez a shopping list which she had scribbled so Mrs Sanchez had to write out the list herself. Her eyesight was

failing. By the time Mrs Laidlaw's writing was scribbling she was getting confused as well. She could not remember where things were. For example, she could not remember her bank account number or her pin number. She would ask Mrs Sanchez for her pin number.

Mrs Sanchez did not know the number. She used to panic a bit when she could not find things such as a chequebook or her pin number.

[198] Mrs Sanchez confirmed she had made a statement on a previous occasion, production 5/2/3. This was a handwritten statement which was an accurate account of what she remembered at the time. Mrs Sanchez said the statement was dated 22 June 2016. In summary, she described the deterioration in Mrs Laidlaw's health following the eye surgery at the Eye Pavilion on 4 April 2016 until her death on 17 May 2016. Mr and Mrs Sanchez were on holiday in Lanzarote from 8-22 April 2016. They kept in contact with Mr Hanton while they were away as they were concerned about Mrs Laidlaw's wellbeing. After returning from holiday Mrs Laidlaw's health had deteriorated further. She was admitted to Edinburgh Royal Infirmary on 27 April 2016 after collapsing at home.

[199] Mrs Laidlaw self-discharged from the Western General on 29 April 2016. She was by then very confused and forgetful. She could understand what Mrs Sanchez was saying. She would just say "yes" or "no". Mrs Sanchez could not get much other conversation from Mrs Laidlaw. From then Mrs Laidlaw had 24 hours' assistance from the Marie Curie nurses for palliative care. Her health rapidly deteriorated until her death. She had very little vision and barely knew where she was or what she was doing.

[200] From 29 April 2016 until Mrs Laidlaw's death Mr Hanton was heavily involved in her care. He was there for her all the time.

[201] Mrs Sanchez was referred to an affidavit of Jamie Miller dated 24 October 2016, production 5/2/2. At the time Mr Miller was a Senior Legal Executive with McEwan Fraser

Legal, Edinburgh. That affidavit covered what was apparently said by Mrs Sanchez to Mr Miller at a meeting on 21 October 2016.

Note: Objection was taken by the defender to the admissibility of the affidavit as Mr Miller did not give evidence and the pursuer had not given notice to the defender of the intention to rely on section 2 of the Civil Evidence (Scotland) Act 1988. Mrs Sanchez did not agree with passages in the affidavit. There was no explanation why Mrs Sanchez could not have sworn an affidavit. As Mr Miller did not give evidence the defender had no opportunity to cross examine him on the terms of the affidavit. In all these circumstances the objection is sustained. The affidavit is not admissible.

[202] Mrs Sanchez was very supportive of Mr Hanton in his caring of Mrs Laidlaw until her death. Mrs Sanchez provided Mrs Laidlaw with a great deal of support in the weeks preceding her death.

[203] I had concerns about Mrs Sanchez's reliability generally. Mrs Sanchez was confused about dates and the order of events. That was understandable given the events occurred some years ago.

4. Christopher Laidlaw

[204] Mr Laidlaw was the son of Mrs Laidlaw. He was a security officer at Edinburgh University, aged 48 at the date of proof in February 2019.

[205] Mr Laidlaw described himself and his mother as both being very independent people. She was a very strong-willed person. She was a private person.

[206] On the evidence Mr Laidlaw was not close to his mother. At times Mr Laidlaw was very vague in answers to questions. Mother and son had an on/off relationship. There could be significant periods of time when there was no contact. While Mr Laidlaw said he

would go and see his mother once a month or once every couple of months it is more likely to have been less frequent and that contact was generally by text or by phone on occasion.

[207] Mr Laidlaw was not aware his mother was dying until a matter of days before her death. There was a bundle of screenshots showing text messages received from him by Mrs Laidlaw from 31 March 2016 until 10 May 2016. Mrs Laidlaw did not reply to any of the texts. Mr Laidlaw saw his mother at her home a matter of days before she died. It had been months before then that he had last seen his mother.

[208] Mr Laidlaw was distant from what was happening to Mrs Laidlaw in the weeks and months leading up to 29 April 2016. His evidence was of little assistance to the court.

5. Kathryn Stewart

[209] Ms Stewart was a retired radiographer, aged 60 at the date of proof in February 2019. She was a neighbour of Mr Hanton and Mrs Laidlaw being at the back of their property.

[210] Ms Stewart described her relationship with Mrs Laidlaw as: "we were friends and neighbours, not close friends."

[211] Ms Stewart spoke to events after 29 April 2016. Ms Stewart saw Mrs Laidlaw the day after she came home from the Western General, on 30 April 2016. She described Mr Hanton as looking very tired, visibly upset and emotional as well. As for Mrs Laidlaw she said that as from 30 April 2016 she could answer yes or no; you could tell if she wanted something; she was unable to get out of bed; she was fully bedbound; she could not conduct a conversation; she knew you were there; she did not show any emotion; she was a dying woman. It was her impression that from 30 April 2016 Mrs Laidlaw did not appear to be able to make decisions about anything. She was lying in bed semi-conscious. She was not able to communicate in any shape or form. Ms Stewart would sit with Mrs Laidlaw so that,

for example, Mr Hanton could go to the shops. Mrs Sanchez was there much more often than Ms Stewart. Ms Stewart would generally see Mrs Laidlaw once a week. She did not work on Fridays or at weekends.

6. Mrs Jacqueline Sinclair

[212] Mrs Sinclair provided support for people with physical and learning difficulties within their own homes. She was aged 64 at the date of proof in February 2019. She was the elder sister of Mr Hanton.

[213] Mrs Sinclair was close to Mr Hanton. Mrs Sinclair had known Mrs Laidlaw from when he and Mrs Laidlaw had first started a relationship about 24 years ago.

[214] Mrs Sinclair said the first property bought by Mr Hanton and Mrs Laidlaw was in Rossie Place. They sold that property fairly quickly and bought a property in Holyrood Road. When Holyrood Road was sold they then purchased a property in Meggetland. There was a delay in getting into the property which resulted in them staying with Ms Sinclair's and Mr Hanton's mother for about 9 months at 46 Liberton Place, Edinburgh. Their mother had had an acute stroke so it worked out quite well that when she returned home Mr Hanton and Mrs Laidlaw were staying with her and providing overnight care.

[215] Mrs Sinclair said the business was their lives. They worked together in the shop 6 days a week, sometimes 7 days a week in the run up to Christmas: "they were together all the time."

[216] Mrs Sinclair did not know anything about the financial arrangements for any of the properties or the finances of the business.

Inheritance

[217] After their mother passed away her house at Liberton Place was sold. Mrs Sinclair had been a welfare guardian for her mother. Each of the four sons and daughters received £53,000 and a further £2,500 when the estate was finally wound up. Mr Hanton received a total of £55,500.

[218] Mrs Sinclair was told by Mr Hanton he used some of the inheritance to buy new stock. The shop needed some redecoration and she discussed with him installing a damp-proof course. She also had a discussion with Mr Hanton about investing in long term ISAs, but so far as she was aware, most of the inheritance was put into the business and spent on a couple of "good holidays" to the USA and Tuscany.

Mrs Laidlaw's Financial Position

[219] When her brother and Mrs Laidlaw first got together she was going through a divorce. Mrs Laidlaw told her it was a messy divorce but Mrs Sinclair had no details of Mrs Laidlaw's financial position.

Cameron Toll Gardens

[220] The two of them carried out a considerable amount of work to the front and side of the property with new paving stones. They also put up a conservatory. They both loved the garden. They had a lovely, south facing garden.

Marriage

[221] They were married on 9 December 2015, 2 days before Mr Hanton's birthday.

Mrs Sinclair was not happy that she was not invited to the wedding. She was very close to Mr Hanton and she and Mrs Laidlaw had become good friends.

Mrs Laidlaw's fall-out with her sister Sandra

[222] Mrs Sinclair was aware of the situation when Mrs Laidlaw and her sister Sandra became estranged. Mrs Laidlaw had been very ill in 2013. When she came out of hospital she went to live with her sister. Mrs Laidlaw told her about the fall-out later, that Sandra had been quite cruel to her and had taken £10,000 from her. Mrs Laidlaw had been very hurt, upset and shocked by what happened. Until then Mrs Laidlaw and Sandra had had a close relationship and she had relied on Sandra for support.

Mr Downie

[223] Mrs Sinclair had only met Mr Downie on 3 or 4 occasions. Mrs Sinclair did not know of Mr Downie's existence until a few days before Mrs Laidlaw died. This was after she was discharged from the Western General on 29 April 2016, when she went home and was dying. Mrs Sinclair was at the house with Mrs Laidlaw every day from 30 April 2016 until her death. Mrs Laidlaw was being looked after by Mr Hanton, herself, Mrs Sanchez, Ms Stewart, district nurses and the Marie Curie nurses.

[224] On one occasion Mr Downie came into lounge and said:

"I've to get the engagement ring for my granddaughter."

[225] Mrs Sinclair had previously taken off the engagement ring from Mrs Laidlaw's finger while carrying out personal care for her. She told Mr Downie he would have to speak to

Mr Hanton about that. She made sure the engagement ring was put somewhere safe. She was disgusted by what Mr Downie had said. It was the engagement ring given by Mr Hanton to Mrs Laidlaw.

[226] On another occasion Mr Downie came into the house with Mrs Downie. He had been at the beach with his grandchildren and popped in literally for 20 minutes.

[227] On the day she died Mr Hanton phoned Mr Downie to let him know he needed to come to the house. Mr Downie came to the house. Mrs Laidlaw died later that day.

Mr Hanton

[228] After Mrs Laidlaw died Mr Hanton was quite ill. He lost 3 stone in weight; she was very concerned about his mental state; he just was not coping; he had lost his "soulmate"; he was not sleeping. All the family were concerned about his wellbeing.

[229] Mr Hanton did cope before Mrs Laidlaw's death. They both very much needed each other. They were quite an insular couple. They did not lead separate lives. That was part of the problem. Mr Hanton just did not know what to do with himself after her death.

Will - 29 April 2016

[230] Mrs Sinclair was not made aware of the will until after the death.

[231] Mrs Laidlaw never confided in her that Mr Hanton was a gambler. Mr Hanton cared for and really loved Mrs Laidlaw. He was always there to support her. They had a really, really good relationship. Mr Hanton was a very kind, loving man who loved his wife.

[232] Mrs Laidlaw suffered illness over a long time. Mrs Sinclair said no partner or husband could have done more than Mr Hanton in caring for her. Mrs Laidlaw was always

saying to Mrs Sinclair: “your brother is so good”; “I worry about him”; “he is trying to run the business and taking me to appointments.”

Christopher/Wendy

[233] Mrs Laidlaw spoke about Christopher quite a lot. She worried about him when he broke up with his partner. She cared about him a lot. She spoke very fondly of him.

Mrs Laidlaw never opened up about Wendy. There was no discussion about Wendy at all.

7. Angela Martin

[234] Mrs Martin was aged 57 and a charge nurse at a community hospital in Duns, at the date of proof in February 2019. Before that she was a staff nurse on a gynaecology ward at the Western General. She had been a staff nurse for 12 years.

[235] In April 2016 Mrs Martin was working on ward 11 at the Western General. She worked shifts: dayshift 7.30 am – 8 pm and nightshift 7.30 pm – 8 am. She would usually work 2-3 days on then have days off. Mrs Laidlaw came into her care for a couple of days and, in particular, she was in her care on 29 April 2016. She remembered nursing Mrs Laidlaw while on the ward. She remembered being asked to be a witness to her will and she was present when Mrs Laidlaw wanted to self-discharge.

[236] On the morning of 29 April 2016 Mrs Laidlaw told her that her lawyers were coming in to see her. She remembered Mr Downie coming to visit Mrs Laidlaw with his wife. She had spoken with Mr Downie on the evening of 29 April 2016 as he was concerned about her discharge. Mrs Martin could not remember any other visitors. There may have been other visitors but she did not recall any. She did not recall meeting Mr Hanton.

Mrs Laidlaw's condition on 29 April 2016

[237] Mrs Laidlaw was able to communicate. She was spatially aware. She was orientated to where she was. She knew she was in hospital. She knew her lawyers were coming in to see her that day in connection with her will. Mrs Martin had no concerns about Mrs Laidlaw's ability to understand what was going on around her.

[238] Mrs Laidlaw's vision was not 100%. She had limited visibility. She could not see you on the other side of the room. She could see you close up. She could eat her meals and see what she was eating. If you were away from her she struggled with her visibility.

[239] Mrs Laidlaw did not require assistance with food and drink as they were always right in front of her on her table.

[240] The lawyers came to visit. Mrs Martin could not remember if Mrs Laidlaw told her why the lawyers were coming. Mr Downie was present. He asked if a private room could be arranged when the lawyers came. Mrs Martin took Mrs Laidlaw in a wheelchair to the ward sitting room and left her there with the lawyers. As far she could remember Mr Downie stayed in the room. Mrs Martin did not recall the length of the meeting. She could not remember who asked her, but she was asked to witness Mrs Laidlaw's will. She went into the ward sitting room and did that for her. She said Mrs Laidlaw had signed the will before she went into the room.

[241] Mrs Martin had witnessed wills in the past. There was nothing unusual about what happened. She had no concerns. Mrs Martin would not have put Mrs Laidlaw in the category of a confused patient.

Discharge from Western General 29 April 2016

[242] Mrs Laidlaw needed help with her personal care. She could not recall what medical care was required.

[243] Mrs Laidlaw self-discharged on 29 April 2016. She wanted to go home. She was quite anxious and agitated. She was quite determined she wanted to go home.

[244] It was suggested to Mrs Martin that Mrs Laidlaw was only able to say the words "ome" "ome" and was not able to communicate. Mrs Martin disagreed. Mrs Laidlaw had expressed herself quite clearly. She wanted to go home. She wanted to go home "now".

[245] A Discharge Against Advice form was completed when a patient wanted to be discharged against medical advice. The other discharge form was when a patient was ready to be discharged and was medically fit. Mrs Martin had not seen Discharge Against Advice forms very often, perhaps 5 or 6 times over 12 years as a staff nurse. The Discharge Against Advice form for Mrs Laidlaw was production 6/18/31.

[246] Mr Downie approached Mrs Martin and expressed concern about Mrs Laidlaw being discharged home and her safety being at home. Mrs Martin asked for a doctor to speak to Mrs Laidlaw and Mr Downie about the discharge. That led to the Discharge Against Advice form being completed and signed. Mrs Laidlaw was discharged. Mrs Martin was sure Mr Hanton came to collect her. This was recorded in the nursing notes for Mrs Laidlaw, productions 6/18/133 and 6/18/134. There were entries completed by Mrs Martin at 19.16 hours and 19.31 hours. Mrs Martin was not present when the Discharge Against Advice form was completed and signed.

[247] Mrs Martin recalled Mrs Laidlaw was anxious, agitating and shouting that she wanted to go home. She was angry. She was not screaming but she was shouting. It was

her perception Mrs Laidlaw was anxious because she wanted to go home that night. She was determined that was what she wanted.

[248] It was put to Mrs Martin that while Mrs Laidlaw may have had a basic level of functioning and could understand mundane basic matters that she might have been impaired in relation to more nuanced matters such as weighing judgments and that may not have been obvious. Mrs Martin disagreed. Mrs Laidlaw was aware of where she was. She was aware of what was happening that day. Mrs Martin was working with Mrs Laidlaw every day on the ward. That was how she was. In caring for Mrs Laidlaw's needs that was not just medical needs but psychological as well. If something was obviously not right Mrs Martin would have done something about it.

[249] Generally, Mrs Martin described Mrs Laidlaw as a nice lady who was frustrated at times as she was not able to manage her own care. She was also irritable about her sight as well, having to ask you to come closer to see. She was not rude like some other patients were. She made herself clear about wanting to go home. She definitely said the words "I want to go home". Mrs Martin could not recall the detail of any other conversation with her.

8. Ian Downie

[250] Mr Downie was the brother of Mrs Laidlaw, aged 67 at the date of proof in February 2019. He had worked on the family farm for many years before re-training as an electrical maintenance engineer. Since 2012 he had worked as a self-employed handyman, currently on a part-time basis.

[251] Mr Downie was one of 7 siblings, 3 of whom were deceased: William, Mary and Kathleen (Mrs Laidlaw) with the others being Sandra, Ena and Drew.

[252] Mr Downie grew up in the same house with Mrs Laidlaw. When she got married to Norman Laidlaw they continued to have a good relationship. Mr Downie married his wife Julie in 1972. Their relationship was not so good after the divorce. It was a messy divorce although Mr Downie had no details. Mrs Laidlaw distanced herself from the family at Broomlee after she started her relationship with Mr Hanton. Mr Downie would see her occasionally. He did not know where she was staying with Mr Hanton. He did not see much of her after that. Some people said that she picked "the wrong guy".

[253] Mrs Laidlaw and Mr Hanton used to come out to see his other sister Sandra from time to time. Sandra lived about half a mile from Broomlee. He would see the 2 of them occasionally.

[254] When Mrs Laidlaw was first diagnosed with cancer in 2013 he went to visit her in the Western General. She was not in a good way. After she left hospital she wanted to stay at Sandra's. She came to die but miraculously she went into remission. She went back to her home. She had a fall-out with Sandra about money. Mr Downie did not know the details.

[255] About 18 months before she died Mr Downie received a telephone call from her asking if he would be her executor. She said she wanted someone she could trust.

Mr Downie had never been an executor before but he agreed to be her executor because she was his sister.

[256] In 2015 the cancer returned. Mr Downie was still in touch with Mrs Laidlaw. She used to phone him regularly. When she got bad she spoke to her lawyer Mr Thomson who arranged a Power of Attorney in his favour, production 6/3. Mr Thomson arranged a bank card for Mr Downie to use so that he could pay bills for Mrs Laidlaw. She had wanted someone she could trust and rely on. That was why he was nominated her attorney.

[257] During the period April 2015 – April 2016 she used to phone Mr Downie once or twice a week or if he was in town he would pop into the shop. Her health was not too bad until April 2016. Mr Hanton was with her most of the time and she had support from friends and neighbours such as Mrs Sanchez and Ms Stewart. She asked him to do some jobs for her at the house. They were of a minor nature. There was work carried out on the kitchen and slabbing the backyard. He did not do the work but arranged for other tradespersons to carry out that work.

Radiotherapy appointments list

[258] Some time in evidence was taken up covering the radiotherapy appointments list, production 5/1/4, and the transport arrangements for Mrs Laidlaw to and from the Western General in April 2016. It was clear from the handwritten note on the list that patient transport had been arranged and should be cancelled when not required. There was an issue between Mr Downie and Mr Hanton whether a rota was agreed between them to transport Mrs Laidlaw by car as an alternative to patient transport. I had concerns about the reliability of Mr Downie during this passage of evidence, not assisted when he volunteered information on several occasions which had not been put to Mr Hanton in cross-examination. The evidence about radiotherapy appointments was not material to the determination of the issues in this case.

27 April 2016

[259] Mr Downie received a telephone call from Mr Hanton after lunch and told him Mrs Laidlaw had collapsed. Mr Downie went to the house. The GP was there. She had

been passing by chance. Mrs Laidlaw was taken to the ERI by ambulance with Mr Hanton travelling in the ambulance. Mr Downie followed in his van.

[260] At the hospital she was put in a cubicle. Mr Downie and Mr Hanton sat with her. A doctor saw her. She was not very good at the time. That was around 3 pm – 4 pm. He left the hospital around 7.30 pm. By then Mrs Laidlaw was in a good state. She was sitting up in bed chatting away as if nothing had happened. She was transferred to the Western General the following day.

28 April 2016

[261] Mr Downie and his wife went to visit her on the evening of 28 April 2016. She was in a good state of health. She was sitting up in bed, chatting away as normal. She was speaking in sentences. She knew who they were. She understood where she was. She was not confused; she was normal.

[262] She told them Mr Hanton was coming in at 6.30 pm but he did not appear then.

Mr Downie was asked by her to phone Mr Hanton at 7.45 pm to see where he was. He did that. He got through. Mr Hanton said he was shopping. He said he was busy.

Mrs Laidlaw was very unhappy that he had not come into the hospital. She hated hospitals. She just wanted company.

[263] Mr Hanton had not arrived at the hospital by the time Mr and Mrs Downie left at 8 pm. Mrs Laidlaw said the next day he came for about 10 minutes, after 8 pm.

29 April 2016

[264] Following her collapse on 27 April 2016 Mrs Laidlaw asked him to contact her lawyer Mr Thomson to arrange a meeting once she knew she was going to be in the Western

General. A meeting was arranged for around 10.45 am on 29 April 2016. Mr Thomson came to the hospital.

Meeting with Mr Thomson on 29 April 2016

[265] On the morning of 29 April 2016 Mr Downie drove from his home in West Linton to the Western General arriving at about 10.35 am, shortly before the meeting was due to start. He met Mr Thomson who came with another lawyer named Claire (Mrs Forrester). This was the first time Mr Downie had met Mr Thomson.

[266] Mr Thomson asked the nurses for a private room. Mr Thomson and Mrs Forrester went with Mrs Laidlaw into a private room. Mr Downie took her into the room in a wheelchair. Mr Thomson then asked Mr Downie to leave. There were 3 people in the room: Mrs Laidlaw and the two lawyers.

[267] On the morning of 29 April 2016 Mrs Laidlaw was in a very good state; she was chatting away; she was laughing; she was speaking in sentences; she understood where she was; she seemed to recognise Mr Thomson; she seemed to understand why the lawyers were there.

[268] The meeting lasted about an hour. Mr Downie went away for a coffee. When they came out of the room Mr Thomson told him Mrs Laidlaw had made another will but he said nothing about the terms of the new will. Mr Downie was asked to act as courier.

Mr Thomson returned to his office with Mrs Forrester and some time later Mr Downie received a telephone call from Mr Thomson's secretary to say the new will was ready in reception to pick up. While waiting for Mr Thomson's call Mr Downie and Mrs Laidlaw had a coffee and a chat but the will was not discussed.

Previous Wills

[269] Mr Downie was aware of Mrs Laidlaw's intentions when she made a will in 2013. She told him she had left him £10,000 to have a nice holiday.

Signing of Will

[270] Mr Downie returned from Mr Thomson's with the sealed envelope at about 2 pm. Mrs Laidlaw asked him to get a doctor or a nurse to witness the will. She was beside her bed in her chair. Mr Downie arranged for a nurse, nurse Martin, to be a witness.

[271] Mr Downie saw Mrs Laidlaw open the envelope. She appeared able to read the will. Mr Downie did not look at the will. She and the nurse were at a table next to her.

Mr Downie saw her sign the will and the nurse sign as a witness. She then put the will back in the envelope, sealed it and Mr Downie couriered this back to Mr Thomson's office by taxi around 3 – 3.30 pm returning to the hospital by about 4 pm.

[272] It was Mr Downie's impression Mrs Laidlaw was quite happy. She was able to communicate. She was able to speak in sentences. She understood where she was. She seemed to understand who the people were around her. She did not seem confused. She seemed to understand what she was doing about the will. She told him she had made a new will but nothing more was said.

Self-discharge of Mrs Laidlaw on 29 April 2016

[273] After Mr Downie returned to the hospital he popped in to say to her he had made the delivery. She said she wanted to go home that night. Mr Downie said that was not a good idea as nothing had been arranged, such as a hospital bed and commode.

[274] Mr Downie went home. He and his wife came back to the hospital later. Mr Downie phoned Mr Hanton at about 5.45 pm to tell him Mrs Downie and himself were going to the Western General. They arrived at about 6.45 pm.

[275] Mr Hanton was there. Mrs Laidlaw was sitting and had a case ready to go home. Mr Downie went to speak to one of the nurses and eventually a doctor spoke to her. She was adamant she was going home. She raised her voice. Mrs Laidlaw was able to speak to medical staff in sentences. The medical advice was that she should stay in hospital until everything was set up at home, but she was adamant she wanted to go home. Both Mr and Mrs Downie said they wanted her to stay in hospital but she would not have it.

[276] Mrs Laidlaw self-discharged and Mr Downie, Mrs Downie and Mr Hanton took her home. As far as Mr Downie was concerned when they got her home they had a cup of tea and she was quite happy.

30 April 2016 – 17 May 2016

[277] After Mrs Laidlaw returned home she was not bad for the first week but after that she started going downhill. She could talk to you but it was not the same. The tumour was obviously taking effect. For the last 4 days she was on a syringe driver. She would squeeze a hand but very seldom opened her eyes until her death.

Role of executor

[278] Once a death certificate had been obtained through the lawyers, Mr Downie had a meeting with Mr Thomson's colleague Mrs Forrester as Mr Thomson was on holiday. She read out the will. The will dated 29 April 2016 was production 6/1. That will left everything

to Mr Downie, whom failing Mrs Downie, whom failing their children. Mr Downie said: "I was gobsmacked."

[279] On Mr Downie's instructions the lawyers made an offer to Mr Hanton that he should have the shop and shop contents as it was a working business. There was never any reply to that offer.

[280] Mr Downie said Mrs Laidlaw did have capacity to make a will on 29 April 2016. He denied any undue influence. Mrs Laidlaw was a strong-willed person who would not have changed her mind easily. She was a very lovely person, always pleasant, very happy and just a joy. She had phoned him most days in the weeks leading up to her death.

[281] Mr Downie denied expressing any interest in Mrs Laidlaw's engagement ring when at her house. Mr Downie denied saying that Mrs Laidlaw had told him his granddaughter was to have the engagement ring.

[282] Mr Downie denied ever being in financial difficulties. He said he had never been in debt. Productions 6/10 and 6/11 were bank statements showing he was in credit:

"I've never needed to worry about money. I've always worked hard. I've never needed credit."

[283] Mr Downie denied being a gambler. Mr Downie denied creating a scheme for financial gain. Mr Downie said:

"She (Kathy) asked me to be her executor. She trusted me."

[284] In cross-examination Mr Downie was asked a series of questions focusing on Mrs Laidlaw's determination to go home on the evening of 29 April 2016. It was repeatedly put to Mr Downie that Mrs Laidlaw was not paying any notice to what the medical staff were saying because of her state of mind. She was not capable of making any sensible decision about whether she should go home. Mr Downie disagreed. She did not like

hospitals. She had completed all her treatment. She was determined to go home.

Mr Downie said:

“You don’t know Kathy. It was Kathy’s nature.”

[285] Mr Downie did not accept Mrs Laidlaw was shouting or agitated and shouting despite being pressed on this.

Note: Mr Downie was determined to downplay how Mrs Laidlaw was reacting when medical staff were trying to dissuade her from going home. There was other evidence, particularly from the nurse Mrs Martin, that Mrs Laidlaw was agitated and raising her voice in her determination to go home. That evidence was more reliable.

4-5 weeks leading up to 29 April 2016

[286] Mr Downie had not seen a lot of Mrs Laidlaw in the weeks before her collapse on 27 April 2016. Her health had deteriorated a little but she was able to chat away and converse.

[287] When Mr Downie visited her she was sitting in her chair. When they went out she managed to get into the car. He would push her in a wheelchair as her walking was not good. He tried to visit 3 times a week for a couple of hours at a time. He would give her a cup of tea and chat to her. At weekends Mr and Mrs Downie would take round food, such as lasagne, made by Mrs Downie.

Post discharge 29 April 2016

[288] Mrs Laidlaw was quite frail when she left the Western General on the evening of 29 April 2016. She needed support to prevent her from falling or collapsing. When they returned to her home they had a cup of tea, cake and a chat. They chatted away for about an hour before Mr and Mrs Downie went home.

Deterioration of Mrs Laidlaw after 29 April 2016

[289] Mrs Laidlaw was in effect bedbound from after the hospital bed was installed on Monday 2 May 2016. She had a commode beside her bed. For the first week after the discharge she was mentally alert but after about a week she was uncommunicative and monosyllabic.

[290] It was put to Mr Downie on more than one occasion Mrs Laidlaw was uncommunicative and monosyllabic during the week after 29 April 2016 and, in particular, that other witnesses had spoken to Mrs Laidlaw being uncommunicative and monosyllabic after a couple of days of returning home. Mr Downie said she was alert and communicative for about a week after her return home.

Engagement Ring/Jewellery

[291] Mr Downie repeatedly denied saying to Mrs Sinclair that Mrs Laidlaw's engagement ring was to go to his granddaughter. Mrs Sinclair was an independent witness. There was no reason to disbelieve her account. I did not accept Mr Downie's denial as credible. That evidence was not relevant to capacity or matters of undue influence, facility and circumvention, rather to Mr Downie's credibility and reliability generally.

[292] As for her jewellery generally Mr Downie repeatedly denied ever seeing any jewellery. When shown the attendance note prepared by Mr Thomson of the meeting on 29 April 2016, production 6/14, which recorded that Mrs Laidlaw had passed her jewellery to Mr Downie to make over to Wendy so there was no need to refer to jewellery in the will, Mr Downie again denied ever receiving any jewellery. Mr Downie had not attended the meeting on 29 April 2016.

Will 29 April 2016

[293] Various propositions were put to Mr Downie including that there had been no need for Mr Downie to rush in a taxi to get the new will; that he had called Mr Hanton early on the morning of 29 April 2016 to tell Mr Hanton that he was at the hospital, that everything was fine and that he need not attend. Mr Downie denied these propositions. He collected the will on 29 April 2016 as he was under instruction from Mrs Laidlaw to do so.

[294] On the morning of 29 April 2016 Mr Downie left home for the hospital at 9 am. There had been snow which meant he had to take a detour. He just arrived at the hospital in time for the meeting. He did not have any call with Mr Hanton early on the morning of 29 April 2016.

[295] There were many questions about arrangements for the meeting between Mrs Laidlaw and her solicitor Mr Thomson on 29 April 2016. There had been a meeting arranged for a later date then brought forward following her collapse on 27 April 2016. It was put to Mr Downie he had been instrumental in setting up the meeting for 29 April 2016 which he denied. There was some uncertainty whether the telephone call to arrange the meeting took place on 28 or 29 April 2016. Not least due to the passage of time the evidence about when the call was made and what was discussed during the call was unreliable. The reliable evidence comes from the solicitors Mr Thomson and Mrs Forrester and the attendance note of 29 April 2016, production 6/4.

Gambling

[296] It was put to Mr Downie he had made up a story about Mrs Laidlaw being angry at Mr Hanton for going to the bookmakers. Mr Downie disagreed. He said Mrs Laidlaw had

also expressed concerns about Mr Hanton's gambling to their other sister Sandra and to his wife, Mrs Downie.

Mr Hanton

[297] It was put to Mr Downie that he did not like Mr Hanton and that he had never liked Mr Hanton. Mr Downie disagreed.

[298] It was put to Mr Downie he had never given Mr Hanton his place even though he had married Mrs Laidlaw. Mr Downie disagreed.

[299] Production 6/3 was an attendance note made by Mr Thomson of a telephone call with Mr Downie on 29 April 2016. The note recorded:

(GT noting that ID never refers to Kenny as KL's husband. He always calls him "that guy she has been staying with". GT wondering if ID knows that KL and Kenny got married).

[300] Mr Downie claimed he could not remember saying those words explaining "my memory is not as good as it used to be".

[301] Mr Downie eventually accepted that if that was what was recorded by Mr Thomson he must have said it.

[302] This passage of evidence from Mr Downie was unimpressive. There is persuasive evidence Mr Downie did not refer to Mr Hanton by name when speaking with others and that he did speak about Mr Hanton in disparaging terms. Putting that into context he had already said in evidence:

"Nobody (in the family) could understand why she (Kathy) had gone out with Mr Hanton."

[303] Mr Downie denied having a plan to get to the hospital early, to make sure no one else was around, and to make sure Mr Hanton did not come to the hospital and interfere so that he could ensure Mrs Laidlaw had a mistaken belief that she should change her will.

[304] Mr Downie denied that before the meeting with Mr Thomson he already knew Mrs Laidlaw was going to change her will that day and that there would be a need to transport the will. Mr Downie said he was just doing what Mrs Laidlaw asked him to do.

Capacity to make a Will on 29 April 2016

[305] Referring to the evidence of Dr Derry and his opinion that there could be fluctuations in the level of functioning, it was put to Mr Downie it might be difficult to see whether Mrs Laidlaw was functioning fully on 29 April 2016. Mr Downie said it was not his decision whether Mrs Laidlaw was competent to make a will on 29 April 2016. That was a decision for Mr Thomson and his colleague Mrs Forrester, but so far as Mr Downie was aware Mrs Laidlaw was capable of making a will on 29 April 2016.

[306] A number of propositions were put to Mr Downie that showed he had exercised undue influence over his sister:

- persuading her to have work carried out on her home;
- persuading her into false beliefs and, in particular, that Mr Hanton was a gambler or was in betting shops;
- adopting a plan to take control of the situation so that Mrs Laidlaw changed her will on 29 April 2016;
- persuading Mrs Laidlaw into having a false belief that she was getting no support from Mr Hanton through her illness and was only getting support from Mr Downie.

[307] Mr Downie denied he had exercised undue influence, that he had a plan or that he had persuaded her into false beliefs. Mr Downie said most people knew Mr Hanton was a gambler. Mrs Laidlaw had told him Mr Hanton was a gambler years before. Mr Downie had not made up his evidence. Mr Hanton had given support to Mrs Laidlaw particularly during the last week when he was brilliant (the emphasis being on the last week of her life and not before then).

[308] Mr Downie had no personal knowledge of the ownership of the shop premises in Montrose Terrace or the property at Cameron Toll Gardens. He said "it was nothing to do with me." Mr Downie did offer a comment:

"She told me she ran the show; she owned the house and the shop; that's all I know."

[309] While for the most part Mr Downie was a credible and reliable witness he was not credible or reliable all of the time. Mr Downie never liked Mr Hanton and his evidence has to be considered in that context.

[310] I have concluded there was no undue influence on the part of Mr Downie to persuade Mrs Laidlaw to change her will in his favour. There was no scheme of circumvention. Mrs Laidlaw was not facile. Mr Downie was a credible and reliable witness in relation to the events concerning Mrs Laidlaw on or about 29 April 2016. His account is to be preferred over Mr Hanton where inconsistent.

9. Graeme Thomson

[311] Mr Thomson was a senior associate with Balfour Manson Solicitors, aged 42 at the date of proof in March 2019. He was previously with Boyd Legal for 4 years from 2014-2018.

[312] Mr Thomson's first contact with Mrs Laidlaw was a few weeks after he started at Boyd Legal. She had asked him to check title deeds for the house at Cameron Toll Gardens

and the shop in Montrose Terrace as she was concerned title may have been transferred to her partner (Mr Hanton) or a mortgage taken out without her knowledge. When Mr Thomson checked both properties were still in her name. Nothing had been transferred or added. Mr Thomson said Mrs Laidlaw seemed relieved and quite pleased when he told her.

[313] Quite a few weeks later, in 2014, Mr Thomson had a meeting with Mrs Laidlaw to discuss her will. Mr Thomson could not recall the terms of that will but most of the family featured including her children, with the children getting quite a large proportion of the estate and Mr Downie receiving a legacy. Mr Thomson did not know any of the family.

[314] In 2015 Mr Thomson prepared a Power of Attorney nominating Mr Downie as Attorney. Mr Downie discussed with Mrs Laidlaw whom she trusted to look after her affairs. She trusted her brother Mr Downie. Production 6/3 was a standard letter from the Office of the Public Guardian dated 4 July 2015 with the Power of Attorney. This was a continuing financial and welfare Power of Attorney signed by Mrs Laidlaw on 28 April 2015 which he witnessed.

[315] Mr Thomson also completed and signed a certificate under section 15(3)(c) of the Adults with Incapacity (Scotland) Act 2000 which was a statutory requirement that he was happy Mrs Laidlaw had capacity to sign the Power of Attorney and that she understood the nature and extent of the Power of Attorney when this was granted.

[316] Mrs Laidlaw also signed a document headed Determination of Incapacity which was to assist the attorney when welfare powers could be exercised in terms of the Power of Attorney. Mrs Laidlaw selected the option:

“When my Attorney considers me incapable of dealing with my own affairs.”

Wills dated 22 March 2016 and 11 April 2016

[317] Mrs Laidlaw wanted to update her will. That will was signed by Mrs Laidlaw and witnessed by Mr Thomson on 22 March 2016, production 5/1/1. At some point Mr Thomson was aware of Mrs Laidlaw's ill health. At one of the meetings she was wearing a wig because of having chemotherapy. They had a bit of a discussion about what she was going through.

[318] The property at 31 Cameron Toll Gardens was to be transferred to Mr Hanton who was her husband by then. As executor, Mr Downie was directed by her to make over all her jewellery to her daughter Wendy. The commercial property at 6-8 Montrose Terrace was to be sold, and from the net free proceeds of sale £10,000 was to be paid to Mr Downie, with the remaining balance to be split equally between her children Wendy and Christopher.

[319] Mr Thomson knew the shop was in the name of Mrs Laidlaw as he had previously checked the title. He was also aware she ran a business from the premises including upholstery. Mr Thomson said Mrs Laidlaw described the business as a sole trader. She described the business as "her business". The will also provided that her interest in the business known as Cameron Properties including all furniture, stock, business cash and other business assets were to be made over to Mr Hanton.

[320] Mr Thomson discussed with Mrs Laidlaw her relationship with her family. The children's share was being reduced to reflect that she did not see much of her children, if at all.

[321] Mr Downie was not at the meeting. Mr Thomson said that at a couple of meetings a friend came and sat in reception. The meeting was only with Mrs Laidlaw. As at 22 March 2016 Mr Thomson had no reason to be concerned that Mrs Laidlaw might not have capacity to make a new will. Mr Thomson said he had a full discussion with Mrs Laidlaw about the

new will. There was nothing to suggest Mrs Laidlaw did not understand what she was doing.

[322] A short time later Mrs Laidlaw contacted Mr Thomson again. Mr Thomson arranged to visit her in hospital on 11 April 2016. Mrs Laidlaw made a further will signed by Mrs Laidlaw and witnessed by Mr Thomson on the same day, 11 April 2016, production 6/19.

[323] Mrs Laidlaw had 2 matters to discuss:

1. reducing the share for the children and increasing the share for Mr Hanton;
2. concern about Mr Hanton having access to money while she was in hospital as the business was in her name and there were no joint accounts. Mr Hanton could not access any money to pay bills.

[324] Mr Thomson suggested Mrs Laidlaw amend one or more of the bank accounts to have a joint account or appoint Mr Downie as attorney so he could access funds if required.

[325] Mrs Laidlaw said her children had not been supportive when she had been unwell so she wanted to change the provisions of the will.

[326] Mrs Laidlaw wanted to make over part of the residue of her estate to Mr Hanton, whereas the will of 22 March 2016 divided the residue of the estate into 3 equal parts with Mr Hanton receiving one third and each of Wendy and Christopher receiving one third. The whole residue of the estate was now left to Mr Hanton. Mrs Laidlaw was matter of fact. She did not see her children. She wanted to give them less. She was not emotional about she wanted to do.

Will 29 April 2016

[327] Mr Thomson was called by Mr Downie mid to late April 2016. Mrs Laidlaw wanted to meet him to make more changes to her will. Mr Thomson recalled Mr Downie saying:

“Kathy has made me call you.”

[328] His recollection was that an appointment was made, but Mrs Laidlaw could not make it into the office. The meeting was due to take place on Monday 2 May 2016, but Mr Thomson received a call towards the end of the previous week from Mr Downie telling him Mrs Laidlaw had taken another turn and was back in hospital. She was not going to make the meeting on 2 May 2016 as she was at the Western General. Mr Downie asked if Mr Thomson could go and see her as soon as possible. Mr Thomson went to the Western General on 29 April 2016 to have a meeting with Mrs Laidlaw. He asked a colleague Claire Forrester, another solicitor, to accompany him in case there were any issues of capacity and to get a second opinion. When they arrived at the hospital Mrs Laidlaw was there as was Mr Downie. A nurse showed them to a private room then left. Mr Thomson knew he was there to take instructions from Mrs Laidlaw about amendments to her will. Mr Downie was asked if he would leave the room so that they could take instructions from Mrs Laidlaw herself.

[329] Mr Thomson asked Mrs Laidlaw if she knew why they were there. She said she knew they were there to review her will and she wanted to make changes. She was in a wheelchair as her mobility was restricted. Mr Thomson said “other than that she seemed like normal Kathy”.

[330] By 29 April 2016 Mr Thomson had met Mrs Laidlaw about five times and had chatted on the phone a couple of times in between.

[331] Mrs Laidlaw was able to speak in sentences. Mrs Laidlaw knew where she was and why he was there. They had a good half hour discussion about her instructions. Had he any concerns: “no, not in the slightest.”

[332] Mr Thomson said he had a raised level of awareness about Mrs Laidlaw’s capacity because of the circumstances. That is why he brought a colleague Mrs Forrester with him. When he and Mrs Forrester were on the way back to the office he apologised for “dragging Claire out” as Mrs Laidlaw was fine.

[333] Mrs Laidlaw told Mr Thomson she wanted to re-direct her estate to her brother Mr Downie. She said she was very unhappy Mr Hanton had not been supporting her with her illness during the past few weeks. She mentioned he had not turned up for some visits and visits he had made had not been long. She had tried to call him. Mrs Laidlaw said it had sounded as though he had been “in a bookies”. Mr Thomson had not previously heard Mrs Laidlaw mention anything about gambling. Mr Thomson recalled her actual words: “Kenny was useless.”

[334] As well as not being supportive Mrs Laidlaw had thought Mr Hanton was making a poor attempt at running the business through her absence.

[335] Mrs Laidlaw had said Mr Hanton and the children had not been supportive and had not been around. It was only Mr Downie who was around so she wanted to provide for him and his family. When she indicated she did not want any part of her estate to go to Mr Hanton or the children, Mr Thomson explained Legal Rights to her. Mrs Laidlaw understood the concept of Legal Rights. She had almost welcomed that as a challenge: “Well, let them claim; they’re getting nothing from me in my will”.

[336] Asked whether this change came as a surprise Mr Thomson said “not in this particular case.” When people supported her or were not supportive she expressed that in her will. That was her way.

[337] Asked whether Mrs Laidlaw understood the effect of the changes she was making to her will, Mr Thomson said he discussed instructions with her 2 or 3 different ways to make sure she said the same thing and that she understood what was happening. Mr Thomson did not think Mrs Laidlaw was confused about lack of support from Mr Hanton and her children. She seemed quite clear in her views. Mrs Laidlaw did not mention any issue with her eyes at the meeting. Mr Thomson and Mrs Forrester were there with Mrs Laidlaw for possibly a little over half an hour.

[338] At the end of the meeting Mr Thomson said to Mrs Laidlaw he would go back to the office and Mr Downie could courier the will. If she was happy she could sign the will and have one of the nursing staff witness the will.

[339] Mr Thomson had no concerns Mr Downie had acted inappropriately or was taking advantage of Mrs Laidlaw. Mr Downie seemed quite embarrassed about being involved at all and in making arrangements for collecting the will. There was no discussion with Mr Downie about what changes had been made to Mrs Laidlaw’s will. The will was production 6/1. Mr Thomson confirmed it was Mrs Laidlaw’s signature on the last page, dated 29 April 2016. In terms of the will the residue of the estate was to go to Mr Downie whom failing his family.

[340] At clause 6 of the will there was a declaration regarding husband and children:

“It is my wish that neither my husband nor my children benefit from my estate, although I appreciate that Legal Rights are available to each of them should they choose to claim.”

[341] That was not a standard clause. That clause was inserted to explain Mrs Laidlaw had considered that and that it was not an oversight.

[342] Mr Thomson could not recall any discussion about jewellery.

[343] Mr Thomson saw the signed will on Monday, 2 May 2016 when he returned to the office after the weekend.

[344] Production 6/13 was an attendance note of a telephone call from Mr Downie to Mr Thomson on 29 April 2016. Mr Thomson prepared that file note.

[345] Production 6/14 was an attendance note of the meeting on 29 April 2016.

Mr Thomson said he would have written that attendance note when he came back to the office after the meeting, when it was fresh in his mind. While he did not recall discussing jewellery at the meeting, there was reference to jewellery in the note and the note was accurate.

[346] Mr Thomson did not speak with Mrs Laidlaw again prior to her death.

[347] Mr Thomson thought everything was perfectly above board at the meeting on 29 April 2016. Mrs Laidlaw knew what she was doing. She was not acting out of character. Mr Thomson was actually surprised at how well she seemed.

Note: There is a side note at the end of attendance note of 29 April 2016:

“Side note – throughout the meeting KL seemed bright, attentive and fairly determined. She confirmed her instructions two or three different times – each time with the same instructions. She was noticeably upset with how KH and her children had been staying away. No reason to suspect that KL is doing anything under duress or out of confusion”.

[348] If Mr Thomson had had any concerns about Mrs Laidlaw’s capacity he would have discussed that first with Mrs Forrester and if they both had concerns he would have

consulted one of the medical staff. Mr Thomson was satisfied with Mrs Laidlaw's capacity.

That was why he apologised to Mrs Forrester for dragging her out of the office.

[349] Production 6/15 was a letter dated 29 April 2016 from Mr Thomson to Mrs Laidlaw enclosing the will for signing. The letter specifically mentions the provisions of the new will:

"Ian is to be appointed as your sole executor and sole beneficiary. The whole estate will therefore pass to him. If Ian has predeceased then the estate will pass to his wife Julie. If both have predeceased then Ian's children will be the beneficiaries".

[350] The meeting with Mrs Laidlaw on 29 April 2016 was fairly conversational.

Mr Thomson was asking questions with Mrs Laidlaw giving lengthy answers, not one word answers. It was a fairly balanced discussion.

[351] Looking at the attendance note, production 6/14, the actual meeting lasted about 25 minutes. Mrs Laidlaw was quite a strong personality: "you could notice her in a room". She was quite strong-willed, quite a dominant personality:

"I think it would be quite hard to form a relationship with her. She had quite a brash character."

[352] When he saw Mrs Laidlaw on 29 April 2016 she was perhaps a little subdued but she still seemed quite strong-willed and quite determined.

[353] At none of the meetings had Mrs Laidlaw mentioned any properties being in trust. He was not aware of any trust. The properties were all in her name.

[354] Following that meeting the next contact was with Mr Downie when Mr Thomson was told Mrs Laidlaw had died. Mr Thomson was instructed by Mr Downie to handle the administration of the estate. Mr Thomson had no concerns about Mr Downie's role as executor in the administration of the estate.

[355] Mrs Laidlaw never mentioned she was dying to Mr Thomson. She always appeared quite positive. Mr Thomson was aware she might be dying.

[356] Mr Thomson had no knowledge of any business partnership. He had not been told about Cameron Properties. He had not seen any trust documents.

[357] While Mrs Laidlaw made three wills within a matter of weeks, it seemed to Mr Thomson that was merely part of a pattern. When people upset Mrs Laidlaw she amended her will accordingly.

[358] It was Mr Thomson's impression both Mrs Laidlaw's children were largely estranged. Mrs Laidlaw felt obliged to give them something – she wanted her jewellery to be passed on to her daughter and down the female line – but towards the end of Mrs Laidlaw's life there was little relationship with either her son or her daughter.

[359] The attendance note of the meeting made mention of a care package after Mrs Laidlaw left hospital. Mr Thomson wanted to raise with Mrs Laidlaw the matter of a care package/care plan so that she would give this some thought. Mr Thomson was not aware of there being any care package/care plan and did not know what happened after she left hospital. Mr Thomson did not know how long Mrs Laidlaw expected to live, but care provision would be relevant short-term and long-term.

Supplementary

[360] Mrs Laidlaw had had a failed marriage. She had been in a volatile relationship with Mr Hanton. Her initial instructions concerned her thinking that Mr Hanton was interfering with her property. Mrs Laidlaw got married to Mr Hanton. They then fell out. All of that seemed to match Mrs Laidlaw's personality. Against that background the making of new

wills in March 2016 and April 2016 was “part of a pattern” and not of any concern to Mr Thomson.

[361] Mr Thomson was a credible witness. It was unfortunate he had not had access to the file(s) of Mrs Laidlaw before giving evidence on two separate occasions. The files for Mrs Laidlaw did not form productions in the action, only extracts, so Mr Thomson could not refer to her files.

[362] The attendance note, production 6/14, was prepared shortly after the meeting on 29 April 2016 and can be regarded as a reliable record of the meeting. While Mr Thomson was uncertain about his recollection “at the edges” he was a persuasive witness in relation to the meeting on 29 April 2016. On his evidence Mrs Laidlaw had capacity to make testamentary provisions on 29 April 2016. I accepted that evidence.

10. Prof Alan Carson (referred to as Dr Carson by Dr Derry)

[363] Prof Carson was a consultant neuropsychiatrist based at the Royal Edinburgh Hospital. His CV was production 6/12A. Prof Carson adopted as his evidence a report dated 27 March 2017, production 6/12.

Discharge against medical advice certificate dated 19 April 2016

[364] Prof Carson’s interpretation of the medical records was that Mrs Laidlaw was advised by medical staff it was a very bad idea for her to go home as she was putting her health at risk, but Mrs Laidlaw had capacity to self-discharge and go home. If Mrs Laidlaw had not had capacity the discharge against medical advice certificate would not have been signed by her and medical staff would have considered detention under the Adults with

Incapacity (Scotland) Act 2000 or the Mental Health (Care and Treatment) (Scotland) Act 2003. Prof Carson said that on 29 April 2016 Mrs Laidlaw had capacity for her own welfare.

28 April 2016

Progress report, Dr Pringle

[365] The records noted “expressive dysphasia”. That would not interfere with her ability to understand what was being said to her and she would be able to express views in a comprehensive way, but at times she would have word-finding difficulties.

[366] Mrs Laidlaw was not a well lady in April 2016. She had a lung tumour which was being treated on conventional lines. She had metastatic brain tumours, the largest of which was in the frontal area. The frontal regions of the brain were the most involved in decision making and judgment powers. Prof Carson explained he had been assessing cognition and capacity in brain tumours since 2000. That was what he did on a day to day basis.

[367] Referring to his report, Prof Carson gave three principal reasons for Mrs Laidlaw’s deterioration between mid-March and mid-April 2016:

1. The tumours having a structural effect on the brain;
2. The blockage of fluid which can cause the brain to swell;
3. Delirium which was a final common pathway of illness leading to eventual death:

“It is essentially a discrepancy between the brain’s energy requirement including for oxygen and the ability of the body to provide it. When someone becomes delirious they start to progressively lose contact with reality. The core symptoms of delirium are a decrease in attention, in other words a patient cannot focus on something and therefore does not remember but also a fluctuation in state such that classically somebody will be alright mid-morning and mid-afternoon but start to deteriorate in the late afternoon and evening and in particular overnight. Delirium is very common and will affect the majority of terminally ill patients.”

[368] Delirium was not static, worse at night, when the patient would become increasingly confused. Prof Carson gave an example of a patient having illusions – mistaking the microphones used in court for snakes. Equally, during the day, the patient could be lucid. The delirium could fluctuate from day to day. On a consideration of the medical records Prof Carson said there was no evidence Mrs Laidlaw was delirious at the meeting with Mr Thomson on 29 April 2016.

[369] If a patient had delirium as soon as you started going into detail on any matter you would quickly know something was wrong. A patient with hyperactive delirium would be agitated. A patient with hypoactive delirium would not be interacting but sitting quietly. Someone with hypoactive delirium would not necessarily know where home was or if they were in hospital. If asked if they wanted to go home they might reply – yes. If asked a follow-up question how they will cope they would not know.

[370] If Mrs Laidlaw had been engaged in a detailed discussion about testamentary provisions for around 30 or 40 minutes, the actual length of the meeting made no difference as long as not just 5 or 10 minutes, Mr Thomson could not have had such a discussion if Mrs Laidlaw was delirious at that time. The cognitive ability varied over a 24 hour period. If Mrs Laidlaw had delirium she could have been in a lucid window when meeting with Mr Thomson to manage discussions about changes to her will. The delirium was not impacting on her cognition at that point in the 24 hour cycle.

[371] Prof Carson had read the affidavit of nurse Martin that she was present during the meeting with Mr Thomson, but that was incorrect. That did not impact on Prof Carson's opinion.

[372] Mrs Laidlaw made a number of changes to her will in the months prior to 29 April 2016. It was not a case of Mrs Laidlaw making a sudden change to her will. That would

have caused Prof Carson more concern. Mrs Laidlaw was expressing reasons why she wished to make changes to her will. That reassured Prof Carson there had been no fundamental change in Mrs Laidlaw's cognitive ability by 29 April 2016.

[373] Prof Carson maintained his opinion as set out in the final paragraph of his report:

“... from a medical perspective the most likely diagnosis was a delirium and the core feature of a delirium is that it does fluctuate over a 24-hour cycle – indeed that is how one makes the diagnosis – and therefore it is also perfectly feasible that she was entirely rational at the time of making the Will. I further consider that if she was as confused as is suggested at the times of her worst confusion, in and around those few days at the end of April, it would have been hard, if not *nearly* impossible, for solicitors and the staff nurse not to have noticed this during the process of the drafting of the Will...”

Report by Dr Derry

[374] Prof Carson commented on the report from Dr Derry, production 5/3/1. Prof Carson disagreed with Dr Derry. In the opinion of Dr Derry there was a structural deficit which was hard to see/covert and which interfered with Mrs Laidlaw's testamentary capacity. In Prof Carson's opinion there was no evidence to support there being a structural deficit. A structural deficit and delirium were not mutually exclusive structures. Both Prof Carson and Dr Derry agreed delirium was present.

[375] If Mrs Laidlaw had had a gross deficit which was relatively covert, but which interfered with her testamentary capacity, that would have been noticed by the solicitors in the course of a 30-40 minute meeting on 29 April 2016. Mrs Laidlaw would have shown signs, such as being sticky, difficult, going off on a tangent, jumping about. There was no evidence of that. Mr Thomson would also have noticed Mrs Laidlaw was different from how she had been before at recent previous meetings.

[376] Prof Carson said his opinion in this case was a core area of his job and the reality was that people would come to him for a second opinion.

[377] Prof Carson noted that, in her affidavit, nurse Martin expressed the opinion that at the time of signing the will Mrs Laidlaw had capacity and knew what she was doing at that time. This was a professional colleague expressing a view that Mrs Laidlaw had capacity. It was unusual for nursing staff to express an opinion.

[378] A patient had the right to make a decision which was bad for them if they had the capacity to do so. The bar could be set at different levels but capacity about a decision to go home and capacity to make testamentary provisions both involved the same cognitive functions. From a medical perspective it was necessary to look at the structure of decision making by the patient rather than the accuracy. One could look at why the patient so believed and what were the cognitive processes.

[379] Prof Carson was an impressive witness. Prof Carson's depth of knowledge, experience and reasoning in support of his opinion were weighty and compelling. I preferred Prof Carson's opinion to the opinion of Dr Derry. Mrs Laidlaw could have been entirely rational and have capacity at the time of making the will on 29 April 2016.

11. Mrs Claire Forrester

[380] Mrs Forrester was employed as a solicitor with Boyd Legal from 2012 until May 2017. She completed her traineeship in 2012. She worked in the private client department as a solicitor from 2015 until 2017. She worked with Mr Thomson in the private client department. Mr Thomson was a senior associate and very experienced as a private client lawyer. He was always very thorough, took his job very seriously, and did not take shortcuts.

[381] Mrs Forrester had no involvement with Mrs Laidlaw prior to 29 April 2016. Mr Thomson asked her to accompany him to the Western General in order that he could

take instructions about a will from Mrs Laidlaw. He wanted her to be there in case there was any concern about Mrs Laidlaw's capacity and if he wanted a second opinion.

[382] When they arrived at the hospital they met Mr Downie in a corridor. Mr Downie was the brother of Mrs Laidlaw. They then went into a ward where Mrs Laidlaw was sitting. A nurse said they could go into a private room. All three of them, but not the nurse, went into a private room. Mrs Laidlaw said she wanted to make some changes to her will. Mr Thomson asked Mr Downie to leave the room. Mr Downie agreed and left the room.

[383] Mrs Forrester did not participate in the meeting. At no time in the course of the meeting did Mrs Forrester have any concerns about the capacity of Mrs Laidlaw to give instructions about changing her will. If she had had concerns she would have raised them with Mr Thomson.

[384] Mrs Forrester remembered Mrs Laidlaw being pleased to see Mr Thomson. She was quite animated. When Mr Thomson asked questions she came back really quickly.

[385] Mr Thomson explained why Mrs Forrester was there. Mrs Laidlaw told Mr Thomson she wanted to make two changes to her will: the children were not to be in the will and her husband was not to be in the will.

[386] Mr Thomson asked Mrs Laidlaw why she was changing her will from their last meeting. Mrs Forrester's recollection was not clear but she remembered Mrs Laidlaw saying she was disappointed in their behaviour. It was along the lines that her husband was saying he was coming to visit then not coming or not staying for long. She was not happy with his behaviour. Mrs Forrester recalled Mrs Laidlaw saying something about the shop and that her husband was not great at running the shop. As for the children, Mrs Forrester did not know anything about the children except she did not think they were minor children. She did remember Mrs Laidlaw saying the children had not been around and had not been

having anything to do with her. Mrs Forrester recalled Mrs Laidlaw was quite annoyed about that.

[387] Mrs Forrester had no concerns Mrs Laidlaw could not see. She had no concerns Mrs Laidlaw did not understand what was happening at the meeting. She did not seem confused. She did not seem pressurised. She gave clear instructions of the changes she wanted to make to the will. She gave answers to questions from Mr Thomson that were perfectly reasonable and made sense. She wanted to leave everything to Mr Downie.

Mr Thomson asked Mrs Laidlaw questions about the changes she wanted to make.

Mrs Laidlaw said she was not really happy with the people around her. She said Mr and Mrs Downie had been helping and had been really good to her. That was why she wanted to change the will. When she said that Mrs Laidlaw seemed to have some degree of satisfaction.

[388] Mr Thomson did not use the expression "Legal Rights", but he explained what that meant to Mrs Laidlaw on account of the changes she was making to her will. Mrs Forrester remembered Mrs Laidlaw saying something along the lines: "they'll have to try and take it..."

[389] After the meeting was finished Mr Downie came back into the room. There was a discussion about logistics. Mr Thomson was going to make changes to the will back at the office. Mr Downie was going to collect the new will and take it back to the hospital.

[390] Mrs Laidlaw seemed to be a person who had strong views about things.

Mrs Forrester had no concerns when she was in the company of Mr Downie. They seemed comfortable in each other's company.

[391] Mrs Forrester was a credible witness. She did struggle at times to remember details of the meeting on 29 April 2016. I had no reservations about her reliability how Mrs Laidlaw

presented during the course of the meeting. In particular, I accepted her evidence that there were no concerns about Mrs Laidlaw's capacity to make any testamentary provisions.

12. Mrs Julie Downie

[392] Mrs Downie was aged 65 at the date of proof. She had retired in April 2019, having been a practice manager for a GP practice for the previous 20 years. She was married to Mr Downie. They had married in 1972 and had two sons.

[393] Mrs Downie described her husband as being "kind, thoughtful and loving". He was always very careful with money and had never been in any financial difficulties.

Mr Downie had worked throughout their married life.

[394] Mrs Downie had first met Mrs Laidlaw in around 1971, before she was married to Mr Downie. By then Mrs Laidlaw was married to Norman Laidlaw. Mr Downie and Mrs Laidlaw were very close. Mrs Laidlaw was a very strong character, very confident and good fun. She very much knew her own mind and her own thoughts: "you couldn't sway her".

[395] The two couples regularly socialised over the years. The marriage lasted about 25 years. Mr Laidlaw had an affair. The break-up was acrimonious from what Mrs Laidlaw told Mrs Downie. Mrs Laidlaw was devastated when she found out Mr Laidlaw was having an affair. Mrs Downie did not know anything about the financial settlement on Mrs Laidlaw's divorce.

[396] Mrs Downie first met Mr Hanton in around 1997, as Mrs Laidlaw's boyfriend. Mr Hanton was involved in family occasions. It was quite a volatile relationship. They split up on more than one occasion. Mrs Laidlaw was quite upset about that. They did reconcile.

Mrs Downie thought Mr Hanton's gambling caused some of the problems. That was what she was told by Mrs Laidlaw.

[397] Mrs Laidlaw had told Mrs Downie she owned all the houses and the shop and that she was very much in charge. Mrs Downie had no information about the finances of either Mrs Laidlaw or Mr Hanton.

[398] Mr and Mrs Downie had visited the shop in Montrose Terrace from time to time. Mrs Laidlaw ran an upholstery business. She did contract work for hotels and businesses. There was also some furniture for sale in the shop with customers but the main business was the upholstery business. Mrs Laidlaw was very experienced as an upholsterer. Mrs Downie did not know Mr Hanton's role in the shop.

2013

[399] Mrs Laidlaw became very unwell quite suddenly in 2013. She had been diagnosed with cancer. She was having palliative care, staying with her sister Sandra in West Linton. Mr and Mrs Downie saw Mrs Laidlaw when she was staying with Sandra, Mr Downie more so than herself. Mr Downie helped with lifting, etc. Mrs Downie picked up her medication and helped out with cooking and baking. Mrs Laidlaw made a remarkable recovery and went back to work.

2013–2016

[400] Mr Downie became much closer to Mrs Laidlaw when she was unwell. Mr and Mrs Downie did see more of Mrs Laidlaw following her recovery, Mr Downie more so as Mrs Downie was working. He would pop into the shop to see her. If Mrs Laidlaw asked for

anything Mr Downie did his best to help. In about 2015 Mrs Laidlaw asked Mr Downie to be her attorney for a Power of Attorney, to which he agreed.

Children

[401] Mrs Laidlaw was estranged from her daughter Wendy for quite a number of years.

As for Chris, she would get the odd text. That was still the position at the time of her death in 2016.

Thursday 28 April 2016

[402] Mrs Laidlaw had been having a course of radiotherapy. During the second week of this she became unwell and was admitted to hospital as an emergency.

[403] Mr and Mrs Downie visited Mrs Laidlaw on the Thursday evening. Mr Hanton was not present during their visit. Mrs Laidlaw was unwell. She had had radiotherapy that day. She was quite upset Mr Hanton had not visited that day. Mr and Mrs Downie reassured Mrs Laidlaw he would be in but he had not arrived by 8.00 pm. Mrs Laidlaw asked Mr Downie to call Mr Hanton which he did after leaving the hospital. It was her recollection Mr Hanton said he was shopping. Mr and Mrs Downie then went home.

[404] Mrs Laidlaw could see Mr and Mrs Downie perfectly well. She had been watching TV. She knew where she was. She knew why she was in hospital. She understood very well what was happening. She was not confused at all. She was able to speak in sentences. She was able to answer questions. They sat and had a normal chat. They tried to cheer her up. She was "just the normal Kathy". The visit lasted about 1-1.5 hours. Mrs Downie had no impression Mrs Laidlaw could not find words. She was absolutely fine. She was unwell, but she seemed like she always seemed.

Friday 29 April 2016

[405] Mr and Mrs Downie arrived at the hospital about 6.00 pm after Mrs Downie had finished work at about 5.00 pm. Mrs Laidlaw and Mr Hanton were both there.

[406] Mrs Laidlaw was just the same. She was not confused. Mrs Downie was able to have a conversation with her. When they arrived Mrs Laidlaw said she wanted to go home.

[407] A male nurse asked if they could try and persuade Mrs Laidlaw not to discharge herself that day until arrangements were in place at home to assist her mobility, such as a commode, as the toilet was upstairs. The nurse had had that conversation before Mr and Mrs Downie arrived, but she still wanted to go home.

[408] Mr and Mrs Downie agreed to speak to Mrs Laidlaw. Mrs Downie said to her a Friday was not a good time to be discharged as there would be nothing put in place until the following week, and there was a public holiday on the Monday. They tried to persuade her to stay in hospital until the following week. Mrs Laidlaw said she wanted to go home and that she would manage.

[409] Mrs Downie did not think it was a good decision to go home as she thought Mrs Laidlaw might fall, but Mrs Laidlaw knew exactly what she wanted. Mrs Downie thought she had just decided she would manage. She was speaking in sentences. She understood what she was doing.

[410] The nurse then said he would have to get a doctor to have a conversation with Mrs Laidlaw, as she was going to self-discharge. It was Mrs Laidlaw who spoke to the nursing staff and the doctor. Mrs Downie had no memory of Mr Hanton speaking to them.

[411] Mrs Downie was present when the doctor spoke to Mrs Laidlaw. The doctor explained she was self-discharging against advice and that she would have to sign a form. They spoke for a while. The doctor went and got the form. Mrs Laidlaw read and signed

the form. The doctor said they would prefer her to stay in hospital, but Mrs Laidlaw said “no”, that she wanted to go home. She was coherent during that conversation. She wanted to go home. That was what she was like. That was just her normal way. She was always very determined.

[412] The form was signed and Mrs Laidlaw self-discharged. Mr Hanton went to get the car. Mr and Mrs Downie helped Mrs Laidlaw out with the wheelchair. Mr Downie and Mr Hanton got her into and out of the car when back at her home. Mr and Mrs Downie went back to the house to see that she was settled. There was the four of them at the house. Mrs Laidlaw was still lucid. They all had a cup of tea.

[413] No arrangements had been put in place to deal with her mobility. Mr and Mrs Downie suggested Mr Hanton call NHS 24 to try and get the ball rolling before the GP surgery opened on the Tuesday. Mr Hanton asked Mr Downie if he would make the call. Mr Downie rang NHS 24 on the Saturday, 30 April 2016, and explained the situation. Arrangements were put in place for a hospital bed and a commode and for the district nurse to visit.

[414] Mrs Downie next saw Mrs Laidlaw the following Saturday, 7 May 2016, as she was working during the week. Mrs Laidlaw wanted some shopping. She gave Mrs Downie a list and some money. Mrs Downie bought some food and brought this back to the house. Mrs Laidlaw was still having a perfectly lucid conversation. She understood where she was. She spoke in sentences. She was not confused.

[415] Mrs Downie saw Mrs Laidlaw again the following Saturday, 14 May 2016, a few days before she died on 17 May 2016. She had deteriorated quite rapidly. She was still speaking but was pretty much bedbound.

[416] Mrs Downie was a very matter of fact witness. There was no embellishment or exaggeration. She told the court what happened as she saw it. Mrs Downie strongly disagreed with any suggestion Mrs Laidlaw could not communicate clearly on the evening of 29 April 2016, both at the hospital and when back home. She remained calm and measured in the course of her evidence. I concluded Mrs Downie was a credible and reliable witness.

Submissions generally

[417] Written submissions for both parties were lodged and expanded upon in oral submissions. The submissions for the pursuer were in outline form. Full submissions were lodged for the defender. These submissions were of assistance to the court. The written submissions are referred to for their terms.

Submissions for pursuer

[418] The pursuer moved for decree in terms of the first, fourth and fifth craves of the writ. The pursuer accepted Mrs Laidlaw had capacity to make the will dated 11 April 2016. The estate would fall to be dealt with in terms of that will as a valid testamentary provision in the event decree was granted in terms of the first crave.

[419] The pursuer's approach was to look at crucial points in evidence which might be determinative of the issues or assist the court in determining the issues.

Jewellery

[420] There was a conflict between the evidence of Mr Downie and Mrs Laidlaw, as recorded by Mr Thomson. If the court accepted the evidence of Mr Downie that

Mrs Laidlaw had never given her jewellery to him, then what Mrs Laidlaw said to Mr Thomson on 29 April 2016 demonstrated she had a very serious defect in her capacity and that, in turn, demonstrated Mr Thomson and Mrs Forrester were unable to detect that their client was aberrational. The onus was on the defender to prove Mrs Laidlaw had capacity to make the will on 29 April 2016. On that one point of evidence the court could make a determinative view or a very substantial indication, sufficiently supported by other evidence, including Dr Derry, Mrs Laidlaw was suffering from a serious consequence of the structural injury to her brain arising from the brain lesions. The opinion of Dr Derry should be preferred to Dr Carson, as his opinion that Mrs Laidlaw was only suffering from the cyclical effect of delirium was insufficient to explain such an aberration.

Purchase of SUV

[421] Mr Hanton said Mrs Laidlaw went out on a shopping trip at the beginning of January 2016 and came home as the proud owner of a new car she had ordered, in circumstances where she had not held a driving licence since that had been withdrawn by DVLA in 2013. If that adminicle of evidence was accepted, that demonstrated a lack of capacity by Mrs Laidlaw to make decisions, without having to consider whether Mr Downie was a truthful witness. Mr Hanton had to persuade the motor dealer that the sale of the car could not proceed. In these circumstances the defender could not succeed in satisfying the court of the capacity of Mrs Laidlaw on 29 April 2016.

Engagement ring

[422] There was a conflict of evidence between Mrs Sinclair and Mr Downie whether Mr Downie tried to lay claim to Mrs Laidlaw's engagement ring before her death.

Mrs Sinclair was a credible witness. Mr Downie denied any incident happened but, when confronted in cross examination, his responses were evasive and unsatisfactory. Mr Downie was not a credible witness.

[423] Mr Downie was opportunistic and had the appearance of being systematic. Another example was when Mr Downie telephoned Mr Hanton from the hospital on the evening of 28 April 2016 and then told Mrs Laidlaw that Mr Hanton was in a betting shop, which influenced Mrs Laidlaw when it came to changing her will on 29 April 2016.

[424] If Mrs Laidlaw was not incapax, she was subjected to a scheme of circumvention by the opportunistic Mr Downie. Mrs Laidlaw was in a weakened or facile state of mind and her will was abnormally imposed upon by Mr Downie between 27 April 2016 and 29 April 2016.

Medical evidence

[425] Dr Derry was correct to attribute delirium with executive dysfunction and cognitive impairment. On a balance of probability the brain lesions were causing cognitive impairment so that Mrs Laidlaw lacked the capacity for nuanced judgment, which would not be obvious to Mr Thomson or a nurse or otherwise without a specific assessment. When Mrs Laidlaw told Mr Thomson she had given the jewellery to Mr Downie that was not a delirium which made her unable to give answers, but they were not answers which, on enquiry, had any rational basis.

[426] Mrs Laidlaw's instructions for the sale of the shop premises to fund a care programme had no rational basis given the time it would take to sell the property when she was close to palliative care and death occurring within about two weeks.

Note: This is not accurate. The attendance note of the meeting, production 6/14, states:

“...KL considering the sale of the shop in order to finance it.” Mrs Laidlaw did not give instructions for the sale of the shop premises at the meeting.

[427] Dr Carson had been distracted by looking at matters more broadly and misunderstanding the facts. Nurse Martin was not present throughout the meeting as the instructions for the will and the signing of the will were in two parts.

Capacity – threshold for elderly or infirm client

[428] In assessing capacity Mr Thomson and Mrs Forrester had made a generous allowance or a lower threshold for the older client. Unless the client was “zombie-like” (Mrs Forrester) the client would have capacity to give instructions to make a will.

Note: The reference by Mrs Forrester to the term “zombie-like” has been taken out of context by the pursuer. Mrs Forrester gave a number of reasons why she was satisfied, as a solicitor, that Mrs Laidlaw had capacity to make the will on 29 April 2016.

[429] Nurse Martin’s memory of events on 29 April 2016 was flawed as it was her recollection the instructions and the signing of the will took place in the course of one visit whereas it was in two stages. In any event her evidence about the capacity of Mrs Laidlaw could not be relied upon as no assessment was carried out. Referring to Dr Derry’s opinion, nurse Martin could have been easily fooled or have failed to detect the subtle forms of a defective capacity where no assessment had been carried out. Nurse Martin was referring to a functional level for Mrs Laidlaw, such as eating her food, seeing and basic functional questions, which was very different from what Dr Derry was talking about as in high function to give instructions to make a new will. Very little reliance could be placed on the evidence of nurse Martin.

Circumvention and Undue influence

[430] Two examples were given where undue influence was exerted by Mr Downie:

1. Mrs Laidlaw's mobile phone. The phone was not broken, merely the battery had been discharged. The idea of the phone being broken had come from Mr Downie so that Mrs Laidlaw had no external means of communication.
2. Mr Downie answered the telephone calls made by Mr Hanton to Mrs Laidlaw on the morning of 29 April 2016 and, further, Mr Downie said there was no need for Mr Hanton to come to the hospital that morning, making no mention of Mr Thomson coming to the hospital at 10.00 am. Why did Mr Downie not say something so that Mr Hanton would have been aware of what was happening? That was at odds with Mr Downie promoting Mrs Laidlaw's wish to see more of Mr Hanton. He could have encouraged Mr Hanton to come to the hospital that morning, but did the direct opposite.

[431] These were steps in the scheme of circumvention to the benefit of Mr Downie. For all these reasons Mr Hanton had made out the case for circumvention and undue influence, and the will of 29 April 2016 should be set aside.

Partnership Cameron Properties, Trust and Joint Assets

[432] Mr and Mrs Downie only had second-hand knowledge from what they were told by Mrs Laidlaw. Mrs Downie played down the role of Mr Hanton in the business. Mr and Mrs Downie did not know of the existence of a partnership at all. Mr Hanton entrusted Mrs Laidlaw to manage the paperwork while he dealt with the practical side of the business. Mrs Laidlaw made a will with Mr Thomson in the knowledge that some of the property was partnership property. That was demonstrated by the partnership accounts. Mrs Laidlaw

was responsible for the accounts not Mr Hanton. Against the background of an acrimonious divorce and the impact that had on Mrs Laidlaw, it may be the case Mrs Laidlaw wanted to be independent and have things her own way.

[433] Mrs Laidlaw may have told different things to different people, depending on what suited her at the particular time. The pursuer relied on the letter from Ketchen and Stevens production 5/4/15, which made reference to the business of Mr Hanton as a sole trader and with Mrs Laidlaw just operating the bank account.

[434] The pursuer relied on sections 1(3) and 1(4) of the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act"). The pursuer pointed to two adminicles of evidence which were determinative:

1. The evidence of Mr Hanton and the productions relating to the sale proceeds of Rossie Place, productions 5/4/60 and 5/4/61, whereby the proceeds were divided equally between Mr Hanton and Mrs Laidlaw. That was a clear example of the way things were to work and did work between the two of them when Mrs Laidlaw was alive.
2. Averments of reliance were borne out by the evidence of Mr Hanton and productions 5/5/2, 5/5/3 and 5/5/4, being the letters to Macadam's. Mr Hanton signed a letter to allow title to be taken in the sole name of Mrs Laidlaw for the Holyrood Road property. That was on the understanding of what Mrs Laidlaw had told Mr Hanton to allow the transaction to proceed, with Mrs Laidlaw as agent for both of them, and as nominee for both of them in taking title. It was also agreed between them the property would be a joint asset of which Mr Hanton and Mrs Laidlaw were both the beneficial owners. Mrs Laidlaw held title in her name as nominee and trustee for both herself and Mr Hanton and to the survivor. Otherwise title would

have been in joint names and to the survivor. It was on that understanding, on that reliance, Mr Hanton took a back seat in relation to purchase of properties.

Submissions for the defender

[435] The defender adopted the written submissions. The motion for the defender was that the court should find Mrs Laidlaw had capacity to make the will on 29 April 2016 and that no property of Mrs Laidlaw was subject to a trust.

[436] In summary, and with particular reference to the decision of Lord Glennie in *Smyth v Rafferty and others* 2014 WL 5311821, the defender had proved Mrs Laidlaw had capacity at the time of making the will on 29 April 2016, and there was no evidence of facility and circumvention or undue influence on the part of Mr Downie.

[437] In order to establish a trust the pursuer would have to show the following:

- Existence of an asset;
- Dedication of the asset or right to defined trust purposes;
- There was a beneficiary with defined rights in the trust estate;
- The delivery of the trust deed or the subject of the trust or a sufficient and satisfactory equivalent to delivery, so as to achieve irrevocable divestiture of the trustor and investiture of the trustee in the trust estate.

[438] That statement of what was required to establish a trust was followed by Lord Uist in *Gordon Malcolm MacLure as Trustee on the Sequestrated Estate of David Johnston; Capelrig Limited v Andrew Baird* [2012] CSOH 117. In the present case the pursuer had failed to prove a trust had been established.

[439] Dealing briefly with the submissions for the pursuer:

1. *Jewellery*

Even if Mrs Laidlaw was incorrect in her recollection, that did not equate to a lack of capacity. Persons made mistakes every day. Mrs Laidlaw could have been mistaken about the jewellery having been handed over. That did not bear on capacity at all, see *Simon v Byford* [2014] EWCA 280 (Civ).

2. *Purchase of SUV January 2016*

Mr Hanton spoke to the alleged purchase of an SUV by Mrs Laidlaw in January 2016. Mrs Laidlaw executed wills on 22 March 2016 and 11 April 2016 where her capacity was not challenged. The alleged purchase had no bearing on Mrs Laidlaw's capacity as at 29 April 2016.

3. *Engagement ring*

The incident involving Mrs Sinclair and Mr Downie was not relevant to capacity. Even if the court decided Mr Downie's denial was untruthful that did not go to the crux of the case.

4. *Lower threshold*

The submission by the pursuer that Mr Thomson and Mrs Forrester set a lower threshold for capacity for elderly clients was unfair and had no basis. This was not a case where there was no will at all. There were a number of wills.

5. *Letters from Mrs Laidlaw to Macadam's, productions 5/5/2 and 5/5/3*

There was a covering letter from Mrs Laidlaw and a disclaiming letter from Mr Hanton. It was not known to what Mrs Laidlaw was responding. No other inferences could be drawn from the correspondence.

6. *Requirements of Writing (Scotland) Act 1995*

The pursuer's case did not meet the test set out by Lord President Emslie in *Clark Taylor and Co Limited v Quality Site Development (Edinburgh) Ltd* 1981 SC 111, see

pages 47 and 48 of the written submissions. The burden of proof was on the pursuer to establish a trust.

[440] There were a number of reasons which pointed away from there being a trust. There was no dispute the accounts did not show any of the properties as being in trust. There were no other accounting documents which might indicate the existence of a trust or some other way of dealing with property. The properties belonged to Mrs Laidlaw alone. There was no evidence to support the submission that Mrs Laidlaw said different things to different people about ownership of properties. Ownership was as it appeared to be, in the sole name of Mrs Laidlaw.

Further submissions for pursuer

[441] The Macadam's correspondence was fundamental. But for that letter from Mr Hanton, the solicitors would have obtained title in the joint names of Mr Hanton and Mrs Laidlaw, as joint property and on joint instructions. That had two important legal consequences. It was an acting *rei interventus* and a basis of personal bar under section 1(3) and (4) of the 1995 Act. A trust was created over joint property. The letter was a sufficient indication of Mr Hanton acting in reliance from Mrs Laidlaw, but for which the letter would not have been signed. Mr Hanton was entitled to rely on the 1995 Act and insist on the arrangement being binding on Mrs Laidlaw and her executor in her place. The case of *Clark Taylor and Co Ltd* was pre the 1995 Act and the Civil Evidence (Scotland) Act 1998. The case was not in point. That was a case of a trust by one truster in favour of a trustee. That was a different situation from two persons creating a trust over joint property.

Note

[442] The pursuer seeks production and reduction of the will dated 29 April 2016 on several grounds:

1. Mrs Laidlaw did not have legal capacity when she made the will.
2. The will was impetrated from Mrs Laidlaw by Mr Downie by fraud or circumvention.
3. The will was impetrated from Mrs Laidlaw through the exercise of undue influence by Mr Downie and to her lesion so as to vitiate her consent.

The Law

[443] There was no material difference between parties as to the applicable law.

[444] There is a summary of the law covering capacity, undue influence and facility and circumvention discussed by Lord Glennie in *Smyth v Rafferty and others* 2014 WL 5311821 at paras 35 – 53 which can be applied to the facts and circumstances in the present case.

Capacity

[445] The burden of proof of capacity is on the defender who relies upon the will.

[446] Lord Glennie states at para 40:

“...the testator does not have to have an actual understanding of the nature of the act, the extent of the property and the claims of those who might expect or be expected to benefit. The question is whether he was capable of understanding such matters, not whether he actually understood them on the occasion in question... The capacity to understand is not to be equated with a test of memory or intelligence.”

[447] Lord Glennie states at para 41:

“The burden of proving capacity lies on the person seeking to rely on the will or other disposition... It has been observed that if a properly executed will has been professionally prepared and then explained to the maker by an independent and experienced solicitor, it will be markedly more difficult to challenge its validity on the grounds of lack of mental capacity than in a case where those prudent procedures have not been followed...”

[448] Lord Glennie made a further general observation on capacity at para 51:

“...it is clear that testamentary capacity may come and go over time. A person may have rational moments when he is incapable of thinking or acting rationally. In the context of testamentary capacity, a testamentary disposition will only be reduced if it can be shown that it was executed while the testator was incapable.”

Undue influence

[449] Lord Glennie states at para 43:

“The essence of undue influence is the abuse of a relationship of trust and confidence” approving Lord Macfadyen’s opinion in *Broadway v Clydesdale Bank* 2000 SLT 707 para [26].”

[450] Lord Glennie states at paras 44 and 45:

“...there must first be shown to be a relationship of trust and confidence, where one party places trust and confidence in the other...”

The other necessary element is that of abuse... There must be no coercion, inappropriate acting or concealment. But there are many other ways, some overt or blatant and some more subtle, falling short of coercion or deceit, in which a position of trust and influence may be abused. I shall refer to them compendiously as “pressure”... What is required is evidence of some such pressure having overpowered the will of freedom of action of the testator. Mere persuasion of a testator who is capable of resisting and able to express his own wishes is insufficient...”

[451] In order to avoid the risk of a transaction being reduced the maker should obtain separate and independent legal advice. It need not be from a professional lawyer or accountant but it must be independent (Lord Glennie at para 47). Mrs Laidlaw obtained independent legal advice when giving instructions for the will on 29 April 2016.

Facility and Circumvention

[452] Lord Glennie states at para 48:

“To succeed in a plea of facility and circumvention ... it is necessary to establish (i) that the deceased was facile and (ii) that he was pressurised to make the new will by acts of circumvention or fraud...” and

at para 49:

“...A person is said to be “facile” if his mind is so weak or pliable so that he is unlikely to be able to resist pressure applied by another... Circumvention is the name given to improper pressure applied to such a person by another in such circumstances...A robust individual will be able to resist pressure, or at least decide whether or not he wants to resist it. A facile person may not. But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable having regard to the extent to which the person on whom it is exerted is facile...”

Analysis, Decision and Reasons

[453] This case must be considered on its own facts. The case of *Smyth v Rafferty and others* is of assistance but that case can be distinguished on the facts.

[454] Given the circumstances of the making of the will dated 29 April 2016 Mr Hanton had a genuine belief and concerns that Mrs Laidlaw did not have capacity when she made that will or that she was persuaded by Mr Downie through undue influence to make the last will leaving everything to him.

[455] It is of note Mr Hanton and Mrs Laidlaw kept their finances separate throughout their long relationship. They each had their own bank accounts. They never discussed their financial affairs with each other. Mr Hanton did not know anything about Mrs Laidlaw’s finances as that was of no interest to him. Mr Hanton did not know any of the provisions of any of the wills prior to the death of Mrs Laidlaw. Mr Hanton never discussed with Mrs Laidlaw any wills he had made. It would not have been a surprise to him that she did not tell him of her intentions. It would not have been a surprise to him if Mrs Laidlaw did

not want him to know about her intentions with any will. Mr Hanton had no expectation of Mrs Laidlaw leaving her estate to him on her death.

Capacity to make a Will on 29 April 2016

[456] Medical evidence is one of the factors to consider but is not determinative. Neither of the medical experts examined Mrs Laidlaw. I preferred Prof Carson's opinion that Mrs Laidlaw could have been entirely rational and having capacity at the time of making the will on 29 April 2016.

[457] In the present case the best evidence of Mrs Laidlaw's capacity comes from the witnesses who saw her on 29 April 2016.

[458] There was a sharp conflict on the facts between Mr Hanton and Mr Downie as to Mrs Laidlaw's capacity to make a will on 29 April 2016. The court heard a lot of evidence about Mrs Laidlaw including covering periods before and after 29 April 2016. It is necessary to undertake a close examination of any independent evidence of what happened on and around 29 April 2016 and the making of the will to assist in determining the issue of capacity.

[459] Mr Thomson was an experienced solicitor, a senior associate, whose areas of work covered Wills, Powers of Attorney, Trust Work and Executries. Mr Thomson knew Mrs Laidlaw well professionally. He had met her about five times and had also had a number of telephone calls with her. Mr Thomson was her solicitor from 2014 until her date of death. Mr Thomson said he had made 4 wills for Mrs Laidlaw. The first will made in 2014 was not available. The other wills were dated 22 March 2016, 11 April 2016 and 29 April 2016. In addition Mr Thomson prepared a Power of Attorney in favour of Mr Downie in 2015 and he also gave Mrs Laidlaw general advice on financial matters.

[460] The initial contact from Mrs Laidlaw was a telephone call in October 2014. There is a summary of what happened in Mr Thomson's Affidavit, production 6/4, at paragraph 4.

"I was first consulted by Kathleen Ann Laidlaw in October 2014 when she asked me to check the title to her 2 properties. She was concerned that title may have been transferred to her partner or a mortgage taken out without her consent."

[461] Mr Thomson checked the title deeds for the 2 properties. Mr Thomson advised Mrs Laidlaw that the properties were still in her name. Neither property had been transferred out of her name nor had any mortgage been added. Mr Thomson said she seemed relieved, quite pleased, on receiving that information.

[462] It was some weeks later Mr Thomson had a meeting with Mrs Laidlaw when she made a will. While he could not remember the details he said most of the family featured in the will. In 2015 he prepared a Power of Attorney in favour of Mr Downie on her instructions, nominating Mr Downie as her attorney as she trusted him.

[463] Mrs Laidlaw made a will which she signed and was witnessed by Mr Thomson on 22 March 2016, production 5/1/1. The property at 31 Cameron Toll Gardens was to be transferred to Mr Hanton. The property at 6-8 Montrose Terrace was to be sold with Mr Downie receiving a legacy of £10,000 and the balance being shared equally between her 2 children Wendy and Christopher. The will also made provision that Mr Hanton was to receive her interest in the business Cameron Properties including all furniture, stock, business cash and other business assets.

[464] Mrs Laidlaw made a further will which she signed and was witnessed by Mr Thomson on 11 April 2016, production 6/19. The change in that will was that Mr Hanton was now to receive a share of the residue of her estate and the children to receive less. The residue of her estate was to be divided in 3 equal shares among Wendy, Christopher and

Mr Hanton. Mr Thomson said she wanted to give the children less. She did not see them. She was matter of fact. She was not emotional about making the change.

[465] It was expressly accepted by the pursuer that Mrs Laidlaw had capacity to make the will on 11 April 2016.

[466] The last will was made on 29 April 2016. Mr Thomson was alert to possible questions of her capacity to make a will. The meeting took place with Mrs Laidlaw at the Western General. The meeting lasted for about half an hour.

[467] As a prudent legal practitioner Mr Thomson took with him another solicitor, Mrs Forrester, for a second opinion on whether Mrs Laidlaw had capacity to make a will. In the event, Mr Thomson had no concerns about her capacity. He said he was actually surprised at how well she seemed. She wanted to leave all her estate to Mr Downie. Asked if he was surprised at such a change being made, he said he was not in this particular case. When people supported her and when they were not supportive Mrs Laidlaw expressed that in her will. That was her way. Mr Thomson discussed her instructions in 2 or 3 different ways to make sure she said the same thing and that she understood what was happening. She was quite clear in her views.

[468] Mr Thomson explained Legal Rights available to Mr Hanton and the children. She understood the concept of Legal Rights. He said she almost welcomed that as a challenge:

“Well, let them claim; they are getting nothing from me in my will.”

[469] The will, which consisted of only 2 pages, contained a specific declaration regarding Mr Hanton and the children:

“6. It is my wish that neither my husband nor my children benefit from my estate, although I appreciate that Legal Rights are available to each of them should they choose to claim.”

[470] On the way back to the office Mr Thomson apologised to his colleague Mrs Forrester for dragging her out of the office as there had been no concerns about Mrs Laidlaw's capacity.

[471] As an experienced solicitor Mrs Forrester required to make her own judgment about Mrs Laidlaw's capacity. She had not met Mrs Laidlaw before. Mrs Forrester had no concerns Mrs Laidlaw did not understand what was happening at the meeting and the effect of the new will. It was Mrs Laidlaw who gave clear instructions of the changes she wished to make to the will. She engaged in discussion with Mr Thomson throughout the meeting including Legal Rights.

[472] Mr Thomson very properly prepared an attendance note following the meeting, production 6/14. He said he prepared that attendance note when he got back to the office and the meeting was fresh in his mind. That attendance note was a contemporaneous note and provided a cross check.

[473] The final paragraph of that note is of significance:

"Side note – throughout the meeting KL seemed bright, attentive and fairly determined. She confirmed her instructions two and three different times – each time with the same instructions. She was noticeably upset with how KH and her children had been staying away. No reason to suspect that KL is doing anything under duress or out of confusion."

[474] Mr Thomson sent a letter to Mrs Laidlaw dated 29 April 2016 to accompany the will, production 6/15. That letter set out the provision of the new will and that the whole estate was to pass to Mr Downie. Mr Thomson also explained the position on Legal Rights in Scots Law.

[475] In his role as her solicitor Mr Thomson had no reason to believe that on the making of any of the wills and, in particular, the will of 29 April 2016 Mrs Laidlaw lacked capacity to make decisions concerning any will, in the sense of being unable to understand or

appreciate the nature of what she was doing, how she was disposing of her estate and the interests of family who ought to be considered.

[476] On 29 April 2016 Mr Thomson and Mrs Forrester were well placed to make an assessment of Mrs Laidlaw's testamentary capacity. The evidence of the two solicitors, as independent witnesses, to the making of the will on 29 April 2016, backed up by a contemporaneous note and the letter of 29 April 2016, was persuasive.

[477] Mrs Martin was an experienced staff nurse working on ward 11 at the Western General in April 2016. Mrs Laidlaw was under her care on 28 and 29 April 2016.

[478] On 29 April 2016 Mrs Martin said Mrs Laidlaw was able to communicate. She was spatially aware. She was orientated to where she was. She knew she was in hospital. She knew her lawyers were coming in to see her that day in connection with her will.

Mrs Martin had no concerns about Mrs Laidlaw's capacity to make a will.

[479] Mrs Martin had witnessed wills in the past. There was nothing unusual about what happened with the signing of the will and her acting as a witness. She had no concerns.

While Mrs Martin's recollection that there were 2 stages rather than everything happening in 1 visit was mistaken, that was a matter of detail and not material to the question of Mrs Laidlaw's capacity.

[480] On the evening of 29 April 2016 Mrs Laidlaw self-discharged against medical advice. She was able to communicate clearly with medical staff, read and sign a Discharge Against Advice form. Mrs Laidlaw would not have been allowed to self-discharge if the medical staff had concerns about her ability to communicate and sign the Discharge Against Advice form. That evidence provides additional support of Mrs Laidlaw's capacity on 29 April 2016 during the course of the evening, following the meeting with Mr Thomson. Mr Hanton's

evidence that Mrs Laidlaw could not communicate on the evening of 29 April 2016 was not reliable and is rejected.

[481] The consultant neurologist Dr Derry could not say definitely Mrs Laidlaw did not have capacity, but it was more likely than not, she was not capable of thinking through the ramifications of what she was doing, when she made the will on 29 April 2016. Dr Derry based his opinion on a consideration of Mrs Laidlaw's medical records, a report from Dr Carson and the Record.

[482] As a matter of fact Mr Thomson knew Mrs Laidlaw well professionally and had taken her instructions in the making of 4 separate wills. Mrs Forrester, another experienced solicitor, corroborated Mr Thomson. Mrs Martin was an experienced staff nurse who had Mrs Laidlaw under her care.

[483] Mrs Laidlaw may have been mistaken about her jewellery at the meeting on 29 April 2016, but as stated by Lord Glennie in *Smyth v Rafferty and others* at para 40, capacity to understand is not to be equated with a test of memory or intelligence.

[484] Both Mr Thomson and Mrs Forrester attended the meeting on 29 April 2016 specifically prepared to address any concerns about Mrs Laidlaw's capacity to make a will.

[485] The burden of proving capacity lies on the defender. I have accepted the evidence of Mr Thomson, Mrs Forrester and Mrs Martin supported by the opinion of Prof Carson, which is preferred to the opinion of Dr Derry. On the evidence I am satisfied the defender has proved Mrs Laidlaw had capacity to understand what she was doing and that she was able to make her own decisions in giving instructions for a new will at the meeting on 29 April 2016. The pursuer's case on incapacity has failed.

Undue influence, facility and circumvention

[486] Mr Hanton was convinced Mr Downie had exercised undue influence over Mrs Laidlaw and had persuaded her to have false beliefs resulting in her making the will on 29 April 2016. Mr Downie did not like Mr Hanton. Despite his protestations to the contrary there was clear evidence that was the position.

[487] Mr Thomson prepared an attendance note of a telephone call with Mr Downie on 29 April 2016, production 6/13. Mr Thomson recorded in that attendance note:

“(GT noting that ID never refers to Kenny as KL’s husband. He always calls him “that guy she has been staying with.” GT wondering if ID knows that KL and Kenny got married.)”

[488] While there were question marks about the reliability of Mr Downie in the course of his evidence and it was unhelpful when he repeatedly volunteered information unfavourable to Mr Hanton but not put to Mr Hanton in cross examination, it is of significance Mrs Laidlaw made 3 wills on 22 March 2016, 11 April 2016 and on 29 April 2016 and Mr Downie was appointed to be her executor for each of the wills. Mr Downie was also appointed as her attorney at her request, when the Power of Attorney was drawn up in April 2015 as she trusted Mr Downie to manage her financial affairs.

[489] Mr Thomson was an experienced solicitor instructed in the making of all these wills, in addition to an earlier will in 2014. There was a continuity of legal advice over a number of years. Mr Thomson explained the reasons Mrs Laidlaw changed her will. Mrs Laidlaw was a strong-willed person. There was evidence from a number of witnesses that Mrs Laidlaw was a strong character who had always been robust in her views. Mrs Laidlaw made decisions about each of the wills and, in particular, the will of 29 April 2016 having obtained independent legal advice. As an example, when Mr Thomson explained Legal Rights to Mrs Laidlaw on 29 April 2016 he recalled her saying she welcomed the possibility

that might be challenged but that, as far as she was concerned, Mr Hanton and her children were not getting anything in her will. Mr Thomson was not surprised at the changes made to her will on 29 April 2016. There was no evidence to contradict the views expressed by Mr Thomson, the court having preferred the opinion of Prof Carson to Dr Derry.

[490] Production 5/3/2 was a bundle of text messages between Mrs Laidlaw and Mr Downie covering the period December 2015 to March 2016. The messages from Mrs Laidlaw to Mr Downie were of a friendly and affectionate nature right up to the last full text message on 11 March 2016.

[491] As stated by Lord Glennie in *Smyth* at para 137:

“Many people make new wills towards the end of their lives often at a time when they are less alert mentally than they were previously.”

[492] Mrs Laidlaw made 3 wills during the period 22 March 2016 to 29 April 2016, instructing her solicitor Mr Thomson on each occasion. The last testamentary disposition was made some 18 days before her death. None of the wills had any complex provisions. The will of 29 April 2016 consisted of 2 pages and only 11 clauses.

[493] Mrs Laidlaw had capacity to make decisions concerning her will. Unless there was undue pressure or influence was used to procure the will as executed on 29 April 2016 the will must stand.

[494] The pursuer sought to rely on incidents where the pursuer said Mr Downie had demonstrated undue influence over Mrs Laidlaw to change her will, including the mobile phone incident at hospital on the morning of 29 April 2016 and the telephone calls with Mr Hanton that morning. This was speculation on the part of Mr Hanton. On any view these were minor incidents when looked at in the overall context. Mr Downie gave explanations which were reasonable. In any event, in the particular circumstances of this case there was

nothing unusual in Mrs Laidlaw making a new will and her not discussing that with Mr Hanton.

[495] There was no reliable or independent evidence of any abuse of the relationship of trust and confidence between Mr Downie and Mrs Laidlaw. The evidence which I accepted was to the contrary.

[496] There was no independent evidence to support Mr Hanton's assertion that Mrs Laidlaw was persuaded by Mr Downie to change her will either through undue influence or through facility and circumvention in the weeks up to 29 April 2016. The texts from Mrs Laidlaw to Mr Downie during January to March 2016 are contra-indicators.

[497] Mrs Laidlaw was a strong-willed individual. There was no evidence Mrs Laidlaw was facile. There was evidence she was able to resist pressure. I am not persuaded there was any reliable evidence of circumvention by Mr Downie. There was no reliable evidence Mrs Laidlaw was put under any pressure by Mr Downie to change her will. The evidence which I have accepted is to the contrary. There is no basis for setting aside the will on the grounds of undue influence, facility and circumvention.

The existence of a Trust/Joint Assets

31 Cameron Toll Gardens

6-8 Montrose Terrace

[498] The pursuer relies on section 1(3) and 1(4) of the 1995 Act for there being a trust.

Section 1(3) and 1(4) provide:

1. Writing required for certain contracts, obligations, trusts, conveyances and wills.

(1) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.

(2) Subject to subsection (3) below, a written document which is a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for —

(a) the constitution of —

- (i) a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land;
- (ii) a gratuitous unilateral obligation except an obligation undertaken in the course of business; and
- (iii) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire;

(b) the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law; and

(ba) the constitution of an agreement under section 66(1) of the Land Registration etc. (Scotland) Act 2012 (asp 5),

(c) the making of any will, testamentary trust disposition and settlement or codicil.

(3) Where a contract, obligation or trust mentioned in subsection (2)(a) above is not constituted in a document complying with section 2 or, as the case may be, section 9B of this Act, but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust (“the first person”) has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other party to the contract, the debtor in the obligation or the truster (“the second person”) —

(a) the second person shall not be entitled to withdraw from the contract, obligation or trust; and

(b) the contract, obligation or trust shall not be regarded as invalid, on the ground that it is not so constituted, if the condition set out in subsection (4) below is satisfied.

(4) The condition referred to in subsection (3) above is that the position of the first person —

(a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and

(b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.

[499] Mr Hanton said the two properties at 31 Cameron Toll Gardens and 6-8 Montrose

Terrace were joint assets, and that both Mr Hanton and Mrs Laidlaw were beneficial owners,

with Mrs Laidlaw holding title in her name as nominee and trustee for the two of them and for the survivor of them.

[500] The existence of any trust was never recorded in writing. Mrs Laidlaw never made mention of a trust. No trust deed exists.

[501] There is no evidence Mrs Laidlaw ever gave instructions regarding the existence of a trust. All the evidence is to the contrary.

[502] It is necessary to consider what other evidence is available to determine whether any trust existed. No other witness gave evidence of the existence of any trust.

[503] The letter from Ketchen & Stevens dated 7 August 1997, production 5/4/15, does not assist. That letter only relates to the new business known as Cameron Properties. The two properties were never assets of the business.

[504] The pursuer relies on the letters to Macadam's, productions 5/5/2, 5/5/3 and 5/5/4 but all the letters demonstrate is that title to the property in Holyrood Road was to be taken in the sole name of Mrs Laidlaw. Nothing else can be inferred in the absence of any evidence for the reason for the request from Macadam's. No weight can be attached to that correspondence.

[505] All the residential properties were in the sole name of Mrs Laidlaw. All commercial properties were in the sole name of Mrs Laidlaw. There was no survivorship clause in favour of Mr Hanton.

[506] The initial instructions from Mrs Laidlaw to Mr Thomson in October 2014 were for Mr Thomson to check the title deeds for the two properties in her name as she was concerned title may have been transferred to Mr Hanton. Having checked the titles Mr Thomson was able to reassure Mrs Laidlaw there had been no transfer and that the

properties remained in her name. There was no suggestion of the properties being joint assets. The evidence of Mr Thomson is a contra-indicator of Mr Hanton's position.

[507] We do not know the terms of the first will made in 2014 except in general terms as recollected by Mr Thomson but there are 3 other wills which are available. The wills dated 22 March 2016 and 11 April 2016 specifically refer to the two properties as being the property of Mrs Laidlaw.

[508] Mrs Laidlaw refers to "my interest in the property at 31 Cameron Toll Gardens..." and "I direct my executors to sell my commercial property at 6-8 Montrose Terrace..."

[509] When Mrs Laidlaw made the will on 11 April 2016 she expressed concerns to Mr Thomson about Mr Hanton not having access to money to pay bills as the business was in her name and there were no joint accounts. In the course of the proof the pursuer accepted Mrs Laidlaw had capacity to make the will of 11 April 2016.

[510] Contrary to the evidence of Mr Hanton, who said Mrs Laidlaw had no money to invest in the business Cameron All Trades, the accounts for the period ended 31 October 1998, production 5/4/124, record that Mrs Laidlaw introduced capital of £22,803. I have accepted those accounts as reliable and rejected Mr Hanton's evidence on this.

[511] It is for Mr Hanton to prove on the balance of probability that the two properties were joint assets held in trust and for the survivor. Apart from the evidence of Mr Hanton himself all the evidence points against there being a trust. Mr Hanton has not proved that case on the balance of probability.

Decision

[512] I sustain the second, third, fourth, fifth, sixth and seventh pleas in law for the defender. I repel the first, second, third, fourth, fifth, seventh and eighth pleas in law for the

pursuer. I recall the interim interdict granted by interlocutor of 2 March 2017. Decree of absolvitor is granted in favour of the defender. Expenses were expressly reserved. The Sheriff Clerk will fix a hearing on expenses.