

IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.366/74

BETWEEN PATRICK GERARD EGDEN of
Christchurch, Chartered
Accountant, KATHLEEN
MARY KARS of Christchurch,
Married Woman and JOHN
NICHOLSON MATSON of
Christchurch, Solicitor

Plaintiffs

A N D

PATRICK JOHN McHUGH of
Russell, Retired, JOSEPH
PATRICK McHUGH of Hamilton,
Policeman, MAURICE JAMES
McHUGH of Auckland,
Insurance Salesman, MARGARET
MORGAN of Lower Hutt, Married
Woman, ANDREW GILBRIDE McHUGH
of Whangarei, Harbour Board
Manager, MIRIAM JOAN MINEHAN
of Wellington, Married Woman,
PATRICK SHANNON McHUGH of
Auckland, Salesman, KATHLEEN
DOROTHY KELLY of Wellington,
Married Woman, SHIRLEY
VERONICA PETERS of Petone,
Married Woman, KATHLEEN MARY
KARS of Christchurch, Married
Woman and the PUBLIC TRUSTEE
OF NEW ZEALAND as executor of
the Will of Peter Felix
McHugh

Defendants

Hearing: 12, 13, 14, 15 July 1976

Counsel: J.F. Burn for Plaintiffs P.G. Egden and
J.N. Matson
J.R. Milligan for Plaintiff Mrs Kars
N.W. Williamson for Defendants Joseph Patrick
McHugh, Mrs Margaret Morgan, Mrs Miriam
Joan Minehan, Andrew Gilbride McHugh,
Mrs Kathleen Dorothy Kelly
M.J. McHugh in person

Judgment: - 2 SEP 1976

JUDGMENT OF SOMERS J.

Action. The plaintiffs, Mr P.G. Egden,
Mrs K.M. Kars and Mr J.N. Matson, seek an order that

396

(but? whether possible to
adequately enhance background)

- appeal

No Special
Consideration

probate of a will dated 6 July 1973 and four codicils the first three of which are respectively dated 9 October 1973, 11 December 1973 and 6 March 1974 and the fourth of which is undated of Miss Miriam Margaret McHugh who died on 16 July 1974 aged 81 years be decreed in solemn form of law.

The testatrix as I shall call her, for there was no dispute as to the validity of the will, was survived by her brother, Mr Peter McHugh, who died in October 1974, ten nephews and nieces including Mrs Kars and Mrs Peters, children of her brother Peter, some 35 grand nephews and nieces and 2 great grand nieces. She herself had never married, and was predeceased by her parents and by five other brothers.

Parties and Procedure. At the commencement of the hearing a number of substantially procedural points was debated. First, Mrs Kars was joined in the original writ both as a plaintiff and a defendant. Mr Burn told me he appeared for the plaintiffs in their capacity as trustees and Mr Milligan told me he appeared for Mrs Kars personally. It did not seem to me possible that Mrs Kars could sue herself or appear in two capacities or indeed that she or any other plaintiffs had any recognisable capacity. So far as the action was concerned each plaintiff sued in person. Mrs Kars was therefore struck out as a defendant and Mr Burn continued to appear for Mr Egden and Mr Matson and Mr Milligan for Mrs Kars.

Second, a statement of defence was filed by Mr Patrick John McHugh jointly with Mr Andrew Gilbride McHugh. I was informed the former had died. By consent, an order was made adding as a defendant Mrs Lesly Myrtle McHugh of Russell, Widow, as Executrix of the Will

of Patrick John McHugh and directing that the action be carried on between the continuing parties and the added party. Mr Williamson of counsel appeared for her to support the defence of the late Mr P.J. McHugh which she adopted.

Before dealing with the matters in issue it is convenient to give some general narrative of the will and codicils, the estate of the deceased, and the stand taken by various members of the family.

Will and Codicils

By her will dated 6 July 1973 the testatrix appointed her brother Peter McHugh, her accountant the plaintiff Mr Egden and her solicitor the plaintiff Mr J.N. Matson executors and trustees thereof. She gave her personal chattels and motor car to her brother free of duty; and her freehold and leasehold land and live and dead stock to her brother for his life and directed that on his death the same should fall into residue. The testatrix gave the residue of her estate upon the usual trusts for sale and after payment thereof of her debts funeral and testamentary expenses, and estate duty directed the balance, called her residuary estate, be held for such of her nephews and nieces as survived her and if more than one as tenants in common in equal shares except that the share of Mrs Kars should be double the share of any other nephew or niece. She also provided that if any nephew or niece predeceased her leaving adult or children who survived her that child or those children should take ^{if} more than one equally between them the share in her residuary estate such nephew or niece would have taken had he or she survived the testatrix.

On the footing that children of nephews and nieces who died before the will are included the residue

so disposed of would have been, in the events that happened, divisible into 13 shares of which Mrs Kars would have taken two.

The persons other than Mrs Kars, so entitled to a share of residue, or entitled to divide a share in the case of grand nephews and nieces, together with the personal representatives of two nephews who died after the testatrix are defendants in the action.

By the first codicil dated 9 October 1973 the testatrix (i) gave three small charitable legacies; (ii) directed that Mrs Kars should have a treble share in residue, and (iii) gave to Mr Eric Kars (Mrs Kars' husband) the option at the death of her brother to purchase at market value her leasehold land and gave her trustees power to leave the purchase money owing on mortgage. The effect of the alteration in the shares of residue was that the number of shares was now 14 and Mrs Kars took three.

By the second codicil dated 11 December 1973, the testatrix (i) gave her motor car to her brother Peter free of duty; (ii) in effect, gave her personal chattels other than the car to Mrs Kars and Mrs Peters; and (iii) gave certain directions about her grave. Effectively the codicil revoked the bequest of car and personal chattels to her brother made in clause 4 of the will.

By the third codicil dated 6 March 1974, the testatrix appointed Mrs Kars an executrix and trustee of her will along with her brother and Messrs Egden and Matson.

By the fourth codicil which I find to have been made on 18 June 1974 (a date not in dispute) the testatrix (i) revoked clause 5(b) of the will so far as it related to her freehold land - i.e. the provision that the same should on her brother's death fall into residue;

(ii) declared new trusts of her freehold land subject to her brother's life interest; (iii) revoked clause 5(b) of her will as to leasehold land - i.e. the provision the same should on her brother's death fall into residue - and bequeathed the same to Mr and Mrs Kars as tenants in common in equal shares; (iv) revoked the option given to Mr Kars in the first codicil; and (v) revoked the residuary gift to Mrs Kars. The trusts of the freehold land to take effect on her brother's death were as follows:

"2. My trustees shall hold my freehold land on trust subject to the life interest of my brother Peter Felix McHugh for such of the descendants of my father having the surname of McHugh as my brother shall by deed revocable or irrevocable or by will appoint and in default of appointment for all such descendants being males as are living at the date of my brother's death as tenants in common in equal shares."

The effect of the codicil so far as the defendants are concerned is to increase a share to one-eleventh in a residue depleted by the loss of freehold and leasehold land.

The Estate

The testatrix's estate had a net value of \$212,131 (excluding a gift of \$4,000 made to her brother Peter on 8 or 11 March 1974). It was made up as follows:

Cash	\$ 31,930
Stock and Plant	12,925
Shares	21,427
Land	146,600

The land so valued included freehold and leasehold land in and near Darfield. I was not told the separate values. The lease was of 254 acres of University Endowment Land and is now and at material times was intended to be under the Public Bodies Leases Act 1969. The freehold land comprised in all about 181 acres in four blocks comprising a half acre section in Darfield, nine

acres in three separate titles, twenty-eight acres on which is situate the house of the testatrix, and 143 acres comprising the main part of the freehold farm. The testatrix had acquired the land in about 1958 under the will of her brother Frank. He had previously been farming with another brother or brothers. The testatrix's father had also had a small holding which I understand was included in the lands received by the testatrix under her brother's will.

The Litigation

The plaintiffs are the three surviving executors, two of whom are named in the will and one, Mrs Kars, in the third codicil. Statements of Defence were filed by or on behalf of seven of the defendants. Mr Williamson of counsel appeared for six. The seventh, Mr M.J. McHugh, appeared in person. By their pleadings the estate of Patrick John McHugh, Mr Andrew McHugh and Mr Joseph Patrick McHugh attacked all four codicils on the grounds of want of knowledge and approval of contents, lack of testamentary capacity and undue influence. Mrs Margaret Morgan, Mrs Miriam Minehan and Mrs Kathleen Kelly attacked the last codicil only on the grounds of want of knowledge and approval of contents and lack of testamentary capacity.

In opening his case at the conclusion of the plaintiff's evidence Mr Williamson (i) intimated that the issue of want of capacity was confined to the fourth codicil; (ii) intimated that the plea of want of knowledge and approval of contents related to the fourth codicil only; and (iii) particularised for the first time the undue influence pleaded by the three male defendants as being that of Mr Peter McHugh and as relating to all four codicils.

Mr M.J. McHugh by his amended statement of defence claimed that the testatrix did not know and approve

the contents of the fourth codicil and had no capacity to make the same. He further claimed that Mr and Mrs Kars, Mr Peter McHugh and Mr Matson conspired to unduly influence the testatrix and that the execution of the four codicils were obtained by the undue influence by those persons. There was also an allegation that the execution of the codicils were obtained by misrepresentations by Mr Matson or by failure on his part to make adequate explanations as to the meaning of the codicils. There are other pleas into which I need not, I think, go. In the event after the completion of the evidence, while still complaining that Mr Matson had failed adequately to explain the codicils to the testatrix he nevertheless limited his defence to the fourth codicil on the grounds of want of knowledge and approval of its contents by the testatrix and lack of testamentary capacity.

Finding on Will and Three Codicils

At the conclusion of the hearing I indicated that I found for the will (which was not in dispute), and the first three codicils, and indicated that I would take time to consider the position regarding the fourth codicil.

Having indicated the issues and the parties and having mentioned some general background matters I propose to refer shortly to the testatrix and then, chronologically, to the will and codicil and other material events.

The Testatrix

The testatrix lived and had her home at Darfield where her farm property and home was situated. For a period of some 20 years up to her death, her brother, Peter, who lived with his wife in Christchurch, used to go out by the week or the day, and attend to farm work. Latterly, too, she had a share cropping arrangement with a neighbouring farmer. Her solicitor over the last few

years at all events was Mr Matson. Mr Egden (who did not give evidence) looked after her financial affairs, including her investments. She insisted on large cash balances being available.

She was not, it seems, well educated but not on the other hand ill educated. Mr Matson described her as unassuming and very quiet. She was not given to long explanations or simply talking in expansion of something said. He described her as knowing her own mind and of a firm character. He illustrated this by an occasion in March 1974 when she made a gift of \$4,000 to her brother. Mr Matson said he inquired whether she was not doing too much for the latter and was put in his place, albeit politely.

She exhibited strong feelings for her brother and for his daughter, Mrs Kars. The latter was, I think, particularly good to her aunt. She was as it happens the only niece living in Christchurch over the past five or six years and it is clear that she expended a good deal of care on the testatrix over the last year or so of her life.

The Will

In March 1973 the testatrix had a gall bladder operation in the Calvary Hospital. On 7 April 1973 Mr Matson saw her there. As a result, he drafted a will. (Exhibit G.1.) He saw her again on 10 May 1973 at the Santa Maria Convalescent Home where she was recuperating. I will refer hereafter to that Home as the Convalescent Home.

Mr Matson had difficulty identifying the various pieces of land referred to by the testatrix in her instructions; he spoke to her on the telephone and wrote her with a plan on 12 June 1973 (Exhibit G.3). She was then still at the Convalescent Home. Mr Peter

McHugh then called on Mr Matson with the plan and with his help Mr Matson identified the pieces of land.

He then prepared a will (Exhibit G.8).

It differs from the will eventually executed chiefly in a devise of three parcels of freehold land totalling about eight and three-quarters acres in three titles to Mr P.J. McHugh. That will was not signed.

In the event the will of 6 July 1973 was prepared by Mr Matson and executed at the Convalescent Home. The witnesses were Mrs A.H. Johnson who managed or controlled the Convalescent Home and Mr J.H. Johnson described as gardener and who is, I think, the husband of Mrs Johnson.

The will was not impeached in the pleadings. I find it to have been duly executed, the terms to have been with the knowledge and having the approval of the testatrix and that the will was made with full capacity.

On the 1st or 2nd October 1973 Miss McHugh returned to her home at Darfield. Mrs Kars took her.

First Codicil

On 9 October 1973, when the testatrix had been home for about a week, she executed the first codicil. I have already indicated its terms. It was, in fact, signed at Mr Matson's office. He was not able to remember the particular occasion but nothing gave him any reason to doubt her capacity. I observe, too, that Mrs Doig, referring to the testatrix's first stay at the Convalescent Home, which included the period ending about a week before the execution of the codicil, indicated that the testatrix conversed readily with her and apparently behaved in a normal way. Indeed there was no evidence at all to suggest she was other than normal. At the end of the day the codicil was attacked by three defendants only upon the grounds that it was the product of the undue influence of Mr Peter McHugh. Mrs Kars was of course his daughter and

Eric Kars his son-in-law and both obtained some benefit under that codicil. Apart from matters of general inference to which I shall refer presently there is no evidence whatever to support the proposition that the codicil in question owed anything to the intercession of whatever nature of Mr Peter McHugh. The defendants have not discharged the burden of establishing undue influence.

Second Codicil

On 11 December 1973 the testatrix executed her second codicil. This, too, according to Mr Matson, was executed at his office, and again he had no particular recollection of the occasion. He said that on none of these occasions did he detect any cause for concern. Again, this codicil is attacked by the same defendants upon the ground of the undue influence of Mr Peter McHugh. By the will he was left the testatrix's personal chattels and motor car. By this codicil he was left the motor car owned by the testatrix at her death but personal chattels, apart from any motor car, were to be divided between Mrs Kars and Mrs Peters. They are, of course, Mr Peter McHugh's daughters. There was no evidence to suggest that Mr Peter McHugh had even discussed that codicil with the deceased and I have no hesitation in rejecting the allegation of undue influence by him.

In January of 1974 Mr M.J. McHugh visited the testatrix at her home at Darfield. He went there, I think, with the best of motives. He was under the apprehension, induced he said by something written by his aunt, that she might be in need of assistance and in particular of the removal from her shoulders of what Mr McHugh considered to be the burden involved in managing the farm. The concern he had felt about her ability to handle her own affairs was, he said, alleviated a little when he saw her.

Speaking of that time, Mr McHugh said he formed the opinion that "intellectually she was just a shell of her former self" - "her brain tired quickly if put to any serious thought" and he formed the view that any talk of business was beyond the testatrix. He said "she had a range of familiar topics and on these could talk away at length". He had previously seen her a year or two years earlier. He did not see her again.

Mr McHugh impressed me as an honest decent man. I have no doubt however that so far as the property at Darfield is concerned he has the firm conviction that the testatrix owed a duty to her family which the fourth codicil failed to meet. I have no doubt too that the opinion he expressed and which I have recorded reflects the only justification which he can perceive for the change made by his aunt in her dispositions. In the light of the evidence I have heard I cannot accept that in January of 1974 the testatrix intellectually was just a shell of her former self. I do not doubt that physically she must have changed quite considerably. She was described by Mr Eric Kars as lighter in weight and was patently frailer. I suspect she was not particularly willing to discuss business affairs with Mr McHugh.

Third Codicil

On 6 March 1974 the testatrix executed her third codicil. Its effect was simply to add Mrs Kars as an executor and trustee to the three appointed by the will. Again, the only attack mounted upon this codicil was that it was executed under the influence of Mr Peter McHugh. It was in fact executed in Mr Matson's office and again I find that there is no evidence to suggest that Mr Peter McHugh took a part in it and that it represented anything other than the desire of the testatrix herself.

Pausing at this point it will be seen that in each of the three codicils the position of Mrs Kars is changed. In the first two her financial interest is increased. In the third she becomes an executrix. There is I think a ready enough explanation for that. I have already mentioned that Mrs Kars, along with her father, were the only two blood relatives of Miss McHugh who lived in Christchurch and I think even in the South Island. At all events it is perfectly clear from what Mrs Kars herself said that she was very good to the testatrix. When the testatrix went into Calvary to have her operation in 1973 and thereafter during her convalescence at the Home Mrs Kars saw her daily. She took the testatrix home to Darfield when she left the hospital in October and she brought her back for a further operation on 14 March 1974. In the interval her visits to Darfield were more frequent. They had previously been without great frequency. In that interval she went to see her aunt at Darfield about every twelve days and thereafter, while in Calvary and later in the Home convalescing and again when the testatrix was taken to the Calvary Psychiatric Clinic Mrs Kars saw her daily. I think the change in the testatrix's will in favour of Mrs Kars reflected her gratitude, probably a mounting affection and to some extent her very propinquity. All in my view are perfectly understandable in the circumstances. Indeed, Mr M.J. McHugh was constrained to say that he appreciated what Mrs Kars had done for the testatrix.

Gift to Mr P. McHugh

Shortly before going to the hospital the second time the testatrix made a gift of \$4,000 to her brother, Peter McHugh. It is recorded in a rather curious way on document G.15 (produced by Mr Matson) - the carbon gift statement for Revenue purposes. It refers to the

date of the gift as being 11 March 1974. It may indeed have been three days earlier for the carbon copy shows 8 March as the date of the declaration. The gift is not without significance on two counts. First, it is of course prayed in aid by the defendants as illustrating the relation between the testatrix and her brother and supporting the allegations made; secondly, Mr Matson said that at the time that he had raised the testatrix's intentions with her and was, as he put it, politely put in his place.

Operation and Visits of Mr Matson

The testatrix returned to Calvary Hospital as I have said, on 14 March 1974. On that occasion she had a breast removed. The need for that surgery was brought about by cancer. Following that operation and when fit enough she returned to the Convalescent Home.

On 28 May Mrs Kars, at the request of Miss McHugh, telephoned Mr Matson. As a consequence, Mr Matson visited the testatrix at the Convalescent Home on 30 May. He was not able to recall the particular purpose. He was accustomed to see her on various matters, that is to say, on matters of business. I mention this for the purpose of indicating that at that time, after the cancer operation, and approaching the date of the codicil principally canvassed, Mr Matson felt able to discuss business with her and discerned nothing about her which occasioned him any relevant concern. He called again to see the testatrix on 5 June 1974 at the Convalescent Home. He could not remember the particular discussion but thought it had perhaps had to do with her will.

Meeting of 12 June 1974

On 12 June there was a meeting at the Convalescent Home. There were present the testatrix, Mr Matson, Mr Eric Kars and Mr Peter McHugh. Both Mr

Matson and Mr Kars were telephoned by Mr McHugh who asked them to meet the testatrix at the Convalescent Home. Mr Kars, for his part, did not know why he was going. I think Mr Matson understood that a discussion was to be had concerning the testatrix's will. Mr Kars was the first to arrive. He recalled Mr Matson's arrival and subsequently, Mr McHugh's arrival. The three men went into the Convalescent Home together. The testatrix was seated on a chair. Mr McHugh sat on her right, Mr Kars on her left and Mr Matson faced her. The meeting lasted for something approaching an hour. Mr Matson said that Miss McHugh wished to discuss what should be done in particular with her land. She spoke of leaving the freehold land to her brother and Mr Matson thought it was pretty clear that he wanted that. She also mentioned the possibility of leaving the leasehold land to Mr and Mrs Kars and asked Mr Kars whether he could work in with Mr McHugh. Mr Matson thought Mr Kars did not answer; Mr Kars said he told the testatrix he could not do so. I think it quite clear from the evidence of Mr Matson and Mr Kars that the latter hardly spoke at the meeting and indeed was, I think, under some embarrassment. Mr Matson said that the testatrix expressed an anxiety to keep the freehold land in the McHugh family and he could see her mind tending towards that result. She also indicated her continued wish to do something more for Mr and Mrs Kars. So far as the retention of the land in the McHugh family was concerned it was coupled with some suggestions, I think by Miss McHugh, that the surname McHugh continue to be connected with the land. The three men left together at the end of the meeting. At that time, Mr Matson said he was left with no specific instructions but he was to return later and receive final instructions from Miss McHugh.

At this time, I think it clear that Miss McHugh had developed a considerable concern as to how to deal with her land. I do not discount the possibility that her brother raised the matter or created some concern in her mind about it. But what I think is clear is that she had that concern and that while her brother would have liked the land left to him there was no suggestion that Miss McHugh was acceding to that. Nor, for that matter, is there any evidence that her brother was in any way attempting to bring influence to bear on her to that or any other end.

The Fourth Codicil

On 17 June 1974 Mr Peter McHugh telephoned Mr Matson at about 10.15 in the evening and told Mr Matson that the testatrix wanted to see him urgently because she was to go into Calvary the next day. Mr Matson assumed from that phone call and assumed throughout the events of the following day that Miss McHugh was to have some further surgery. He had no knowledge at all of the arrangement that Miss McHugh be removed into the psychiatric clinic of the Calvary Hospital.

Mr Matson saw the testatrix alone on the following day, 18 June. He was there about an hour and a half. The first 15 to 20 minutes was taken up with what Mr Matson described as a general discussion not concerning the testatrix's will. The remaining time was engaged in a discussion about the proposal for the disposition of the land, the writing out of the codicil and its execution. The testatrix was again seated in a chair in her room in the Convalescent Home. Mr Matson observed that her general health so far as he could see was not as good as it had been when she had previously been convalescing in that Home. She was obviously, he thought, tired and homesick, very much wanting to return to

her place at Darfield. Mr Matson expressed it generally by saying that she was really just getting older. He said that during 1974 he did not notice any diminution of her grasp. He considered she had more difficulty in coming to a decision but in his view knew just what she was doing. He felt no concern whatever in taking instructions for a codicil. The actual codicil he prepared was as follows:-

"This is a fourth codicil to the will of me
"Miriam Margaret McHugh of Darfield spinster which
"Will is dated the 6th July 1973.

"1. I revoke clause 5(b) of my will so far as it
"relates to my freehold land.

"2. My trustees shall hold my freehold land on
"trust subject to the life interest of my brother
"Peter Felix McHugh for such of the descendants of
"my father having the surname of McHugh as my brother
"shall by deed revocable or irrevocable or by will
"appoint and in default of appointment for all such
"descendants being males as are living at the date
"of my brother's death as tenants in common in
"equal shares.

"3. I revoke clause 5(b) of my will so far as it
"relates to my leasehold land and I give my leasehold
"land subject to the life interest of my brother
"Peter Felix McHugh to Eric Kars and Kathleen Kars
"as tenants in common in equal shares.

"4. I revoke clause 3 of the first codicil to my
"will.

"4. I revoke clause 1 of the second codicil to my
"will by which I left my motor car to my brother Peter.

"5. I revoke clause 2 of the first codicil to my will
"by which I left Kathleen Kars a treble share in my
"residuary estate and I declare that clause 6 of my
"will shall not operate to confer any share in my
"residuary estate on her.

"Signed by the testatrix in
"our presence and attested by
"us in her presence clause 4
"having first been deleted
"and replaced.

M. M. McHugh

"A.J. Johnson
"Registered Nurse
"Christchurch

T.H. Johnson
Retired
Christchurch"

Mr Matson was unsure who initiated the concept of dispositions to persons of the surname McHugh but thought it was the testatrix. It was something that

had, in any event, been discussed at some length on 12 June by Miss McHugh with understanding. It was, Mr Matson said, what she wanted to do. There was talk between Mr Matson and Miss McHugh on 18 June about the trust in default of the exercise of the power of appointment. Mr Matson was adamant that the codicil as drawn is what the testatrix said she wished to do and was discussed before being reduced by him to writing. After the codicil had been written out by Mr Matson he went through it with her clause by clause, although he was unable to say that he had read every word to the testatrix. Eventually, the codicil was duly executed and Mr Matson left with it. It was completed in that way on that day first, because Mr Matson was under the apprehension she was to undergo surgery and secondly, as he said, because she wished the matter completed.

Calvary Clinic

That same afternoon Mrs Kars called to take the testatrix to the psychiatric clinic. As it happened, Mr Kars passed the Convalescent Home in his truck and seeing his motor car there, stopped and saw his wife and the testatrix when the latter was leaving the Home and getting into the motor car. He spoke to her. It seems clear enough that she was perfectly well orientated. She said she was going to Calvary. She also asked Mr Kars if he would take her back to her home at Darfield. Mr Kars was asked whether he thought that was a serious question and he replied that he thought that if he had said "yes" the testatrix would have gone with him. That I find perfectly understandable. Mrs Kars took the testatrix to Calvary and stayed there until 5 o'clock. During that time Dr Ding, the consultant psychiatrist at Calvary, saw the testatrix. Mrs Kars

went out of the room for that purpose. I do not think the interview was longer than about 5 minutes. Mrs Kars returned again to see Dr Ding at 6 p.m. and was with him for some considerable time then saw her aunt again. Mrs Kars thought that her aunt was normal enough, although not happy at the move. Dr Ding thought that the mood of the testatrix was depressed when he saw her between 4 and 5 p.m. From his discussion with her that day he formed the view that she was depressed and that her depression was related to the stress of the operation she had had, the emotional strains of the period of convalescence, the knowledge that she had had cancer of the breast. The testatrix was polite but guarded as if suspicious. She was correctly orientated as to the date and the day and as to where she was. She was able to tell Dr Ding about her past operations. Dr Ding explained why she was in the clinic. He said she partially accepted the explanation and said she would stay but implied that her decision was on a day to day basis. Dr Ding said that as a matter of routine he attempted to find out the state of her memory function and her mental state and intellectual function. He said that intellectually and in terms of memory function she was at least an average 81 year old and perhaps better than most.

Mrs Doig, a cousin of the testatrix and her godchild, although not seeing the testatrix frequently when she lived at Darfield, visited her in the Convalescent Home on both occasions (i.e. 1973 and 1974) the testatrix was there. On the second occasion she said that the testatrix was very different. Mrs Doig described her as looking much thinner and sick. She was quieter and did not inquire about the family. Mrs Doig said that if she did not speak the testatrix did not speak to her, but she would give a rational

response when spoken to. Mrs Doig thought that when she spoke of her (Mrs Doig's) family the testatrix did not realise of whom she was speaking. On a visit about a week before the testatrix went to the Calvary Clinic the testatrix complained to Mrs Doig of the food and thought the staff were trying to poison her. Mrs Doig observed too that other patients were never mentioned by the testatrix whilst on the first occasion in the Home the testatrix knew them all and spoke of them.

Events after 18 June 1974

Dr Ding indicated that the extent of the testatrix's suspicious attitude became more apparent on the next few days after she had arrived at the Clinic. He had a discussion with her on 19 or 20 June. The testatrix was suspicious of the intentions of the staff and the patients of the ward. She felt that people were laughing at her and talking about her and that the food may have been poisoned. She was reluctant to eat and was reluctant to accept medication. She was reluctant to be involved socially with other patients. Those suspicions and I think that reluctance remained more or less constant over the first five or six days but by the end of the first week the testatrix became physically weakened and her suspicions appeared to diminish. The doctor indicated that during the first week he made attempts to reason with the testatrix and in the course of those attempts made inquiries regarding relatives. That, he said, was a matter of routine with any patient who has strong suspicious ideas. He did not find any evidence, by which I think he meant she did not say anything to indicate, that she was suspicious about her relatives. Her suspicions were very much directed towards her immediate environment and Dr Ding said that in his view based on

his experience and his discussions with the testatrix her delusions were restricted to her immediate environment, more specifically other patients and staff. Dr Ding was unable to recall any delusions expressed by the testatrix on concepts outside her immediate environment.

Sister Mary Therese was at material times nursing at the Calvary Clinic. Her recollection of the first day was far from clear but she knew that when the testatrix first arrived she was resistant to the notion of staying in the Clinic and seemed rather suspicious of the staff. She described the testatrix as a lively little thing. It took a lot of persuasion to help her to settle down. In the afternoon of 19 June the testatrix apparently became violent. She broke a window. I think it was part of an argument about taking medication and the testatrix made observations about the food being poisoned. She made too some observations about religion for Sister Therese remembered that the testatrix was emphatic that the Sister was not a nun but was dressed up to fool her. The giving of medication was successfully achieved by assembling a number of the staff around the testatrix so as visually to intimidate her. From her observations of the testatrix Sister Mary Therese described her as a disturbed woman but at the time considered having regard to "her age and so on she had "a right to be disturbed coming to the Clinic, just "coming to a strange environment". She had seen manifestations of suspicion such as that shown by the testatrix in old people which had necessitated them coming to the Clinic, that sort of paranoia she considered was not uncommon. She thought that the testatrix's emotional state did not settle and indeed it is plain that after a few days her condition deteriorated. Mrs

Doig saw her about a week after she had been admitted to the Clinic, that is to say, a fortnight from her previous visit at the Convalescent Home. The testatrix was sitting in a chair. Mrs Doig said she did not know whether the testatrix really knew her. She thought she did not. Her condition was similar a week later and so Mrs Doig did not visit again. Mrs Doig said that the testatrix's condition on the first occasion she saw her at Calvary Clinic was different from when Mrs Doig had seen her a fortnight before at the Convalescent Home. She was much quieter and seemed content to sit and not move around as she had.

Testamentary Capacity

There is, I think, no doubt but that the testatrix was under an apprehension which amounted to a delusion that the staff in the Convalescent Home and in the Clinic were trying to poison her. She mentioned it to Mrs Doig when the latter last saw her at the Convalescent Home. Her complaint to Mr Matson about the food at the Home on 18 June was no doubt related to that although he did not appreciate its force and Dr Ding was clear that she had such delusions prior to coming to Calvary. I think it clear, too, that the testatrix was moved to the Clinic because she became difficult to manage in the Home, unwilling to take her medication no doubt for the delusional reason I have mentioned. She was, too, depressed upon her arrival at the Clinic. That depression was I think shown by the evidence to be related to the strength of her desire to be at her home rather than in the hospital. The strength of the delusion and perhaps of the depression is, I think, illustrated by the matter of the broken window on 19 June. It may well be that her mental state both as to delusion and depression contributed to what seems to have been a speedy decline of her physical powers and health.

I turn then to consider the evidence generally as it relates to capacity. Mr Matson had known the testatrix over a lengthy period and saw her over the last three weeks before the execution of the fourth codicil on four occasions. On at least two of those occasions he discussed her will and on one of them and probably on three of them he discussed other matters. He is an experienced solicitor. Her behaviour and her responses and the conversations she had with him apparently did nothing to put him on guard. Indeed the only observation she made which he found at all out of the ordinary was the complaint, which he described as vehement, on 18 June about the food at the Convalescent Home. Mr Matson said he was unable to judge the merit of that complaint and I think accepted it as valid at the time. I note that for some 15 to 20 minutes on 18 June he had some general discussion with the testatrix before embarking on the matter of the codicil. Mr Matson did not say what the discussion was about but as his suspicion was not raised I think I may infer that it was a rational enough conversation. Mrs Kars and her husband, although not expressing themselves in that way, plainly had no occasion to sense that the testatrix was not aware of what she was about. The evidence of Mr Matson and Mr and Mrs Kars is in a sense negative evidence. More positive evidence was given by Mrs Doig which I have recounted and Sister Mary Therese.

Dr Ding stands on a slightly different footing. He considered the testatrix orientated when she arrived at the Clinic and in response to questions put to him by Mr Burn gave it as his opinion that on 18 June she would have been able rationally to consider details of various properties; she would have been able to weigh up the possible claims of various relatives so as to make a choice between them; and he said that he

had no evidence that she had a special concern about one relative rather than others. The latter point has weight only as being the expression in a different form of the doctor's view that the testatrix's delusions were confined to her environment. He made no real enquiry into her views on her relatives.

In short, Dr Ding, having regard to all that he knew and discovered about the testatrix, was of the opinion that she had testamentary capacity on 18 June 1974.

The principles relating to testamentary capacity with particular reference to delusions were considered in In re White (1951) N.Z.L.R. 393 C.A. The present is in my view a case where a delusion clearly existed and accordingly the codicil is to be regarded with great distrust and all presumptions in the first instance made against it. I remind myself of the observations of Sir Alexander Cockburn, C.J., in Banks v Goodfellow (1870) L.R. 5 Q.B. 549:-

"Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property." (570)

To that salutary warning the Chief Justice added the following rider:-

"But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld." (570-571)

(Those words destroyed the theory that the mind was one and indivisible so that a delusion on a particular matter evidenced the unsoundness of the whole.)

The onus in this matter rests upon those who propound the testamentary paper and where, as here, a delusion is shown to have existed it is a heavy onus. Thus, in Smee v Smee (1879) 5 P.D. 84 Sir James Hannen, P. in summing up to the jury said:-

"The burden of proof rests upon those who set up
 "the will, and, a fortiori, when it has already
 "appeared that there was in some particular
 "undoubtedly unsoundness of mind, that burden is
 "considerably increased. You have, therefore,
 "to be satisfied from the evidence ... that the
 "delusions under which the deceased laboured were
 "of such a character that they could not reasonably
 "be supposed to affect the disposition of his
 "property." (91)

In the end before I may declare myself satisfied of the competence of the testatrix to make the very codicil which she made on the day upon which she made it I must be brought affirmatively to that conclusion. The evidence of normality given by Mr Matson is of course open to the criticism that he did not know she was or had been under any delusions or that she was about to go, not to the hospital itself, but to the psychiatric clinic. He knew the testatrix well and his suspicions were not excited. The evidence of Mr Matson was negative evidence. It is not I think simply to be put entirely on one side but its weight is not great. And I warn myself that the testatrix's ability to discuss affairs rationally, as I think she must have discussed her business affairs with Mr Matson, does not exclude the idea of unsound mind. That very point was referred to in Smee v Smee (supra) 90 which illustrated that a man might be capable of transacting complicated business requiring the exercise of intelligence and yet may be subject to delusions so as to be unfit to make the testamentary paper or of unsound mind with reference to that ability.

Dr Ding's evidence is open to criticism of a different kind, namely, that when he saw the testatrix on 18 June, or indeed at any subsequent time, his mind was

never directed to the precise issue of testamentary capacity. I nevertheless regard his evidence as of very considerable value on two counts. First, he is a consultant psychiatrist and held a staff position at the psychiatric clinic. It was his business to ascertain the state of mind of patients generally and of the testatrix in particular. He found her orientated and, as I understand his evidence, quite rational. And those findings were made by him well knowing the delusions under which she suffered. Secondly, I find his evidence of value in the analysis he gave of the nature and scope of the delusion. It was, in his view, confined to her environment, that is to say, the staff and fellow patients, and he considered it did not affect her in other ways. It is true, of course, as I have said, that he did not embark on the type of inquiry which he might have done had he been asked to report then and there on her capacity. But his evidence is positive evidence of a man trained in a relevant field and I accept it as to the nature and scope of the delusion. And I find that it was not a delusion such as would affect the capacity of the testatrix to make the codicil.

I have considered too, the nature of the disposition which the testatrix in fact made upon that occasion. It was a curious one - it entrusted to a brother who was only some five or six years younger a power of appointment and constitutes as objects of the power a class of relatives which I think might comprise males and females but which (contrary to the view expressed by Mr McHugh) did not, as I think, include her brother himself. And the gift in default was between a class which was different in that females were excluded. That disposition was not something which arose for the first time as a proposal on 18 June 1974. It had been discussed with Mr Matson and Messrs Peter McHugh and Kars some six days earlier.

Curiously little was said about the bequest of the leasehold lands to Mr and Mrs Kars except as illustrating the result of the undue influence claimed. It was not a new notion for it too had been mentioned by the testatrix at the meeting on 12 June 1974. Neither of the dispositions were inofficious.

Looking at the evidence as a whole including the nature of the disposition, the delusions from which the testatrix was suffering, the depression she was under, her physical condition and age, the subsequent rapid deterioration of her physical and mental health, I am nevertheless brought affirmatively to the view that the testatrix had capacity and the suspicion with which I approached that codicil has been dispelled.

Undue Influence

I turn to the matter of undue influence. The submission made on behalf of certain of the defendants by Mr Williamson related not only to the fourth codicil but to the earlier three. It was that the testatrix had been unduly influenced in a relevant sense by Mr Peter McHugh. In support of that Mr Williamson referred first to the pattern of the codicils with what he described as increasing provisions for the family of Mr Peter McHugh, namely, Mr and Mrs Kars and Mrs Peters; secondly, the call made by Mr McHugh to Mr Matson and Mr Kars concerning the meeting on the 12th and that made to Mr Matson to see Miss McHugh on the 17th; thirdly, his failure to tell Mr Matson of the fact (if he ever knew it as to which there was no evidence) that the testatrix was going to the psychiatric clinic; fourthly, that he did a lot of talking at the meeting of the 12th and considered he ought to get land and supported the alternative notion that it should go in the McHugh line; and, lastly, the inference to be drawn from the codicil that was made on 18 June after he had asked Mr Matson to go and see Miss McHugh. I am unable from that evidence

to infer that there was undue influence. I do not even think that I would be willing to infer that there was persuasion in any material way. I reject that defence.

Knowledge and Approval of Contents

Finally, all defendants submitted that the last codicil was made without the knowledge and approval of the testatrix. As to that, I bear in mind the approach to be made when as here assuming there to be no incapacity, there is nevertheless a weakness or an extreme age. The foundation for the submission really rests upon Clause 2 of the fourth codicil. It is submitted that it does not truly represent that which the testatrix apparently considered doing on 12 June. I think that is to succumb to an analysis that is far too minute. What the testatrix had in mind on 12 June was that her freehold land should go to persons having the name McHugh. No doubt the codicil is so worded that the objects of the power embrace males and females while the gift over embraces males only. Nevertheless, I have the uncontroverted evidence of Mr Matson that he went through the matter with her clause by clause and following in a general way as it does that which had previously been discussed and which was on the day according to Mr Matson what she wanted. In my view the plaintiffs have discharged the onus, which in the circumstances I treat as lying upon them, of showing affirmatively the testatrix's knowledge and approval of the contents of the fourth codicil.

It follows therefore that probate will be granted of the will and four codicils.

I heard submissions upon the question of costs. The circumstances of the fourth codicil were such that in my view it was quite proper for the defendants to raise the issues of capacity and knowledge and approval of contents. I do not think that they had at any time any real evidence to suggest that there was any undue influence.

In the case of Mr McHugh, there was no evidence at all on his behalf to support the allegations he made against Mr Peter McHugh, Mr and Mrs Kars and Mr Matson.

Mrs Kars sought costs from Mr McHugh.

I do not think she had any need for a separate representation from her co-plaintiffs. And I do not really think that the allegations made by Mr McHugh added much to the preparation which was needed to be made on her behalf. Mr Burn sought costs against Mr McHugh in favour of Mr Matson. He was unable, however, to indicate that Mr Matson had incurred any costs other than those which he would have incurred as a prospective executor in propounding the documents. I think that the matter of costs can justly be met in this way:

1. The plaintiffs will have one set of costs only to be taxed as between solicitor and client and paid out of the estate of the testatrix. If any question arises as to such costs as between Mr Matson and Mr Egden on the one hand and Mrs Kars on the other I will hear counsel.

2. The defendants for whom Mr Williamson appears will have party and party costs out of the estate together with disbursements for fees of Court, witnesses' expenses (other than those of Mrs Minehan and Mrs Kelly who I think added nothing) and other necessary payments as fixed by the Registrar. I fix those party and party costs at \$500 and in so doing make allowance for the plea of undue influence which I do not think ought to have been raised. I will sever those costs between the sets of defendants represented by Mr Williamson if that is desired.

3. Although Mr McHugh's allegations against the plaintiffs and Mr Peter McHugh personally were wholly unjustified, I propose in the circumstances to make no award of costs against him. On the other hand, I do not propose to allow him any expenses himself for

it seems to me on the issues of want of knowledge and approval and incapacity he might well have joined the others of his family who instructed Mr Williamson.

Solicitors:

Matson, Marshall & Butler, Christchurch, for Plaintiffs
Connell Lamb Gerard & Co., Whangarei, for Estate P.J.
McHugh and A.G. McHugh
Adams, Richardson, McKinnon & Garbett, Hamilton, for
J.P. McHugh
Raymond, Donnelly & Co., Christchurch, for M. Morgan,
M.J. Minehan and K.D. Kelly