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N.Z.L.R. Reports

IN THE HIGH COURT OF NEW ZEALAND

A NO 6/82

BLENHEIM REGISTRY

74

BETWEEN L R PEPPER and FILLINGHAM

Plaintiffs

AND C WILLIAMSON

First Defendant

AND R WILLIAMSON

Second Defendant

AND L WILLIAMSON

Third Defendant

Hearing: 27-29 September 1983

Counsel: J R Wild for Plaintiffs
C B Atkinson, Q.C., for Second Defendant

Judgment: 21 FEB 1984 Reserved Judgment of Eichelbaum J delivered by Deputy Registrar Turner

JUDGMENT OF EICHELBAUM J

This litigation concerns the estate of H Williamson who died on 21 October 1976. The plaintiffs, the executors named in his last will, seek probate of it. The will left the deceased's entire estate to his son C the first defendant. It will be convenient to refer to the sons by their first names. Another son, R (the second defendant) has challenged the will upon grounds of lack of testamentary capacity, undue influence by the first defendant and want of

knowledge and approval on the part of the testator of the contents of the will. A , the third of the defendant's sons, has died. His own son was named as third defendant in his capacity as executor of his father's will. As a result of a compromise the third defendant has not taken any part in the hearing.

In his younger days Mr H Williamson, whose birthplace was the Shetland Islands, had been a sea captain. Later, on shore, he was successful in business. Initially he was a fruiterer in Timaru. A Christchurch chartered accountant, Mr J.P. Goldsmith, assisted him with his financial affairs. In or about 1967, on Mr Goldsmith's advice, the testator formed a family company as an estate planning measure. It held the rental properties which at that stage were Mr Williamson's principal business assets. Each of the three sons was given an equal number of shares in the company. However, the company's structure excluded them entirely from control as voting rights attached only to the separate shares held by Mr and Mrs Williamson. In 1973 when Mrs Williamson was terminally ill the arrangement was modified to the extent that three of the ten voting shares were transferred to Mr Goldsmith and two to C

The formation of the company had the effect that ownership of a major part of Mr Williamson's assets passed to his three sons in his lifetime. The latest figures available, namely as at 31 March 1982, gave the worth of the company as in the vicinity of $140,000. For this purpose the properties were brought into account at government valuation and even on this basis, the company's assets amounted to several times the value of

Mr Williamson's estate. At the date of death the disparity was not as great but at any rate, by establishing the company, Mr Williamson undoubtedly made significant provision for each of his sons; not, however, in a form that was of any immediate benefit to them, as will emerge.

C Williamson was the only son not to marry. He lived with his parents throughout their lives. In or about 1967 he purchased a pharmacy in Picton and at that stage he and his parents moved to Picton together.

In 1967 Mr Williamson and his wife made mutual wills in identical terms. In the event that the other spouse survived, he or she was appointed executor, and the shares held by the testator or testatrix in Williamson Holdings Limited were bequeathed to that spouse. The residue of the estate was bequeathed to the company. If the other spouse did not survive then Mr Goldsmith and his partner, Mr Stanley, were appointed executors. In that event the estate was to be divided equally between the three sons.

In 1973 Mrs Williamson died after being ill for some time. The Picton property in which the Williamsons had lived with C had been owned by Mr and Mrs Williamson as joint tenants. After his wife's death Mr H Williamson signed documents, the intended effect of which was to transfer title to the property into his name and C 's as joint tenants, in consideration of a sum equal to one-half of the gift duty valuation of the property. The parties signed a memorandum of transfer, which referred to a previous oral agreement, and a deed of indebtedness, the latter reciting that the consideration

was not to be paid in cash but was to stand charged against C interest in the property. Both documents left the amount of the consideration blank, and on the evidence before me, the transaction has never been completed. In the meantime, title to the property stands in the name of H Williamson, by virtue of his survivorship as between Mrs Williamson and himself.

In 1974, the year after his wife's death, Mr Williamson made a new will. The executors were Mr Goldsmith and Mr Ames, a Christchurch solicitor, who had acted for Mr Williamson and who, I infer, prepared the will. It was however executed before two Blenheim solicitors. Under this will, Mr Williamson forgave C any monies owing in respect of the transfer of the half interest in the house. The balance of the assets was left to the family company, except for the voting shares. In substance the only asset was the sum standing to the credit of the testator with the company; as will be explained this was at least $20,000. The effect of the 1974 will was that such sum ultimately would be divided equally among the three sons. So far as the house property was concerned, clearly Mr Williamson's intention was that the whole property should pass to C debt-free, which would have been the combined effect of the documentation already referred to, and the 1974 will, had the earlier transaction been brought to completion. The will also provided, against Mr Goldsmith's advice, that the trustees were to retain the deceased's voting shares for a period of five years from the date of death. The trustees were then to wind up and distribute the company. Mr Goldsmith's view was that in the case of children in middle life, as

the three sons were, this was unnecessary and it gives some insight to Mr Williamson's characteristics, or his lack of confidence in his sons, or both, that this advice was not accepted.

Some other facts now need mention. After Mr and Mrs Williamson and C had shifted to Picton, inevitably the parents became a little isolated from the other two sons who lived in Christchurch and Wellington respectively. I think that this became increasingly so after the death of Mrs Williamson. R did not visit his father again although A continued to call. The other sons, according to R , were unaware that a transfer of a one-half interest in the house was contemplated, nor that C had been given some entree to the affairs of the family company. I am sure that C would not have gone out of his way to let his brothers know about these developments. But in case it is thought that I regard all these aspects as suspicious, I think it fair to add that in the circumstances that had developed, these moves might well have been expected to occur. Obviously Mr Williamson was becoming increasingly dependent on C for his needs, not in a monetary sense but in regard to all the other problems of daily living that become more difficult with the approach of old age. It was a situation tailor-made for the end product that C would be preferred to the other two, and no doubt with some degree of justification.

In 1972 C was convicted, for the second time, on charges of presenting fraudulent prescriptions. On another occasion he had been convicted of theft of a prescription. This time he was sentenced to 18 months

imprisonment and was struck off the register of pharmacists. It seems that somehow the news was kept from C father. In the early stages of his mother's final illness C was in prison but on release he returned to Picton, assisted his father to visit Mrs Williamson on a daily basis, and after his mother's death, cared for him until his father's own death three years later. In April/May 1975, that is some three months after the execution of the final will, the testator was still well enough to accompany C to Timaru for a period of some weeks. However, when in June 1975 C had to go into hospital for an operation, his father was admitted to hospital just for care. He had been in hospital previously in October 1974 when he broke his clavicle in a fall.

The evidence did not disclose who attended to Mr and Mrs Williamson's legal work when they moved to Picton. They had some slight contact with the firm which by 1975 was known as Wain & Drylie. Mr Goldsmith continued to look after the accountancy side and it may be that Mr Williamson did not have need of any legal assistance locally during this period. Then in 1975 Mr Phillips, a legal executive employed by Wain & Drylie, received a telephone call from C . Mr Phillips knew C and had carried out legal work for him previously. C gave instructions on behalf of his father for a new will. The executors were to be the present plaintiffs who were the testator's brothers-in-law. According to the brief note taken by Mr Phillips the estate consisted of a half interest in the Picton house - there was a question mark after the word "half interest" - plus chattels and furniture. The note went on to say that C had looked after the testator for the two years since Mrs Williamson had died, "so" everything was to go to him.The other brothers were to be

left out. The note concluded "Jack Goldsmith wants it fixed" - a remark to which I shall return later.

Mr Phillips, an experienced legal executive, appreciated that the situation called for some caution. He knew that he was dealing with an elderly testator, and he had not received instructions from the testator direct but from the sole beneficiary. A further question mark arose because of knowledge that C Williamson had been convicted on charges involving dishonesty. The will was to be executed a week later. Wain & Drylie had a Picton office which was visited twice weekly but it was decided that execution would take place in Blenheim. Although Mr Phillips did not say so directly I infer that arrangements were made quite intentionally for the will to be executed in the presence of Mr Wain who in turn, and again deliberately, arranged for his partner, Mr Drylie, to be the other attesting witness.

On 10 February 1975 C brought his father to the offices of Messrs Wain & Drylie in order to have the will signed. Neither Mr Wain nor Mr Drylie had met the testator before, and regarded him as a new client. Mr Williamson was then aged 84 or 85; I do not think that Mr Wain or Mr Drylie were made aware of his exact age but they knew they were dealing with a testator in such an age bracket. Both were aware of C 's 1972 conviction and recognised that the situation required a degree of caution. Mr Wain, who had prepared the will in accordance with the instructions taken by Mr Phillips, said in evidence that he discussed the contents of the will with the testator. He asked him what he understood the will provided and was satisfied with his answers. He then asked him why he was

preferring C to his other two sons. I interpolate here that C remained in the room throughout the interview. I am satisfied that he did not take any part, except to introduce his father. In retrospect Mr Wain and Mr Drylie recognised that it would have been preferable had the interview been conducted in C absence. Mr H.B. Williamson's reply was that the other two sons had been provided for and were well housed. Mr Wain noted that the testator appeared to be physically fit. One of the partners asked the testator to read the will through which he did without the use of glasses. He was then asked by one or other of the witnesses to explain what it meant and he satisfied Mr Wain that he understood the contents. The interview took ten or fifteen minutes.

At the time of this interview Mr Wain had been in practice for about ten years. He impressed me as a competent and careful solicitor. It would have been surprising if after this interval of time he had retained a greater memory of detail than to the extent that he gave in evidence and he did not endeavour to expand his recollection by making any assumptions. At the time he was alert to the possibility of issues arising about all three of the matters put in question by the defence, that is to say capacity, knowledge of content, and undue influence. I am satisfied that if he had seen any reason why an investigation should be undertaken in greater depth, for example by obtaining a medical opinion, he would have not hesitated to say that this was necessary. The formalities of execution were adequately proved and not challenged.

C maintained that he warned Mr Phillips that there would be trouble with his brothers, and for that reason to watch the question of testamentary capacity. He

claimed that he said the same to Mr Wain and Mr Drylie. None of them gave evidence to that effect. I do not believe that C made any such statement.

At the time Mr Wain and Mr Drylie jointly made a note of events. This was first to the effect that a copy of the will should be sent to Mr Goldsmith as well as to the testator himself. Then Mr Wain briefly noted:-

> "Attending Mr H B Williamson and son. Other sons well housed and provided for (family company). C has stood by you. You are clear on this and apparently of sound mind. Read will without glasses. JFD and JJW both in attendance."

(The initials referred to Mr Drylie and Mr Wain).

Mr Drylie also gave evidence. He is no longer in practice, now being engaged in a course of training for the Ministry. Mr Drylie was likewise a careful and accurate witness and I have no hesitation in accepting his evidence fully. He was asked to witness the will. He had no prior knowledge of the contents. To use Mr Drylie's own phrase, the presence of Mr C Williamson put him on enquiry. He was aware of something of C 's problems with the law. Accordingly, before the testator read the will Mr Drylie put some questions to him about it. He was able to give the names of the trustees and in general terms the disposition of his estate. Mr Drylie also recalled that either he or his partner asked Mr Williamson why he

was disposing of the whole of his estate to C . The reply was that the other sons were well provided for already and that he was concerned that C should be left in a stable situation with somewhere to live after his deat He added that C had been responsible for caring for him in the last few years. Then Mr Williamson read the will through carefully and proceeded to execute it. Mr Drylie said that he was under no doubt that the testator knew the contents of the will having regard to his quick response to the few questions that were asked concerning the contents, his general demeanour and the certainty with which he responded to the enquiries. He too said that C took no part in the interview in any way except for the introduction and farewell.

The absence of any contemporary medical evidence means that the testimony of these two solicitors, whose independence was not called in question, assumes particular importance. In Mr Drylie's case, it is fair to add that he had the advantage of three years experience on the staff of the Public Trust Office in Wellington where on a number of occasions he had attended to the taking of wills of elderly people, persons who in some cases were terminally ill, such interviews on occasion being in hospital or in the testator's home. Had there been any visible signs of testamentary incapacity, or any obvious reason to think that the testator had not fully understood the nature and content of the provisions he was making, I am sure that Mr Drylie, like Mr Wain, would have noticed it and said so. Both solicitors however were disadvantaged by lack of knowledge of the testator's affairs, without which they were handicapped in assessing both his capacity, and his ability to comprehend the effect of his dispositions.

Several matters need to be mentioned in elaboration of the last point. I have already referred

to the arrangements made after Mrs Williamson's death to confer on C a joint tenancy of the house property, in consideration of an acknowledgement of debt, and the provision in the 1974 will that any balance which might be owing at the date of death was to be forgiven. I have little doubt that the testator's initial intention was to make a gift to C of an interest in the house rather than contemplate any repayment by his son. Mr Williamson was in his early eighties when his wife died. At the time the joint tenancy arrangements were made he must have been becoming increasingly dependent on his son for care and attention. It is difficult to be sure what was in the testator's mind, or C , regarding the house property in 1975. Assuming they understood the effect of a joint tenancy (but of course they may not have done so) all that was needed was a provision forgiving the amount owing, as in the 1974 will. One can put aside the possibility that they realised that the 1974 transaction had not been perfected; as they had signed the formal papers they would have regarded the transfer of the interest as an accomplished fact. However, none of this seems to have been explored with the testator or C

A second aspect is the substantial credit the testator had with the family company, which for practical purposes was equivalent to cash. As to how much was involved, Mr Goldsmith thought there had been some accrual in the current account between the date of death and the present time; and presumably there may have been some between the date of the will and Mr Williamson's death. I cannot therefore state precisely the overall value of Mr Williamson's interest in the company and the amounts owing by the company as at the date of the will but on the information before me there is no basis on which the accruals mentioned earlier could have been substantial. Any dividend attracted by the voting shares was insignificant. There may have been director's fees but they must have ended with the testator's death. So the amount involved could not have been significantly less than the $26,000 mentioned as the

present day figure by Mr Goldsmith. At the very least it must have been $20,000. However, that is not to say that Mr Williamson senior was aware of the figure. This much is clear, Mr Phillips was left with the impression that there was no estate of significance apart from the interest in the house. That was Mr Wain's reaction also. There are several possible explanations as to why no reference was made to the funds tied up in the company. I have no doubt that in the recent past Mr Williamson had been aware of the existence of the funds. I reject the possibility that C did not know about their presence. He would have seen the accounts and known of the position in general terms. When C was pressed on the point that the solicitors were unaware of that portion of the testator's assets, it is significant that his response was that there was some disparity between the position at the date of the will, and the date of his father's death. He did not endeavour to profess ignorance. Another possibility is that C could have mentioned the matter, but Mr Phillips did not make a note at the time. That too is improbable and C did not claim this was so. The only remaining explanation is that C deemed it prudent not to mention this substantial additional asset in case its disclosure led to further enquiries that might disturb the prospect that he would be the sole beneficiary. In suppressing this information, he took the risk that his father might refer to it when he came to execute the will. It leads one to speculate that C realised that his father had forgotten about the funds, or now thought these sums belonged to the company rather than being personal assets at his disposal. I am sure that C made no reference to the voting shares; this I believe was for the same reason as I have ascribed to him in not disclosing the sums held or owing by the company.

The third aspect relates to the provision for the other sons. It was true that they had been provided for : I am sure that so far as quantum was concerned their position was adequately met by the shares they held in the family company. In two other respects however their position was less than satisfactory. First, resulting from the particular structure of the family company and the earlier transfer of some of the voting shares, the effect of the new will was that on his father's death C would obtain control. From the terms of the 1974 will, it is apparent that Mr Williamson's then intention was that the company's assets should automatically be distributed to his three sons upon the expiration of the period of five years after his death. Furthermore, in the meantime control would have been in the hands of two independent professional men. The effect of the 1975 will on the other hand was that C would be able to frustrate or at least delay any distributions that his brothers might otherwise enjoy. Thus the "provision" that had been made for the other sons, while adequate on paper, had practical limitations. This has been illustrated eloquently by the fact that today, seven years after his father's death, Robin has not received one cent from the family company. Secondly, there was the matter of the other sons being "well housed". In fact, as C conceded in cross examination, it was quite wrong to refer to either of his brothers in that way. Both their marriages had broken up and neither had a house of his own. So far as housing was concerned, even before execution of the will C was in a better position than either of them. As already recorded the note made by Mr Wain referred to the question of housing and other provision separately. Accepting as I do that the note correctly records something said by the testator, again this inaccuracy on his part has several possible explanations. One is that the testator had been deliberately misinformed by C but I do not think there is sufficient material to enable me to prefer that inference to others, such as that the testator had forgotten or

overlooked that the position of his other two sons had changed with the breakup of their marriages.

In summary, there were a number of factors on which first Mr Phillips and then Messrs Wain and Drylie were not informed, or imperfectly so. In listing them in this manner, I do not imply that every one was vital. However, their cumulative effect will require some consideration :-

1. The testator had made a will only a year before.

2. That will had been prepared by another firm, which had acted for the testator for many years.

3. The testator had significant assets apart from the house and chattels.

4. There was the question of the right of control of the family company.

5. The testator believed he had already made provision for C substantially in excess of that made for the other sons.

6. The transfer of the interest in the house property had not been perfected.

7. The appointment of trustees meant the dismissal of two professional

men who had been involved in the testator's affairs, and the substitution of two relatives living at a distance who lacked any previous connection. From the testator's point of view, it was difficult to see any good reason for the change. From C s point of view, it was a move that very likely would leave him greater freedom of action than would have been the case if the former executors remained.

While on the subject of the instructions for and execution of the will there are two other matters I need to mention. The first relates to the note made by Mr Phillips concerning Mr Goldsmith, reading "Jack Goldsmith wants it fixed". Mr Phillips did not recall the context of this remark. He knew that Mr Goldsmith was the family accountant in Christchurch. In my view the explanation that Colin gave was entirely unsatisfactory. He maintained that it was simply an expression he used when he wanted something done promptly particularly when dealing with the legal profession. I do not believe a word of it. I am sure that the truth of the matter was that for some reason, probably because Mr Phillips enquired, C felt it necessary to explain why his father was discarding the existing trustees and sub-

stituting persons who on the face of it did not have very close connections with the testator, and did not live in or near Picton. Thus he felt it necessary to pretend that the steps now being taken had Mr Goldsmith's approval. In fact however Mr Goldsmith knew nothing about the proposed new will and had not given any advice in connection with it. I need hardly say that this conduct on C s part must excite suspicion, or to put it more correctly from a legal point of view, must increase the suspicion with which for other reasons the Court is in any event bound to regard the transaction.

The second matter relates to the choice of the solicitors consulted. C said that they had been suggested by his father, that the latter desired that the will should be prepared by solicitors who were independent, that is to say were not the regular solicitors for either father or son, and that the testator thought that the Crown Solicitors would be the best choice; they, in the testator's opinion (so C said) would be certain to be impartial and above board. No doubt all this was intended to sound very high-minded; but in cross examination it emerged that in fact Colin first went to a different firm, who were not his regular solicitors. They had also acted as agents for Mr Ames' firm in dealing with the testator. They were not prepared to carry out the instructions and suggested that C should consult Messrs Wain & Drylie. There is no reason to think, I may add, that the latter were aware of this background.

I refer next to an event that occurred shortly after execution. Messrs Wain & Drylie's firm received a letter in the testator's hand as follows :-

"This letter is to substantiate and place on record that my will has been made in favour of my son C because of his services to me. Provision for my sons Robin and Alan has already been made."

This letter is dated 11 February 1974. Putting aside the mistake in the year, on its face it was written the day after execution of the will. It reached Mr Wain under cover of a letter addressed to him personally dated 30 May 1975, written by C . Although Mr Wain could not recall any preceding conversation, the letter refers to a telephone consultation. C s evidence was that after execution of his will his father had mulled over the fact that the two other sons were not mentioned in the will. He requested C to discuss it with Mr Wain with a view to having a formal document drawn up which he would be happy to sign. However, according to C , Mr Wain suggested that a letter which could be put with the will would be sufficient. In his covering letter C said that his father wanted the letter filed with the will and added "This letter was written in my father's own handwriting, of his own free will and choice, he having and being in full use of his faculties."

The testator's letter was put to R who said that his father would not use a phrase like "substantiate and place on record". In fact his father would not have known how to spell substantiate. In R 's opinion the letter "bore all the fingerprints of C s making". Rc said that his father had had a rudimentary primary school education, had gone to sea at the age of 15 and used the most simple terms. This evidence had the ring of truth.

C . said that he left his father to write the letter and he did not even read it. This was one of several specific respects where in my view C was untruthful and which have led me to form an unfavourable opinion of his credibility as a whole. The testator's letter I am sure was written on C s dictation in order, as he hoped, to shore up any doubts about the February will.

C Williamson said his father's letter would have been written within a day or two of his own covering letter. The date "1974" I think was simply a mistake but the reason why a letter written on or about 30 May was dated 11 February may be more subtle. On 1 June the testator was admitted to hospital and it was with reference to this period that Doctor Mills made certain comments as to his testamentary capacity. Unfortunately, owing to illness Doctor Mills was unable to come to court. An affidavit made by him in the caveat proceedings which preceded the present action was read by consent. Doctor Mills first attended Mr Williamson in October 1974 when Mr Williamson had been admitted to Picton hospital after a fall in which he fractured his collar bone. On that occasion he was in hospital for about three weeks. He attended Mr Williamson again during his second admission, from 1-16 June 1975. Doctor Mills said that he had a clear recollection of Mr Williamson during the first period. He said that he definitely had testamentary capacity then.

The necessity for the second admission in June 1975 came about because C was in hospital himself. On this occasion the doctor said he made a note as to Mr Williamson's senility. The affidavit continued:-

> "Senility can be of the body or the mind or both. In this case I was probably referring to the mind and, on reflection, I think Mr Williamson probably did not have testamentary capacity by June 1975. However, apart from my notes, I have no recollection of him during the second period of admission and am unable to give any definite opinion as to whether he had testamentary capacity then."

Doctor Mills said that up to this point he had not seen Mr Williamson as a private patient but he did so from 18 March 1976 onwards. C maintained that Doctor Mills had in fact seen his father regularly at his surgery after his discharge in October 1974. At any rate, according to a note made by Doctor Mills on 18 March Mr Williamson was:-

> ".... disorientated, deteriorated, delusions boxes of goods have been stolen."

Doctor Mills expressed the view that by that date Mr Williamson had definitely lost testamentary capacity.

This case has been noteworthy for the paucity of the medical evidence available. The nursing notes relating to Mr Williamson's two spells in Picton hospital were exhibited. In those relating to the October 1974 admission one entry states "difficult to manage night". It is apparent that Mr Williamson was in pain. In parts

the notes are difficult to read but I have been unable to find anything of significance in relation to present issues.

The notes relating to the June 1975 admission contain a number of entries that suggest that Mr Williamson was not fully in possession of his faculties. The initial entry says "disorientated". The next day the nurse noted "difficult to keep occupied. Found wandering down hill 2pm", while the next day, in a different hand, the entry reads "very disorientated, impossible to reason. Wandering into patients' rooms. Fulltime escort needed." Further references to the patient being disorientated occur on 4 June. Then, between 5 and 14 June there are several remarks recording that the patient was confused. These entries are intermingled with others referring to quiet or unremarkable behaviour.

There was also evidence relating to two subsequent periods when the testator was a patient in Wairau Hospital, Blenheim, these being in November 1975 and July 1976 respectively. On both occasions the records show that Mr Williamson was admitted to give his son a break. On the first occasion, the record stated that on admission the patient was unable to give a coherent account. Under the heading "Impression" it was stated "otherwise fit old man with a tremor of ? aetiology and some early senile dementia." On this occasion the patient was in hospital for a little over a fortnight and the notes contain a few references to his being confused. The ward sister's assessment stated:-

> "Inclined to live in past. Can be very interesting when relating to happenings when a master mariner. Gets disorientated as to time and place."

The discharge summary completed by the staff doctor in charge of the patient stated that his "mentation" was reasonably clear.

In relation to the July 1976 admission, on discharge the doctor under whose care Mr Williamson had been commented that he was confused at times while at other times he had been quite co-operative. The most noticeable feature was the extent to which he was tremulous, due it was thought to Parkinson's disease. One of the nursing notes refers to Mr Williamson as "a delightful old man".

To round off the information that is available to me on the question of testamentary capacity, I need to refer to the evidence of Mr Goldsmith and Mrs Kenny. Mr Goldsmith impressed me as a reliable and accurate witness. He had got to know Mr Williamson over a long period of years in Christchurch and continued to see him regularly three or four times a year after the Williamsons moved to Picton. He thought that he probably saw Mr Williamson after the date when the last will was made but was not certain about it. However his evidence was of assistance to me in gaining some picture of the testator. He described him as a man "not of this century". His manner of putting things was unusual. He was a distinctive personality, forthright and intelligent, and he always understood without exception what Mr Goldsmith was getting at. Mr Goldsmith added, whether he agreed with it was another matter; and he instanced specific occasions when Mr Williamson did not accept his advice. He said that he was certain that Mr Williamson had a real understanding of the structure of the family company and that he fully understood the rights of control.

Mrs Kenny's evidence was admitted on affidavit by consent. She was a director of a business on the Picton waterfront and used to see Mr Williamson frequently when he went for walks along the foreshore. She found that he was always alert, interested in what was going on, and lucid. Mrs Kenny however was unable to be in any way specific as to dates. She said that the walks suddenly stopped. I am inclined to think this may have been in October 1974 when Mr Williamson suffered the fracture. While Mrs Kenny's evidence assists in the formation of a general picture of the testator, in the absence of dates it cannot help to resolve the issues in this case.

Certain incidents after the death of Mr Williamson merit mention. They may indicate no more than that C was concerned to protect his position. They are certainly consistent with a guilty conscience. They heighten the suspicion one feels that C ; part in the execution of the final will went further than just carrying out instructions that his father had decided upon independently.

Immediately after the funeral, which took place at Timaru, R and A together with C attended Mr Goldsmith's offices. A would not go inside, owing to the suspicions he felt (I think quite unjustifiably) about Mr Goldsmith's part in his father's affairs. The question of a bonus issue was discussed. On R enquiring as to the whereabouts of his father's last will, he was met with silence. I can understand that Mr Goldsmith may have thought that it was not his role to break the news. R announced that he was going to see Mr Ames; again, there was no response or comment from C . R duly saw Mr Ames who gave him the 1974 will but said that it might not be the last. R then returned to where A

and C____ were waiting and challenged C with Mr Ames' statement. C s reply was all solicitors were liable to say that: anyway he did not know what his father did, he had often gone to Blenheim alone. That he was lying was I think readily apparent to R . He withdrew the assent he had earlier given to a bonus issue. I interpolate here that when it was put to Mr Goldsmith that the 1975 will must have come as a surprise to him, he made the significant reply that having regard to Mr Williamson's attitude in discussions they had had in Picton, it had not. Then a week after his father's death C wrote to Messrs Wain & Drylie notifying them of his father's death and adding that his brothers were endeavouring to locate the last will. Having mentioned that they had found the 1974 will, he continued:-

> "It would therefore be appreciated, if you are holding a will with a later date if you would forward a copy together with any supporting letter or codicil ...."

and he then gave the names and addresses of his brothers and asked that copies be forwarded to them as well as himself. Clearly all this was subterfuge, designed to ensure, if possible, that in forwarding the will and letter which C knew very well Messrs Wain & Drylie were holding, they hopefully would make no mention of the part he had played in relation to either document.

Following their father's death R and A Williamson lodged a caveat against the grant of probate. I need not detail the steps that followed. It is sufficient to say that the present plaintiffs, foreseeing (I think correctly) that in the end the likely outcome of the caveat proceedings would be an order that the application for administration be made in solemn form, launched the present action. There is no point, at this stage, in dwelling on the excessive time it has taken to bring the dispute to a head.

It is now necessary to deal with the three bases on which the second defendant challenges the plaintiffs' right to probate. The first is that the deceased did not know and approve the contents of the will. As the Court of Appeal fully surveyed and restated the principles in Tanner v Public Trustee 1973 1 NZLR 68 I need do no more than summarise the relevant law. A party who puts forward a document as being the true last will of the deceased must establish that the testator knew and approved of its contents at the time when he executed it. The testator's knowledge and approval are part of the burden of proof assumed by everyone who propounds a testamentary document. In ordinary circumstances the burden is discharged by proof of testamentary capacity and of due execution, from which knowledge and approval by the testator are assumed : Williams, Mortimer & Sunnucks, Executors, Administrators and Probate, 16th Edn, p 157. But, the learned authors continue, in the various particular circumstances which they then discuss, knowledge and approval must be proved affirmatively by those propounding the will.

The weight of the burden of proof will vary with the circumstances. In some cases very little is required to satisfy the Court that the deceased knew and approved of the will (Williams, Mortimer & Sunnucks, p 159). But where the vigilance and suspicion of the Court are aroused the burden of proof may be extremely heavy, Wintle v Nye /1959/ 1 All ER 552, 557 per Viscount Simonds; in the same case Lord Reid referred to the requirement (where the will has been prepared by or on the instructions of a person who benefits under it) that the effect of the testamentary act must have been brought home to the mind of the testator. On the facts Lord Reid doubted whether the testatrix had any real understanding of the magnitude of her estate or the effect of the dispositions she had made (p 561).

One of the circumstances well recognised as arousing the vigilance and suspicion of the Court is where a party has procured the execution of a will under which he takes a benefit :

> " . . . if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased". -
>
> Barry v Butlin (1838) 2 Moo PC 480, 482 per Parke B.

Later in his speech in the case just cited, Parke B referred to the duty on the Court, where circumstances of suspicion were present, not to grant probate without full and entire satisfaction that the instrument expressed the real intentions of the deceased. It is clear that that rule is not limited to cases where the will is prepared by a person taking a benefit. The principle applies wherever a will is prepared and executed under circumstances which excite the suspicion of the court : Tyrrell v Painton (1894) P 151. See also Chatterton v Howie (1926) NZLR 595 per Skerrett CJ at p 605, and McDonald v Valentine 1920 NZLR 270 per Sim J at p 272.

In Fulton v Andrew (1875), L R 7 H L 448 Lord Hatherley said :

> " There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will . . . . and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction. "
>
> (p 471).

Although this passage has often been cited, I have been able to find little by way of exposition of the meaning of the phrase "the righteousness of the transaction" in the context. In Craig v Lamoureux 1920 A C 349, a

case where the Judicial Committee declined to apply the principle to a plea of undue influence, the Board (Viscount Haldane, Lord Buckmaster and Lord Dunedin) referred to "evidence of (the) honourable and clearly comprehended character" of the transaction regarding the legacy in question.

As in Barry v Butlin, Fulton v Andrew was a case where those who had procured execution of the will, and taken a benefit under it, were not as here related to the testator. It is true that in Fulton v Andrew, Lord Cairns L C specifically referred to the fact that the persons were strangers, see p 461. As I see it, the principle that the court's vigilance is aroused where the will confers a benefit on those who procured it, is applicable whether or not the persons in question are strangers; if they are related, then depending on the nature of the relationship and the general circumstances, that factor may diminish suspicion, or dispel it altogether. In Baker v Batt (1838) 2 Moo P C 317 the concept was applied against a testator's husband; three members of the Judicial Committee who sat on that case, including Parke B, were also party to the decision in Barry v Butlin, heard later the same year.

In turning to apply these various principles to the facts, I bear in mind the limitation upon the matters which can raise the question of the righteousness of the transaction, see Re R deceased 1951 P 10. They must be circumstances attending, or at least relevant to, the preparation and execution of the will itself. There is no doubt that in the present case, a number of such circumstances existed. C Williamson gave the instructions for the will, made the necessary arrangements, and brought the testator to the solicitors. All are aspects capable of an innocent interpretation, and in a situation where an elderly testator is heavily dependent upon a relative for assistance to enable him to attend to his affairs, may be no more than one would expect. While therefore

they raise suspicion, in the absence of other factors that suspicion might quite readily be dispelled. But here we have a significant number of additional considerations : the incomplete information given by way of instructions, C deception about Mr Goldsmith, the unreasoned change in executors, the radical departure from the scheme of earlier wills, only a year after the last, the change of solicitors, the absence of any reference either in the instructions or in the conversation that preceded execution of the sums held by the family company, and the like failure to advert to the voting shares and to the effectiveness of the provision made for the other sons should control of the company pass to C . Cumulatively, the circumstances mentioned are such, in my view, as to raise a heavy onus : Tanner v Public Trustee (above) p 87. Has it been discharged ?

The strongest point in the plaintiffs' favour is the evidence of the attesting witnesses, which includes of course that the testator read the will before execution. It is now well established however that the fact that the will was read by the testator is not conclusive on the question of knowledge and approval of the contents, see Tanner at p 89, per Turner P, and at p 74, per Macarthur J. The testimony of Messrs Wain and Drylie is entitled to great weight, both on the aspect of the case presently under consideration, and in regard to testamentary capacity (Williams, Mortimer & Sunnucks at p 151) especially bearing in mind the favourable view I take of them as witnesses. In addition there is other evidence, including Mr Goldsmith's, that assists the plaintiffs' case. But there is a formidable amount of material in the scales on the other side : not only the factors already listed as raising suspicion, but other matters which in terms of Re R deceased should not be taken into account for purposes of that enquiry, but relevant to the total picture the Court has to view in reaching its decision. The effect of the evidence as a

whole tended to increase suspicion rather than dispel it; that comment is applicable to the impression that C Williamson made on me in general, as well as that engendered by particular matters, such as the 11 February letter, events immediately after the funeral, and the letter written by C to Wain & Drylie after his father's death. In totality the evidence leaves me in the state of mind that the plaintiffs have failed to prove that the testator knew and approved the contents.

I should elaborate a little on that conclusion, in fairness to the attesting witnesses. I am satisfied that the testator was aware that the will he executed left the whole of his property to C . I am not satisfied - and now I hark back to Fulton v Andrew and Wintle v Nye - that the effect of the testamentary act had been brought home to the testator. That is not a criticism of Messrs Wain and Drylie. I think that anyone placed in their position faces considerable difficulties. Lacking the necessary background information they remained unaware of the substantial credits held by the family company, the voting rights, and the true position of the other sons. The evidence does not establish to my satisfaction that the testator appreciated the extent of the change that the new will effected to his previous dispositions, and the impact upon his other sons; or, in the language of Turner P in Tanner's case at p 92, that it was a will which he properly understood and to which he gave his true assent.

I turn to the second matter put in issue, testamentary capacity. Here too there is a modern decision of the Court of Appeal in which the field is fully canvassed, In re White (deceased) 1951 NZLR 393. In relation to general principles, I refer to the judgment of O'Leary CJ at pp 408-409, where the question of the onus of proof is dealt with, as it is in the judgments of Finlay J at p 417, and Gresson J at p 424. Sound testamentary capacity involves proof that three things

exist concurrently : (1) The testator must understand that he is giving his property to one or more objects of his regard; (2) he must understand and recollect the extent of his property; (3) he must also understand the nature and extent of the claims upon him both of those whom he is including in his will, and those excluded : Williams on Wills (4th Edn) p 22. Mere forgetfulness to comprehend some property, or to recollect the claims of those excluded, "would not seem sufficient to invalidate the will" : 17 Halsbury (4th Edn) para 898. Both Halsbury (page 472, fn 1) and Williams, Mortimer & Sunnucks (p 148, fn 9) take up the comment made in The Conveyancer, Vol 35 p 303 (in a review of the first Williams & Mortimer) that no case has been decided on the question of lack of knowledge of the extent of the property; but Halsbury defends the proposition stated under (2) above on principle. See also In re White (deceased), per O'Leary CJ at p 409. As regards the burden of proof, if the will is rational on its face and duly executed, in the absence of evidence to the contrary it is presumed to be that of a competent testator. However, when the whole of the evidence is before the Court, the decision must go against the validity of the will, unless it is affirmatively established that the testator was of sound mind at the time of execution : Williams,Mortimer & Sunnucks pp 156 - 7 . Ultimately the issue is one of fact.

Again, I start with the proposition that the evidence of the attesting witnesses is entitled to be given full weight in favour of the plaintiffs : see Williams, Mortimer & Sunnucks at p 151. But while I accept without reservation that Mr Wain and Mr Drylie reported in good faith all that they were able to recollect of their single brief interview with the testator, I cannot ignore the limited nature of the opportunity they had to make their assessment, and the inadequacy of the material they had with which to test Mr Hosea Williamson's capacity. The evidence now available that runs counter to the impression they formed - of course it was not

accessible to them - is quite significant. The simplistic instructions, mirrored in the stark form of the will itself, were inappropriate to the assets still possessed by the testator. There is the absence of all reference to the sums held by the company, and likewise in regard to the voting shares. On Mr Goldsmith's evidence, in earlier times the testator undoubtedly had understood the significance of the latter. How the testator now disposed of them was of importance in relation to the effectiveness of the prior provision he had made for his other sons. I do not overlook the possibility that had the question been present to his mind he might still have done as he did, and left the shares to C But that involved a significant change from his thinking only a year earlier, when in the 1974 will he had put control of the company in the hands of his long-standing professional advisers, with firm instructions as to when they were to distribute the assets for the benefit of all three sons. The conclusion seems inescapable that the testator had forgotten the existence of the voting shares, as with the sums held to his credit by the company. If the instructions and the will are compared with the will made a year earlier it seems likely, too, that the testator had forgotten the debt owing by C in relation to the house. So far as the testator knew - that is, on the assumption that he believed the transfer of the half share in the house had been completed - the voting shares, the credits and the debt were his only assets of substance. Yet, if the instructions were his, the testator failed to mention them, nor did he make any reference to them in the discussion preceding the execution of the will. From this, Mr Wain's perception was that Mr Williamson did not have any substantial assets. I am not satisfied that the testator comprehended with any accuracy what assets were still within his power. Overall, my impression is that of a person who, while able to conduct a short conversation intelligently enough to satisfy a stranger unfamiliar with his background or

history, may well have lost any detailed grip on his affairs. His remark about the housing of his other sons is consonant with that conclusion. Finally, the change in the executors, which was not discussed with the testator because the previous position was not known to Messrs Wain & Drylie, defies any rational explanation from the testator's point of view, although as indicated earlier, it was sound enough from C .

Dr Mills, although unable to express a definite opinion, had doubts about Mr Williamson's testamentary capacity as at the beginning of June 1975, less than four months after the date of execution. There is no doubt that within a year of executing the will, the testator no longer had capacity. While I am mindful that medical evidence is not essential, I am conscious that more evidence of that nature must have been available. I would have placed considerable reliance on Mr Goldsmith's impressions had he seen the deceased after the will but he could not be sure on the point.

In the end, I find myself in much the same position as with the previous issue; I am simply not satisfied that the plaintiffs have satisfied the onus on them. As already indicated, I believe that the testator understood that he was leaving his property to C But for the reasons given, the evidence has failed to satisfy me, to the required degree, in regard to the other two essentials. I think there is a strong inference that the testator did not understand and recollect the nature and extent of his property. In this case that failure impinges on the third requirement, that the testator must comprehend the nature and extent of the claims upon him. Here, I am not satisfied that Mr Williamson any longer had any reasonably accurate understanding of the needs of R and A nor that the form of his proposed new testamentary provision failed to make reasonable provision for those needs.

The defendant's third plea is undue influence. As to principles, I adopt those set out in Williams, Mortimer & Sunnucks at pp 168-169, where the learned authors commence their discussion of definition by quoting from the direction given to the jury by Sir J P Wilde, later Lord Penzance, in Hall v Hall (1868) L R 1 P & D 481, 482 :

> " . . . . (P)ressure of whatever character . . . if so exercised as to overpower the volition without convincing the judgment . . . "

Adverting to matters especially relevant to the present facts, I accept that undue influence is not bad influence but coercion. Persuasion and advice do not amount to undu influence so long as the free volition of the testator to accept or reject them is not invaded. Appeals to the affections or ties of kindred, or to a sentiment of gratitude for past services, may fairly be pressed on the testator. In Craig v Lamoureux (above) the Judicial Committee said it was important to keep in mind that it is not sufficient to establish that a person had the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained.

As to the onus of proof, I take the view, although Mr Atkinson argued to the contrary, that it rests on the defendant. Williams, Mortimer & Sunnucks say :

" Burden of proof in cases where undue influence is alleged

While the overall burden of proving a will lies on those who propound it, such burden is, in general, discharged by showing that the will was duly executed and that the testator had testamentary capacity. On these matters being shown, those alleging undue influence must prove it; for, as already stated, undue influence cannot be presumed. It is not sufficient to show that the circumstances attending the execution are consistent with its having been procured by undue influence, it must be shown that they are inconsistent with any other hypothesis.

Nevertheless in many cases in which the court has not been satisfied that there was undue influence, and even in cases where undue influence has been positively disproved, the court has pronounced against the will propounded. The court in those cases has refused to pronounce for the will because circumstances have excited its suspicion and vigilance, and it has not been satisfied as to the righteousness of the transaction. "

(pp 168-9)

Applying the foregoing principles to the background of the facts already recited, I have little difficulty in concluding that undue influence has not been proved, and in view of my other findings there is no need to go over the ground at length. Certainly, given C 's history, there is sufficient material to excite suspicion, especially in events after execution. But nothing occurred at the time of execution itself; and I do not think that the adverse inferences to be drawn from C subsequent behaviour are nearly strong enough to establish the charge. Accordingly, I do not uphold this head of defence.

On the grounds given earlier I pronounce against the will of 10 February 1975, and give judgment in favour of the second defendant. As to costs, I have considered the discussion in Williams, Mortimer & Sunnucks, Cap 41, and the remarks of Sim J in McDonald v Valentine (above), an action where, the same issues having arisen as here, the Court reached similar conclusions. Costs were awarded against the plaintiff, but both in that case, and in Campbell v Campbell 1936 GLR 123 where Smith J followed the course taken by Sim J, the persons propounding the will had procured it as well as taken substantial benefits. So far as the present plaintiffs are concerned, strictly speaking it does not seem they were obliged to apply (Williams, Mortimer & Sunnucks, p 379) but having regard to the circumstances in which the testator left his affairs, the hostility between C and R . and the delays that ensued, from a practical point of view I think the plaintiffs had little alternative but to bring the action. Although unsuccessful, in my opinion they should receive their costs out of the estate, on a solicitor and client basis. R should likewise receive his costs from the estate on the same footing. There may be difficulty in the way of making any formal orders at the moment, since the result of the proceedings is that there is as yet no

grant of administration, and the estate is not before the Court. In the circumstances I propose to reserve all questions of costs, leaving it to the parties, when they think appropriate, to make such application as they see fit.

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