28/4

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

MEDIUM PRIORITY

(3)

A No. 503/85

IN THE MATTER of the Estate of WALLACE LEE ESCHER late of Lower Hutt, Tutor, deceased

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BETWEEN THE NEW ZEALAND CRIPPLED CHILDREN SOCIETY INCORPORATED a duly incorporated Society having its registered office at Wellington
Plaintiff

AND DOROTHY CHRISTIANSEN of Lower Hutt, Married Woman
First Defendant

AND ROY ALFRED CHRISTIANSEN of Lower Hutt, Occupation unknown
Second Defendant

A No. 8/86

IN THE MATTER of THE ESTATE OF WALLACE LEE ESCHER, Lower Hutt Deceased

BETWEEN DOROTHY CHRISTIANSEN of Lower Hutt, Married Woman
Plaintiff

AND THE NEW ZEALAND CRIPPLED CHILDREN SOCIETY INCORPORATED a duly incorporated society having its registered office at Wellington
Defendant

Hearing: 24 and 25 March 1986

Counsel: C.J. Booth and Miss J.M. Kelly for The New Zealand Crippled Childrens Society Incorporated
D.J. Turley and Miss M. Duncan for Dorothy Christiansen
M.P. Shelton-Agar for R.A. Christiansen (on behalf of the estate)

Judgment: 23/4/86

JUDGMENT OF HERON J.

These are two actions for probate in solemn form of the wills of Wallace Lee Escher deceased. In respect of will dated 19

December 1967 (hereinafter referred to as the 1967 will) and for probate in solemn form in respect of the will of Wallace Lee Escher dated 8 June 1983 (hereinafter referred to as the later will). Actions were brought in the first place by the executor of the earlier will, who with her husband was also the executor of the 1983 will. Action for probate in solemn form was brought by one of the beneficiaries in respect of the 1983 will and by a consolidation order both actions were heard together.

There is no question of the testamentary capacity in respect of the 1967 will, and but for the later will it would be admitted to probate in the conventional way. The real question at issue between the parties is whether the 1983 will should be admitted to probate.

Wallace Lee Escher died on 15 June 1983. He was then aged 46. In June of 1982 he had been diagnosed as having Hodgkins Disease, a form of lymphotic cancer, generally amenable to treatment with the likelihood of preserving life for some years, notwithstanding the disease. In this case the disease was of an agressive form, which would not respond in any acceptable way to conventional treatment, and caused the death of the deceased one year after diagnosis. In the early morning of 7 June 1983 the deceased, who had earlier been in Wellington Hospital to receive the treatment I have described, returned to Wellington Hospital. By that time the disease was in an advanced state and the deceased, who had been living on his own

whilst not in hospital, was very ill. He was admitted to the hospital for what was described as palliative care. A few days later he was transferred to the Hutt Hospital where he died. It is the circumstances over these latter weeks and days, including the execution of a will on 8 June 1983 that are at the heart of these proceedings. It is accepted by the beneficiaries seeking probate of the later will that a significant question has arisen as to the testamentary capacity of the deceased so far as the later will is concerned, and that the onus of proof is correctly on them to establish that at the time of execution of the will, including the circumstances at the time the instructions were given, the deceased had the necessary testamentary capacity.

The two wills are substantially different in context. The first will made provision for the deceased's mother who died in 1979, and thereafter provided for a gift to Mrs Dorothy Christiansen, referred to in the will as Dorothy Gibson, and in the event of her death, two other friends of the deceased. The later will made a provision for Dorothy Christiansen, as she was now referred to, by way of a legacy of $10,000, and the balance of the estate to be divided in four equal shares to well known charities.

The deceased was a tutor at the Petone Technical Institute where he taught chemistry. He was a Master of Science in Chemistry. Mrs Christiansen was his half sister, and a Mr Robert Ellis, now living in New South Wales, was a half

brother. Mr Ellis was some 34 years older than the deceased and Mrs Christiansen some 24 years older. All three children had the same father and the deceased was the only child of his father's second marriage. The deceased had never married and had no children or dependents. He was a cat lover and kept a number of cats. This was plainly an interest he and his mother shared, and it went so far as to be such that various family pets would be buried in the garage of the deceased's premises and their deaths recorded on brass plates. Indeed shortly prior to his death and in an event which has some significance overall, the deceased made arrangements with a neighbour to dispose of the two remaining cats, one to be put down, the other to be put into a home for cats.

The deceased was described by witnesses as a somewhat shy, introspective man, meticulous so far as his work was concerned, and a reasonable keeper of records and diaries. One of the medical witnesses who saw him at an earlier point when he was first undergoing treatment, described him as introspective and a man having difficulty in making decisions, a reserved person. When he was 30 years of age he made a will with well known solicitors in Petone, Rowse, Rouse & Wood. He had occasion to use those solicitors in 1955, in 1967 at the time of the 1967 will and apparently again in 1980 when there was some difficulty over the care and treatment of his cats when he was away from Petone. Mrs Christiansen had been a client of Phillips Shayle-George, Solicitors of Wellington and Lower Hutt and formerly Petone, for a considerable period of time, and

approximately six weeks before the execution of the later will the deceased made it known to his sister that he had not made a will and requested his sister and her husband to be appointed as executors, which they agreed to do. It seems he knew sufficient about wills to know that that was a requirement, and in 1979 there is evidence that he had been involved in the administration of his mother's estate and dealt with Rowse, Rouse & Wood in that regard also. On his death the deceased had assets to the value of $133,000.

In the first of a number of significant events the deceased, as will be seen, had apparently failed to recall the making of his earlier will notwithstanding that will made provision not only for his mother but for Mrs Christiansen in the event (which must have been likely) of his mother's earlier death. It also provided for gifts in the event of Mrs Christiansen's death. I think it of no small significance that even by then the deceased's memory was faulty and he had forgotten his earlier will.

Notwithstanding his earlier communication with Mr and Mrs Christiansen that he intended to make a will and had obtained their consent to act as executors, he had by Monday 6 June 1983 done nothing about it. His condition on Monday 6 June had deteriorated to an extent that Mrs Christiansen arranged for the deceased to come to her home, where he volunteered that he had not done anything about a will and that he had generally made a mess of things. In order to placate his obvious anxiety

Mrs Christiansen suggested that she would arrange for her solicitor to look after the matter. The deceased had recalled in earlier discussions with Mrs Christiansen that a person in Petone had done some work for him, although according to Mrs Christiansen he did not go so far as to say that that person was his solicitor. In the event that recollection appears to be correct and the work done in 1980 was handled by a clerk from Rowse Rouse & Wood. The deceased was able, with difficulty, to recall the name of Rowse. As often happens, Mrs Christiansen, who was able to contact her own solicitor and with whom she had been dealing reasonably regularly, prevailied upon the deceased, without difficulty, to have her own solicitor attend to the matter. It was plain to everybody that there was need for some immediate action, as it must have been obvious to all that the deceased was suffering from a terminal illness and was in a very serious condition. I am quite certain that, but for the initial request made to her and her husband, and the fact that by 6 June the deceased was distressed at not having made a will, Mrs Christiansen would not have taken the active part she did.

In the evening of 6 June and the early hours of the morning of 7 June the deceased's condition had worsened, to the obvious concern of Mr and Mrs Christiansen and he was admitted to Wellington Public Hospital. The nursing notes show that his admission to the ward occurred at 3.30 a.m., and his hospital admission form showed the hospital admission time as 2.29. There was a further discussion about whether the deceased

wanted the help of a solicitor and he agreed that Mrs Christiansen's solicitor could attend to it. It is common ground that Mrs Christiansen arranged for Mr Westbury, of the firm of Phillip Shayle-George & Co. to attend at the hospital on the morning of 7 June. Mr Westbury did so at approximately 11.30 a.m. where he saw the deceased for the first time. Amongst other things he was concerned to know whether the deceased had other solicitors and whether Mr Westbury could, having cleared that aspect of the matter with the deceased, then proceed to take his instructions.

The interview was not without its difficulties. It was plainly upsetting to Mr Westbury. The deceased's condition was poor. He did not know what he wanted to do with his estate and to some extent the initiative for the various provisions that were to be included in the will came from Mr Westbury. There is no criticism of this because Mr Westbury had to deal with the situation as he found it. The deceased was apparently lapsing into periods where he was not able to concentrate and it seems that the condition observed at the time of his admission was largely unchanged. Mr Westbury described him as being weak and drowsy and needing time to gather strength and discuss his affairs and the interview was a protracted one. Thereafter the solicitor sought from the deceased details of his estate and in summary he obtained a fair recollection of his estate, which was a house, two motor vehicles, some shares and some monies with the Public Service Investment Society. He understated, as subsequent events showed, his assets in the Public Service

Investment Society by some $30,000, he omitted any reference to three life insurance policies which had been taken out in the early 1960's. What information was given to Mr Westbury he described as being given in a way which made him feel that the deceased was quite uncertain about the details of his estate. It is suggested by Mr and Mrs Christiansen that partway through the initial interview on the morning of 7 June Mr Westbury left the bedside of the deceased and spoke with them, asking them about the value of the deceased's property in Petone. Mr Westbury is adamant that he continued the interview to the end, and that the discussion about the value of the property came then. Nothing very much turns on the point because it was a proper inquiry for Mr Westbury to make at any time, in an effort to ascertain the extent of the estate. Mr and Mrs Christiansen were quite firm that that was the way in which the events occurred. There is nothing in the notes of the initial interview on which the will was drafted to assist, nor do I think anything turns on the point.

A more significant matter is the conflict between Mr and Mrs Christiansen and Mr Westbury as to the discussion which ensued at the end of the interview. In summary Mrs Christiansen says that the terms of the instructions were made known to her by Mr Westbury including the fact that a small bequest only had been made in her favour, and the rest had gone to charity, and that there had been no provision for Mrs Christiansen's own children. Mr Westbury says that apart from making a reference to charities, he did not reveal the contents of the

instructions. I think Mr Westbury probably revealed enough for Mrs Christiansen to ascertain the nature of the instructions and in the end I do not think there is a great deal between the two versions. What is important is Mr Westbury's confession that he had grave reservations as to the testamentary capacity of the deceased. Whilst he would not go so far as to say that he told Mrs Christiansen that he would have to acknowledge that in the event the will was challenged, he would say he had doubts as to the deceased's testamentary capacity, it seems to me that in essence he was making it plain that he had considerable reservations as to the capacity of this man at the particular time.

That assessment of the deceased in the morning of 7 June is confirmed in other respects. In the nursing orders of 7 June he is variously described as having generalised weakness, very tired and having difficulty sleeping, depressed and exhausted. It is clear also that he was troubled with nausea and belching to the extent of retching. In the agreed statement of facts Mr Westbury acknowledged that the deceased was having difficulty in detailing his assets and was quite unsure about the details of his estate. In the event, apart from the life insurance policies and the additional amount in the bank accounts, the assessment so far as it went was tolerably accurate.

In addition the deceased had said that he had no other relatives other than Mrs Christiansen, omitting reference to his step-brother. The question as to other relatives was

however directed to him in the context of other relatives in respect of whom he might make provision under his will. The literal reply however is inaccurate, and he had omitted reference to his step-brother, Mrs Christiansen's full brother. The significance of that omission, is it is argued, tempered by the context in which the question was put, and the age of that person, who would be unlikely to receive attention in a discussion about a will. Nevertheless that person was not referred to at all, and he himself had a daughter who was known to the deceased. Some six months earlier he had travelled to Australia and renewed acquaintances with his step-brother and his step-brother's daughter and her four children.

Following that difficult interview, Mr Westbury says that he effectively received instructions which could be best carried out by his making provision for the deceased's wishes by dividing the estate into five parts, one of which would go to Mrs Christiansen, the other four to charities. It is necessary to analyse the steps that were taken to arrive at that structure for the will. Mr Westbury says the deceased did not know what he wanted to do, but volunteered that he wanted to leave his estate to charities after some provision for Mrs Christiansen. It was Mr Westbury who suggested $20,000 for her, which received the deceased's acquiesence and Mr Westbury's method of approach was to divide the estate into five parts, which on a calculation based on the assets in the estate given to him by the deceased would realise not $20,000 in exact terms for Mrs Christiansen but one-fifth of an

approximate value of an estate which had been assessed at about $85,000. In fact a bequest of $17,000 would result.

This was a rather unusual approach when it would seem that the initial instructions received were to make a provision of $20,000 for Mrs Christiansen. It is indicative of the tentative nature of the instructions. The charities were not listed by the deceased but Mr Westbury nominated approximately ten, and he says that after a period of consideration, which must have been with some difficulty, the deceased selected four. Those are the four mentioned in the will in respect of which probate is sought. No reference was made to any charity which had any bearing on the acknowledged interest of the deceased in animals, and the subject of his cats was raised only later at the time of execution of the will. Mr Westbury says that over his lunch time between 1 p.m. and 2 p.m., he prcceeded to draft a will in accordance with the instructions he had received, and also endeavoured to ascertain the correct value of the estate. This included a telephone call to the Public Service Investment Society, which at that time confirmed a bank balance in the order of $10,000 or thereabouts. Also he said he had an opportunity of doing some calculations with regard to share valuations. Mr Westbury, following the drafting of the will returned to visit Mr Escher at approximately 3 p.m., and there received instructions to reduce the provision for Mrs Christiansen to a legacy of $10,000 with the balance of the estate to be divided equally among the four charities. That alteration was subsequently made, and at 11.30

a.m. the next day, in the presence of Mr Westbury, together with a Mr Callinicos, a staff solicitor, the will was duly executed.

The reservations Mr Westbury had as to the deceased's testamentary capacity in the morning and up until 1 p.m. of 7 June 1983 and shared by the professional witnesses who gave evidence was not the view taken by Mr Westbury on his return on the afternoon of 7 June. In a note which he dictated two days later he said, "I took instructions on the morning of Tuesday 7 June 1983 (at about 11.10 a.m.). At that time Mr Escher was quite dopey. He was able to give me the outline of his instructions but was a little unsure of his assets position. He had trouble concentrating basically. I returned later that afternoon (about 3 p.m.) with a will for him to sign. He was much more lucid and on reading the will considered that he wished the gift to Mrs Christiansen to be reduced from $20,000 to $10,000." There would of course have been no immediate impact on the deceased by virtue of anything he saw in the will. The fact that he had left $20,000 to his sister, as he thought would have to come from a recollection of the earlier interview or a calculation done as to what one-fifth of the estate would be otherwise worth. Nevertheless, Mr Westbury says the only instruction he received was to reduce the entitlement to $10,000 and to make the provision finite. Mr Westbury, as can be seen in that memo, refers to the improvement in the deceased's condition, and he extended that evidence considerably in his affidavit where he said as follows:

> "At approximately 3 p.m. on the same day, that is the 7th of June 1983, I returned to Wellington Hospital for a second meeting with the deceased. The deceased appeared much more lucid at this meeting. He recognised me on my arrival and knew the purpose of my return visit. He was sitting upright in bed and both his physical and mental condition appeared to have improved dramatically when contrasted with his appearance and demeanor at our morning interview. Throughout our 20 minute discussion the deceased appeared much more interested in what was going on about him and was what I would describe as 'mildly chatty'. I was subsequently advised by the charge nurse, Nurse Bennett, that following my interview with the deceased on the morning of 7th of June the deceased had undergone a medical procedure which had relieved his symptoms somewhat."

This admittedly hearsay statement was not supported by the evidence of Nurse Bennett, who did not swear an affidavit nor was called as a witness. The medical evidence is that at some time the deceased underwent a chest aspiration procedure. In concept it is simple enough to understand. The chest cavity outside the lungs as a result of renal failure and other complications of the deceased's illness, commences to fill with fluid, and there is simply not enough room for the lungs to expand and contract in the normal fashion. As a result distress is caused, breathing is difficult and there is an inadequate supply of oxygen to the blood and to the brain. The condition is relieved by the imperical procedure of drawing off the fluid by syringe. The volume of liquid drawn off was substantial in comparative terms, and the best evidence is that that procedure, which would have to be done in respect of both lung cavities, would be likely to take at the least 20 minutes on each side, or a minimum period of 40 minutes, but probably more like an hour. It is an awkward procedure in the sense that it is uncomfortable for the patient for a relatively long

period of time, but thereafter the symptoms of improvement are immediate and dramatic. It seems to be common ground in this case that given the advent of that procedure followed by the obtaining of instructions and the execution of a will, the greater the likelihood of there being adequate testamentary capacity. For that reason considerable time was taken in endeavouring to determine just when the procedure was in fact undertaken.

The witnesses have placed some reliance on the observations of Mr Westbury as to what he saw at 3 p.m. on the afternoon of 7 June. Dr Bridge has given evidence that in his view it is likely that the procedure was carried out before Mr Westbury interviewed the deceased that afternoon. I have disregarded the hearsay evidence concerning Nurse Bennett. I must also have regard to the fact there is no reference in the original minute made by Mr Westbury of that conversation. Evidence in the affidavit has been substantially extended, but it must of course run the criticism that it is a recollection made well after the events occurred and might have been confused with the interview the next day. The complicating factor in this case is the clear conflict between Mr and Mrs Christiansen, not only as to the matters I have mentioned, but also as to whether Mr Westbury returned at all on the afternoon of 7 June. The silent evidence as to that is contained in the notes that he made, and in the work record sheets of his firm as to attendances, which show a continuing attendance from approximately 11.30 that morning through to 4 that afternoon.

Included in that is some period taken for drafting, but largely for attendances.

On the other hand, Mr and Mrs Christiansen for no motive that appears to me, record the fact that after the interview had concluded in the morning and they had their discussion with Mr Westbury as to the matters relating to the will, they returned to the hospital at 2.30 p.m. having been away during lunchtime and found Tui Brookfield, a cousin of the deceased with the deceased. She said that she arrived just after 1 o'clock, the deceased had difficulty remembering who she was, he apparently had looked at her but not recognised her. According to her, he was incoherent, short of breath, and in her view in no fit state to make any decisions. She says that she stayed with him until about 3.30 p.m. and that at about 2.15 p.m. she was joined by Mr and Mrs Christiansen, left at 3.30 p.m. and there were no visitors during that time. What is more important is that she observed no medical procedures being made ready nor was she asked to leave the deceased's bedside. I was informed the aspiration procedure would have been carried out only when there were no visitors at the bedside. Mr Westbury's interview concluded just before 1 p.m. and it was only after that, the procedure could have taken place. It seems very difficult on that evidence to find sufficient time for this procedure to have been carried out prior to Mr Westbury's return.

The matter is complicated further by the entries of the nurse in the patient's condition and progress form. I was told that

at that time the afternoon shifts commenced at between 2.30 and 3 p.m. and that the entries made by the nurses related to events that occurred during that shift. If that is so, the entry for the afternoon shift of 7 June 1983 which reads: "Chest aspiration done 1450 m/s turbid fluids" and then signed by the nurse was a report only as to what occurred at the earliest after 2.30 p.m.. I think on the probabilities more likely a little time after that having regard to the general nature of the evidence as to the timing of such shifts. Mrs Christiansen however never observed any procedure of that kind, nor was she asked to absent herself from the bedside whilst it was undertaken. I was advised that generally speaking nursing notes are entered up at the end of the shift. In this case there are two entries for the afternoon shift, the first one I have referred to and the later one was written it would seem some time after 9 o'clock, because there is a reference to that time in those notes. The fact that there are two separate signatures suggests that the chest aspiration was done earlier in the afternoon or p.m. shift, but how much earlier is the critical question. Dr Gray, whose ward it was, and who appeared uncertain as to the detail, did say that he understood that there were two reports, one in the morning between 7 and 8 and others between 10 and 11 in the evening. He said he would have expected the aspiration to be done in the early afternoon. But the nursing notes seem to be reasonably clear that the a.m. report was reporting events up to the end of the morning shift. There is recorded visits by family and lawyer, and also the fact that the deceased had slept most of the

morning and also that he received 10 grams of morphine at 1 o'clock, which must mean 1 p.m.. On the assumption that the nursing notes report what occurred during the shift, then the chest aspiration could only have started at some time after 2.30 p.m..

Dr Culpen said that in his view the note which refers to inter alia, the visit by the lawyer would have been written at the end of the morning shift, that is he said 3 p.m., but it could be that it was a little earlier than that. The other notes under the heading p.m. would have been written in his view at 11 p.m., but because of the fact that there were two separate entries, separately signed, he would have thought that the earlier procedure would have been recorded at some earlier stage. His view was that generally speaking physical procedures, such as chest aspirations, were carried out if possible during the day in hospital when there were more staff available and the laboratory was open. Dr Culpen conceded that whilst it was not a life saving emergency, in the sense that the operation had to be done within minutes, he would have expected it to be done within a few hours of diagnosis. It is clear, chest x-rays were carried out shortly after the deceased's admission to the ward, but I do not think there is anything in the evidence that compels me to the view that it must have been at the very commencement of the afternoon shift that the chest aspiration was done. The timing of this operation is critical. Dr Culpen is prepared to say that at the initial interview, the deceased lacked testamentary

capacity and in regard to the second interview his opinion would be materially affected by whether or not the pleural aspiration had taken place. He said that on the assumption that the interview did take place at 3 p.m. on that day before the pleural aspiration the deceased would not have had the appropriate level of mental capacity. It is plain from the agreed statement of facts that this was not the only treatment that the deceased was undergoing at the critical time. At 1 p.m. on 7 June he received the powerful drug soluimedrol together with morphine. This was the first administration of either of those two drugs, recorded in the nurses notes, and there was some noticeable effect so far as the morphine was concerned. The view that I take is that on the probabilities it was simply not possible for the chest aspiration to have been done prior to the visit by Mr Westbury at approximately 3 p.m. I think the failure of the relatives to observe Mr Westbury must be explained by the relative shortness of the interview which was concerned only with the instruction relating to Mrs Christiansen. I think that if there was any improvement detected by Mr Westbury as he says, then it is due to other factors other than the chest aspiration. It was not suggested to Mrs Brookfield that she had got the wrong day. Cross examination was directed to the possibility that she may simply not have been there at all times. I think the more likely explanation for the apparent conflict is that Mr Westbury's attendance was somewhat later than he recorded, and by that time Mrs Brookfield had gone, and the Christiansens have either forgotten the return of Mr Westbury or were

momentarily absent whilst the discussion took place. It is interesting, that in the report to the Hutt Hospital, prior to the deceased being transferred there on 11 June, the Registrar reported that on this "medication", that is the morphine and the soluimedrol "he felt symptomatically better". It is perhaps of some probative value to examine the general comment on his condition as being fair both in the morning and afternoon shifts, and the first significant improvement in the patient's condition and progress form is detected in the morning of 8 June. I cannot of course overlook Mr Westbury's recollection, but it is not reinforced by the evidence of the nurse, and it may well be that he is confusing impressions of the date of execution with those of the day earlier. I should make it clear that I am not disbelieving Mr Westbury's account of the improvement, but I am doubtful as to whether it was as significant on the afternoon of the 7th as he now recalls. There was an improvement, consistent with the medication treatment, but I am unconvinced that in the short period of time between his departure from the deceased and his drafting of the will and his consequential return to the hospital the position improved to an extent as now recalled. I think that improvement is more likely to have been the position the next day.

Mr Christiansen, who impressed me in the short time that he was in the witness box and under cross-examination as a truthful witness, recalled a discussion he had with the deceased on 8 June. The deceased told him that he had had morphine and later

in the evening he had had aspirations of both lungs in the late evening after visiting hours as this witness understood it. Mr Christiansen was not cross-examined on this additional but important comment that the deceased had made to him, apart from a question as to the time he had visited the next day, when he received this information. There is further confirmation of the likelihood that the chest aspiration took place later in the afternoon shift rather than earlier, and that comes from Mr Benson, who gave vive voce evidence. He said that when they visited at 7.30 to 8 p.m. that he was drifting in and out of consciousness and had difficulty in concentrating sufficiently on making a decision as to what drink he would have when the supper trolley came round. But Mr Benson says that his condition was significantly improved some days later when he went to see him again.

The results of the chest aspiration procedure are of undoubted significance in this case. I am satisfied on the evidence that the presence of pleural effusion, combined with the advanced nature of this man's disease, was in the totality preying on his mind in a fashion that was depriving him of the appropriate mental ability to recall those people to whom he might be expected to consider under his will, and further was impeding his proper recollection of the extent of his assets. Dr Culpen, as does Dr Bridge, see that as a distinct and discernible event in the terminal stages of this man's treatment. Prior to the pleural aspiration the combination of the factors, including the important factor of the impact of

the effusion, would bear down on the mental processes of this man to an extent to put his capacity in serious jeopardy. Removal of that condition, whilst not restoring him to anything like his mental capacity of weeks or months before, would nevertheless be sufficient for him to contemplate and recall in a manner required, sufficient to enable any document that he signed and the instructions he gave in its preparation to be regarded as lucid. No-one can suggest that a will made in these circumstances can be the product of a careful and dispassionate assessment of all factors. That simply would ignore the huge overtones of the imminence of death which must have been bearing down on this man. But the law does not require that the conditions be perfect, because by its nature the making of a will may be delayed until the last possible moment. The Court is required to give effect to it, if it can, nevertheless. The law does not require, as with some legal documentation for independent advice and ideal conditions to be present at the time of its conclusion.

But the conditions which Mr Westbury found the deceased in on 8 June were clearly different. He and Mr Callinicos recorded that he appeared extremely lucid, and it is significant that he had three new matters to raise with Mr Westbury, and those were matters that he had not referred to earlier. They were spontaneous and original matters born in my view of an improved condition overall. He recalled his cats, the funeral benefit he would be entitled to through his Lodge, and some further gifts that he wanted to make to friends in Upper Hutt. That

suggestion was deflected by Mr Westbury by suggesting that he should conclude the substance of his will and attend to the detailed amendments by way of codicil. I think that is significant of a different approach. The two earlier interviews had been characterised by the absence of any spontaneous observation by Mr Escher with the possible exception of wishing to reduce Mrs Christiansen's provision, and by the need for Mr Westbury, quite properly in my view, to suggest the form that the will might take. Mr Westbury had taken some advice from another partner and of another member of the firm who had had experience in estate matters. They had suggested to him the need to obtain some evidence from medical staff at the moment of execution, but in the end result Mr Westbury was satisfied as was Mr Callinicos, the solicitor witness, as to capacity at that time. Mr Westbury suggests now that in addition to having Mr Escher recall to him the extent of his estate which he did, he also indicated orally the provisions of his will. In a postscript to his original memorandum of 9 June, Mr Westbury records the deceased at Mr Westbury's request, recalling the assets that would be in his estate. He makes no comment on a request to him to also describe what were the provisions of his will. Mr Callinicos recalls the conversation about the assets but also recalls that the conversation was brought to an end by the tiredness of the deceased. Mr Callinicos described it as follows:

> "The deceased took some time to read the Will over, particularly the second page of the Will. I was concerned to check the deceased was not having difficulty with concentration. I accordingly made particular note of his

> eye movements. He appeared to be reading over the Will slowly and I got the impression he was re-reading a particular clause on the second page."
>
> "Mr Westbury then asked the deceased to itemise the major assets of his estate. The deceased was slow in responding to this question and appeared to be tiring. I recall the deceased affirmed he had a house, some shares and funds in bank accounts."

He makes no reference to the recital of the contents of the will. Mr Westbury on that occasion apparently spoke to a nurse, and Mr Callinicos records that he asked her to take a particular note of the deceased's current condition because of the imminence of the execution of the will. If that was the Miss Bennett previously referred to, then it would have been of assistance to have had her evidence taken if it was available. I am still concerned that Mr Westbury has not confused the conversation of 8 June with the conversation recorded in paragraph 22 of his affidavit of 7 June. More likely it was that this observation as to the deceased's condition on 8 June would have been made then and not earlier.

Finally the deceased signed his surname incorrectly and made no attempt to correct it.

The question remains as to whether the improvement recorded on 8 June, was in itself sufficient to remedy any of the defects there may have been in the capacity of the deceased to give adequate instructions on the 7th. In my view there were still significant factors at work so far as this man's condition was concerned on 8 June. He was concerned about further bequests

which he had not contemplated earlier, and he had again overlooked quite clear arrangements that he had made for the welfare of his cats at some earlier time with a neighbour. Those arrangements were quite specific and were carried out. On 8 June he had forgotten all about them. He also expressed no reaction to the substantial increase in cash that he had and which he had omitted to recall. Again he made no reference to his life insurance policies notwithstanding that they were apparently part of his assets and the premia had been met for the last 15 - 20 years. Whilst the premium in respect of those polices was not great it was also not insignificant. I think Dr Culpen is right in saying that there was a regular reminder by virtue of the payments that would be regularly deducted from salary, of an ever increasing asset. But the way in which the will was structured and then modified were the result of what occurred on 7 June. It was that arrangement that Mr Escher was being asked to endorse. Dr Culpen considers that he may have had testamentary capacity at that time but he did not in fact have sufficient resilience to change what had been made. He was not of proper capacity. The fact that he was deflected from completing what he wished to do under his will by the promise of a subsequent codicil is evidence of that.

It is relevant to consider the form of the testamentary directions that the deceased gave. In the 1967 will provision was made for his mother and then for his sister and then for other friends. There was no suggestion of any charity. In the later will, apart from the provision for his sister the total

estate is left to charity. The will was prepared by a solicitor who was not the deceased's regular solicitor, so there was no opportunity for the terms of the earlier will to be considered. The charities were selected really by chance, and none of them included a charity that might have reflected the deceased's interest in animals. It is clear however that there was nothing gross about the testamentary provisions, which on their own would have raised suspicion as to testamentary capacity. Nor do they stand in contrast to the earlier will so different that they are demanding of an explanation. On the other hand, they are of some slight assistance in reaching a conclusion as to the state of mind of the testator and are sufficiently different from what might have been expected from this man, as to enter the basket of factors which go to make up the court's final conclusion on the question of testamentary capacity. On their own of course they would simply be regarded as unexceptional. I think they tend to portray the absence of spontaneity in the instructions that were given. In some of the cases which I discuss later the difference between the testator's will and what could reasonably have been expected from him are at the heart of the inquiry into testamentary capacity. That cannot be said here but on the other hand it cannot be completely excluded. In my view the provisions were different from what might have been anticipated from this testator having regard to his history as it is known to the Court. He was a man who had difficulty making up his mind. In this regard he was more prone to the influence of outside events than another might have been. In

the words of O'Leary C.J. (infra) I think there is a real question as to whether he knew what he was about.

It has been argued by counsel for the charities that the will is not an inofficious one. Furthermore it has followed a quite deliberate decision not to benefit Mrs Christiansen's children because they were already sufficiently established. I agree that the evidence as to that is indicative of quite rational thought so far as it goes and I have said that in other respects the will on its face is unexceptional for a bachelor in these circumstances. However the testamentary capacity must not be solely judged from the point of view of the end result. No doubt these cases only arise when perceived injustices occur but the test to be applied must be independent of that and concern itself with what is known as to the deceased's state of mind at the time. Dr Culpen, for example, suggests that a reduction in the entitlement of Mrs Christiansen may reflect an unduly negative attitude to his only close and immediate relative and likewise her children. Furthermore there is the absence of any bequest to his lodge or a charity concerned with animals or perhaps his step-brother's grandchildren.

The legal principles as to testamentary capacity are well established. To uphold the validity of a will the testator must be of sound, memory and understanding. At the time of the execution of his will he must be of a sound disposing mind. In Banks v. Goodfellow 1870 LR 5 QB 549 the primary doctrine was set out as follows:

> "It is essential to the exercise of such a power that the testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will and disposing of his property and bring about a disposal of it which if the mind had been sound would not have been made."

In Re White (deceased) Brown & Ors v. Free & Ors (1951) NZLR 393 O'Leary C.J. said:

> "The factors of competency are that the party must know what he is about, have sense and knowledge of what his property was and who those persons were that then were the objects of his bounty."

In the will of Wilson (1897) 23 VLR 1971 a passage in the judgment of Hood J. was cited by Dixon J. in Timbury v. Coffee (1941) 66 CLR 277 at 283, with approval as follows:

> "Before a will can be upheld it must be shown that at the time of making it the testator had sufficient mental capacity to comprehend the nature of what he was doing, and its effects; that he was able to realise the extent and character of the property he was dealing with, and to weight the claims which naturally ought to press upon him. In order that a man should rightly understand these serious matters it is essential that his mind should be free to act in a regular, ordinary and natural manner."

In this case the evidence suggests that a distinction can be drawn as to the testamentary capacity on 7 June, which was the day taken up with the giving of instructions in respect of the will, and 8 June in the morning when the will was executed. The witness for the Plaintiffs, Dr Culpen, changed his ground somewhat in the witness box and quite properly conceded that had the events all occurred on 8 June, then his reservations as the capacity of the deceased would be significantly reduced.

In Halsbury's Law of England 4th Ed. Para. 899 there is a statement of the law particularly relevant to this case:

> "The sound disposing mind and memory must exist at the actual moment of execution of the will, but the measure of testamentary capacity need not be as complete at the time of execution as it was at the time of giving instructions for the will, and it would seem that when a will has been drawn in accordance with the instructions of the testator, whilst of sound disposing mind, a perfect understanding of all the terms of the will at the time of the execution may be unnecessary."

In Parker v. Felgate 8 Probate Division 171 Sir James Hannan said:

> "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention and I accept the document which is put before me as carrying it out."

In this case that proposition was relied on by Mrs Christiansen. It was submitted that the principle may apply in reverse so that if the testator does not have sufficient capacity at the time of giving instructions it must be proved that his condition and general wellbeing had improved to the extent that he did have capacity at the time of execution and further that it had improved sufficiently for him to recognise his previous lack of capacity, thereby enabling him to remedy any defects which may have arisen in his will due to his previous lack of capacity. I think that submission and the dicta of Sir James Hannan (supra), simply emphasise the primary importance of testamentary capacity at the time instructions are given. The question is whether the circumstances

surrounding the execution, coupled as they were with the deceased reciting the assets of his estate but reading his will are sufficient to overcome the very real doubt which I have as to his capacity on the 7th. Again the interview was not without its difficulty, it was brought to an end by apparent fatigue, and it had as I have said the disturbing aspects of not in itself representing the complete wishes at the time of the deceased. A significant asset was omitted and the discovery of substantially greater cash assets drew no comment. Again notwithstanding the obvious concern of the solicitor as to the deceased's condition, which had been heightened by the advice he had received from his colleagues, no immediate confirmation of his testamentary capacity or any direct evidence of his medical condition at that time was obtained. According to Dr Gray it was readily available. In McClaren & McClaren v. McKenzie 1919 GLR 287 Chapman J. said:

> "The issue of testamentary capacity raises the same and other questions. When once it is shown that the testator is suffering from a mortal illness of such a character as to be likely to cloud his intellect, the greatest care must be taken to see that at the actual moment when he is called on to exercise his will his mind is clear and he perfectly understands what he is doing: in Keyes v. MacDonnell (Irish Reports 6 Equity 611) it has been authoritatively laid down that a man who is at times insane may make a will in a lucid interval, that in such a case the Court must be most careful to see that it is clearly proved that the testator's mind was clear and his capacity to exercise his judgment was completely reinstated when he made his will. Cartwright v. Cartwright (1 Phillim 100).

I think that the initial instructions were given when there was an absence of testamentary capacity, and when those instructions were modified on the same day. I consider one must look at the whole process and that the giving of

instructions and the subsequent execution of the will is inextricably bound up in a way that makes it impossible to say in this case; whatever might have been his condition on the 7th he was lucid and well enough not only to give instructions on the 8th but to overcome or amend or freely confirm what was being put in front of him as a will to be signed on the 8th of June.

The case is delicately balanced and was presented on both sides with care and skill. In normal circumstances one would regard the execution as the ultimate exercise of the power of testamentary disposition, but the overall condition of the deceased cannot be ignored. If there was testamentary capacity to understand the nature and quality of what the deceased could do by will on 8 June, that is significantly affected by the earlier instructions and taints the validity of the will in a significant fashion. I think the concept of testamentary capacity extends not only to the endorsement of instructions given earlier with testamentary capacity present, but also requires sufficient evidence of capacity to require a revision of such a will if the need arises. I do not think it has been established that that capacity was present on the 8th. To that extent the whole execution is tainted by the absence of testamentary capacity on the 7th.

As is said in Halsbury Vol. 17 Para. 904:

> "904. Burden of proof where will made in lucid interval. Once incapacity before the date of the will has been established, the burden lies on the party propounding the will to show that it was made after recovery or during a lucid interval and therefore valid. In such a case the will should be regarded with great distrust, and every presumption should in the first instance be made against it, especially where the will is an inofficious one. It is not, however, necessary in order to constitute a lucid interval that the testator should be restored to as vigorous or active a state of intellect as he enjoyed before his incapacity."

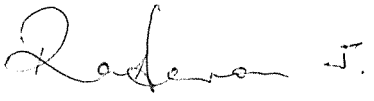
It is this distrust which I have towards the will of 8 June. There is an absence of contemporaneous medical opinion so readily available. Dr Gray's views, whilst entitled to considerable weight, would have been of more value had he been specifically consulted, a situation which he implicitly regrets. He confirms that the deceased's condition varied a great deal over the two days.

I note the particulars of Mrs Christiansen's statement of claim and the point taken by Mr Booth as to that. The reality is that the case must be decided on the events of both the 7th and 8th of June, and I did not consider Mr Booth dealt with it in any other way, or was at all adversely affected by the pleadings which are somewhat narrow. I disallow the pleading point.

The claim by the charities for probate in solemn form in respect of the later will fails.

It follows that I pronounce probate in solemn form in favour of the last will of the deceased dated 19 December 1967.

There will be an order that the costs and disbursements of the charities be paid on a solicitor client basis out of the estate. There is no need to provide for Mrs Christiansen's costs as she now succeeds to the whole estate.



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