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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 381/91

IN THE ESTATE of ELIZA LEWIS FRASER of Lower Hutt, in New Zealand, Widow, Deceased

BETWEEN DAVID BERNARD ROBINSON and DAVID KEITH SARGINSON, both of Lower Hutt, Solicitors

Plaintiffs

94/1069

A N D TERRENCE JOSEPH KILLALEA formerly of Lower Hutt, now of Waikanae, Solicitor

First Defendant

A N D DAVID CLIFFORD FRASER of Auckland, Retired

Second Defendant

Hearing: 2, 3 and 10 June 1994

Counsel: G J Thomas and Nicola Thomas for Plaintiffs
No appearance for First Defendant
J D Atkinson for Second Defendant

Judgment: 1 July 1994

JUDGMENT OF GREIG J

This claim is brought to propound the validity of the will of the deceased, Eliza Lewis Fraser, and to seek a grant in solemn form of probate of the will in favour of the plaintiffs, the executors named therein. The proceedings are brought pursuant to an order made by consent by this Court on 3 April 1989. The will is dated 9 September 1982, the testatrix being then aged 92 years. The sole issue in the case was the testamentary capacity or the alleged lack of it.

The testatrix was born Eliza Lewis Clark on 21 June 1890. She was the second youngest natural child in a family of eight of whom seven survived into adulthood and three of whom, including herself, had no family. Some 14 years after she was born a boy was adopted into the family. He was named Arthur and became the favourite child with whom his two nearest sisters, in particular, had and continued to have a close relationship. In or about 1918 the testatrix married George Fraser. He was one of a family of six sons of whom only two had any children. For many years Eliza and George Fraser lived in Lower Hutt and were near neighbours of the first defendant, Terrence Joseph Killalea, when he was growing up in his parents' house. As a schoolboy and a university student Mr Killalea had a relatively close neighbourly association, assisting in gardening and other chores and being given the advantage of a job in a wool store during university years which had been arranged by Mr Fraser. Mr Killalea, later being admitted and practicing as a solicitor, was consulted by the Frasers on occasions and he prepared wills which were executed by the Frasers on 23 April 1974. Each of those wills appointed Mr Killalea as the sole executor and trustee, directed cremation, gave the whole of the estate to the surviving spouse upon surviving a month after death, and otherwise leaving the whole of the estate to nine named nephews and nieces of both the Fraser and the Clark families. They included all the Fraser nephews and nieces, four of whom, including the second defendant David Clifford Fraser, described simply in the will as Clifford Fraser, being the children of the oldest brother, the other nephew being the only other child and the only child of the second oldest brother. The Clark side was represented by four out of some nine nephews and nieces. The four were the two sons, Keith and Arnold Clark, of the adopted youngest brother Arthur and the two children of the next older sister, Georgina. Three other sisters and brothers of Eliza Clark, who had between them six children, were not mentioned in those wills at all.

George Fraser died on 27 January 1976. Probate was granted of his 1974 will and the whole of his estate passed to the testatrix, Eliza Fraser. After

her husband's death the testatrix continued to live in her home in Lower Hutt. On 20 February 1978 she wrote to the second defendant in these terms:

> " Dear Cliff
>
> I am sorry I did not see you when you were here on your holiday as I wanted to see you.
>
> Your Uncle George had spoken about giving you a copy of our will, our affairs are all in order the lawyer has sole charge, but we thought when the time came you would have the will, would know exactly how things stood. no one else has a copy. Will you do that Cliff?
>
> Love from
> Auntie Tottie "

That letter was accompanied, as it said, with a copy of the 1974 will. Some six months later the testatrix consulted Mr Killalea to seek advice as to her future accommodation and the possible sale of the home. Mr Killalea, as he told the Court in his evidence, was particularly struck by her comment at the time that her husband had told her "that if she ever needed any help she was to contact me", that is Mr Killalea. Mr Killalea then took steps to apply to the Wesley Social Services Trust Board Inc. for the admission of Mrs Fraser to the Wesleyhaven Eventide Settlement. She entered the home on or about 24 January 1979.

In 1982, on one of his visits to Mrs Fraser in Wesleyhaven Home, Mr Killalea was informed by her that she wished to make a will. She indicated that she had not seen members of her husband's family for some time and that she wanted to make some provision for Mr Killalea and his wife. She referred to her gratitude, in particular, to Mrs Killalea for her constant visits. Mr Killalea remonstrated with her but seeing that her mind was made up requested his partner, Mr David Robinson, to attend upon Mrs Fraser and to take her instructions. He attended her on 6 September 1982, undertook a discussion with her, took a number of notes which were produced at the hearing, and in accordance with those instructions drafted a will which was executed in his presence and in the presence of two other employees of the solicitor's firm on 9 September 1982. By that will she appointed Mr Robinson and Mr David Keith Sarginson, both solicitors in the firm, as executors and trustees and divided her estate in two giving one part to three grandnieces, the children of her nephew Keith Clark (one of the sons of the

younger adopted brother Arthur) and the other part to Mr and Mrs Killalea. The testatrix died on 20 October 1987 in the Wesleyhaven Hospital, she having been moved there in or about 1984. She was then aged 97 years. The cause of death was described as Bronchopneumonia. The second defendant attended the funeral. The only other family members present were Keith Clark's wife and one of his daughters, one of the grandnieces mentioned in the 1982 will. It was then or later that Mr Clifford Fraser learnt about the later will and he caused to be filed on 13 November 1987 a caveat.

Against that background it is convenient to turn to the evidence as to the strength or relative strength of the links and association between the testatrix and the members of her and her husband's family and, in particular, the nephews and nieces and grandnephews and grandnieces. The direct evidence of this came from Mr and Mrs Keith Clark and from Mr Clifford Fraser. There was some further evidence of a more indirect nature from Mr and Mrs Killalea and others who had association with the testatrix such as the Deputy Charge Nurse at the Wesleyhaven Home. The tenor of the evidence on the part of those propounding the will, Mr and Mrs Clark and Mr Killalea, was to minimise any association or link with the Fraser side of the family and to emphasise the links with the Clark side of the family and, in particular, with the family of the brother Arthur Clark. It is clear, I think, that over the years there was little contact between the two separate sides of the family. This would not be unusual where the connecting point, Mr and Mrs George Fraser were childless, and so there would be visits to an older aunt and uncle made often individually or occasions on which the aunt and uncle visited their brothers and sisters from time to time and thus meet up with the children, their nephews and nieces. That at once explains the lack of knowledge on each side of the connection and association of the others with their common aunt. It is appropriate, too, to comment on the fact that the evidence covers a very long period. Mr Clifford Fraser was born in 1925 and so his association is over many years. Mr Keith Clark, likewise, has memories that go further back in time though not so long as Mr Clifford Fraser. As is usual, and as is to be expected, the recollections of the last few years are clearer and evidence was concentrated on the support and assistance given to the testatrix in the last years of her life, particularly after she went to Wesleyhaven in about 1979.

Both Mr and Mrs Clark gave evidence of a strong and continuing connection, at least from the date of their marriage in 1959, including times of visits to Dunedin when Mr and Mrs George Fraser visited their family living there. That

included a correspondence carried on, in particular by Mrs Clark, in which news of her family and her three girls, the testatrix's grandnieces, were mentioned. The family photographs kept by the testatrix in her room at Wesleyhaven were of the Clark family. Visits to Lower Hutt were less frequent for reasons of distance and expense but Mrs Clark visited in 1977 and in 1980 when the testatrix turned 90 and in 1981 and with Mr Keith Clark in February 1984. Mr Keith Clark visited her in November 1981, October 1983 and May 1985. The particular connection between the brother Arthur and the testatrix was pointed up by the fact of visits by Arthur and his wife in 1977 after the husband, George, had died, and again in 1979 when they visited the testatrix to help move her out of her house and into Wesleyhaven. That there was a particular interest on the part of the testatrix in the health and welfare of the grandniece Dianne was caused because she was a diabetic and the testatrix too had, in later life, suffered from that disability.

Mr Keith Clark has a brother Arnold. It is clear I think that he had no recent connection or association with his aunt but in earlier times, and in particular in a period in the late 1960's when Arnold was living in the Wellington district, there were visits from time to time.

Both the Clarks and the Frasers hailed from the Otago area and a number of members of the families remained in that area. As is customary, however, members of the families settled elsewhere. The testatrix and her husband made visits not only to Dunedin but also to Auckland from time to time to visit members of the family there. Mr Clifford Fraser is able to give evidence of a number of visits and a connection with his uncle and the testatrix over a number of years. Before 1966, when Mr Clifford Fraser moved to Auckland, he lived near Wellington and in the decade before that recollects visits from time to time to his aunt and uncle in Lower Hutt. In or about 1975 Mr Clifford Fraser and his family purchased a holiday home outside Alexandra in Central Otago. He has made annual visits there and has never failed, during the life of the testatrix, to call upon her, usually on his way back to Auckland. He speaks about a wedding present given to his daughter in October 1976. He is able to refer, in addition, to her request to him and to him alone in the family in respect of the 1974 will in the letter of February 1978.

It is, I think, important to mention in this connection Mr Clifford Fraser's unusual appearance. I have already mentioned his date of birth but unlike many people of his present age he has retained the colour of his hair which is

distinctively sandy in colour and, on his appearance in court, he had a ruddy complexion which belied, in a general way, his age. Moreover, he is of unusually short stature and is, as well, a hunchback. He is a person who would be difficult to forget and is one whom I accept could be the recipient of affection from somebody who was otherwise reserved in that regard. He speaks of being hugged by his aunt though others indicate that, perhaps with her Scottish background, such unreserved display of affection was at least unusual. Mr Clifford Fraser also gave evidence as to his understanding of the connection between his sisters and brothers and his cousin John Fraser, the only other nephew on the Fraser side, with the testatrix. He very fairly accepted that those other members of the family had had little, if any, association with the testatrix over the last years of her life.

My conclusion is that Mr and Mrs George Fraser maintained contact with their families, but because of distance and expense this was relatively infrequent by way of visits. There was, however, a particularly close connection with the adopted brother Arthur Clark and his family and with Clifford Fraser and his family. The connection with the other Clark children, nephews and nieces, seems to have been less frequent and to have diminished in latter years. Indeed only the family of Georgina Lawrence seem to have had any association of which any remark can be made. Equally, with the Fraser family, John Fraser and the other members of the family, of whom only two of the five remained alive after 1970, had little connection. After the death of Mr George Fraser the only effective family association was with Mr Keith Clark and his family and Mr Clifford Fraser. At the most these were annual visits, although I think there was some further connection and association by letter and from time to time by telephone.

I am satisfied that Mr and Mrs Killalea, and particularly the latter, gave continued and significant support to the testatrix in her years in Wesleyhaven. That included visits, outings and other assistance which must have been of significant value to the testatrix in her declining years.

I turn now to the medical and other evidence of qualified persons as to the testatrix's mental state. The contemporaneous evidence of this starts, I think, with Mr Killalea's letter to the Wesley Social Services Trust Board on 14 September 1978 in which he refers to her growing incapacity to look after herself and indicated that she was "now reliant upon the writer in many respects for advice and other matters relating to her affairs." In the formal application form which Mr Killalea wrote, the answer to the reason the application was made was: "Now

unable to care for self totally. Capable but now becoming a little forgetful and needs some help and care." These comments, I think, have to be considered in light of the likelihood that some slight exaggeration may have been felt to be desirable to ensure or to facilitate her admission to the home. A functional assessment was undertaken by a medical practitioner on behalf of the Trust Board on 12 January 1979. Among other things that noted, "Some signs early senile dementia lately, memory poor, but really satis." Of five descriptions of mental state between no mental disorder and, at the other extreme, frequent difficult behaviour, the one chosen was mild impairment requiring some supervision. The testatrix was then described as independent and fully mobile.

The routine of Wesleyhaven required that Mrs Fraser would be seen by a doctor every three months. The earlier records are no longer available. The earliest remaining record is a note made by the attending doctor on 27 August 1983 which notes, "Memory failing" but also notes "No apparent problems". The next assessment is dated in May 1984. At that time a number of examinations and interviews were done in light of her deterioration in health and mental abilities with a view to obtaining greater nursing care than could be provided in the Wesleyhaven Home. The recommendation at that stage was that she should be transferred to the Wesleyhaven Hospital for continuing hospital care. Among the medical matters listed were dementia and cataracts. Her vision under the doctor's signature was described as poor.

As part of that assessment there was what was described as an abbreviated mental test which was intended to assess, in a general way, her mental state. It included questions as to age, date of birth, recognition of persons and so on. Her score, as recorded, was zero out of ten. She was unable, it appears, to answer correctly any of the questions that were asked. The doctor's prognosis, as recorded by him, was interpreted to mean that she needed long term care, secondary to or because of dementia. The report of a site nurse, at the same time, indicated as a comment that the testatrix was very confused, "has become very much more confused and disorientated this past month" and requires "more and more supervision". The next contemporary records submitted in the course of the hearing were extracts from the night duty log in February and March 1986 which, on both occasions, showed that the testatrix was very confused, without proper sense of time or place. There was a further assessment undertaken on 14 August 1986 which indicated a severe deterioration into a dementia including

incontinence, memory impairment, disorientation and dependency for all activities of daily living.

Both Mr and Mrs Clark and Mr Fraser gave evidence about their recollection of their aunt and visits at about the time the will was made. Mr and Mrs Keith Clark and their family did not make any visit in 1982. There were visits in November 1981 and October 1983 but none in 1982. Mr Fraser has no actual recollection of a visit in 1982 although he feels sure that he would have made a visit in January 1982. He did have a recollection of a visit in January 1983. On his arrival on that occasion he remembers being warned by a member of the staff that her condition had deteriorated and that she might not be able to recognise him. In fact she did not recognise him immediately but after some conversation he thought that she became clear in her recollection and was able to talk about family members. On that occasion she asked Mr Clifford Fraser if he had got a copy of the will. He was unaware a new will had been signed in 1982 and naturally thought that she was referring to the 1974 will which he had received in 1978. It was his evidence that in January 1984, when he again visited his aunt, she did not recognise him and that it took much longer for her to remember him and that she needed more prompting. He said that if he could draw a comparison, her condition would be twice as worse in 1984 as it had been in 1983. Assuming that he made a visit in January 1982 I think that it must be inferred that there was little to note and that, in comparison, it was the shock of non-recognition and the deterioration of her condition that was remarkable in 1983. Mr Keith Clark referred to an occasion in February 1984 when he and his wife visited the testatrix and she did not recognise them. That was the first time that had occurred and he had visited her in November 1981 and October 1983. Notwithstanding the failure to recognise him in February 1984 it was their evidence that she soon recollected them and he considered that she was of full mental capacity at that time. The matter of recognition has to take account, I think, of the fact that in May 1984 the testatrix was described as having cataracts and poor vision, added to which is the fact that any elderly person in their 90's may take some time to recognise, unannounced, a person who though a relative has not been seen for some months or a year.

The solicitor who attended the testatrix for the making of the 1982 will was then of some considerable experience having had twelve years' practice and was a partner with Mr Killalea. He did not know the testatrix and his recollection is that he had no knowledge of her, her affairs or her intentions in regard to the will. He had had previous experience taking instructions and making

wills for elderly people and had previously visited Wesleyhaven and the geriatric hospital that was then operated at Silverstream for that purpose. He had concern, therefore, to ascertain for his own satisfaction that the testatrix had appropriate and adequate capacity. He took with him a copy of the 1974 will. He visited her at Wesleyhaven on 6 September 1982. He made notes and these he retained with the will after its execution. They are still available. His recollection of the events is, at least in part, refreshed by those notes. He obtained her age, which as recorded was correct, and brief details of the three main assets in her estate. These, too, as recorded, were accurate. He then proceeded to ask her some questions about her family and the beneficiaries of her previous will. The first note on this topic was the sentence, "No point leaving to brother and sister cos both very old." There is then noted a sister and brother, the former noted as Caroline Martin known as Lena without children. That was correct. As to the brother it was noted that he was named Arnold Clark aged in his late 80's and had either three or four children. The note referring to the children shows a 3 superimposed on a 4 or vice versa. It is not possible to tell which. There is then a further explanatory note in relation to that brother as follows: "Writes to him. Not real brother - adopted. Always treated as brother, good friend to her in Dunedin." That was an accurate reference to her brother's status and in fact was a matter that was not known to his son Keith Clark or to other members of the family at the time. However, the brother's name is Arthur, not Arnold. Arthur had two sons Keith and Arnold. So that there were only two children not three or four. Arnold Clark, like Keith Clark, has, too, three daughters. This naming of Arnold Clark is repeated immediately under the notes describing the brother in this way, when it is said: "Keith is Arnold's son."

Mr Robinson said in his evidence that he must have written down the name Arnold and he himself became confused as to whether Arnold was the son or the brother. This may be supportable on the grounds that Mr Robinson was in possession of the 1974 will under which both Arnold and Keith Clark are referred to as nephews and Arthur Clark is not mentioned at all. Keith's brother, however, is not referred to in the notes at all either by name or description. The repeated reference to Arnold as the brother's name does seem to indicate that it is more likely that the testatrix was confused. Under a heading "Existing will" it is noted that both Douglas Fraser and John Fraser were dead. It was correct that Douglas Fraser, Clifford Fraser's brother, was dead. He died in November 1976. John Fraser, the son of her brother John Fraser, was not dead, he did not die until September 1987. The brother John Fraser was dead.

The notes record a reference to Jean Duff, correctly identifying her as one of the Fraser nieces. There is a reference to Elvira Newman. Apparently in answer to a question from Mr Robinson as to who she was the note upon her is as follows: "Doesn't know Elvira Newman except that she is a niece of some sort." She was not a Fraser niece but a Clark niece being the daughter of Georgina. The other niece from that family, Clinton Lawrence is not referred to or mentioned at all. Neither Elsie Dick or Clifford Fraser are mentioned or referred to at all in the notes. Likewise Arnold as a nephew is not mentioned.

Turning then to Keith Clark, I have already noted that he is recorded. He is misdescribed in the notes as a professor. He was, at the time, a traffic officer. There is, in fact a professor in the family. He is Clifford Irvine, a son of one of the testatrix's older sisters. He was not mentioned in the earlier will.

There is then a reference, proximate to the first reference to Elvira, in these words: "Keith's daughter could be Elvira. Now 21 years." That, however, has been crossed out and, underneath that, there is a reference to Keith's daughter or daughters and a particular reference to Dianne Clark as being a diabetic and "2 others". Beside that is the term "3 girls". Adjacent to that is the word "grandnieces". It is perhaps relevant to note that the word "grandnieces", the term "2 others" and the "s" added to the daughter in the phrase "Keith's daughters" is in a different coloured ballpoint pen. Mr Robinson recollected that he may have gone over with the testatrix some of the matters and written, at some moments later than the first time, some additional material in this different colour. He did not suggest that those marks were written at a different time.

At the foot of the first page of the instructions is a note giving the correct initials and address of the brother Arthur Clark and his wife in Dunedin. It is to speculate but it is not unlikely that that address was ascertained for the purpose of finding out the full names of Keith Clark's daughters. There is, with the instruction papers, a piece of paper with the typed names of those daughters which is likely to have been done by a typist in the office after a call or correspondence. The next page sets out the testatrix's instructions. It is set out in this form:

> " Wants to leave ½ to Jan & Terry
> Known Terry well over <u>20 years</u>. When 18 yrs old he and husband good friends
> husband gave job in woolstores woolclasser when at University. Terry used to mow lawns etc.

> Terry always hard and honest worker etc.
> ½ to the 3 girls. "

There is then added after that, in the other coloured ballpoint pen, further reference to Mr and Mrs Killalea, or to Mrs Killalea and her family and their frequent visits to the testatrix since she had been in Wesleyhaven. Those references provide a brief but accurate recollection of the past association with Mr Killalea.

Mr Robinson recollected, apart from the notes, that she clearly had a warm spot for her brother Arthur. Moreover she indicated to him that she had very little contact with the people mentioned in the previous will other than the brother with whom she had correspondence. It is clear that she wanted particularly to give a benefit to the Killaleas with whom she had had continuing, relatively frequent and obviously grateful association since she had been in Wesleyhaven in 1979. Mr Robinson concluded that the testatrix, as he put it, -

> " ... was lucid in what she wanted, providing me with immediate responses to the questions that I asked and that she had a genuine desire in the case of the Killalea's to demonstrate her gratitude for the care and attention that they had taken of her and given her over a considerable number of years. This was in preference to family members with whom she had infrequent contact and whom, she had formed the view, had no real concern for her. "

He prepared the will and went to Wesleyhaven on 9 September with Cecily Fitzgerald and Raewyn McColl, two of the employees in his office, to execute it. Both of these employees had known Mrs Fraser, the testatrix, from previous contact in the office. They were alerted to the need to satisfy themselves that the testatrix had appropriate capacity. At the time of the execution of the will there was a conversation between those present. It is remembered that this centred upon a television set which Mrs Fraser had recently obtained. The will was read out and the operative provisions were explained and the machinery and procedural provisions were paraphrased. All the parties were satisfied that Mrs Fraser, the testatrix, understood what she was doing. The evidence of the two employees is perhaps somewhat negative in that there was an absence of anything which alerted them to any concern as to the testatrix's ability to understand what was happening.

The defendant called Carole Pugh, the Deputy Charge Nurse at Wesleyhaven, who had worked there since 1978. She recollected the testatrix on admission in 1979 as "a sweet little old lady who was forgetful and needed encouragement and help". She spoke of a gradual deterioration and, by reference to the assessment in May 1984, considered the testatrix was then "seriously confused to the extent that she was unable to recognise what was going on around her in most senses ....". She was unable to remember her condition precisely in September 1982.

Finally, there was the evidence of Dr Mark Davis, a consultant psychiatrist. He had never attended the testatrix but gave his opinion about her condition based upon the evidence that I have already mentioned, including the records retained in the Wesleyhaven Home and Hospital and the briefs of evidence and other material available to him. It was his evidence that a contemporaneous examination is required to assess the state of mind at a specific point of time. The only contemporary assessment was that by the lay people, Mr Robinson and the two employees who attended on the will and its instructions. It was his conclusion that the testatrix was then probably of testamentary capacity. There was no documented evidence indicating significant dementia in 1982. Dr Davis went on to explain and comment upon a number of the matters that were brought up or brought to attention, particularly arising later in 1984. He proposed the possibility of a condition known as vascular dementia which can happen to people with high blood pressure and with diabetes. Rather than the usual gradual deterioration the condition manifested itself in significant decrease in function in specific steps. This could be apparent in a comparison between say, her condition in 1982 and in 1984. Mrs Pugh did not recollect anything but a gradual deterioration. Even at that date Dr Davis opined that there was not enough to suggest that the testatrix was then not of testamentary capacity. As he put it, there was not enough data to suggest that she was definitely not of testamentary capacity. The incidence of lack of recognition of relatives he suggested was consistent with the early stages of memory impairment or dementia particularly as it was accompanied by embarrassment and an apparent awareness of her memory lapse at that time.

The principles of the law applicable to the topic of testamentary capacity are well known and are well settled. It is not necessary, on general principles, to do more than to cite the famous passage in *Banks v Goodfellow* (1870) LR 5 QB 549 at p 565. Those principles were applied in the our Court of

Appeal, for example, in *Re White (deceased)* [1951] NZLR 393 and more recently in *Peters v Morris* (unreported, Court of Appeal, CA No. 99/85, 19 May 1987).

In this case, where there is evidence of a progressive deterioration of mental power and some defect in the memory at the particular time, what was said in *Banks v Goodfellow* on that subject is of particular interest. At p 566 there appears this passage:

> " It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause—namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. "

And at p 568 there is a quotation from the judgment in *Stevens v Vancleve* 4 Washington, at p 267 where it is said:

> " 'But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all time to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and

> the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?' "

And then at p 569 a reference to the judgment by the Privy Council delivered by Erskine J in *Harwood v Baker* 3 Moo PC 282 at p 291:

> " And, therefore, the question which their Lordships propose to decide in this case is, not whether Mr Baker knew, when he executed this will, that he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. "

In *Battan Singh v Amirchand* [1948] AC 161, a judgment of the Privy Council, at p 170 appears this:

> " A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations, and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid. "

The onus of proof is upon him who propounds the will. McMullin J in giving the judgment in *Peters v Morris* at p 25 said this:

> " The approach adopted to the matter of proof in all these cases is the same - that before a will can be admitted to probate it must be shown that the testator was a person of sufficient mental capacity; that in the absence of any evidence to the contrary it will be presumed that the document has been made by a person of competent understanding; that once a doubt is raised as to the existence of testamentary capacity an onus rests on the person propounding the will to satisfy the Court that the testator retained his

> mental powers to the requisite extent; that in the end the tribunal must be able to declare that it is satisfied of the testator's competence at the relevant time, but that a will will not be defeated merely because a residual doubt remains as to that matter. The matter has been put in different ways with varying degrees of emphasis according to the circumstances of each case but we do not detect any difference of judicial opinion, significant for the purposes of the present case, in the passages cited. "

In this case Mr Atkinson, for the second defendant, sought to impose an additional burden on the plaintiffs submitting that this was a case where the suspicion of the Court should be aroused and enquiry be made as to righteousness of the intended benefaction because the will had been prepared by a partner of the solicitor who, with his wife, was to receive a benefit under the will. Reference was made to *Tanner v Public Trustee* [1973] 1 NZLR 68. In that case the principle was applied to a will in which the wife of the person preparing the will became an increased and substantial beneficiary.

The facts of that case bear little, if any, resemblance to the facts in this and so it may be at once distinguished. There is no suggestion whatsoever in this case that there was any influence at all placed upon the testatrix by either Mr or Mrs Killalea. To the contrary Mr Killalea remonstrated with her and Mrs Killalea refused to discuss any question of the will with the testatrix. What was put by Mr Atkinson was that there ought to have been the interposition of an independent solicitor to give independent advice on the matter, that it was not sufficient to ask Mr Robinson, a partner, to deal with the matter. I reject that. Mr Robinson, though not independent in the full sense, was clearly independent from Mr and Mrs Killalea and being unknown and unfamiliar with the testatrix and her affairs was well able to give her appropriate advice and to decide the strength of her desire and testamentary wishes. It may be that he did not try to dissuade her from the proposed benefaction or to press upon her the claims of others related by blood or marriage and who had been previous beneficiaries. I think, however, that there can be no doubt that the testatrix knew her own mind as to what she wished to do with her estate and the size and general details of it. The Killalea's had been of service and support for a number of years and had taken the place to a great extent of other relatives whose visits and attention were infrequent and at a distance. I do not believe for a moment that the testatrix did not have a full understanding of what she was doing and that she fully and clearly intended to give the benefits she did to

the Killalea's. That was the actual point upon which *Tanner's* case fell to be decided.

The righteousness of the transaction is a requirement on the beneficiary to show that, as regards him or her, the transaction may be approved in truth and honesty: see *Fulton v Andrew* (1875) LR 7 HL 448 per Lord Hatherley at p 471. I have no doubt, in the circumstances of this case, about the righteousness of the transaction.

The question in this case is really the capacity, the ability of the testatrix to have proper regard and mindful consideration of all those who had some claim upon her. The 1974 will provided contingently for all the Fraser nephews and nieces and some, presumably the closest ones, in the Clark family. It was a will mutually agreed between husband and wife, intended to provide as a childless couple for the more distant relatives. The 1982 will is a striking departure from that scheme. No nephews and nieces are benefited and of all the nephews and nieces the children of one and one only are included and strangers are for the first time included.

The testatrix from 1979 onwards was subject to failing mental abilities. I am satisfied that by 1984 she was not of sufficient capacity to be described as having testamentary capacity. I think on all the evidence that is available there was a gradual deterioration of her mental power. There is no evidence of any sudden diminution although those who visited her from time to time and infrequently marked the changes. Those, however, who saw her more frequently perceived I think the gradual deterioration. In 1982 when she gave her instructions, and it is the time of the instructions which I think is more important in this case, she had an adequate understanding of her estate and assets, understood that she was making a will and was fully cognisant and firm in her desire as to disposition of her estate. The question is whether, in selecting one family alone out of her nephews and nieces, and the strangers, she had sufficient memory and understanding of the others so as to form a deliberate and intelligent intention to exclude them.

In this case considerable emphasis was put upon the comparative support and services given by various members of the family, or not given by them in the testatrix's life and, in particular, in the years of her widowhood. It is not just a matter of the claims of those who have given service and support or who have

cared and demonstrated their care and affection. There is and remains an obligation to recognise the claims or at least to be cognisant of those who, though, for instance, having no claim under the Family Protection Act, have otherwise a moral claim as relatives. That may require an assessment of their need as well as an assessment of the value in spiritual terms of the care, affection and support they have given. Of all the testatrix's relatives I think it is clear that in the later years it was Keith Clark and Clifford Fraser who provided the familial care and affection. Some others, on both sides of the family, had done so in the past but in the last 20 years of her long life it was only those two who continued an association with her. What is striking, I think, in this matter is that Clifford Fraser was ignored or forgotten, both in instructions and in the will. It seems that he was not adverted to at all although he of the two relatives had more recently visited her in or about January 1982. That omission, coupled with the other errors and omissions in her instructions, indicate to me that in September 1982 her mental process did not allow her, or enable her to bring to mind those who had been her beneficiaries, who might well have been considered to be her beneficiaries so as to intentionally and deliberately exclude them. Her failure to recognise Clifford Fraser in 1983 appears, then, not as a new and further step in her deterioration but merely another example of it on the way.

In the end, therefore, I have concluded that the plaintiffs fail to prove that in September 1982 that the testatrix was of sound memory and understanding and that the claim for probate of the 1982 will must fail.

The second defendant was therefore justified in bringing and prosecuting his caveat and in continuing his defence of these proceedings. The plaintiffs, on the other hand, were justified if not bound to proceed in the way they did. This is not a case in which it could be said that there was a clear cut answer. It required the full canvas of the hearing in a court to achieve a result. I think that this is a case where all parties should be entitled to their costs to be paid out of the estate and upon a solicitor/client basis, that is to say reasonable costs. I reserve leave to the parties to apply further in the formulation and execution of the judgment in this case.

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Atkinson Jackson, AUCKLAND, for Second Defendant