



Neutral Citation: [2022] EWHC 158 (Ch)

Claim No: PT-2021-000211

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

IN THE ESTATE OF ERNEST FRANCIS DECEASED

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 7 February 2022

Before :

DEPUTY MASTER DRAY

Between :

**(1) BEVERLEY FRANCIS WILSON
(2) TAMAR WILLIAMS**

Claimants

- and -

**(1) ANGELLA ROSE-MARIE SPENCE
(2) DWAYNE SMITH**

Defendants

**The Second Claimant (in person) for the Claimants
Dilan Deeljur (instructed by Solomon Shepherd) for the Defendants**

Hearing dates: 11 & 12 January 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties or their representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Monday 7 February 2022.

DEPUTY MASTER DRAY:

Introduction

1. Ernest Francis (the Deceased) was born on 10.4.1934 in Jamaica. He came to the UK many years ago, certainly by the early 1980s (if not before). He lived at 63 St Pauls Road, London N17. He died on 2.5.2019 in London. These proceedings concern the entitlement to his estate.
2. The Deceased married Theodosia (née Smith, and also formerly known as Diana Smith) in London on 26.4.1989. Theodosia had, it appears, 11 or 12 children by multiple men other than the Deceased. The Defendants are two such offspring and, as such, are step-children of the Deceased.
3. The First Claimant is the mother of the Second Claimant. The Claimants maintain that they are, respectively, daughter and granddaughter of the Deceased. The Defendants say, however, that the Claimants are, like them, step-relations of the Deceased.
4. Based on the evidence I have received, it is conceivable that the First Claimant is indeed the step-daughter (rather than daughter) of the Deceased, being a child of Theodosia by another man. On this basis the Second Claimant is a step-granddaughter of the Deceased. However, the evidence in this respect is somewhat obscure.
5. I have seen what it said to be the Jamaican birth certificate of the First Claimant (Supplementary Bundle (SB), p.31). It identifies the child in question as Beverly [sic, not Beverley] Elizabeth Henry and records her mother as Diana Smith (i.e. Theodosia). No father is named on the certificate, although one Ernest Henry, who is said to have been present at the birth, is the stated informant.
6. The First Defendant and Mr Samuel Smith (as to whom see below) say that they knew the First Claimant as Beverley Henry in Jamaica and that it is only when she came to the UK that she adopted the name Beverley Francis. As I note below, I did not hear from the First Claimant.
7. For present purposes it is not necessary for me to reach a finding on the point (and Mr Deeljur accepted that not much turns on it), and I do not do so. What is nonetheless clear from the evidence is that the Deceased (and indeed the rest of the family, including the

Defendants) regarded the Claimants as his daughter and granddaughter (rather than as step-relations) at all material times.

8. After the death of the Deceased the Defendants, on the footing that (as they maintain) the Deceased died intestate, obtained a grant of letters of administration on 23.5.2020. I return to this below.
9. By these proceedings, issued on 9.3.2021, the Claimants seek the revocation of that grant. They also seek a grant of probate in their favour, relying on what is said to have been the Deceased's last will dated 5.12.2018 (the 2018 Will).
10. The 2018 Will is a document prepared by a Leicester-based company known as Simple Wills of which Philip Izzard was and remains a director and Genevieve Frost was at the relevant time an office manager.
11. The 2018 Will is expressed to appoint the Claimants as the Deceased's executors. By clause 6 it provides that the whole of the Deceased's residuary estate (after payment of debts and expenses) is to pass to the First Claimant. There are substitutionary provisions in clause 7 and 8 which apply if that gift fails; pursuant to them the Second Claimant would acquire a third of the estate. Clause 9 is a curious index-linking provision. It purports to index-link "the said monetary bequest" but there is no such bequest. It thus appears to have been included in error. Clause 10 is a declaration that the Deceased made no provision for his son Jonny Francis.
12. The 2018 Will is regular on its face. It is apparently signed on each of its 3 pages by the Deceased (in a clearly shaky hand using imperfectly formed, individual capitalised letters) and is purportedly witnessed at its end by Dansi Hall, a café assistant, and by Angelina Johnson whose address is given as 53 Durban Road E17 5EA.
13. By their Defence the Defendants resist the claim. They specifically deny that the Deceased made the 2018 Will. They contend that the 2018 Will was not made on 5.12.2018 and was not actually witnessed as it purports to be. They contend that the supposed witnesses did not attend any signing, and that the Second Claimant arranged for witnesses to sign the document in the absence of the Deceased. They maintain that any evidence to the contrary is untrue. They also dispute that the Deceased had testamentary capacity to make, and that he knew and approved of the contents of, the 2018 Will. Of course, if I find that the 2018 Will was not made and witnessed as alleged (and hence is invalid on that basis), the other contentions rather fall away in terms of their importance.
14. The Claimants take issue with the Defendants' challenge to the validity of the 2018 Will.

The parties' cases in outline

15. Shorn of much detail, the Claimants' case is as follows:

- (1) By way of background, the Deceased had made an earlier will dated 26.4.2015 (the 2015 Will) by which he had appointed his then carer, Colin Anthony Rodrigues, as executor. That will (drawn by Your Concern UK Ltd, the former name of Simple Wills) gave 25% of the estate to Theodosia (or, in the event of her predeceasing the Deceased, to her issue) and the remaining 75% to the First Claimant. It excluded Jonny Francis, said to be the Deceased's son, from any inheritance.

I add that the 2015 Will records that it is witnessed by Ayub Omar, assistant sub-postmaster, and Hitesh Patel, shop owner. Neither Claimant was involved in or knows anything of the preparation or execution of the 2015 Will. I have not heard from Messrs Omar and Patel.

- (2) The Deceased expressed a desire to update his will in the light of deaths of both Mr Rodrigues and Theodosia. This is recorded in a note made by Mr Izzard (as to which see below).
- (3) Mr Izzard visited the Deceased at his home. The Second Claimant was present. Mr Izzard took instructions from the Deceased. He made a file note of this visit.
- (4) Ms Frost telephoned the Deceased whilst he was in hospital in late November 2018 to confirm the instructions previously given to Mr Izzard.
- (5) On 5.12.2018, in the evening, having returned from home from hospital that day, the Deceased executed the will at his home in the presence of the two named witnesses (Ms Hall and Ms Johnson). Again, the Second Claimant was present. There are photographs of him signing the will.
- (6) The Deceased was of sound mind and knew what he was doing.
- (7) The 2018 Will is valid.

16. Stripped to its essentials, the Claimants' case appears a simple one, and one which it might reasonably be expected to be difficult to controvert.

17. Similarly reduced to its core, the Defendants' case is that:

- (1) To the extent relevant, the 2015 Will was invalid. The signature it bears is not that of the Deceased, and the Deceased did not have capacity at the date it was purportedly made.
- (2) In the circumstances described below, there is reason to doubt whether and when Mr Izzard took instructions from the Deceased.
- (3) The Deceased was in hospital from 3.11.2018 to 5.12.2018.
- (4) The Deceased was not in a fit state to make, or to be aware of and understand the contents of, the 2018 Will on 5.12.2018.
- (5) The Deceased could neither read nor write (something which is common ground). That, coupled with his ill health generally (including the fact that he was blind in one eye and had poor vision in the other), meant that he could not have signed (and did not sign) the 2018 Will.
- (6) Samuel Smith, a step-son of the Deceased, who lived with him at 63 St Pauls Road and had been his principal carer for some years, received the Deceased when he was

brought home from hospital by the ambulance service on 5.12.2018 and was in the house all the evening. Mr Smith let no-one into the property, and nobody attended.

(7) Hence the 2018 Will could not have been, and was not, signed or witnessed as alleged.

(8) The 2018 Will is invalid, both in form and in substance.

18. It will be seen that the Defendants' account of events is manifestly at odds with that advanced by the Claimants.

The trial

19. I heard the trial over 1.5 days on 11 and 12 January 2022. The trial was held in person in court 4 in the Rolls Building.

20. The Claimants, although represented by Legal Rights Partnership at times, were represented at the trial by the Second Claimant acting in person. She was assisted at times by Natasha Pichon (with my permission).

21. The Defendants were represented by Mr Dilan Deeljur of counsel.

Legal principles

Due execution

22. Due execution concerns the formal validity of a will.

23. The relevant principles are:

(1) By section 9 of the Wills Act 1837, in essence (and so far as is material for current purposes) a will must be signed by the maker and the maker's signature must be made or acknowledged in the presence of two or more witnesses present at the same time; and each witness must attest and sign the will or acknowledge their signature in the presence of the maker.

(2) The propounder of a will must prove due execution (including witnessing) of the same. That is one of the formal requirements for proof of a will: *Face v Cunningham* [2020] EWHC 3119 (Ch) at [46]; *Sangha v Sangha* [2021] EWHC 1599 (Ch) at [130-131].

(3) There is a rebuttable presumption of due execution (i.e. in favour of the formal validity of a will) where, as in this case, the will in question contains an attestation clause, i.e. where on its face the document is apparently duly executed in accordance with the statutory provisions.

(4) The presumption can usually be rebutted only by the strongest of evidence. There is a public interest in upholding valid testamentary dispositions: *Sherrington v Sherrington* [2005] EWCA Civ 326; *RNID v Turner* [2015] EWHC 3301 (Ch) at [121-122].

(5) There is a sliding scale. What constitutes the strongest evidence in one case may not do so in another. Regard must be had to the totality of the relevant facts of the case

and the court's evaluation of the probabilities. The court must look at all the circumstances relevant to attestation: *ibid*.

- (6) So, although there are many cases in which the presumption is of real practical importance, for example if the attesting witnesses have died or the will was made many years before the trial, where (as here) the will and statements of those concerned are relatively fresh, the court is justified in deciding whether the will was duly executed on the strength of all the evidence, on the balance of probabilities, making all appropriate allowances for the usual fallibility of recollection even over a relatively short period of time. It is also appropriate to bear in mind that, given the implications of concluding that the will was not signed as its purports to be, namely that there has been a serious deception, the court should be satisfied that there is cogent evidence justifying such a conclusion before reaching it: *Gardiner v Tabet* [2021] EWHC 563 (Ch) at [89].

Testamentary capacity

24. Testamentary capacity – and, separately, knowledge and approval (discussed below) – is an element of the substantive validity of a will.

25. The relevant principles are:

- (1) Having testamentary capacity means that when giving instructions and executing the will, the maker was of sound mind, memory and understanding such that:
- a. The mind was able to form the testamentary intentions in the will;
 - b. The memory was sound to recall the possible objects of benefit and their ties to the maker; and
 - c. The understanding extended, or was capable of extending, to the acts of testamentary disposition and their effects, the extent (although not the detail) of the property being disposed of, and the claims on it.

Banks v Goodfellow (1870) LR 5 [2021] EWHC (QB) 549 and Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate* (21st ed.) at 10-03.

- (2) Capacity is to be presumed in the case of a duly executed rational will. The evidential burden is on the party challenging the will to raise a real doubt about capacity, if this presumption is to be displaced: *Cowderoy v Cranfield* [2011] EWHC 1616 at [130] - [137].
- (3) If, however, the evidence and circumstances raise such a doubt and displace the presumption, the decree must be against the will unless there is positive evidence of capacity: *Symes v Green* (1859) 164 ER 785.
- (4) The so-called 'golden rule' is that where there is any doubt about the capacity of a prospective will maker, the will should if possible be witnessed or proved by a doctor, ideally a specialist in old age psychiatry, who satisfies themselves of the person's capacity and records the examination: Williams, Mortimer and Sunnocks at 10-08.
- (5) The courts should not too readily upset, on the grounds of lack of testamentary capacity, a will that has been drafted by an experienced independent lawyer. If an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the person understands what they are doing, the will so drafted and

executed should only be set aside on the clearest evidence of lack of testamentary capacity: *Burgess v Howes* [2013] EWCA Civ 94 at [60].

- (6) However, ultimately, the question is one of degree and the court must consider all the circumstances and ask whether there remain doubts about capacity in the light of all the evidence. If so, the ‘golden rule’ should be applied: *St Clair v King* [2022] EWHC 40 (Ch) at [168].

Knowledge and approval

26. The relevant principles are:

- (1) The maker’s knowledge and approval of the contents of the will is part of the burden of proof assumed by the party seeking to propound it. However, in ordinary circumstances, the burden of proof will be discharged by proof of testamentary capacity and due execution, from which knowledge and approval by the maker of the contents of the will are assumed.
- (2) However, there will be an additional evidential burden on the party seeking to propound the will (who must then affirmatively prove knowledge and approval so that the court is satisfied that the will represents the wishes of the maker) if the circumstances in which the will was drafted or executed are such as to arouse the suspicions of court that the maker did not know of its contents: *Fuller v Strum* [2002] 1 WLR 1097 at [33]-[34] and at [64]-[72].
- (3) Where the additional evidential burden requires to be satisfied, then the court is concerned with the single question as to whether the maker (a) understood what was in the will when they signed it, and (b) what its effect would be: *Gill v Woodall* [2010] EWCA Civ 1430 at [22] and [71].
- (4) The relevant understanding can be proved in any way, including by proving that instructions were given to a solicitor, that the maker actually read the document, or that they allowed an executed will to stand: see *Williams, Mortimer and Sunnocks* (supra) at 10-30 and 10-33.
- (5) The matter of knowledge and approval is to be approached objectively; it does not involve a value judgment about the justice of the testamentary disposition or the circumstances in which the will was prepared and signed: *Fuller v Strum* at [34].

The evidence and the witnesses

27. I now record: (a) the central parts of the evidence I received, and the evidence which I did not receive; (b) my observations on the various witnesses.

The First Claimant

28. I did not hear from the First Claimant. Neither did she provide any witness statement. I understand that, whilst formerly present in the UK, she is now living in Jamaica and has been denied a visa to enter the UK. In the circumstances I doubt that she would have had any material evidence to give. I consider that this explains her lack of active involvement in the proceedings, despite being named as the sole beneficiary under the 2018 Will.

The Second Claimant

29. The Second Claimant produced two witness statements. One is dated 18.8.2021, the other 3.12.2021. The first bears no formal statement of truth at its end, although it does start, “*I ... make this statement believing the same to be true and accurate to the best of my knowledge and belief*”. The second starts similarly and also bears a concluding statement of truth, albeit not in the terms required by CPR PD 32, paragraph 20.2 (although this criticism can be levelled at all the witness statements in this case).
30. The two statements are both short. Each is 2 pages. The second statement starts by referring to the earlier statement and saying that the Second Claimant wishes to add to it. The two statements each speak to the alleged execution of the 2018 Will on 5.12.2018. However, they are at odds with one another in other potentially significant respects. In particular, a major divergence is that in the first statement (paragraph 3) the Second Claimant said that Mr Izzard visited and took instructions for the Deceased’s will on 29.11.2018 whereas in the second statement (paragraphs 2 and 7) she said that such visit actually occurred back in February 2017 and that Ms Frost telephoned the Deceased to confirm the instructions on 29.11.2018 (paragraphs 3, 4 and 7). I return to this and other issues of concern below.
31. The Second Claimant gave oral evidence in which she confirmed her statements, indicating (though not clearly) that the second supplants the first as regards the date of Mr Izzard’s visit. Indeed, it soon became clear from her testimony that the Second Claimant had no real recollection of the timing of Mr Izzard’s visit, although she maintained that the visit had indeed occurred.
32. The Second Claimant was cross-examined. It was put to her clearly that her account of the alleged execution of the 2018 Will was untrue. She denied the suggestion.
33. I regret to say that, quite aside from the haziness of her recollection on such a fundamental matter, the Second Claimant was not an impressive witness overall. I set out below particular aspects of the Second Claimant’s evidence which are directly relevant to the present case and which are unsatisfactory and give me real cause for concern.
34. First, as noted in paragraph 30 above, the Second Claimant’s account of a central event, namely the date when Mr Izzard took instructions from the Deceased, was completely unreliable. Originally she said it was 29.11.2018. Then she changed to February 2017, in line with Mr Izzard’s statement (dated 2.12.2021 and thus postdating her first statement).
35. I readily accept (in line with the point made in paragraph 23(6) above) that memories are fallible, especially in relation to dates. I also accept that the Second Claimant may well have made her first statement based on the dates as they prima facie appear from the documents disclosed by Simply Wills (see paragraph 62 et seq below), without appreciating that those dates are not all they appear (see paragraphs 63 and 64 below). She might thus perhaps say that she was so misled, although that is not in fact an explanation she actually put forward.
36. However, it strikes me that it is quite one thing for the Second Claimant to say that the Deceased gave instructions for his will to Mr Izzard at his home *and in her presence* on 29.11.2018, a date just one week before she arranged for the will allegedly to be signed, and quite another thing for her to say that such instructions were in fact given as far back as February 2017, this entailing that the interval between the instructions and the

execution of the will was 1.75 years. The discrepancy is astonishing and incredible. I do not ascribe it simply to a fault in precise recollection.

37. My concern is all the greater when it is borne in mind that (as I find, based on the Deceased's medical records, as to which see below) the Deceased was in hospital from 3.11.2018 to 5.12.2018, leaving the hospital only on the very day that he is supposed to have made the 2018 Will. This being so, it is manifestly *impossible* for him to have instructed Mr Izzard *at his home* on 29.11.2018.
38. The marked variability over time of the Claimants' case is also discernible from consideration of the Response to the Defence (dated 3.11.2021, and thus apparently after the Defendants' disclosure of the Deceased's medical records in October 2021). Paragraph 7 of the Response states, "*Mr Izzard of Simple Wills attended the deceased's property to meet with him in person. Having given instructions the deceased was unable to pay the fees requested by Simple Wills. The deceased requested that an appointment is booked for the following week in order for the Will to be executed. The deceased then went into hospital and instructions were confirmed by [Ms Frost] ...*". Yet this timeline and overall account is seriously awry. There is nothing to substantiate the claim that the Deceased requested a follow-up visit one week after Mr Izzard's visit (whenever that occurred) or that a hospital stay then intervened hard on the heels of such visit.
39. Even allowing for the point noted in paragraph 35 above, how the Second Claimant gave the unsustainable date of 29.11.18 in relation to an in person visit by Mr Izzard to the Deceased's home is hard to fathom if her evidence is honestly given. There is considerable room for the suspicion that she concocted a narrative and alighted on the 29.11.2018 date before the medical records (as to which see below) and the witness statement of Mr Izzard (see also below) emerged. When they did, the discoveries that (a) Mr Izzard actually maintained that the visit had been way back in February 2017 and (b) the Deceased had been in hospital in November 2018 blew a hole in her account and necessitated a fundamental revision to the timeline of events.
40. In any event, the result is that there is grave doubt about the overall reliability of the Second Claimant's evidence. Her evidence is a mess. As I explain below, the above error and inconsistency is by no means the only unsatisfactory element of her evidence.
41. Second, linked to the preceding point, in her second statement the Second Claimant says (paragraph 3) that in November 2018 the Deceased was in hospital and told her that he wanted to finalise his will. She says, "*I was surprised as I thought that he had already finalised it.*" Even if one allows for a gross failure of recollection on the matter of timing of Mr Izzard's visit, it is hard to see how the Second Claimant can now possibly claim, credibly, to recollect that she was surprised about the delay, not least because (as noted above) she really has no accurate recollection of when Mr Izzard actually visited and hence as to what interval elapsed between the visit and the Deceased being in hospital. Initially she portrayed the will as having been executed hard on the heels of the instructions having been given; now in a volte face she alleges that she was alarmed by the passage of time between the instructions and its execution. This aspect of her account has an air of artificiality. It seems to me to be an attempt to give a veneer of detail to the refreshed account. All in all, it smacks of the construction of a new, revised narrative after the first one unwound.

42. Third, the first statement of Second Claimant makes no mention whatsoever of the Deceased having been in hospital. Neither do the Particulars of Claim (which notably give no particulars of the execution of the 2018 Will). In like vein are letters said to be from Ms Hall and Ms Johnson (for what they are worth: see below); they too are silent as regards any hospitalisation. Yet the second statement of the Second Claimant (and the unsigned statement of Ms Johnson) introduces this significant part of the story. It is again telling that these later accounts appear to have emerged only after the disclosure of the Deceased's medical records by the Defendants.
43. Fourth, in her first statement the Second Claimant, besides making no mention of Ms Frost, said that the Deceased received the will for execution. But in her second statement, having referred to the Deceased's hospitalisation, she acknowledged that the will was sent to her (at 16 Reed Road) by Ms Frost (as Simple Wills' computer entries indicate). This is another material shift of position. Linked to this, it is only in her second statement that the Second Claimant says that she contacted Simple Wills in November 2018; the first statement conveys the impression that the contact was by the Deceased himself.
44. Fifth, the Second Claimant suggests, in her second statement, that it was on 5.12.2018 – the date of his discharge from hospital – that the Deceased asked her to arrange for his will to be signed immediately and that she then contacted Ms Hall and Ms Johnson. However, there is no direct confirmation of this in the various materials said to emanate from those persons (even if they are to be given any weight, despite those persons not attending the trial, as to which see below). Additionally, the notion that the Deceased, on the cusp of discharge from hospital, then insisted that his will be executed without delay is inherently rather implausible given the period of prolonged delay that had already intervened.
45. Sixth, another notable factor is that the first account put forward by the Second Claimant made no mention of the alleged execution occurring in the *evening* of 5.12.2018. Again, neither did Ms Hall nor Ms Johnson in the letters. It was only in the Response to the Defence (dated 3.11.2021) and in the Second Claimant's second statement (both written after disclosure of the medical records which evidence the Deceased being discharged from hospital that very day) that the Second Claimant introduced this detail.
46. Seventh, as noted below, it emerged from the Second Claimant's line of questioning of Mr Smith that she maintained that she accessed 63 St Pauls Road because the door was routinely left on the latch. She accepted in closing submissions that she did not have a key to the door, and that her case is as she put it to Mr Smith.
47. Strictly speaking, the Second Claimant did not give evidence as such on the point; she merely raised the suggestion about the door being left on the latch when cross-examining. In any event, it is noteworthy that nowhere in her short statements is there any mention of how she gained entry to the property. One would have expected to see such detail if she lacked the normal means of access, namely a key. The want of such important detail is, I consider, significant; its absence casts some doubt on her account, especially when one notes that the Defence (paragraph 11) had expressly put forward a case of non-attendance on 5.12.2018. There is at least a striking absence of detail and transparency.
48. Eighth, the strongest card held by the Second Claimant is the photographs she put forward (SB, pp.22-24). Prima facie, these are powerful evidence in support of her case,

and I bear them firmly in mind when assessing both the Second Claimant's evidence generally and also that of Mr Smith. However, as I explain below, the photographs themselves raise as many questions as they answer. I therefore ultimately conclude that they alone cannot and do not carry the day for the Claimants, although I consider their significance in the round.

49. On the one hand, the photographs (which I viewed on Second Claimant's mobile phone, the screen images being clearer than the photocopied prints) are ostensibly dated 5.12.2018 and timed between 18:07 and 18:11. (That said, the court has not seen the metadata.) Further, the photographs show a person apparently wearing hospital clothes – this being consistent with Mr Smith's account of the Deceased's attire on 5.12.2018 (see paragraph 94 below) – signing what seems to be the 2018 Will. So far, so good.
50. On the other hand, it is striking what the photographs do not show. They are zoomed in shots of a person's hands seemingly in the act of signing the document. They show only the hands of the person. They do not reveal the person's face. Also, they do not show any third parties, e.g. the alleged attesting witnesses, present at the scene. They are not a video recording of the whole process. As a comprehensive record of the signing, they are thus clearly wanting/incomplete.
51. Ninth, there is the fact that the Second Claimant's account (and that of the Claimants' witnesses) is not only inherently self-serving (in that she potentially stands to gain, albeit indirectly, if her mother, the First Claimant, takes under the 2018 Will) but moreover is generally presented in such little detail in the witness statements (and in the statements of case too).
52. In her oral evidence, confronted with medical evidence regarding the ill-health of the Deceased, his poor eyesight (I find that he was blind in his right eye and had poor sight in the left: see the medical notes at SB, p.479) and his acknowledged inability to read and write, the Second Claimant claimed that she read the will over to the Deceased on (I believe) 5.12.2018. However, this key fact was not mentioned by her in either witness statement. Neither was it foreshadowed in the Particulars of Claim or anywhere else.
53. The blanks do not stop there. The thin statements and the letters of Ms Hall and Ms Johnson, even if they are to be given any weight (see below), do not allude to any such activity by the Second Claimant. Hence the Second Claimant's belatedly introduced account stands by itself.
54. Tenth, it appears that the Second Claimant, together with Ms Johnson, had been granted probate of the estate of one Lillieth Adassa Goodwin (valued at c.£1 million) on 11.7.2019. (SB, p.30.) However, when asked about this the Second Claimant was disconcertingly defensive and evasive in her replies. She broadly claimed to have no recollection of the matter. She could not satisfactorily explain why her address was recorded on the grant as 63 St Pauls Road, which she acknowledged is not her address. She sought to suggest that it must be the result of the contents of a document dating back many years, when that cannot have been case given that Ms Goodwin only died on 25.11.2018 (and hence the application by the Second Claimant must have been between then and 11.7.2019). She was even unwilling to acknowledge that the Ms Johnson to whom probate had been jointed granted was the same Ms Johnson as had allegedly witnessed the 2018 Will, despite this being obvious (not only because of the coincidence

of names but also because Ms Johnson's stated address on the grant of probate was again given as 53 Durban Road). Further, she was disinclined to accept that she had played a real role in the administration of the estate of Ms Goodwin even though the evidence (SB, p.27) clearly discloses that she had arranged settlement of a £6k care home bill.

55. In her closing submissions the Second Claimant said that she was confused about the questions in this regard. I do not accept this. I consider that she fully understood the questions. She simply did not answer them straightforwardly. She also submitted that the date of issue of the grant of probate was not the date when the details of her as executor were taken. That is of the course the case; the grant necessarily post-dated the application (which the grant records was made by her). But the application cannot have been much earlier because there was only a limited window between the date of death and grant of probate, and (as she accepted and I find) at no material time did she reside at 63 St Pauls Road. The Second Claimant further maintained that she was only an executor and not a beneficiary of the estate of Ms Goodwin. That may be the case but it does not constitute any explanation, let alone good reason, for her obfuscation when answering these questions.
56. I do not take the various above identified concerns in isolation. Rather, it is their cumulative effect which leads me to conclude that I cannot accept the Second Claimant's account unless it is common ground or verified by others.
57. Herein lies a manifest difficulty for the Claimants. As I explain below, they have failed to bolster their case by live evidence from the central protagonists other than the Second Claimant herself. In particular, they have not called the alleged attesting witnesses who could have spoken to the claimed execution of the 2018 Will. The absence of the entire supporting cast is noteworthy and significant. As it is, the Second Claimant's evidence, and hence the Claimants' case, is unsubstantiated.

The Claimants' other "witnesses"

58. A remarkable feature of this case is that, although the Claimants compiled a supporting cast of no fewer than four, including both of the alleged attesting witnesses, none of the four attended the trial and was made available for cross-examination. I next consider the 'evidence' of the quartet.

Mr Izzard

59. Mr Izzard made a witness statement dated 2.12.2021. However, he did not attend the trial. He indicated that he was busy with unspecified business commitments. So the Claimants did not call him at the trial.
60. No Civil Evidence Act hearsay notice was served in respect of Mr Izzard's statement (or, indeed, any of the statements), despite the Claimants having had legal representation until (and even through, albeit not at) the trial. Mr Deeljur invited me to disregard the statement altogether. However, I consider the statement (and, likewise, the other statements, where signed) to be admissible notwithstanding the absence of such notice but I regard the absence of notice, and more especially the absence of the witness, to be very important factors when assessing what weight, if any, to give to the statement(s).
61. The account in Mr Izzard's statement can be summarised thus. He visited the Deceased at his home on 20.2.2017, travelling by train after an abortive visit by car on 15.2.2017.

He took the instructions from the Deceased for what became the 2018 Will on that day. Those instructions included the fact that Theodosia and Mr Rodrigues had both died; hence the Deceased's stated wish to update his will. He (Mr Izzard) made a file note. The Deceased could not afford to pay for the will and so a draft was not then produced. It was not until November 2018 that the Second Claimant contacted him to say that the Deceased wished to finalise the will, and arranged payment. On 29.11.2018 Ms Frost telephoned the Deceased to confirm the instructions. She then supplied the will to the Second Claimant.

62. Mr Izzard had disclosed to the Claimants (under cover of an email dated 19.11.2020), amongst other things, a typescript file note of his meeting with the Deceased (Original Bundle (OB), pp.33-34) and a printout of a computer system's log of entries in relation to Simple Wills' dealings with or concerning the Deceased (OB, pp.35-36).
63. The note is on its face dated 29.11.2018, not February 2017, and would thus lead a reader to believe that Mr Izzard visited the Deceased and took his instructions on 29.11.2018. However, in his statement Mr Izzard explains that the note was actually made by him in 2017 but the 29.11.2018 date was added by Ms Frost in November 2019 (when she is believed by him to have spoken to the Deceased to confirm his instructions). Ms Frost's statement is to similar effect; she refers to typing up the attendance note and adding the date. I remark that I have not seen any manuscript note.
64. The dates of the entries in the computer log might also lead a reader to believe that Mr Izzard visited the Deceased on 29.11.2018. As to this, in his statement Mr Izzard explains that the system shows only the dates/times when entries are made on the system, not the dates/times of the underlying events to which the entries refer. He says that some of the entries reflect the correct date because they were made on the day that the events in question occurred but other entries are misleading in that they were entered onto the system at later dates, as is the case in relation to the e.g. the entry in relation to the taking of instructions from the Deceased for the 2018 Will. Ms Frost's statement is to like effect; she refers to making entries on the system on the day of the task or on later dates.
65. I have not had the benefit of hearing from Mr Izzard. His evidence has not been tested by cross-examination. In the circumstances I give it only limited weight.
66. Indeed, there are undoubtedly aspects of Mr Izzard's evidence which invite questions, questions which are necessarily unanswered. For instance, both the sequence and also the very belated timing of some of the computer entries (many of which were seemingly made ex post facto) is not at all easy to fathom or understand. Also, why the manually input text of the entries does not record the date of the underlying events (so as to make the records intelligible and reliable) is a mystery.
67. That said, I am satisfied that, in broad terms, Mr Izzard's statement presents an accurate account. There is no particular reason to disbelieve the basic narrative given by Mr Izzard, in particular as to his taking of instructions from the Deceased in February 2017. Mr Izzard is a professional and has no obvious interest in the proceedings or axe to grind; there is no reason to doubt his bona fides. Also, his movements by train in February 2017 are supported by transactions recorded on his bank statements (SB, pp.25-26).

68. It is clear that Simple Wills (under its former name) had drawn up the 2015 Will. I also accept and find that Mr Izzard did visit the Deceased in connection with making an updated will, that he took instructions and made an attendance note on that occasion, recording the visit and what he was told, and that the Second Claimant was in attendance too. I find that this occurred on 20.2.2017. I accept that the typed up version of the note reflects the note he made at the time. It is also apparent that Simple Wills drew up the form of the will which the Claimants allege was signed on 5.12.2018.
69. However, I am not prepared to attach any weight to Mr Izzard's report of the events of 29.11.2018. This is hearsay. Any engagement with the Deceased on that day was by Ms Frost, and Mr Izzard did not participate in any telephone call.
70. In the circumstances, I conclude that (apart from providing confirmation that the Deceased's instructions were taken back in February 2017, not in November 2018, and with the exception of the point to which I refer in paragraphs 108, 109 and 124(4) below), the evidence of Mr Izzard does not take matters very far in the context of this case. This is because: (a) his substantive involvement preceded the apparent execution of the 2018 Will by over 19 months; (b) he had no contact with the Deceased in November or December 2018.
71. Therefore, all in all, Mr Izzard's evidence sets a general background (and shows that there was a marked interval of time between the taking of the instructions and the alleged execution of the will) but does little more than that.

Genevieve Frost

72. Genevieve Frost made a witness statement. A signed copy of it (dated 1.12.2021) was only supplied during the trial but I nonetheless admit the statement. Again, she was not called to give evidence. No reason at all was given for her absence. As before, this affects the weight I can give her account.
73. Ms Frost says in her statement that she spoke to the Deceased on the telephone in November 2018 in order to confirm the instructions he had given Mr Izzard in February 2017. She says that she recalls him being unwell and "*in and out of hospital*" but of sound mind. According to Ms Frost the Deceased confirmed the entire instructions he had previously provided.
74. In the circumstances I decline to place any reliance on Ms Frost's untested statement (except insofar as it supports Mr Izzard's account about his attendance note and the workings of the computer log). In so concluding I note that: (a) there is no attendance note of the alleged telephone call on 29.11.2018; (b) there is also no log of it on the computer system; (c) the Deceased was not "in and out" of hospital; (d) the medical notes show that he was in hospital from 3.11.2018 to 5.12.2018, with delirium at some stage. Further and in any event, Ms Frost cannot speak to the alleged execution of the 2018 Will.

Dansi Hall

75. Dansi Hall, a friend of the Second Claimant, made a 5-paragraph statement (dated 3.12.2021) in which she says that, having been contacted by the Second Claimant, on 5.12.2018 she witnessed the Deceased signing his will at his home in the presence of Ms Johnson and the Second Claimant. She gives the barest of details in this regard. All this

is in the context of the Defendants having expressly alleged (in their Defence dated 29.10.2021) that the alleged attestation is a fiction and did not happen. Mr Deeljur described the account of Ms Hall as threadbare. I agree.

76. There is also before me a letter dated 22.10.2020 which purports to have been written by Ms Hall (OB, p.31). This too is very thin in content and, besides not being verified by a statement of truth, does not materially take matters any further.
77. As a supposedly attesting witness in a case in which execution of the alleged will is expressly challenged, Ms Hall's attendance at trial would have been expected. Again, she was conspicuous by her absence. The only reason given (in the Second Claimant's first statement, not by Ms Hall herself) was that Ms Hall has young children and no childcare. No particulars are given and on the scant information before me I am not persuaded that cover could not have been arranged to enable her to testify in court.
78. Consequently, I feel unable to give any weight to Ms Hall's very bald narrative of events.

Angelina Johnson

79. As set out in paragraph 54 above, Ms Johnson is an acquaintance of the Second Claimant and jointly obtained with her the grant of probate in respect of the estate of Ms Goodwin.
80. A brief witness statement supposedly made by Ms Johnson is before the court (SB, p.14). It records that she too was contacted by the Second Claimant and as a result allegedly witnessed the Deceased sign his will at his home on the evening of 5.12.2018. She gives very slightly more detail than Ms Hall but her account is still remarkably light.
81. When I observed that the copy statement is unsigned, I was informed by the Second Claimant that in fact Ms Johnson has not had time to sign her statement. Hence there is in fact no witness statement as such from Ms Johnson, only a draft which may or may not reflect the evidence she might give.
82. What is more, Ms Johnson was also notable by her non-attendance at court. She herself has given no reason for that. The Second Claimant said in her first statement that Ms Johnson could not attend because she is elderly and self-isolating. But there is nothing to show that this reason, even if it held good in August 2021, still applied at the time of the trial.
83. I do not overlook that there is before the court a letter dated 19.10.2020 supposedly written by Ms Johnson (OB, p.30). However, I have some reservations about its provenance (and, indeed, the equivalent letter from Ms Hall: see paragraph 76 above); both letters appear to have been written by the same person in a mixture of the first/third person – e.g. each reads “*I [name] ... is [sic] writing to confirm that on [5.12.2018] I witness [sic] ...*”; each is in the same font; the letter ascribed to Ms Johnson misspells Walthamstow as “Walthamtow”.
84. Further, the account in the letter does not wholly tally with the account in the draft witness statement. The letter indicates that in November 2018 Ms Johnson received a single telephone call and it was arranged that she would attend to witness the Deceased signing his will on 5.12.2018. By contrast, the statement suggests that there was a second

contact (after the initial telephone call) when the appointment for 5.12.2018 was made, although it offers no detail in that regard.

85. In addition, the paperwork leaves unanswered key questions. For example, if (as the letter suggests) it was arranged *in November 2018* that Ms Johnson would attend the Deceased's home on 5.12.2018, there is nothing to explain how it was known that the Deceased (then in hospital) would then be out of hospital, bearing in mind that he was only discharged on 5.12.2018 itself.
86. In the circumstances I am unable and unwilling to accept the written hearsay 'evidence' of Ms Johnson. Even if the written accounts are in fact by her, they have nonetheless not been verified by her and, what is more, have not been tested at trial. All in all, having regard to the way in which it has been adduced, I regard her supposed 'evidence' as worthless.

Overview of the Claimants' evidence

87. With the solitary exception of the Second Claimant (who, as the daughter of the First Claimant, has an indirect interest in the outcome of the litigation), none of the Claimants' witnesses in the case – in particular, the supposedly independent attesting witnesses – has testified. It is impossible to ignore the fact that they have not come to court to speak to their claimed accounts. As indicated above, I am not persuaded by the reasons offered for their non-attendance. Further, as I have explained, I regard the evidence of the Second Claimant as unsatisfactory.

The Defendants' witnesses

The First Defendant

88. The First Defendant attended court, spoke to her statement and was cross-examined by the Second Claimant.
89. She gave little evidence of central bearing, although she did confirm that her brother, Samuel Smith, had been the Deceased's main carer and that the Deceased could not read.
90. In cross-examination she said that went round to the Deceased's home very often. She had previously lived at 63 St Pauls Road. Her sons were born there. She had a good relationship with the Deceased. She cooked for the Deceased. She maintained that the Second Claimant was not really on the scene.
91. The First Defendant gave her evidence feistily. It was clear that the relationship between her and the Second Claimant is strained. Nonetheless, I accept the general content and thrust of her account.

Samuel Smith

92. Mr Smith is a brother of the First Defendant, another child of Theodosia. He came to the UK in 1996 and lived, as he still does, at 63 St Pauls Road.
93. Mr Smith is accepted to have been the Deceased's next of kin. He asserts that he took responsibility for the Deceased for the last 7 or so years of his life. He says he took the Deceased to medical appointments. He maintains that the Deceased would not go with anyone except him. He says that they had a great relationship.

94. According to Mr Smith, the Deceased arrived back from the Whittington Hospital, via ambulance, in the afternoon/early evening of 5.12.2018. He was taken by the transport team to his room on the first floor of the house where he settled in his recliner chair. He was wearing clothes given to him in the hospital. Mr Smith says that he gave the Deceased light refreshments and stayed with him until he settled and that he (Mr Smith) then went to his room next door where he remained all evening. He is adamant that no one else (except (i) a friend who delivered some soup before the Deceased returned from hospital) and (ii) his partner who visited him (Mr Smith) in his room) attended the property that evening. Thus he refutes the notion that the Second Claimant and the alleged attesting witnesses (Ms Hall and Ms Johnson) visited. Indeed, he says that he locked the front door and that he alone (along with the Deceased) had the keys to the house, so the Second Claimant could not have visited without his knowledge.
95. Mr Smith was cross-examined effectively by the Second Claimant. He stood his ground on the central points of dispute. However, during his cross-examination, his evidence developed and in some respects departed from his written account. Also, some question marks arose. I give some details below.
96. In his statement Mr Smith says that on 5.12.2018 the Deceased was brought home between 4 and 5pm and that he gave the Deceased his medication and food at 6pm. Yet in his oral evidence though he said that the hospital telephoned him around 4-5pm to tell him that the Deceased would be coming home but that it was not until about 6pm that the Deceased actually arrived back. He (wrongly) denied having said that he gave the Deceased his medication at 6pm, maintaining that it could have been 6.30pm. There was therefore some evident inconsistency and uncertainty in his account about the time of the day, and an apparent shifting of events to slightly later in the day. In this context it is not lost on me that by the time of the trial Mr Smith will have been aware of the time which the photographs relied on by the Claimants are stated to bear (see paragraph 49 above).
97. In his witness statement Mr Smith says that the only other person to attend the property that evening was the soup-bringing friend. Yet in his oral evidence he referred to his now ex-partner visiting him that evening, perhaps around 8pm, and apparently taking some pictures of him sitting on his bed, although he cannot now contact her to obtain them. As the Second Claimant noted, this was new evidence, introduced in his oral testimony in court.
98. When I asked Mr Smith how he could remember the events of, and his movements on, 5.12.2018 he answered that it is in the Deceased's medical records that he was telephoned on that day. However, although the medical records note that the Deceased was discharged on that day, Mr Deeljur was unable to identify any supporting entry referencing a telephone call, although he submitted that the Deceased's discharge from hospital after a month's stay would have been an event of some significance.
99. The Second Claimant questioned Mr Smith about an entry in the Deceased's medical records for 30.8.2018 (SB, p.39). The entry records a GP home visit that day. It includes the following: "*When I arrived, the door to the property was open. I found Mr Francis in one of the rooms upstairs. His son Sammy did not want any involvement and stayed in his room. He was not aware of any home visit.*" Mr Smith responded that he was always there in the house. He said he never left the Deceased. He suggested that he had been setting things up for the Deceased's birthday but it was apparent that this was based on

his mistakenly having thought that the entry related to 10 April. When the correct date was pointed out, he merely reiterated his general stance. He did not directly address the specific incident.

100. The Second Claimant invited Mr Smith to agree that he generally left the front door to the property on the latch. He firmly denied that, saying that he closed the door and that one could not simply push it to access the house, although as I have said he gave no explanation for the entry in the notes.
101. Mr Smith was also asked by the Second Claimant about an entry in the medical notes dated 31.7.2018 (SB, p.39). That entry records that the Deceased had failed to attend a clinic. There was a GP telephone consultation as a result. The associated comment is: “*Some tension as son feeling he cannot accompany Ernest to every appt and Ernest refusing to go unaccompanied.*” In answer Mr Smith reiterated that he always attended the Deceased’s medical appointments, failing which the Deceased would not attend them. He maintained that the Defendant never went to such appointments with others. He repudiated the suggestion which the Second Claimant put to him that he had corresponded with her about medical appointments. He said that she never went to any appointments, although he admitted that he did sometimes telephone the Second Claimant because at the time he thought the Deceased was her grandfather. The purpose of such calls was not fully explained by Mr Smith. He later said that might find it in himself to call the Second Claimant as a “*spur of the minute thing*”. He added that he would only call her when the Deceased was in hospital.
102. The Second Claimant drew Mr Smith’s attention to Mr Izzard’s note of his meeting with the Deceased (OB, p.33). The note includes: “*Ernest informed me that Theodosia did not have a good relationship with her children or past partners and died without making a will, she knew that Ernest would look after their daughter.*” The Second Claimant suggested that this was the case and that explained why Mr Smith was not mentioned in the 2018 Will. Mr Smith dismissed the notion. He disagreed that what is stated in the notes reflects the reality of the situation. Mr Smith was somewhat confrontational in his replies. He rhetorically asked, “*In what way was I not mentioned?*” Of course, it is obvious that he is not mentioned in the 2018 Will, and I consider that he must know this. He then continued to explain that he believes that someone (implying the Second Claimant) arranged the 2018 Will behind his back.
103. I have given careful consideration to Mr Smith’s evidence and to the various infelicities besetting it. I bear in mind that it is apparent that there is no love lost between him and the Second Claimant. I have asked myself whether this has coloured his evidence.
104. Standing back, on the balance of probabilities I am satisfied that, despite the various blemishes, the basic account given by Mr Smith is true and reliable, and I thus accept it. In particular, although Mr Smith’s narration of the events of 5.12.2018 is plainly not perfect (especially as regards the precise timings), I believe it to be substantially accurate. I do not believe that he has tailored the key parts of his evidence to suit his cause or do down the Second Claimant.
105. I do, though, incline to the view that Mr Smith has somewhat overplayed quite how dutiful he was vis-à-vis the Deceased and, allied to that, downplayed the involvement of the Second Claimant in the life of the Deceased. For instance, accepting as I do that Mr

Izzard visited the Deceased at the property in February 2017 and was let into the property by the Second Claimant on that occasion (as recorded in Mr Izzard's note), it is evident that the Second Claimant did have some contact with the Deceased, notwithstanding the contrary impression that Mr Smith would seek to convey. However, I do not regard this as materially distorting his presentation of the key narrative, especially in relation to the events of 5.12.2018.

106. So far as access to the property is concerned, notwithstanding (in particular) the medical note (which has given me considerable pause for thought), I accept Mr Smith's evidence that he did not leave the door on the latch as a matter of routine.

107. It is right to note that Mr Smith was not expressly questioned about the fact that Mr Izzard's note of his meeting with the Deceased states that he was admitted to the Deceased's home by the Second Claimant and that he did not see Mr Smith. There is uncertainty as to how the Second Claimant gained access to the property on that occasion, especially since she does not distinctly address the point in her evidence. I do not speculate on the matter in the circumstances, although I record that, however her presence in the property on 20.2.2017 came about, I am satisfied that it does not undermine Mr Smith's evidence about his being in general control of entry to the house, specifically on 5.12.2018.

108. As for what Mr Izzard recorded in respect of what he was apparently told by the Deceased in February 2017 about Theodosia's relationship with her children and the Deceased's wish to prefer the First Claimant, I accept Mr Smith's rejection of this as an accurate presentation of the position. This is not to impugn the accuracy of Mr Izzard's note; it is not to say that Mr Izzard was not told what he put in his note. My conclusion reflects the fact that the Defendant's grasp of matters in February 2017 was plainly questionable, demonstrated by the fact that (as I find) he told Mr Izzard that Theodosia had died when (as explained below) she had not.

109. As to this, Mr Izzard's note to this effect does not stand alone; in her first witness statement the Second Claimant (who was present at the meeting in February 2017) referred to Mr Izzard's note, effectively endorsing its contents. Likewise, the Particulars of Claim (paragraph 6(f)(v)) report the Deceased as having notified Mr Izzard of the death of Theodosia. Yet the various witnesses who testified before me recalled that Theodosia did not die until perhaps later in 2017 or in 2018, although they were not clear as to the precise date of death. After the hearing, having enquired if her death certificate was available, I have been provided with a copy of it. It confirms that Theodosia died on 18.7.2017. This demonstrates that what the Deceased said in February 2017 was manifestly wrong.

Gloria Bretton

110. The final witness was Gloria Bretton. She is a niece of the Deceased.

111. Her evidence was largely peripheral but she did confirm that the Deceased could not read or write. She does not believe that the signature on the 2018 Will is his.

112. Ms Bretton was cross-examined by the Second Claimant.

113. She maintained that she thought the purported signature of the Deceased on (both) alleged wills to be “too perfect”. She explained that there had been a time when the Deceased had shared a flat with a Mr Douglas. From her knowledge every letter that the Deceased sent back then, including to Theodosia in Jamaica, was in fact written by Mr Douglas at the Deceased’s direction. She assumed that Theodosia had later taken over the role. However, she did not know if, and how, the Deceased had signed correspondence or other documents. She had not read the letters in question.
114. She also said that Mr Smith was the Deceased’s primary carer and that the Second Claimant had not been on the scene much until the last year of the Deceased’s life.
115. Ms Bretton gave her evidence helpfully, in a clear and measured way. She was plainly an honest and credible witness and I accept her evidence in its totality. That said, I reiterate that her evidence only tangentially bears on the central issues, in particular the alleged execution of the 2018 Will.

The Deceased’s medical records

116. These extensive records were put before the court by the Defendants (SB, pp.32 to 634).
117. Counsel for the Defendant referred the court and the Second Claimant to a selection of potentially germane entries, identified below.
118. A note made on 28.4.2015 (SB, p.57) records that the Deceased was in hospital as an emergency admission for delirium and myoclonic jerks between 10.4.2015 and 16.4.2015. This is also borne out by the A&E record (SB, p.459), which records that the Deceased presented at A&E on 9.4.2015 with shaking, and by the hospital record (p.463). Entries on SB, p.74 (dated 20.4.2015 and 28.4.2015 respectively, although the dates likely reflect the entries rather than the underlying events) likewise record an acute kidney injury and delirium as resulting in the hospital admission, and thus provide corroboration. It also appears (SB, p.501) that the Deceased had a follow-up visit at day hospital on 24.5.2015.
119. Turning to 2018, it is undoubtedly the case that the Deceased was admitted to hospital on 3.11.2018 (SB, p.105) and was diagnosed with delirium, sepsis and atrial fibrillation (ibid). He was discharged on 5.12.2018 (SB, p.106). This is supported by the notes (SB, p.109).
120. I accept the history of the Deceased’s health which emerges from the medical records and which I have summarised above.

Medical evidence

121. Aside from the medical records, neither party adduced any expert medical evidence in relation to the Deceased’s capacity at any relevant time.

Findings

122. When all is said and done, there is essentially a straight conflict of fact in relation to the critical events between the accounts given by Second Claimant and Mr Smith.
123. For the reasons I have set out, I prefer the evidence of Mr Smith on such matters.

124. Taking all the evidence in the round, I find on the balance of probabilities that:

- (1) The Deceased could not read or write. He was blind in one eye and poorly sighted in the other. He would have needed the content of any document read and explained to him.
- (2) Mr Smith was the Deceased's main carer. Although the Second Claimant had some contact with the Deceased dating back to at least 2017, and was not wholly excluded from the picture, nonetheless her involvement with him was somewhat marginal, although it increased in 2018, towards the end of his life
- (3) The Deceased gave instructions to Mr Izzard in February 2017 (and not on 29.11.2018), in the presence of the Second Claimant, at his home.
- (4) The Deceased was confused at that time, for he then reported to Mr Izzard that Theodosia had died when, in fact, she did not die until July 2017.
- (5) The fact that there is nothing to suggest that the Second Claimant sought to intervene and correct this misstatement underscores her limited knowledge of the family's situation at the time.
- (6) The Deceased was in hospital from 3.11.2018 to 5.12.2018, having been admitted on an emergency basis with a kidney injury and delirium.
- (7) During that period the Second Claimant came to learn that the instructions given to Mr Izzard had not actually been converted into an executed will. She therefore contacted Simply Wills to procure the completion of will. She was instrumental in organising the 2018 Will.
- (8) Although Ms Frost may perhaps have spoken to the Deceased by telephone during his stay in hospital, there is no reliable or detailed evidence as to the existence or content of any such discussion, and the terms of any such discussion are not established. I am not satisfied that such a conversation took place, let alone (if it did) what was discussed.
- (9) The draft 2018 Will was sent by Simply Wills to the Second Claimant, not to the Deceased (who was then in hospital).
- (10) The Deceased was discharged and returned home (to 63 St Pauls Road) from hospital in the late afternoon/early evening of 5.12.2018 where he was met by Mr Smith who had earlier been telephoned by the hospital to inform him of the discharge.
- (11) The Second Claimant did not reside at 63 St Pauls Road and did not have keys to the property.
- (12) Mr Smith did not leave the door to the property unlocked on 5.12.2018.
- (13) On 5.12.2018 Mr Smith settled the Deceased in his room and gave him his medication and some food. This was around 6 to 6.30pm.

- (14) Thereafter, Mr Smith retired to his room, next to the Deceased's room, where he spent the remainder of the evening, before being joined by his now ex-partner at around 8pm.
- (15) The Second Claimant did not arrange (whether on 5.12.2018 or otherwise) for Ms Hall and Ms Johnson to attend 63 St Pauls Road to witness the Deceased's will on the evening of 5.12.2018.
- (16) Mr Smith did not let the Second Claimant, Ms Hall and/or Ms Johnson into the house that evening.
- (17) Mr Smith did not see or hear the trio in the house that evening. He would have been aware of their attendance had they visited. I reject the possibility, suggested by the Second Claimant, that he might simply not have heard them.
- (18) The Second Claimant, Ms Hall and Ms Johnson did not visit the house and did not witness the Deceased execute the 2018 Will around 6pm (or at all) on 5.12.2018.
- (19) The Second Claimant did not read the 2018 Will to the Deceased.
- (20) Insofar as the Second Claimant's photographs show a person's hands seemingly in the process of signing the 2018 Will purportedly on 5.12.2018 at around 6pm, the evidence does not clearly establish that the person so depicted was the Deceased or when or where the signature was effected. Still less does it prove that any signature was effected in the presence of Ms Hall and Ms Johnson, bearing in mind that there are no images of the alleged witnesses.
- (21) The 2018 Will was not executed by the Deceased (if indeed it was ever signed by him) on 5.12.2018 in the presence of the alleged attesting witnesses, contrary to the case of the Claimants.
- (22) At no stage, let alone close in time to 5.12.2018 when the 2018 Will was supposedly executed, was the Deceased ever the subject of a testamentary capacity assessment by a medical practitioner. Insofar as Mr Izzard may have believed that he personally was satisfied as to the Deceased's competence, not only does the court lack any detailed account from Mr Izzard, verified and tested under oath (and, in particular, it has not had the benefit of hearing what Mr Izzard would make of the fact that, contrary to what the Deceased told him, Theodosia had not died by February 2017), but also and in any event his involvement with the Deceased was back in February 2017 and hence long before the 2018 Will was supposedly executed.

Conclusions

Execution of the 2018 Will

125. Although the will is regular on its face, and despite the starting-point of a presumption of due execution, on the facts I have found I am satisfied that there is cogent evidence which rebuts any presumption or notion that the 2018 Will was properly and validly executed.

126. In my judgment, looking at all the facts and circumstances of the case relevant to the attestation of the 2018 Will, there is strong evidence that on the balance of probabilities the 2018 Will was not executed as it purports to be.

127. I recognise that this is a serious conclusion but it is a conclusion informed and driven by the evidence received (and the evidence not presented to and received) by the court in these proceedings.

128. It follows that I conclude that the 2018 Will is invalid as a matter of form.

Knowledge and approval

129. Since due execution of the 2018 Will has not been proved, knowledge and approval of the contents of the 2018 Will on the part of the Deceased is not to be assumed.

130. Moreover and in any event, the circumstances in which the 2018 Will came about arouse suspicion as to whether (even if he signed the same) the Deceased knew of its contents. So far as relevant, those circumstances include but are not limited to the following: (a) the prolonged gap between the giving of instructions in February 2017 and the claimed execution of the 2018 Will in December 2018; (b) the absence of any evidence to which weight can be given (or any note, contemporaneous or otherwise) regarding any telephone call by Ms Frost on 29.11.2018; (c) the fact that the Deceased was then in hospital and the Second Claimant, indirectly interested in the 2018 Will, was responsible for procuring the same; (d) the fact that the Deceased only came out of hospital on 5.12.2018 after a lengthy stay for a serious illness; (e) the Deceased being unable to read and write; (f) the Deceased having poor eyesight; (g) the fact that I do not accept the Second Claimant's evidence that she read the 2018 Will to him.

131. Consequently, I find that, even if (contrary to the above) the 2018 Will was validly executed, the Claimants have failed to establish that the Deceased knew and approved of its contents.

Testamentary capacity

132. A presumption of capacity does not here arise because the evidence shows that the 2018 Will was not duly executed.

133. Further, I consider that the Defendants have raised real doubts about the Deceased's capacity. The circumstances giving rise to such doubts include the following: (a) as appears from Mr Izzard's note, in February 2017 the Deceased was fundamentally confused as to the existence of his wife, Theodosia, wrongly believing her to have died; (b) in November/December 2018, including at the point when he is supposed to have endorsed the 2017 instructions, the Deceased was in hospital where he had been suffering from serious illness (including delirium) – although I do not have the precise timeline in relation to his recovery; (c) there is no detailed and reliable evidence of the alleged endorsement of his instructions; (d) the Deceased is supposed to have executed the 2018 Will within hours of his discharge from hospital; (e) the 'golden rule' is not met: the Deceased was not seen by a doctor who confirmed his capacity and recorded the examination.

134. In the circumstances, considering everything in the round, I am satisfied that (notwithstanding the need to be slow to overturn a will on this ground) there are in this

case meaningful doubts about the Deceased's capacity which the Claimants have failed to dispel through positive evidence of capacity. I thus determine that the 2018 Will also fails for want of proven testamentary capacity.

Result

135. I pronounce against the alleged 2018 Will.

The letters of administration granted to the Defendants

136. The mere fact that the 2018 Will counts for nothing does not of itself mean that the Defendants were entitled to the grant of letters of administration of the Deceased's estate and are able to resist the Claimants' application for revocation of that grant.

137. Section 46 of the Administration of Justice Act 1925 provides for the order of succession to an estate on intestacy. Step-children do not fall within any category of those entitled; they are not issue of the deceased.

138. Section 46 is complemented by rule 22 of the Non-Contentious Probate Rules 1987 which provides for the order of priority of those entitled to a grant of administration. Unsurprisingly, it mirrors the sequence set by section 46. Again, step-children are not listed; they do not feature as persons eligible for a grant.

139. I raised this with Mr Deeljur after the hearing and sought an explanation of how it is said in the circumstances that the Defendants were entitled to a grant. I also sought the production of the application for the grant.

140. Mr Deeljur's response, having taken instructions, was that the Defendants had applied for the grant on the basis that they lived as children of the household of the Deceased. He also submitted that, whilst the First Defendant had accepted she was a step-child (and not a blood relative of the Deceased), the point had not been put to her, and further that the Second Defendant had not given evidence on the point (or, one might add, at all).

141. As to this:

(1) It is clear from the (unsigned) PA1A probate application form supplied (which I am informed is the same as the original version lodged at the Probate Registry) that in answer to question 3.2: "*How many of the following blood and adoptive relatives did the person who has died have?*" (my emphasis) the Defendants answered that there are 11 surviving sons or daughters.

(2) In panel 3.5, when asked to state the relationship of each of the persons applying for the grant to the person who had died, the Applicants stated, "*Daughter (Next of Kin)*" and "*Son (Next of Kin)*" respectively.

(3) It thus appears that the Defendants did indeed represent that they were children (blood relatives) and not step-children of the Deceased when applying for, and obtaining, the grant.

142. Insofar as Mr Deeljur sought in his response to suggest that the status of the Defendants, in particular that of the Second Defendant, was unclear (through want of challenge or evidence), I reject that contention. It is quite clear that the Defendants are

step-children, not blood (or adoptive) issue, of the Deceased. There is no doubt about that. Indeed, it is not open to the Defendants to contend otherwise because the point was never in issue in the litigation. In the Particulars of Claim (paragraph 2) it is pleaded, “*The Defendants are the Deceased’s stepchildren.*” The response, in the Defence (paragraph 4) is, “*Paragraph 2 of the Particulars is admitted.*” In accordance with this, Ms Spence’s witness statement (paragraph 1) identifies the Deceased as her stepfather. Likewise, counsel’s Dramatis Personae describes the Defendants as step-daughter and step-son of the Deceased respectively. Consequently, there was no need to put the matter to the Defendants, and the Second Defendant’s want of evidence is immaterial.

143. It follows that the Defendants falsely represented their status when applying for the grant. They had and have no standing to obtain a grant.

144. Therefore, I am satisfied that, notwithstanding the void status of the 2018 Will, the grant of letters of administration in favour of the Defendants was wrongly obtained and cannot stand. I shall order that the grant be revoked.

The 2015 Will

145. The result of above leaves for consideration the 2015 Will.

146. As the Defendants submitted, the Claimants have not formally sought a pronouncement in favour of the 2015 Will. They simply set the 2015 Will as background and advanced their case (which I have rejected) in respect of the 2018 Will. The Claimants did not plead the 2015 Will as an alternative (fallback) to the 2018 Will. Hence, although the Defendants (for the reasons outlined below) submit that the 2015 Will is also invalid, their primary case is that it is not actually in issue in this litigation.

147. If and insofar as is necessary, the Defendants challenge the 2015 Will on the following grounds:

- (1) The will is dated 26.4.2015. That was about 1 week after the Deceased had been in hospital suffering from delirium: see paragraph 118 above. There is thus doubt as to his capacity in respect of the 2015 Will.
- (2) The signature of the Deceased on the 2015 Act is not only manifestly different from that on the 2018 Will (being apparently fluently written, using joined-up capitalised letters) but also is hard to credit given not only the Deceased’s inability to write and his poor sight but also (and specifically) the fact that he had very recently beforehand been suffering from shaking.
- (3) Although the Claimants claim in their Response to the Defence that the 2015 Will was signed by the Deceased, they cannot know this given their non-participation in its execution. In this regard it is to be noted that the Claimants say that they were not aware of the 2015 Will until years later when the Deceased allegedly expressed the wish to update his will.
- (4) Where the date of the 2015 Will is written, it appears that someone started to write May rather than April and that the text “MA” (the beginning of “MAY”) was crossed-out and replaced by “APRIL” above it. Below this text appear what seem to be the

initials “CR” and “EF”. Both seem to be in the same hand and to mirror the hand of the person who signed the will.

- (5) The reference to “CR” points naturally to Colin Rodrigues, the named executor. Absent other and direct evidence from those present at the scene, this is strong circumstantial evidence from which it is to be inferred that Mr Rodrigues actually signed the 2015 Will in place of the Deceased.
- (6) Concern in this regard is exacerbated by the fact that there is in the bundle (SB, pp.482-488) an inter-agency safeguarding adults alert form completed by a GP. The form records alleged recurrent verbal abuse by Mr Rodrigues, the Deceased’s carer, to Theodosia, a report of such alleged abuse having been made by her on 14.4.2015, i.e. only 2 weeks before the 2015 Will. It is suggestive of Mr Rodrigues having had considerable control and influence.
- (7) If Mr Rodrigues signed the will, the attestation clause does not so provide and there is no evidence that he did so in the presence of the Deceased and at his direction (so as to meet the requirements of section 9 of the 1837 Act). Cf *Barrett v Bem* [2012] EWCA Civ 52 in which a will was rejected for want of sufficient evidence that the testator’s sister had signed at his direction.
- (8) The attesting witnesses (Omar and Patel) have not given evidence. There is no suggestion of any efforts having been made to contact them (by any party).
- (9) There is no evidence about the preparation of this will from Simple Wills.

148. I agree with the Defendants that the 2015 Will has not been distinctly put forward by the Claimants in these proceedings. For their part the Defendants have not sought any formal relief in respect of the 2015 Will either. Also, the multiple issue of Theodosia who would prima facie be interested in her 25% share thereunder have not been joined to these proceedings.

149. Therefore, although I entertain doubts about the validity of the 2015 Will for the reasons put forward by the Defendants, on the basis that the 2015 Will is not squarely in the arena in these proceedings, the Claimants had no direct hand in its preparation or execution, no relief is expressly sought in relation to it and those concerned are not before the court, I do not consider that it is appropriate to make any ruling on the 2015 Will. As Mr Deeljur submitted, the 2015 Will is not in play in this litigation. I thus make no order in relation to the 2015 Will.

150. The result is that it will remain open to any relevant party to seek probate of the 2015 Will, if they maintain that it is a valid instrument. If, in that event, a dispute is raised, that dispute will fall to be decided on the evidence adduced in that context.

Ending

151. This judgment will be handed down without the need for attendance.

152. I invite the parties to submit a draft order reflecting the above for my approval. I suggest that the Defendants, represented by counsel, take the lead in this regard. The draft should be CE-filed within 1 week of this judgment being formally handed down.

153. If the parties cannot agree the terms of the order or any issues in relation to costs, I shall deal with any consequential issues by way of written submissions or, if I later determine to be appropriate, at a consequential hearing.