

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2023] SC EDIN 38

EDI-A823-19

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the cause

GRAHAM BRUCE SOMERVILLE

Pursuer

against

ALASDAIR RODERICK ALLAN

qua Executor-Nominate of the late Josephine Margaret Allan, and as an individual

Defender

Edinburgh, 25 September 2023

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

FINDS IN FACT

1. The pursuer is Graham Bruce Somerville. The defender is Alasdair Roderick Allan. Jennifer Somerville and Laura Somerville are the sisters of the pursuer. Patricia Somerville is the sister of the defender and the mother of the pursuer, Jennifer and Laura.
2. Josephine Margaret Allan (“the deceased”) was born on 20 June 1945 and died on 28 September 2019. The deceased was 74 years old when she died. The deceased: (i) was the sister of the defender, Patricia and John Allan; (ii) was the maternal aunt of the pursuer; and (iii) preferred to be called Margaret. The deceased died unmarried and without children. The deceased was formerly a nurse. She retired in March 2018.

3. The deceased had a love of animals and owned horses. Ian Butt was the deceased's favourite veterinarian.

4. Since 2013 Christine Judd has been in a relationship with the pursuer. The pursuer and Christine subsequently got engaged and were married in June 2022. Janette Judd is Christine's mother.

5. Over the course of many years the deceased had a very close relationship with Patricia, Jennifer, Laura and the pursuer. The deceased was particularly close to the pursuer. Christine became good friends with the deceased after she became the pursuer's girlfriend and they shared a love of animals. The deceased met Janette through Christine and the deceased became friends with Janette and regularly visited Janette's home.

6. After Christine became the pursuer's girlfriend, the pursuer and Christine would go to the deceased's house, about once a week, for dinner and to watch a TV programme. The pursuer would also regularly telephone and text the deceased.

7. On 13 November 2018 Patricia and the deceased travelled together for appointments with the firm of Blackwood & Smith LLP, solicitors in Peebles. Each saw a solicitor separately and gave instructions for a will to be drafted. The deceased, in the course of providing her instructions, described Patricia as her nearest relative. Blackwood & Smith LLP subsequently drafted wills for both Patricia and the deceased.

8. On 27 November 2018, at Peebles, the deceased validly executed a will (the "2018 will"). The 2018 will appointed the pursuer as the sole executor and provided a residuary legacy for the pursuer, which included the deceased's heritable property at 52 Nether Craigour, Edinburgh (the "deceased's house"). The 2018 will included the following legacies:

- (1) Two signet rings to Jennifer and Laura;

- (2) Car and Bose music centre to the defender;
- (3) Two horses, Dale and Missy, to Ian Butt;
- (4) Cat, Tiger, to Patricia; and
- (5) Any items within her property that Patricia, Jennifer and Laura wish to have.

9. The deceased's house was a small semi-detached one bedroomed house. A spiral staircase led to a single bedroom up the stairs.

10. Prior to April 2019 there was a period of time when the defender did not speak to the deceased. During this period the deceased would see the defender in the park and go over to speak to him, but the defender would just ignore her. There then came a point when the deceased and the defender began speaking again.

11. At some point in the months before her death the deceased told the pursuer that:
(i) her will was in a cabinet in her house under the stairs in the middle drawer; and (ii) she had left everything to the pursuer except for: (a) a few things for his sisters and mother; and (b) her car, which was to go to the defender because he had done a lot of work on it.

12. By April/May 2019 the defender had moved into the deceased's house and was spending each night there.

13. Prior to the defender moving into the deceased's house, the deceased was house proud and kept her house neat, clean and tidy.

14. After the defender moved into the deceased's house: (i) the defender slept on the living floor on a makeshift bed; (ii) the makeshift bed would generally remain in position on the living room floor during the day; (iii) the defender brought numerous items of his property to the deceased's house and these items were strewn across the living room; (iv) the general condition of the deceased's house deteriorated significantly; (v) the pursuer and Christine maintained their weekly visits for dinner and to watch a TV programme with

the deceased when she was not in hospital, but the defender would create an atmosphere, during those visits, by lying across the sofa, which meant that the pursuer and Christine had nowhere to sit in the living room and caused them to sit on the floor or on the stairs while eating their dinner; (vi) on occasions when the pursuer would visit the deceased the defender would shout to the deceased when she was in her upstairs bedroom in an uncaring way; (vii) the defender would shout at the deceased; and (viii) the deceased was scared of the defender.

15. The deceased did not like the condition and untidy state of her house after the deceased moved into her house. The pursuer did not want the defender to remain living in her house, however, she did not like confrontation and, as a result, put up with him living in her house.

16. In April / May 2019 the deceased was diagnosed with declining renal function and heart failure. The deceased also suffered from type 2 diabetes, which was controlled by the administration of insulin. Thereafter, the deceased had various admissions to the Edinburgh Royal Infirmary ("ERI").

17. The deceased's ERI medical records accurately record the observations and impressions of the medical professionals at the date and time attributed to them in the ERI records.

18. In early July 2019 the deceased was admitted to a renal ward at the ERI. At that time Dr Potts, Consultant Psychiatrist, amongst other medical professionals, provided care and treatment to the pursuer. At that time the deceased, as well as suffering from the medical conditions set out in finding in fact 16 above, was suffering from anxiety and was diagnosed with a panic disorder. The deceased was prescribed medication for her anxiety. The deceased commenced haemodialysis on 9 July 2019 whilst still an inpatient. On 9 July 2019

Dr Potts began to wonder about the deceased's cognitive function. However, at that time, the deceased continued to have capacity to make decisions about her medical treatment.

Dr Potts made the following entry in the ERI medical records:

09/07/2019	11:59	Speciality Review	Psychological Medicine RIE	Dr Stephen G Potts	<p>R/v 30' Into her first HD [<i>haemodialysis</i>] session. Looked settled but said "I'm terrified" Unsettled last few nights esp in anticipation of permcath and HD. Reported [<i>sic</i>]that diazepam in current doses insufficiently effective (though I not incontinence and fall)</p> <p>I'm beginning to wonder about cognitive function. She was repetitive, perhaps confused re time of sequence of events, and initially did not recognise me.</p> <p>Imp: continuing problematic anxiety + ? emerging evidence [<i>sic</i>] of cognitive deficits – mild if present, not impairing capacity.</p> <p>PLAN: I have increased 6pm diazepam to 7mg, and kept the additional 2 mg prn dose for 10pm We'll need to establish baseline cognitive function via a MOCA when she is not on dialysis or unduly anxious. Not urgent</p> <p>I'll review Friday 12/7</p>
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19. The deceased received dialysis three times a week on a Tuesday, Thursday and Saturday. Dialysis changed the balance of minerals and electrolytes in the deceased's body. Dialysis made the deceased tired, a bit confused and left her feeling washed out. The effect of the deceased's renal failure made the deceased's legs swell, which resulted in her having difficulty with her mobility.

20. On 16 July 2019 the deceased had her cognitive function formally tested by way of a Montreal Cognitive Assessment ("MOCA"). Her MOCA score was 21 out of 30, which was consistent with a mild cognitive impairment. On 16 July 2019 Dr Potts reviewed the deceased. Her anxiety symptoms were persisting. Her mood was lifted by fluid coming off her legs and her mobility improving as a result. Dr Potts noted the MOCA result and noted a further MOCA should be undertaken once the deceased's anxiety and pain had settled and she was established on dialysis.

21. On 31 July 2019 the deceased attended a multi-disciplinary team (“MDT”) meeting. At that time the deceased remained an in-patient at the ERI. The MDT meeting was attended by Patricia, Laura and the pursuer. During the meeting the deceased was reiterating that she wanted to go home. All the multi-disciplinary professionals were explaining the reasons why it would not be safe for the deceased to return home. During the meeting at least some of the deceased’s family members were getting frustrated with the deceased. At some point Patricia walked out of the meeting due to the deceased not listening to the medical professionals. Laura then left the meeting to check on her mother. After the meeting the deceased was visibly upset. Dr Whitworth made the following entries in the deceased’s ERI records on 1 August 2019 regarding the MDT on 31 July 2019 and the deceased’s attitude to being discharged:

01/08/2019	09:50	Progress Notes	Renal Medicine	Dr CE Whitworth	<p>WR Whitworth</p> <p>Meeting with family on 31/7/19 – lasted 1.5 hours. Present: nephew Graham, niece Lauren [sic], sister Susan [Patricia], Mrs Allan, Dr Whitworth Consultant, Dr Geddie Clinical Fellow, PT, OT, SW, Nicola Byers DCN.</p> <p>Difficult meeting. Mrs Allan very resistant to offers of options. She was clear she wished to go home and was resistant to the idea that she would not be able to go home and access upstairs bedroom and bathroom. Offer of downstairs commode. Family fairly silent throughout meeting and did not offer any alternative suggestions. Options of sheltered housing and residential care rejected by Mrs Allan. Physical modifications of house rejected by Mrs Allan. Final agreement that she would allow OTs to visit her home to see how commode could be installed and downstairs bed. She was very insistent she would go home after meeting, requesting that family take her home after the meeting. Advised by whole MDT and family that going home to her current home situation is not safe nor practical. The dangers of going home were explicitly explained, including leading to an even longer hospital admission and potentially death. We will accept that she has capacity to make her own decisions.</p>
01/08/2019	12:10	Ward Round	Renal Medicine	Dr CE Whitworth	<p>[...]</p> <p>Tearful this morning Desperate to go home Feels she cannot see any way forwards – cannot envisage living anywhere else and not willing to accept home adaptations</p>

					<p>Upset that she has fallen out with her family over this</p> <p>Wants to go home and 'just take her chances'</p> <p>I explained clearly we think this would be unsafe and is therefore against medical advice</p> <p>[...]</p>
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22. On 2 August 2019 the deceased reported to Dr Whitworth that the pursuer had a welfare and continuing power of attorney in respect of her. The pursuer had also told ERI staff that the pursuer was her next of kin ("NOK").

23. On 3 August 2019 the pursuer told ERI staff on the telephone that the family will contact the deceased and did not currently want to speak to her. On 4 August 2019 the deceased was very emotional on the ward and pulled her phone apart. She attempted to call various family members multiple times for a variety of reasons. The pursuer then came to visit the deceased but she was rude to him and the pursuer subsequently left. The deceased then became very irate and inconsolable and the ERI staff had to take her off the ward in order to calm her down. The deceased was very difficult to reason with and her anxiety about her home situation was increasing. At that time the deceased was self-managing her diabetes with insulin.

24. On 5 August 2019 the deceased was discharged from the ERI. Earlier in the day on 5 August 2019, prior to the deceased being discharged, the deceased was unsteady with a walking stick and was expressing paranoid views, including that someone on the ward had drugged her. Christine and her mother came to the hospital to take the deceased home but she refused to go with them and was uncharacteristically nasty to the Christine. The deceased referred to Christine as "Laura". The deceased was seen by Dr Smyth, Consultant Psychiatrist. At that time the deceased continued to express some paranoid ideas but these were challengeable and not held with delusional intensity. Dr Smyth considered detaining

the deceased under the Mental Health Act but decided, on balance, that the least restrictive option was to allow the deceased to go home with family support. The following entries, amongst others, were made in the deceased's ERI records on 5 August 2019:

05/08/2019	02:01	Progress Notes	Renal Medicine	Dr Jane Goddard	<p>[...]</p> <p>She appears unsteady with a walking stick and is very keen to go home She has packed her bag and is standing by the ward entrance to leave No previous documentation of cognitive impairment Oriented to time place person I think she has capacity to a good extent to make decisions around her health needs but I am not sure if she has adequate insight about her ability to cope in her current home environment and risks of leaving hospital now</p> <p>[...]</p> <p>I am not convinced that she understands the risk of leaving hospital against advice and she avoids talking about this when I asked if she can tell me this back.</p> <p>[...]</p>
05/08/2019	04:59	Progress Notes	Renal Medicine	Jennifer M Clarke	<p>[...]</p> <p>Tricky to assess whether she has capacity to leave hospital. Seems aware of the risks of going home now but does not know how she will manage at home [unable <i>sic</i> to tell me that she was readmitted on same day as discharge following 1 month admission].</p> <p>[...]</p>
[...]					
05/08/2019	11:08	Progress Notes	Renal Medicine	Occupational Therapist	<p>[...]</p> <p>O.T. phoned Graham patient's nephew. Graham <i>sic</i> stated that it was to be his Fiance Christine and uncle Alistair and Alistair's wife. Graham <i>sic</i> stated that patient has been out to house 02/08/19 with family and had managed the stairs then. Graham also stated that if patient is not wanting to accept commode or feels environmental assessment is not required then as a family they would <i>sic</i> be accepting of her coming home today 05/08/19.</p> <p>[...]</p>
[...]					
05/08/2019	13:22	Consultant Review	Renal Medicine	Dr Jane Goddard	<p>Discussion with Lucy McFadyen OT – Ms Allan is adamant she not having a commode in the house – the home visit was to ascertain if there was room for this so she feels little point in the visit if she is not going to accept this. Pt states she has a recliner chair downstairs but again it is considered likely that she</p>

					<p>will simply go upstairs when at home. Home OT visit therefore cancelled as pt not willing to accept commode for downstairs living. Her nephew Graham has, however stated to Lucy that Margaret managed the stairs at home at the weekend when on pass. She has accepted home OT assessment once discharged. They will help her with shopping/taking out to shop.</p> <p>Discussion with Graham Sutherland – nephew and NOK – confirms she went out at the weekend to see horses and go home and managed the spiral stairs safely if slowly.</p> <p>He confirms she is adamant she will not have a commode in the house. We have agreed that we can put in equipment for downstairs living but that even with, she is able to make her own decisions about whether [sic] she will live up or downstairs anyway. We have talked about this being a high risk discharge particularly given the rapid return last time and our concerns but that she does understand the risks and our concerns and is able to make this decision herself. From our earlier conversation, Margaret is able to comprehend these risks and is clear she wants to take them to be home and remembers her rapid readmission the last time.</p> <p>[...]</p>
05/08/2019	16:08	Consultant Review	Renal Medicine	Dr Jane Goddard	<p>The Fiance of Ms Allan’s nephew and her friend have come to take her home. However Ms Allan has woken up paranoid and aggressive. She initially was refusing to go with them now insisting on leaving but at the same time refusing to go with nephew’s fiance and is being uncharacteristically nasty to her. She is expressing that someone on the ward has drugged her and other paranoid ideas re. staff actions. This is very different from the lady we talked with this morning and is not safe to go home. I have discussed this with nephew’s fiancee and that we are going to talk with liaison psych about appropriate sedation and potential section. Roger Smith is very kindly going to come and assess with us. Separate from current events it is a concern that Ms Allan has told family no one has discussed driving with her and she can do this. Dr Whitworth’s note is categorical she has been told not to and reiterated today. I have reinforced to family as d/w nephew she should NOT drive – medically unfit and on sedatives, and should inform DVLA</p> <p>[...]</p>
05/08/2019	17:08	Speciality Review	Psychological Medicine RIE	Dr Roger S Smyth	<p>ATSP [<i>asked to see patient</i>] regarding acute change in mental state with apparent paranoia, agitation, and increased arousal.</p> <p>History below noted. Patient previously seen by Dr Pretorius and referred to Dr Potts. Anxiety Disorder.</p> <p>At interview was somewhat more settled than reported one hour ago (family confirmed this). However, remained somewhat over-aroused. Initially slightly suspicious but then settled somewhat. Reports some paranoid ideas – e.g that</p>

					<p>staff not not [<i>sic</i>] check that her meals really are vegetarian – no thought disorder, hallucinations, or wider delusional system. Ideas are challengeable and not held with delusional intensity. Reports very poor sleep last night. No overt mood symptoms or marked signs of acute confusion.</p> <p>[...]</p> <p>Opinion: The optimal plan here is that she stays overnight and allows us to offer her a mild hypnotic, with hopefully good effect, and is then discharged post-dialysis. However, she adamantly refuses this, leaving us with a choice between a discharge at increased risk of rapid breakdown, or of using MHA powers to detain her – which she would bitterly resent.</p> <p>I think that, on balance, the least restrictive current course is to allow her home with the family support which is currently available.</p>
05/08/2019	17:23	Consultant Review	Renal Medicine	Dr Jane Goddard	<p>As per Dr Smyth – discussions with patient, nephew by phone and nephew's fiancée in person</p> <p>[...]</p> <p>Reiterated again by myself and Dr Smyth she must not drive – we will also be informing DVLA we have told her this as there is the impression she is 'hearing but not heeding' us</p> <p>[...]</p>

25. Prior to the deceased being discharged on 5 August 2019 the deceased told her family that the medical staff at the ERI had not discussed driving with her and that she could drive. That was incorrect. Rather, the deceased had been categorically told by medical staff, prior to making the foregoing statement to her family, that she should not drive. The deceased was hearing but not heeding the advice not to drive from the medical staff. The deceased remained adamant that she could drive and the pursuer was concerned that the deceased would try and drive after being discharged. In the circumstances Patricia took the deceased's car keys and gave them to the pursuer. The pursuer then retained the deceased's car keys, for a few days, to prevent her from driving and causing an accident.

The deceased was told, on several occasions, that the pursuer had her car keys and the reason why he had taken them.

26. Between July and 5 August 2019 the deceased was regularly visited in hospital by the pursuer, Patricia, Christine, Jennifer and Laura. During that period the defender either did not visit the deceased in hospital or only visited her seldomly.

27. After being discharged from the ERI the deceased attended the ERI for dialysis on Tuesday 6, Thursday 8 and Saturday 10 August 2019. The deceased attended dialysis by transport arranged by the ERI. The defender did not, on any occasion, take the deceased to dialysis.

28. Whilst attending the ERI for dialysis on 6 August 2019 the deceased was distressed at the loss of her driving licence. She felt trapped and isolated as a result of this loss and was concerned that she would not be able to visit her horses. The deceased advised the dialysis nurse that she felt in low mood and questioned her ongoing desire to live.

29. On 6 August 2019 the deceased telephoned Christine saying words to the effect that she could not breathe or move. At this time the deceased was in her house with the defender. Christine called an ambulance and drove to the deceased's house. When Christine arrived the deceased was hyperventilating, crying and in a complete panic. The defender was lying on the sofa. The deceased told Christine that the defender would not call her an ambulance. The ambulance crew arrived in the region of 20.00 hours (all times are given using the 24 hour clock). When the ambulance crew arrived the deceased was sitting in a chair and was distressed and weepy. The ambulance crew checked the deceased's blood sugar levels and ascertained that she had not eaten for a considerable period of time. They said that the deceased needed something to eat immediately. The defender offered to get the deceased food from a chip shop. Christine made the deceased

some food and calmed her down. The out-of-hours doctor was contacted and gave advice to the ambulance crew. The pursuer, Patricia, Jennifer and Laura all came over to the deceased's house. The deceased and Christine spoke to the out-of-hours doctor between 22.03 and 22.05. The deceased did not want to be admitted to hospital. The doctor agreed that the deceased would not be admitted to hospital and would attend a planned appointment with her GP the next morning. The defender knew that: (i) the deceased was distressed; (ii) the deceased had stated she had difficulty breathing; and (iii) the deceased had asked him to call her an ambulance. In such circumstances the defender ought to have called an ambulance for the deceased. The defender failed to do so and showed a lack of care toward the deceased during the incident on 6 August 2019.

30. On 7 August 2019 the deceased refused to allow anyone to administer her insulin. On that date she was also seen by her GP, Dr Alexander Blair and was tearful during that appointment.

31. On 8 August 2019 the deceased's house remained in an untidy state. The deceased did not want the social work department to visit her house due to the poor state of it. On that date the deceased telephoned Patricia and was crying as she wished for Patricia to visit her. Around that date: (i) Patricia would take the deceased out and when Patricia brought her back to the deceased's house, the deceased would plead with Patricia to stay with her; (ii) Patricia was struggling to provide support to the deceased as the deceased wished Patricia to be with her most of the day and into the evening; and (iii) the deceased was confused and uncharacteristically aggressive.

32. On 9 August 2019 an occupational therapist ("OT") attended at the deceased's house. The defender answered the door. The OT explained that she had received a referral from the hospital and was visiting to see how the deceased was managing since her discharge.

The deceased and the defender would not let the OT in the deceased's house and said they did not need social work input. The deceased, however, did agree for the OT to take her to visit her horses on the following Wednesday. The deceased then said to the OT that her legs were giving way and the defender assisted her into her living room. The OT then left.

33. On 9 August 2019 Patricia took the deceased to an appointment with her GP. On that date the deceased was asking Patricia to take her on a trip anywhere. When Patricia declined to take the deceased on a trip the deceased started crying and said she was going to end it all. Patricia reported the above to the social work department by text message sent at 10.22 on 9 August 2019.

34. On 9 August 2019 the defender contacted Blackwood & Smith LLP to advise them that the deceased wished to discuss the 2018 will.

35. The deceased had consultations with her GP on 25 July, 7 August, 9 August, 14 August, 16 August, 26 August and 30 August 2019. At those consultations the deceased had capacity to make decisions about her medical treatment.

36. On 10 August 2019 the deceased fell twice whilst going to or returning from dialysis. On that day the deceased was crying non-stop and talking about ending it all. Patricia took the deceased out and she could hardly walk. Patricia and another had to help the deceased. The deceased kept bending over and needed to be held up most of the time. Patricia reported the above to the social work department by text messages sent at 23.44 and 23.50 on 10 August 2019.

37. Around 9 August to 11 August 2019 the defender prepared a will on his computer for the deceased (the "2019 will"). The terms of the 2019 will that the defender prepared for the deceased were as set out in finding in fact 41 below.

38. James Edwin White is a friend of the defender. They met a number of years ago through a proprietors' association. At some point shortly before 11 August 2019 the defender contacted Mr White and asked him if he would be willing to witness the deceased signing the 2019 will. Mr White agreed.

39. On 11 August 2019 Mr White drove to the deceased's house. Mr White met with the deceased outside the deceased's house in his vehicle. The deceased had the 2019 will in her possession. Mr White knew that the 2019 will that the deceased had in her possession was the deceased's will that he had been asked to witness her signing. A piece of paper had been placed over the upper part of the 2019 will so that Mr White could only see the lower part of the 2019 will commencing with the line beginning "Signed this day,..."

40. On 11 August 2019 Mr White witnessed the deceased sign the 2019 will. When he did so the piece of paper remained covering the upper part of the 2019 will.

41. The 2019 will was in the following terms:

“ **Last Will and Testament.** ”

I, Josephine Margaret Allan, born 20th June 1945, Inverkeithing & currently residing at 52, Nether Craigour, Edinburgh EH17 7SB, being of sound mind, make the following testimony voluntarily and without pressure from any other person, in order to settle the succession to my estate after my death, provide as follows:-

1. **Revocation** : I revoke all prior wills and testamentary writings.

2. **Executors** :

I appoint my younger brother, Alasdair Roderick Allan, [address], to be the sole executor of this Will.

3. **Declaration** : I do solemnly declare that in the event of my death, it is my express wish that all my worldly goods, house, possessions, property, animals & live-stock fall into the ownership & care of my brother, Alasdair Roderick Allan, with the provision that he oversees the safe transport of my horses, Dale and Missy, into the trusted care of Mr. Iain Butt, [address].

Signed this day, 11th August 2019, at Edinburgh [signed by the deceased] in the presence of
:

Witness : [signed by James Edwin White] James Edwin White
[address of James Edwin White]
Witness :"

The name and address of Mr White and "11th" was handwritten. The word "Edinburgh" where it appears after "August 2019, at" was handwritten and appeared to be initialled by the deceased. Mr White did not handwrite the word "Edinburgh" or "11th".

42. The defender is the sole executor and the sole beneficiary under the 2019 will.

43. On 11 August 2019 the deceased's diabetes was, to some extent, poorly controlled and the state of her health was very poor.

44. On 13 August 2019 the defender drove the deceased to Blackwood & Smith's offices in Peebles. On that date the deceased was thin, extremely pale and slightly jaundiced looking. The deceased appeared to be very ill and was finding it difficult to walk for long periods. She smelled unclean generally. Emma Lawrie, solicitor, met with the deceased in Blackwood & Smith's property shop due to the deceased having mobility issues. The defender accompanied the deceased to the meeting and sat down next to her in the meeting room. The deceased then handed Ms Lawrie the 2019 will and said she wanted to replace the 2018 will. At that point Ms Lawrie asked the defender to leave the meeting room. Ms Lawrie then spoke to the deceased in private. Ms Lawrie looked at the 2019 will and asked the deceased why she had made such major changes. The deceased advised that: (i) since the pursuer had found out that he was to benefit from everything in the 2018 will she had not seen him in over a year – he had not been at her house or anywhere near her; and (ii) the defender was now the person who was helping her out with everything due to her being very ill. The deceased went onto to discuss arrangements for her horses and cat and said she knew that the defender "would do right by them". The deceased also stated that she felt

as though Patricia and her daughters wanted her out the house and into a care home. She also noted that each time she was in hospital, Patricia would go into her house and read her mail. The deceased confirmed to Ms Lawrie that all was to go to the defender.

45. Ms Lawrie said to the deceased that she should think about putting a power of attorney in place. Ms Lawrie explained what a power of attorney was and what it meant. She asked the deceased who she wanted appointed as her attorney and she said the defender because at that point he was taking her up and down to hospital three times a week for dialysis. After Ms Lawrie had discussed the 2019 will and the power of attorney with the deceased, she asked the defender to come back into the meeting room. Ms Lawrie asked the defender if he was happy to act as the deceased's attorney and he agreed. Ms Lawrie did not ask the deceased any questions about how the 2019 will had been prepared.

46. Although the deceased was upset at points during her meeting with Ms Lawrie, Ms Lawrie did not have any concerns about the deceased: (i) being vulnerable; (ii) lacking capacity; or (iii) being unduly influenced. Ms Lawrie thought the deceased's upset was due to being fearful of returning to hospital and was satisfied that the deceased told Ms Lawrie her true wishes. The defender did not act in a domineering way towards the deceased at the meeting. Ms Lawrie thought that the defender was a somewhat timid person, almost shy.

47. At the meeting with Ms Lawrie the deceased gave two reasons for changing the 2018 will. These two reasons were as follows:

- (i) since the pursuer had found out that he was to benefit from everything in the 2018 will she had not seen him in over a year – he had not been at her house or anywhere near her;

- (ii) the defender was now the person who was helping her out with everything due to her being very ill;

The deceased believed the above two reasons to be true, however, both of those reasons were factually incorrect.

48. The true position was that:

- (i) the pursuer regularly visited the deceased at the her house throughout 2019 when she was not in hospital, which included Christine and the pursuer going to the deceased's house for their dinner once a week;
- (ii) the pursuer took the deceased to medical appointments;
- (iii) when the deceased was in hospital between July and August 2019 she named the pursuer as her next of kin ("NOK");
- (iv) the pursuer, Patricia, Jennifer, Laura and Christine regularly visited the deceased in hospital between July and August 2019 and were regularly involved in discussion with ERI staff about the deceased's care;
- (v) the pursuer, Patricia, Jennifer, Laura and Christine were all involved in helping the deceased in July and August 2019 and constantly provided support to her during that time;
- (vi) the nature of the deceased close relationship with the pursuer did not change between the granting of the 2018 will and the deceased's death.
- (vii) the defender, on occasions, spoke to the deceased in a uncaring way;
- (viii) the incident with the ambulance crew on 6 August 2019, as described in finding in fact 29, showed that the defender acted towards the deceased in an uncaring way during that incident;

- (ix) the defender only visited the deceased in hospital on very limited occasions;
- and
- (x) the defender had minimal involvement in the deceased's care when she was in hospital

Given the above, as at 13 August 2019: (i) the deceased had very regularly seen the pursuer in the last year, which included regularly seeing him at her house; and (ii) the defender was not the person who was helping the deceased with everything due to her being very ill.

49. At the meeting with Ms Lawrie the deceased said that she wanted the defender to be her attorney because at that point he was taking her up and down to the hospital three times a week for dialysis. That was incorrect. The hospital arranged the transport to take the deceased to dialysis three times and week and the defender did not ever take the deceased to dialysis.

50. Around 14 August 2019 the deceased made an attempt to complete the Daily Express crossword, dated 14 August 2019.

51. On 16 August 2019 the deceased was again admitted to the ERI. On 17 and 18 August 2019 the deceased was doing crosswords on the ward.

52. On 20 August 2019 the pursuer and Patricia were visiting the deceased who then refused Patricia permission to be present when Dr Potts spoke to the deceased. At that time: (i) Dr Potts thought that the deceased had not lost capacity for decisions about placement, support or medical treatment and that it would be difficult to justify detaining the deceased under the Mental Health Act; and (ii) the deceased had not lost capacity for decisions about placement, support or medical treatment. Dr Potts made the following entry in the ERI records:

20/08/2019	19:31	Specialty Review	Psychological Medicine, RIE	Dr Stephen Potts	<p>Patient now available. Attended by nephew [sic] and sister who [sic] seeks to join discussion. Patient refuses me permission to d/w sister so seen alone.</p> <p>Issues as noted above, plus:</p> <ol style="list-style-type: none"> 1. Firm refusal to have me speak to family, despite [sic] my best efforts to persuade 2. Firm refusal to take antidepressants, fearing side effects - despite complaints [sic] of low mood and anxiety 3. Does not accept team views about safety of discharge or placement. Continues to refuse help at home or alternative placement 4. Minimises degree to which HD was causing problems 5. not currently seeking to d/c dialysis <p>I have advised her firmly to participate in tomorrow's meeting with an open mind and a willingness to accept support, if only for a trial period. I don't [sic] think she will.</p> <p>On the basis of this evening's discussion I do NOT think she has lost capacity for decisions about placement, support or medical treatment. She disagrees - but this is not the same thing as lacking capacity.</p> <p>I would find it very difficult to justify MHA detention to keep her in hospital [sic] against her will and I am not sure what purpose [sic] it would serve.</p>
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53. At some point between July and 20 August 2019 the deceased volunteered to Dr Potts that she was bequeathing her estate, which consisted of a house or a flat, to the pursuer.

54. At some point or points in the months before her death the deceased told Janette she wanted: (i) the house to go to the pursuer; (ii) her cat to go to the pursuer's mother; (iii) her jewellery, photo albums and any other personal belongings to go to the pursuer's two sisters; (iv) her car to go to the defender; and (v) her horses to a vet.

55. On 28 August 2019 the deceased attended an appointment at Blackwood & Smith's offices in Peebles. The deceased met with Sally Swinney, solicitor, for a short period. Ms Swinney had not met the deceased before. A financial and welfare power of attorney had been prepared for the deceased following her instructions to Ms Lawrie on 13 August 2019.

Ms Swinney witnessed the deceased sign the financial and welfare power of attorney, which appointed the defender as the deceased's attorney. At that time, Ms Swinney did not have any concerns about the deceased's capacity to grant the financial and welfare power of attorney. Neither the deceased nor the defender told the pursuer, Patricia, Jennifer, Laura or Christine about the power of attorney.

56. Around 31 August 2019 the deceased made an attempt to complete the Daily Express crossword, dated 31 August 2019.

57. Around 10 September 2019 the deceased underwent a brain scan. There were no acute lesions but marked ventricular enlargement out of keeping with her age. This meant that the deceased's brain was vulnerable to the effects of infection, medication and the fluid shifts of dialysis. At this time the deceased was partly disoriented to time and place. She was notably confused after dialysis.

58. On 13 September 2019 Dr Potts reviewed the deceased. Cognitive deficits were still evident. The deceased was incorrect about the length of her stay in hospital and was unsure what day it was. The deceased complained bitterly about having no cough linctus when the medicine chart showed otherwise. The deceased's capacity to make decisions about medical treatment was, at that time, fluctuating and marginal. The deceased had a better prospect of having capacity on a non-dialysis day.

59. Around 14 to 16 September 2019 the deceased undertook further MOCAs. The deceased scored: (i) 15/30 on a non-dialysis day; (ii) 12/30 post dialysis; and (iii) 15/30 on the next non-dialysis day. A score of 15 out of 30 indicated moderate to severe cognitive impairment.

60. On 17 September 2019 Dr Potts reviewed the deceased. The deceased was more cognitively impaired, with deficits in orientation and memory. She was using compensatory

confabulation and voicing unfounded criticism of various aspects of her care. At that time the deceased had lost capacity to make decision about her medical treatment.

61. On 20 September 2019 the defender asked the staff at the ERI not to tell the deceased's wider family about the power of attorney in his favour.

62. On 25 September 2019 the pursuer attended the nurses' station on the deceased's ward at the ERI and asked for the defender to be removed from the system and not to be informed about the deceased.

63. On 26 September 2019 members of the Somerville family were upset at the ERI and told staff that the defender had changed the deceased's will. They also sought access to the deceased's medical records.

64. On 27 September 2019 Patricia and her daughters advised ERI staff that they had discovered that the defender had power of attorney in respect of the deceased and that they were engaging lawyers to challenge it.

65. Around the time of the deceased's death, in September 2019, her house was in an extremely poor condition. The defender's belongings were strewn across the living room. The living room was a complete mess. The kitchen floor was filthy with at least one mouse trap lying on the kitchen floor. The kitchen work tops were cluttered.

66. Between July and September 2019 the deceased was not assessed for testamentary capacity.

FINDS IN FACT AND LAW

1. That the terms of the 2019 will were unheralded.
2. That the deceased did not receive any independent advice or assistance before making the 2019 will.

3. That when making the 2019 will on 11 August 2019 the deceased: (i) understood that she was changing her will and making the defender her sole beneficiary; (ii) understood that all her belongings, including her house, would be going to the defender; and (iii) comprehended and appreciated that the pursuer and the rest of the Somerville family would have had an expectation of being beneficiaries under any will made by her.

4. That the deceased made the 2019 will on 11 August 2019 because of the following two reasons: (i) since the pursuer had found out that he was to benefit from everything in the 2018 will she had not seen him in over a year – he had not been at her house or anywhere near her; and (ii) the defender was now the person who was helping her out with everything due to her being very ill. Those two reasons were incorrect. Those two reasons influenced the deceased's will in disposing of her property and brought about a disposal in the 2019 will, which, if the deceased had been of sound mind, she would not have made.

5. That the deceased lacked testamentary capacity when she made the 2019 will and therefore the 2019 will should be reduced.

6. That upon the 2019 will being reduced the defender will have no title to intromit with the deceased's estate. The defender continues to have access to the deceased's house. In the circumstances when decree of reduction is granted, decree of interdict should also be granted to prevent the defender from intromitting with the estate of the deceased.

FINDS IN LAW

1. That the defender has failed to prove that the deceased had testamentary capacity when she made the 2019 will on 11 August 2019.

2. That, as a result of the deceased lacking testamentary capacity when she made the 2019 will, the 2019 will is void and is reduced.

3. That decree of interdict against the defender preventing him from intromitting with the estate of the deceased is granted.

NOTE:

Introduction

[1] The deceased's main asset was her house. On 27 November 2018 the deceased validly executed the 2018 will that had been drafted by Blackwood & Smith LLP, solicitors. The 2018 will appointed the deceased's nephew, the pursuer, as sole executor, left some relatively minor legacies and provided a residuary legacy for the pursuer (which included the deceased's house). On 11 August 2019 the deceased signed the 2019 will that had been drafted by the deceased's brother, the defender. The 2019 will revoked all prior wills and testamentary writings, appointed the defender as sole executor and made the defender the sole beneficiary (which included the deceased's house). The deceased passed away on 28 September 2019.

[2] In this action the pursuer craves for:

- (1) the reduction of the 2019 will on the following grounds: (i) lack of testamentary capacity of the deceased to validly execute the 2019 will; (ii) facility and circumvention; or (iii) undue influence on the part of the defender; and
- (2) interdict preventing the defender from intermitting with the estate of the deceased.

The pursuer also added by amendment, at the end of the proof, two fall-back craves, which crave, in the event of the 2019 will not being reduced, that:

(3) the 2019 will should be rectified so that the defender is appointed as executor and trustee to exercise his judgment and discretion as to the distribution of the deceased's estate; and

(4) a declarator should be granted that there is no presumption that the 2019 will is self-proving under section 3 of the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act").

[3] The proof was heard over 9 days, namely, 3, 4, 5 and 6 April, 13 and 20 June and 24, 25 and 27 July 2023. Mr Macleod, advocate, appeared for the pursuer and Mr Wilson, solicitor, appeared for the defender. The parties had agreed some background facts in a joint minute of admissions and also agreed that a signed statement from Emma Lawrie, solicitor, was to be received into evidence. The pursuer called the following 10 witnesses to give evidence:

1. The pursuer;
2. Patricia Somerville (the pursuer's mother and sister of the deceased, the defender and John Allan);
3. Mary Bell (the deceased's friend);
4. Gordon Bell (the deceased's friend);
5. Dr Dan Lee, Consultant Geriatrician (skilled person);
6. Christine Judd (the pursuer's now wife);
7. Laura Somerville (the pursuer's sister)
8. Janette Judd (mother of Christine Judd);
9. John Allan (the brother of the deceased, defender and Patricia);
10. Jennifer Somerville (the pursuer's sister).

As several of the pursuer's witness have the surname Somerville and two have the surname Judd I have referred to those witnesses by their first name.

[4] The defender called the following five witnesses to give evidence:

1. Dr Alexander Blair (the deceased's GP);
2. Dr Stephen Potts (the deceased's treating consultant psychiatrist);
3. The defender;
4. Sally Swinney, solicitor; and
5. James Edwin White (the defender's friend and witness to the signing of the 2019 will).

[5] The evidence covered the last 6 months of the deceased life in some detail and included numerous references to the deceased's GP and ERI records (respectively productions 5/1/2 and 5/3/3). In the circumstances I considered that it was important to set out the evidence at some length and thereafter deal with each of the issues set out at para 2 above. This has resulted in a lengthy judgment.

The Evidence

The Pursuer's evidence

[6] The pursuer is 33 years of age and was self-employed. He got married to Christine in June 2022 and had been engaged to her for about two years prior to the date of the marriage. The deceased, who preferred to be called Margaret, was his maternal aunt and his mother's sister. His mother, Patricia, also had two brothers, the defender and John Allan. The pursuer has two sisters, Jennifer and Laura.

[7] The deceased had lived at her house for as long as the pursuer could remember. The deceased's house was very small, it was semi-detached with a single bedroom up the stairs.

The pursuer had, for about the last 10 years, lived at an address that was about a five minute drive from the deceased's house. The deceased was shy but friendly when you got to know her. She only trusted a few people. She had a good sense of humour and was very kind and generous. The pursuer had a close relationship with the deceased and he considered her to be his second mother. From a young age the deceased took the pursuer horse riding and the pursuer would be at her house most days. Once the pursuer met Christine they would go to the deceased's house for dinner every week and the pursuer would see the deceased once or twice a week. If the pursuer had any problems he would go to the deceased. The pursuer would generally see the deceased at her house but sometimes the deceased would come round to the pursuer's house or he would see her at the horse stables where the deceased had horses. The horse stables were originally at Bilston but then the horses were moved to Pentland Stables in Damhead when the deceased's health started to decline.

[8] The deceased rarely socialised. If she did it would be with the pursuer's mother or the landlady at the stables, Betty. At the back end of 2018 the pursuer was still working as a nurse in a nursing home. At that time the pursuer thought that: (i) his mother and the deceased were on good terms and met up once or twice a week; (ii) the deceased did not have a friendship with the defender; and (iii) the deceased did not see her brother, John Allan, due to a previous family fall out. At that time the deceased's health was good, but she had been diagnosed with diabetes. The deceased was upset about that diagnosis but overcame that upset.

[9] The pursuer was taken through the terms of the 2018 will. Ian Butt was the deceased's favourite vet. The pursuer became aware of the contents of the 2018 will in April / May 2019. At that time the deceased had told the pursuer that her health was not good. She told the pursuer that her will was in a cabinet in her house under the stairs in the

middle drawer. She told the pursuer that she had left everything to the pursuer except for: (i) a few things for his sisters and mother; and (ii) her car, which was to go to the defender because he had done a lot of work on it. The pursuer explained that the deceased had previously suggested that she would leave everything to the pursuer but this was the first time he had heard anything about a will. The deceased did not tell the pursuer why she was leaving everything to the pursuer but he thought it was because he was the favourite nephew. The pursuer thought the deceased saw him as the son the deceased never had. As at April /May 2019 the pursuer, apart from the will, did not know much about the deceased's finances. The deceased sometimes got the pursuer to look over her tax return and the pursuer was aware the deceased was quite often in overdraft. The pursuer thought his mother may have known about the 2018 will in 2018 but not the contents of it. The pursuer thought the deceased told his mother about the contents of the 2018 will in April / May 2019. After that date the pursuer did not have any further discussions with the deceased about her testamentary plans.

[10] The deceased had always really lived on her own and was house proud when living on her own. When the 2018 will was signed by the deceased she was living on her own. At some point after that the defender started staying at the deceased's house overnight. The deceased got ill around April / May 2019. The defender may have commenced staying overnight at the deceased's house before this time period but it was around April / May 2019 when he started staying at the deceased's house permanently. Nobody knew how this arrangement came about. The deceased did not ask the defender to move in and the deceased often told the pursuer's mother and Christine that she wished that the defender would move out back to his own house. The deceased said that the defender left her house in a state and left things lying around on the floor, sofa and the sideboards, so that the

deceased could not get moving. The deceased did not say anything to the defender about the living arrangements because she did not like confrontation. The pursuer considered that the defender was living with the deceased and acting on the premise that he was caring for her. However, the pursuer would not call it caring. There was numerous times when the deceased did not get food because she was too ill to make it. On another occasion paramedics came to the deceased's house and found that the deceased had not eaten all day. The pursuer did not agree with the description of defender by Ms Lawrie as being a caring sibling. Quite often when the pursuer was visiting the deceased at her house the defender would shout up to her in an uncaring way and say things like ""oi you up there, you have visitors"". The defender would also refuse to turn the TV up and would take possession of the TV controllers.

[11] In April / May 2019 the pursuer was seeing the deceased once a week and more so when she was in hospital. At that time the pursuer started to suffer from panic attacks and became quite irrational. She felt she couldn't breathe and was worried about going to sleep. She was irrationally worried that the defender was going to put a pillow over her head. The pursuer and Christine would take the deceased down to the hospital when she was having a panic attack and told her not to be silly when she was saying irrational things. When she was at hospital it was then that she was diagnosed with renal problems and heart failure.

[12] The pursuer was referred to entries in the deceased's GP records (at pages 137 and 125), which confirmed the above health problems that the pursuer was suffering in April / May 2019 and also noted that the deceased's diabetes was poorly controlled. He was also referred to a discharge letter in the GP records dated 6 May 2019 (page 120 to 121) which noted "Patient and nephew happy with plan". The pursuer explained that he was involved with several discussions at the hospital regarding the deceased and believed that the

discussion referred in the letter of 6 May 2019 was confirming that the pursuer and the deceased were happy that the deceased could manage in her own house.

[13] After April / May 2019 the deceased was in an out of hospital, sometimes she would be in for a few days and sometimes it would be a few weeks. Initially it was the panic attacks and then it was for dialysis for heart and kidney failure. The pursuer, Christine and his mother generally took the deceased to hospital. The pursuer thought that the defender took the deceased to hospital on one occasion.

[14] The pursuer was referred to a discharge letter in the deceased's GP records (page 70 to 71), dated 31 July 2019 regarding an attendance at hospital on 18 June 2019. The pursuer was listed as the contact for the deceased and it was noted that the deceased was "seen with sister and niece". The pursuer thought he was listed as the contact for the deceased because he had probably taken her into the hospital. The reference to sister and niece was a reference to his mother (who was referred to as the "sister") and either one of his sisters or Christine. Around this time the deceased was constantly telephoning Christine, his mother, his sisters and the pursuer. The deceased was calling them as she was wanting company and wanted to get out of the house away from the defender. The pursuer did not think that the defender was particularly nice to the deceased. The deceased feared dying and she discussed this with the pursuer. She could not understand why she had low mood as a result of being diagnosed with heart failure.

[15] The pursuer was referred to a social work note of a meeting that took place on 31 July 2019 (production 6/2/19). The note included the following:

"Renal Social Work attended the meeting today, which included Dr Whitworth, OT, PT, Staff Nurse Nicola Byers, family members (sister Susan, nephew and niece) – and Margaret. The meeting lasted 1.5 hours during the majority of the meeting Margaret was reiterating that she wanted to go home as she hates being on the ward. All multi-disciplinary professionals were explaining the reasons why she would not be

safe returning home at this point until OT can do an environmental assessment and see if it is possible for a commode and hospital bed to be placed downstairs in her living room. She continued to say that she could climb the spiral staircase on her hands and knees so that she would not need to sleep downstairs and it was explained that her mobility would be unsafe climbing the stairs. Eventually she came round to the [sic] idea that the OT could visit her home to assess for a commode and bed, grab rails etc – but when she was told that it could be next week before there would be availability for an OT to visit she became very upset and said that she wished to return home in the interim. Dr Whitworth and others again went through the reasons why this would be a huge risk to her safety but that they could not stop her returning home if she self-discharged. Her family were clearly frustrated with her throughout the meeting and two of them walked out.”

The pursuer accepted that the above meeting took one and half hours. He explained that his mother was at this meeting and that she had been erroneously referred to as Susan. The pursuer explained that the family were not frustrated but were upset that the deceased was not listening to the medical professionals. The pursuer thought one of his sisters walked out and then his mother went out to check on her. The pursuer accepted that the deceased did not like being in hospital and wanted to leave hospital at that time. He accepted that the medical professionals did eventually persuade the deceased to stay in hospital on that occasion. The pursuer did not think, at that time, that the deceased would have felt a lack of support from her family. He did not think the deceased would have been disappointed that two family members walked out and did not support her returning home and noted that the deceased knew they were upset and did not think that the deceased was upset with them. Rather, the deceased was upset in general and she did not want the medical staff going into her house and, in particular, did not want them installing a commode. Her family were supporting her at that time. The pursuer confirmed, at that time, the deceased knew she was dying and advised that she would not have wanted to die in hospital, but rather die at home peacefully. However, at that time, she was not wanting to go home to die, rather she

simply wanted to go home because she hated being in hospital. The pursuer accepted that the deceased was strong willed.

[16] The pursuer was referred to the entry in the ERI records dated 2 August 2019 and timed at 09:46. The pursuer explained that he believed he was the deceased's NOK. The deceased had told him and the hospital staff that he was the deceased's NOK. The deceased had also told him that he had power of attorney in respect of her. The pursuer had not seen any paperwork in relation to a power of attorney but believed he held power of attorney in respect of the deceased.

[17] The pursuer explained that in the first 11 days of August 2019 he would have seen the deceased almost every day. When she had been in hospital, during that period, he would go and visit after work. If the visits were not every day, they were every second day. At that time the deceased's health was very poor, she was confused and agitated. The deceased insisted she could drive, but she was not physically able to do. She wanted to drive so she could go and see her horses.

[18] The pursuer was asked about the entry in ERI records on 4 August 2019 and timed at 16:36. The pursuer explained that the deceased pulled her phone apart on a number of occasions. The deceased could not understand why some of her telephone numbers were missing and the pursuer noted that it was not ascertained why some of her telephone numbers were missing. The pursuer explained that as he tried to leave the ward at the end of visiting time on 4 August 2019 the deceased became inconsolable. The pursuer noted that the deceased did not normally fall out with him and that he would have seen the deceased after that visit on 4 August 2019. Indeed the entry in the ERI records dated 5 August 2019 and timed at 17:23 showed he was still involved in her care and the deceased continued to telephone him daily.

[19] The pursuer recalled the discussion recorded in the ERI records on 5 August 2019 and timed at 13:22. The hospital wanted to put some aids in the deceased's house but the deceased was not having it. She thought a commode was impersonal. The pursuer was not present when Christine went to pick up the deceased on 5 August 2019 (see ERI records timed at 16:08) but later learned about it. The deceased was not normally nasty. At that time the deceased thought that people were drugging her all the time and the pursuer was more worried than ever about the deceased.

[20] The pursuer was referred to an "NHS Lothian Unscheduled Care Service" form in the deceased's GP records (at page 57) with a case date of 6 August 2019. The history recorded in that form included the following:

"74y With confusion.

Patient has been in RIE with kidney and heart failure. Started dialysis 3w ago. Had been agitated in hospital. Had been on diazepam due to agitation while an inpatient. In the end she DAMA [*discharged against medical advice*], agreeing to return for dialysis, which indeed she did today.

I have looked through Clinical Viewer and indeed there was a lot of this behaviour on the ward... it seems they couldn't convince her to say [*sic*] and didn't feel using the MHA to do so was indicated/ in her best interests so allowed her to leave. Tonight however she called her nephew distressed and saying she couldn't breathe or move so he contacted SAS.

[...]

Anxiety/panic attacks; has been in and out of A&E with these over the last few weeks; often calls family"

The pursuer explained that the deceased had been suffering panic attacks when she was an inpatient. The reference to "nephew" was a reference to him but the pursuer thought that on that occasion the deceased had actually called Christine who had then contacted the Scottish Ambulance Service ("SAS").

[21] The pursuer did not see the deceased having dialysis but saw her afterwards and she was teary, upset and wiped out. After dialysis, which she had two or three times a week, she had no energy and would sleep for the rest of the day. She was spaced out, which the pursuer thought was partially to do with the dialysis and partly to do with the medication she was on. The defender did not go with the deceased for dialysis. When she was not in hospital, the hospital organised a patient ambulance or private taxi to take her to dialysis.

[22] The deceased had been told on discharge on 5 August 2019 that she could not drive and, in any event, she was not physically able to do so. Even though the entry in the ERI Records dated 6 August 2019 and timed at 14:15 confirmed that the deceased said to medical professionals that she was not going to drive, the deceased was still adamant that she was going to drive to go and see her horses. The entry in the ERI records dated 5 August 2019 and timed at 16:08 confirmed that the medical professionals were concerned that the deceased had not told the family that she had been advised not to drive, which could have meant that the deceased was not recollecting what she had been told or was confused. In the circumstances the pursuer's mother suggested he had power of attorney for the deceased and that he should take the deceased's car keys to avoid a crash. The pursuer thereafter took the deceased's car keys because he thought she would be a danger to herself and other road users if she drove. The deceased was told, on several occasions, that the pursuer had her car keys to protect her safety. About three or four days later the pursuer gave the deceased her car keys back after the deceased had said she understood the reasons the pursuer had taken her car keys and had promised not to drive. The pursuer advised that he did not receive a phone call from the deceased threatening to change her will if he did not return her car keys. That was not the reason he returned the car keys to the deceased. The pursuer noted that if the deceased wanted to see her horses, in general the family would

have taken her. The pursuer accepted that the defender may have taken the deceased to see her horses in his car but did not think that he was in the habit of doing so. The pursuer rejected a suggestion that the defender would have transported bales of hay to the deceased's horses in his car, because Susan at the stables dealt with that on the deceased's behalf.

[23] The pursuer was referred to the 2019 will. The pursuer accepted that the entry in the ERI records dated 26 September 2019 and timed at 19:17 showed that he was aware of the 2019 will by then. However, he was not, at that time, aware of the contents of the 2019 will or that the defender had been appointed as executor. The pursuer first became aware of the contents of the 2019 will and that the defender had been appointed executor when the deceased's will was requested from the solicitor after the deceased had died. This was in October / November 2019, but it could have been later. He thought that the signature on the 2019 will looked very similar to the deceased's signature. He accepted it appeared as if Mr White had witnessed the deceased's signature. The pursuer was shown the power of attorney dated 28 August 2019 appointing the defender as the deceased's attorney and accepted that the deceased had signed the power of attorney. The pursuer maintained that he thought, at that time of the deceased signing the 2019 will and the power of attorney, that the deceased would have been unable to hold a pen steadily for any length of time. However, he accepted that the deceased would not need to hold a pen for a length of time to sign her name. The pursuer thought the deceased had good days and bad days and accepted that it appeared that the deceased was able to hold the pen when she signed her name on the 2019 will and on the power of attorney. The pursuer advised that he did not think he saw the deceased on the day she signed the 2019 will, on 11 August 2019, and therefore accepted that he would not know whether she was having a good day or bad day.

[24] The pursuer accepted that there was nothing in the medical records which said that the deceased lack capacity when she signed the 2019 will on 11 August 2019. He accepted that the entry in the ERI records dated 5 August 2019 and timed at 13:22 said that the deceased could make her own decisions but noted that that was in relation to the deceased's discharge from hospital. He accepted that the entry in the ERI Records dated 20 August 2019 and timed at 19:31 stated: (i) that the deceased did not want his mother join the discussion with the psychiatrist, however, the pursuer noted that the deceased was timid, did not like people knowing her business and would not want people to know she was depressed; and (ii) that the psychiatrist noted that the deceased had capacity, however, the pursuer noted that it was capacity about placement, support or medical treatment. The pursuer accepted that there was not an entry in the medical records between 5 and 20 August 2019 that stated that the deceased lacked capacity, however, he noted that the medical professionals were considering detaining the deceased under the Mental Health Act, however, they considered that would be more problematic.

[25] The pursuer accepted that the deceased was in the habit of doing the daily express crossword but thought she was gradually declining from doing crosswords in 2019. The deceased had a lack of concentration, lack of ability to hold a pen for a long time and would sometimes miss where she wanted the pen to go. The pursuer was shown two filled in daily express crosswords dated 14 and 31 August 2019 (productions 6/2/15 and 6/2/16) but did not know whether these were completed by the deceased. The pursuer, under reference to the entries in the ERI records dated 17 August 2019 and timed at 02:22 and 18 August 2019 and timed at 03:33, did accept that the deceased was doing crosswords in hospital but noted that the entries did not say how well she was getting on in completing the crosswords. The pursuer accepted, under reference to the entry in the ERI records dated 31 July 2019 and

timed at 17:32, that the deceased appeared to use a kwikpen to inject insulin but noted whilst acknowledging that he was not a medical professional, that using a kwikpen and a normal pen was slightly different.

[26] The pursuer confirmed that the deceased: (i) did not speak to him about changing her will; (ii) did not speak to him about changing her executor; and (iii) did not say that she did not want the pursuer to benefit from her estate.

[27] The pursuer was referred to para 11 of the statement of Ms Lawrie (see para 189 below). The pursuer explained that the deceased statements about not seeing him for a year and the defender helping her out with everything were incorrect. The pursuer thought for the deceased to say these things that she must have felt under pressure to change her will.

[28] The pursuer, under reference to para 18 of Ms Lawrie's statement, explained that he believed that his mother wanted the deceased to make a will so that her money went to who she wanted, but beyond that he could not comment on her appearing standoffish. By the time the deceased and the defender visited Ms Lawrie on 13 August 2019 the pursuer thought the defender had been living with the deceased for about 6 months. The pursuer did not think that the defender visited the deceased in hospital daily but considered he maybe visited once or twice a week, but only from August 2019 onwards. The pursuer never visited the deceased in hospital with the defender. The pursuer accepted that the defender had walked the deceased's dog over the years but explained that there was a split in the deceased's relationship with the defender and there was no contact for a period prior to 2018. The reason for that was that the deceased had bought a second hand car and she got the pursuer to drive it back from the seller. The defender took much offence to the pursuer driving the car back and wrote to the pursuer, the pursuer's mother and the deceased a

nasty letter saying that if the deceased was not able to drive the car she should not be on the road. This letter made the deceased very upset and the pursuer and the deceased did not see the defender until August 2018.

[29] The pursuer explained in response to allegations made in answer 7 of the Record that: (i) in 2019 the deceased did not become disappointed in the pursuer's mother and Christine; (ii) the deceased was not unhappy with the family's treatment of her and she was able to make her own decisions about her care; (iii) the pursuer's mother and Christine did not pressurise the deceased to leave her house and the deceased actually: (a) asked to move in with the pursuer's mother; (b) asked friends if she could move in with them; and (c) discussed a care home in Roslin; (iv) the pursuer did not try and persuade the deceased not to go home and the entry in ERI records dated 5 August 2019 at 11:08 showed that he was involved in the deceased being discharged to her home; (v) the pursuer did not drift in and out of employment, the deceased never said that he did and the deceased never said she was disappointed in the pursuer; (vi) the pursuer never asked the deceased to pay him any money; (vii) whilst there were times the pursuer and his mother were unable to answer calls from deceased, they never deliberately ignored the deceased's phone calls; (viii) the pursuer's mother would only give out the deceased's telephone number if the deceased asked her to and it turned out that the deceased had befriended people whilst at hospital and had been giving her telephone number out to them; (ix) the deceased was not unhappy with the pursuer's mother; (x) the pursuer never asked for the deceased's PIN number for her bank account; (xi) the deceased was not disappointed that the pursuer and his mother would not commit to ensuring her horses and cats were given a home, rather she wanted the horses to go to Ian Butt and the dogs and cats to go to either the pursuer or his mother; (xii) it could be seen from the ERI records that the pursuer and his mother did not ignore the

deceased independence and did not try and take control of her life; and (xiii) neither the pursuer or his mother told the deceased that she should move to a care home.

[30] The pursuer explained that he did buy an electric radiator for the deceased. The deceased paid him the money for the electric radiator. The pursuer found someone to install it but when the installer was due to fit the new radiator the installer couldn't take the old radiator out because it had been on. After that the pursuer tried on numerous occasions to arrange for the new electric radiator to be installed but the deceased kept pushing it back to another day.

[31] The pursuer accepted that he was given a bollard by the deceased. The reason for that was for the pursuer to see if his friend, who did welding, could fix it. However, the damage to the bollard was beyond repair and the pursuer reported that to the deceased and she said she would just get another bollard.

[32] The pursuer accepted that the deceased gave him money to buy a radiator valve. The radiator valve cost about £15 or £20 and was not for the deceased, but for the defender. The pursuer bought the radiator valve but it was not the right one, so it went back to the shop. The pursuer would have tried to give the money back to the deceased but she probably told the pursuer to keep it, as she often did.

[33] The pursuer explained that if the deceased had been unhappy with him she would have told him, because that was the nature of their relationship. They always told each other everything. There was never any tensions between the deceased and the pursuer's mother apart from when the pursuer took the deceased's car keys.

[34] The pursuer explained that he contacted the deceased's solicitors two or three days before she died. He did so because his sister, Laura, when she had been to the deceased's house to collect items for the deceased to bring to hospital, came across a letter, which had

been opened, which suggested that equity had been taken out of the deceased's house. The pursuer phoned the equity company to say that the deceased was not of sound mind. The equity company said that the deceased sounded confused and that there was someone in background prompting her. The pursuer considered that the deceased had no reason to be entering into an equity release scheme and, as a result, he contacted the deceased's solicitors to let them know there was some involvement with the equity company and that the deceased was not in a capable state of affairs to be involved with the equity company. The pursuer rejected a suggestion that by calling the deceased's solicitors he was trying to get his hands on the deceased estate before she was dead and noted that he was not sure how he could have managed that.

[35] The pursuer was not aware of the deceased being certified as an adult with incapacity. The deceased never said to him or gave any indication that she wanted her estate to go to the defender.

[36] The pursuer confirmed that the deceased's GP records were obtained to prove that the deceased did not have the capacity to change her will. When the pursuer's solicitors sought the deceased's GP records the pursuer was aware that the defender was the deceased's executor. He did not think he was telling any lies to the GP to obtain the deceased's medical records and thought he was signing the mandate to recover the medical records because he was the executor in the 2018 will. The pursuer accepted that the mandate did not make mention of the 2018 will and accepted he signed the mandate, but noted that he did not type it up. He accepted that the 2018 will had no effect unless and until this court overturned the 2019 will. He accepted that: (i) the mandate was signed on 28 October 2019; (ii) that the warrant to cite was dated 28 November 2019; and (iii) that it would seem that the averment on Record that medical records were obtained after the

raising of the action was untrue. However, the pursuer explained that he was telling the truth to the court.

[37] The pursuer was referred to the entries in the ERI records dated 26 September 2019 and timed at 19:17, 27 September 2019 and timed at 12:07, 28 September 2019 and timed at 00:20. The pursuer was not sure if he was present on 26 September 2019 with his mother. He explained that he found out the deceased's will had been changed when he phoned the deceased's solicitors about the equity company. He accepted that his mother was frustrated because the deceased's will had been changed and that she wanted the defender excluded. The pursuer did not know why the deceased's medical records were requested. The pursuer accepted that he had no evidence to say that the defender was financially abusing the deceased, other than the deceased used to say that the defender would not let the deceased have her credit card. The pursuer did not think that the defender was physically abusing the deceased, however, he thought he was mentally abusing her.

[38] The pursuer accepted that the above entries showed a threat of legal action against the defender before the deceased had passed away. As regard the entry in the ERI records dated 26 September 2019 and timed at 04:01 the pursuer explained that the he believed he had been removed as NOK, was worried he would not know what was happening with the deceased's care and was worried who had been named the deceased's NOK. The pursuer was not demanding for the defender to be removed from the ERI system but was asking. The pursuer accepted that he did not want the defender to be provided information about the progress of the deceased. As regard the entry on the ERI records dated 23 September 2019 and timed at 10:09 the pursuer accepted that: (i) the defender was asking whether any other care could be given to the deceased; (ii) the defender was told that the deceased's sister and nephew would be informed of the deceased's progress and the defender did not say

that they should not be informed; (iii) the defender's concerns were about the deceased's care; and (iv) the concern of the pursuer's family was to mount a legal action due to the will being changed and have the defender excluded. The pursuer did not think anything that he or his family did would have given the deceased a good reason for changing her will.

[39] The pursuer accepted that shortly after the deceased's death he re-directed the deceased's mail to his house. He did so because he thought that financial information about the deceased would have gone to the defender when the pursuer believed he should be receiving that information. When the re-direction of the mail was arranged the pursuer was not sure if he was aware that the defender had been appointed executor.

[40] The pursuer advised that the deceased's brother John Allan made the arrangements for the deceased's funeral. The pursuer did not take part in the arrangements other than to suggest it be at Mortonhall and provide music. The pursuer was not aware that the defender had been appointed executor at the time the funeral arrangements were made. The pursuer did not tell the defender what the funeral arrangements were and did not think that the defender attended the deceased's funeral. The pursuer's understanding was that the defender had phoned up the undertaker and asked about the funeral arrangements. The pursuer accepted that he and other family members deliberately excluded the defender from the deceased's funeral. The pursuer thought that the defender did not care about the deceased and had said that he would be quite happy to see the deceased in a bin bag. The pursuer was not convinced that the deceased would have wished the defender to be at her funeral.

Patricia Somerville

[41] Patricia was retired. She lived with her two daughters, Jennifer and Laura. Prior to August 2018 Patricia did not see her brother John Allan at all. She only saw the defender when he was at the deceased's house. She did not have a relationship with the defender. She had a very close relationship with the deceased. The deceased was kind, generous and shy. The deceased liked country music and going to concerts. She loved her nursing job. Her horses were her life. She kept herself to herself. The deceased was a private person and did not like people coming to her house. Instead she would visit her friends at their houses. The deceased would visit Patricia at her house almost every day. These level of visits continued for many years and it only stopped around July / August 2019 when the deceased became ill and was no longer able to drive. The deceased would go to concerts with Patricia. Patricia would take the deceased out. Patricia's daughters would look after the deceased's animals. When the deceased could not drive Patricia and her family would go to the deceased's house to visit her.

[42] The deceased and the pursuer were very close and got on very well. The pursuer was the apple of deceased's eye. The deceased never used to let anyone ride her horses but when the pursuer was younger the deceased let him ride her horses and gave him horse riding lessons. The pursuer and his now wife, Christine, used to go down to the deceased's house every week for their dinner. The deceased took Patricia's daughters to swimming lessons when they were younger.

[43] Patricia explained how the deceased came to make the 2018 will. Patricia had decided to make a will and told the deceased about it. The deceased said she also wanted to make a will. The will was made for charity and they eventually found that a solicitor in Peebles was doing wills for charity. They both then travelled to the solicitor's office in

Peebles. They chatted to the staff and laughed with them. Patricia then met with a solicitor on her own and got her will done. The deceased then met with the solicitor on her own after Patricia and got her will done. The deceased was happy leaving the solicitor's office. A few days after that the deceased told Patricia that the defender was getting the music centre, that the defender could have the "bloody car" and that Patricia was getting the deceased's cat. The deceased did not, at that time, say who was getting the rest of the deceased's estate. Patricia did not know if the deceased told anyone else about the contents of the 2018 will.

[44] When the deceased lived on her own she kept her house neat and tidy and had a place for everything. There was a period when the defender was not speaking to the deceased. During this period the deceased would see the defender in the park and go over to speak to him but the defender would just ignore her. The defender then came back into the deceased's life and moved into the deceased's house shortly before the deceased became ill in April 2019. Once the defender moved into the deceased's house you could not sit on a seat because it was covered in the defender's stuff. The defender's stuff was lying on the floor and the deceased complained about this to Patricia. The deceased did not want anyone in her house because she was embarrassed by the defender's mess. When the defender was living with the deceased, Patricia heard the deceased ask the defender to leave. He did not do so and the deceased just put up with the situation because she did not like conflict. In around July 2019 the deceased was at her house when she tripped over the defender's dog. The deceased told Patricia that the defender flew off the handle and was shouting at the deceased. The deceased thought she was going to die and the defender was shouting at her. The deceased telephoned the pursuer's wife and she called the paramedics. When the paramedics arrived they said that the deceased, who was a diabetic, needed food and the defender offered to go and get the deceased fish and chips from a chip shop.

[45] The deceased's health deteriorated in 2019. Her diabetes, for which she took injections, was poorly controlled. She was not eating and not taking her medication at the right times. The deceased also suffered from anxiety. If Patricia was going on holiday the deceased would get worked up, not because she grudged Patricia going on holiday, but because she didn't like getting left on her own. When the defender was living in the deceased' house, the deceased told Patricia she would spend most of her time in the bedroom. The deceased felt she couldn't sit in the living room of her house because the defender would complain about her rustling the paper or the TV being too loud. If the deceased was in living room, she would, at times, have to watch the TV with subtitles.

[46] In 2019 the deceased would visit her friends, Mary and Gordon Bell, Christine's family and would visit Patricia at her house. The deceased would drive to these visits but Patricia did not think she was safe to drive at that time. When the deceased was admitted to hospital in 2019 Patricia would visits with her daughters almost every day. The pursuer and Christine would visit the deceased when they could. At that time the pursuer was the deceased's NOK because she was close to him and trusted him. On one occasion the deceased became unwell and the defender took her to hospital. At that time the deceased was not able to speak and the defender said that he was the deceased's NOK. The deceased was distressed about the defender claiming to be her NOK.

[47] Patricia advised that the deceased did not say anything to her about changing her will and did not think that she would have changed her will. In July 2019 the pursuer went to visit the deceased and the defender made a comment to the effect that the pursuer was only visiting to get something out of the deceased's will. Patricia, in response to this, said that the deceased already had a will. Patricia subsequently told the deceased that she had told the defender that the deceased had a will and the deceased looked scared. After the

defender found out the deceased had a will the defender suggested to Patricia, at the deceased's house, in the presence of one of her daughters, that the deceased's will should be changed so Patricia got the house because she deserved it more than the pursuer.

[48] Patricia was referred to a social work note of a meeting that took place on 31 July 2019 (production 6/2/19 - see para 15 above). Patricia accepted that that meeting was a difficult meeting. She explained that she walked out the meeting first, then her daughter, Laura, followed her. Patricia walked out because the deceased was not listening to medical staff and this upset Patricia and she needed a break. Laura left the meeting to see if Patricia was okay. The pursuer did not leave that meeting. Under reference to entry in the ERI records dated 1 August 2019 and timed at 09:50 Patricia explained that she was not aware that the deceased had thought she had fallen out with her family after the meeting on 31 July 2019. Patricia explained that she saw the deceased after the meeting and interacted with her. At that time the deceased was tearful most of the time because she knew she was dying.

[49] By August 2019 the deceased was in and out of hospital. She was admitted for periods of time due to the deceased having kidney and heart failure. Patricia explained that the deceased did not want to stay in hospital. During this period the deceased was having dialysis at the ERI three times a week. Patricia thought that the dialysis affected the deceased's brain. The deceased legs gave way after dialysis and she would struggle to walk. Patricia attended dialysis with the deceased on one occasion but the sight of all the blood and the machines was too much for Patricia.

[50] Under reference to the entries in ERI Records dated 5 August 2019 and timed at 13:22 and 16:08 Patricia explained that she could not cope when the deceased was being paranoid and aggressive. The deceased was being paranoid about the nurses. She said she was going to throw herself out the windows of the hospital. The deceased did not normally act in a

paranoid or aggressive way and she would have been mortified at the way she was acting if she was in her normal state. It was quite distressing watching how the deceased was acting. However, neither Patricia nor the pursuer had a fall out with deceased at that time.

[51] Patricia recalled, at that time, that the medical staff told the deceased that she should not be driving. Patricia did not think the deceased accepted that she should not drive and so Patricia took her car keys from her and gave them to the pursuer to ensure that the deceased could not drive. Patricia told the defender that she had taken the deceased's car keys. When the deceased was discharged from hospital Patricia told the deceased that the pursuer had her car keys and would return them when he got back from working in the west of Scotland. The deceased was not anxious to get her car keys back and it was more the defender wanting the car keys so that he could drive the deceased's car. The defender then told the deceased that Patricia was responsible for getting her driving licence taken away. Then, at the deceased's house, the defender lost his temper and was shouting that he was the only that cared for the deceased and that Patricia had taken the deceased's driving licence. At one point the defender even put his fist at the deceased's face. The car keys were returned to the deceased about a week after they were removed after the deceased said she understood that she could not drive and had no intention of doing so. Patricia considered that the deceased was acting more reasonably at the point when the car keys were returned to her. She could not recall the date the pursuer returned the car keys to the deceased. Patricia advised that the defender had a temper and shouted at the deceased a lot.

[52] Patricia was then referred to a conversation record prepared by Lucy Mitchell, OT, dated 8 August 2019 to 27 September 2019 (production 5/3/3), which included:

"08/08/19 – OT call to Margaret – no reply so contacted her sister (Patricia) who advised that Margaret may not answer her phone. Patricia advised that her sister isn't keen for anyone to visit her at home due to the state of her house (she is usually

house-proud). Also, Patricia advised that Margaret is concerned that adaptations will be made to her home, which she doesn't want. I advised that I will reassure her that this will not happen.

Their brother is staying there at present with aim to support/care for Margaret but is not providing meals, tidying the house and is sleeping on the settee. Patricia advised that Margaret has phoned her today and was crying as she wished Patricia to visit. Patricia advised that she is struggling to provide support to Margaret as Margaret wishes her to be with her most of the day and into the evening. We discussed Margaret's condition and impact on her ability. Patricia reports that Margaret has been confused and aggressive which is not like her.

[...]

09/08/09 – I visited Margaret at home and her brother answered the door. I explained that I had received a referral from the hospital and was visiting to see how Margaret was managing since her discharge. Margaret and her brother would not let me in the house and said they did not need SW input. I explained that I was from H&SC and my role was to ensure that she was managing at home, to give support but not to interfere. I explained that I knew she had horses and I could take her to visit them. She appeared defensive, stating that she had paid the livery, and how did I know about this. I reiterated that I was offering to take her to visit only and that I had no involvement in the care of her horses. She agreed for me to visit next Wednesday to take her to the stables. She. [*sic*] has dialysis on Tues/Thurs/Sat. Margaret then stated that her legs were giving way and her brother assisted her into the living room, so I left."

Patricia confirmed that she was still very much involved in the deceased care at this time.

She would visit her every day from the afternoon to 20:00. She would take the deceased out but when it was time to take the deceased home, the deceased would plead with Patricia to stay with her. Patricia thought the OT would have got her telephone number from the hospital. Patricia explained that the defender was sleeping on the floor of the deceased's house rather than on the settee.

[53] Patricia was referred to a transcript of text message sent by Patricia to the social work department (production 5/3/4), which included the following:

"09/08/19 – 10:22 Text from Patricia – any chance you could come early. Took her to docs and wants me to take her anywhere. When I say no she starts crying and saying she is going to end it all. [...]"

[...]

10/08/19 – 23:44 Text from Patricia – I am really worried about Margaret. She is not sleeping and non-stop crying. Keeps talking about ending it all. Took her out today and she could hardly walk. Took two of us to her help [*sic*]. She has her stick which isn't any good. Kept bending over and needed held up most of the time. [...]

10/08/19 – 23:50 text from Patricia – she fell twice in the taxi apparently when she was either going for her treatment or after it. Taxi driver didn't even help her – said to her she would be better in an ambulance.

[...]”

Patricia explained that she could not recall sending text messages to the OT. However, she did not see any reason why they would be made up. Patricia recalled around 10 August 2019 that the deceased fell in a taxi on her way back to her house from dialysis. Patricia explained that between 8 and 10 August 2019 that the deceased was distressed but Patricia did not know why. Just because Patricia took the deceased out on 10 August 2019 did not mean that she did not take the deceased out on 11 August 2019. As 10 August 2019 would have been a Saturday, which was a dialysis day and, as a result, Patricia did not think they would have went anywhere other than the horses, however, she could not be sure. Patricia did not think 10 August 2019 was the day she took the deceased to S. Luca's (on which see para 54 below). Patricia explained that the good relationship between her and the deceased and the good relationship between the pursuer and the deceased, did not change in the period between 8 and 10 August 2019.

[54] Patricia was not sure if she saw the deceased on the 11 August 2019, which was the day the 2019 will was signed. Patricia was sure that she saw the deceased that weekend. She thought that she took the deceased to S. Luca's café in Musselburgh on the Sunday, which was 11 August 2019. What happened was that the deceased phoned Patricia during the late afternoon on the Sunday and asked Patricia to take her to S. Luca's. Patricia and her daughter, Jennifer, picked up the deceased and headed to S. Luca's. Patricia's other

daughter, Laura, joined them at S. Luca's. On that Sunday the deceased looked like she was dead behind the eyes. It was like nobody was there. She was not her usual cheery self. She kept her head down, never spoke and did not even ask how anybody was. The deceased did, however, have something to eat and was able to walk. Laura commented that it seemed like the deceased had given up. Patricia presumed that the deceased's presentation was due to the medication that the deceased was on. Patricia bumped into Mary Bell on the Monday or Tuesday, after the Sunday, and Mary Bell told Patricia that her and her husband, Gordon Bell, had taken the deceased out on the Sunday morning to Eyemouth. Patricia said to Mary Bell that she must have dropped the deceased off and the deceased must have then immediately phoned Patricia to ask to be taken to S. Luca's.

[55] Under reference to the entry in the ERI Records dated 20 August 2019 and timed at 19:31 Patricia could not recall a situation where the deceased refused to allow Patricia and the pursuer to be part of a discussion with medical staff. Under reference to the entry in the ERI Records dated 26 September 2019 and timed at 19:17 Patricia explained that a few weeks before 26 September 2019 the defender had tried to stop the family visiting the deceased.

[56] Patricia was referred to para 11 and 18 of the statement of Ms Lawrie (see para 189 below). Patricia explained that it was not correct: (i) that the pursuer had not seen the deceased for over a year; and (ii) that the defender was now the person helping the deceased out with everything. Patricia did not think that the defender was caring. The defender never turned up at the hospital when the deceased was admitted and only came to the hospital when he wanted something. Prior to moving in with the deceased, the defender only turned up at her house when he wanted the deceased to look after his dog. Patricia did not think she was standoffish when she attended the solicitor's office in Peebles apart from when she was privately meeting with the solicitor to get her will done. Patricia was asked

whether the solicitor was lying about her being standoffish and the defender being caring and Patricia thought that she was.

[57] Patricia was referred to a letter sent to deceased from Blackwood & Smith LLP, dated 19 August 2019, enclosing a draft power of attorney (production 6/2/9). The letter included:

“The powers contained within this document are onerous. They should only be given to those that you trust and I am sure that that is the position here.”

Patricia explained that when she told the defender about the 2018 will she also told him that they didn't get a power of attorney done. Patricia thought that as the pursuer was executor in the 2018 will he would also have power of attorney. The next things Patricia knew was that the defender had power of attorney. Patricia explained that she thought the deceased was more scared of the defender than trusted him, but accepted the above passage in the letter suggested that the deceased trusted the defender.

[58] There came a point when the deceased was at Patricia's house and, in the presence of her daughter, Jennifer, said that the defender was trying to take her house from under her feet. Patricia thought that this occurred in August / September 2019, but she could not be sure. Patricia told the deceased not to worry because she had a will, however, the deceased did not seem convinced.

[59] A few days before the deceased died Patricia found out that the defender was trying to sell the deceased's house. Her daughter, Laura, was at the deceased's house when she came across a document that showed the defender was trying to find equity. The pursuer then phoned the equity company and was told that the defender was heard in the background telling the deceased what to say. Under reference to the entry in the ERI Records dated 28 September 2019 and timed at 00:20 Patricia explained that they phoned the deceased's solicitor after they found out that the defender was trying to sell the deceased's

house and it was then they found out that there was another will. Patricia thought she became aware of this other will the day before the deceased died. The legal action referred to in the entry was to stop the defender selling the deceased's house; it was the current court case. Patricia did not say anything about financial abuse to the medical staff.

[60] The only times Patricia did not answer a telephone call from the deceased was when she was not able to answer. Patricia rejected a suggestion that she did not answer the deceased's telephone calls in order to bring her to heel and explained that that was not a figure of speech she would use, but it was something that the defender would say. Patricia never referred to the deceased as a burden and did not think the deceased ever felt humiliated by Patricia. Patricia never pressed the deceased to get her PIN number, rather the defender asked Patricia to get the deceased's PIN number or bank number. In response Patricia said to the defender that she would ask the pursuer about this but in fact never asked the pursuer or the deceased about the deceased's PIN number or bank number. Patricia explained that the defender was opening the deceased's mail. When Patricia took the deceased her mail in hospital, she was not happy that the defender had been opening it. Patricia accepted that the deceased could be strong willed and determined.

Mary Bell

[61] Mrs Bell got to know the deceased when deceased started come to see her for reiki therapy. The deceased started attending for reiki about seven or eight years ago. The deceased used to come once a week for reiki and they became friends. The deceased continued to attend once a week for reiki and would occasionally pop in if she was passing Mrs Bell's house for a cup of tea and a blether. In the beginning the deceased would drive to Mrs Bell's house but towards the end of her life Mrs Bell thought the deceased relied on the

defender to drop her off sometimes. The deceased had a wicked sense of humour, was a very caring person and Mrs Bell considered her to be a good friend. Mrs Bell had been outside the deceased's house but had not been inside. She had met Patricia and at least one of her daughters a couple of times. She had seen the defender in the park a couple of times and thought she had met the pursuer once. The deceased told Mrs Bell that she was quite close to the pursuer. The deceased told Mrs Bell that she was not happy about the defender living in her house. Mrs Bell asked the deceased if she wanted her to have a word with the defender but the deceased said no due to the fact that she did not want to upset anyone. Mrs Bell thought this conversation took place three or four months before the deceased started dialysis, but Mrs Bell could not be completely sure about the date.

[62] Mrs Bell was aware that the deceased's health was declining around the middle of 2019. Around that time Mrs Bell went to visit the deceased in hospital on one occasion. Around that time, when the deceased was not hospital, Mrs Bell and her husband sometimes took the deceased out in their car for a run and a coffee. When they took her for a run in the car the deceased was fine on the first couple of times that they went. However, on the last occasion they took her out for a run in the car she was very tired and slept most of the way. On that last run Mrs Bell and her husband took the deceased to Eyemouth. On prior occasions the deceased had driven over to Mrs Bell's house and then went on a run in their car. However, on the last occasion they went on a run in the car, Mrs Bell and her husband had picked up the deceased at her house. On that last run to Eyemouth Mrs Bell thought that they had picked the deceased up at around 12.00 and dropped her off about 15.30 / 16.00. On that last run they had stopped for food at MacDonald's. The deceased was really sleepy that day. It was suggested to Mrs Bell that Patricia Somerville had taken the deceased to the S. Luca's café on 11 August 2019 and that was the same day as Mrs Bell had

taken the deceased on her last run to Eyemouth. Mrs Bell thought that was correct, however, she could not swear to the date but recalled that Patricia had told her that she had taken the deceased on the day of the last run to Eyemouth.

[63] Mrs Bell advised that the deceased never spoke to her about having written a will. Mrs Bell thought the deceased was a private person.

[64] In cross examination Mrs Bell was asked what day the last run in the car took place. Mrs Bell advised that they usually took the deceased for a run at the weekend, so it would either have been a Saturday or Sunday but Mrs Bell thought it was a Sunday. Mrs Bell was asked whether the deceased had had dialysis on the day of the last run, however, Mrs Bell did not know whether she had or hadn't.

[65] Mrs Bell advised when she first became friends with deceased an advert came on the TV about wills. Mrs Bell commented that she had not made a will and the deceased went to say something but then she stopped. Mrs Bell thought she stopped because the deceased was a private person.

Gordon Bell

[66] Mr Bell knew the deceased because he used to help his wife run the reiki therapy. Mr Bell used to see the deceased once a week or once a fortnight when she attended for reiki. Mr Bell thought that the deceased was a wonderful woman who was kind and wanted to help everybody. Mr Bell had previously met the defender when walking his dog in a park in Loanhead. Mr Bell noted that everyone in Loanhead knew the defender as "Robert", however, he did not know why this was and found it disturbing.

[67] Mr Bell had met Patricia when the deceased had brought her to reiki. He was aware that Patricia had two daughters and a son but the deceased did not really talk about them.

Mr Bell was aware that the deceased's health declined in 2019. He was aware that the deceased was on dialysis and had been to visit her in hospital. Mr Bell thought that the dialysis made the deceased tired. When she was not in hospital he and his wife would take the deceased out in their car. This normally took place on a Saturday or Sunday and they would go to Galashiels or Eyemouth. Mr Bell could not remember the last time they took the deceased out in the car, however, he advised that he would not take issue with any witness who said that it was a Sunday afternoon in August. Mr Bell explained that the deceased had told him that she was "feart" of the defender (meaning afraid of the defender). The deceased told him, just before the deceased started dialysis, that: (i) the defender had moved into her house; (ii) the defender was sleeping downstairs with the fire on; (iii) the deceased was terrified that the house would burn down; (iv) as a result, the deceased didn't sleep at night but slept during the day when the defender went out; and (v) the deceased did not want to say to the defender to leave, because she did not want to rock the boat and was terrified that the defender would shout and scream at her. Mrs Bell had asked the deceased whether she wanted them (Mr and Mrs Bell) to have word with the defender, but the deceased said she did not want the hassle and thought that if they did say something the defender would blow his top.

[68] Mr Bell explained that the deceased never discussed a will with him. However, she did say that the pursuer was her favourite nephew and that if she was going to leave anything to anyone it would go to the pursuer. Mr Bell could not remember when the deceased had said that.

[69] In cross examination Mr Bell was asked whether he had seen the deceased in the company of the defender. Mr Bell explained that there was one occasion when the defender dropped the deceased off at Mr Bell's house and then the defender took his dog for a walk in

a park. When the deceased came to leave she did not want the defender to drive her home because she was “feart” of him and asked Mr Bell to drive her home. Mr Bell, however, declined and said that the defender would be waiting to take her home. Mr Bell confirmed that he had never seen the defender shouting and screaming at the deceased and advised that the defender would not have done that in front of him.

Dr Dan Lee

[70] Dr Lee is a consultant geriatrician. He is currently working as a clinician at a private hospital in London on a medical assessment unit. Prior to that he had worked for 23 years as a consultant geriatrician at the Royal Free Hospital in London. At the Royal Free Hospital Dr Lee had performed a number of roles including clinical director and head of department, running a busy acute ward for older people, leading the liaison service to old age psychiatry and Trust lead for dementia. Dr Lee had also run a dementia clinic and regularly assessed the mental capacity of patients. He also had a medical legal practice and had previously assessed whether a person had testamentary capacity. It was one of the core skills of a consultant geriatrician to assess whether a patient had capacity. In the present case, Dr Lee had prepared a report in relation to the deceased’s testamentary capacity and he adopted that report as part of his evidence.

[71] Dr Lee explained that it was possible for a person to have capacity for one thing and not another. It was also possible for a person to lack capacity but subsequently regain capacity, however, this depended on the cause of the lack of capacity. Where the patient suffered from a progressive condition, such as dementia, once capacity was lost the patient would not be expected to regain capacity.

[72] Dr Lee explained that he had assessed the deceased's testamentary capacity by applying the four tests set out in the English case of *Banks v Goodfellow* (1869-70) LR 5 QB 549 at 565 (the four test are set out at para 218 below). Dr Lee accepted that he had never met the deceased and explained that he had based his opinion primarily on his analysis of the deceased's medical records, but he had also considered statements that he had been provided.

[73] The deceased's GP records disclosed that the deceased had a history of neurotic disorders dating back to 1972, a neurotic (reactive) depression in 1980, a recurrent depressive disorder in 2015 and by June 2019 an anxiety state. A letter from the deceased's renal consultant dated 7 June 2019 showed that: (i) the deceased was suffering from end stage renal failure; (ii) haemodialysis was discussed with the deceased; and (iii) the deceased had symptoms of low mood, panic attacks, palpitations, agitation and fear of death. The latter symptoms had prompted a referral to a liaison psychiatrist. Dr Lee noted that it was not uncommon for a patient with renal failure to have anxiety and depression.

Haemodialysis could also cause anxiety, emotions of impending death, fatigue and confusion. The fatigue could be increased if the patient was also on sedatives (which was the case in respect of the deceased). In the present case the deceased already suffered from anxiety and the dialysis could have increased her anxiety.

[74] In June 2019 the deceased had frequent attendances at A & E with symptoms of anxiety and panic attacks. On 2 July 2019 the deceased was reviewed by the liaison psychiatrist who: (i) found a 6 months history of anxiety with health focus and significant panicky exacerbations; (ii) noted antidepressant drugs had thus far only exacerbated her anxiety; and (iii) prescribed diazepam to be given three times daily (see the entry in the ERI

Records dated 2 July 2019 and timed at 18:26). The diazepam dose subsequently required further increments.

[75] On 16 July 2019 the deceased had her cognitive function formally tested by way of Montreal Cognitive Assessment (“MOCA”). Her MOCA score was 21 out of 30, which was consistent with a mild cognitive impairment. On 25 July 2019 the deceased was discharged back home but readmitted later the same day as her “carer (brother) is not going to be looking after now and she cannot manage alone at home” (GP records at page 65). On 29 July 2019 a chaplain visited the deceased and noted that the deceased was “very emotional and upset around the fact that people will be going into her home”.

[76] Under reference to the entry in the ERI Records dated 1 August 2019 and timed at 09:50 Dr Lee noted it was recorded that the deceased “has capacity to make her own decisions” in respect of her own care. Dr Lee explained in practice medical professionals try and take the least restrictive option. The tendency is to try and facilitate the patient going home, particularly if the family agree with that decision. If going home then fails the medical professionals would try and negotiate another path and attempt to get the family on board with that. However, it would sometimes be necessary to use powers under the Mental Health Act to detain the patient if it was felt the patient did not have capacity.

[77] Dr Lee accepted that: (i) the ERI records showed the deceased had a number of psychiatric assessments; and (ii) there was never a finding that the deceased lacked capacity following those assessments. However, Dr Lee explained that the degree of understanding for testamentary capacity was higher than having the capacity to make the basic decision whether to go home or not and noted that, in the deceased’s case, the medical professionals were trying to act in the deceased best interests and take the least restrictive option. Dr Lee

did not think that if a person had capacity to make a decision to go home it necessarily meant that they had capacity to make a will

[78] Dr Lee thought that the entry in the ERI records dated 4 August 2019 and timed at 16:36 showed the deceased was suffering pretty severe anxiety and was not really understanding the risks that the medical professionals were concerned about. The entry in the ERI records dated 5 August 2019 and timed at 02:01 showed that the deceased tried to leave the ward in the early hours of the morning to go home and that the doctor who spoke with her concluded that she was not convinced that the deceased understood the risk of leaving hospital against advice. The entry in the ERI Records, dated 5 August 2019 and timed at 04:59 showed that another doctor noted that: (i) it was tricky to assess whether the deceased had capacity to leave hospital; (ii) the deceased did seem to be aware of the risks going home but did not know how she would manage at home; and (iii) the deceased was unable tell the doctor that she was readmitted on the same day as discharge following a one month admission. Dr Lee thought that in these entries the doctors were trying assess whether the deceased had capacity to go home and it was clearly borderline whether or not she did so. Dr Lee considered that it was significant, in terms of her capacity, that the deceased could not remember being admitted on the same day as she was discharged from her last hospital stay.

[79] Under reference to the ERI Records dated 5 August 2019 and timed at 13:22, 16:08 and 17:08 Dr Lee explained that it was noted that the deceased was paranoid. This meant that the deceased, at that time, was having false beliefs. However, Dr Lee did not think these went as far as being delusions (which are unshakeable false beliefs), rather they were false beliefs that could be challenged. The reference in those entries to sedation would have been to relieve the distress that the deceased was experiencing and treat her symptoms. The

medical professionals also made mention of a potential section under the Mental Health Act and Dr Lee considered that they must have had significant concerns that the deceased lacked capacity to make the decision to go home. The fact that the deceased told her family that she could drive, when she had been told the opposite, also pointed towards a lack of capacity because what the deceased was saying to her family was false. Dr Lee accepted that: (i) the entry timed at 13:22 did note that the deceased understood the risks of discharge and the concerns that the medical professional had and was deemed to be able to make the decision to discharge herself; and (ii) the medical professionals did ultimately allow the deceased to go home. However, Dr Lee thought that the medical professionals were accepting that the discharge was high risk and were trying to act in the deceased best interests by taking the least restrictive option. They must have thought the deceased understood the risks sufficiently to let her go home with support. Dr Lee did not consider that that entry meant that it could be inferred that the deceased had testamentary capacity at that time.

[80] Under reference to the entries in the ERI Records dated 7 August 2019 and timed at 16:25 and 19:59 Dr Lee explained that the fact that the deceased was refusing to allow anyone to administer her insulin on 7 August 2019 was a factor in his assessment of the deceased lacking testamentary capacity. This was because insulin was critical to the life of the deceased as a diabetic. The entry timed at 16:25 showed that the deceased had been assessed as requiring someone to administer her insulin, however the deceased was refusing to let this happen. In the circumstances the medical professionals had reached a pragmatic solution to allow the deceased to administer her own insulin.

[81] Dr Lee accepted there was a gap in the medical records between 7 and 16 August 2019.

[82] Dr Lee explained that if a person was not making a decision on the basis of the reality in front of them that could call into question their capacity. Under reference to para 11 of the statement of Ms Lawrie, Dr Lee noted that it was clear from the ERI records that the pursuer was involved in the discharge planning for the deceased, therefore, the deceased's statement that she had not seen the pursuer for over a year meant that the deceased was either not telling the truth or forgetting or had a false belief that the pursuer had not been involved with her. If the deceased's reason for changing her will was because she thought she not seen the pursuer for over a year, and that was clearly false, that change would be based on a false belief and would call into question her testamentary capacity. If that was the case, the false belief would have influenced her decision to change the will and it would be a decision that the deceased would not have otherwise reached if she did not have that false belief. Dr Lee accepted that the deceased might not have told the truth to Ms Lawrie about the reason for changing her will because she was a private person and wanted to fob off Ms Lawrie, but he thought that the more likely explanation was because she lacked testamentary capacity.

[83] Dr Lee accepted that the deceased was admitted back to hospital between 16 August 2019 and 23 August 2019. The entry in the ERI records dated 19 August 2019 and timed at 17:22 showed that the chaplain had recorded that when the deceased had not had dialysis she was clear in her thoughts, however, after dialysis her thoughts could be a bit muddled. Under reference to entry in ERI Records dated 20 August 2019 and timed at 19:31 Dr Lee explained that Dr Potts was considering the deceased's capacity to go home, which was, again, different from testamentary capacity and was at a different point in time from when the deceased signed the 2019 will. Dr Lee accepted that the entry in ERI Records dated 21 August 2019 and timed at 17:45 noted that the deceased would look after her own insulin

but noted that the entry did not mean that she was monitoring it appropriately. Dr Lee accepted that entry in the ERI Records dated 22 August 2019 and timed at 01:17 noted that the deceased had taken a “hypo” and accepted that she could not have taken a “hypo” without taking insulin but explained that the deceased may have taken too much. Dr Lee accepted that the entry in the ERI records dated 22 August 2019 and timed at 13:28 indicated that the deceased was taking her insulin, but noted that she was not monitoring it appropriately, which was hazardous and that there generally appeared to be a paranoia running through the records about the deceased not wanting district nurses to come to her home to administer her insulin. A discharge letter of 23 August 2019 showed that medical professionals again considered that the discharge of the deceased was at a high risk of failure.

[84] On 14 September 2019 the deceased undertook a further MOCA and scored 15 out of 30, which indicated moderate to severe cognitive impairment.

[85] Dr Lee accepted that a few weeks after the 2019 will was signed by the deceased a solicitor assessed her as having capacity to grant a power of attorney in favour of the defender. Dr Lee accepted that a solicitor’s assessment carried weight but explained that one could easily be fooled, by a person’s social veneer, that they had capacity when they did not. That was why there was a formal test to test capacity. This test was not done when the power of attorney was granted or when the deceased met Ms Lawrie on 13 August 2019 and it was therefore possible that the solicitor on each occasion got the decision wrong due to the deceased’s presentation.

[86] Dr Lee, accepted that his opinion was based on inferences drawn from the deceased medical records both before and after 11 August 2019 and the statement of Ms Lawrie. After analysing the medical records and the statement of Ms Lawrie, as a whole, and in particular

the facts set out in his report at paras 3.1 to 3.27, Dr Lee arrived at the opinion that the deceased passed the first three tests set out in the case of *Banks*. However, the deceased's intense anxiety and paranoia at around the time when the 2019 will was executed in August 2019 was sufficient to drive the alteration of her previous settled view on who should benefit from her will. Using the terminology of the case of *Banks* the deceased's intense anxiety and paranoia perverted her sense of right. As such Dr Lee's opinion was that the deceased failed the fourth test set out in the case of *Banks*. Further, Dr Lee considered that the deceased's paranoia and intense anxiety were of a degree that she was vulnerable to manipulation and in the legal sense facile. It was therefore plausible that she was pressurised into changing her will.

Christine Judd

[87] Christine was aged 27 years and was employed as a consultant ecologist. She was now married to the pursuer. She first met the deceased in June 2013, shortly after she started dating the pursuer. The deceased and the pursuer had a mother / son type relationship. The deceased was a private and shy person who wouldn't like to cause a scene, however, she was very funny once you got to know her. Christine and the deceased had a shared love of animals and Christine became good friends with the deceased because of that. Christine and the pursuer went round to the deceased's house once a week for dinner and to watch a TV programme. Christine also frequently met the deceased at the stables where her horses were kept. The deceased also got to know Christine's mother and brother, was a frequent visitor at Christine's mother's home and joked about moving in. The deceased did everything with the pursuer's mother.

[88] The relationship between the deceased and the pursuer was a strong relationship throughout the deceased's life. The pursuer was always there for the deceased and was in constant communication with her. The pursuer was always texting and calling the deceased.

[89] Christine lived a short distance from the deceased's house. The deceased's house had one bedroom. There were numerous ornaments in the living room and pictures of animals that the deceased had rescued over the years. The deceased always kept her house immaculate, the ornaments were polished and the hoovering was always done.

[90] Between 2013 and up to about a year before the deceased's death Christine had never heard of the defender. She had never seen the defender and the deceased had never spoke about him. There then came a point when the deceased saw the defender in a park and told him that she was unwell. It was after that that the defender came back into the deceased's life and quickly moved into the deceased's house. The defender just turned up at the deceased's house and the next thing he was living in it. The deceased had not invited the defender to stay or move in. After the defender had moved into the deceased's house Christine and the pursuer continued to attend for their weekly dinner with the deceased. However, the defender made it awkward. The defender would place his arm across the door so as to prevent them entering the deceased's house. When inside the defender would lie across the sofa so that Christine and the pursuer had nowhere to sit when eating their dinner. Christine and the pursuer were determined that they would keep visiting the deceased and took turns to sit on the floor or the stairs whilst eating their dinner and watching a TV programme. The deceased told Christine that she did not want the defender living in her house but felt she couldn't get him out. Christine thought that the defender was psychologically overpowering the deceased and was definitely scared in her own

house. The deceased told Christine that the defender would take her mobile phone away. Christine also received texts from the deceased's phone, however, these were not in the manner that the deceased would write text messages. Christine thought the defender would take the deceased's phone away so as she could not call people for help or support. Christine also had difficulty contacting the deceased by phone on days when she had arranged to meet her.

[91] Under reference to various photographs of the interior of deceased's house (production 5/2/2) Christine explained that, after the defender moved into the deceased's house, the house changed from being immaculate to becoming dirty and extremely cluttered with the defender's stuff. The interior of the deceased's house was unrecognisable from what it had previously been like. When the deceased was in hospital Christine took the deceased's clothes to the defender to get them washed but he never did it and the pursuer's mother had to buy the deceased new clothes.

[92] The deceased's health deteriorated in mid-2019. Christine visited the deceased regularly in hospital both as a visitor and also when she was an inpatient with her own medical issues. The pursuer visited the deceased in hospital every day. Christine also, on occasions, sat next to the deceased when she was having dialysis. After dialysis the deceased would be completely drained. She would not be able to form a sentence and when she got to her hospital bed or her own bed, she would just sleep. It would take the deceased days to recover from dialysis and then it would be time for more dialysis.

[93] A few months before the deceased passed away she gave an individual piece of jewellery to the pursuer's mother, the pursuer's two sisters and Christine. When Christine and the deceased were sitting in the deceased's garden she told Christine that she should

sell the piece of jewellery if they needed money to get the defender out of the deceased's house.

[94] Under reference to the entry in the ERI Records dated 5 August 2019 and timed at 16.08 Christine explained that she is the fiancé referred to and her friend was in fact her mother. The deceased hated being in hospital and wanted to get out to see her horses. Christine recalled attending hospital with her mother that day to take the deceased home and to take her to see her horses. Christine had seen the deceased the day before and she had been fine, however, the deceased was not herself on 5 August 2019 and Christine had never seen her act like that before. At that time Christine's relationship with the deceased was really good. On 5 August 2019 the deceased was so upset and she kept saying "I don't want to go home", which was strange for the deceased. That day she also was saying, over and over again, that the defender was trying to take the house from under feet. The deceased was angry with Christine because she was the one that was going to be taking her home and she didn't want to go home. The deceased called Christine "Laura" and Christine explained it was like the deceased did not see that it was her. Given the deceased's presentation, Christine had to call the doctor. The doctor said that they had never seen the deceased act like she was acting and was thinking about admitting the deceased under a psychiatric Act.

[95] Christine and her mother eventually took the deceased home on 5 August 2019. They had arranged to meet the defender at the deceased's front door at an allocated time so that the defender could assist the deceased into her home. However, when they arrived at the deceased's house, the defender was not there and they were locked out of the deceased's house. When the deceased arrived at her house she begged Christine's mother to take her back to the hospital canteen, even though she wanted to be home to see her horses. After a

number of hours Christine or her mother managed to reach through the deceased's letter box and obtained a key to open the front door. When the deceased got into her house she was not happy to be home.

[96] On 6 August 2019, after the deceased had been discharged home, she called Christine later that day and said words like "help I am scared, I can't breathe". Christine phoned an ambulance and drove round to the deceased's house. When she arrived she was shocked to find the defender present, lying on the sofa. When Christine arrived the deceased said she was scared, needed help and that the defender would not call an ambulance for her. Christine could not understand why the defender had not called an ambulance. The deceased was hyperventilating, in tears, would not sit down and was just in a complete panic. When the ambulance arrived the paramedics were quite shocked. It had been agreed as part of the deceased's discharge from hospital that the defender would keep an eye on her. However, when the paramedics asked the deceased if she had anything to eat in last 24 hours, the deceased said she had not and that the defender would not make her anything to eat. The deceased was crying her eyes out. The deceased's blood sugar levels were checked and they showed that she hadn't eaten. The deceased was as pale as a ghost. The paramedics said that the deceased needed something to eat immediately. The defender then offered to get the deceased a chippy and the paramedic gave the defender a look like 'are you for real?'. Christine considered that it seemed to be a hassle for the defender to even walk across the road to the chip shop. The deceased did not want the paramedics to take her back to hospital but she had an impending doom and was hysterically panicking.

[97] Christine made the deceased some food and the pursuer, the pursuer's mother and two sisters all came over. Christine phoned the out-of-hours doctor to tell the doctor what was going on. She then looked through photo albums with the deceased, which calmed her

down. Christine accepted that there were times in August 2019 when the deceased was not anxious, but that was when she was with the pursuer or his sisters or his mother as they would take her mind off things.

[98] The deceased told Christine that she made a will at the same time as the pursuer's mother had made a will. After that will was signed the deceased never discussed with Christine about making any changes to her will. On one occasion, the deceased, not long before she died, sometime in August 2019, was at Christine's mother's house sitting with Christine's mother and the pursuer. Christine was just dotting around in the room. The deceased then said she wanted: (i) the house to go the pursuer; (ii) her cat to go to the pursuer's mother; (iii) her jewellery, photo albums and any other personal belongings to go to the pursuer's two sisters; and (iv) her car to go to the defender. The deceased said something like "make sure you know what I want". Christine did not ask questions about this or contribute at all because she knew that the deceased was private person. Christine had not been aware of the 2019 will but had since become aware of it. Christine explained that it was completely incorrect that, as at August 2019, the deceased had not seen the pursuer for over a year. The deceased was never disappointed in the pursuer, rather she was like his little cheer leader and knew that the pursuer was doing his best for her, which he was. The deceased attitude to the pursuer never changed. Christine, the pursuer, the pursuer's mother and two sisters were all with the deceased holding her hand on her last day when she passed away.

Laura Somerville

[99] Laura was aged 28 and worked in a bank. The deceased was her aunt and she had a very close relationship with her. The deceased had a caring personality. She only wanted

the best for her brother, the pursuer, her sister, Jennifer, and her. The deceased referred to Laura's mother (who is also the pursuer's mother) as "the caring one". Laura saw the deceased most days when she was a child and she maintained her close relationship with the deceased as she grew up. The deceased had friends but she would not invite them to her house. This was because, although her house was very tidy, her carpet was in a state due to the animals that she had had. The deceased's pride meant that she did not want people to see the state of her carpet. In late 2018 the deceased had a close relationship with Laura's mother, the pursuer, Jennifer and her. The deceased saw the pursuer as her blue eyed boy. As at late 2018 the deceased lived at her house on her own.

[100] Laura did not think the deceased met up with the defender in late 2018. The deceased used to see the defender sitting in a park in Loanhead and would try to speak to him but the defender would ignore her. However, the deceased told Laura that she later approached the defender in the park and asked him to help her with a CD recording. It was then that the defender came back into the deceased's life and moved in with her. Laura still visited the deceased at her house after the defender moved in but the visits became hard and difficult due to the defender's presence. The deceased told Laura that the deceased had asked the defender to leave on several occasions. However, the deceased did not like conflict and would not be one to get into an argument.

[101] Under reference to various photographs of the interior of deceased's house (see production 5/2/2) Laura accepted that she had taken the photographs and said she had done so before the deceased had died, whilst the deceased was in hospital. She explained that, after the defender moved into the deceased's house, the house changed from being a house where everything had its place, to house that was dirty, littered with the defender's stuff and had problems with mice.

[102] Later in 2019 the deceased was in and out of hospital. She was started on dialysis. The dialysis caused her legs to swell up and made her confused and upset. When the deceased was initially admitted to hospital Laura believed that the deceased said that the pursuer was her NOK. Laura regularly visited the deceased in August 2019. In August 2019 the deceased did not fall out and was not upset with the pursuer, her mother or her. The deceased did not fall out with any of them.

[103] At some point before the deceased commenced dialysis she had told Laura that she wanted the pursuer to have her house, however, Laura could not be more specific about the date when the deceased had said this. The deceased never discussed anything further with her about the deceased's property and never discussed anything to do with her will.

[104] Laura saw the deceased on 11 August 2019. She recalled it was a Sunday. She knew it was a Sunday because her sister, Jennifer, doesn't teach on a Sunday and it was Laura's first long drive after passing her driving test. The deceased had been begging her mother to take her out. Her mother agreed to take the deceased to S. Luca's café. Her mother, the deceased and Jennifer attended at S. Luca's around 4pm or 5pm. Laura drove to S. Luca's alone and met them there. When she arrived the deceased did not acknowledge her. The deceased look deflated. Normally the deceased would speak and have a conversation but she didn't even look at her. The deceased did not speak and her head was down facing the floor. Laura did not know why the deceased presented in that way but assumed it was due to the medication the deceased was prescribed.

[105] A few weeks before the deceased's death Laura went to the deceased's house to get the deceased a change of clothes. At that time she came across documents to do with equity in the deceased's house. These documents had signatures under the deceased's name but it was not the deceased's signature. Laura told her mother about the equity documents but

her mother never really took it in and she had to tell her mother again, about these documents, the following day.

[106] In cross examination Laura denied that the deceased had always had a close relationship with the defender. She also rejected a suggestion that the various photographs that she had taken of the interior of deceased's house had been taken a few days after the deceased had died. Laura accepted being at the meeting with medical professionals on 31 July 2019 and explained that her mother, Patricia, walked out and then she walked out afterwards. Her mother had walked out because she was upset that the deceased was not accepting any help, which resulted in the meeting going round in circles and she had walked out in order to check on her mother. Laura rejected a suggestion that her mother and the pursuer were frustrated at the meeting and noted that she would be surprised if that was the impression someone else at the meeting had.

Janette Judd

[107] Janette was the mother of Christine and the now mother in law of the pursuer. She worked as a carer. She got to know the deceased through the pursuer about 6 years ago. The deceased was a lovely person. She was also a private person who kept herself to herself. The deceased would visit Janette's home about three times a week. They would chat and the deceased would tell her what she had been up to and what was happening with her horses. Janette was aware that the deceased had made a will in November 2018 because the deceased used to say to her that everything was in place when she passed away. The deceased told Janette, at some point before she was admitted to hospital, that she had left her cat to her sister, Patricia, her house to the pursuer and her horses to a vet.

[108] There came a point when the defender was living with the deceased. The deceased never talked about the defender much. Janette accepted that the deceased's health declined in 2019 and that she was in and out of hospital. Janette went to visit the deceased in hospital.

[109] Under reference to the entry in the ERI Records dated 5 August 2019 and timed at 16.08 Janette explained that she went with her daughter, Christine, to pick up the deceased from hospital. Janette recalled the deceased being nasty to Christine on that day but explained that the deceased was not normally nasty to Christine. Janette and Christine took the deceased to her house that day. At that time the deceased could not remember a lot and wasn't quite right.

[110] The deceased never said that she wanted her house to go to anyone other than the pursuer. Janette was not aware of the deceased ever falling out with the pursuer.

John Allan

[111] Mr Allan was a retired police officer. Mr Allan was one of six siblings that included the deceased, Patricia, and the defender. Mr Allan got on well with the deceased when they were younger but they didn't have much contact after their mother died. The deceased was quiet, reserved, neat, tidy and organised. The deceased was closest to her sister Patricia.

[112] Mr Allan was not aware of the deceased becoming ill in 2019. After the deceased died Mr Allan was contacted by his sister, Patricia. She informed him of the deceased's death and explained that the hospital would not release the death notification to anyone other than the eldest sibling. In the circumstances Mr Allan called the hospital to pick up the death notification and then registered the deceased's death.

[113] Mr Allan then received a letter from the defender, dated 1 October 2019 (production 5/1/3), asking for the deceased death certificate. Mr Allan considered the defender was a bit of loner, a bully and was someone who tried to make himself important. The letter was formal in its terms and was an example of how the defender behaved. At the time Mr Allan received the letter he: (i) had no relationship with the defender; (ii) was not aware of the deceased's will; and (iii) was not aware of the deceased's funeral instructions. By the time Mr Allan received the letter he had already made the funeral arrangements for the deceased's funeral and did not take any action as result of receiving the letter.

[114] In cross examination Mr Allan accepted that in the 20 years prior to the deceased's death he may not have had any contact with the deceased or the defender. Mr Allan explained that he used to visit the deceased with his children but the defender used to complain and berate the deceased about Mr Allan being in her house. In the circumstances Mr Allan stopped visiting the deceased to avoid creating problems. The deceased continued to know where Mr Allan resided but did not make contact.

Jennifer Somerville

[115] Jennifer was aged 31 and was a swimming teacher. The deceased was her aunt. The deceased was generous, kind, witty and very good listener. She loved animals and owned horses that she loved and cared for. The deceased took Jennifer to swimming lessons and horse riding when she was younger. Jennifer would see the deceased almost every day. She would see the deceased with her sister, Laura, her brother, the pursuer and her mother, Patricia. Jennifer was very close to the deceased, she shared a birthday with her and she was more of second mother to Jennifer, Laura and the pursuer, than an aunt. The deceased doted on the pursuer. The deceased had a very close relationship with Jennifer's mother.

The deceased and Jennifer's mother would do things for each other. The deceased had friends and she would go and visit them but she would not have friends visit her house because, although her house was always spick and span, she was embarrassed about her old carpet.

[116] As at late 2018 Jennifer was still seeing the deceased almost every day. At that time the deceased was living on her own and her house was kept clean and tidy. At some subsequent point the defender moved into the deceased's house. Jennifer was not sure when this occurred or how it came about. The deceased told Jennifer that she was scared of the defender. The defender lost his temper and the deceased was scared how the defender would react to things.

[117] Under reference to various photographs of the interior of deceased's house (see production 5/2/2) Jennifer explained that after the defender moved into the deceased's house, the house changed from being spick and span to being a complete mess. The deceased saw her house being a complete mess and she hated it. She hated living in that state but by that time she was too weak to do anything about it.

[118] Jennifer accepted that there came a point in 2019 when the deceased became ill and that she was in and out of hospital. Jennifer thought that the deceased would have told the hospital that the pursuer was her NOK, but that was a guess on Jennifer's part. Jennifer visited the deceased in hospital and was aware that she was receiving dialysis. The dialysis made the deceased very weak and she struggled to walk and even stand. In August 2019 Jennifer visited the deceased quite a lot. At that time there was nothing done by Jennifer, her mother or the pursuer to upset the deceased.

[119] It was only when the deceased was in hospital that Jennifer became aware that the deceased had signed the 2018 will. Jennifer became aware that the remainder of the

deceased's estate was going to the pursuer. That was not a surprise to Jennifer because the deceased loved the pursuer and Jennifer remembered the deceased saying years ago that she would leave her house to the pursuer. The deceased never told Jennifer she planned to change her will and only talked about her house going to the pursuer.

[120] Jennifer recalled seeing the deceased on the weekend of 11 August 2019. Jennifer thought she saw the deceased on a Sunday because both Jennifer and Laura were working as lifeguards at that time and were both off. On that Sunday the deceased phoned her mother and was keen to go out. Around 4pm Jennifer and her mother went to the deceased's house to pick her up. Jennifer's mother then drove them all to S. Luca's café in Musselburgh. Laura was not initially going to go but then phoned to say she was going to come after all and made her way to S. Luca's. Jennifer was aware that the deceased had earlier been out with Mary and Gordon Bell. That day the deceased, from the moment she was picked up, did not say a word. That was not normal, the deceased was normally chatty. The deceased was completely lifeless, it was like she was dead behind the eyes. Jennifer was not aware why the deceased was presenting like that.

[121] In cross examination Jennifer was asked whether she was sure that it was the weekend of 11 August 2019 that she went to S. Luca's. Jennifer explained that she was sure because it was the last time they took deceased out and that she will always remember that day.

Dr Alexander Blair

[122] Dr Blair has been a GP for 27 years in the same practice. Dr Blair was the deceased's GP and he remembered her. Dr Blair explained that the duty of confidentiality in relation to a patient's records continued after death. Dr Blair had released the deceased's GP records to

the pursuer following being sent a mandate. Towards the end of her life the deceased was suffering kidney failure, diabetes, anxiety and depression. She latterly required dialysis for the kidney failure. Her diabetes was treated by insulin, which the deceased administered herself. The deceased would test her blood sugars by pricking her finger and use a device to check. She would then record her blood sugars in a book. There was suggestion that it would be better for district nurses to administer insulin to the deceased but she wished to do it herself and Dr Blair was content for her to do that.

[123] Under reference to a letter sent by Dr Blair to the defender's solicitor, dated 30 December 2019 (production 6/2/12) and the GP records at page 4, Dr Blair explained that he saw the deceased on 7 August 2019 and she was tearful. Dr Blair explained that the deceased became increasingly unwell and more tearful towards the end of her life because she was frustrated she could not get out as much as she would like to. Dr Blair again saw the deceased on 9 August 2019 and she told him she did not want anyone in her house. Dr Blair thought that was because the deceased was a very private person but was not sure for what time period the deceased had not wanted people into her house. Dr Blair noted that the deceased was seen at the GP practice by another doctor and the practice nurse. Dr Blair explained that during his consultations with the deceased on 7 and 9 August 2019, the deceased had capacity to make decisions about her own welfare. The conversations he had with deceased on those occasions were normal and he had no reason to suspect she lacked capacity. Dr Blair considered that at those consultations the deceased seemed like someone who knew what she was doing. Dr Blair did not know how dialysis had effected the deceased but noted in general it makes people feel tired and weak for the rest of the day and often the following day.

[124] In cross examination Dr Blair accepted that he was not asked to assess the deceased capacity in August 2019. He was aware during that month that consideration was given to detaining the deceased under Mental Health Act and agreed that would have been a significant event. Dr Blair explained that he was aware that, around that time, the deceased was having paranoid thoughts and noted that she was a very anxious lady.

Dr Stephen Potts

[125] Dr Potts is a consultant psychiatrist who has worked at the renal unit at the ERI since 1996. His role included seeing patients on the ward and as out-patients. Dialysis could make patients feel unwell. It was gruelling and was associated with depression, anxiety and panic attacks. Older patients undergoing dialysis could also experience an aggravation to any existing cognitive impairment. That cognitive impairment could show itself in a number of ways. If the patient had dementia, dialysis could make the patient's cognitive deficits worse during a dialysis session and for a period of time afterwards. Sometime dialysis could expose cognitive impairment in a patient. Dr Potts would be asked by colleagues on the renal unit to see patients if they were concerned about the patient suffering from cognitive impairment.

[126] Dr Potts recalled the deceased and was involved in her care. He first saw her in July 2019. He was originally supposed to see the deceased as an out-patient but by the time of her appointment she was actually an in-patient. He thereafter repeatedly made assessments of the deceased's capacity to: (i) consent or refuse dialysis and other medical treatment; and (ii) understands the risks of going home when medically unwell (collectively referred to as "medical consent capacity"). In making his assessment of the deceased's medical consent capacity he took account of concerns from the renal specialists, nurses, as well as his own

assessment of her during interview. In the course of his assessments Dr Potts would be looking at: (i) the deceased's awareness of her surroundings; (ii) the medical problems that the deceased was suffering from; (iii) the risks associated with treatment / not having treatment; and (iv) her ability to manage in a hospital setting. Dr Potts would also be looking to exclude insane delusions. Dr Potts had seen the deceased on about 16 occasions and had not seen any insane delusions but his colleague, Dr Smyth, did document something like that in August 2019. Dr Potts did not, at any stage, assess the deceased's testamentary capacity.

[127] The object of Dr Potts' treatment of the deceased was to assist the renal unit in offering the most appropriate treatment given the deceased's evident distress. The dialysis caused the deceased confusion, fatigue and aggravated her anxiety. The deceased's anxiety could be improved, to a degree, by medication given early on in dialysis or before dialysis. The deceased had previously been treated with anti-depressants but these had caused side effects. They had also not been particularly effective and were discontinued.

[128] If a person lost medical consent capacity the question of whether that would be permanent would depend on the underlying cause of the loss of such capacity. A person with a permanent severe brain injury would probably lack medical consent capacity from the time of the injury. As Alzheimer's disease progressed there would come a certain stage when the loss of medical consent capacity became permanent. There was some evidence that the deceased had some form of dementing illness but this had not been diagnosed when she started dialysis. The deceased underwent a CT scan on 6 September 2019 and that showed brain abnormalities. A dementing illness normally progressed from months to years but that progression could be quicker if the person had the dementing illness on top

of other illness and dialysis. Dialysis could also make the effects on the brain more apparent in older patients during and after dialysis.

[129] Dr Potts was taken through a number of the entries he had made in the ERI records and some of the entries made by other professional. Dr Potts made the following observations

- (1) 05/07/2019, 11.22 – Dr Potts did not think that deceased's intense anxiety at that time was having any impact on her medical consent capacity;
- (2) 09/07/2019, 11:59 – Dr Potts was beginning to wonder about the deceased's cognitive function in terms of possible Alzheimer's disease or some other possible diagnosis. However, the deceased's cognitive function was not impairing her medical consent capacity at that time. The plan was to do a MOCA when the deceased was not on dialysis because if it was done shortly after dialysis that could result in a lower MOCA score than the deceased would otherwise have achieved.
- (3) 16/07/2019, 16:53 – Dr Potts impression was that the deceased anxiety was slowly improving. The dialysis had removed some fluid from the deceased's body, her legs were less swollen and that had resulted in an improvement in her mobility.
- (4) 19/07/2019, 17.44 – The deceased's weight was coming down due to fluid being removed from her body during dialysis.
- (5) 05/08/2019, 16.08 – Dr Potts accepted that this record showed the deceased being paranoid and thinking that she had not been told that she could not drive.
- (6) 05/08/2019, 17.08 – This entry was made by Dr Potts' colleague, Dr Smyth. Dr Potts' understanding was that the deceased was discharged from hospital on 5 August 2019.

(7) 20/08/2019, 19.31 – This was the first contact Dr Potts had had with deceased after a period of leave. Dr Potts, at the time, did not understand why the deceased did not want her family to join the discussion he was having with the deceased. The fact that a detention under the Mental Health Act was being considered did not mean that the deceased had lost medical consent capacity at that time. It was, however, significant that a Mental Health Act detention was being considered. A person could be detained under the Mental Health Act for mental illness or acute confusion and still retain medical consent capacity and testamentary capacity. In the entry on 5 August 2019 at 17:08 Dr Smyth was considering the deceased's paranoid beliefs and desire to leave hospital, which was more mental illness than a lack of medical consent capacity. Dr Smyth stated, at that time, that there were no marked signs of acute confusion and did not call the deceased's medical consent capacity into question. Dr Smyth did not regard the deceased as suffering from a delusional disorder and found that the deceased's mental illness presentation was not so bad, at that time, as to merit a detention under the Mental Health Act.

(8) 10/09/2019, 20.22 – The CT scan had been ordered because the deceased had collapsed and it was needed to ascertain whether she had had a stroke or cerebral bleed and required urgent intervention. Whilst Dr Potts was not a radiologist, the CT scan showed ventricular enlargement out of keeping with the deceased's age. This made her brain vulnerable to the effects of infection, medication and the fluid shifts of dialysis (the removal of waste products from the blood stream and the re-balancing of salts in the blood). Dr Potts asked the renal team to get specialist advice from a neuro-radiologist, who subsequently advised that the deceased was suffering from central atrophy. Central atrophy was localised shrinkage to the central area of

the brain and was consistent with the vulnerability of the deceased brain to dialysis, which had been witnessed clinically. It was not possible to say how long the deceased had been suffering from central atrophy because there was not an earlier CT brain scan, but it was likely it had been present for a while (it was likely to be years rather than months or weeks but without an earlier CT scan it was impossible to know). Central atrophy would impair medical consent capacity as it progressed and if associated with intrusive treatment, like dialysis, it may impair medical consent capacity. On 10 September 2019 the deceased was partly disorientated. She was not due to get a transplant so the deceased was wrong about that. The deceased's sister's view, that the deceased was notably confused, was consistent with what was being witnessed clinically. The reference to "post-dialysis delirium" was a clinical diagnosis of disturbed mental functioning arising from physical ill-health.

(9) 13/09/2019, 09.58 – This entry showed, on a simple assessment, that the deceased was disorientated to a degree.

(10) 13/09/2019, 17.57 – Dr Potts considered that the deceased's medical consent capacity fluctuated rapidly between 6 September 2019 and 13 September 2019.

Dr Potts noted in the entry that the deceased's cognitive deficits were still evident from when she was admitted back to hospital around 6 September 2019. This was based on his own observations and the observations of other members of the medical team.

(11) 17/09/2019, 18.18 – A MOCA was scored out of 30 and a score of less than 20 would indicate moderate cognitive impairment. The deceased had scored 15/30 on 14 September 2019 (non-dialysis day), had dropped to a score of 12/30 on

15 September 2019 (post dialysis) and then increased to a score of 15/30 on 16 September 2019 (non-dialysis day). A score on 15/30 indicated clinically significant cognitive impairment. The 12/30 score would have been due to the effects of dialysis and it was well recognised that dialysis could have an adverse effect on a patient's orientation.

(12) 17/09/2019, 18.47 – The deceased was now saying things that were clearly false. She was using compensatory confabulation, which was describing events that had not happened to fill in the gaps in her memory. Whilst Dr Potts had noted that it was possible that the deceased could have retained medical consent capacity on a non-dialysis day she did not in fact do so and therefore it was Dr Potts' view that the deceased had lost medical consent capacity by 17 September 2019.

(13) 20/09/2019, 17.37 – This was the last involvement Dr Potts had with the deceased. The deceased had lost medical consent capacity by that stage. Dr Potts was not told why the deceased's brother did not want the power of attorney discussed with the wider family.

[130] Dr Potts did not think there were any problems with the deceased's medical consent capacity prior to 5 August 2019. He did not have doubts over the deceased's medical consent capacity until he learned about the events of 5 August 2019 on 6 August 2019. Dr Potts considered that the deceased's medical consent capacity was fluctuating between 5 August 2019 and 17 September 2019. Her medical consent capacity was lost on 17 September 2019. The deceased's cognitive impairment was effected by dialysis, the other medical conditions she was suffering, anxiety and poorly controlled diabetes. The deceased's cognitive impairment would be relevant to assessing her testamentary capacity.

[131] Dr Potts recalled having a discussion with the deceased at some point before 20 August 2019. During that conversation the deceased told him that her will arrangements were that she would bequeath her estate, which consisted of a house or a flat, to her nephew. Dr Potts would not have asked the deceased about her will arrangements and therefore the deceased must have volunteered this information to him. Dr Potts understanding was that the deceased's nephew was her NOK and the entry in the ERI records dated 10 September 2019 and timed at 20.22 confirmed that. Dr Potts recalled having one or two conversations with the deceased about her nephew. The deceased spoke about her nephew with warmth on these occasions but Dr Potts could not recall when these conversations took place and he did not think he made a note of them. Dr Potts recalled the deceased's nephew visiting the deceased in hospital on occasions and he had recorded the nephew being in attendance in entry in the ERI records on 20 August 2019 at 19:31.

[132] Dr Potts had, over his career, been asked to make an assessment of a person's testamentary capacity on a small number of occasions. If he was undertaking that task he would want to: (i) understand the person's medical circumstances; (ii) know the reasons they were admitted to hospital; (iii) consider any previous cognitive assessments; (iv) consider any previous brain CT scans; (v) know what triggered the request; and (vi) interview the person under reference to the factors required to establish testamentary capacity. The interview with the person would be crucial. However, he accepted that, whilst it would be preferable to conduct a contemporaneous interview with the person, it would be possible to give a retrospective view on testamentary capacity on the basis of medical records and other evidence, if the person was deceased.

The defender

[133] The defender gave evidence over the course of two days. The defender was aged 68 and was the brother of the deceased. The defender was now retired. Prior to retiring he had had various jobs including being a ministry of defence police constable, working for the Scottish Prison Service and working at a special needs school. The defender considered that, out of all the siblings, he had the closest relationship with the deceased. The defender and the deceased shared a love of animals and that was the foundation of their relationship. The defender's next closest sibling was Kathleen. Kathleen moved to Shotts and ran an animal sanctuary for a long time. There was never a period of time that the defender and the deceased were not close. In 2013 the defender hardly saw the deceased because his sister, Kathleen, had developed throat cancer and the defender commuted daily to Shotts to assist Kathleen. However, the defender kept in touch with deceased by way of text messages and phone calls during that time. There was never a period of time when the defender was not a part of the deceased's life. There was never any rift between the deceased and the defender. The defender and the deceased depended on each other to look after their respective animals when the other was working. When the deceased was working she worked four nights and the defender used to look after her animals. The defender accepted that the deceased and Patricia used to see each other every day.

[134] The deceased had been a diabetic since about 2012. The deceased did not conform to advice about meal habits in relation to her diabetes. Rather, the deceased gauged it herself and managed her diabetes by her own methods. She carried sweets with her in case she felt light headed. The deceased never once collapsed into a diabetic coma at her house and the defender considered that the deceased had been successful in administering her insulin, which she did with a pen like item. When it was later suggested by the hospital that a nurse

visit the deceased's house to administer her insulin the deceased was of the view she had been in the nursing business since she was aged 18 and did not need a young nurse to come and give her insulin. The defender did not force meals on the deceased. She knew when she wanted to eat and was very strong about that. The defender was not aware of the deceased ever refusing to take her insulin.

[135] Nobody knew that the deceased was a very vulnerable and anxious person. The deceased had suffered from panic and anxiety since childhood. She told the defender in August 2019 that she had a fear in childhood of being abandoned. The deceased's anxiety worsened after she lost her job in March 2018 and it got worse around August 2019. The deceased hoped that Dr Potts would have got to the bottom of her anxiety but he didn't have sufficient time to do so before her death.

[136] In March 2018 the deceased lost her job and that was a shock to her. In May / June 2018 the deceased started dropping hints to the defender to stay the night at deceased's house, which was a one bedroomed property. The defender agreed to stay and quickly realised that the deceased did not want to be isolated on her own. The deceased was happy for the defender to sleep on the floor in her house and he went back to his own home in the morning. The defender then normally went to the stables, where the deceased's horses were kept, in the afternoon to help muck out. The defender would then go back to deceased's house, they would have tea and then take the dogs for a walk in the evening. That arrangement was fine until the deceased developed a terminal illness from around March 2019.

[137] From March 2019 the defender spent more time at the deceased's house. He would still go home in the morning but would not stay away for as long as he used to do. The defender had always cut the grass and trimmed hedges at the deceased's house and the

deceased also used to garden. However, by 2019 the deceased was not able to garden. The defender therefore kept the garden of the deceased's house neat and tidy and that was part of the reason for staying at the deceased's house. From March 2019 for about the next six months the defender stayed at the deceased's house every night. The defender did so at the deceased's suggestion. The letter of 3 June 2019 from the ERI to the deceased's GP, Dr Blair, regarding the deceased attendance at the ERI on 1 June 2019 (GP records, at page 97) confirmed that the deceased said to the ERI staff that she often had the defender over to stay and help. The defender believed that from June 2019 the deceased was being put under pressure by her sister, Patricia, to get rid of the defender. Patricia told the defender the reason she wanted him out of the deceased's house was so that she could apply to the government for carer's allowance. When Patricia raised this with the defender, the defender said to the deceased that he was happy to leave but the deceased said that the Bell family were: (i) filling Patricia's head with nonsense about how much she could make as a carer; and (ii) saying that they had so much money from benefits that they had to spend money to keep below the £16,000 limit. The deceased also said to the defender that she wished they (meaning the Somerville family) would leave her alone.

[138] By July 2019 the deceased had commenced dialysis three times a week on a Tuesday, Thursday and Saturday. She was taken to dialysis in transport arranged by the hospital. The defender's car was not suitable for taking the deceased to dialysis. The deceased was initially taken to dialysis by taxi, however, she had a fall and the defender thought the hospital arranged a double crewed ambulance to take her after that. The dialysis was not too bad for the deceased in the beginning. When she got home she liked a cup of tea and a rest. After she had a sleep she was a lot better. She may have been slightly confused when she woke up but that quickly passed. She did not remain confused. The deceased managed

to maintain her daily routine as best she could and continued to get out and about, visit her horses and complete crosswords. The dialysis did not result in the deceased losing her personality, character or stop her doing the things she wanted to do. The deceased was very strong willed and determined and that did not change when she was undertaking dialysis. If anything the dialysis made her more determined to get on with normal life. The dialysis was a set-back for the deceased but she did not give in. As her condition worsened, the deceased's breathing became more laboured and she had aches and pains. The deceased, however, coped well with dialysis up until about the middle of August 2019 but it then became apparent that it was not working.

[139] Up until August 2019 the deceased tended to look after herself. She had a very limited diet and ate bananas, yogurt, muesli, toast and cheese. She did not have a big appetite and never took breakfast. She was mobile and made herself microwave stuff. When it became obvious that the deceased had breathing difficulties and moving from her chair was an effort, the defender would bring meals to her.

[140] Under reference to the social work note of a meeting, dated 31 July 2019 (production 6/2/19 – see para 15 above), the defender noted that the deceased was wishing to leave hospital but the professionals were against that. Although some of the deceased's family were at that meeting, the defender was not. At that time the Somerville family were frustrated with the deceased and not supporting her. The defender was not surprised that an entry in the ERI records on 4 August 2019 recorded that the Somerville family did not want to speak to the deceased as that was consistent with the Somerville family's attitude towards the deceased. The defender's view was that the deceased knew she was dying at the beginning of August 2019 and, using her lengthy nursing experience, weighed up the risks and decided she wanted to be at home rather than in a hospital or a care home. She

made the decision that she did not want to be resuscitated and nobody said she was not of sound mind to make that decision.

[141] On 4 August 2019 when the deceased took her phone apart in the hospital, it was not the case that she was having mental episode. About 1 week before that the deceased had given the defender her mobile phone and said that it was not working. The defender showed the deceased how to open the back of the phone, take the sim card out, re-insert the sim and put the phone back together. This procedure resulted in the deceased's phone working. The same thing happened in hospital. The deceased's phone fell off the bed. The deceased was trying to fix the phone by doing what the defender had showed her. The deceased got so far, but the sim card clip had sprung out and the deceased got frustrated as many people would do.

[142] Under reference to the undated letter from the ERI to Dr Blair (GP records at page 54) regarding the deceased's discharge on 5 August 2019, the defender explained that the deceased had told him about the build up to her discharge from hospital. The deceased had reacted as she did due to the strain and pressure she was under from the Somerville family and the Judd family. Christine and the deceased were, contrary to what had been suggested in the earlier evidence in the case, not best friends. The deceased's view of Christine was that she was an impudent woman who was prone to exaggeration. The Somerville family and the Judd family had been goading the deceased all week saying that: (i) she would never get out of hospital; and (ii) all her belongings were worthless and would end up in a skip. The deceased told the defender that Christine and her mother had assaulted the deceased in hospital by forcefully removing her from her bed and dragging her into a shower. The defender thought this assault took place on 5 August 2019. The deceased did not take showers as she had a fear of water hitting her face. Christine and her mother

laughed at that fear and forced the deceased to shower and experience that. When Christine and her mother came to take the deceased home from hospital all the pressure and mental torture that the deceased had suffered from both the Somerville family and the medical professionals, which including the medical professionals saying that she needed a commode and changes made to her house, resulted in the deceased reacting in the way she did. The deceased was ashamed of the way she reacted in hospital, said it would never happen again and it never did. The defender accepted that the deceased was pretty unwell when she was discharged from hospital on 5 August 2019 and that her mobility was becoming more restricted each day.

[143] The defender was asked about an ambulance attending the deceased's house on 6 August 2019 after the deceased had been discharged from hospital. The defender initially explained that he thought that incident occurred in the early hours of the morning. The defender confirmed he was present throughout the attendance of the ambulance staff. What happened was that the deceased had been watching TV in her house and scanning the channels. The channels that she was looking at had sign language interpreters and the deceased decided to telephone Christine. The defender thought this was about 01.30. The defender suggested to the deceased that she might wait to telephone Christine until the morning as it was a bit late. The deceased said it was okay because Christine stayed up late and she could telephone her at any time. The deceased phoned Christine and during the call the deceased said she was out of breath and had pains in her chest. The deceased told the defender that Christine had hung up. The deceased tried to phone Christine back, but the line was engaged. The defender said to the deceased that Christine was probably trying to phone the deceased. A short time later a paramedic arrived at the deceased's door. This shocked the deceased and the defender. Two ambulance crew arrived after that. Christine

then appeared and told the ambulance crew that she had called them because the deceased had collapsed and was dying. At this time the deceased was not in a state of collapse but was, rather, sitting in her chair. She was checked over and the defender thought the deceased's blood sugar was found to be low. The paramedic and ambulance crew had no concerns about removing the deceased to hospital. The defender didn't do anything because there was nothing to do. Christine suggested that the deceased was mentally unstable, confused and that hospital was the best place for her. This was another example of the Judd family trying to place the deceased in hospital. However, the ambulance crew did not agree, but, in order to appease Christine, they arranged for an out-of-hours doctor from the ERI to have a telephone conversation with the deceased. After a lengthy conversation the doctor said there was no evidence to suggest that the deceased needed admitted to hospital and was happy for the deceased to see her GP later that morning. The deceased was not taken to hospital following the visit from the paramedic and ambulance crew.

[144] The defender was referred to notes made by the ambulance staff and the out-of-hours doctor that subsequently called the deceased on 6 August 2019 (GP records at page 48, 51 and 52). The defender accepted that the ambulance staff recorded a time of 20.44. The defender initially accepted he could have been mistaken about the time the ambulance staff attended, but then said he thought it was a different ambulance crew. The defender thought the out-of-hours doctor phoned about 03.30 but the records showed a consultation, at an earlier time, between 22.03 and 22.05 on 6 August 2016. The defender advised that during the incident the deceased did say she had difficulty breathing but did not say anything about feeling stressed. The deceased did not telephone Christine because she was unwell, rather she phoned to have a chat with Christine and find out what the pursuer was doing.

The defender did not consider it was odd for the deceased to telephone Christine the day after she had been assaulted by her.

[145] The defender thought that the pursuer was self-employed around July / August 2019. During that time the deceased told the defender that the pursuer asked the deceased to put her house up as security for a business loan. The deceased was also concerned that the pursuer was trying to be appointed as her attorney. The deceased told the pursuer that if she needed him, she would let him know. On 7 August 2019 the pursuer approached the defender in a car park and said "she's needing an attorney".

[146] The defender accepted that the deceased had been given medical advice in August 2019 not to drive. The defender explained that the deceased followed that advice and did not make any attempt to drive thereafter. On 5 August 2019 Patricia removed the deceased's car keys from the deceased's house and gave them to the pursuer. The deceased was not told they had removed her car keys and was very concerned about her car keys being missing. The deceased only had one set of car keys and therefore her car was rendered unusable. During the course of that week Patricia and the pursuer denied knowledge of the car keys and said to the deceased that she must have left them in hospital and must be losing her memory. On Saturday 10 August 2019 the pursuer's father arrived at the deceased's house. The deceased asked him if he knew where her car keys were and he told her that the pursuer had them. When the pursuer's father left the defender said to the deceased that the only way they were going to get to the bottom of the missing car keys was to report them missing to the police. The deceased said she would make one last attempt at obtaining her car keys before going to the police. That last attempt was on Sunday 11 August at 16.00 when the deceased telephoned the pursuer and asked for the return of her car keys. The defender only heard one side of the telephone conversation, which went

on for 20 minutes. During the telephone call the deceased quietly and patiently asked for the return of the car keys. Towards the end of the telephone call the deceased said “the will can be changed you know”. The deceased then told the defender that the pursuer was coming to her house with Christine and the car keys at 18.00. At 18.00 on Sunday 11 August 2019 the pursuer attended the deceased’s house with the car keys.

[147] There never came a point when the deceased was unhappy about the defender staying at her house. The defender did not interfere with what the deceased wanted. The defender considered that the hospital were under the impression that the deceased was being discharged to an empty house when that was not the case. The defender did not consider that the deceased was a high risk discharge and was of the view that the hospital would not have been so concerned if they knew the defender would be staying with him. However, it was up to the deceased to tell the hospital that the defender was staying with her and she perhaps didn’t do so because she was a private person. When the deceased was discharged she never fell in her house. When she returned to her house the defender provided care to her, which including escorting her up and down the spiral stair case in her house. The defender provided care for the deceased as a result of brotherly love and was not paid. Under reference to the letter from the ERI to the deceased’s GP, dated 21 August 2019, regarding the deceased attendance at the ERI on 25 July 2019 (GP records at page 65) the defender advised that there was never a point where he said that he would not care for the deceased.

[148] The defender first became aware of the 2018 will on the afternoon of Friday 9 August 2019. At around 15.40 on that day the deceased and the defender were watching TV in the deceased’s house when an advertisement came on the TV. At that time the deceased said “can I not just make my own will”. The defender said she could but asked if the deceased

had a lawyer. The deceased said she had a lawyer in Peebles. The defender made a joke about there being no lawyers in Edinburgh that could prepare a will. The deceased laughed and said that the 2018 will was Patricia's idea. In relation to the making for the 2018 will, the deceased had thought she was going out for the day but Patricia had booked two appointments at the lawyer's office in Peebles, one for Patricia and one for the deceased.

The defender explained that he was aware that between March 2018 and August 2018 Patricia had been vociferous in saying to the deceased that she should make a will, otherwise her house would go to the government. This took the form of a one way battering from Patricia telling the deceased to make a will. The deceased told Patricia that she had not given a will any thought and Patricia told the deceased that: (i) there was not much to think about; (ii) nobody would want her pictures and ornaments; and (iii) the only thing of value that she had was her house. Patricia did not tell the defender about the 2018 will, but she did tell the deceased, prior to making the 2018 will, that the defender did not want her house because the defender already had a house. Patricia also said that her daughters would get her house in Penicuik and that the pursuer was only one without a house.

[149] On 9 August 2019 the deceased was very specific that she wanted a brief short will, unlike the 2018 will, which the defender thought the deceased said ran to about seven pages. The deceased said she wanted her horses and other animals cared for and for the defender to look after and decide what to do with her possessions, including her house. The defender said to the deceased that she should contact her solicitor. The defender, under reference to a telephone bill for the deceased's landline (production 6/2/11), initially thought the deceased had placed two calls to Blackwood & Smith on 9 August 2019. However, in cross examination the defender said he may have called Blackwood & Smith on 9 August 2019 or possibly dialled their number and handed the phone to the deceased. The defender thought

that the two telephone calls on 9 August 2019 to different telephone numbers were made because Blackwood & Smith had two offices in Peebles and it may have been that the person making the call (either the deceased or the defender) was asked to phone the other office. The defender thought that there was no solicitor available at Blackwood & Smith on the Friday (9 August 2019) and that the deceased was asked to phone back on the Monday (12 August 2019). The defender never spoke to a solicitor on the telephone on 9 August 2019. As 9 August 2019 was a Friday, the deceased had not attended dialysis.

[150] The deceased was anxious to put a will in place before she saw a solicitor and said to the defender that her condition could worsen before she got an appointment with a solicitor. The deceased asked the defender to go on the internet to find out how to make a will. The defender searched the internet and found various samples of wills. If the defender found a phrasing in a sample will that the deceased liked, the defender included that in the will he ultimately prepared. The deceased rejected a lot of suggestions that the defender put forward from the sample wills. The defender then compiled a short will as per the deceased instructions as regards what she wanted. The deceased made arrangements in the will for her animals and also discussed the beneficiaries being the Somerville family and her vet, Ian Butt. She also discussed nursing colleagues and animal charities being beneficiaries.

[151] The deceased asked the defender to look after her house and said that if the defender did not want to she could give it to charity. The deceased knew her pictures and ornaments were not worth anything but she said she would like them to go to a charity shop rather than in a skip. As regard the deceased's house, when the defender read what he had drafted out to the deceased he said to her that she was giving him the power and discretion to distribute her assets and the deceased said "yes". The defender said to the deceased that she was leaving everything to the defender's judgment and discretion and the deceased said

that she trusted the defender and that is what she wanted. The deceased wanted the defender to be her executor. The defender felt uncomfortable because: (i) the will was giving him a lot of responsibility; and (ii) the uneducated would assume he had constructed the will for his own gain and forced the deceased into making the 2019 will. The defender, however, did not consider himself to be a beneficiary in the 2019 will. Rather, he interpreted it that he was down as the deceased executor to distribute her worldly good according to his discretion and judgement. The deceased did not want to have beneficiaries in the 2019 will. In examination in chief the defender said that he said to the deceased that the Somerville family would expect to be down as beneficiaries and the deceased said "no one is entitled to anything, I have worked hard all my life to get this". In cross examination the defender when going over the same passage of evidence said the deceased said to him "look it is my will, it is none of anyone's business, none of them contributed, I paid the mortgage myself, it is my will, this is what I want". When the defender was challenged that he gave a different quote in examination in chief he said that he could not remember word for word what the deceased said but the quote given in cross examination was what the deceased had said. The defender thought that the deceased thought that the Somerville family felt that they were due the deceased's house, but the defender thought they had not given the deceased any assistance and that the deceased's house could be disposed as the deceased sought.

[152] The defender initially thought the will he had prepared following his researches on the internet would be used as draft to get further advice from the solicitor when they met with the deceased. However, the deceased wanted the will signed asap. She did not know when she would get an appointment with a solicitor and wanted the peace of mind that she was correcting the 2018 will, which had been a mistake. Patricia had been the architect of the 2018 will. The deceased was putting forward a will of her own and not a will of Patricia

who had led the deceased to believe that the defender did not want the deceased's house. The will (the 2019 will) was signed by the deceased on Sunday 11 August 2019, which would be a day after she had dialysis. The deceased's signature was witnessed by Edwin White. The defender had met Mr White through a proprietors' association in around 2006 and they had got on well thereafter. The deceased knew Mr White through the defender. The defender, at the deceased's suggestion, had initially tried to contact some of the deceased's neighbours to see if they could witness the signing of the 2019 will on the Sunday (11 August 2019). However, no neighbours were available, so on the Saturday night (10 August 2019) the defender or the deceased telephoned Mr White to see if he was available on the Sunday. The defender explained that his initial intention was to have the deceased's signature witnessed by two witnesses but he found out from the internet that only one witness was needed in Scotland.

[153] Mr White was agreeable to attend the deceased's house on the Sunday (11 August 2019). The defender thought Mr White attended about 11.30 to 12.00. At that time the deceased was very alert. The deceased seemed like she had a new lease of life. She was not tired, rather she was the opposite. When she saw Mr White's car arrive the deceased was off out her chair with the unsigned will in her hand. The defender said in examination in chief that he went to welcome Mr White but the deceased put her hand up to stop the defender going any further. The defender described the deceased as galloping down the path to greet Mr White. Her speed was incredible, she could not wait, it was like she was regenerated, she was like a phoenix rising from the ashes. The defender then left the deceased and Mr White to it and went upstairs for a shave and bath. When he came downstairs about 30 minutes later the deceased was in her chair and Mr White was gone. In cross examination the defender said when Mr White arrived he thought he went to greet him. He said to Mr

White that the deceased was fine but if she looked tired or wanted to change her mind she was not to be forced going any further. The defender then said he was not sure if he spoke to Mr White that day but did say to him that the deceased was not to be forced. In re-examination defender clarified that what he meant by the phrase "galloping" was that the deceased was walking more quickly than usual.

[154] After the 2019 will was signed the deceased ordered the defender to take the 2019 will out of her house as she did not want it lying around in case the Somerville family found it. The deceased did not leave her house on 11 August 2019. Rather she read the Sunday papers and did crosswords until about 16.00. The pursuer came to her house at 18.00 with her car keys. At the time the deceased signed the 2019 will there was no tension between the deceased and the Somerville family, however, the defender considered that there was a strained relationship. The foundation of this was the mistreatment and mental anguish that the deceased was experiencing from the Somerville family. The deceased was not, however, a vindictive person and although she felt that the Somerville family could not wait for her to die and that she was just a nuisance, she did not hold a grudge.

[155] Under reference to the 2019 will, the defender confirmed that it was the deceased signature on that will. As at Friday 9 August 2019 the deceased was able to write and was in the daily habit of doing crosswords. After she signed the 2019 will on Sunday 11 August 2019, the deceased contacted Blackwood & Smith on the following Monday. She was initially offered an appointment on Wednesday 14 August 2019 but the deceased asked for an earlier appointment and was given an appointment on Tuesday 13 August 2019.

[156] On Tuesday 13 August 2019 the deceased had attended dialysis in the morning. She returned home, had a cup of tea and then also perhaps a banana. The deceased then had snooze until about 13.30. The solicitor who the appointment had been arranged with had

been aware of the deceased's condition and that the appointment may need to be cancelled at short notice if the deceased was not feeling up to the journey to Peebles. The defender asked the deceased whether she wanted to make the trip to Peebles for the appointment and the deceased assured the defender that she wished to attend. The defender then drove the deceased to that appointment in Peebles.

[157] The defender walked the deceased into the Blackwood & Smith's office and then Ms Lawrie, solicitor met with the deceased in private. The deceased took the 2019 will with her to the appointment. The deceased did not mention or discuss with the defender what went on at her appointment with Ms Lawrie, however, the defender was present at the later part of the meeting between the deceased and Ms Lawrie. The defender formed the impression that Ms Lawrie thought that the deceased was coming to make amendments to the 2018 will and not to draw up a new will. The deceased wanted Ms Lawrie to re-write the 2019 will on legal paper but Ms Lawrie said that wasn't necessary as the 2019 will was perfectly valid and it would just cost the deceased money to re-write it. The deceased asked Ms Lawrie, in the presence of the defender, whether she had to tell anyone that she had made a new will and the solicitor told her that she did not have to. The deceased then said that she wanted to tell them (meaning the Somerville family) but if she did she would never see them again. The deceased then turned to the defender and said "when they find out they will come for you". The defender told the deceased that if she wanted to tell them (meaning the Somerville family), she should and that she should not worry about the defender. The deceased said that she was not going to mention anything. Ms Lawrie offered the deceased the 2018 will back, but the deceased put up her right arm, waved the 2018 will away and said "no, I want nothing more to do with that, take it away and burn it or do what you do with old wills, it was a mistake, I want nothing more to do with it."

[158] Ms Lawrie also discussed the deceased granting a power of attorney. The defender made suggestions as regard who the deceased could have as her attorney. The defender suggested the pursuer, Ian Butt (vet) and a few others but the deceased said to the defender “no I want you if you will have me”. The deceased also said to Ms Lawrie at the meeting that the defender was her rock. Also at Ms Lawrie’s office the deceased told the defender that she was handing the baton over to the defender and was happy for the defender to do what was necessary. The deceased did not really discuss with the defender why she changed the 2018 will.

[159] The defender was asked, under reference to para 11 of the statement of Ms Lawrie (see para 189 below), whether it was true that the deceased had not seen the pursuer for one year. The defender said that was absolutely correct. The defender explained that there was no time period referred to by Ms Lawrie and that the pursuer did not in fact see the deceased between May 2018 and May 2019. In May 2018 the pursuer came to the deceased’s house with his girlfriend, not to enquire about the deceased’s health, but to announce their engagement. The deceased then did not see the pursuer for a year. The defender initially said in his evidence that he considered that the deceased’s statement to Ms Lawrie to the effect that the defender was helping the deceased out with everything was correct. The defender noted that the deceased was due to have a knee operation on 14 February 2019 and the defender was ready, if it had taken place, to take her to hospital and care for her during her recovery. The defender, however, later in his evidence, conceded that he was perhaps not doing everything for the deceased but what the deceased had said to Ms Lawrie was to express that she was grateful for the help the defender was giving her. The defender accepted that the deceased’s statement to the effect that the defender was taking the

deceased to hospital three times a week was not correct. The defender explained that he did not tell the deceased what to say at the meeting with Ms Lawrie on 13 August 2019.

[160] The defender noted that he considered that he had no financial interest in the 2019 will. The defender explained he was trying, as an executor, to represent the deceased's wishes and thoughts as best he could. Whether he gave the house to charity or to the Somerville family was a matter for him. He had no interest in the deceased's house.

[161] At some point after the meeting with Emma Lawrie on 13 August 2019 the deceased said that she wanted give a 'thank you' to Ian Butt (vet) for taking the deceased's horses. The deceased knew that Ian Butt did not have stabling in his field and she suggested to the defender that on the sale of her house he could purchase a flat pack kit stable and pay for its installation. The deceased thought that even if Ian Butt sold his house it would be a good legacy as the next owner would be getting a field with a built stable. The defender actually discussed this proposal with Ian Butt after the deceased's death and he was agreeable to the proposal. The idea was get a six horse stable installed for £15,000 to £20,000.

[162] The deceased did not go out with the Bell family on 11 August 2019. She went out with the Bell family to Eyemouth on 1 September 2019 and that was one of her last outings before she went back to hospital. On Wednesday 28 August 2019 the deceased was in Peebles for a meeting with her lawyer, Sally Swinney, regarding a power of attorney and appointed the defender as her attorney. Two days later the deceased was back in Peebles for a meeting with Ian Butt. On Saturday 30 August 2019 [30 August 2019 was in fact a Friday] the deceased had an outing with one of her former nursing colleagues, with them being away all day and back around tea time. A short time later the deceased phoned the Bell family and asked if they were doing anything that night because the deceased wanted to go somewhere else. The Bell family told the deceased that they were going to the Borders on

the Sunday morning, with Eyemouth and Coldstream being mentioned, and that they could pick her up around 10.00 on 1 September 2019. The Bell family did that and brought the deceased home around 16.00. About 15 or 20 minutes after her return home the deceased phoned Patricia and asked if she could take her somewhere. Patricia and her daughter Jennifer then turned up about 1 hour later and took the deceased to S. Luca's in Musselburgh.

[163] The defender explained that the deceased's attitude to the pursuer had not changed when she made the 2019 will. She still loved him. Towards the end of August 2019, before the deceased went back into hospital at the beginning of September 2019, the deceased asked the defender to give the pursuer a bit more (meaning a bit more from the deceased's estate) than the pursuer's sisters as she always had a soft spot for him. Also at the end of August 2019 the deceased invited Jennifer and Laura round to her house to give them jewellery. Only Jennifer attended and the deceased gave her jewellery. The defender was present when this occurred and there was nothing wrong with the deceased's mental capacity at that time. One of the last things the deceased said to the defender before she went back to hospital in September 2019 was "can I just ask you to keep an eye on Graham, look after him and see that he is ok and does fine and I know in business things can go wrong and with your experience you can be more help to him than any of the others". However, the defender did not think the deceased would have described her relationship with the pursuer as treating him as her own son. That would be like saying the deceased treated the defender as a husband. The deceased told the defender that this supposed dotting on the pursuer was blown out of all proportion. Rather, the deceased felt sorry for the pursuer when he was a child because his mother was giving more attention to his sisters and the pursuer was being neglected.

[164] The defender accepted that Dr Potts would have no reason to lie about the deceased telling him that she wanted to bequeath her property to the pursuer, however, he noted that if the deceased had said to Dr Potts that she was giving her house to the defender the deceased may have feared that that may have led to repercussions from the Somerville family.

[165] The defender was asked about the evidence Mr Bell gave in relation to the deceased being scared of the defender. The defender advised that the deceased was never scared of him and Mr Bell's evidence in that regard was different from reality. The defender was not sure whether Mr Bell had an interest in the case and noted that he was very close to Patricia. An example of this was when Patricia and Mr Bell had caused a scene at a garage claiming that they were experts in trading law and saying that the garage had sold the deceased a lemon of a car. The defender thought Patricia and Mr Bell were prepared to lie. The defender denied shouting upstairs to the deceased in a non-complimentary way and noted that the deceased rarely went upstairs in her house in the latter stages of her life. The defender never shouted at the deceased, anyone else in his family or anyone else. The defender advised that he did not use a sleeping bag in the deceased's house. Rather there was a blanket on the floor, which was his bed. The defender would move the blanket if anyone came in to the deceased's house. The defender did not lie on the floor and obstruct a visit to the deceased. Rather, if someone was staying for more than 5 minutes, the defender would take the opportunity to go back to his own house or walk the dog. Such an opportunity was a welcome relief and allowed the defender to go elsewhere.

[166] Under reference to the conversation record prepared by the OT (production 5/3/3 - see para 52 above) the defender noted that: (i) he never slept on the settee, so Patricia must have made that up; (ii) the deceased did not stop people coming to see her, however, it had

to someone that she knew; and (iii) the involvement of Lucy Mitchell came about because Patricia had gone behind the deceased's back and involved the social work department, however, the deceased knew what Patricia was doing and that is why the deceased did not want any of the Somerville family at meetings because they were working against her and trying to get her in a care home; and (iv) the deceased did accept the offer from the social work department to take her to see her horses. The defender accepted that when the deceased was in hospital it was the pursuer, Christine and Patricia that was involved in her care and that the defender only visited her in hospital on a few occasions. The defender explained that the deceased did not want him to visit her in hospital because she could not bear it when he left and the deceased told the defender it was easier if he did not attend the hospital. The arrangement the defender had with the deceased when she was in hospital was that the deceased would send for him if she needed him. On 22 August 2019 the deceased phoned him up and asked him to attend a multi-disciplinary meeting because the Somerville family were acting against her. The defender explained that the deceased constantly thought that her telephone calls to the Somerville family were not being answered. This was not just in the last few months of her life. There was a 4 day period when Patricia refused to answer telephone calls from the deceased and Patricia said that the deceased needed to be brought to heel.

[167] Under reference to the transcript of text message sent by Patricia to the social work department (production 5/3/4 – see para 53 above), the defender said that the information contained in the email came from Patricia after she had went behind the deceased's back to the social work department. The defender was asked why Patricia would make up the information contained in the transcript. The defender said that Patricia was constantly trying to get the deceased in hospital or in a care home and was using the deceased's

condition to suit her own interest. The text messages at 23.50 showed Patricia was pre-occupied with the deceased.

[168] At some point the deceased and the defender asked the pursuer to give the defender a hand pulling a washing machine out so that the defender could deal with a mouse infestation at the deceased's house. The pursuer said he would provide such assistance but never did. There was another time the deceased asked the pursuer to get a parking bollard welded because she knew that the pursuer's friend was a welder. The pursuer took the bollard away and still has it to this day.

[169] The defender had never seen the 2018 will. At some point the deceased told the defender that in April 2019 the deceased told Patricia that she was thinking of making another will. Patricia reacted rudely and said that if the deceased ever made a new will she would never see them (meaning the Somerville family) again. The defender considered that the deceased was capable of signing the 2019 will. The defender thought the deceased knew the effect of making the 2019 will. She was of sound mind when she signed the 2019 will. The defender explained that he had met thousands of people in the prison service and in a special needs school where he worked and that a sound mind ought to be judged by communicating with the person in front of you. The defender had spoken with the deceased at the time when she signed the 2019 will. The deceased knew what she was doing and understood the consequences of her actions.

[170] The defender was not aware of the deceased taking any medication for depression between 9 and 11 August 2019 and she did not make any threat to the defender to end her life at that time. The defender considered that the deceased was capable of communicating and understanding right up until the middle of September 2019. Indeed she filled in a mail

order application for shoes on 14 September 2019 as result of having swollen feet.

Unfortunately, the shoes arrived just after she died.

[171] The deceased was not weak willed or open to persuasion. She was the exact opposite and her insistence on being discharged from hospital on 5 August 2019 was an example of that. The defender did not persuade the deceased to change her will. The defender was not interested in the financial side of the deceased's house. He had his own house, could pay his bills and his only outlook was his animals. The defender did not influence the deceased's decision making. The defender did not think that anyone was in a position to influence the deceased, including the doctors and nurses at the hospital. The only person who had influence over the deceased was her GP, Dr Blair, who persuaded to stop driving on the basis that her knee might lock when she was driving. The deceased accepted Dr Blair's advice and did not drive thereafter. The defender accepted that the deceased was a private person who did not like confrontation but he did not think she was timid.

[172] The defender accepted that the deceased was house proud and that, prior to him moving in, her house was spick and span. The defender thought the photographs of the deceased's house in an unkempt state (production 5/2/2) were taken on Monday 30 September 2019. At 10.00 that morning Patricia, her two daughters, husband and a friend of the pursuer all came to the deceased's house. They immediately started searching the place, opening cupboards and drawers. They were also on the phone to the pursuer a lot. They would not tell the defender what they were looking for but he believed it to be a will. The defender asked them to stop what they were doing. The defender accepted that the photographs showed the state of the deceased's house at that time. The defender explained that the deceased did not say she didn't like the state of her house and initially in his evidence said she was comfortable with it. However, later in his evidence the defender said

that he got the feeling the deceased didn't like the mess. The deceased told the defender to leave his bed on the floor as there was nowhere to store it. The defender noted that on the Sunday prior to them attending on 30 September 2019, he had taken items out of the cupboards in the kitchen and placed them on the worktops. He had done so in order for the unopened items to be taken to the supermarket for recycling and for the opened items to be crushed up and used as bird feed. The defender noted, at that time, that he was planning to have a clear out of the deceased's house, which would have included gutting the kitchen and arranging for pest control to attend. Under reference to a communication from the Royal Mail, dated 26 September 2019 (production 6/2/17), the defender explained that the pursuer tried to redirect the deceased's mail after her death. The defender advised that he was not made aware of the deceased's funeral arrangements and did not attend her funeral.

[173] The defender did not agree that the deceased had no reason to be disappointed in the pursuer and noted that the pursuer had failed to complete a number of college courses. The defender rejected a suggestion that it was he who seeking to release equity from the deceased's house. The pursuer and Patricia were not trying to do their best for the deceased based on the medical advice, rather, they were trying to take advantage of the situation to get the deceased out of her house. On 2 August 2019 the deceased was in the hospital and the defender was in the deceased's house when Christine knocked on the door. Christine told the defender that she was giving him a heads up that they would be coming round on the following Tuesday to gut the deceased's house. That, however, did not materialise. The defender thought that it was accurate to say that the Somerville family were trying to exclude him from the deceased's care. Under reference to an entry in the ERI records dated 20 September 2019 and timed at 17:31, the defender explained that he was trying to protect the deceased. As he held the power of attorney the defender wanted to respect the deceased

privacy and wanted the hospital to consult him before speaking to the Somerville family.

The defender accepted that he wanted to keep the power of attorney secret from the Somerville family.

[174] Under references to filled in crosswords in the daily express, dated 14 August 2019 (production 6/2/15) and 31 August 2019 (production 6/2/16), the defender explained that the crosswords contained the deceased's handwriting and that she had completed them.

Sally Swinney

[175] Ms Swinney had worked as a solicitor for 27 years and had recently retired. She latterly was the senior partner at Blackwood & Smith. Her practice included general chamber work, including conveyancing, wills, powers of attorney, executory work and she specialised in the family law. She was regularly involved in the witnessing of the signing of wills and powers of attorney. She assessed the capacity of persons to sign wills. Ms Swinney explained that she developed a process over her 27 years' experience for checking a person's capacity. If she was simply witnessing the signing of a document and had not met the person signing the document before, she would: (i) have a general conversation with the person; and (ii) ask the person to explain their understanding of the document they were signing. Ms Swinney would then decide whether or not the person had capacity to sign the document. She would also occasionally ask a colleague to accompany her when witnessing a person signing a document. If she had a doubt about a person's capacity she would revert to a medical professional.

[176] The deceased met with Ms Lawrie on 13 August 2019. At that time Ms Lawrie was an associate with Blackwood & Smith. Ms Swinney did not attend the meeting on 13 August 2019. Ms Lawrie asked Ms Swinney to see the deceased on 28 August 2018 in

order to witness the deceased signing the financial and welfare power of attorney, which appointed the defender as her attorney (production 6/2/7). The financial and welfare power of attorney was based on a Blackwood & Smith style. Ms Swinney could not recall why Ms Lawrie asked her to see the deceased on that date. On 28 August 2019 Ms Swinney met with the deceased. She had not met with the deceased before 28 August 2019. On that date Ms Swinney witnessed the deceased signing the financial and welfare power of attorney.

[177] Ms Swinney could not specifically recall meeting with the deceased on 28 August 2019. Ms Swinney noted that her then office was on the first floor but if she was meeting a person who was infirm and could not make the stairs, she would book a room in the firm's property shop. Ms Swinney had checked and there was no room booked in the property shop, so she assumed that she had met the deceased in her then office on the first floor. Ms Swinney advised that she had no doubt about the deceased capacity to sign the financial and welfare power attorney because otherwise she would have refused to allow the deceased to sign it. Ms Swinney did not think that the meeting with the deceased would have lasted longer than 15 minutes. At that time Ms Swinney knew the deceased was terminally ill.

[178] On 28 August 2019 Ms Swinney also completed the declaration appended to the rear of the power of attorney which certified that Ms Swinney: (i) had interviewed the deceased immediately before she subscribed the power of attorney; (ii) was satisfied, because of her own knowledge of the deceased, that, at the time the power of attorney was granted, the deceased understood its nature and extent; and (iii) had no reason to believe the deceased was acting under undue influence or that any other factor vitiated the granting of the power of attorney. Ms Swinney could not recall if she had specifically asked the deceased about point (iii) of the certificate.

[179] After the deceased passed away Ms Swinney took a phone call from the deceased's sister whose name could have been Patricia. The deceased's sister was quite agitated and wanted information about the deceased will, however, Ms Swinney told her it was confidential. Ms Swinney did not take any telephone calls from the deceased's family prior to deceased's death. Ms Swinney could not recall any discussion about anyone trying to re-mortgage the deceased's house.

[180] In cross examination Ms Swinney agreed that a power of attorney, on the one hand, and a will, on the other hand, did different things. Ms Swinney agreed that a power of attorney was more of administrative appointment but noted that an attorney can be given the power to grant benefits to other people. Ms Swinney confirmed that she never met the deceased to take her testamentary instructions.

James Edwin White

[181] Mr White was born on 28 July 1936. He retired when he was aged 65. He had worked in a number of jobs including in the airline industry and in shipping. Mr White met the defender about 15 years ago through a property association. Thereafter, they had remained in touch and met occasionally for a coffee.

[182] Mr White did not really know the deceased. He had met her on occasions when he was meeting the defender. However, he had only exchanged a few words with the deceased and did not have any form of relationship with her.

[183] Mr White confirmed that he witnessed the deceased sign her will on 11 August 2019. Mr White could not be sure on timescales but thought about a week before that date the defender contacted him by telephone and invited him to witness the deceased signing a will.

The defender told Mr White that the deceased was not well, suffered from diabetes and that her legs were in a bad shape. Mr White did not speak to the deceased on the telephone.

[184] On 11 August 2019 Mr White drove round to the deceased's house. He thought he arrived between 11.30 and 12.30. He parked his car about 25 feet from the deceased's house. When he arrived the deceased came down the pathway from her house. The pathway was really unsafe. Mr White expected the deceased to be tired and uncomfortable. However, the deceased seemed to have a head of steam up and was hurrying along the path without assistance. The defender was behind the deceased and helped her into Mr White's car. Mr White met with the deceased in his car to ensure that no one could hear their conversation and because it would be comfortable. Mr White considered that the deceased was very alert and raring to go. She wanted the will done and dusted.

[185] Mr White was expecting some small talk with the deceased, however, the deceased was anxious that he witnessed her signing the will. The deceased said that she had been pressured in the past to write a will, that she was not happy with it and wanted a new will. Mr White deliberately changed the conversation and commented on how fast the deceased came out of her house. They then discussed how the path ought to be modified and the deceased was able to talk about that. Mr White considered that the deceased was pretty switched on and knew what she was doing. The deceased then showed Mr White the will. There was a bit of paper over the contents of the will but the deceased confirmed that it was her will. Mr White could only see the bottom part of the will where the signatures were to go, which commenced "Signed this day...". Mr White then gave the deceased his pen, she signed the will and he counter-signed it.

[186] Under reference to the 2019 will (production 5/1/1), Mr White confirmed that "M Allan" was the deceased signature. Mr White did not write "11th" and did not write

“Edinburgh”. After the will was signed Mr White considered that the deceased was feisty. She thanked him for signing will and said it was very important to her. She then left Mr White’s car but came back and said “I want to thank you profusely”. Mr White thought he met with the deceased in his car for about 20 minutes.

[187] Mr White advised that he would not have witnessed the deceased signing the will if he had not been satisfied that she understood what she was doing. He considered he was performing a very important task. Mr White accepted that the deceased could be described as tired at that time but thought a better description was worn out. However, he did not think she looked dead behind the eyes and was surprised by how alert she was.

[188] In cross examination Mr White confirmed that he had no medical or legal qualifications. He was not aware that: (i) the deceased was suffering from terminal renal failure; (ii) the deceased was attending dialysis; or (iii) in the week prior to 11 August 2019 that a doctor had considered sectioning the deceased under the Mental Health Act. Mr White noted that he was aware that a will was a very important document. Mr White advised that the deceased did not tell Mr White about the contents of her will. If she had she done so, Mr White would have stopped her because he did not need to know and it would have been embarrassing.

Emma Lawrie

[189] The signed statement from Ms Lawrie that was received into evidence included the following:

“9. [*The deceased*] came to see me on 13 August 2019, accompanied by her brother, [*the defender*]. He originally came into the meeting with her and sat down beside her in our meeting room. [*The deceased*] then handed me the Will which she said she wanted to replace her other Will and at that point I asked [*the defender*] to leave the

meeting room. I met with [*the deceased*] in the property shop because it had a flat front and we used that shop for clients with mobility issues.

10. The meeting was instigated by a telephone call by [*the defender*]. He contacted us on 9th August 2019 to say that [*the deceased*] was looking to discuss her Will. He initially spoke to our receptionist and thereafter I called him back. I said to him that I would be happy to meet her but it would be her that I would need to meet with in order to make any changes...

11. [*The deceased*] came into the meeting and handed me the Will across the table. I then considered it and noted it to be a complete change to her original Will. At that point I asked [*the defender*] to leave the room so that I could chat with her by myself. I had a look at it and asked her why she had made such major changes. In so doing, I pointed out her previous Will (which I had brought along with me anticipating I may be making only minor changes). She advised me that since her nephew Graham had found out that he was to benefit from everything in her Will, she had not seen him in over a year. She was clear that she had not seen him in over a year. He had not been near her house or anywhere near her. He had stopped coming around to her house and was not seeing her. She then went on to say that [*the defender*] was now the person who was helping her out with everything due to her being very ill. It was quite evident she was very ill. She seemed very tired. It also became evident that she was looking for a Power of Attorney to be put in place and that is really why I asked her so many questions. I needed to ascertain that she was able to do that. I therefore asked her why she wanted [*the defender*] to inherit everything and had made no provision in the new Will for her horses or cat. Despite them being mentioned, there was nothing left to provide for their care. I explained to her that she would need to make sure that her previous vet was still happy to take them. She said again that she had already sorted things with him and that she knew [*the defender*] would "do right by them". She went on to tell me that she was in terrible pain but did not wish to leave her house. That was one of the main factors for coming to see me. She felt as though her sister, Patricia and her daughters wanted her out of the house and into a care home. In all honesty, I could see given her condition that living in a flat was perhaps not best for her, but she was clear in her wishes that she did not want that to happen. She was evidently terrified that she was going to be put into a home by her sister. She also noted that each time she was in hospital, her sister was going into her house and reading her mail. At that point again I went over the Will with her to confirm that she did not want to leave any specific legacies to anyone else and that it was all to go to her brother. She confirmed again that was what she wanted to do. I then said to her given that she was fearful of being ejected from her house, she should possibly think about putting a Power of Attorney in place. I explained to her what a Power of Attorney was and what it meant. I explained that without one, Social Work do have statutory powers to put her into a home. I asked who she wanted to be appointed as her Attorney and she said [*the defender*] because at that point he was taking her up and down to hospital three times a week for dialysis... It was only after I had discussed the Will and Power of Attorney and gone over all of that with her horses and established that she was understanding all that I was saying to her that I asked [*the defender*] to come back

into the meeting. I spoke to him and advised that [*the deceased*] wished to appoint him as her Attorney. I asked him if he was happy to act as Attorney. Prior to him re-joining the meeting, [*the deceased*] said that she did not want anything posted to her house because she believed her sister was reading all her mail. I recall that being an express instruction from her. She did not tell me anything about how the Will itself had been prepared or signed. At that point, I simply asked if she was sure what she wanted and she said that she was. I did not ask any questions about how the Will had been prepared. I was more or less trying to ascertain whether she understood the gravity of the changes.

12. In terms of how [*the deceased*] presented on the day, she was quite changed from how she was when I met her a year or so previously. She was already quite a thin lady, but she was even thinner. She was extremely pale and slightly jaundice looking. I could see quite clearly that she was very, very ill. She found it difficult to walk for long periods. She smelled unclean generally. ...

13. [*The deceased*] was quite upset at points when she came to see me. I have been asked whether I had any concerns as to her being in any way vulnerable or whether there may have been any issues with capacity or undue influence. I did not have any such concerns because although she was upset and fearful about going into hospital, she did not seem to be actually fearful of her family or family members. She was not evidently scared of *them*, it was more that she knew she was dying and she wanted clearly to die in her own house. Although she was saying that she thought her sister was reading her mail and wanting to put her in a care home, she was not actually saying that she was not meeting with her or seeing other family members. She was quite assured in her view that she wanted to stay in her house. The other time that she got particularly upset was in not being able to see her horses. That was another indicator to me of how unwell she was as she could not get out to see them. I was satisfied that what she told me was her true wishes at that point in time.

14. [*The deceased*] did not particularly offer any explanation beyond that which I have already stated as to why she made such significant changes to her Will. The main factor however was that she felt as soon as her nephew knew he was going to inherit, he just stopped coming round to see her and that since she had been taken gravely ill, her brother was one who was doing most things for her.

[...]

18. The view that I formed as to the relationship between [*the deceased*] and her brother was that he was a caring sibling. That is all that I could really say. He did not proffer anything in the meeting. He answered the questions that I asked of him. He did not say anything to her in the meeting and there was no conversation which took place between the two of them. I advised him that she wished to do a Power of Attorney and that she wanted to appoint him. He said yes to that. The only other view I could form was that the action he had taken in bringing her down to Peebles, in helping her into the office and his interactions with her in front of me was that of a caring brother looking after an ill sister. I would observed that it was somewhat in

contrast to the fairly standoffish relationship that [*the deceased*] seems to have had with her sister Patricia, when they came to see me. Again, what I was seeing was admittedly a snapshot, however it did seem that Patricia was interested in what was happening with [*the deceased's*] money. Other than being ill, there did not appear to be any real dependency on [*the defender*] before me. There was certainly no dominance from him. I found him to be a somewhat timid person and almost shy. Again, I cannot comment on what the situation was either before or after they came to the office.

[...]

22. I have no further general comments to make, other than to say meeting someone for half an hour or 40 minutes is not the same as meeting with someone all of the time and knowing the ins and outs of their living conditions. I do firmly believe that what [*the deceased*] said to me at the time was what she wanted. However how she came to that opinion I cannot say as I do not know what was going on inside her head. I cannot comment on how she formed those opinions beyond what she told me."

Submissions

[190] The pursuer produced a 24 page written submission. The defender produced a 23 page written submission. Both parties supplemented those submissions with oral submissions. What follows is a summary of the submissions made.

Submissions for the Pursuer

[191] The pursuer submitted that decree should be granted in terms of his primary craves for reduction and interdict, failing which decree should be granted in terms of his fall-back craves.

[192] As regards testamentary capacity, the pursuer, under reference to the cases of *Banks* at page 565, *Smyth v Romanes's Executor* 2014 CSOH 150 at paras 40, 41 and 122, *Laidlaw v Laidlaw* 1870 8 M 882 at page 888 and *Ward, Appellant* 2014 SLT (Sh Ct) 15, contended that the following propositions applied in the present case:

- (1) capacity is task specific;

- (2) testamentary capacity falls to be judged at the time when a testamentary writing was executed;
- (3) where the will was not professionally prepared (which was the position in the present case) and its terms were remarkable, the circumstances should be subject to particular scrutiny;
- (4) testamentary capacity falls to be judged having regard to the whole circumstances, including medical and other evidence; and
- (5) if the deceased lack testamentary capacity that would be the end of the matter and there would be no need to consider either facility and circumvention or undue influence (which both require the deceased to have testamentary capacity).

[193] As regards facility and circumvention, the pursuer, under reference to the cases of *Mackay v Campbell* 1967 SC 53 at page 61, *Smyth* at para 48 and 49, *MacGilvary v Gilmartin* 1986 SLT 89 at page 90 and *Horne v Whyte* 2004 SCLR 197 at para 10, contended that the following propositions applied in the present case:

- (1) it was unnecessary to lead evidence of specific acts of circumvention in cases where the grantor is dead;
- (2) acts of circumvention may be inferred having regard to the whole circumstances;
- (3) matters require to be considered holistically – the greater the evidence of facility and lesion, the less is required to establish circumvention; and
- (4) in any event, circumvention may be assumed where a deed has been granted in favour of the impetrator.

[194] As regard undue influence, the pursuer under reference to the cases of *Gray v Binnie* 1879 7 R 332 at page 347, *Broadway v Clydesdale Bank Plc (No 2)* 2003 SLT 707 at para 28 and

Smyth at para 47 and 126, contended that: (i) the Inner House case of *Gray* set out the leading explanation of undue influence; (ii) if personal benefit could be demonstrated that will be one of the relevant circumstances to be taken into account in deciding whether the inference that undue influence was exerted should be drawn; (iii) that any independent advice and assistance had to be given prior to the execution of a testamentary writing; and (iv) there may be overlap between facility and circumvention, on the one hand, and undue influence on the other hand.

[195] As regards the evidence, all the witnesses called for the pursuer were credible and reliable. The evidence of the pursuer showed that the pursuer had a close relationship with the deceased and that did not change. The pursuer remained closely involved with the deceased in the latter weeks of her life and was her NOK until the defender was appointed her attorney. The steps the pursuer took to exclude the defender towards the end of the deceased's life were because he and his family thought that the deceased lacked capacity and that the defender was wrongly intromitting with her estate. The evidence of Dr Potts showed that the deceased was in cognitive decline when the 2019 will was signed. Janette and Dr Potts confirmed the deceased's intention was to benefit the pursuer on her death. Dr Potts' evidence in that regard was particularly important because the deceased had volunteered her testamentary intentions to him, prior to 20 August 2019, and said that she was bequeathing her property to the pursuer. There was no dispute that the deceased was suffering from numerous health conditions. A number of witness, including Christine, explained that dialysis left the deceased completely drained. Christine also confirmed that the deceased was acting out of character at the hospital before she was discharged on 5 August 2019 and the ERI records supported her evidence in that regard. Christine's account of what occurred on 6 August 2019 was supported by the ambulance records, unlike

the evidence of the defender in relation to that incident. Laura confirmed that the defender's illness resulted in her legs swelling up, which impacted on her mobility. Production 5/3/4 showed that Patricia was contacting the social work department and reporting on the poor health of the deceased between 8 and 10 August 2019. Patricia's reports were consistent with the ERI records and were made without having any knowledge that the 2019 will was being prepared and signed between 9 and 11 August 2019.

[196] Mrs Bell, who had no interest in either the 2018 or 2019 will, explained that the deceased was not happy with the defender staying at her house but did not want to upset anyone. Although Mrs Bell could not recall the date that she and her husband took the deceased to Eyemouth, she was able to say that the trip was between around 12.00 and 16.00 and that the deceased was very sleepy on the journey. Mrs Bell later found out that Patricia had taken the deceased to S. Luca's after she and her husband had dropped the deceased off. Mr Bell supported the evidence of Mrs Bell and he explained that the deceased was "feart" of the defender. Whilst Patricia could not recall the date she took the deceased to S. Luca's in Musselburgh, her evidence was consistent with that of her daughters, Jennifer and Laura, who confirmed that the date they went to S. Luca's with the deceased was on 11 August 2019. The evidence of Mrs Bell and Patricia regarding deceased contacting them and asking to go somewhere, which then resulted in the trips to Eyemouth and S. Luca's, was also consistent with what Patricia had reported on 8 August 2019 to the social work department (production 5/3/4) as regards the deceased phoning people to ask if she can go to them or go somewhere. Jennifer recalled that it was on 11 August 2019 that they went to S. Luca's because it was the last time she took the deceased out. Laura recalled it was that date because it was the first time she had driven any distance since passing her test. Patricia, Jennifer and Laura all described the deceased being in a poor state during the trip to S.

Luca's with Patricia describing her as being doped up on medicine. Their descriptions contrasted markedly with the evidence of the defender and Mr White as regard the state of the deceased on 11 August 2019, with both describing the deceased as very lively. When all the evidence about the trip to Eyemouth and S. Luca's was taken into account, the court should accept that: (i) both trips occurred on 11 August 2019; and (ii) that the deceased was in the state described by Patricia, Jennifer, Laura, Mrs Bell and Mr Bell.

[197] Dr Lee's conclusions were based on the contemporaneous medical records and were that the deceased's anxiety and paranoia deprived her of testamentary capacity and rendered her facile. Dr Lee's evidence in that regard was not undermined to any extent. The test for capacity was task specific and Dr Lee's evidence could stand with the evidence of Dr Blair, Dr Potts, Ms Lawrie and Ms Swinney because none of those persons assessed testamentary capacity on 11 August 2019.

[198] There were a number of difficulties with the defender's evidence. His evidence, at times, seemed rehearsed. He gave lengthy answers, which at times, raised irrelevant matters. He made a number of allegations about the conduct of the witnesses called for the pursuer, without those allegations being put to those witnesses. He was obdurate during cross examination. His evidence regarding the timings of the incident of 6 August 2019 appeared to be wrong. His evidence regarding who called Blackwood & Smith on 9 August 2019 changed, despite him giving certain and specific evidence about the time when the deceased asked him about making her own will on that day. His evidence of the deceased galloping up the path on 11 August 2019 jarred with: (i) his own evidence about him making telephone calls for the deceased due to her being breathless and handing her the phone; and (ii) the other evidence regarding the deceased's mobility at that time. The defender's evidence of him interpreting the 2019 will as not making him a beneficiary did not ring true.

The defender's explanation, about the deceased's statement to Ms Lawrie that she had not seen the pursuer for over a year, being true, did not accord with the statement of Ms Lawrie. There was clear evidence that the pursuer had seen the deceased in the year prior to her meeting with Ms Lawrie. There was also clear evidence to show that the deceased's statements to Ms Lawrie that the defender was doing everything for her and was taking her to dialysis three times a week, were both incorrect. Ms Lawrie confirmed that the deceased was in poor health on 13 August 2019, she said the deceased was thin, pale, jaundice looking and appeared to be very ill, which again contrasted with the evidence of the defender and Mr White of the deceased being very lively on 11 August 2019.

[199] The defender's evidence ought to be judged from the context that: (i) he framed the 2019 will; (ii) he did so at a time when the deceased was, on any view, fragile on account of her ill-health and suffering the effects of medical treatment; and (iii) he was the beneficiary under the 2019 will. The defender did not tell anyone about the 2019 will or the subsequent power of attorney and that suggested an element of control and secrecy. Where there was dispute in the evidence, the evidence of the pursuer's witnesses ought to be preferred to that of the defender.

[200] The defender had the initial burden of proving testamentary capacity on 11 August 2019. The 2019 will was suspicious. It was unheralded. The effect of the 2019 will was to disinherit the pursuer, which defied the deceased wishes which she had expressed in the 2018 will and to others, including Dr Potts. If the deceased wished to have changed her will, she could have done so at any time. The three statements that the deceased made to Ms Lawrie on 13 August 2019 were manifestly wrong and showed the deceased was confused or deluded. The defender's contention in his submissions that the deceased made incorrect statements to Ms Lawrie because she was a private person was implausible. The deceased

was not assessed for testamentary capacity on 11 or 13 August 2019. The accounts given by the defender and Mr White about the deceased's health, mobility and alertness were sharply contradicted by: (i) the medical records; (ii) other contemporaneous evidence about the deceased's reaction to dialysis and mobility; and (iii) the evidence of the other five witnesses who saw the deceased later on 11 August 2019. When Ms Swinney met the deceased on 28 August 2019 to witness the deceased signing the power of attorney it was important to recognise that she was not assessing the deceased for testamentary capacity. Rather she was meeting her to see if she understood what she was signing. In all the circumstances the court ought to conclude, after applying the tests set out in the case of *Banks*, that deceased did not have testamentary capacity.

[201] If the court, however, considered that the deceased did have testamentary capacity on 11 August 2019 it nevertheless ought to find that there was facility and circumvention and undue influence, based on the same factual matrix. There was clear evidence that the deceased was facile. The defender framed the 2019 will. The defender was the beneficiary under the 2019 will and excluded all other family members. The defender orchestrated the signing of the 2019 will. The defender and the deceased were siblings and the defender moved into her home. The defender's actions excluded others. The deceased's health meant that she was unable to resist pressure from the defender. The deceased told others that she was scared of the defender. If the defender's evidence was correct that the deceased asked him to frame a new will, he could have refused and taken the deceased to see a solicitor. The deceased's subsequent meeting with Ms Lawrie occurred after the 2019 will was signed and was irrelevant. In all the circumstances if the deceased had testamentary capacity on 11 August 2019 the tests for finding facility and circumvention and undue influence had been satisfied.

[202] If the court did not find that the 2019 will ought to be reduced on one or more of the above grounds, the pursuer, under reference to sections 3 and 4 of the Succession (Scotland) Act 2016 and the case of *Finnie v McClure* 2022 SLT (Sh Ct) 199, contended that the 2019 will ought to be rectified by inserting in the 2019 will at clause 3, after the words “fall into the ownership and care of my brother, Alasdair Roderick Allan” the words:

“qua executor and trustee, to exercise his judgment and discretion as to the distribution of my estate to my beneficiaries”

The above proposed rectification accorded with the defender’s evidence, which made clear that the 2019 will did not accurately express what the deceased instructed.

[203] The pursuer also contended, in the event of the 2019 will not being reduced, under reference to the 1995 Act and *Ormistoun v Hamilton* (1708) Mor. 16890, that the court should grant a declarator that there was no presumption that the 2019 will was self-proving under section 3 of the 1995 Act. The basis for such a declarator was that a bit of paper had been placed over the contents of the 2019 will when the deceased signed it and Mr White witnessed her signature. The subscription had to be related to writing that had gone before the signature. That was not present in this case and the 2019 will was therefore not self-proving. In the circumstances the declarator sought should be granted.

Submissions for the Defender

[204] The defender submitted that decree of absolvitor should be granted. The defender did not take issue with the pursuer’s submission as regards the applicable law in relation to: (i) testamentary capacity; (ii) facility and circumvention; and (iii) undue influence. He relied heavily on Lord Glennie’s analysis of the applicable law in the case of *Smyth*.

[205] There were some aspects of the evidence that were difficult to reconcile. In particular, the deceased's actions were not entirely consistent. She clearly still had affection for the pursuer, yet she decided to change her will because either it no longer represented her wishes or never represented her wishes. It appeared that the deceased may have told some people that she wished the defender to stop living at her home, yet she told the defender and others, such as Ms Lawrie, that he provided her support and was her "rock". It was accepted that the deceased's confused and paranoid behaviour around 5 August 2019 could not be explained by the alleged mistreatment of the deceased in the hospital by Christine and Janette. It was accepted that the said mistreatment, alleged by the defender, seemed inherently unlikely. It was not clear from the evidence whether the deceased was taken out by Mr and Mrs Bell and then Patricia and her daughters on 11 August 2019 or some other Sunday. Both Jennifer and Laura said it was 11 August 2019 but neither gave evidence as to why it had to be that particular Sunday. If Mr White's evidence was to be believed, it seemed unlikely that the deceased would be bright and alert when signing the 2019 will and then, a few hours later, appear to be dead behind the eyes. However, even if that was the case, it would not matter because the crucial issue was the deceased's condition when she signed the 2019 will on 11 August 2019. It was accepted that some of the statements the deceased made to Ms Lawrie on 13 August 2019 were clearly incorrect. However, these incorrect statements could possibly be explained by the deceased's reluctance to discuss private matters and there was no indication from Ms Lawrie that the deceased seemed confused in anyway.

[206] The pursuer had lied about being the deceased's executor to obtain the GP records. There were differences between the evidence of the pursuer and the defender on a number of issues, including the return of the deceased's car keys, but ultimately these matters were

peripheral to the central issues. Where there was a conflict of evidence in relation to the pursuer's evidence, on the one hand, and the defender's evidence, on the other hand, the court ought to look for independent verification. On the central issues that verification came from Mr White.

[207] As regards testamentary capacity, neither Dr Blair nor Dr Potts assessed the deceased's testamentary capacity. Dr Blair had had a number of consultations with the deceased on 7, 9, 14 and 16 August 2019 and he considered that she had capacity during those consultations. Dr Potts considered that it was crucial to meet a person in order to assess their capacity and Dr Lee accepted it was better to do so. Dr Potts considered that the deceased's capacity fluctuated between 5 August 2019 and 17 September 2019 and that she only permanently lost capacity on 17 September 2019. The fact that a detention under the Mental Health Act had been considered did not mean that the deceased had lost capacity at that stage and it was quite possible for such a detention to be made when a person had capacity. Dr Lee was therefore wrong to state that the deceased had lost capacity due to such a detention being considered. Dr Lee was also wrong to suggest that the deceased was refusing to take her insulin after the deceased was discharged from hospital, rather the evidence showed that she was choosing to self-administer it. Dr Lee was again wrong to suggest that the ERI record dated 5 August 2019 and timed at 13.22 should be interpreted that the deceased understood only some of the risks of discharge and not others. Dr Lee's evidence in that regard was contradicted by Dr Potts. Where there were any differences between the evidence of Dr Lee, on the one hand, and Dr Blair and Dr Potts, on the other hand, the evidence of Dr Blair and Dr Potts should be preferred as they had the benefit of regular meetings with the deceased. In all the circumstances Dr Lee's evidence regarding the deceased lacking testamentary capacity on 11 August 2019 should be rejected.

[208] Greater weight should be attached to the persons that saw the deceased when she signed the 2019 will. Those persons were the defender and Mr White. Whilst the defender had a financial interest in the outcome of the case, Mr White did not. Mr White's relationship with the defender did not appear to be so close with the defender that he would bear any degree of partiality towards him and therefore he could be regarded as an independent witness. Minor differences between Mr White and the defender, as regards when the defender telephoned Mr White, did not matter. Unless Mr White was either completely mistaken or lying, the pursuer's case in relation to a lack of testamentary capacity must fail. In addition, Ms Lawrie saw the deceased on 13 August 2019 and did not have any concerns about the deceased lacking testamentary capacity or being unduly influenced. Importantly, it was Miss Lawrie that suggested that the pursuer should consider a power of attorney, rather than the suggestion coming from the deceased or the defender. That suggestion occurred in the defender's absence and the deceased freely indicated that she wanted the defender appointed as her attorney. Both Ms Lawrie on 13 August 2019 and Ms Swinney on 28 August 2019 considered the deceased understood the meaning and effect of the power of attorney such that they could prepare and sign it, with Ms Swinney certifying the three matters referred to on the final page of the power of attorney (see para 178 above). Ms Swinney also made it clear that she had no doubts about the deceased's ability to grant the power of attorney on 28 August 2019. The evidence supported the view that there were times even after 11 August 2019 when the deceased had capacity and the evidence of both solicitors (Ms Lawrie and Ms Swinney) ought to be given high regard. In all the circumstances there was no basis for the court to hold, by 11 August 2019, that the deceased lacked testamentary capacity on a permanent basis. Any incidents

described in the medical records did not mean that the deceased did not have testamentary capacity on 11 August 2019.

[209] Whilst it may not be possible to reconcile all of the things said by the deceased in the course of 2019 or the evidence of different witnesses, ultimately none of that mattered. Nor did it matter whether the terms of the 2019 will were unfair to the pursuer. If the court was satisfied that at the time the deceased signed the 2019 will that she knew the extent of her property, the people who may have an interest in her estate and the effect of making a will, then there was no scope for reduction. From the deceased's discussion with various people, including Ms Lawrie, it was clear that the deceased: (i) knew that the major item in her estate was her house; (ii) understood that the pursuer would consider that he should have a claim on her estate and was one of the people to be taken into account when deciding on a will; and (iii) knew that the effect of the new will was to replace the earlier one with a provision entirely in favour of the defender. That being so, inconsistencies and oddities in the evidence counted for nothing and were not sufficient to show a lack of testamentary capacity.

[210] As regards facility and circumvention, every witness that knew the deceased described her as strong-willed and determined. The medical and social work records showed that on occasions close to 11 August 2019 the deceased was given strong advice by medical professionals, other professionals and family to remain in hospital, but, contrary to that advice, she made her own decision to leave and did so. In some instances the deceased's decisions may have not been in her own best interest with regard to her own safety, but they showed that she was the opposite of a weak-willed or impressionable person who may be facile. There was no evidence at all that at any time the deceased was weak-willed or open to persuasion. Proof of that condition was necessary for a case of

facility and it is one of the elements that could not be proved by inference. Alternatively, even if it could be proved by inference, no facts had been proved to allow such an inference to be drawn. In all the circumstances the case of facility and circumvention must fail.

[211] As regards the pursuer's case of undue influence, the pursuer did not need to prove facility. However, to make out a case of undue influence the pursuer required to prove a dominant or ascendant influence of the defender over the deceased, that confidence and trust arose from this and that the deceased entered into the transaction without the benefit of independent advice and assistance. No facts were proved which showed the defender having a dominant or ascendant influence. Independent witnesses such as Ms Lawrie described the defender as a "caring sibling" in his interactions with the deceased, which was in contrast to what she considered was the fairly standoffish relationship that the deceased had with Patricia. Miss Lawrie found the defender to be "a somewhat timid person and almost shy". Some witnesses, such as Mr Bell, stated that in his view the deceased was "feart" of the defender but he gave no facts from which such a conclusion could be properly drawn.

[212] Nothing turned on the fact that the defender printed the 2019 will for the deceased to sign. The deceased was not computer literate. After the deceased signed the 2019 will she arranged to see her solicitor, Ms Lawrie, at the earliest opportunity to receive confirmation that it was valid, or give instructions for the preparation of a valid will expressing the same bequest as was set out in the 2019 will. Miss Lawrie clearly discussed the changes from the 2018 will to the 2019 will with the deceased and she made clear that the 2018 will did not represent her wishes. The terms of Ms Lawrie's discussion with the deceased included the changes from the 2018 will to the 2019 will, and in particular, that the 2019 will provided for the defender to inherit everything and made no provision for her horses and cat. The

response by the deceased that “she knew that [*the defender*] would do right by them” was consistent with the defender’s evidence that the deceased expected him not to retain the entire estate for himself but to exercise a discretion as to how it should be distributed. The deceased was entitled to change her will at any point and that is what she had done. The case of *Smyth* at para 47 seemed to suggest that the independent advice required to be obtained before the transaction was concluded but that seem to be an unnecessary requirement given that a will could be changed at any time. In all the circumstances the case of undue influence must fail.

[213] As regards the pursuer’s fall-back crave for rectification, at no point did the evidence suggest that the 2019 will did not express accurately what was instructed or intended by the deceased. The defender gave evidence as a layman who was unfamiliar with legal terminology. The deceased’s intention was confirmed to Ms Lawrie. Ms Lawrie asked the deceased why “she wanted Alistair to inherit everything” and the deceased confirmed that that was her instruction. The defender’s evidence ultimately came to be that it was for him to decide how to distribute the deceased’s estate. In all the circumstances there was no basis for the suggesting that the terms of 2019 will did not reflect the deceased’s intention or her instructions.

[214] As regards the pursuer’s fall-back crave in relation to the 2019 will not being self-proving, all the conditions specified in section 3 of the 1995 Act had been met. It therefore did not matter that the upper part of the 2019 will was covered when Mr White witnessed the deceased’s signature. If there had been no writing on the upper part of the 2019 will there would have been no need to cover it. If the pursuer’s argument was correct it would mean that in the case of a disposition of a house or similar document extending to several pages, the presumption in section 3 of the 1995 Act could not apply if the document was

only opened on the final page and signed by the grantor and the witness, without looking at the preceding pages. That was the complete opposite to the rules as to the signature of documents, which were that the witness has to see the person signing the document (on the final page) but need not have any regard to the terms of the document that go before. The case of *Ormistoun* was of no assistance as it was considering an Act of Parliament of 1696. In all the circumstances the declarator sought should be refused.

Analysis and Decision

[215] I considered that the issues in this case were the four issues set out in para 2 above. I will now deal with each in turn.

Issue 1 - whether the 2019 will should be reduced

The relevant law

[216] It is first convenient to deal with the relevant law. Apart from one minor point that I deal with at para 224 below, parties were not in dispute as regards the relevant law. As was noted by Lord Glennie in the case of *Smyth* at para 37, a helpful summary of the relevant principles can be found at para 39.02 of *Gloag and Henderson, The Law of Scotland* (Lord Glennie referred to the 13th Edition but the text in the current 15th Edition is the same):

“A testament executed by a person who at the time lacked mental capacity is ineffectual. It is necessary to the exercise of the power of testing that the testator should be capable of comprehending the nature and effect of the testamentary act. If a person who lacks capacity has a lucid interval, a will made in that interval may be sustained. Where there is no general incapacity on the part of the testator but merely delusions, it must appear that these delusions influenced the dispositions made in the will in order to deprive them of effect.

The law also recognises the existence of a state known as facility, in which, while there is no incapacity to test, there is such weakness or pliability as exposes the testator to improper practices and solicitations by interested parties. This facility may

be due to natural disposition, or to old age or to ill-health. It is not in itself fatal to the will; but, if, in addition, either fraud or circumvention has been used to impetrate the will, it will be reduced.

Apart from cases of mental weakness, a will may be set aside on the ground that it was executed under error induced by misrepresentation, or was obtained by undue influence (that is, an influence exercised by fraud, coercion or a dominant person in whom the testator trusted)."

[217] Having identified the above relevant principles it is helpful to look at the three grounds of challenge in more detail.

Testamentary Capacity

[218] As was noted by Lord Glennie in the case of *Smyth*, at para 38, the leading cases on the subject of testamentary capacity are the English case of *Banks* (which has been referred to with approval in several Scottish cases) and the Scottish case of *Sivewright v Sivewright's Trustees* 1920 SC (HL) 63. In *Banks*, at page 565, Cockburn CJ set out a four stage test in order to determine the question of testamentary capacity:

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

[219] The above four stage test was quoted with approval by Lord Atkinson in *Sivewright* and, in that case, Viscount Haldane, at page 64, stated:

“The question whether there is such unsoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act. But, if he does, he is not required to be highly intelligent. He may be stupid, or he may even be improperly, so far as ethics go, actuated by ill-feeling. He may, again, make his will only in the lucid interval between two periods of insanity. The question is simply whether he understands what he is about. On the other hand, if his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to have been the outcome of the special delusion. It is not sufficient that the man who disposes of his property should be occasionally the subject of a delusion. The delusion must be shown to have been an actual and impelling influence.”

[220] In *Smyth* Lord Glennie, after considering the cases of *Banks* and *Sivewright*, together with some further more recent English authorities stated, correctly, in my opinion, at para 41 and 42:

“[41] The burden of proving capacity lies on the person seeking to rely on the will or other disposition. Few cases nowadays turn on the burden of proof, but it is useful as a point of departure. In many cases little is required to displace the initial burden. If, on the other hand, the testator appears to have behaved in a confused manner, or the content of the will excites “a suspicion of the court” (see *Gill v Woodall* at para 13), a more detailed examination of the circumstances in which it was made may be necessary. It has been observed that if a properly executed will has been professionally prepared and then explained to the maker by an independent and experienced solicitor, it will be markedly more difficult to challenge its validity on the grounds of lack of mental capacity than in a case where those prudent procedures have not been followed: *Burgess v Hawes* at para 13 per Mummery LJ... But every case must turn on its own facts.

[42] ... The court will have to do its best with the evidence it has. The determination of whether the testator did or did not have capacity to make a will does not depend solely upon medical evidence: *Simon v Byford* at para 17. The criteria for assessment of capacity are not directly medical questions, though medical evidence, if available, may be highly relevant. Even where medical evidence is available, the court will not be bound to prefer it over other evidence. It will form its view of the testator's capacity on the basis of all the evidence, both medical and non-medical.”

It is also important to recognise that: (i) testamentary capacity falls to be judged at the time when the testamentary writing was executed (*Laidlaw* per Lord Benholme at page 888); and (ii) capacity is task specific – e.g. a person may have capacity to consent to basic medical treatment but lack testamentary capacity (see *Ward Appellant* per Sheriff Principal Kerr at para 9).

Facility and circumvention

[221] In *Horne v Whyte* [2005] CSOH 115 Lady Smith identified, at para 51, what is required to be established for the pursuer to succeed on this ground:

[51] For the pursuers to succeed under this head, it is necessary that they establish (1) the facility of the deceased at the time the codicil was made; (2) acts of circumvention or fraud which impetrated or procured the codicil; and (3) lesion. Direct evidence is normally required for the first and third of these elements but the second, for obvious reasons, is usually, where the granter of the challenged deed is dead, a matter of inference (see: *Clunie v Stirling* (1854) 17D 15; *Mackay v Campbell* 1967 SC (HL) 53; *Pascoe - Watson v Brock's Executor* 1998 SLT 40; *Gaul v Deerey & Others* 2000 SCLR 407). The three elements are clearly interrelated, they require to be looked at as a whole and the strength of a pursuer's case on one matter may compensate for weakness on other matters (*Mackay v Campbell*; *Pascoe- Watson v Brock's Executor*).

[222] In *Smyth* Lord Glennie explained, at para 49, the words “facile”, “facility” and “circumvention”:

“[49] The words “facile”, “facility” and “circumvention” as used in this context in scots law are not in common usage. But the concept is straightforward. A person is said to be “facile” if his mind is so weak or pliable so that he is unlikely to be able to resist pressure applied by another: *Pascoe-Watson v Brock's Exr* 1998 SLT 40 at 47F-G. Circumvention is the name given to improper pressure applied to such a person by another in such circumstances. That pressure may, at one extreme, be direct, forceful and overpowering or, at the other, be more subtle or insidious, working by solicitation or importuning. Fraud is one example of the way in which a facile mind maybe subverted but it is not an essential part of the principle. Bullying or browbeating may equally amount to circumvention. A robust individual will usually be able to resist pressure, or at least decide whether or not he wants to resist it. A facile person may not. But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable

having regard to the extent to which the person on whom it is exerted is facile. If a person with a weak and pliable mind – whether that condition is permanent or temporary and whether caused by age, infirmity, pain, grief or something else altogether – is pushed or led by fraud, force or solicitation to do what he would, or might, otherwise have resisted doing had his mind been stronger, then his act can be reduced by the court.”

Lesion can be established by proving a beneficiary was denied the inheritance, which under the testator’s earlier will, he would have enjoyed or that the testator’s free will was not permitted to be given effect to due to the fraud and circumvention of the defender (see *Pascoe-Watson v Brock’s Executor* 1998 SLT 40 per Lord Osbourne at page 47K).

Undue influence

[223] The concept of undue influence was explained in the case of *Gray* by Lord Shand at page 347:

“The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance. In such circumstances the Court is warranted in holding that undue influence has been exercised; but cases will often occur – and I think the present is clearly one of that class – in which over and above all this, and beyond what I hold to be necessary, it is proved that pressure was actually used, and that the granter of the deed was in ignorance of facts, the knowledge of which was material with reference to the act he performed.”

[224] In the case of *Broadway* Lord Macfadyen explained, at para 27, how to approach the question regarding whether the requisite abuse of a relationship occurred:

“[27]...The answer to the question whether the requisite abuse of a relationship of trust may be held to have occurred in a particular case must, in my view depend on a consideration of the whole circumstances established in evidence. There will no doubt be cases in which there is direct evidence of action or concealment on the part of the person alleged to have exercised undue influence which will demonstrate that he has acted in a way which involved abuse of his position of trust. There will be other cases in which such direct evidence of acts or omissions demonstrating abuse of the position of trust will not be available, but circumstances will be established

which justify the inference that there has been an abuse of trust. I do not consider it particularly helpful to categorise these as different classes of undue influence. Rather they seem to me simply to be examples of the diverse ways in which the essential feature of abuse of a relationship of trust may be sufficiently proved to have been present.”

Whilst the absence of personal benefit is not fatal to a claim under this ground, if a personal benefit can be demonstrated that will be one of the relevant circumstances to be taken into account in deciding whether the inference that undue influence was exerted should be drawn (*Broadway v Clydesdale Bank Plc (No 2)* 2003 SLT 707 per Lord Macfadyen at para 28). In *Smyth* at para 47 Lord Glennie made clear that the independent advice or assistance (which need not be advice from a professional solicitor or an accountant) requires to be taken before the transaction is concluded (see also the case of *Horne* per Lady Smith at para 65). In the present case I considered that to be before the 2019 will was executed. In such circumstances I considered that the deceased had no independent advice and assistance prior to the 2019 will being executed and reject the defender’s submission, at para 212, to the contrary.

The evidence

[225] I have set out the evidence of each witness in some detail. Almost all the evidence was led without objection. Counsel for the pursuer did object to a line of questioning during the pursuer’s cross examination in relation to the defender not being informed about the deceased’s funeral. That objection was to the relevancy of the evidence and I heard that evidence (which is set out in the last three sentences of para 40 above) under reservation of all questions of competency and relevancy. Counsel for the pursuer insisted on his objection during his closing submission. The solicitor for the defender noted that nothing turned on the evidence objected to, but conceded that the objection ought to be sustained. I considered

that the evidence contained in the last three sentences of para 40 above was irrelevant and I therefore have sustained the objection to its admissibility. There was a considerable amount of evidence that was not in dispute. That included the execution of the 2018 will, the general declining state of the deceased's health in 2019 and the contents of the medical records.

Findings in fact 1, 2 (although there was some confusion over when the deceased retired, but nothing turned on that), 3, 4, 7 to 9, 12, 13, 16 to 20, 22, 27, 28, 30, 41 (Mr White confirmed that he did not handwrite the word "Edinburgh" or "11th"), 42, 51, 52, 57 to 64 and 66 were not seriously disputed.

[226] The pursuer called a number of family members to give evidence. These witnesses clearly supported the pursuer's case and could not be described as independent. There was also a considerable amount of evidence about events / conversations that could not be independently verified. I sought to test the evidence of each witness by considering whether their evidence was internally consistent and by comparing and contrasting their evidence with other evidence I accepted, including the contemporaneous records that were available.

[227] The evidence led was wide-ranging and raised a number of collateral issues (such as what the pursuer did or did not do with deceased's parking bollard). I did not consider it necessary to deal with those collateral issues in any detail as I did not consider that they impacted on the three grounds relied upon to reduce the 2019 will. In my view the key issues in the evidence were as follows:

- (1) The deceased's relationship with the pursuer and other family members;
- (2) The deceased's relationship with the defender;
- (3) Whether the deceased lacked testamentary capacity when signing the 2019 will;

(4) In the event of the deceased having testamentary capacity when signing the 2019 will, whether there was: (a) facility or circumvention; and / or (b) undue influence.

[228] I will examine each of these key issues in turn but before doing so I make the following comments on the credibility and reliability of the witnesses. The pursuer gave evidence in a calm and straightforward manner. His evidence was generally internally consistent, was generally consistent with the evidence of the other witnesses called for the pursuer and consistent with the medical records. I did not consider that the pursuer could be greatly criticised for signing the mandate sent to the GP that had been prepared by his solicitor. I did not consider the difficulties with that mandate adversely impacted on the pursuer's evidence and I found him to be credible and generally reliable. Patricia, Jennifer and Laura all gave their evidence in an open manner. Their evidence did not seem rehearsed and was generally internally consistent and generally consistent with other evidence called for the pursuer. Patricia's evidence was supported by the medical records and: (i) the conversation record prepared by the OT (production 5/3/3 – see para 52 above); and (ii) the transcript of text messages sent by Patricia to the social work department (production 5/3/4 – see para 53 above). The conversation record and transcript of text messages recorded communications made by Patricia on the dates attributed to them, which were very close to 11 August 2019, and in circumstances where Patricia was not aware that the 2019 will was even in contemplation. As such, I considered these conversations and messages could be relied upon. Patricia fairly conceded that she could not be sure whether it was 11 August 2019 that she went to S. Luca's café with the deceased. I found Patricia, Jennifer and Laura to be generally credible and reliable witnesses.

[229] However, I did not accept Patricia's evidence about Ms Lawrie telling lies about her being standoffish and the defender being caring. However, I considered that was a minor overreaction on her part and was based primarily on her view that the defender was not caring towards the deceased and that she did not consider herself to have been standoffish. I also considered that Patricia conflated the incident on 6 August 2019 with another incident where the deceased had tripped over the defender's dog (see para 44 above). However, I consider that that was a minor issue which was understandable given the passage of time. I considered that there had been some retrospective rationalisation on the part of Jennifer and Laura as regards being firm on 11 August 2019 as being the date that they went to S. Luca's with the deceased. Whilst they provided some reasons for being firm on that date, there was no evidence in relation to when Laura passed her driving test and I did not consider there was a clear anchor for it being 11 August 2019 that they went to S. Luca's, as opposed to another Sunday close to that date. I had no doubt that the trip to S. Luca's and the earlier trip to Eyemouth, spoken to by Mr and Mrs Bell, occurred on the same day. I considered that some support could be drawn from the transcript of text messages sent by Patricia to the social work department (production 5/3/4) that the trip to S. Luca's did in fact occur on 11 August 2019, given that the text messages showed that the deceased was requesting to be taken out on 9 August 2019, which was similar to the request she made prior to the trip to S. Luca's. However, I considered that it remained unclear whether those trips took place on Sunday 11 August 2019 or another Sunday close to 11 August 2019. In the circumstances I did not find it proved, on a balance of probabilities, that the trip to S. Luca's (and the earlier trip to Eyemouth) occurred on Sunday 11 August 2019.

[230] Christine came across as a caring person who cared for the deceased. Her evidence was generally internally consistent and consistent with the ERI records, the GP records

relating to the events of 6 August 2019, the evidence of Dr Potts regarding the deceased's testamentary intentions and generally the other witnesses called by the pursuer. I found her to be a credible and generally reliable witness. However, Christine's evidence as regards overhearing the deceased discussing her testamentary intentions with Janette during August 2019 was somewhat at odds with Janette's evidence who said that the deceased told her her testamentary intentions at some point prior to being admitted to hospital. Christine also said that the pursuer was present in Janette's house when she overheard that discussion. However, the pursuer said that the only time the deceased discussed the contents of the 2018 will with him was in April / May 2019 and he did not state where this occurred. The pursuer's time frame was more consistent with Janette's evidence. The evidence given by Christine, Janette and the pursuer as regards what the deceased said about her testamentary intentions was consistent with the independent evidence of Dr Potts and I had no doubt that Christine, Janette and the pursuer were giving truthful evidence about what the deceased had said in that regard. However, it was not clear whether: (i) what the deceased said to Janette (see para 107 above); (ii) what Christine overheard the deceased telling Janette (see para 98 above); and (iii) what the deceased said to the pursuer (see para 9 above); was three different occasions, two different occasions or the same occasion. If what the deceased said to the pursuer was a different occasion then the pursuer: (i) must have not have been within earshot of the deceased when she had the discussion with Janette which Christine overheard; or (ii) must not have been present (in which case Christine would be mistaken); or (iii) must be mistaken that the deceased only discussed the contents of the 2018 will with him on that one occasion. If it was the same occasion, there was a discrepancy between Christine, Janette and the pursuer as regards the approximate time frame when the deceased discussed her testamentary intentions. In the circumstances I considered that what had

been proved, to the required standard, was that at some point in the months leading up to her death the deceased discussed her testamentary intentions with the pursuer and Janette. I have not, however, been able to find it proved whether there was one, two or three discussions. In such circumstances: (i) finding in fact 11 may have occurred at the same time as finding in fact 54 or it may be a different occasion; and (ii) finding in fact 54 may be the product of one or two discussions. Janette's evidence was limited and, subject to the foregoing qualification, I considered that it was consistent with the evidence of her daughter Christine (whose evidence I, again subject to the foregoing qualification, accepted) and was consistent with the medical records. I accepted Janette's evidence as credible and generally reliable.

[231] Mr and Mrs Bell's evidence was again limited. They had no interest in the outcome of the case and I considered both gave their evidence in a matter of fact way. Both fairly said that they were not sure about whether the trip to Eyemouth occurred on 11 August 2019. I found both Mr and Mrs Bell to be credible and generally reliable witnesses. The evidence of John Allan had no real relevance and I did not place any weight on it.

[232] Dr Lee was a highly experienced consultant geriatrician and much of his evidence was consistent with the evidence of Dr Potts. I did not consider that Dr Lee's understanding was that the deceased refused to take her insulin after being discharged from hospital on 5 August 2019. Rather, Dr Lee made clear that his understanding was that she was refusing to allow anyone to administer her insulin on 7 August 2019 when this had been considered appropriate and that the medical professionals had then agreed that the deceased could self-administer her insulin (see para 80 above). Dr Lee considered that the fact that the deceased was refusing to allow anyone to administer her insulin, against medical advice, was a factor in his ultimate conclusion that the deceased did not have testamentary capacity. My

understanding of that passage of Dr Lee's evidence was that it was a factor because, in the circumstances, it showed flawed thinking, on the deceased's part, as regards the appropriate control of her diabetes, which was critical to her life.

[233] Dr Potts explained in his evidence that: (i) the deceased's medical consent capacity was fluctuating between 5 August and 17 September 2019; (ii) the deceased lost medical consent capacity on 17 September 2019; (iii) the cognitive impairment that the deceased was suffering from was affected by a number of factors including poorly controlled diabetes; and (iv) the deceased's cognitive impairment would be relevant to assessing her testamentary capacity (see para 130 above). Given: (i) Dr Potts' view about the deceased's poorly controlled diabetes being a factor in the deceased's cognitive impairment; (ii) that there was evidence that the deceased's diabetes was generally poorly controlled prior to 11 August 2019 (see the pursuer at para 12 above, under reference to the GP records at page 137; and Patricia at para 45 above); and (iii) the fact that medical professionals had considered by 5 August 2019 that it would be better for the deceased's insulin to be administered to her, I considered that it could be reasonably inferred that it would be likely that the deceased's diabetes would, to some extent, be poorly controlled on 11 August 2019 and that account could be taken of that when assessing her testamentary capacity. However, I accepted that the deceased had always controlled her diabetes herself and that Dr Blair was happy for her to continue to do so. In the circumstances I considered, given that the deceased had always administered her own insulin, that whilst there may have been some flaw in her thinking in refusing, against medical advice, to allow anyone to administer her insulin, it could not be regarded as significant factor impacting on her testamentary capacity on 11 August 2019. I considered that the fact that the deceased's diabetes was likely to be poorly controlled on 11 August 2019 was a factor that could impact on the deceased's testamentary capacity,

however, the extent to which it impacted on the deceased's testamentary capacity on 11 August 2019, if any, was not known. I considered that Dr Lee's evidence did not contradict the material evidence of Dr Blair or Dr Potts and I have, for the reasons explained at paras 250 to 261 and 264 below, ultimately accepted the conclusions he arrived at.

[234] The terms of the statement of Ms Lawrie were not in dispute and I accepted the terms of her statement to be credible and reliable. As regards the witnesses called for the defender, the evidence of Dr Blair, Dr Potts and Ms Swinney was not seriously in dispute and I found them all to be credible and reliable. Dr Potts was a particularly impressive witness. I have, for the reasons given at para 257 below, found that Mr White was not a reliable witness in relation to the manner the deceased presented on 11 August 2019, however, I did accept the majority of his other evidence, including that he witnessed the deceased signing the 2019 will on 11 August 2019.

[235] Whilst I did not reject the entirety of the defender's evidence (and indeed his evidence regarding the trip to Eyemouth / S. Luca's not being on 11 August 2019 was a factor in me not finding that particular aspect of the pursuer's case proved), I did not find him to be a satisfactory witness in a number of respects. The defender gave lengthy answers to a significant number of the questions asked. These answers at times included verbatim quotes of what was allegedly said a number of years ago. The defender's evidence also included precise dates and times about events occurring a number of years ago. I considered that the defender's evidence appeared to be rehearsed and that it was implausible that he would remember exact times, dates and verbatim quotes of what was said in relation to events years earlier. The defender's evidence about the breaking of the deceased's phone in hospital on 4 August 2019 was contrary to the medical records and I considered it to be incredible. The defender's evidence regarding Christine and her mother

(Janette) assaulting the deceased in hospital on 5 August 2019 was implausible, but the defender clearly thought that it had in fact happened. The defender's evidence about the ambulance crew attending on 6 August 2019 was unsatisfactory. The defender thought that that incident occurred in the early hours of, presumably, 7 August 2019 and narrated a conversation with the deceased about the lateness of the hour when the records showed the ambulance crew had attended the evening before. The defender also said, in relation to that incident, that he did not do anything because there was nothing to do and that the deceased was not stressed. However, the SAS record of the ambulance crew's attendance clearly recorded that that the deceased was distressed and crying (GP records at page 48 and also at page 52).

[236] I considered that the defender's contention that the medical professionals were mentally torturing the deceased did not accord with the medical records or the evidence of Dr Potts and was incredible. For reasons explained in more detail at para 237 to 243 below, I considered that the Somerville and Judd families had a close relationship with the deceased and found that the defender's contention that they were goading her about: (i) never getting out of hospital; and (ii) her belongings being worthless and would end up in a skip, to be simply unbelievable. I considered the defender's contention that he did not visit the deceased in hospital, because the deceased could not bear it when he left, to be incredible. I also considered that the defender's assertion that the deceased's statement to Ms Lawrie on 13 August 2019 (that she had not seen the pursuer for over a year) was in fact true, because what the deceased was meaning was a year period running between May 2018 to May 2019, was not credible. Overall I considered that the defender was generally not a credible or reliable witness. Subject to any observations I make above or below, I preferred the

evidence of the pursuer's witnesses where there was a material difference between their evidence and that of the defender.

The deceased's relationship with the pursuer and other family members

[237] The pursuer explained the close relationship he had had with the deceased since he was a child. This close relationship continued right up until the deceased's death and included the pursuer making weekly visits to the deceased's house for dinner with his now wife Christine. The pursuer's evidence as regards his close relationship with the deceased was supported by the evidence of his mother, Patricia, his sisters, Jennifer and Laura, Christine, Janette and, to some extent, Mrs Bell. The other supporting evidence included the medical records, which made clear that both the pursuer and his mother, Patricia, were regularly involved in the deceased's care. The ERI records also made clear that the deceased had named the pursuer as his NOK and showed that he was involved in her care and was advocating on her behalf on 5 August 2019 (see the entry timed at 13.22). The terms of the 2018 will made clear that the deceased's intention, at that time, was to leave a residuary legacy for the pursuer, which included the deceased's house, and I considered that that intention supported the closeness of the relationship he had with the deceased. Dr Potts became involved in the care of the deceased in July 2019 and prior to 20 August 2019 the deceased, without enquiry from Dr Potts, volunteered to him that she was bequeathing her estate, which included a house or a flat, to the pursuer. Dr Potts also described the deceased speaking to him about the pursuer with warmth and I considered both those aspects of Dr Potts' evidence supported the closeness of the relationship between the deceased and pursuer continuing shortly before her death. The deceased's discussions with the pursuer and Janette as regards her testamentary intentions in the months before her

death (on which see para 230 above) were consistent with what the deceased volunteered to Dr Potts and were consistent with the terms of the 2018 will.

[238] When the deceased gave instructions as regards the terms of the 2018 will on 13 November 2018 she described Patricia as her nearest relative. The conversation record prepared by the OT (production 5/3/3) and the transcript of text messages sent by Patricia to the social work department (production 5/3/4) showed that Patricia was involved in the deceased's care during August 2019 and, at that time, was providing updates and making clear her worry about the deceased.

[239] The events on 6 August 2019, a day after the defender claimed that Christine and her mother had assaulted the deceased in hospital, showed that the deceased had contacted Christine when she was distressed and struggling to breathe. Christine's account of that incident, which included her telephoning for an ambulance and then immediately attending the deceased's house, was supported by both the record prepared by the SAS and by the record of the out-of-hours doctor (see GP records pages 48 and 50 to 53).

[240] I considered that the overall picture that emerged from the evidence which I accepted was that the deceased had, for very many years, a very close relationship with the pursuer, Patricia, Jennifer and Laura. The deceased was particularly fond of the pursuer and she came to be good friends with Christine and her mother Janette. The defender's contention that the deceased did not see the pursuer between May 2018 and May 2019 was not supported by any other witness and I rejected it on the basis that it was contrary to the above evidence I have accepted. I considered that the pursuer maintained regular contact with the deceased during the latter period of her life and that his relationship with her was always a close one.

[241] I did not consider that the deceased's close relationship with the pursuer, Patricia, Jennifer and Laura, over very many years, was impacted by: (i) the MDT meeting on 31 July 2019 (see production 6/2/19); (ii) the deceased's family not wishing to receive telephone calls from her on 3 August 2019; or (iii) the issue about the removal of the deceased's car keys. I considered that the evidence showed that the pursuer, Patricia, Jennifer, Laura and Christine constantly supported the deceased. The situation that Patricia faced at the MDT was that all the professionals were explaining to the deceased why it was not safe to go home, but the deceased was not accepting that advice. In such circumstances I considered that it was understandable why Patricia, who I considered only wanted what was best for the deceased, became frustrated with the deceased's refusal to accept the professional advice that she was being given. As regards the deceased's family not receiving telephone calls from the deceased on 3 August 2019, the ERI records from the next day showed that the deceased had pulled her phone apart and was making multiple telephone calls to her family for a variety of reasons. The ERI records showed that the pursuer then visited the deceased on 4 August 2019 and was advocating on her behalf on 5 August 2019. As regards the deceased's car keys, she had been told by the hospital doctors that she was not to drive and the entry in the ERI records dated 5 August 2019 and timed at 17.23 noted Dr Goddard's impression that the deceased was "hearing but not heeding" the advice not to drive. In such circumstances I considered it was a sensible precaution for Patricia to remove the deceased's car keys and for the pursuer to retain the car keys for a short period until they were satisfied that the deceased would follow the advice she had been given not to drive.

[242] I have already referred to the conversation record prepared by the OT (production 5/3/3) and the transcript of text messages sent by Patricia to the social work department (production 5/3/4). These showed, amongst other things, that after the MDT, after 3 August

2019 and after the car keys were removed that: (i) Patricia took the deceased to a GP appointment on 9 August 2019; (ii) Patricia was taking the deceased out (including on 10 August 2019); and (iii) the deceased wished Patricia to stay with her for most of the day. I considered that the conversation record and the transcript of text messages supported the close relationship between Patricia and the deceased continuing after the events set out above and that those events, when looked at against the very lengthy close relationship the deceased had with the pursuer, Patricia, Jennifer and Laura, were minor in the grand scheme of things.

[243] I did not consider that the other allegations put to the pursuer and Patricia, in an effort to show their respective relationships with the deceased had difficulties, were well founded and I accepted the responses given by the pursuer and Patricia to those allegations.

[244] Finding in fact 5 is based on a combination of the evidence of the pursuer, Patricia, Jennifer, Laura, Christine and Janette. Finding in fact 6 is based on a combination of the evidence of the pursuer, Patricia and Christine. Finding in fact 21 is based on a combination of the evidence of the pursuer, Patricia and Laura taken with the ERI records and production 6/2/19. Finding in fact 23 is based on the evidence of the pursuer taken with the ERI records. Finding in fact 25 is based on a combination of the evidence of the pursuer and Patricia taken with the ERI records. Finding in fact 26 is based on a combination of the evidence of the pursuer, Patricia, Jennifer, Laura, Christine and the defender taken with the ERI records. Finding in fact 31 is based on the evidence of Patricia taken with: (i) the conversation record prepared by the OT (production 5/3/3); and (ii) the transcript of text messages sent by Patricia to the social work department (production 5/3/4). Finding in fact 32 is based on the evidence of Patricia taken with the conversation record prepared by the OT. Findings in fact

33 and 36 are based on the evidence of Patricia taken with the transcript of text messages sent by Patricia to the social work department.

The deceased's relationship with the defender

[245] A number of the witnesses called by the pursuer explained that there was a period of time when the deceased was not speaking to the defender. The evidence given in that regard was rather vague on the reason why this state of affairs came about (although the pursuer said it was to do with the deceased getting the pursuer to drive a second car for her that she had just purchased – see para 28 above) but all the witnesses that spoke about it were clear that there was such a period. I accepted that evidence and rejected the defender's evidence that there was not such a period. A number of witnesses called for the pursuer were clear that the deceased kept her house in a neat and tidy manner and the defender also accepted that was the case. There then came a point when the deceased and the defender began speaking again and by April / May 2019 the defender had moved in to the deceased's house.

[246] The evidence from the pursuer, Patricia, Jennifer, Laura and Christine, which I have accepted, made clear that the condition of the deceased's house significantly deteriorated after the defender moved in. The defender's property was strewn across the living room and he had a makeshift bed on the floor of the living room. The photographs taken in September 2019 supported that evidence and showed that the deceased's house was in an extremely poor condition. The defender initially said the deceased was comfortable with the state her house had deteriorated to, but later said he had the feeling she did not like the mess. A number of the pursuer's witnesses, including Mrs Bell, gave evidence to the effect that the deceased did not want the defender living with her but did not press the matter

because she did not like confrontation. Indeed Mr and Mrs Bell offered to have a word with the defender in that regard but the deceased declined that offer because she did not want to upset the defender and was concerned that if she did say something to him, the defender would shout and scream at her. The defender maintained that there never came a point when the deceased was unhappy about him staying in her house, but that was contrary to the other evidence, including that of Mrs Bell, and I rejected the defender's evidence in that regard. Patricia explained that the defender would shout at the deceased a lot. The pursuer explained that when he was visiting the deceased that the defender would shout to her in an uncaring way and Christine explained how the deceased would lie across the sofa and create an atmosphere when her and the pursuer went for their weekly dinner at the deceased's house. I have already mentioned the events of 6 August 2019. The evidence from Christine, as supported by the record from the SAS and the record from the out-of-hours doctor, showed that the deceased was distressed and crying. When the deceased phoned Christine she told her she could not breathe (the defender accepted in his evidence that the deceased told Christine that she was out of breath and had pains in her chest (see para 143 above) and that during the incident she said she had difficulty breathing (see para 144 above)). When Christine arrived the deceased was hyperventilating, crying and in a complete panic and told Christine that the defender would not call her an ambulance. The ambulance crew found that the deceased had not eaten for a considerable period. I considered, from the evidence I accepted, that: (i) it could be reasonably inferred that the defender knew the deceased was distressed; (ii) the defender knew that the deceased had said that she had difficulty breathing; and (iii) the deceased had asked the defender to call her an ambulance. In such circumstances I considered that the defender ought to have called an ambulance for

the deceased. The defender failed to do so and I considered that his actions, during the incident on 6 August 2019, showed a lack of care towards the deceased.

[247] The medical records showed that prior to 11 August 2019 the defender had minimal involvement in the deceased's care. Indeed the defender conceded that he only ever visited the deceased in hospital on a few occasions. I have already explained, at para 236 above, that I considered that the defender's reasons for not visiting the deceased in hospital to be incredible. Jennifer and Mr Bell both said that the deceased had told them that she was scared of the defender. Patricia and Christine also formed that impression. When I considered the totality of the above evidence, I considered that it created a foundation for the deceased to be scared of the defender and that she was scared of him.

[248] I considered that the evidence showed that:

- (1) prior to the defender moving into the deceased's house, the deceased kept her house neat and tidy and was house proud;
- (2) after the defender moved into the deceased's house:
 - (i) the defender caused the deceased's house to deteriorate into a poor state;
 - (ii) the defender created an atmosphere when the pursuer and Christine visited the deceased's house for their weekly dinner;
 - (iii) the defender, on occasions, spoke to the deceased in a uncaring way;
 - (iv) the defender, on occasions, shouted at the deceased;
 - (v) the defender, on at least one occasion on 6 August 2019, acted towards the deceased in a uncaring way;
 - (vi) the defender only visited the deceased in hospital seldomly;

- (vii) the defender had minimal involvement in the deceased's care when she was in hospital;
- (viii) the deceased wanted the defender to move out of her house but she did not like confrontation and, as a result, put up with him living in her house; and
- (ix) the deceased was scared of the defender.

[249] Finding in fact 10 is based on a combination of the evidence of the pursuer, Patricia, Laura and Christine. Finding in fact 14 is based on a combination of the evidence of the pursuer, Patricia, Jennifer, Laura, Christine, Mr Bell and the defender taken with the photographs of the deceased's house (production 5/2/2). Finding in fact 15 is based on a combination of the evidence of the pursuer, Patricia, Jennifer, Laura, Christine, Mrs Bell and Mr Bell. Finding in fact 29 is based on a combination of the evidence of the pursuer and Christine taken with the GP records. Finding in fact 65 is based on the evidence of Jennifer and Laura taken with the photographs of the deceased's house.

Whether the deceased lacked testamentary capacity when she made the 2019 will;

[250] The 2019 will was prepared and signed without the deceased having any independent legal advice. The 2019 will was made on 11 August 2019 when the deceased was very ill and only just over a month before she died. The 2019 will was significantly different from the 2018 will and was prepared by the defender, who was the sole executor and beneficiary under it. It was also made against the background of the deceased volunteering to Dr Potts at some point between July and 20 August 2019 that she was bequeathing her estate to the pursuer and making similar comments to the pursuer and Janette in the months before her death. In such circumstances I considered that content of

2019 will was suspicious and unheralded and merited a more detailed examination of the circumstances in which it was made.

[251] Dr Potts first started to wonder about the deceased's cognitive function on 9 July 2019 but he did not consider that her capacity was impaired to make decisions about her medical treatment. Also on 9 July 2019 the deceased commenced dialysis and the evidence, which I accepted, showed that dialysis made the deceased tired, a bit confused and left her feeling washed out. The effect of renal failure made the deceased's legs swell, which resulted in her having difficulty with her mobility.

[252] The deceased was due to be discharged from hospital on 5 August 2019. Prior to being discharged on 5 August 2019 the deceased was unsteady with a walking stick (see the entry in the ERI records dated 5 August 2019 and timed at 02.01) and was expressing paranoid views, including that someone on the ward had drugged her. The deceased referred to Christine as "Laura" and was uncharacteristically nasty to her. The deceased also told her family that no one from the hospital had told her not to drive when that was untrue (see the entry in the ERI records dated 5 August 2019 and timed at 16.08). The deceased was seen by Dr Smyth, Consultant Psychiatrist on 5 August 2019. At that time the deceased continued to express some paranoid ideas but these were challengeable and not held with delusional intensity. Dr Smyth considered detaining the deceased under the Mental Health Act but decided, on balance, that the least restrictive option was to allow the deceased to go home with family support.

[253] Findings in fact 28 to 33 and 35 to 36 set out how the deceased presented in the lead up to the signing of the 2019 will on 11 August 2019. In short, the deceased was upset on 6, 7, 8 and 9 August 2019. The deceased had a consultation on 9 August 2019 with Dr Blair and he considered that she had capacity to make decisions about her medical treatment. On that

date the deceased was crying when Patricia refused to take her on a trip and was saying she was going to end it all. On Saturday 10 August 2019 the deceased fell twice while either going to or coming from dialysis. On that date the deceased could hardly walk, was crying non-stop and talking about ending it all.

[254] The very next day the deceased signed the 2019 will. On that day, Sunday 11 August 2019, the defender and Mr White described the deceased as being very alert. The defender described the deceased as galloping down the path to meet Mr White. He described her being as if she was regenerated and being like a phoenix rising from the ashes. However, that was in stark contrast to how the deceased had been in hospital on 5 August 2019 and in the days before 11 August 2019. It was also in stark contrast to how the deceased presented to Ms Lawrie on 13 August 2019 who described her as thin, extremely pale and slightly jaundice looking. Ms Lawrie also noted that the deceased appeared to be very ill, very tired, had difficulty walking for long periods and smelled generally unclean.

[255] At the meeting with Ms Lawrie on 13 August 2019 the deceased gave two reasons for changing her will, namely, that: (i) since the pursuer had found out he was to benefit from everything in the 2018 will, that she had not seen him for over a year; and (ii) the defender was now the person helping her out with everything due to her being very ill. Whilst there was evidence, which I accepted, which showed that the deceased was a private person, I did not consider there was any evidence to support the suggestion that the deceased would have made up these two reasons as result of having a reluctance to discuss private matters with Ms Lawrie. I rejected that suggestion and considered that the two above reasons the deceased gave to Ms Lawrie for changing her will were given to her because the deceased believed them to be the truth. However, both reasons were in fact incorrect, with the true position being as set out in finding in fact 48. The deceased also told Ms Lawrie that she

wanted the defender appointed as her attorney because, at that point, he was taking her up and down to hospital three times a week for dialysis. That was again incorrect. The defender had in fact never taken the deceased to dialysis, rather she was taken in transport organised by the hospital.

[256] Following on from the meeting on 13 August 2019, findings in fact 52 and 57 to 60 detail, amongst other things, the deceased's cognitive decline. In short the deceased was seen by Dr Blair on 14, 16, 26 and 30 August 2019 and he considered that the deceased had not lost capacity to make decisions about her medical treatment. The deceased was also seen by Dr Potts on 20 August 2019. Dr Potts considered that the deceased had not lost capacity for decisions about placement, support or medical treatment and noted that he would find it difficult to justify her being detained under the Mental Health Act. On 28 August 2019 the deceased appointed the defender as her attorney and Ms Swinney did not consider there to be any issues with the deceased's capacity to grant the power of attorney. On 13 September 2019 Dr Potts reviewed the deceased, following her having a brain scan, and cognitive deficits were still evident. Between 14 to 16 September 2019 the deceased scored 15 out of 30 in a MOCA on a non-dialysis day (the deceased's cognition would be better on a non-dialysis day) which indicated moderate to severe cognitive impairment. On 17 September 2019 Dr Potts reviewed the deceased and she had, by that point, lost capacity to make decisions about her medical treatment.

[257] I did not consider the defender's account of how the 2019 will came to be drafted to be plausible. The defender contended that at around 15.40 on 9 August 2019 that the deceased said "can I not just make my own will". I did not consider it to be plausible that the defender would recall the precise date, time and words used by the deceased to indicate she wanted to change her will. Whilst I accepted that the deceased did sign the 2019 will in

the presence of Mr White on 11 August 2019 I did not accept the evidence of Mr White and the defender of the deceased being very alert and galloping or hurrying along the path because that was contrary to the evidence I accepted of how the deceased presented shortly before and after 11 August 2019 (see paras 252 to 254 above).

[258] I have already noted that Dr Potts considered that the deceased's capacity to consent to medical treatment fluctuated between 5 August 2019 and 17 September 2019. On 5 August 2019 there were clearly concerns about her capacity to make the decision to leave hospital. However, it was decided that she did have capacity to do so. Dr Blair saw the deceased on 7 and 9 August 2019 and considered that she had capacity to make decisions about her medical treatment. I did not consider that there was any basis for doubting those assessments of the deceased's capacity to make decisions about her medical treatment and I considered them to be important factors. However, as I have made clear, at para 220 above, capacity is task specific and the test that I must apply, in considering whether the deceased had testamentary capacity when she signed the 2019 will on 11 August 2019, is the 4 stage test in the case of *Banks* that I have set out at para 218 above on the basis of all the evidence before me (*Smyth* at para 42).

[259] That evidence included how the deceased was presenting in the days shortly before and after 11 August 2019 and included the evidence of Ms Lawrie's discussions with the deceased, which I considered to be of significant importance. I considered that Ms Lawrie's evidence showed that the deceased on 13 August 2019: (i) understood that she was changing her will and making the defender her sole beneficiary; (ii) understood that all her belongings, including her house, would be going to the defender; and (iii) discussed the reasons why the pursuer was not now going to benefit under the 2019 will. There was only a two day gap between 11 and 13 August 2019 and I considered that it could reasonably

inferred: (i) that the deceased understanding on 13 August 2019 (as set out at points (i) and (ii) in the preceding sentence) was the same as when she made the 2019 will on 11 August 2019 and (ii) from her discussions with Ms Lawrie on 13 August 2019 that the deceased, when she made the 2019 will on 11 August 2019, comprehended and appreciated that the pursuer and the rest of the Somerville family would have had an expectation of being beneficiaries under any will made by her. As such I considered, at the time the deceased made the 2019 will on 11 August 2019, that she satisfied stages 1 to 3 of the 4 stage test set out in the case of *Banks*. However, crucially, the deceased told Ms Lawrie that she was changing her will for the two reasons set out at para 255 above. Both of those reasons were, despite the defender's contrary contentions, factually incorrect. Those reasons were given to Ms Lawrie only two days after the deceased signed the 2019 will and I considered that it could be reasonably inferred that those two reasons were the reasons why the deceased made the 2019 will on 11 August 2019.

[260] I have already highlighted the numerous difficulties with the defender's evidence and whilst it may well be true that he did look for sample wills on the internet, I rejected his contentions as regards the reasons why the deceased wanted to change her will. I considered, in line with the opinion of Dr Lee, that the two reasons why the deceased changed her will could properly be described, for the purposes of stage 4 of the 4 stage test in the case of *Banks*, as delusions which influenced the disposing of the deceased's property and brought about a disposal of it which, if she had been of sound mind, would not have been made. The two reasons were, in my opinion, to use the words of Viscount Haldane in *Sivewright* an actual and impelling influence on the deceased making the 2019 will. They resulted in the deceased making the 2019 will with terms that were contrary to the 2018 will and contrary to the testamentary intention the deceased: (i) volunteered to Dr Potts

between July and 20 August 2019; (ii) said in the months before her death to the pursuer and Janette.

[261] Dr Blair did not think the deceased had lost capacity to make decisions about her medical treatment when he saw her on 14, 16, 26 and 30 August and Dr Potts came to the same view on 20 August 2019. However, both doctors were not assessing the deceased for testamentary capacity and were not aware of the two factually incorrect reasons given by the deceased to Ms Lawrie for changing her will. Ms Swinney thought that the deceased had capacity to grant the power of attorney on 28 August 2019, however, this was the first occasion she had met with the deceased, the meeting was very short and Ms Swinney was again unaware of the two factually incorrect reasons given by the deceased to Ms Lawrie for changing her will. I did not consider that the above assessments made by Dr Blair and Dr Potts, which I accepted, precluded a finding that the deceased lacked testamentary capacity on 11 August 2019 because, as I have already noted, capacity is task specific and it was therefore perfectly possible for the deceased to have lacked testamentary capacity on 11 August 2019 and have capacity, both earlier and later in August 2019, to make decisions about her medical treatment. When I considered: (i) how the deceased presented at hospital on 5 August 2019 (including the paranoid views and telling her family that the medical staff had not told her not drive when that was untrue); (ii) how the deceased presented shortly before and after 11 August 2019; (iii) the general very poor state of the deceased's health on 11 August 2019; (iv) the unheralded nature of the terms of the 2019 will; (v) the deceased's recent expressions of testamentary intent to Dr Potts, the pursuer and Janette; (vi) the factually incorrect reason the deceased gave to Ms Lawrie for appointing the defender as her attorney; and, in particular, (vii) the two factually incorrect reasons the deceased gave to Ms Lawrie for changing her will; I considered that the deceased did not meet stage 4 of the 4

stage test set out in the case of *Banks* when she made the 2019 will and did not have testamentary capacity when she made the 2019 will on 11 August 2019. As the burden of proving testamentary capacity lies on the person seeking to enforce the will, I have found, in all the circumstances of the case, that the defender has failed to satisfy that burden. In such circumstances the 2019 will is void and decree of reduction should to be granted.

[262] Finding in fact 11 is based on the evidence of the pursuer. Finding in fact 24 is based on the evidence of Christine, Janette, and Dr Potts taken with the ERI records. Findings in fact 34 and 46 are based on the evidence of Ms Lawrie. Finding in fact 35 is based on the evidence of Dr Blair. Findings in fact 37, 50 and 56 are based on the evidence of the defender. Finding in fact 38 is based on the evidence of the defender and Mr White. Findings in fact 39 and 40 are based on the evidence of Mr White. Finding in fact 43 is based on a combination of the evidence of the pursuer, Patricia, Dr Potts taken with the ERI and GP records. Finding in facts 44 and 45 are based on the evidence of Ms Lawrie and the defender. Findings in fact 47 and 48 are based on a combination of the evidence of the pursuer, Patricia, Jennifer, Laura, Christine, Ms Lawrie (finding in fact 47 only) and the defender taken together with the ERI and GP records. Finding in fact 49 is based on the combination of the evidence of the pursuer, Patricia, Ms Lawrie and the defender. Finding in fact 53 is based on the evidence of Dr Potts. Finding in fact 54 is based on a combination of the evidence of Christine and Janette. Finding in fact 55 is based on the evidence of Ms Swinney.

In the event of the deceased having testamentary capacity when she made the 2019 will, whether there was: (a) facility and circumvention; and / or (b) undue influence.

[263] I have held that the deceased did not have testamentary capacity when she made the 2019 will and therefore it is not strictly necessary to consider whether there was: (a) facility and circumvention; and / or (b) undue influence (both of which require the deceased to have testamentary capacity). However, in the event I am wrong about the deceased not having testamentary capacity when she made the 2019 will, I will briefly comment on each ground.

[264] As regards facility and circumvention, the defender contended that the deceased was strong-willed and the pursuer and Patricia accepted that she was. I considered that that contention was also supported, to some extent, by the fact that the deceased did resist the advice of medical professionals on 5 August 2019 to remain in hospital. However, the other evidence showed that the deceased was not strong-willed when it came to the defender. Rather, the evidence, which I have accepted, showed that the deceased was scared of the defender and wanted the defender to move out of her house. However, she did not like confrontation and, as a result, put up with him living in her house. When I considered the factors identified at points (i) to (vii) of para 261 above, I considered that if the deceased did not lack testamentary capacity on 11 August 2019, her mind was so weak or pliable that she was unlikely to be able to resist pressure applied by the defender. This view was supported by Dr Lee and I considered that if the deceased did not lack testamentary capacity on 11 August 2019, she was facile on that date. Lesion was clearly established given the 2019 will made the defender the sole beneficiary under it. I considered that circumvention could be inferred from the whole circumstances of the case, including, in particular, the problematic relationship that the deceased had with the defender (which I have summarised at para 248 above) and her recent expressions of her testamentary intentions to Dr Potts, the pursuer and Janette. I considered that the deceased would not have made the 2019 will if her mind had been stronger and that it was the defender's circumvention that caused her to

do so. Had I considered that the deceased had testamentary capacity on 11 August 2019, I would have found that the 2019 will was voidable and ought to be reduced on the basis of facility and circumvention.

[265] As regards undue influence, I considered that the evidence, which I accepted, showed that the defender had a dominant or ascendant influence over the deceased. The defender prepared the 2019 will and arranged for Mr White to witness the signing of it. The deceased then allowed herself to be driven to Peebles for the appointment with Ms Lawrie on 13 August 2019 and wanted the defender to be appointed as her attorney. I considered that by the time the 2019 will was signed that the deceased placed confidence and trust in the defender. The 2019 will clearly benefited the defender and the deceased did not obtain any independent advice or assistance *before* the 2019 will was made. When I considered the whole circumstances of the case and, in particular the problematic relationship the deceased had with the defender and her recent expressions of her testamentary intentions to Dr Potts, the pursuer and Janette, I considered that, in the event of the deceased having testamentary capacity, the whole circumstances of the case justified the inference being drawn that the defender had abused the relationship of trust that he had with the deceased. Had I considered that the deceased had testamentary capacity on 11 August 2019, I would have found that the 2019 will was voidable and also ought to be reduced on the basis of undue influence on the part of the defender.

Issue 2 - whether interdict preventing the defender from intermitting with the estate of the deceased should be granted

[266] I have held that the 2019 will should be reduced on the basis that the deceased did not have testamentary capacity when it was made. Parties were agreed that if the 2019 will

was reduced, the 2018 will would be valid and take effect. Under the 2018 will: (i) the defender is due to receive two specific legacies; and (ii) the pursuer is the executor and the residuary beneficiary. Therefore when the 2019 will is reduced the defender will have no title to intromit with the deceased's estate. In evidence the defender confirmed that he still had access to the deceased's house and still sometimes went to her house. The nature of the evidence led in this case made clear that there was considerable animosity between the defender and the Somerville family. In all the circumstances I considered that the case for interdicting the defender from intromitting with the estate of the deceased was made out.

Issue 3 – whether the 2019 will should be rectified so that the defender is appointed as executor and trustee to exercise his judgment and discretion as to the distribution of the deceased's estate

[267] Given that I have found that the 2019 will should be reduced it is no longer necessary to decide this issue. However, for the sake of the completeness, I would make the following observations.

[268] I have set out above, and in particular at para 235 and 236 above, why I considered the deceased to be unsatisfactory witness. I did not consider that his evidence in relation to this issue was credible or reliable. I did not think it was likely that a lay person, such as the deceased, close to death and considering making a will, would not wish to identify who should receive her property on her death. I considered it inherently unlikely that the deceased, if she had testamentary capacity, would have told the defender to make a will: (i) without naming any beneficiaries; and (ii) instruct only an executor to be appointed with the discretion being left to the executor to distribute the deceased's assets as he saw fit. Such a situation did not accord with the deceased's discussions with Ms Lawrie which focused on

the deceased wanting the defender to inherit everything. Had it been necessary to decide this issue, whilst I would have allowed, on cause shown, the application to be considered outwith the 6 month period mentioned in section 4 of the Succession (Scotland) Act 2016 on the basis that defender's contention as regards the deceased's instructions in relation to the 2019 will only came light during his evidence, I would have refused the declarator sought on the basis that I was not satisfied that the 2019 will failed to express accurately what the deceased instructed (see section 3(1)(d) of the 2016 Act).

Issue 4 - whether a declarator should be granted that there is no presumption that the 2019 will is self-proving under section 3 of the 1995 Act

[269] Given the decision I have reached in this case it is, again, no longer necessary to decide this issue. This issue was dealt with swiftly by both parties and I did not consider that I received a full argument. However, again for the sake of the completeness, I would make the following observations.

[270] Section 3 of the 1995 Act provides:

"3.— Presumption as to granter's subscription or date or place of subscription.

- (1) Subject to subsections (2) to (7) below, where—
- (a) a traditional document bears to have been subscribed by a granter of it;
 - (b) the document bears to have been signed by a person as a witness of that granter's subscription and the document, or the testing clause or its equivalent, bears to state the name and address of the witness; and
 - (c) nothing in the document, or in the testing clause or its equivalent, indicates—
 - (i) that it was not subscribed by that granter as it bears to have been so subscribed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (a) to (e) of subsection (4) below, the document shall be presumed to have been subscribed by that granter.

[...]"

[271] Section 7 of the 1995 Act defines 'subscription' in relation to traditional documents as signing at the end of the last page of the document, excluding any annexations. It can therefore be seen that for a traditional document to be probative (or presumed to be validly executed in terms of section 3 of the 1995 Act) three requirements must be met: (i) the document bears to be subscribed by the granter; (ii) the document bears to have been signed by a person as a witness "of that granter's *subscription*" [*my emphasis*] – it is also crucial that the witness is designed by name and address (which can be done in the deed itself or in the testing clause); and (iii) there must be nothing in the traditional document or testing clause which indicates that the document was not subscribed in the way which it bears to have been, nor anything to indicate that it was not validly witnessed (section 3(4) of the 1995 Act provides a list of requirements for the witnessing to be valid). The three requirements make clear that probativity is all about the appearance of the document. A document is therefore either probative or it is not.

[272] In the present case the evidence from Mr White, which I accepted, was that the deceased had placed a piece of paper over the upper part of the 2019 will (see finding in facts 39 and 40). The pursuer contended under reference to the very old case of *Ormistoun*: (i) that the subscription had to be related to the writing that had gone before; (ii) that was not the case in the present case due to the piece of paper being placed over the upper part of the 2019 will; and (iii) in the circumstances, the 2019 will was not probative.

[273] At para 3-65 of *Currie on Confirmation of Executors*, 9th Edition, the learned author, when considering the validity of testamentary writings after the 1995 Act came into force,

makes clear that a “witness to a testamentary writing does not have any concern with the contents of the deed”. There is then a footnote which states “cf. *Ormistoun v Hamilton* (1708) Mor. 16890”. The case report for the case of *Ormistoun* is very short. In that case Lady Ormistoun sought payment under a bond. The defender sought reduction and declarator of extinction of the bond on the basis that the witness to the subscription of the bond did not see the body of the writ or the Lady’s name inserted therein and as a result the requirements of an act of Parliament 1696 had not been complied with. The pursuer argued that witnesses are only adhibited to ascertain the date and verity of the parties’ subscription, without being obliged to know the contents of the body of the paper and that the defender could not found on the act of Parliament 1696 unless he proved that Lady Ormistoun’s name was blank at the subscribing of the bond. The last paragraph of case report provides:

“The Lords repelled the reason of reduction and extinction of the bond. Though some were of opinion that it could not be quarrelled so much upon the act of Parliament 1696, as upon this ground, That the witnesses, who saw nothing of the writ above the parties' subscription, could not be held as witnesses to a subscription; that being a relative word implying *aliquid super*, which they did not see.”

It can therefore be seen that the court in fact refused reduction and accepted the pursuer’s argument (and indeed the case of *Ormistoun* is cited at para 4-90 of *Currie on Confirmation* as authority for the proposition that in relation to the validity of testamentary writings made before the 1995 Act came into force that the “witness did not have any concern with the contents of the deed”).

[274] In the present case the 2019 will: (i) bears to have been subscribed the deceased; and (ii) bears to have been signed by Mr White as a witness of the deceased’s *subscription* (and included Mr White’s name and address in compliance with section 3(1)(b) of the 1995 Act).

There was also no evidence which indicated that the 2019 will was not subscribed in the way which it bears to have been, nor anything to indicate that it was not validly witnessed.

Indeed Mr White made clear in his evidence that he witnessed the deceased subscribing the 2019 will and then he immediately signed the 2019 will as a witness to that subscription. In such circumstances the three requirements set out in section 3 of the 1995 Act were met and, in my opinion, the 2019 will is therefore probative. I did not consider that Mr White required to have any concern with the contents of the 2019 will and I did not consider that the placing of the piece of paper over the upper part of the 2019 will prevented the presumption, set out in section 3 of the 1995 Act, from applying. Therefore had it been necessary for me to determine this issue I would have refused the declarator sought.

Disposal

[275] For the reasons given above I: (i) sustain the pursuer's pleas in law 3, 7 and 8 (in part); (ii) repel the defender's pleas in law 1, 2 and 6; (iii) grant decree of reduction of the 2019 will in terms of crave 1; and (iv) grant decree of interdict in terms of crave 5. Craves 2 and 3 were the pursuer's two fall back craves and the pursuer did not insist on crave 4 (which sought interdict to prevent the defender from applying for confirmation to the estate of the deceased). The remaining pleas in law related to craves 2, 3 and 4 and I did not find it necessary to dispose of those pleas in law for the reasons explained above. A hearing will be fixed to determine the question of expenses. It is of course open to parties to resolve the question of expenses prior to the calling of the hearing on expenses.