Supreme Court

New South Wales

Case Name:	Wehbe v Giotopoulos
Medium Neutral Citation:	[2023] NSWSC 827
Hearing Date(s):	3-6 July 2023
Date of Orders:	14 July 2023
Decision Date:	14 July 2023
Jurisdiction:	Equity
Before:	Darke J
Decision:	Application for grant of probate in solemn form fails. Declaration to be made that the deceased died intestate. Grant of administration to be made.
Catchwords:	SUCCESSION – contested probate – validity of will propounded by plaintiffs – whether the will was duly executed in accordance with s 6 of the Succession Act 2006 (NSW) – whether suspicious circumstances attended the preparation and execution of the will – whether the testator signed the will with knowledge and approval of its contents – where no evidence given by independent witnesses to the preparation and execution of the will – lack of acceptable evidence that attesting witnesses signed the will in the presence of the testator – due execution of the will not established – suspicious circumstances attended the preparation and execution of the will – plaintiffs failed to discharge burden of showing that the testator signed the will with knowledge and approval of its contents – application for grant of probate in solemn form of the will dismissed
Legislation Cited:	Evidence Act 1995 (NSW), s 140 Succession Act 2006 (NSW), s 6

Cases Cited:	Alexakis v Masters (No 2) [2023] NSWSC 509 Burnside v Mulgrew; Re the Estate of Doris Grabrovaz [2007] NSWSC 550 In the Will of Kimbell [1969] 1 NSWR 414; (1968) 88 WN (Pt 1) (NSW) 614 Lewis v Lewis (2021) 105 NSWLR 487; [2021] NSWCA 168 Mekhail v Hana; Mekail v Hana [2019] NSWCA 197 Sullivan v Mouglalis; Wilson v Mouglalis – Estate Late Willem Wyma [2008] NSWSC 1326 Tobin v Ezekiel (2012) 83 NSWLR 757; [2012] NSWCA 285
Category:	Principal judgment
Parties:	George Paul Wehbe (First Plaintiff/First Cross-Defendant– self represented and on behalf of the Second Plaintiff/Second Cross-Defendant) Simon Charbel Wehbe (Second Plaintiff/Second Cross-Defendant) Marcha Giotopoulos (Defendant/Cross-Claimant)
Representation:	Counsel: Mr J E F Brown (Defendant/Cross-Claimant) Solicitors: Shad Partners (Defendant/Cross-Claimant)
File Number(s):	2021/167226
Publication Restriction:	None

JUDGMENT

Introduction

1 These proceedings concern the estate of the late Wadad Wehbe. She died on 10 February 2021 at the age of 68. Wadad Wehbe was not survived by a spouse. Her husband, Mr Paul Wehbe, had died on 19 July 2019 at the age of 81. Wadad Wehbe was survived by her five children.

2 The central issue is whether a will signed by Wadad Wehbe on 8 July 2020 is a valid will.

3 The plaintiffs, Mr George Wehbe and Mr Simon Wehbe, are two sons of Wadad Wehbe. They seek to uphold the validity of the will, which provides for her estate to be shared equally by the plaintiffs and their brother, Mr Bashir Wehbe. The defendant, Ms Marcha Giotopoulos, is one of the two daughters of Wadad Wehbe. She challenges the validity of the will and claims that her mother died intestate. If that is so, the estate would be shared equally by the five children, being the plaintiffs, the defendant, Bashir Wehbe and the other daughter, Ms Mary Naim. The only asset of the estate of significant monetary value is a three bedroom residential property in Highclere Avenue, Punchbowl.

4 The proceedings were commenced by Summons filed on 2 July 2021 by George Wehbe, who sought a grant of probate in respect of the will. However, on 8 July 2021, Marcha Giotopoulos filed a caveat in respect of such grant. The matter thereafter proceeded on pleadings, with George Wehbe and Simon Wehbe filing a Statement of Claim on 27 August 2021 seeking a grant of probate in solemn form in respect of the will. I note in passing that whilst Simon Wehbe is named as an executor in the will, it is provided that he is to so act only if George Wehbe declines to act as executor or if George Wehbe does not survive the testator by 30 days, neither of which event has occurred.

5 Marcha Giotopoulos filed a Defence and a Cross-Claim, and later an Amended Defence and an Amended Cross-Claim, by which she denies the validity of the will and seeks an order that administration of her mother's estate be granted to either herself or a suitable independent administrator. Marcha Giotopoulos puts in issue the due execution of the will, and positively challenges the validity of the will on the basis that suspicious circumstances attend its preparation and execution and Wadad Wehbe did not know and approve the contents of the will, or alternatively, that its execution was procured by the undue influence of the plaintiffs.

The will

6 The will that is propounded by the plaintiffs is dated 8 July 2020. It consists of a standard form (as supplied by "Estate Planning King") that was completed by handwritten inclusions. The will was executed by Wadad Wehbe as testator, whose signature was apparently witnessed by two witnesses (Mr Anthony

Sarkis and Mr Mohamed Derbas) who themselves signed the will. The defendant initially put in issue the genuineness of the signature of Wadad Wehbe, but ultimately seemed to accept that the will was signed by her.

7 The form of will was purchased by George Wehbe on about 23 June 2020. The form of will was sent to him by post. It is not clear when the form of will was delivered, but the order details indicate that it was due to be delivered by 2 July 2020.

8 There is evidence that on 3 July 2020, Wadad Wehbe was taken by George Wehbe to a Dr Nasr Ragy at his surgery in Punchbowl for a neurological examination. George Wehbe deposed that Dr Ragy told him that his mother was "mentally fit". In any event, no issue is raised by the defendant that Wadad Wehbe lacked testamentary capacity at the time she executed the will. As already stated, the defendant puts in issue the due execution of the will, and positively challenges its validity on the basis that suspicious circumstances attend its preparation and execution and Wadad Wehbe did not know and approve the contents of the will, or that its execution was procured by the undue influence of the plaintiffs. The evidence concerning the circumstances in which the will was executed is thus of central importance.

9 The plaintiffs, as well as Bashir Wehbe, gave direct evidence of those circumstances. That evidence is summarised below. Neither Anthony Sarkis nor Mohamed Derbas gave evidence. They had each made affidavits, but neither attended for cross-examination despite notice having been given requiring their attendance for that purpose. In those circumstances, I ruled that their affidavits could not be used.

10 George Wehbe deposed that he purchased the "will kit" after his mother had told him that she wanted to do her will "to make sure my husband's wishes are fulfilled so that you and your brothers will inherit the estate." He deposed that he asked his mother who she wanted to witness the will, and that she said "Anthony Sarkis and Mohamed Derbas".

11 George Wehbe deposed that, on 8 July 2020, he drafted the will in accordance with his mother's instructions. He says that when he wrote out the will "using

straightforward language and in capitals", his two brothers and Mr Sarkis and Mr Derbas were present. George Wehbe further deposed:

> Anthony and Mohamed each said:
>
> *"We will read the will to your mum and explain it to her".*
>
> My brothers and I left the room to give Mum some privacy.
>
> Mum asked me to return to the room. Mum said:
>
> *"Take a photo of me signing the will and send the photo to your sisters".*
>
> I took the photo as Mum asked but I didn't want to upset my sisters, so I never sent the photo.
>
> (A copy of a photograph apparently depicting Wadad Wehbe signing the will is annexed to George Wehbe's first affidavit.)

12 The handwriting that appears on the form of will may be described as follows:

(a) on the first (or title) page, "WADAD WEHBE" appears, as does "8th of July 2020";

(b) the next page includes the names, addresses and occupations of Wadad Wehbe (as "the Will maker"), George Paul Wehbe (as the appointed executor) and Simon Charbel Wehbe (as the appointed executor if George Paul Wehbe is unwilling or unable to act as executor, or if he does not survive Wadad Wehbe for the period of 30 days). At the foot of the page, there are three signatures, apparently being those of the testator, Wadad Wehbe, and the two witnesses, Anthony Sarkis and Mohamed Derbas;

(c) no handwriting appears on the next page, the text of which concerns the guardianship of children, and "Special Bequests/Gifts". There are no signatures at the foot of the page;

(d) on the next page, "GEORGE PAUL WEHBE", "SIMON CHARBEL WEHBE" and "BASHIR WEHBE" appear beneath the text that reads – "After my special bequests I bequeath the residue of my Estate to:". At the foot of the page, there are three signatures, apparently being those of the testator and the two witnesses;

(e) on the next page, the text of which concerns the powers of "my Trustee", the only handwriting consists of three signatures at the foot of the page, apparently being those of the testator and the two witnesses; and

(f) on the final page, "157 HIGHCLERE AVE PUNCHBOWL N.S.W 2196" is written to identify the place where the signed was signed by the testator, and 8 July 2020 is written to identify when the will was signed by the testator. A signature of the testator next to a handwritten "8th of July 2020", and signatures of the two

witnesses, in each case next to a handwritten address, appear in the lower half of the page.

13 George Wehbe deposed that Anthony Sarkis was a long-term friend of his, and that Wadad Wehbe treated him "like a son". He deposed that Anthony Sarkis was present when his mother signed the will. He deposed that Mohamed Derbas was also a very close friend of the family, and close to his mother, especially in her later years.

14 Simon Wehbe's account of the circumstances in which the will was signed is contained in his affidavit (at paragraphs 31 to 42) in the following terms:

> 31. On 8 July 2020, I came home after work. When I walked into the house, I saw Mum sitting at the dining table with George, Bashir and a family friend, Mohamed Derbas.
>
> 32. Mum said:
>
> "*Sit down, because I want to do my will.*"
>
> 33. Mum and I had the following exchange:
>
> Mum: "*I am waiting for Anthony Sarkis to come. He's going to be my witness.*"
>
> Me: "*Why did you choose Anthony? Why don't you get Maurice, the hairdresser on the corner?*"
>
> Mum: "*No, no. Anthony is like a son to me. And I don't want anyone knowing our business, they gossip enough.*"
>
> 34. Mum kept asking George to do her Will. The will didn't take long, probably about ten minutes in total. It seemed to be a fairly simple will.
>
> 35. Mum said to George:
>
> "*I want to make my wishes, and the wishes of your late father, formal by leaving the estate to you and your brothers.*"
>
> 36. Mum said to George:
>
> "*Write down that you and your brothers will inherit the house and all my other assets.*"
>
> Mum had the house, a car which was valued at about $2,000, her furniture and some clothes.
>
> 37. Mum appeared agitated by Mohamed because he kept asking her questions about the will. Then he asked us to leave. I thought it was pretty funny:
>
> a. Mum kept telling Mohamed to "*shut up*" because he made it very serious.
>
> b. At one point I was asked to leave the room so Anthony and Mohamed could talk to Mum about the will.
>
> c. Looking back, I understand why Mohamed did that and I am glad he did so he could talk to Mum without me or my brothers being present.

> 38. Mum didn't speak to Mohamed and Anthony for long before she called me and my brothers back into the room.
>
> 39. Mum said:
>
> "*Come, come, take a photo of me signing the will and send it to your sisters.*"
>
> 40. Mum signed the will in front of me, my brothers, Anthony and Mohamed.
>
> 41. After the Will was signed, Mum appeared very calm and relieved.
>
> 42. My brothers and I, and Mohamed and Anthony each gave Mum a kiss and a hug. She looked happy.

15 Bashir Wehbe's account of the circumstances in which the will was signed is contained in his affidavit (at paragraphs 57 to 65) in the following terms:

> 57. On 8 July 2020, I was at home. I couldn't really go anywhere because of COVID-19. George and Simon were also at home.
>
> 58. Mum said to me:
>
> "*I have seen Dr Ragy to* [sic] *and I am now ready to do my will.*"
>
> 59. I said to Mum:
>
> "*Why did you go to Dr Ragy?*"
>
> 60. Mum said:
>
> "*The will kit that I asked George to buy for me said I should go, so I went.*"
>
> 61. Our family friends, Anthony and Mohamed, were present during the conversation.
>
> 62. I didn't really pay much attention to what was going on. I didn't see Mum's Will as a 'big deal'. On more than one occasion, Mum said "*the house will be left to my sons*". Dad had said the same thing on several occasions. I remember Mum apologised to me and my brothers that there was "*still $60,000 left on the mortgage*".
>
> 63. I saw George write the will in accordance with Mum's instructions that "*the house will be left to my sons*".
>
> 64. George, Simon and I left the room at the request of either Mohamed or Anthony.
>
> 65. Mum called George, Simon and me back into the room and she signed the will in the presence of Me, Simon, George, Mohamed and Anthony.

Applicable principles

16 By her Amended Defence (and her Amended Cross-Claim), the defendant alleges that suspicious circumstances attend the preparation and execution of the will and that Wadad Wehbe did not know and approve the contents of the will. However, the burden of establishing that Wadad Wehbe knew and approved the contents of the will at the time she signed it rests upon the plaintiffs, as the parties seeking a grant of probate in solemn form in respect of

the will (see *Lewis v Lewis* (2021) 105 NSWLR 487; [2021] NSWCA 168 at [2] per Leeming JA with whom Meagher and Payne JJA agreed; see also *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [44] per Meagher JA with whom Basten and Campbell JJA agreed).

17 An issue of knowledge and approval of a will is not the same as an issue as to whether a testator had testamentary capacity (i.e. the mental capacity to make a valid will) at the relevant time. The defendant does not affirmatively raise testamentary capacity as an issue. However, where the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally competent (see *Tobin v Ezekiel* (supra) at [45]). As noted earlier, due execution of the will is in issue on the pleadings.

18 Where testamentary capacity and due execution are established, there is a presumption of knowledge and approval by the testator of the contents of the will at the time of execution (see *Tobin v Ezekiel* (supra) at [46]). This presumption may be displaced by circumstances that create a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator, in which case the onus is upon the proponent of the will to affirmatively prove that the testator knew and approved of the contents of the will. Suspicious circumstances of this character must be capable of throwing light on whether the testator knew and approved of the contents of the will (see *Tobin v Ezekiel* (supra) at [55]).

19 The suspicious circumstances raised by the defendant include that the will template was purchased by George Wehbe and that the will was written by George Wehbe, a person who would take a benefit under the will. It has been said that particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it (see *Tobin v Ezekiel* (supra) at [47]). Depending upon the particular circumstances of the case, it may be necessary, in order for the proponent of the will to discharge the onus, to show that the testator understood the effect of the will. In *Lewis v Lewis* (supra), Leeming JA stated at [170]:

> There are all manner of ways in which suspicious circumstances may be established, but a familiar instance is where a beneficiary has played a part in the drafting or execution of the will. In such a case, it would be usual for the

> propounder to seek to establish that the testator knew and approved that the effect of the will was to confer a benefit on that person. Another way of making that point is as follows. It will not much assist a person seeking to propound a will where there are suspicious circumstances merely to establish that the testator knew the contents of the will, in a case where that alone did not carry with it knowledge that the effect of the will was to confer a benefit on that person. The probate court's vigilant and jealous scrutiny will not greatly be allayed by demonstration that a capable testator whose knowledge and approval is in question knew the contents of the will, but failed to understand its effect.

(See also the judgment of Leeming JA at [179]-[180], [182] and [186]).

20 A useful discussion of the principles concerning the issue of knowledge and approval of a will can be found in the recent judgment of Henry J in *Alexakis v Masters (No 2)* [2023] NSWSC 509 at [476]-[485].

21 The defendant also challenges the validity of the will on the ground that its execution was procured by the undue influence of the plaintiffs (including by others acting with them). On this issue (which is distinct from the issue of knowledge and approval – see *Alexakis v Masters (No 2)* (supra) at [483]-[485]), the defendant bears the onus of establishing the existence of undue influence (see *Tobin v Ezekiel* (supra) at [49]).

22 In *Alexakis v Masters (No 2)* (supra), Henry J also discussed the principles concerning the notion of undue influence in probate cases. Her Honour stated at [561]-[564]:

> 561. Undue influence in probate has been described as "pressure of whatever character", "coercion", "the exercise of the power to unduly overbear the will of the testator" and conduct that "destroys free agency", such that the will the testator has executed can be said to have not been what they intended or desired by way of disposition: *Tobin v Ezekiel* at [49], per Meagher JA (with whom Basten and Campbell JJA agreed); *Salvation Army v Becker* at [63], per Ipp JA (with whom Mason P and McColl JA agreed); *Rofe* at [129]; *Hall v Hall* (1868) LR1P&D 481 (Hall v Hall); *Boyse v Rossborough* at [48]; *Winter v Crichton* at 121; and *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66 (Bridgewater v Leahy) at [62], per Gaudron, Gummow and Kirby JJ.
>
> 562. Not all influences and persuasions amount to undue influence in probate. Persuasion, influence, moral pressure to favour a person by will or appeals to the affections of ties of kindred or sentiments of gratitude for past services are not invalidating in probate unless such a force overpowers the volition of the testator and results in a will they did not intend to make: *Salvation Army v Becker* at [63]–[64], citing *Hall v Hall* at 481; and *Petrovski v Nasev*; *Re Estate of Janakievska* [2011] NSWSC 1275 (Petrovski v Nasev) at [311], per Hallen AsJ.
>
> 563. As stated by Sir JP Wilde in *Hall v Hall* at 481–2:

> "In a word a testator may be led but not driven and his will must be the off-spring of his own volition and not the record of someone else's."
>
> 564. While some form of coercion or pressure is required, actual force, violence or threats of violence need not be proven. The circumstances of the individual testator, including their physical and mental strength, will be relevant in assessing whether the testator's judgement has been impaired by undue influence. If someone is weak and feeble, little pressure may be sufficient to bring about the desired result; the mere talking to them and pressing something on them may so fatigue them that they are induced to do anything for quietness' sake. Thus, what may not constitute undue influence in the case of a person with a strong will and ordinary fortitude may constitute undue influence in the case of a more susceptible individual: *Wingrove v Wingrove* at 82–3; *Winter v Crichton* at 122; *Rofe* at [160]; *Petrovski v Nasev* at [276].

Due execution of the will

23 Section 6 of the *Succession Act 2006* (NSW) relevantly provides:

> 6(1) A will is not valid unless—
>
> (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and
>
> (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and
>
> (c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).
>
> (2) The signature of the testator or of the other person signing in the presence and at the direction of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.
>
> (3) It is not essential for a will to have an attestation clause.
>
> …

24 By paragraph 2 of the Statement of Claim, the plaintiffs assert, in effect, that the will they propound complies with the requirements of s 6. Paragraph 2 of the Statement of Claim is in the following terms:

> On 8 July 2020 the deceased executed her last will by signing the same with the intention of giving effect to the will in the presence of Anthony Sarkis, and Mohamed Derbas, who were present at the same time, and who attested and signed the same in the presence of the deceased.

By paragraph 2 of the Amended Defence, the above paragraph is denied by the defendant.

25 However, as the defendant now accepts that the will was signed by Wadad Wehbe ("the testator") there is no dispute that s 6(1)(a) is satisfied. It remains

necessary for the plaintiffs to satisfy ss 6(1)(b) and 6(1)(c). In order to do so, they must establish:

(1) that the testator's signature was made in the presence of two or more witnesses present at the same time; and

(2) that at least two of those witnesses attested and signed the will in the presence of the testator.

26 The evidence adduced by the plaintiffs concerning the execution of the will is referred to above at [11] and [13]-[15]. The evidence was given only by the plaintiffs and their brother, Bashir Wehbe. No evidence was adduced from either Mr Sarkis or Mr Derbas, who are identified as the attesting witnesses. Mr Sarkis and Mr Derbas had each made affidavits that were served by the plaintiffs. Despite the fact that reasonable notice had been given for them to attend for cross-examination, neither did so. In those circumstances, I ruled that the plaintiffs could not use the affidavits of Mr Sarkis and Mr Derbas.

27 The evidence given by the brothers in their affidavits concerning the actual signing of the will is rather sparse. The evidence of George Wehbe is essentially confined to the photograph he says he took of his mother apparently signing the will, and his assertion that Mr Sarkis was present when his mother signed. The evidence of Simon Wehbe goes a bit further. He deposed that his mother signed the will in front of himself and his brothers as well as Mr Sarkis and Mr Derbas. Bashir Wehbe also deposed that his mother signed the will in the presence of himself and his brothers, together with Mr Derbas and Mr Sarkis.

28 However, Bashir Wehbe departed from that position in cross-examination. He stated on several occasions that he was not present in the room when his mother signed the will. He ultimately conceded that the relevant part of his first affidavit (paragraph 65) was false. He had earlier maintained that Mr Derbas and Mr Sarkis were present when his mother signed the will.

29 Simon Wehbe also said in cross-examination that Mr Sarkis and Mr Derbas were there when his mother signed the will. George Wehbe initially said in cross-examination that the two witnesses were not there on the occasion his mother signed the will. However, the somewhat sarcastic or flippant manner in which he gave the answer suggested to me that he was not really accepting

the proposition that they were not there on that occasion. When the matter was returned to, George Wehbe said “of course they were there…[t]hey signed it, they witnessed it.”

30 That latter answer given by George Wehbe seems to be the only evidence that might be said to go to whether the two attesting witnesses signed the will in the presence of the testator. Otherwise, there seems to be no evidence that they signed the will in her presence.

31 However, having regard to the question asked (and the circumstances in which the question came to be asked) I would not regard George Wehbe’s answer as one directed to the more precise question of whether Mr Sarkis and Mr Derbas each signed the will in the presence of the testator. In any event, for reasons that I will come to, I would not be prepared to accept George Wehbe’s uncorroborated evidence on that point, particularly in the absence of any evidence from the attesting witnesses themselves.

32 The situation is thus that no evidence was adduced, or at least no acceptable evidence was adduced, to the effect that Mr Sarkis and Mr Derbas each signed the will in the presence of Wadad Wehbe.

33 Moreover, I do not think that this evidentiary deficiency is able to be overcome by recourse to any presumption of due execution of the will. Such a presumption (which may be regarded as an aspect of a broader presumption of regularity) may arise in certain circumstances, but not usually until it is proven that the signatures on the will are in fact those of the testator and the attesting witnesses (see *Burnside v Mulgrew; Re the Estate of Doris Grabrovaz* [2007] NSWSC 550 at [18]-[25] per Brereton J, as his Honour then was). In the present case, that has not occurred in relation to the attesting witnesses as no acceptable evidence has been adduced to the effect that the apparent signatures of Mr Sarkis and Mr Derbas are in fact their signatures. Further, it seems to me that there is little room for the operation of such a presumption in relation to this relatively recent will where it has not been shown that the attesting witnesses are either dead or incapable of giving evidence. As stated by Bryson AJ (as his Honour then was) in *Sullivan v Mouglalis; Wilson v Mouglalis – Estate Late Willem Wyma* [2008] NSWSC 1326 at [11], in

contested probate matters, the Court expects to hear the evidence of the attesting witnesses if available (or at least one of them – see *In the Will of Kimbell* [1969] 1 NSWR 414; (1968) 88 WN (Pt 1) (NSW) 614).

34 It follows from the above that the plaintiffs have failed to establish that at least two witnesses, who were present when Wadad Wehbe signed the will, attested and signed the will in her presence. The requirements of s 6(1)(c) of the *Succession Act* have thus not been satisfied, and the plaintiffs have accordingly failed to establish that the will they propound is a valid will.

35 This conclusion is sufficient to determine that the plaintiffs' application for a grant of probate in solemn form fails. Nevertheless, in case that conclusion is incorrect, I will proceed to consider the further challenges made by the defendant to the validity of the will.

The testator's knowledge and approval of the will

36 The burden of establishing that Wadad Wehbe knew and approved the contents of the will at the time she signed it rests upon the plaintiffs. Further, as due execution of the will has not been established, no presumption of knowledge and approval arises even though there is no issue concerning her testamentary capacity. In my opinion, any such presumption would in any event be displaced by circumstances that create a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator.

37 The suspicious circumstances alleged by the defendant are described in the particulars to paragraph 2(b) of the Amended Defence and paragraph 3(a) of the Amended Cross-Claim. The same 19 separate particulars are provided in relation to each paragraph. It is not necessary to set them out. The principal matters relied upon by the defendant as constituting suspicious circumstances may be summarised as:

(a) the will was not prepared by a legal practitioner, but was rather prepared by George Wehbe, a beneficiary under the will who had purchased the will kit on his own accord and not at the direction of the testator;

(b) the purported witnesses to the will (Mr Sarkis and Mr Derbas) were close friends of the beneficiaries under the will, namely, George Wehbe, Simon Wehbe and Bashir Wehbe;

(c) the beneficiaries under the will were present when the will was prepared and executed;

(d) the testator was frail and vulnerable, and suffering from poor health at the time the will was executed;

(e) the testator was wholly dependent upon George Wehbe, Simon Wehbe and Bashir Wehbe for the provision of care at the time the will was executed;

(f) the testator was easily manipulated, and susceptible to the influence of others;

(g) the letter from Dr Ragy dated 3 July 2020 suggests that the testator believed she was making a power of attorney rather than a will;

(h) the testator was unable to read or write English, and the will was not read to her in Arabic;

(i) the will excluded the testator's daughters as beneficiaries, even though they were not estranged from the testator and were natural objects of her testamentary bounty; and

(j) the will was retained in the possession of George Wehbe.

38 I turn now to the salient evidence that bears upon the suspicious circumstances alleged by the defendant.

39 At the outset I note, by way of background, that at the time the will was signed by Wadad Wehbe on 8 July 2020, she lived in the Punchbowl property with her three sons. She was 68 years of age. George Wehbe was then 35 years of age. He had been unemployed since about 2017 when he had an accident on a ferry and injured his knee. George Wehbe is separated from his wife and child. Simon Wehbe was then 33 years of age, single, and working as a storeman. Bashir Wehbe was then 29 years of age and single. It is not clear whether he was in employment at the time the will was signed.

40 At that time, each of Wadad Wehbe's daughters lived in Sydney with their respective husbands and children. Marcha Giotopoulos lived in Greenacre, and Mary Naim lived in either Toongabbie or Winston Hills. The defendant, who is a licensed real estate agent, was 38 years of age at the time the will was signed. Mary Naim was then 36 years of age.

41 As noted earlier, the testator's husband, Paul Wehbe, died on 19 July 2019. There is evidence that suggests that Paul Wehbe was, at the time of his death, an owner of the Punchbowl property, but the evidence is scant. It is not clear

whether he was the owner, or an owner, of the property. Similarly, it is not clear how the Punchbowl property came to be in the sole ownership of Wadad Wehbe. It may be that she inherited her late husband's share in the property under the rules of intestacy, or she may have succeeded to her husband's interest under the rules of survivorship. In any case, nothing of significance turns about how she became the sole owner of the Punchbowl property.

42 Each of the children gave evidence at the hearing, except for Mary Naim. She did not make an affidavit. However, the defendant's solicitors served a précis of the evidence they expected she would give if called as a witness. It seems that Mary Naim was reluctant to become involved in the litigation, and counsel for the defendant informed the Court during the hearing that it was not proposed to call her as a witness.

43 In addition, numerous documents were admitted into evidence, including records produced on subpoena by hospitals and medical practitioners in relation to the testator. These records not only shed some light on the testator's state of health at relevant times, they also provided some insight into the testator's ability to understand English and communicate using the English language.

44 As to the testator's state of health, the evidence, including the testimony of each of the children, showed that at least her physical condition deteriorated in 2019, especially after the death of her husband in July of that year. George Wehbe deposed that she moved very slowly at home, using a four-wheel walker, and that she needed to be supervised all the time. Simon Wehbe deposed that, at that time, his mother "struggled physically" and "hardly went anywhere". Bashir Wehbe deposed that by early 2020 his mother "was really sick and frail", and unable to walk unaided unless he or his brothers were by her side. In cross-examination, he agreed that "in the last part of her life" the testator needed assistance getting out of bed and with going to the toilet. He agreed that she was completely dependent upon himself and his two brothers.

45 By way of example, a Bankstown Hospital note dated 23 November 2020 records:

Sedentary for long time, as per son patient bed bounded most of the time ("gave up" form [sic] life after husbands death).

46 A report of an aged care assessment of the testator, undertaken for South Western Sydney Local Health District on 5 January 2021 (about six months after the signing of the will), included the following:

> **Introduction**
>
> Mrs Wadad Wehbe, age 68, was referred for ACAT assessment post hospital admission for support services at home. Wadad was assessed in her home on 5/1/2021 with assistance of a Health Services Interpreter (Arabic speaking) and her son George in attendance. Assessment information was provided [to] Wadad and George; health information was also obtained from her electronic medical record (eMR). Wadad signed the Consent and Application forms.
>
> **Situation**
>
> Wadad has experienced increasing frailty and functional decline over the past few months. She presented to Bankstown Hospital in late Nov 2020 with worsening lower back pain and shortness of breath and was admitted to intensive care due to persistent hypotension and metabolic acidosis secondary to acute kidney injury and sepsis. She is a respiratory chronic care and bariatric patient (has lost some weight since her admission) and her medical history includes: chronic cardiac failure; atrial fibrillation; asthma; breath difficulties/dyspnoea; pulmonary embolism; diabetes mellitus – Type 2 (NIDDM); previous urinary tract infections; chronic pain (lower back); hypertension; poor vision (right eye); dizziness; previous left hip replacement 2016; abdominal hernias (multiple). She is assisted at home by her sons however, two sons are working & the other has bilateral knee issues and limited capacity to assist with lifts/transfers (requires 1-2 assist with transfers and assistance with daily activities). She uses oxygen at home as needed (usually 15 minutes; has concentrator); is on warfarin.
>
> **Background**
>
> Wadad is widowed and she lives in her own home with 3 of her sons – George, Simon and Bashir. All 3 sons are sharing the caring role and assist with different caring tasks. She also has 2 daughters living in Sydney – they are unable to assist as they have their own families they are caring for. George reports that Wadad's health and physical function has been declining since she lost her husband in 2019 – she is still grieving and spends most of her day in bed. She is housebound and socially isolated despite regular encouragement from her sons to go out with them – she reported she declines going out due to constant (chronic) pain. She is never left alone, one of her sons is home at all times. She receives the aged pension (sons assist with managing finances).
>
> **Assessment**
>
> Wadad mobilises very slowly at home using a 4-wheel walker (4WW) with supervision; she can only mobilise a short distance (pain, dizziness and shortness of breath) – a wheelchair and 2x assist is required to take her to appointments. She is a falls risk (2 falls reported in past 12 months). She requires assistance with all transfers (struggles due to chronic pain) – needs help to stabilise her 4WW which she uses for support when getting in/out of

> bed/chair/toilet; independent with bed mobility; needs assistance to negotiate steps (manages 1-2 only). Needs 1x assist with showers (seated) including washing hair and drying; assisted with dressing/undressing. Occasional assistance needed with toileting and managing incontinence (occasional bladder and bowel) – is not wearing pads and needs some assistance with hygiene tasks. Needs encouragement to eat (poor appetite – pureed, minced meat) – able to feed self. Dependent on sons for all domestic tasks, shopping, cooking and meal preparation, transport/community access, home/garden maintenance and social support. Assistance with medications – administered from Webster pack by son. Functional assessment completed: Barthel score 9/20; OARS 3/14
>
> Wadad was alert and orientated at time of assessment. She declined cognitive testing stating she had no issues with memory or comprehension. Her son George reported that GP neurological examination was completed in July 2020 – Wadad was deemed as mentally fit and able to make her own decisions. She reported she completed primary level schooling and learnt English in Australia – some support required for health literacy.

47 The reference in the report to a neurological examination completed in July 2020 is likely to be to the examination, referred to earlier (at [8] above), undertaken by Dr Ragy on 3 July 2020. The letter he provided at that time is in the following terms:

> To whom it may concern
>
> The above patient Mrs Wadad Wehbe presented to my surgery for mental exam.
>
> A neurological examination was performed at the time of the consultation, and I have found her to be mentally fit to undertake any decision and to also manage her financial affairs.
>
> I have further advised her to seek other documents that need to be submitted for power of attorney from a legal point of view.

48 The reference in the letter to a power of attorney is the basis for the defendant's assertion that the testator believed she was making a power of attorney rather than a will.

49 There was more contention between the parties as to the testator's ability to understand English and communicate using the English language. George Wehbe deposed that each of his parents "spoke English well". He said that his mother seemed to speak English quite well, and that he saw her speak to many people in English. Simon Wehbe deposed that his mother was "bilingual", speaking both English and Arabic. He said that she spoke to many people in English, including to his fiancé. He also deposed that, from time to time, she would ask himself or his brothers to "explain things in bills or

Medicare forms". Bashir Wehbe also described his mother as "bilingual", speaking both English and Arabic.

50 The defendant deposed that she assisted her parents to fill out and complete forms. She deposed that her mother did not read or write English. She deposed that her mother could only speak very basic broken English, and that all of her conversations with her mother were in Arabic. In a later affidavit, the defendant described her mother's English as "very poor".

51 The evidence of each of the siblings on this issue was tested in cross-examination. George Wehbe denied that the testator could not read English. He said that his mother "may have used an interpreter once to expand spoken language", but maintained that she did not require interpreters. When shown a New South Wales Health Discharge Planning Questionnaire, that was filled in so as to indicate that the testator required an interpreter, George Wehbe said that he "was forced to tick that" because the surgeon would not see her. George Wehbe was shown other documents in cross-examination that suggested his mother required an interpreter. His responses varied, but it is fair to say that he did not accept that interpreters were in fact required. I note that, in submissions, Mr Wehbe identified a number of documents which suggested that his mother did not require an interpreter or did not want an interpreter. However, George Wehbe accepted that Arabic was the language spoken at home. He also accepted that, on occasions, he or his brothers were asked by their mother to explain things in bills or Medicare forms that involved "issues of complexity". He did not accept that she asked for help because she could not read the forms. Neither did he accept that his mother could not have read the will she signed. George Wehbe said that she signed the will and "that means she's read it".

52 Simon Wehbe confirmed in cross-examination that, from time to time, his mother would ask him or his brothers to explain things in bills or Medicare forms. However, he did not accept that that was because she did not understand the documents. He also denied that, from time to time, his mother required an interpreter, stating that translators "were only suggested." Simon

Wehbe also did not accept that his mother would not have been able to read the will, although he conceded that his mother did not read English very well.

53 Bashir Wehbe denied that, at best, his mother spoke with broken English. He agreed that on occasions she needed assistance in filling out forms at doctor's appointments, but he did not accept that she could not have read the will.

54 The defendant was confronted in cross-examination with a number of cards she had written and sent to her mother, and which contained words written in English. The defendant pointed out that the cards (or at least many of them) also contained words written in Arabic. The defendant denied that the presence of English words on the cards showed that the testator could read and understand English. The defendant said that when she took her mother to see doctors she acted as the interpreter. The defendant was also shown some examples of her mother's handwriting. She said that the writing was confined to some phone numbers. The defendant maintained that all of her conversations with her mother occurred in the Arabic language, and she maintained that her mother's spoken English was very poor. She said that, at most, her mother could speak a small amount of broken English.

55 The documentary evidence that bears upon this question essentially consists of records made in connection with the provision of medical services, and a few examples of the testator's own handwriting. The evidence is various, and points in different directions. The individual documents may be regarded as reasonably reliable records, so far as they go. They have been considered in the particular contexts in which they were prepared, and as part of the overall situation as described in the records.

56 I have considered the documents (including those specifically identified by George Wehbe in a document he handed up in closing submissions). Having done so, I have concluded that although Wadad Wehbe may have had an ability to communicate in spoken English at a fairly basic level, she had a clear preference for, and much greater proficiency in, the Arabic language. A Bankstown Hospital note dated 1 October 2020, in relation to an interview with a social worker, records that Wadad Wehbe declined an Arabic interpreter and spoke "basic English". An Ambulance Service record dated 12 August 2019

notes “Arabic (incl. Lebanese)” as Wadad Wehbe’s preferred language, and further notes “English Difficulty”. Arabic is recorded as the language spoken at home in an Eye Hospital questionnaire which seems to have been filled out by George Wehbe in about June 2019.

57 Further, the documentary evidence, including the examples of handwriting and the evidence concerning the testator’s need for assistance with forms, provides no substantial support for the contention that she could have read the will and understood it. The evidence to the effect that the testator often required explanations in relation to bills and Medicare forms is indicative of a very limited ability to read and comprehend written English. I do not accept the suggestion made by George Wehbe that his mother only required help in relation to issues of complexity. Further, as stated by the defendant, the mere fact that the testator was given some cards that contained writing in English does not establish that the testator could read and understand English.

58 In broad summary, the position seems to be that, as at July 2020, Wadad Wehbe was a frail lady, 68 years of age and in declining health, and highly dependent for her daily care upon the three sons with whom she lived. In addition, she possessed only a very limited ability to read and understand written English, and her clear preference was to communicate using the Arabic language.

59 The plaintiffs’ case is that at about that time, Wadad Wehbe decided that she wanted to make a will to leave her estate (in essence, the Punchbowl property) to her three sons only, to the exclusion of her two daughters. That intention is claimed by the plaintiffs to be consistent with earlier statements made by the testator, and consistent with statements made (at least since about 2006) by their father, Paul Wehbe. The defendant, on the other hand, claims that her father had told her that he had not prepared a will and that “[y]ou and your siblings can figure it out between the five of you”. The defendant further claims that her mother spoke to her in similar terms in 2019, prior to Paul Wehbe’s death.

60 On this and various other issues in contention, it is necessary to consider the reliability and credibility of the testimony of the siblings.

61 As I have said, each of the siblings (apart from Mary Naim) gave evidence and was cross-examined. The cross-examination of the defendant was undertaken by George Wehbe. Having observed the witnesses, each of whom has a clear interest in the outcome of the litigation, and viewed their testimony in the light of the documentary evidence, I am left with considerable doubt as to the reliability of the evidence of each of George Wehbe, Simon Wehbe and Bashir Wehbe. I formed a more favourable impression of Marcha Giotopoulos, who generally gave her answers in a responsive and straightforward fashion, and appeared to be making a genuine attempt to accurately answer the questions that were put to her.

62 I was troubled by aspects of the evidence given by each of George Wehbe, Simon Wehbe and Bashir Wehbe.

63 In the case of George Wehbe, there was a marked tendency in his evidence to minimise the relationships between the defendant and her parents, and Mary Naim and her parents, and to describe them as having been estranged for many years. Yet that evidence is plainly contradicted by some documentary evidence that I would regard as likely to be broadly accurate.

64 A Bankstown Hospital note dated 12 August 2019 contains the following:

> Pt says she was living at home with her husband and her 3 sons. Two dtrs are married and visit her daily and assist with all tasks…
>
> According to pt her children have always been very supportive, her sons assist with all household tasks, cooking, shopping transport to medical appointments

That information seems to have been provided by Wadad Wehbe herself (and may be regarded as an example of her being able to communicate in spoken English at a fairly basic level). When the content of the note (concerning the daughters' visits) was put to George Wehbe in cross-examination, he described it as "baloney".

65 Another Bankstown Hospital note dated 12 August 2019 described the testator's social situation as:

> Lives: Patient lives with 3 x sons who work during the day.
>
> Services/supports: Has 2 other supportive daughters who see regularly and visit through the week
>
> Finances: not confirmed

Again, the information seems to have been provided by Wadad Wehbe herself, but George Wehbe denied it "unequivocally". When shown another note (also dated 12 August 2019) that referred to two daughters who visit, George Wehbe denied the truth of the statement "unequivocally".

66 Even if some issue could be taken with the detail of the information recorded in the abovementioned notes, the wholesale repudiation of the information seems to me to be reflective of a deliberate downplaying of the relationships that existed between the sisters and their parents. In my view, this downplaying was undertaken in the perceived interests of the plaintiffs' case. I would add that when another Bankstown Hospital note, dated 23 November 2020, was shown to George Wehbe in the witness box, he said it would be "impossible" for the nurse to have spoken to the defendant on the phone, even though that is clearly suggested by the note. Mr Wehbe's attempt to deflect the question, by referring to the misspelling of the defendant's name, was unimpressive. Despite some inconsistencies, and some imprecision in the evidence, I accept the defendant's evidence concerning her continuing relationships with her parents (including as to visits to the Punchbowl property and telephone calls) as generally accurate, and preferable to the evidence given by George Wehbe (and her other brothers) about those matters. The steadfast nature of George Wehbe's evidence on these matters leads me to generally regard his evidence with circumspection, and to doubt its reliability unless corroborated by evidence likely to be accurate.

67 The evidence given by Simon Wehbe, about needing to explain forms to his mother, was unimpressive. He declined to accept that his mother asked for the explanations because she did not understand the forms. Simon Wehbe seemed to be attempting to downplay that part of his own affidavit, probably due to a realisation that the evidence did not advance the plaintiffs' case. On occasion, Simon Wehbe gave directly inconsistent answers. When being asked about the power of attorney referred to in Dr Ragy's letter, Simon Wehbe initially said (on two occasions) that someone had contacted Dr Ragy to clarify the matter; but shortly thereafter Simon Wehbe flatly denied that he had given such evidence. He then refused to accept that Dr Ragy's letter made no mention of the testator making a will. Further, at the end of his cross-

examination, Simon Wehbe conceded that the evidence he gave concerning his mother talking about the will kit had been given because he had read it in one of his brother's affidavits. In light of these matters, I also treat Simon Wehbe's evidence with circumspection, and doubt the reliability of his evidence unless corroborated by evidence likely to be accurate.

68 I reached the same conclusion in relation to the evidence of Bashir Wehbe. He, too, sought to minimise the relationships between the defendant and her parents. He stated "categorically" that in the period prior to the death of Paul Wehbe, she had made "zero visits" to the Punchbowl property. I think that answer was given in order to assist the plaintiffs' case, even though it was not true. Bashir Wehbe's evidence in cross-examination about what his mother said about the will kit was plainly contrary to what was contained in his affidavit, and was itself contradicted later in the cross-examination. His evidence to the effect that he was not present when the will was signed was also contrary to what was contained in his affidavit. He eventually conceded that his affidavit was false in that regard. Even making due allowance for the fact that Bashir Wehbe was labouring with a toothache whilst giving evidence, his evidence must be regarded as less than satisfactory.

69 I turn now to the suspicious circumstances that are alleged to attend the preparation and execution of the will of 8 July 2020. The alleged suspicious circumstances are summarised above at [37]. Those circumstances have, in substance, been established on the evidence.

70 I have already referred to the circumstances in which Wadad Wehbe was situated as at July 2020 as regards her poor health, her dependence upon her sons, and her limited ability to communicate in English (see above at [57]). I think that it can be fairly stated that Wadad Wehbe was then in a position where she was vulnerable to being taken advantage of by her sons.

71 There is no doubt that the will was not prepared by a legal practitioner, but was rather prepared by George Wehbe, a beneficiary under the will. He acquired the will kit, which was sent to him in the post. It is likely that he had received it by about 2 July 2020. In his second affidavit, George Wehbe deposed that his mother said "go and get me a will kit". I am not prepared to accept that

evidence, having regard to my reservations concerning George Wehbe's testimony, and the content of Dr Ragy's letter which suggests that a power of attorney, as opposed to a will, was the subject of at least some discussion between Dr Ragy and Wadad Wehbe on 3 July 2020. It would be odd for Dr Ragy to specifically note a discussion about a power of attorney if Wadad Wehbe had clearly intended to make a will using a will kit she had instructed her son to purchase. Indeed, Dr Ragy's note raises the possibility that, as at 3 July 2020, Wadad Wehbe intended, or believed, that she would be giving a power of attorney. No evidence was adduced from Dr Ragy in relation to these matters, or in relation to the further consultation the testator had with him on 8 July 2020, the day the will was signed.

72 Having regard to my reservations concerning the evidence of each of the brothers, the inconsistencies between their accounts, and a lack of corroboration by any other witness, I find myself unable to accept the evidence of the brothers to the effect that, at or around that time, their mother made statements to the effect that she wanted to make a will leaving her estate (or the Punchbowl house) to the three brothers only. In reaching that conclusion, I have also taken into account the evidence of the defendant (at paragraphs 37 and 50 of her first affidavit), which I accept, of statements made by both parents about not having wills, and the siblings having to work matters out between themselves. I recognise, of course, that statements of testamentary intention may differ markedly, not only over time but according to the audience. In any case, I am unable to accept the evidence of the brothers of the statements of testamentary intention said to have been made by their mother in about July 2020. Moreover, where it appears that there was no estrangement between the testator and her daughters (contrary to the evidence of the brothers), there is no clear reason why she would wish to entirely exclude them as beneficiaries of her estate.

73 The only evidence as to the actual signing of the will was given by the three brothers, who are the beneficiaries under the will. I accept that the form of will was filled in by George Wehbe in handwriting. Further, I am prepared to accept that George Wehbe and Simon Wehbe (although not Bashir Wehbe) were present when the will was signed. The apparent witnesses, Mr Sarkis and Mr

Derbas, appear to be friends with the beneficiaries, and are thus not wholly independent, even if they are not themselves beneficiaries under the will. In any event, neither of the apparent witnesses gave evidence.

74 That absence is of importance. There is no independent evidence of what occurred on 8 July 2020 in relation to the preparation and execution of the will. In particular, there is no independent evidence of what was said by or to the testator on that occasion by way of explanation of the will. Such evidence is likely to be central in any consideration of whether the testator knew and approved the contents of the will at the time she signed it. *A fortiori*, where, as here, the testator is frail, is in a position of dependence upon the beneficiaries, and has only a limited ability to read and comprehend written English. I note that in cross-examination, George Wehbe agreed that, due to her trust in him, his mother often signed documents that he had completed on her behalf. Moreover, the fact that it seems the testator had a discussion with Dr Ragy a few days earlier about a power of attorney underscores the importance of evidence concerning any explanation of the will. In these circumstances, the complete absence of independent evidence of what (if any) explanation was given to the testator about the will is troubling.

75 In dealing with cases such as this, it is necessary to assess the gravity of the suspicious circumstances (see *Mekhail v Hana; Mekail v Hana* [2019] NSWCA 197 at [134] and [136]-[145] per Leeming JA, with whom Basten JA and Emmett AJA agreed). I have attempted to do so by considering the overall nature of the suspicious circumstances (which, as I have said, have been established on the evidence). I do not see this as a case where the degree of suspicion, that the will might not express the mind of the testator, is slight. On the contrary, I think that the degree of suspicion is significant. I think that the plaintiffs are thus subject to a significant burden to dispel the suspicions that arise particularly from the vulnerable position of the testator, the close involvement of the beneficiaries (especially George Wehbe) in the preparation of the will, and the absence of involvement by any solicitor (even though the effort was made for the testator see Dr Ragy).

76 The plaintiffs have attempted to discharge their burden by their own testimony. However, I do not think that the plaintiffs have discharged their burden of establishing that Wadad Wehbe knew and approved the contents of the will at the time she signed it. Having considered the evidence overall, I have not come to an actual persuasion that Wadad Wehbe so knew and approved of the will she signed.

77 To my mind, the state of the evidence is such that I cannot be satisfied that the testator either read and understood the will herself, or had it read to her or explained to her, prior to her signing of it. Given the rather simple nature of the will, that might not necessarily be fatal, were I able to accept the evidence that the testator gave instructions to George Wehbe to prepare a will "leaving the estate to you and your brothers". However, in the absence of corroboration by any independent witness, I find myself unable to accept the evidence to that effect.

78 The doubt as to whether Wadad Wehbe knew and approved the contents of the will is heightened by the defendant's evidence of a conversation she says she had with her mother in about August 2020. The defendant deposed that there was a conversation to the following effect:

> Wadad Wehbe: I have 5 kids and I love you all equally. My kids are all I have left in this world and in my life. When I die, the house is to be divided properly between the five of you. I really hope that your sister Mary is able to buy her own house from her share of the sale of the home so she can stop renting and use her share as a deposit.
>
> Marcha Giotopoulos: We love you Mum. Don't worry about anything. Everything will be alright; we want you to look after yourself.

79 The content of the asserted conversation was not the subject of challenge in cross-examination, although I do not place much weight upon that in circumstances where the cross-examination was not conducted by a legal practitioner. However, based upon the generally favourable impression I formed of the defendant as a witness, I see no reason not to accept that such a conversation occurred. In circumstances where I accept that the defendant maintained a good relationship with her mother until her death, it is unlikely that her mother would have spoken to her in those terms had she understood that

she had recently signed a will that provided for her estate to be given to her three sons only.

80 For the above reasons, I would have concluded that the plaintiffs have failed to establish, on the balance of probabilities in accordance with s 140 of the *Evidence Act 1995* (NSW), that Wadad Wehbe knew and approved the contents of the will dated 8 July 2020. Accordingly, their application for a grant of probate in solemn form in respect of the will would have failed on that account.

Undue influence

81 The defendant further contended that the plaintiffs' application should fail because Wadad Wehbe's execution of the will was procured by the undue influence of the plaintiffs. Had it been necessary to decide this issue, I would have concluded that the defendant had failed to establish the existence of the alleged undue influence. The undue influence case, as particularised, was based not only upon the particulars of the suspicious circumstances case, but also upon allegations that the plaintiffs were violent and domineering towards their mother, and that their influence over her was such that she was not a free agent when she signed the will. The plaintiffs have been unable to dispel the suspicion that the will might not express the mind of the testator, and in my view, suspicion remains as to whether she was tricked into signing the will, perhaps thinking it was a power of attorney in favour of her three sons. However, despite my reservations concerning the evidence given by each of the sons, I would not have concluded that the sons, or any one of them, had acted violently towards, or in a domineering manner towards, their mother.

Conclusion

82 It follows from the above that the plaintiffs' application for a grant of probate in solemn form of the will fails, and that the Statement of Claim must be dismissed. In those circumstances, and in the absence of any alternative application for probate, it is appropriate to make orders as sought in the Amended Cross-Claim, declaring that Wadad Wehbe died intestate, and ordering that a grant of administration of the intestate estate be made.

83 In view of the dispute between the siblings, the grant of administration should be made in favour of a suitable independent administrator. In that regard, the defendant put forward Mr Andrew Fleming, solicitor, as a suitable candidate. Mr Fleming has given his consent to being appointed as the administrator of the estate. The plaintiffs did not suggest that Mr Fleming would not be a suitable administrator, and in my view, his affidavit demonstrates that he would be. Orders will be made accordingly.

84 I will not make any orders as to costs at this stage. The parties will have an opportunity to provide brief written submissions as to costs, including as to whether any costs should be ordered to be paid out of the estate. However, I will make the tentative observation that, subject to one matter, there seems no reason why costs as between the parties should not follow the event. That matter concerns the allegation made by the defendant that the testator's signature on the will was a forgery. That allegation, which was made affirmatively in the Defence filed on 7 September 2021, was removed from the Amended Defence filed on 22 June 2022 and not pressed. The costs of that issue, which seems to be a discreet issue separable from the other issues raised by the defendant, should be borne by her, or at least not by the plaintiffs.

85 I will direct that the defendant/cross-claimant serve and provide to my Associate a written submission as to costs (not to exceed three pages) by 21 July 2023. I will direct that the plaintiffs/cross-defendants serve and provide to my written submission as to costs (not to exceed three pages) by 28 July 2023. I will thereafter deal with the question of costs on the papers.

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