Neutral Citation Number: [2008] EWHC 1587 (Ch)

Case No: HC07C01001

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2008

Before:

THE HONOURABLE MR JUSTICE LEWISON

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Between:

HENRIETTA SARAH LOUISE BAYNES	**Claimant**
- and -	
(1) ROSEMARY FELICITY HEDGER	
(2) ROBIN CHARLES ROWLAND	
(3) THE LANDMARK TRUST	
(4) MARGARET ALICE BAYNES	
(5) AMANDA BAYNES-PANIGAI	
(6) NIGEL BAYNES	
(7) ELIZABETH TOLMIE	**Defendants**

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Mr. Thomas Dumont (instructed by **Campbell Hooper LLP**) for the **Claimant**
Mr Jeffrey Terry (instructed by **Allan Janes LLP**) for the **3rd Defendant**
Miss Emily Campbell (instructed by **Sheridan & Co.**) for the **4th Defendant**
Mr Matthew Slater (instructed by **D R Sceats**) for the **5th, 6th and 7th Defendants**

Hearing dates: 24, 25, 26, 27, 30 June and 1, 2 July 2008

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Judgment

Mr. Justice Lewison:

Introduction

1. Mary Spencer Watson ("Mary") died, aged 92, on 7 March 2006. She was a sculptress of considerable repute and lived at Dunshay Manor in Dorset. Dunshay Manor had been bought by her father, George Spencer Watson RA, himself an artist of repute, and had been the family home since the 1920s. Mary never married and had no children. She left a will dated 6 July 1977 as amended by two codicils. Her testamentary dispositions included:

    i) A legacy of £2,500 to her goddaughter Henrietta Baynes ("Hetty");

    ii) Small pecuniary legacies to other friends;

    iii) A specific devise of the Dunshay Manor Estate to the Landmark Trust;

    iv) A bequest of her residuary estate to Margaret ("Margot") Baynes for life, with remainder to four of Margot's children ("but not Henrietta because she has already benefited").

2. Hetty and Margot now make claims against the estate under the Inheritance (Family and Dependants) Act 1975 on the ground that the will does not make reasonable provision for them. There is a subsidiary issue about the construction or rectification

of the will, which I will deal with separately. The members of the family will, I hope, forgive me if I refer to them only by their given names.

Early history

3. Dunshay Manor was built at about the time of the Civil War in the 1640s, although it was remodelled in the early twentieth century. George Spencer Watson acquired it in 1923 and it became the family home at about that time. The Dunshay Manor estate also included two cottages, and a quantity of grazing land and woodland. George Spencer Watson designed the barn and stables in Purbeck stone. The interior of the house has a strong Arts and Crafts influence. George Spencer Watson, his wife, and his daughter Mary all used it for their artistic activities. Some further modernisation of the house took place in the 1950s or 1960s. In about 1955 Mary granted a lease of Dunshay Manor to Mr Baynes. He was then married to Margot, and they had four children: Nigel, Amanda (known as Jane), Elizabeth ("Lizzie") and Susan ("Susie"). Hetty was born in 1956. Mary continued to live on the Estate in a small studio flat. Mr Baynes was working in or near London at the time, and commuted to Dorset for weekends. Mary and Margot developed a friendship which, within a relatively short time, became an intimate relationship. Within a few years (somewhere between 1958 and 1964) Mr Baynes left Dunshay Manor and eventually he and Margot were divorced.

4. All of Margot's children describe Mary as having exerted a dominant role within their family, becoming a quasi-parental figure to all of them. She took Jane, Lizzie and Susie riding; paid for dressage lessons; taught Nigel to drive; taught Susie painting and drawing; encouraged Lizzie to take up ballet; and showed Nigel a number of country and agricultural skills. Mary was also financially generous. She paid for Lizzie's school fees at Cranbourne Chase, and Hetty's fees at the Royal Ballet School. She lent Nigel the money to buy his first car; and bought Lizzie her first car in 1989. There is considerable later correspondence which shows how important Mary was in all their lives.

5. In 1965 Mary bought Coombe Bury Cottage, a large Regency house in Richmond. Mary, Margot, Hetty and later Lizzie moved in there. Mary and Margot shared a bedroom. The house was divided into three parts. Mary, Margot, Hetty and Lizzie lived in the middle part, and Nigel and Susie had a flat each in the outer parts. The house was sold towards the end of the decade; and from the proceeds of sale Mary gave Nigel, Lizzie and Susie money for a deposit on a flat or house. By this time Hetty was at ballet school. Mary bought another house in Fife Road, Sheen and she, Margot and Hetty moved in there. At this stage they lived at Fife Road during the week, and went to Dunshay Manor at the weekends. In 1972 Mary settled the sum of £15,000 on trust for Margot for her life with remainder to Hetty for her life, with remainder to Hetty's children. The settlement gave the trustees wide powers of advancement. The initial funding for the settlement came from the proceeds of sale of Coombe Bury Cottage.

6. The house in Fife Road was sold in 1974, and Mary bought another house in Kelsoe Road. Title may have been held in the joint names of Mary and Margot, but the evidence is inconclusive. By now Mary wanted to devote more time to her sculpture and spent much more time at Dunshay. Margot preferred town, and stayed in London. In her witness statement Hetty said:

> "Mary began to spend most of her time at Dunshay to concentrate on her sculpture. My mother continued to reside in London where she had her own beauty salon."

7. In her oral evidence Hetty described the situation. She said that her mother lived at 15 The Terrace "and sometimes Mary". Mary had her own room there and came up from Dunshay. Hetty said that Margot's main residence was at 15 The Terrace, but did not accept that Mary and Margot lived separately. She said that it was "more interconnected than that"; and that Mary was very much a part of Margot's life and her own life.

8. The house in Kelsoe Road was sold in 1978 and with the proceeds of sale Margot bought a house at 15 The Terrace, Barnes. Title to the house was in her sole name, although the money for it came ultimately from Mary. In effect, therefore, the house was a gift from Mary to Margot. In her witness statement Hetty said:

> "Mary continued to reside at Dunshay although she had a room at my mother's house."

9. At about the time of the sale of the house in Kelsoe Road in 1978 Mary bought Hetty her first flat in Abingdon Villas in Kensington. She bought it outright, without the aid of a mortgage. It was a gift from Mary to Hetty. Hetty was, by now, a young actress with a budding career. She lived independently, and supported herself from her earnings.

10. In the early 1990s Margot sold 15 The Terrace and bought another house at Oak Tree Cottage, 37 Crescent Road, Kingston-upon-Thames. She still lives there.

Mary, Hetty and money

11. Hetty sold the flat in Abingdon Villas and after a number of purchases and sales of other flats bought a flat in Arundel Gardens, Fulham in the mid-1980s. She embarked on a programme of refurbishment of that flat, but ran into financial difficulties, even though she was making a good living as an actress. In February 1986 Mary made Hetty another gift of £6,235, which Hetty formally acknowledged in writing. In July 1986 Mary made Hetty a loan of £6,000 which Hetty agreed to repay at £60 per month. In her letter of 28 July 1986 she confirmed that she had set up a standing order for that purpose. These monies were used partly to pay off Hetty's debts, and partly to fund the refurbishment.

12. Hetty married the film director Ken Russell in 1992. Their son Rex was born in 1993. However, by 1996 the marriage had broken down; and they separated and subsequently divorced. Hetty had retained the flat in Fulham and let it out. The rent from the flat covered the cost of its outgoings. She eventually received a settlement of about £235,000 on her divorce; together with periodical payments for the maintenance of Rex at the rate of £500 per month. The settlement was embodied in a court order of 18 April 1997. While the divorce settlement was being negotiated Mary helped Hetty with money. Undated correspondence from about that time makes it clear that Hetty characterised the payments as loans.

13. In May 1996 Hetty wrote to Mary thanking her for a loan of £10,000 over a period of a year. This loan was recorded in a formal loan agreement drawn up by solicitors.

Interest on the loan was payable at the rate of 4.5 per cent per annum. In November Mary received a telephone call from Hetty in which the latter said that she had no money for food; and it was agreed that Mary would lend her another £1,000. The further loan of £1,000 was acknowledged by Hetty in writing on 15 November 1996. That additional loan was to be governed by the terms of the formal agreement. Hetty repaid the aggregate loan (and interest) in April 1997. I infer that she repaid it out of her divorce settlement.

14. Having received her divorce settlement Hetty sold the flat in Fulham and bought another at Matlock Court in Notting Hill Gate. There was a mortgage over the flat. That flat was then sold and Hetty bought another in Arkwright Road, Hampstead. The chronology of these transactions has remained obscure. There does not appear to have been any spare cash left from the divorce settlement. It may all have gone into the property purchases.

15. At all events, in August 1999 Hetty acknowledged in writing that Mary had lent her another £10,000 at 3 per cent interest and said that she would endeavour to repay it on or before 1 December 1999. By the end of September she wrote to Mary to ask whether she could borrow a further £5,000 or £10,000 "with the same plan of interest & repayment". Mary obliged with £5,000 which Hetty acknowledged in writing on 27 October 1999. In her letter Hetty said that she would repay the loan on completion of the sale of her house, which she hoped would be on 1 December 1999. In the following month Mary lent Hetty a further £5,000, making an aggregate loan of £20,000. In March 2000 Hetty sold her flat in Hampstead. From the proceeds of sale she repaid Mary some £30,000. That payment discharged all her outstanding debts to Mary.

16. However, later in the year, Hetty was short of money again. On 8 November 2000 she wrote a long letter to Mary which she described as a "cards on the table" letter. She stressed her determination to be financially independent and described in detail how she had tried to restart her career. She continued:

> "This is how I see it and what I need to do – and I am coming to you to help us. You know that I always pay you back and we keep it "strictly business". So no emotions come into it!!... If I could appeal to you to help us get started again – back on the property ladder – by which time in 2001 my income should be on a different level. Given all of the above what we really need is a kind of re-starter package - £10,000 – to see things through till the purchase including move etc so that if no work is forthcoming till next year I won't go into debt. The positive thing is I HAVE NO DEBTS and NEVER WANT TO BE IN DEBT AGAIN. Then
>
> £50,000 for a deposit on a property …
>
> I would hope/trust/want to pay you the full amount back within 2 years and if all else fails I can always resell & pay you back anyway …
>
> I have always paid you back & couldn't possibly come to you if I didn't feel confident that I could continue to do this."

17. The letter ended with a PS:

> "this would all be drawn up legally as we've always done it."

18. Mary did not have spare cash to make available to Hetty. So she began discussions with her own bank about borrowing £60,000, which was the sum that Hetty had asked for. Initially she characterised the loan from the bank as "capital to assist" Hetty with the purchase of a property. But within a short time she described the purpose of the loan to her from the bank as enabling her to "gift funds" to Hetty. The loan from the bank was finalised in November 2001. The final amount was £72,490. It was secured on shares that Mary owned. The money was paid to Hetty shortly afterwards. Hetty used it to buy a flat at Morgan's Walk in Battersea, with the aid of a mortgage. In the light of Hetty's letter I infer that the amount of the deposit was of the order of £50,000. I do not know what the purchase price was. Despite Hetty's PS, no legal agreement was drawn up between Mary and Hetty. Mary subsequently told Nigel Baynes that she had made money available to Hetty for the flat in Battersea by way of loan; and I accept this evidence.

19. By February 2003 Hetty was short of money yet again, and Mary once more approached her bank for a loan. The amount in question was £20,000. In August 2003 Hetty wrote again asking for another loan "paid back on the remortgage". She gave Mary a list of bills that needed to be paid. There was some £17,000 outstanding on the mortgage, and just over £16,000 in other debts: a total of some £33,000. Mary arranged for a cheque for £7,313.39 to be paid to Hetty's mortgagees to cover four monthly instalments of the mortgage. Mary also borrowed more money from her bank to make over to Hetty. The total this time was £42,000: £20,000 in February 2003 and £22,000 in September 2003. This ought to have left Hetty well in credit. Before the second of these payments was made to Hetty, a meeting took place. Hetty and Mary were present, together with Mr Henderson, Mary's accountant. Mr Henderson says that at the meeting Mary made it clear to Hetty that this would be the last time that she would be assisting. He understood that the clear message was that from then on Hetty would have to stand on her own. He said that the two women shook hands on the deal; and he thought that that transaction would bring an end to Mary's financial support. In her cross-examination Hetty was reluctant to give direct answers to questions about what actually happened at the meeting. She was more keen to interpret the meeting with the aid of hindsight. However, she did eventually agree that there was a bit of a showdown; and that Mary told her that this was the last time that she would help. She agreed that she was told that there would be no more help; and that the meeting was quite formal. She did not remember shaking hands at the end of the meeting. She thought it more likely that she and Mary hugged each other. In fact Mr Henderson was not talking about a handshake at the end of the meeting, but a handshake to seal the deal. In substance Hetty agreed with Mr Henderson's evidence, which I accept, including his evidence about the handshake. Mr Cooper, whose evidence I also accept, said that Mary had told him a long time later that at least one of the reasons why Mary had taken Hetty to see her accountant was to show Hetty that she could no longer go on paying out for her.

20. Within six months Hetty had gone back on the deal; and Mary again agreed to lend her money. In March 2004 Hetty wrote to Mary "to confirm our new arrangement for the following few months". Mary was to make three monthly payments of £1,910 towards Hetty's mortgage and a cash float of £3,000. The loan would be repaid out of the proceeds of sale of Hetty's flat which was then on the market, together with "any

interest that you would have lost". Mary made a note of the arrangement in similar terms, also recording it as a loan with interest. In November 2004 Mary paid just over £600 to discharge a bill for servicing Hetty's car.

Mary, Margot and Margot's health

21. Ms Gifford, a friend of Hetty since childhood, recalled going to Fife Road for long weekends and half terms. As she put it: "Mary would often be staying there with Margot". They shared a bedroom, and were seen as a couple.

22. Mrs Maria Wooster has lived opposite Margot in Kingston-upon-Thames since about 1998. She would regularly see Mary at Margot's home, and her car outside. As she put it: "Mary would often stay over a weekend and sometimes she would stay for a couple of weeks." In her oral evidence she explained that this would happen every month or two.

23. Margot's health was deteriorating, and she began to suffer from Alzheimer's syndrome with which she was diagnosed in 2000. Between 2002 and 2004 Mrs Wooster was also Margot's carer, until she needed full time care. While she was working for Margot, Margot "would also go and stay with Mary at Dunshay Manor". In her oral evidence she explained that Margot would go to Dunshay every three months or so for a weekend or for a week. As Margot's health deteriorated she went to Dunshay less and less. Mary would come to see her in Kingston instead. Nigel Baynes' evidence was that:

> "Up until 2003 my mother would still go and stay with Mary at Dunshay Manor for long periods during the year but this stopped because of the progression of the disease. However, Mary would still come and stay with my mother at the weekends and they would spend Christmas together. My mother and Mary were still very much a couple up until Mary died."

24. In his subsequent statements Mr Baynes said that Mary spent every other weekend with Margot (rather than every weekend).

25. Ms Annette Ratuszniak is an art curator who got to know Mary well in the late 1990s. She was working on a retrospective exhibition of British sculpture and wanted to include Mary as one of the featured sculptors. Part of the preparation for the exhibition was the making of a film about Mary. It included 25 hours of film, which were later edited down. In the following years Ms Ratuszniak spent a lot of time with Mary. Together they went through large bundles of photographs of Mary's life and Mary would comment on each one. She rarely spoke of Margot, although Ms Ratuszniak was aware of the Baynes family and Mary's sense of responsibility to them. In her oral evidence she estimated that she must have spent hundreds of hours talking to Mary about her life. She had no idea of the relationship between Mary and Margot; and assumed that they were just very good friends.

26. In the summer of 2003 there was concern about the level of care that Margot needed. Hetty telephoned Mary on 9 August. Mary made a note in her diary. The relevant (and legible) parts of it read:

> "I have refused to take the solicitor down to Mummy & try to get a signature out of her on Tuesday. Het agreed. Meeting for 5 children to discuss the future situation. After some pretty straight talking about [Nigel] having taken all the care of [Margot] for the past 5 years & more this must be recognised and his advice and co-operation asked about [Margot's] future care and maintenance. He has been saying that he was not happy about her being left on her own and wanting to employ an "Au pair" to live in this being a cheaper way of carer – I have said that if a carer was employed to sleep in this would be more expensive. [Nigel] has said there are 2 further payments of government services available and will supply the particulars…. [Margot] must have her own solicitor – working for her interests – only. I said I was in the process of settling my affairs my health being unpredictable. I wanted [Margot] to be properly and completely ~~settled without me by her 5~~ children. The responsibility of her 5 children (if necessary by family trust)."

27. She also made a note to herself to look out the settlement, which must have referred to the 1972 settlement.

28. The meeting took place on 12 August 2003. Hetty, Nigel, Lizzie, Mary and Susie were all there. Lizzie had driven Mary to the meeting, and on the way Mary told her about the existence of the 1972 settlement (of which she had been unaware). The meeting was also attended by Mr Jonathan Walsh who had been Hetty's solicitor during part of her divorce proceedings. He made an attendance note. At the outset of the meeting Mr Walsh made it clear that Hetty had invited him to attend; and that if Margot needed greater care on a permanent basis he felt he could help with an equity release scheme from the house. The meeting was argumentative. Nigel took the view that Margot did not yet need full time care. His view was supported by Susie and Mary. Hetty and Lizzie took the opposite view. After an hour or so the meeting broke up without any agreement having been reached. Mary made a note in her diary also recording that Lizzie and Nigel had walked out, both being very upset.

29. What was decided, probably by Mary, was that the trust fund comprised in the 1972 settlement would be used to pay for Margot's care. If the income proved insufficient then recourse would be had to the capital. This is recorded in a manuscript note made by Mary ("use <u>settlement now</u> while M able to enjoy house which she loves"). As at August 2003 the value of the trust fund was £55,000. Nigel was informed at the time by Lawrence Graham, who administered the trust, that the trustees had power to advance a proportion or the whole of the capital of the fund to Margot. Lawrence Graham wrote to Mary to seek her consent to a release of capital to Margot, and on 24 August 2003 she gave that consent. In the following month Mary wrote to Lizzie. She again referred to the existence of the settlement and said that it would be available to cover the additional cost of Margot's care "according to what is necessary and advised by her specialist." She continued:

> "It will continue for some years & also gives time for the question of raising money on her property. Nothing should be done under duress or in a hurry.

> Any strange person in her house causes Margot violent animosity and would have to be introduced gradually…
>
> Nigel & Hetty are the only two of her children living near and able to help in the daily smooth running of Margot's life and household and give her the mental & emotional companionship & care natural from the children which she moves…
>
> You must try to understand Nigel's protective violence – caused by you all ignoring his years of daily attendance and running of her household in the absence of you other children …"

30. The level of care was not, I think, increased at that time; but was increased in the following year when Mrs Wooster left. Since 2004 Margot has had the services of a full-time carer twenty four hours a day, seven days a week. Lizzie described the situation in her oral evidence. She said that Mary and Margot shared so much. She was reluctant to agree that Margot had a separate home and household, as suggested by Mary's letter to her. As she put it, between them they had two houses; but as she got older Margot felt happier in her own little house. Dunshay was too big and she was more comfortable in her house in Kingston. But she visited Dunshay a lot for holidays. Mary had her own room in the house in Kingston, which contained clothes and other things, and Margot had her own room at Dunshay, which likewise contained her clothes and things.

31. In October 2004 Mary wrote a card to Margot which she concluded by saying:

> "So – until Christmas when I shall come & stay (please?) for a week"

32. Miss Comfort Okine was Margot's carer between 2005 and October 2007. Her evidence was that Mary would "visit" Margot every other weekend and stay for three or four days at a time.

33. Ms Gifford said that she had not seen Mary and Margot together for a decade or more, although she had been to Dunshay. Mr Ilay Cooper, who has lived in a caravan at Dunshay since the late 1980s said that Margot had not come down to Dunshay for the last ten years or so. He thought that she was never much of a countrywoman. However, Mary would go to London every two weeks.

34. There is no doubt that the relationship between Mary and Margot was very close. Many of the witnesses who saw them together described them as a couple. They were seen as a couple by Margot's children. But they were of a generation for whom a same-sex relationship was not an acceptable lifestyle, and their relationship was not openly acknowledged. Lizzie said that the family would never have put it to them. They were of that age when that sort of thing was unacceptable and it would have upset them. As Mr Cooper put it: "I was aware that they were a couple; but one doesn't talk about it". Others, such as Mrs Biddulph, suspected that there was a relationship, but as she put it "there was no declaration made by either party". Hetty went further and said that the relationship between Mary and Margot was "hidden" and that they denied sleeping together. Many people who came into contact with Mary had no inkling of the nature of her relationship with Margot. These included her

cousin Andrew Whittuck who spent a week or two at Dunshay Manor every year for over twenty years, and who said in evidence that in retrospect he felt rather naïf in not having seen it; Mr Sherbrooke her solicitor who helped her with her will; Mr Henderson her accountant; and Ms Ratuszniak who spent hundreds of hours talking to Mary about her life.

35. I conclude that Mary and Margot had a loving relationship which spanned fifty continuous years. In its early phase they shared a bedroom and so it was probably also sexual; although since 1978, when each of them had her own bedroom in the other's house, it was probably not. But they were undoubtedly emotionally committed to one another. When they were not together they would speak on the telephone every day. There was no falling out between them, and their relationship carried on until Mary's death. But their relationship was a private relationship. Although those close to them might have guessed, or even known, that they were a couple; it was not something that they themselves acknowledged. Had any sexual element in the relationship been suggested, they would have denied it.

Mary's will and the bequest to the Landmark Trust

36. Mary's original will was made on 6 July 1977. By clause 5 of that will she made a bequest of the Dunshay Manor Estate to the Artists' General Benevolent Institution. However, over time she decided that the Institution would not be a suitable donee of Dunshay Manor, mainly because they were likely to sell it. Mary's strong desire was to see Dunshay Manor kept intact, ideally as a working place for artists. She made a codicil to her will in November 1999, which is not relevant to this dispute.

37. The Landmark Trust is a charity whose aim is to rescue old and interesting buildings which are at risk. It has a large portfolio of unusual buildings, including forts, follies, small cottages and so on. It restores its buildings and then lets them out for holidays. It does not require a capital endowment before accepting a building. In 2002 Mary learned of the existence of the Landmark Trust from Mr Julian Francis, a solicitor and patron of her work as a sculptress. She had set her face against leaving Dunshay Manor to the National Trust and began to think that the Landmark Trust would be a suitable donee. She also talked it over with Ms Ratuszniak who had stayed in various Landmark properties and who confirmed that they would be a suitable donee. Over the ensuing years Mary and Ms Ratuszniak spoke a lot about Dunshay. Ms Ratuszniak said that the most important thing in Mary's life was Dunshay, partly because it was her parents' creation, partly because it was the scene of her own artistic endeavours but above all because it was her heritage.

38. In the summer of 2002 Mary made contact with the firm of Humphries Kirk in Poole, with a view to changing her will. Nothing much happened over the summer, but by the autumn she was moving towards a decision to leave Dunshay Manor to the Landmark Trust. At this stage the problem was that the Landmark Trust had not decided whether they would be willing to accept the gift.

39. In October 2002 Mary had a meeting with Mr Simon Sherbrooke, a partner in Humphries Kirk. The Landmark Trust had still not made a decision, and in those circumstances Mr Sherbrooke and Mary decided on what Mr Sherbrooke called a "stop gap". At this stage, however, Mary wanted Dunshay Manor to go to the Landmark Trust. Mr Sherbrooke drafted a second codicil on her instructions. The first draft contained a bequest of Dunshay Manor to the Landmark Trust, subject to the

proviso that if the Trust declined the gift then the will trustees would hold it for such purposes as they thought compatible with her wish that Dunshay Manor "be preserved in the manner and habit of the Landmark Trust rather than that of the National Trust". Her residuary estate was to be held on trust for Margot for her life, with remainder to Margot's five children (including Hetty). Mr Sherbrooke queried whether Hetty should be included in this gift; and on 29 October Mary telephoned to say that Hetty should be omitted. This decision was influenced by the fact that the 1972 settlement already contained a gift over to Hetty, and no doubt by the fact that Mary had already given Hetty generous financial assistance. Mary signed the second codicil on that day. As noted, the codicil explained that Hetty was excluded from the gift over of residue "because she has already benefited".

40. In November 2002, following a meeting of trustees, the Landmark Trust decided that they would accept the gift; and on 19 November 2002 they wrote to Mary to inform her. She made an appointment to go and see Mr Sherbrooke to discuss that development and also to get on with a new will. In early 2003 some of her own family members (notably Mr Whittuck) investigated the possibility of setting up a family trust to take Dunshay Manor. Mr Sherbrooke was sceptical because such a trust would not be charitable; and would have the consequence of increasing the liability of the estate to inheritance tax. On 6 February 2003 he wrote to Mary explaining this. Mr Francis was also sceptical, and the idea was not pursued further.

41. In the early summer of 2003 Mary was considering conditions to be attached to her bequest of Dunshay Manor to the Landmark Trust. She set them out in a letter of 9 June 2003 which Mr Cooper typed for her. The first condition which she described as "most important" was that the Dunshay Manor estate should be kept intact. The last of the conditions was that her cousin, "Andrew Whittuck, and five named friends", be allowed to stay off-season at concessionary rates. The five named friends appear to have been the Baynes children. There was no mention of Margot in the conditions.

42. Mr Drury, the chairman of the trustees, promised to consider them; and in the following month Mr Pearce, the Trust's chief executive, prepared a memorandum dealing both with the suggested conditions, which for the most part were acceptable, and also with the principle of accepting the gift. Having seen the interior of the house, he thought that the house was good but not exceptional; a lot of money would need to be spent on it, and that in those circumstances it was only "a marginal case for acceptance".

43. Mary went to see Mr Sherbrooke on 20 August 2003. They discussed the destination of her residuary estate. Mr Sherbrooke's attendance note records:

> "And the residue of her estate is to go to Margo Baines five children equally and Henrietta is not to have to bring into Hotchpot that which [she] has already had. I carefully went through this with Miss Spencer-Watson. Henrietta is her goddaughter and has to be looked after. Now in a very parlous financial position."

44. The division of the residue among all Margot's children (including Hetty) would have been a departure from the executed codicil.

45. During 2004 Mary corresponded with the Landmark Trust. She expressed her desire that the cottages should be kept for estate workers drawn from local families. In 2005 the question of the status of the tenants of the cottage arose. Mary wanted to give them greater security of tenure than they already had; and she discussed this with Mr Sherbrooke. Mr Sherbrooke also embarked on the drafting of a new will. The principal dispositions in the new draft were the same, for practical purposes, as the existing will and codicils; except that Hetty was included in the gift over of residue. Mary was still concerned about the fate of the tenants of the two cottages. The Landmark Trust would not guarantee to employ her existing tenants and she wrote to the Trust in May 2005 saying that it would "simplify the position if I took cottages 1 & 2 out of the bequest". Mr Pearce replied on 6 July 2005 saying that:

> "If you chose to keep cottages 1 and 2 out of a bequest to Landmark that would cause us no difficulties at all and I would entirely understand your reasons. I am sure you are right that there are other options for accommodating a caretaker either in the house or the stables."

46. She also began to investigate the possibility of leaving the cottages to a local housing association, the Corfe Castle Charities, instead of the Landmark Trust. This proposal went nowhere, because the Corfe Castle Charity was not willing to grant long term security of tenure to the tenants. Mary's will remained unchanged.

Hetty's difficulties and Mary's will

47. Hetty's financial difficulties continued throughout 2005. She had consulted solicitors with a view to applying to the court for more money from Ken Russell. On 23 June 2005 Hetty wrote Mary another long letter. She thanked Mary for £1500 covering a car and cash and said:

> "Very much appreciated, but I want to pay it back when I can."

48. She continued:

> "I intend to certainly pay you back for the money you lent me last year apx £10,000… I also intend to pay you back for the other money. I know you said it was a gift – but I would much rather, if I can, return this to you – apx £100,000 including £10,000 + £2,500 this year…
>
> The urgent urgent bills come to apx £10,000 – I can just get though with that + I wondered if I could have a strictly business arrangement with you - i.e. a further loan to be paid back once the case goes through with Ken. I will also endeavour as I said to pay you back everything. The amount we will be applying for will be maintenance upgrade – up £3,000 a month – and between £300,000 - £500,000 to pay me back for everything it has cost me and you.
>
> … I always pay my debts – eventually – remember when I paid you back the £30,000 when I sold Hampstead? It doesn't feel good for me to accept handouts. …

> I think if I can go ahead with the case Baynes v Russell – I can't imagine any court not seeing the invidiousness of the imbalance … So it is just a matter of my getting through the next month or two….
>
> I don't want a gift – merely a business arrangement like going to my bank.
>
> But no handouts – only a banking arrangement"

49. On 28 June 2005, very shortly after Mary must have received Hetty's letter, she spoke to Mr Cooper about Hetty's finances. He noted the conversation in his diary. She told him that Ken Russell was not contributing sufficient maintenance. She also told Mr Cooper that during the previous year Hetty had asked her for money, and that she had felt compelled to take her to her accountant who showed that Mary could not go on supporting Hetty. Mary also told him that when she had refused to give Hetty money, Hetty had stopped contacting for a short while. When Mary telephoned Hetty, Hetty said that she could not phone because of her financial worries.

50. While the application for increased maintenance and a large lump sum was being progressed Mary agreed to pay Hetty's mortgage, and also wrote her a cheque for £3,000. Although Hetty was reluctant to accept in evidence that Mary's agreement to pay the mortgage was limited in time the evidence of Mr Midgley, Hetty's own accountant, was that Hetty had told him in 2005 that Mary had agreed to pay the mortgage for six months. It is not easy to date precisely when Mary agreed to do this. There was expected to be a hearing of Hetty's application for an increase in maintenance in January 2006; and it is likely that Mary's agreement related to the six month period immediately beforehand. Thus the prospect of financial help from Mary would end at the end of 2005. This is consistent with what Hetty put on the form filed at court in support of her application. It is also consistent with the table of payments made by Mary for Hetty's benefit compiled for the purposes of this case which indicates that the first payment (which included some arrears) was made on 4 July 2005; the last payment made to Birmingham & Midshires (the first mortgagee) was made on 10 January 2006 and the last payment to Welcome Finance (the second mortgagee) was made on 24 January 2006. It is also clear that in her letter Hetty was dangling before Mary the prospect that everything would be repaid out of what she was asking for in the matrimonial application; and that she was doing no more than asking for a loan for a few months.

51. On 25 July 2005 Mary saw Mr Sherbrooke again. Following the meeting, he wrote to her on 29 July enclosing a new draft will. Under this draft the cottages were to be left to Corfe Castle Charities; the remainder of the Dunshay Estate to the Landmark Trust and the residue of the estate to Margot for life with remainder to all the Baynes children. Hetty was not to be required to bring any previous gift or advancement into hotchpot.

52. During the summer Hetty visited Dunshay a number of times. According to Mary's diary she and Rex stayed for two weeks between 22 August and 5 September. Mrs Biddulph saw them during that time. Her impression was that Hetty insisted on paying her way (if, for instance they went to a pub for lunch); that Hetty was attentive to Mary; and that Hetty and Rex were the centre of Mary's life.

53. On 26 September 2005 Hetty wrote to Mary again. She reported:

> "I had a brilliant session with the lawyers (Ken court case) on Thursday it was about 2 hrs … and it all looks incredibly hopeful – i.e. the amount we can go for is huge! Whether Raymond Tooth (the lawyer) decides to is a future decision but it came to £60,000 a year (including school fees)…"

54. By October, however, it had become apparent that there was no prospect of securing a further lump sum from Ken Russell. Hetty's application was dated 17 October 2005; and it asked only for an increase in the monthly maintenance payment for Rex, plus a school fees order. The schedule of expenditure for Rex's benefit attached to the application came to £46,000 a year. In describing her income the financial statement said:

> "Money from Godmother – Mary Spencer Watson to live. This will not continue"

55. On 13 December 2005 Hetty went to see Mary at Dunshay. She was accompanied by a friend, Keith Schmidt, professionally known as Ben Douglas. He had been encouraging her for some time to have a conversation with Mary to get her to "take ownership of her role in the Baynes family" and especially in Hetty's life. This included taking on financial responsibility for Hetty as a parent would. By now Hetty had realised that her application for a large lump sum from Ken Russell would not succeed. She confronted Mary about her relationship with Margot, and Mary admitted that their relationship had been an intimate one. All the witnesses agreed that Mary was a very private person, who had never previously acknowledged her relationship with Margot; and to do so at this juncture must have been very difficult for her. Hetty herself said that Mary confessed to guilt and shame about the relationship. In her oral evidence, however, Hetty said that it was not her purpose to use the meeting to get Mary to pay her bills. It was, as she put it, about the "bigger picture"; although the canvas of the bigger picture seemed to be filled by her and Rex, and in particular her financial problems. What she wanted was for Mary to make her and Rex secure, by clearing her debts, buying her somewhere to live and giving them a solid base. She said to Mary that without anything coming from Ken she would be bankrupt and homeless; and asked Mary whether she would be happy with that. Without Mary's help, she said, they would not survive. These statements must have put considerable pressure on Mary and in my judgment they were designed to do so. They had some effect. By the end of the meeting Mary had said that she would put the wheels in motion and see what was possible. I find also that at about this time Mary made more money available to Hetty. In her evidence Hetty insisted that Mary treated money made available to her as gifts. But this is not consistent with an annotation that Mary made on a letter sent to her by Mr Sherbrooke on 10 January 2006. Mary's annotation reads:

> "I need repaying for my stop gap payment of the last week or so. Detail later this week"

56. In her oral evidence Hetty suggested that what Mary had in mind was paying herself back out of the money that was to be raised by means of an equity release. This interpretation of a straightforward note was convoluted and implausible; and I reject it. It was, unfortunately, symptomatic of Hetty's tendency to "explain" things in the

way that suited her case. Given that a hearing of Hetty's application for increased maintenance was due to be heard in the following month, the "stop gap" was to bridge the time until the application had been determined. Hetty had not disabused Mary of the idea that the maintenance payment for which she was applying would be "huge". At the meeting Hetty also challenged Mary about the Landmark Trust: that she was giving everything to charity and charity begins at home. What was she doing giving everything to charity? She said that it was not the right thing when she and Rex were in dire need. On the other hand, and to my mind flatly contradictory to this evidence, she said that she did not know what was in Mary's will and that she did not attempt to persuade her to change it. In fact two of the witnesses called by Hetty confirmed that she did know what was in Mary's will. Mrs Gifford said that through Hetty she knew that in the last year of Mary's life "Hetty had been talking to Mary about changing her will so that instead of leaving her estate to charity she would leave it to the Baynes children." Mr Merifield said: "I knew that Hetty had been trying to persuade Mary to change her will and she talked to me about this." I have no doubt that Hetty did try to persuade Mary to change her will and did so in forceful terms. I do not accept her denials in the witness box. One thing is clear from all the evidence and that is Mary's love of Dunshay and her ardent desire to see it preserved as a memorial to her parents and to her. To have been confronted by Hetty in this way about her intentions for Dunshay must have been shocking for Mary.

57. Mr Schmidt was not a party to the conversation between Mary and Hetty, although he was within earshot and said that he heard it all. No doubt he was doing his best to recall it, but I do not consider that his recollection is reliable. First, he said that a total sum of between £600,000 and £700,000 was mentioned. But when in the following month Mr Midgley put forward a proposal on Hetty's behalf he calculated her "financial requirement" as £585,000 and said that it was more than Mary and Hetty had discussed. Second, he said that Mary told Hetty that she had not signed anything relating to the Landmark Trust. But she had already made a codicil to her will leaving Dunshay Manor to the Trust, and it is inconceivable that she had forgotten that. Third, he recorded Mary as having said that "it wouldn't affect her bequests since such support would only be to a small degree". He tried to explain in his oral evidence that the support he was referring to was support for the Landmark Trust. But this makes no sense, because the whole point of leaving Dunshay Manor to the Landmark Trust was to keep it intact, and Mary knew that it was her major asset. The sentence only makes sense if the small degree of support to which Mary referred was support for Hetty. I think that Mr Schmidt must have misunderstood what he thought he had heard.

58. Between 2003 and April 2006 Hetty engaged Ms Gail Parmigiani as a part time personal assistant. Her main task was to bring some order into Hetty's financial affairs in order to enable her to take control of her life. She sorted out the paperwork, paid the bills and so on. She said that throughout the time that she was employed by Hetty she was in regular contact with Mary. Hetty got her to make the calls to Mary because she felt uncomfortable about asking for money. Ms Parmigiani's perception was that conversations about money between Hetty and Mary "put a huge strain on their relationship". When Ms Parmigiani called Mary she was polite but straight talking. She wanted details of what it was that Hetty needed help with; and her typical response was that she "would see what she could do". In the event, however, Ms Parmigiani could not recall any occasion on which Mary refused to help. What is clear from the evidence is that the normal pattern was for a specific request to be made to Mary for financial help; and that Mary needed to be satisfied that help was really needed. Although she did not, in the event, refuse to help, she kept her options

open. In addition the fact that the requests for money put a "huge strain" on the relationship between Hetty and Mary does not suggest that Mary was a willing giver.

59. Mr Sherbrooke and Mary met on 19 December 2005. Part of the meeting is recorded in Mr Sherbrooke's attendance note, and part in a letter (referred to in the attendance note) that he wrote to Mr Henderson on the following day. Mary explained that she did want to give security of tenure to her tenants. She explained that her priorities were the Baynes family, Dunshay Manor and her tenants. Mr Sherbrooke commented that he did not know what the order of priority was as between the three. He pressed her to get on with a new will. Mary did not mention the meeting she had had with Hetty only a week earlier. She did not tell Mr Sherbrooke that she intended to make any substantial capital gift to Hetty. In his letter to Mr Henderson of 20 December Mr Sherbrooke said:

> "Now Mary has come to see me because with increasing age and less production of sculptures, her income is not enough for her needs, anyway when there is taken into account the assistance she has provided and wants to continue to provide to a semi-adopted family.
>
> Mary came to me with the idea of equity release. However, so that the house itself is free to go as she wants it to, on her death, Mary had the idea that merely the "stable block" on the south side of the pond, which has some residential accommodation in it, should be the subject of "equity release". I am against that idea, unless absolutely necessary. Quite apart from anything else it would "break up" the Dunshay Manor estate. Apart from the footprint of the stable block itself, what land if any would be provided with it? And whilst it may have some development potential, I don't think that the stable block, by itself, would raise very much."

60. I infer that this was in part prompted by her meeting with Hetty in the previous week, although Mary did not tell that to Mr Sherbrooke. What is clear from the way in which Mary approached the question of equity release was that her desire to help Hetty was not to jeopardise the bequest of at least the core of Dunshay Manor to the Landmark Trust. The indication that she was interested in equity release in relation only to the stable block also shows that she was not thinking of raising a large amount of money. The existence of this record of Mary's thinking is one of the reasons why Mr Schmidt's recollection must be wrong. It is also noticeable that her primary reason for wanting to go down the road of equity release, as given to Mr Sherbrooke, was that her own income was inadequate for her own needs. At Mr Sherbrooke's request Hendersons provided an update on Mary's financial position. They referred to the loans that Mary had taken from NatWest and to the fact that part of Mary's share portfolio was sold every year to meet the bank's repayment schedule. Mr Sherbrooke sent it on to Mary on 29 December under cover of a letter which he said would not make pleasant reading. Mary's liquid capital amounted to some £400,000 but her debts to the bank came to some £87,000. He pointed out that there was a shortfall between her outgoings and her income, and that the normal way to bridge this gap would be to realise capital. He continued:

> "When we (last) met, which of course was before I had Hendersons' letter, you had come with the idea of "equity release" as to the barn/building on the south side of the duck pond, you told me that the trust fund for Mrs Baynes will run out in a year. Apart from expressing doubt as to being able to raise much money on that barn, I replied that you would have to sell either some capital, or cottage and I asked if there was some piece of sculpture (or more) that was available to be sold…
>
> I see no alternative but to suggest the following sequence, at the slowest rate possible so as to [keep] CGT to a minimum – realising your capital, selling a cottage and then the second cottage, and if the worst comes which frankly is a function of longevity and infirmity, raising money on the security of Dunshay itself albeit what the Landmark Trust's reaction to being left a mortgaged property, I do not know. Should indeed shouldn't this be discussed with it?"

61. Once again Mr Sherbrooke's advice was predicated on a bequest of Dunshay (although this time minus the cottages) to the Landmark Trust.

62. Susie died of cancer on 29 December 2005. The family was distraught. Mary was very upset by Susie's death. She was with Margot in Kingston at the time. Mary and Lizzie cried together; and Mary told Lizzie how much she loved Susie and how much she loved Margot. Mrs Wooster (whose evidence I accept) thought that Susie's death changed something in Mary. The grief made her realise how much the Baynes family meant to her. At about this time, she also "opened up" to Mrs Wooster in a way that she had not previously done. She told Mrs Wooster that Hetty had been asking for money from her; that she was now asking for too much and that things had gone over the top. She had helped Hetty in the past but could not do much more, and that Hetty would now have to help herself. Mrs Wooster could not pinpoint a reason but thought that it was almost like Mary was being bullied; and that without actually saying so, that was what Mary was implying.

63. Mary and Mr Sherbrooke met again on Saturday 8 January 2006. In the meantime Mary had decided that, in principle, she wanted to help Hetty to some extent. Apart from the payments made to cover Hetty's mortgage, Mary had made a number of small payments to Hetty over the previous couple of weeks. The cash payments were £500 on 14 November; £50 on 5 December; £500 on 19 December; and £450 on 22 December 2005. I infer that these payments must have been made at Hetty's request, since that was the normal pattern. At some time in the New Year Hetty and Rex were staying with Mary. They were at Dunshay when Susie's funeral took place on 11 January 2006. The whole family attended (including Mary). But Rex was ill and so Hetty did not attend, but remained at Dunshay. They returned to London, however, on 14 January. During this period Mary made two further payments to Hetty: one of £800 of 13 January 2006 and the other of £500 on 17 January 2006.

64. Mary's annotations on Mr Sherbrooke's letter of 10 January 2006 make clear what her intention was at that time. She made the annotations on 14 January 2006 after Hetty and Rex had returned to London. Her first annotation read:

> "I need repaying for my "stop gap" payments of the last week or so. Details later this week."

65. These stop gap payments must have been those to which I have just referred; and Mary's annotation is a clear indication that the payments were regarded by her as loans. In his letter Mr Sherbrooke summarised the historic position based on what he had been told by Mary. He referred to the settlement that Mary had made for Margot's benefit; and to the fact that she had paid for a house in Richmond for the Baynes family. He said that the trust capital would run out in about a year's time. Mary annotated that with the comment "2 years". He said that:

> "Margot's son Nigel plans that when the trust is spent, the house will have to be resorted to – "equity release""

66. Mary annotated this: "or other – He will take responsibility for Margot".

67. Mr Sherbrooke's letter then turned to Hetty. It recorded that Mary wanted to help Hetty, to which Mary added "to wind up her debts". She annotated this part of the letter:

> "[Hetty] says if she can be freed from her debts she can maintain herself by her career and Russell maintains his son. I do <u>not</u> want her to feel she is supported by me or to feel that there is money for that purpose."

68. Mr Sherbrooke next dealt with the residue. He said:

> "At present, your Will provides for that capital balance to be Margot's for life with remainder over equally to her five children, namely Hetty and her siblings. However, any such benefit to Margot might incur an IHT liability on her death. Additionally, as she goes "downhill" and her house is expended, the State will step in. Therefore Margot is to be bypassed. Which brought us to whether what is left of your capital should, as now, be divided equally between Margot's five children. Your decision on Saturday morning was that, notwithstanding Hetty being one of five, and all that which you have previously provided to her, she being your goddaughter, she is to be the sole recipient of what is left of your capital."

69. At this stage, therefore, I find that Mary's intention was to help Hetty clear her debts and no more. She did not intend to make an immediate payment to buy a home for Hetty; nor to provide Hetty with any additional lump sum. In addition she expected to be repaid out of the maintenance claim for the stop gap payments she had recently made. She expressly rejected any responsibility for supporting Hetty. Her comments on Mr Sherbrooke's letter also show that she still wanted to leave Dunshay Manor to the Landmark Trust; and that she did not want the cottages to be sold off to pay for borrowing. She did not want to leave the cottages either to the Baynes family or to Hetty alone. Nor did she wish to assume responsibility for Margot's care. So far as the residue of her estate was concerned she wished to bypass Margot, and leave it all to Hetty. Mr Sherbrooke was to investigate the funding of equity release. The kind of

equity release he was to investigate was not an immediate lump sum drawdown, but a facility to borrow as and when borrowing was needed.

70. On 17 January Mary spoke to Mr Sherbrooke. His note records that he was to go ahead with exploring borrowing; that Mary had made a "stop gap payment" to Hetty; and that there was to be a hearing of Hetty's claim against Ken Russell at the end of the month.

71. At some time in January 2006 Ms Ratuszniak received a letter from Mary. She was concerned because the letter arrived in an envelope marked "urgent" which was unlike Mary. Mary said that she needed to sell some sculptures urgently. Ms Ratuszniak went straight over to see her. Mary was distressed. She told Ms Ratuszniak that Hetty and a solicitor had been talking about equity release to raise funds, and that Hetty had asked her to consider it; and she was concerned about that. Ms Ratuszniak asked her if that would endanger Dunshay; and Mary replied that if she did it (and she was not sure that she would) it could be covered in some way. She did not want to endanger Dunshay. Mary also said that she had helped Hetty in the past; that she felt she had done her duty by Hetty; that she was willing to help one more time, but now she had to stand on her own two feet; and that that was reflected in her will. Although Mary did not say, in so many words, that she was being put under pressure, that was the impression that Ms Ratuszniak had.

72. Mary had gone to Susie's funeral on 11 January. At some time in January (perhaps the same time) she made her last visit to Margot in Kingston. It was during this visit that she said to Nigel that she was damned if she was going to be told what to do with her money by Hetty.

73. By February Mary was 92 years old and her health was failing. Her legs were bad, and she found it difficult to get upstairs. Her neighbours fitted a temporary bedroom and toilet for her downstairs. The neighbours also organised a roster between them to provide Mary with one square meal a day, because they were concerned that she was not eating properly.

74. A meeting took place on 6 February 2006 attended by Hetty, Mary, Mr Sherbrooke and Mr Midgley. In preparation for the meeting Mr Midgley had prepared a summary of Hetty's "financial requirement". The total came to £585,000. This included £465,000 for the purchase of a three bedroomed house or flat; discharge of £75,000 debts; £20,000 for a "professional makeover", and £20,000 working capital. The major debts were:

EGG credit card	£14,000
Welcome Finance	£17,000
Barclays Bank loan	£17,000
Barclays Bank overdraft	£2,000
Debts to friends	£5,000
Household and other bills	£10,000
Total	**£65,000**

75. In his covering letter Mr Midgley commented:

> "I am aware that the total sum is more than the figure you were discussing with Hetty, but I believe that the way in which we have put the figures together will explain how I arrived at this figure."

76. At the meeting, which lasted for a couple of hours, a number of proposals were discussed. The meeting must have been a considerable strain for Mary, because Mr Midgley described her as becoming tired towards the end; quite slumped over, to the point where he wondered if she was falling asleep or indeed even listening. But she responded clearly whenever she was asked a question. Hetty felt encouraged by the meeting, because she thought things were moving in the direction in which she and Mary wanted them to go. But she did not say in her oral evidence that Mary had made any firm commitment. Hetty did, however, write an upbeat note to herself saying that it was "so fantastic" and that she felt she would be able to start again. The note also contained the remarkable comment:

> "It is so interesting that she is so fixed in her meanness and selfishness – but that's how she is I can't change that."

77. On the day after the meeting, Mr Sherbrooke wrote to Hetty's bank, at the request of Hetty and Mr Midgley and with Mary's agreement. In his letter Mr Sherbrooke said:

> "Miss Spencer Watson has agreed to bail out her goddaughter, Miss Baynes. Apart from Miss Spencer Watson having Dunshay, including its land and cottages, she has about £400,000 in securities. Because of CGT she wishes to avoid too fast a sale of those stocks and shares and instead will be borrowing on the security of Dunshay – in order to funds first a settlement of all Miss Baynes' existing debt as stated above of about £75,000 and secondly the purchase of alternative accommodation (particularly three bedrooms rather than two) with the thinking that her present accommodation will be let out."

78. This letter was designed as "comfort" for Hetty's bank. It went further than the meeting, because Mary had not "agreed" to Hetty's proposal in the sense of having committed herself to it. That was made clear in Mr Sherbrooke's summary of the meeting in his letter to Mary of 8 December 2006; which Mr Midgley confirmed was an accurate summary. Mr Sherbrooke ran though the sums that Mary had already made available to Hetty which came to £150,000. Mary annotated this part of the letter "cancel" which suggests that at this stage she was willing to write off the loans, thus converting them into gifts. He set out the figures that Mr Midgley had prepared and rounded them up to £600,000. In paragraph 10 of his letter he said:

> "The proposal is that you should give that to Hetty. And that should be raised on the security of Dunshay. In fact to repay the loans you have had from Natwest, your borrowing would be another £100,000 namely, in total, £700,000."

79. Mary struck through the figure of £700,000 with the comment "Too much for Landmark Trust!" Mr Sherbrooke was not in favour of the proposal which he described as being "to put it mildly, extreme". He said that Mary had "done her bit"

by the Baynes family, especially Hetty, and that it was for her now to secure what she wanted for Dunshay. Mary annotated that: "water under the bridge". During the course of the meeting he asked Mary what her priorities were and she replied that they were first Hetty, second Dunshay and third the two cottages. Mary annotated this part of the letter by saying that on reflection her priorities were first Hetty, second the cottages and third Dunshay. Mary was clearly concerned about the attitude of the Landmark Trust; because her annotation suggested a bargain with Landmark Trust to see what their bottom line was. However, she had also annotated that page of the letter "CHANGE OF PLAN by Landmark Trust". In paragraph 16 of his letter Mr Sherbrooke suggested two other possibilities, both of which Mary struck through. They were that Hetty could go bankrupt; and that Mary could do no more than pay her rent if she were to move. In paragraph 17 of his letter Mr Sherbrooke suggested a number of possibilities. One (against which Mary noted "the answer") was that after the Trust had Dunshay and Corfe Castle Charities had the cottages, the residue could settle a number of small legacies and leave a balance to be shared between Hetty and her siblings. Another (against which Mary noted "OK") was that Mr Midgley's proposal would leave nothing "after the Landmark Trust gets Dunshay and Corfe Castle Charities get the cottages, for anyone else than Hetty". One of Mr Sherbrooke's tasks was to find out what level of borrowing against Dunshay would be acceptable to the Landmark Trust. On the same day he wrote to Hendersons to keep them in the picture, and to see if there was anything he did not know; because his view was that Hetty's proposal was "completely mad".

80. Hetty was staying with Mary at Dunshay in mid-February. On 14 February she spoke to Mr Sherbrooke and made it clear that she was looking for an undertaking by Mary to the bank that Hetty would be receiving substantial funds. The letter of comfort was not enough. Hetty's own note of that date contains a draft form of undertaking that Hetty would be receiving £600,000 early inheritance in four to six weeks' time. Mary gave no such undertaking.

81. On 14 February 2006 Mr Sherbrooke spoke to Mr Drury of the Landmark Trust. Mr Drury told Mr Sherbrooke that the Trust "could not accept the property unless it were unencumbered, regardless of the size of the debt." He confirmed the Trust's position by e-mail. Mr Sherbrooke relayed this to Mary in his letter of 16 February 2006. Again Mary hoped that a bargain could be struck with the Trust. Mr Sherbrooke concluded his letter by saying:

> "I am sorry but I am beginning to reach the conclusion that there is a real choice to be made – helping Hetty to the degree she is apparently looking for OR securing Dunshay's future. I perceive there is a real conflict between those two objectives."

82. In a PS he referred to Hetty's request for an undertaking and expressed a wish to see Mary alone after Hetty had left. In a second letter of that date to Mary Mr Sherbrooke explained that he had bumped into Mr Henderson who had told him of the meeting in February 2003 at which Hetty had promised that she would not be back for any more assistance, which Mr Sherbrooke had not previously known about. He added:

> "Indeed Mr Henderson was asking whether Hetty's approach to me was on the basis that "going through" Mr Henderson would produce a refusal, and to avoid that she was trying a different tack.

> All of this reinforces that concluding paragraph on my other letter of today and the post-script thereto."

83. Mr Sherbrooke said in evidence that he felt uncomfortable about what was going on. It is plain, in my judgment, that he thought that Hetty was putting pressure on Mary to help her financially. On about 17 February Mr Sherbrooke spoke to Mary. She thanked him for his inquiries of the Landmark Trust. His note reads:

> "Looks as if Hetty must be cut back so that investments are necessarily enough that Dunshay is free of [mortgage]."

84. In his oral evidence he confirmed that this was Mary's instruction to him. At about this time Mary made notes about her will. The notes themselves are undated but the first paragraph refers to "the answer" being in Mr Sherbrooke's letter of 8 February; so they must have come into existence after Mary received that letter. Parts of the notes read:

> "Loans to settle debts must be settled by investments"
>
> "H has asked "get rid of my debts and I will get on with my life". ACTING – What has she TRAINED FOR"
>
> "CHANGE OF PLAN BECAUSE LANDMARK TRUST WILL NOT TAKE DUNSHAY WITH A DEBT BARGAIN?"

85. Mr Cooper spoke to Mary on 19 February 2006, and recorded the conversation in his diary. She spoke to him of her bequest to the Landmark Trust and asked him if he thought that she was doing the right thing. Mr Cooper said that there were three options. She could leave the estate to an individual, who would immediately sell it. Mary rejected that. She could leave it to Corfe Castle Charities who would divide it for affordable houses. That would have been Mr Cooper's own preference, but he knew that Mary would reject that option, and she did. The third option was to leave it to the Landmark Trust, which fulfilled all the conditions that she wanted. As far as Mr Cooper was concerned it was that option that Mary had decided on.

86. Mr Sherbrooke had another meeting with Mary on 20 February. Mary still wanted to help Hetty, but Mr Sherbrooke tried to explain the consequences to her. It would simply not be possible for Mary to do everything that she wanted to do. The Landmark Trust would not accept an encumbered gift, so Mr Sherbrooke explained that any borrowing would have to be repaid from the remainder of Mary's assets. He worked out that the most that she could afford to borrow, on the basis that interest would be rolled up, would be £250,000. It is fair to say, however, that in making that calculation he did not take into account the value of Mary's artworks. He recorded the upshot:

> "Her instructions are to prevent borrowings exceeding her investments – so that when she dies there is available for the Landmark Trust, Dunshay and for CCC the two cottages….
>
> And therefore explaining that there is no way in which she can buy a new house for [Hetty] and that, instead, the amount available would be, say, £250,000 maximum…

> Round and round in circles but I am to speak to [Hetty's] accountant as to the above."

87. In his evidence Mr Sherbrooke amplified his note. He said that Mary was racked with indecision between wanting to help Hetty but at the same time wanting the Landmark Trust to have Dunshay and for the tenants of the cottages to be safeguarded. These objectives were in conflict. She was reduced to asking Mr Sherbrooke to make the decision for her, which quite properly, he could not and would not. I accept Mr Sherbrooke's evidence.

88. According to Mary's note Hetty rang that evening. She was suggesting that Dunshay could be preserved by covenants. She rang at least three times during the following week, on each occasion putting forward the suggestion about covenants.

89. Mr Sherbrooke relayed the contents of his meeting with Mary to Mr Midgley on 21 February 2006. Mr Midgley made a note of what Mr Sherbrooke told him; and I accept it as accurate. The note reads:

> "At that meeting [i.e. the meeting between Mr Sherbrooke and Mary on 20 February] she had agreed that she does want to help Hetty solve her financial problems, but is not prepared to do so at the expense of risking the equity of either Dunshay or the cottages. He said that this meant that after allowing for the fact that interest will roll up, he was advising her that she should not borrow more than £250,000 to give as a gift to Hetty. This was because this, added to the existing loans with Natwest, would come close to the existing value of her portfolio of shares."

90. Mr Sherbrooke made a note of the conversation to similar effect. Mr Midgley relayed the contents of this call to Hetty. Hetty did not mention this at all in her written evidence, although she made a written note of the conversation. She attempted to explain in her oral evidence that this was because the situation was "fluid", but I found her explanation unconvincing. It is clear from her private journal that she was furious at what she saw was Mary's reneging on her promise. She wrote in her journal that Mary should grow up and honour her relationship with Margot and her parenting of Hetty and her siblings; and take responsibility. She described Mary's behaviour as "selfish + childish + cruel + abusive".

91. Mr Midgley pursued his inquiries about the possibility of a lifetime mortgage secured against Dunshay Manor. He was in contact with Jean MacIntyre of Argyll Financial Group. As a result of those inquiries an appointment was made for him, Hetty and Ms MacIntyre to see Mary at Dunshay Manor to discuss further ways of raising capital so that Mary could help Hetty. It was not proposed that Mr Sherbrooke should attend that meeting. Instead, Mr Cuppage, a partner in Campbell Hooper, a solicitor chosen by Hetty and whom Mary had not previously met, would attend. This meeting never took place. It was first arranged tentatively. In her journal Hetty complained that Mr Midgley had set up a meeting with a mortgage broker but that Mary had "tried to get out of it". An appointment was eventually made for 7 March 2006. But the meeting was postponed because Mary had been taken into hospital and in fact she died on that day.

92. Ms Harvey was with Mary in hospital very shortly before she died. Her evidence was unchallenged. She said that while she was sitting with Mary, Mary took off her oxygen mask, and said:

> "I can't be doing with this, I've got to get up. I've an important meeting this morning, I have to make sure Hetty is settled, looked after, that she has what she needs from the estate. I've got to get it sorted."

93. Ms Graham calmed her and she drifted off to sleep. She died shortly afterwards.

The estate

94. The principal asset of the estate is Dunshay Manor and its surrounding land. As well as the principal dwelling house, the Manor also includes a large and dilapidated barn, two cottages and some grazing land and woodland. The two cottages are occupied probably on assured shorthold tenancies. The remainder of the Manor is vacant. It was valued for probate in two lots. The Manor, the barn and the land were valued at £1,950,000 and the two cottages at £430,000, making a total of £2,380,000. A more recent valuation by Mr Mark Lanyon FRICS of Knight Frank values the entirety at £2,000,000. Mr Lanyon's view is that the Manor essentially consists of five components or lots:

    i) The principal dwelling house, the barn and land extending to 38.85 acres;

    ii) The field known as Moreton's field, extending to 6.33 acres;

    iii) No 1 Dunshay Cottages and its garden;

    iv) No 2 Dunshay Cottages and its garden, and

    v) A field, strip of land and shed to the north of Dunshay Cottages extending to 2.31 acres.

95. It would be possible to sell some of the land in the first lot separately from the remainder. But Mr Lanyon warns that if that is done then the diminution in value of the remainder of that lot might well be greater than the amount realised on the sale.

96. So far as the values of the component parts is concerned, Mr Lanyon's view is that the grazing land has an aggregate value of £319,000 made up as follows:

    i) Moreton's Field: £70,000

    ii) Paddock: £25,000

    iii) 6.33 acres of grazing land: £76,000

    iv) 16.42 acres of grazing land: £148,000.

97. He considers that the value of the two cottages as they stand is £495,000 although that value would rise to £565,000 if vacant possession were to be obtained.

98. In addition to Dunshay Manor the estate at Mary Spencer Watson's death included:

i) Business assets (mostly sculpting tools): £23,660

ii) Investments and bank accounts: £438,090

iii) Chattels: £90,625.

99. There were liabilities of £124,500. These included the balance of the borrowings that Mary had made in order to help Hetty. Because the major bequest (i.e. the Dunshay Manor estate) was a bequest to a charity, it was exempt from inheritance tax. After taking into account a number of lifetime gifts that Mary made to Hetty (totalling £171,432) which reduced the nil rate band, there was an inheritance tax liability of £80,876.40. If the whole or part of Dunshay Manor has to be sold in order to fund a payment to Hetty or to Margot, the charitable exemption will be lost or diminished; and the liability to inheritance tax will rise. It is possible, however, that some of the land will attract agricultural property relief.

100. Since Mary's death some expenses have been paid. These include utility bills payable for Dunshay Manor (amounting to some £15,000). There have been legal fees (excluding the costs of this litigation) amounting to some £35,000.

Construction or rectification of the will

101. Logically, the meaning and effect of the will must be decided first; because until that has been done, it is not possible to form a view on whether the will makes reasonable financial provision for Margot. It is common ground that, whatever the will says, inheritance tax must be discharged out of residue, because of the effect of section 41 of the Inheritance Tax Act 1984. However, the dispute affects the incidence of liability for debts existing at Mary's death and the expenses of administration.

102. The point arises because of the combination of clause 6 of the original will and clause 2 of the second codicil. Clause 5 (1) of the original will had left to the Artists' General Benevolent Institution:

> "so much of my land and premises situate at and known as The Dunshay Manor Estate as is not required for the payment of the debts funeral and testamentary expenses legacies capital transfer tax and other death duties interest and costs pursuant to clause 6 hereof"

103. Clause 6 began:

> "I GIVE all the residue of my estate to my Trustees Upon Trust to sell call in and convert into money as much of The Dunshay Manor Estate as is required for the payment of the debts funeral and testamentary expenses legacies capital transfer tax and other death duties interest and costs directed to be paid by this clause … and to hold the net proceeds of such sale calling in and conversion and the part of The Dunshay Manor Estate so required for the time being remaining unconverted Upon Trust to pay thereout my funeral and testamentary expenses my debts any legacies given by this Will or any Codicil hereto and all capital transfer tax … and subject thereto to hold the residue of my estate UPON TRUST for [Margot] absolutely"

104. Clause 2 of the second codicil deleted clause 5 (1) of the original will and substituted:

> "I give to the Landmark Trust … the Dunshay Manor Estate…"

105. The point of dispute is whether (as Miss Campbell submits, supported by Mr Slater) the gift of the Dunshay Manor Estate is charged with the payment of debts and expenses etc (apart from inheritance tax) or whether, as Mr Terry submits, the gift of The Dunshay Manor Estate is an absolute gift, so that the debts etc must be paid out of residue.

106. In *Charles v Barzey* [2003] 1 WLR 437 Lord Hoffmann, writing for the Privy Council, said:

> "The interpretation of a will is in principle no different from that of any other communication. The question is what a reasonable person, possessed of all the background knowledge which the testatrix might reasonably have been expected to have, would have understood the testatrix to have meant by the words which she used."

107. So my first task is to interpret the will, using the ordinary techniques of interpretation. The will, as amended by the codicil begins with what is, on the face of it, an absolute gift of the Dunshay Manor Estate to the Landmark Trust. It then continues in clause 6 by giving the residue of the estate to the will trustees. This must mean the remainder of the estate apart from the Dunshay Manor Estate (and the specific pecuniary legacies). The will trustees are required by clause 6 to hold the residue and so much of the Dunshay Manor Estate as is "required" for payment of debts etc for that purpose. In my judgment if the residue (in its ordinary sense) is sufficient to pay the debts etc, then no part of the Dunshay Manor Estate is "required" for that purpose. If, on the other hand, the residue is insufficient for that purpose, then part of the Dunshay Manor Estate may be required. This is a partial adaptation of the general principle that a specific gift abates if there is insufficient residue to pay the debts etc. The general principle is that if there is insufficient residue to pay the debts etc, then specific gifts abate rateably *inter se*. What this will does is to change that general principle, so that the gift of the Dunshay Manor Estate abates in priority to any other specific legacy. Thus read, in my judgment there is no ambiguity in the will, as amended by the codicil. Debts etc are payable out of residue.

108. Mr Terry also relied on the principle summarised in Williams on Wills (9th ed) para 52.8:

> "… if there is a clear, unambiguous gift, and a subsequent clause, in terms applying to this gift, or to this and other gifts, and as so applied inconsistent with the intention, taken as a whole, the subsequent gift is neglected, or applied only to other gifts with which it is not inconsistent."

109. In my judgment that principle dispels any possible ambiguity in the will, as amended by the codicil. The gift contained in clause 2 of the codicil is a clear unambiguous gift. The only possible doubt is introduced by clause 6 of the original will which applies both to the Dunshay Manor estate and to the residue. If applied so as to make the gift of the Dunshay Manor estate subject to the payment of debts etc that would, in

my judgment, be inconsistent with the intention taken as a whole. If that is wrong, and there is a remaining ambiguity, then under section 21 of the Administration of Justice Act 1982 evidence of the testator's intention may be admitted.

110. Mary executed the codicil on 29 October 2002. It seems to me that it is her intention at that date which counts, rather than her intention or understanding at some later time. By 29 October Mary had been in touch with the Landmark Trust. Mr Drury, the chairman of the trustees had written to her on 1 October 2002, noting that Mary's intention in bequeathing Dunshay to the Landmark Trust was "to ensure that the estate assembled by your parents was kept intact." I place little weight on her note of 20 October 2002 which contemplated a gift of residue "free of estate duty". As indicated, that would not have been legally possible if it was intended that the inheritance tax would be borne out of the gift to the Landmark Trust, and it may well be that Mr Sherbrooke explained that to her. At all events on 24 October 2002 Mr Sherbrooke's letter to Mary commented on clause 2 of the codicil saying that the Dunshay Manor estate, as defined was to be left to the Landmark Trust. Mary's annotation on that part of the letter dealing with residue "(less 40%...)" indicates that she thought (correctly) that inheritance tax would be paid out of the residue. If her note of 20 October indicated that the gift of residue would be free of tax, by 24 October (or shortly afterwards) she had changed her mind. Since one of the purposes of bequeathing the Dunshay Manor Estate to the Landmark Trust was to keep it intact, it would be inconsistent to attribute to Mary an intention that part of it should be sold to pay off her debts etc. To the extent that it admissible, the evidence of Mary's contemporaneous intention supports the construction I have reached.

111. The question of rectification does not therefore arise.

112. In the course of her final address Miss Campbell drew my attention to *Re Rooke* [1933] Ch 970 in support of the proposition that the utility bills payable for Dunshay Manor ought to be borne by the Landmark Trust rather than paid out of residue. The case appears to support that proposition. However, the point was neither raised on the pleadings, nor in the skeleton arguments. The case itself was only produced after Mr Terry had concluded his address. In those circumstances I will not decide the point. I hope that liability for these payments can be agreed.

The legal framework

Locus standi

113. The categories of persons who are entitled to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 are specified in section 1. They include:

> "[a person who] during the whole of the period of two years ending immediately before the date when the deceased died, … was living—
>
> (a) in the same household as the deceased, and
>
> (b) as the husband or wife of the deceased" (section 1 (1A))

> "a person if for the whole of the period of two years ending immediately before the date when the deceased died the person was living—
>
> (a) in the same household as the deceased, and
>
> (b) as the civil partner of the deceased" (section 1(1B))
>
> "any person … who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased" (section 1 (1) (e))

114. For these purposes, a person is:

> "treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person" (section 1 (3))

115. The amendments relating to civil partners took effect on 5 December 2005, less than two years before Mary's death.

116. Margot puts her claim in two ways. First, she says that she was living in the same household as Mary and as her civil partner during the whole of the two years preceding Mary's death. Second, she says that she was wholly or partly maintained by Mary immediately before her death. Hetty bases her claim on the assertion that she was wholly or partly maintained by Mary immediately before Mary's death.

Living together in the same household as civil partners

117. There is some learning on the question whether two people are living in the same household. In *Churchill v Roach* [2003] WTLR 779 HH Judge Norris QC said:

> "It is, of course, dangerous to try and define what 'living in the same household' means. It seems to me to have elements of permanence, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources. None of these factors of itself is sufficient, but each may provide an indicator. If I adopt that approach in relation to what was happening between Muriel and Arnold in the seven months preceding December 1998, I would reach the conclusion that they were essentially maintaining two separate households. I do not regard it as fatal that two separate properties were involved: Shakespeare Avenue and 7 Ferry Lane. It is perfectly possible to have one household and two properties. But what does seem to me to be the case is that there were two separate establishments with two separate domestic economies. There was, of course, a degree of sharing when the two met at

> weekends and some of those weekends were long. But that does not mean that they lived in one household."

118. The Act also requires that the two persons in question lived in the same household for the whole of the two years immediately preceding the death. Thus it is not enough to establish that they did so at some more remote time. In *Gully v Dix* [2004] 1 WLR 1399 Mrs Gully and Mr Dix had lived together since 1974. There relationship was a difficult one. Mrs Gully left in August 2001 because of Mr Dix's abusive behaviour, and Mr Dix died some two months later. However, their relationship had not ended, and Mrs Gully would have gone back to Mr Dix. Mrs Gully was held to have been living in the same household as Mr Dix for the whole of the requisite two year period, even though she was physically absent from their home when he died. The trial judge held that:

> "the reference …to the whole of the period of two years ending immediately before the date when the deceased died, does not require the court to confine its attention solely to that period. The court's duty is to look at that period and, if necessary, the preceding period, to discover what the established relationship between the parties was. If that relationship has come to an end, then of course the applicant will not satisfy the test during the whole of the relevant period. If, however, the relationship was merely suspended during the onset of the death, then the applicant can, in my judgment, satisfy the test by showing what was the norm within a two-year period."

119. That was approved in terms by the Court of Appeal. Ward LJ said that two people:

> "… will be in the same household if they are tied by their relationship. The tie of that relationship may be made manifest by various elements, not simply their living under the same roof, but the public and private acknowledgment of their mutual society, and the mutual protection and support that binds them together. In former days one would possibly say one should look at the whole *consortium vitae*. For present purposes it is sufficient to ask whether either has demonstrated a settled acceptance or recognition that the relationship is in truth at an end. If the circumstances show an irretrievable breakdown of the relationship, then they no longer live in the same household and the Act is not satisfied. If, however, the interruption is transitory, serving as a pause for reflection about the future of a relationship going through difficult times but still recognised to be subsisting, then they will be living in the same household and the claim will lie. Just as the arrangements for maintenance may fluctuate, … so the steadfastness of a commitment to live together may wax and wane, but so long as it is not extinguished, it survives. These notions are succinctly encapsulated in the judge's test, which was to ask whether the relationship was merely suspended, and I see no error in his approach."

120. In *Kotke v Saffarini* [2005] 2 FLR 878 the question was whether the claimant was entitled to bring a claim under the Fatal Accidents Act 1976 as a person living with the deceased in the same household as husband and wife. Potter LJ, giving the judgment of the Court of Appeal said:

> "[33] …we have derived some assistance from *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 and *Kimber v Kimber* [2000] 1 FLR 383. In the former case, Woolf J was concerned with the question whether a man and woman were 'living together as husband and wife' for the purposes of para 3(1)(b) of Sch 1 to the Supplementary Benefits Act 1976.
>
> **[**34**]** He commended as 'admirable signposts' the criteria set out in the supplementary benefits handbook then issued for the guidance of claimants. He said:
>
> 'They are: whether they are members of the same household; then there is a reference to stability; then there is a question of financial support; then there is the question of sexual relationship; the question of children; and public acknowledgement.'
>
> **[**35**]** In *Kimber v Kimber* Judge Tyrer referred to those six factors and, in relation to the first helpfully observed: 'Generally this means that the parties live under the same roof, illness, holidays, work and other periodical absences apart.'
>
> **[**36**]** Whereas in the context of supplementary benefits, the six factors identified were separately stated, it seems to us that in any case where it falls to be decided whether two people are living together as husband or wife *in the same household*, factors 2–5 equally fall to be considered in relation to the question whether a household itself exists."

121. Statements of general principle such as this must of course be read in the light of the facts of the case. Human relationships are many and various and it is perfectly possible that two people have a long-term, loving and intimate relationship without ever living in the same household; or, having once lived in the same household, decide to live in separate households, while continuing the relationship. In deciding whether two people have lived together in the same household during the whole of the requisite two year period the court's gaze is not confined to that two year period, in so far as previous events explain what was happening within that period. Nor, if two people are living in the same household will they necessarily stop doing so merely because they are temporarily physically separated. In the end, it seems to me that the question whether two people live together in the same household is essentially one of fact.

122. In addition to establishing that she lived with Mary in the same household for the whole of the two year period, Margot must also establish that she did so as Mary's civil partner. The Civil Partnership Act 2004 came into force on 5 December 2005, less than two years before Mary's death. A true civil partnership cannot come into existence without registration: Civil Partnership Act 2004 s. 1. Registration entails

signing a civil partnership document in the presence of a civil partnership registrar and two witnesses (Civil Partnership Act 2004 s. 2) before which the proposed civil partnership must have been notified to the registration authority (Civil Partnership Act s. 8) and publicised (Civil Partnership Act 2004 s. 10). It is difficult to see how two people could live as civil partners before the concept was invented. Miss Campbell submitted that section 1 (1B) of the 1975 Act, which was introduced by amendment, did not, unlike section 1 (1A), restrict its application to deaths after any particular date. This may be right, but I do not have to decide that. Any difficulty in this respect is capable of being overcome by reading the phrase "as husband and wife" in section 1 (1A) as covering same-sex relationships, as the House of Lords did in *Ghaidan v Godin-Mendoza* [2004] AC 557, and as Master Bowles did in *Saunders v Garrett* [2005] WTLR 749.

123. In *Southern Housing Group Ltd v Nutting* [2005] 2 P & CR 14 the question was whether the survivor of a same-sex relationship was entitled to succeed to a tenancy. The statute allowed succession by a person living with the tenant as his or her wife or husband; but it was common ground that in the light of *Ghaidan v Godin-Mendoza* the same rights were conferred on the survivor of a same-sex relationship which was sufficiently like that of husband and wife. The recorder said that there were a number of indicia which lead to an affirmative answer to the question whether two people were in a relationship of the necessary quality. They were:

> "(a) Have the parties openly set up home together?
>
> (b) Is the relationship an emotional one of mutual lifetime commitment rather than simply one of convenience, friendship, companionship or the living together of lovers?
>
> (c) Is the relationship one which has been presented to the outside world openly and unequivocally so that society considers it to be of permanent intent—the words 'till death us do part" being apposite?
>
> (d) Do the parties have a common life together, both domestically (in relation to the household) and externally (in relation to family and friends)?"

124. On appeal, Evans-Lombe J commented on those indicia as follows:

> "Having regard to the authorities it does not seem to me, with respect, that the fact that question (a) can be answered in the affirmative is indicative of a "spousal" relationship. That answer could have been given in relation to students sharing lodgings. The recorder himself did not treat an affirmative answer to question (d) as being so indicative. I agree with him. Without a lifetime commitment at least at some point in the relationship there is no sufficient similarity to marriage. There are many ways in which a marriage relationship can be described but it seems to me that the test prescribed by the recorder at paragraph (b) subject to the qualification in paragraph (c), that the relationship must be openly and

> unequivocally displayed to the outside world, is an entirely adequate test and one which is consistent with the authorities."

125. Given that both a marriage and a civil partnership are publicly acknowledged relationships, I respectfully agree that the qualification in paragraph (c) is essential.

Maintained by the deceased

126. In the case of a claim which, by virtue of the Act, is limited to a claim for "maintenance", section 3 (4) provides that:

> "the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility."

127. Strictly speaking the matters referred to in section 3 (4) must be considered when the court comes to the question whether the will makes reasonable provision for the applicant, rather than at the stage when the court is considering whether the applicant is entitled to ask the court to answer that question at all. However, in *Re Beaumont* [1980] Ch 444 Megarry V-C accepted the argument that section 3 (4):

> "makes it plain that an essential of a claim under section 1 (1) (*e*) is that the deceased should have assumed responsibility for the maintenance of the applicant, and if the applicant could not establish this, his claim was bound to fail."

128. This conclusion was accepted by the Court of Appeal in *Jelley v Iliffe* [1981] Fam 128. However, the Court of Appeal did not agree that the assumption of responsibility had to be express. Stephenson LJ said:

> "But how better or more clearly can one take on or discharge responsibility for maintenance than by actually maintaining? A man may say he is going to support another and not do it, promise to pay school fees but not pay; but if he does pay them, has he not both assumed and discharged responsibility for them whether or not he covenants to pay them? Surely A shoulders the burden of supporting B by supporting him. If B is A's mistress and he maintains her by providing her with accommodation or money or both, has he not assumed or taken on responsibility for her maintenance? If it be said, as Mr. Butterfield submitted, that he has a moral obligation which makes the assumption of responsibility easier to presume, is the presumption nevertheless not to be made where provision of a share in a home and/or financial support is made out of the donor's generosity of heart to a poor relation or friend? It may be that the presumption can be rebutted by circumstances including a disclaimer of any intention to maintain. But here there is, in my judgment, a distinction to be drawn between an intention to maintain during the lifetime of the giver who has

> something to offer and an intention to provide continuing support after death. …If it is necessary, or relevant, to prove an intention on the part of the deceased to maintain a dependant, qualified to apply under section 1 (1) (*e*), after the deceased's death, the only cases in which there will be the required qualification will be those where the deceased's intention has been defeated by accident, e.g., by his dying intestate and leaving children or having made an invalid will in the dependant's favour.
>
> I do not read the Act as expressing so limited a legislative intention. Its object is surely to remedy, wherever reasonably possible, the injustice of one, who has been put by a deceased person in a position of dependency upon him, being deprived of any financial support, either by accident or by design of the deceased, after his death. To leave a dependant, to whom no legal or moral obligation is owed, unprovided for after death may not entitle the dependant to much, or indeed any, financial provision in all the circumstances, but he is not disentitled from applying for such provision if he can prove that the deceased by his conduct made him dependent upon the deceased for maintenance, whether intentionally or not."

129. Griffiths LJ said:

> "Section 1 (1) (e) appears to me to be aimed at giving relief to persons where the relationship to the deceased is such that it is highly unlikely that any formal arrangements will have been made between them. Obvious examples are the elderly but impoverished relative or friend who is taken into the deceased's household and given free board and lodging and treated as a member of the family or a man living with a woman out of wedlock but supporting her as he would a wife. In such circumstances I would not as a general rule expect to find any formal declaration of assumption of responsibility, but it cannot have been the intention that such cases should fail for want of some such formality. I read "assumed responsibility for" as being equivalent to "has undertaken" and not adding much to the fact of maintenance. …It is of course possible to envisage situations in which a deceased was making regular payments to some person's support while at the same time making it quite clear that the recipient could not count on their continuing. But I regard such a situation as likely to be the exception rather than the rule."

130. Accordingly, the actual discharge of the burden of maintaining someone raises a presumption that the person discharging that burden has assumed responsibility for doing so; but that presumption can be rebutted. One way of rebutting it is by disclaimer, particularly if the disclaimer is made clear to the person who is being maintained. Where it is made clear to the person being maintained that the maintenance will only continue for a limited period, that would prevent any assumption of responsibility from continuing beyond the expiry of that period.

131. The claimant must be a person who was being maintained by the deceased "immediately" before the death. The word "immediately" has also been the subject of judicial consideration. In *Jelley v Iliffe* the Court of Appeal approved observations of Megarry V-C in *Re Beaumont*. Stephenson LJ said:

> "In considering whether a person is being maintained "immediately before the death of the deceased" it is the settled basis or general arrangement between the parties as regards maintenance during the lifetime of the deceased which has to be looked at, not the actual, perhaps fluctuating, variation of it which exists immediately before his or her death. It is, I think, not disputed that a relationship of dependence which has persisted for years will not be defeated by its termination during a few weeks of mortal sickness."

132. Griffiths LJ said:

> "The words "immediately before the death of the deceased" in section 1 (1) (e) cannot be construed literally as applying to the de facto situation at death but refer to the general arrangements for maintenance subsisting at the time of death. So that if for example the deceased had been making regular payments to the support of an old friend the claim would not be defeated if those payments ceased during a terminal illness because the deceased was too ill to make them."

133. Part of the reasoning of Megarry V-C which was expressly approved by the Court of Appeal included this:

> "The word "immediately" plainly confines the court to the basis or arrangement subsisting at the moment before death, and excludes whatever previously subsisted but has ended, and the state of affairs under it."

134. If, therefore, Mary in fact maintained Margot or Hetty immediately before her death (in the extended sense of "immediately"), there is a presumption that she assumed responsibility for it; but the presumption may be rebutted by other evidence. Arrangements that have come to an end do not count as such maintenance.

135. In addition to considering whether Mary assumed responsibility for maintenance of either Margot or Hetty, I must also have regard to both the extent of the assumption of responsibility and the basis on which responsibility was assumed.

Whether the will makes reasonable provision

136. As Oliver J pointed out in *Re Coventry* [1980] Ch 461:

> "Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my

> judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant - and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position."

137. When the case reached the Court of Appeal that court affirmed the proposition that the question is not whether it might have been reasonable for the deceased to assist the claimant, but whether in all the circumstances, looked at objectively, it is unreasonable that the effective provisions governing the estate did not do so.

138. There are therefore two questions to be decided:

i) Looked at objectively did the will fail to make reasonable provision for the claimant's maintenance in all the circumstances of the case; and

ii) If so, to what extent (if at all) should the court exercise its powers under the Act?

139. The first question is a value judgment. The second question is a question of discretion: *Re Coventry* [1980] Ch 461; *Espinosa v Bourke* [1999] 1 FLR 747. In deciding both the question whether a will failed to make reasonable financial provision for an applicant and also the question (if it did) whether and how to exercise its extensive powers under section 2, section 3 of the Act requires the court to have regard to the following:

> "(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
>
> (b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;
>
> (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
>
> (d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;
>
> (e) the size and nature of the net estate of the deceased;

> (f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;
>
> (g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant."

140. Section 3 (5) provides that in considering the matters to which the court is required to have regard, the court must take into account the facts as known to the court at the date of the hearing.

141. In the case of the claims by both Margot and Hetty, the extent of the claim is limited to the question whether the will makes

> "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance."

142. The concept of "maintenance" is no doubt a broad one, but it has limits. In *Re Dennis* [1981] 2 All ER 140 Browne-Wilkinson J said:

> "The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach. But in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him *pro tanto* of income expenditure. Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable him to continue to carry on a profit-making business or profession may well be for his maintenance."

143. On the facts of that case Browne-Wilkinson J held that the payment of the applicant's debts was not for his maintenance, because there was nothing to suggest that payment of those debts would do anything to help his future maintenance.

144. In *Re Abram(deceased)* [1996] 2 FLR 379 HH Judge Cooke also considered the question of payment of debts. He said:

> "I cannot see on the authorities how the provision of funds to pay off creditors, without more, can be said to be proper provision for maintenance. The argument might be raised that he can only maintain himself once he has paid off his creditors.

> But there is a fallacy in that because if a man goes bankrupt the creditors get the estate as it stands but he can still be maintained by subsequent earnings/entitlements. I think the payment off of debts can only really be justified in the way in which it was put (and there very much in passing and without considering argument) in *Dennis*, i.e. that by paying off the debts it would enable an applicant to establish himself in business. I think, however, if one was going to go down that road one would need very clear evidence of what it was hoped to achieve and the degree of maintenance that would ultimately be produced."

145. There are two cases to which my attention has been drawn in which a claimant's debts have been paid by an award. In *Espinosa v Bourke* the claimant had bought a business with the aid of a loan secured by a mortgage. Having referred with approval to *Re Dennis*, the Court of Appeal took the view that an award of a lump sum was appropriate. Butler-Sloss LJ explained the rationale:

> "In my judgment the best way to provide for the future maintenance of this appellant is to relieve her of the debts on her business and *thereby to enable her to derive an income from it to support her for the future*." (Emphasis added)

146. In *Re Myers* [2005] WTLR 851 Munby J made an award part of which was to pay off debts incurred by the claimant. However, these were debts for living expenses incurred after the date of death of the deceased; and Munby J excluded from his award any sum towards her debts incurred before the date of death. Although Munby J quoted from *Re Dennis* in his examination of the law, it does not appear to have been argued that the payment of debts was not maintenance. But in any event, since the debts in relation to which the award was made were debts incurred after the date of death of the deceased, I do not regard *Re Myers* as inconsistent with the earlier authorities.

147. The conclusion that I reach is that a sum awarded to pay a claimant's debts will not fall within the concept of "maintenance" unless the payment of those debts enables the claimant to derive a future income which he or she could not do if the debts remain unpaid; or the debts represent living expenses incurred since the date of death of the deceased.

148. When the court is considering the obligations and responsibilities that the deceased had the relevant obligations and responsibilities are obligations and responsibilities which the deceased had immediately before his death. An Act intended to facilitate the making of reasonable financial provision cannot have been intended to revive defunct obligations and responsibilities as a basis for making it: *Re Jennings* [1994] Ch 286. Likewise, in my judgment, if the deceased had discharged such obligations as he had towards a claimant during his or her lifetime, there will be no subsisting obligations at the date of death.

Did Margot and Mary live in the same household as civil partners?

149. There can, in my judgment, be no question but that Margot's main residence was in Kingston; and Mary's was at Dunshay Manor. This was the state of affairs that had prevailed since the late 1970s. It was, therefore, the settled pattern. It was not a

temporary situation. Mary herself regarded Oak Tree Cottage as Margot's home, rather than their joint home or one of their joint homes. This is made plain not only by her letter to Lizzie of September 2003 in which she refers explicitly to the "smooth running of Margot's … household", but also, tellingly, by the card that she wrote to Margot in October 2004 asking for permission to come and "stay". The language in which that card is couched does not suggest one who was going to her own (or a joint) household. It is equally plain that Mary regarded Dunshay as her home and not as the (or a) joint home of her and Margot. There is, for example, no evidence that she consulted Margot about the gift of Dunshay to the Landmark Trust, even though she had made her decision before Margot's health deteriorated in 2003; nor about what (if any) conditions should be attached to the gift. In addition her original will executed in 1977 left Dunshay unconditionally to charity. This is not consistent with Dunshay being the (or a) joint home of Margot or Mary. They did not in any real sense live under the same roof. They were physically together for one weekend in two and for an occasional longer period; but for the last twenty years or more, not for longer than two weeks. Mrs Biddulph, who knew Mary well and saw her every day over the summer of 2005, described her as "incredibly lonely", which does not suggest two people living together. Those who knew them best spoke of Mary going to "stay" with or "visit" Margot and vice versa. That, in my judgment, was the reality. They each had their own home. Moreover, for the last two years of Mary's life (which is the period that the Act requires me to concentrate on) Margot had to have twenty four hour care, which made it virtually impossible for her to go to Dunshay. She did not in fact go to Dunshay after 2003. Her domestic economy was managed by Nigel. However, there is no doubt that the centre of Mary's life was Dunshay. That was her household and I do not consider that it can be said that for the last two years of her life, Margot lived in that household. Nor do I consider that it can be said that Mary lived in Margot's household. She was, in my judgment, no more than a visitor. To borrow HH Judge Norris' phrase, there were two separate establishments and two separate domestic economies.

150. Accordingly, whether or not it can be said that Mary and Margot lived as civil partners, I hold that Margot's claim under section 1 (1B) fails. But in any event the true nature of the relationship between Margot and Mary was unacknowledged and, indeed, hidden. Some close members of the family knew of their relationship and other people guessed. But there were many people, including people who knew Mary well, who had no inkling. It seems to me that it not possible to establish that two persons have lived together as civil partners unless their relationship as a couple is an acknowledged one. Indeed it may be that an acknowledgement of the relationship is also an ingredient of living in the same household, which would only reinforce my conclusion that Mary and Margot did not live in the same household during the last two years of Mary's life.

Was Margot being maintained by Mary immediately before Mary's death?

151. The next question is whether Margot was being wholly or partly maintained by Mary immediately before Mary's death. Mr Nigel Baynes compiled a spreadsheet designed to show the sources of Margot's income in the years from 1996/97 to 2007/08. She was receiving an income from the 1972 settlement of between £2,000 and £3,000 a year until 2003/4. That income diminished considerably in that year when capital funds were made available from the trust fund instead. According to that spreadsheet Mary was paying for home help at the rate of some £4,500 a year and grocery bills (paid by Barclaycard) at the rate of some £3,000 to £3,500 a year. Both payments

stopped in the year 2003/4 when part of the capital of the trust fund was released. This I infer was shortly after the family meeting in August 2003 after which it was decided that Margot's care should be met from the capital of the trust fund; and at Lawrence Graham's request Mary agreed to the release of capital. Since then the only significant payments alleged to have been made by Mary consisted of paying for a tree surgeon in 2004/5 (£1,350) and some work on Oak Tree Cottage (£250). It was also suggested that Mary paid approximately £50 in cash every month. This, I think, would have done little more than contribute towards the costs of Mary's own visits. Margot's remaining maintenance (including the cost of her care) was met out of the capital of the trust fund. She pays one third of the cost of the care package: the remaining two thirds is paid by the local authority and primary care trust.

152. The payment of the tree surgeon's bill was plainly a "one off" expense and in my judgment does not count as maintenance at all. Once capital of the trust fund took over, Mary's cash contribution of £600 per annum to Margot's total income of between £18,300 (2004/4) and £15,800 (2004/5) was, at its highest, no more than 4 per cent. Indeed the reality is that two thirds of the cost of Margot's care is met by the local authority. So well over half of the cost of Margot's maintenance is being paid for out of public funds. Of the total cost of Margot's maintenance (including her care) Mary's contribution was less than 2 per cent. But as I have said, in any event the cash contribution can have done little more than cover the cost of Mary's own visits. I cannot regard these contributions as being "substantial".

153. Miss Campbell argued that the fact that Margot lived in a house which had been bought with money provided by Mary and that substantial payments were made to her by way of advancement from the 1972 settlement both counted for the purposes of the 1975 Act as being maintained by Mary immediately before her death.

154. The Act requires the claimant to establish that the deceased "was making" a contribution immediately before death. The contribution may be in money or money's worth. The phrase is in the imperfect tense which suggests a continuing or uncompleted action. In my judgment a contribution in money is made when the money is put into the hands of the donee; and a contribution in money's worth (which will usually be the provision of accommodation or the rendering of services or a gift of property) is made when the accommodation is provided, or the services are rendered or the property is given. In the case of accommodation I accept that there may be a continuous provision, as where someone is allowed to live in the deceased's house under a licence, or at a concessionary rent. In such a case the asset itself (i.e. the house) remains an asset of the deceased. But I do not accept the proposition that a one-off outright gift of a house made nearly thirty years earlier can be said to amount to maintenance immediately before death, even if the donee continues to live in the house. That contribution was made when the gift was made. On the making of the gift the house became Margot's house. It was her asset. She could have sold it and used the proceeds for whatever she wanted, or she could have continued to live in it. In fact Margot did not continue to live in the house, but sold it and bought another one in the early 1990s. I do not consider that the 1975 Act contemplates the sort of tracing exercise that would be required in order to sustain Miss Campbell's argument.

155. So far as the trust fund is concerned, once the money passed into the settlement, it ceased to be Mary's money. The fact that Mary was one of the trustees does not alter that. In her capacity as trustee she was a party to the exercise of powers of

advancement contained in the settlement, but it was from the settlement rather than from Mary that the contributions to Margot's maintenance came.

156. I conclude that Margot has failed to establish that she was being maintained (within the meaning of section 1 (3) of the 1975 Act) by Mary immediately before her death. Margot's claim therefore fails.

157. The point can be looked at from another angle. One of the matters to which I am required to have regard is the extent to which and the basis on which the deceased assumed responsibility for the claimant's maintenance. In my judgment where the deceased sets up a trust for the benefit of the claimant, the extent of the trust fund is a clear indication of the extent of the responsibility that the settlor has assumed. The basis on which the deceased has assumed responsibility is that it is the trust fund, rather than his or her free assets, which is to be used for the maintenance of the claimant. Likewise in the case of the house, the making of a one-off gift does not carry with it any assumption of responsibility for future maintenance or the provision of future accommodation. As I have said, strictly speaking, these factors go to the question whether the will fails to make reasonable financial provision for the claimant, rather than whether the claimant can ask the court to answer that question. But if I were to ask the question it would only admit of one answer, particularly in the light of the gift of residue to Margot for her life with wide powers of advancement. The will does not fail to make reasonable financial provision for Margot's maintenance.

Was Hetty being maintained by Mary immediately before Mary's death?

158. Whether Hetty was being maintained by Mary immediately before her death is a question of actual fact, rather than unimplemented promises. The discussions that took place in January and February 2006 are therefore irrelevant to this question. They may, of course be highly relevant to the questions whether the will makes reasonable provision for Hetty and, if not, whether further provision for her maintenance ought to be made. But at this stage, what matters is whether immediately before her death Mary "was making" substantial contributions to Hetty's reasonable needs; not whether she had agreed to make such contributions.

159. In 2003 Mary made a large sum of money available to Hetty; and Hetty promised that this would be the last time. The two women shook hands on the deal. In my judgment the fact that Mary and Hetty agreed that this would be the last time means that the payment of that sum and any preceding gift cannot be regarded as the settled state of affairs prevailing at the date of Mary's death. It was an arrangement that had been terminated by mutual agreement. The slate was wiped clean and any arrangement which can be said to have constituted the normal state of affairs, or the settled pattern "immediately before" Mary's death cannot, in my judgment, rely on what happened in or before 2003.

160. In 2004 Mary paid five months-worth of Hetty's mortgage; gave her a Christmas present of £500 cash and also made available a further £3,000 in cash. However, this was expressly said to be a loan to be paid back out of the proceeds of sale of Hetty's flat, together with interest. Mary recorded it as such.

161. Hetty's main source of money in the year preceding Mary's death was voluntary lending by banks, credit card companies and friends, and involuntary lending by

creditors whom she simply did not pay. This is demonstrated both by the fact that Mr Midgley's memorandum showed that she was £75,000 in debt at the beginning of 2006; and also by the schedule attached to her IVA. During 2005, according to the schedule of payments compiled on Hetty's behalf, Mary had made available some £6,400 in cash to Hetty, including the "stop gap" payments made during the Christmas period. She had also discharged some of Hetty's bills to the value of some £1,800. She had paid the insurance premium for Hetty's car.

162. It is true that Mary also agreed to pay Hetty's mortgage for six months in the summer of 2005. This agreement superseded any support by payment of Hetty's mortgage that Mary had given during the previous year. The payments stopped in January 2006, a couple of months before Mary died. When Mary agreed to make these payments it was made clear to Hetty that this was for a limited time only. This, therefore, was an arrangement that was intended to end and had ended before Mary's death and does not, in my judgment, count as maintenance "immediately" before her death.

163. What is left, then, is the fact that during 2004 Mary made available to Hetty some £3,000 plus a generous Christmas present, and in 2005 some £8,200, part of which was the stop gap payments. Was this substantial? I have hesitated about this, but in the end I have come to the conclusion that, by a narrow margin, it was.

164. Mr Dumont submitted that the sums that Mary made available to Hetty were either gifts or were what he called "soft loans" and were, therefore, contributions made otherwise than for full valuable consideration. By soft loans Mr Dumont meant a loan which:

i) Was interest free;

ii) Would never be enforced;

iii) Did not have to be repaid; and

iv) Was unlikely to be repaid, to Mary's knowledge.

165. Given Hetty's repeated protestations that she did not want gifts or handouts and that she intended to repay, it is distasteful that she now seeks to characterise the payments as gifts. There are, as I have recounted in dealing with the narrative, indications that Mary herself saw them as loans. But I am willing to accept that they were soft loans in the sense in which Mr Dumont used that phrase. The contributions were therefore made otherwise than for full valuable consideration.

166. I hold, therefore, that Hetty was being partly maintained by Mary immediately before her death. She is therefore eligible to make a claim.

Does the will fail to make reasonable provision for Hetty?

167. Hetty's claim is for:

i) £175,000 to discharge her debts;

ii) £600,000 or thereabouts for the purchase of a three bedroomed house or flat and SDLT on the purchase;

iii) £25,000 as a "cushion" to enable her to pursue her career;

iv) £7,500 to buy a car.

168. To the extent that these sums are not to be satisfied out of residue they will have to be "grossed up" to reflect the loss or reduction of exemption from inheritance tax.

169. I must now examine the factors that the Act requires me to examine in order to decide:

i) Whether the will fails to make reasonable financial provision for Hetty; and

ii) If it does, what provision (if any) ought to be made for her maintenance?

Hetty's current position

170. Hetty's current financial position is parlous. In November 2007 she entered into an individual voluntary arrangement with her creditors. Her only declared asset was the legacy of £2,500 to which she was entitled under Mary's will and her current claim. Her liabilities, all of which were unsecured, amounted to £148,000. These included bank overdrafts of some £32,000; professional fees (e.g. Mr Midgley's fees of £7,000); legal fees incurred in pursuing her application for an increase in maintenance (e.g. Sears Tooth's fees of £14,250); and loans from friends (e.g. Mr Schmidt's loan of £2,300). She entered into an assured shorthold tenancy of a flat in SW11 in May 2006. She paid the first two months' rent; but has paid no rent since then. The landlord has begun proceedings for possession. According to the schedule to the IVA the rent arrears now amount to £26,000 (some £10,000 more than they were when the possession action was begun).

171. Her income consists of working tax credit, child benefit, maintenance for Rex and very small earnings. It amounts to some £1,800 per month. Her outgoings, on the other hand, amount to some £2,250 per month. Her earnings consist of an occasional repeat fee and a small amount of acting work. This year (2008) she has only earned £6,000 from acting, which she was paid for two days' work in filming a commercial.

172. The proposal in the IVA is based entirely on her claim in this action. Clause 5.2 requires any funds received as a result of this claim to be paid to the Supervisor of the IVA for the benefit of Hetty's creditors. Clause 8.18 provides:

> "On the successful completion of my voluntary arrangement the Supervisor will issue a certificate of full implementation. Any creditor bound by the voluntary arrangement is obliged to write off any sum of money owing them and cannot pursue any recovery against me."

173. Hetty's legal team in the current action are now working on the basis of a conditional fee agreement which provides for a success fee. The uplift for success is 20 per cent. The base costs (incurred and estimated) come to some £223,000. Depending on the definition of "success" in the conditional fee agreement, Hetty could be liable for up to £267,000 in costs.

174. Accordingly, Hetty's liabilities, actual and contingent (including her legal costs) amount to some £415,000.

175. Hetty expresses every confidence in her ability to resume her career as an actress, despite the modesty of her earnings. She is on the books of Ken McReddie, a successful theatrical agent. She says that he is determined to help Hetty back to the level at which he considers she should be, as a leading lady in West End theatre, high quality television and films. Mr McReddie has not given evidence himself; and the two letters from him which are in the bundles do not give any indication of the type of work that Hetty can expect to obtain. She has also been taken on by JJ Jackson at Performing Arts Management. He is putting her forward for motivational and after dinner speaking. Hetty also undertakes occasional teaching lecturing and examining in drama for MA students at Goldsmith's College. Nevertheless, at the moment her income does not cover her outgoings.

176. Hetty suffers from depression, although there is no suggestion that this impacts on her earning capacity. She has responsibility for Rex, although Ken Russell pays towards his maintenance at a rate which, I assume, the family courts consider reasonable. Rex is now 15 years old and is in full time education.

177. If no award in her favour is made, she is likely to be made bankrupt. There is no evidence that bankruptcy will have any adverse effect on her future prospects as an actress. However, her modest entitlement to repeat fees would become an asset of her estate.

Margot's current position

178. Margot receives pension credit, together with her state pension and higher rate attendance allowance. She is exempt from paying council tax. She receives full time care which is in large part paid for by the local authority and the local primary care trust. She contributes £200 a week towards the cost of the care package. That is approximately one third of its overall cost. She also pays for food and household expenses (including feeding the carers). Mr Nigel Baynes compiled a spreadsheet showing Margot's actual expenditure for the year to 31 March 2008. Including the contribution towards the care package, it came to just over £22,000. With a contribution of £10,000 capital from the trust fund, she would have covered that expenditure.

179. She owns Oak Tree Cottage, which is unencumbered. Its value is of the order of £350,000. An equity release scheme could produce capital in cash equivalent to half its value.

180. Margot's care package is reviewed at regular six month intervals. No change is recommended or has been recommended for some time. The most recent general report on Margot's state of health is that of her GP, Dr Kayzakian, dated 12 May 2008. She says:

> "Since my last medical report to you on 3rd July 2007, she has remained very stable. I assessed her last on 9th May 2008 at her home when her son and her current carer were present. Interestingly she was the brightest that I have ever seen her. She is extremely happy in her home surroundings. Her most recent blood tests were normal, indicating her thyroid disease is table on her current dose of Thyroxine and her blood pressure was also excellent.

> My thoughts on her care have not changed in the past twelve months and I would again state that it would be far preferable for Mrs Baynes to remain in her own home rather than be placed in a nursing home for future care as she does become agitated when she is surrounded by many people, especially unfamiliar faces. Her current carer is with her 24 hours a day and has built up an excellent relationship with her. I would therefore state that her current medical condition is extremely stable and I could foresee her continuing in her current good health for the foreseeable few years, although obviously I cannot give you an exact prognosis or timetable."

181. Her consultant psychiatrist, Dr Holton, is broadly of the same view. He says that her dementia is now in a severe stage. He adds, however, in his letter of 5 June 2008:

> "Mrs Baynes' life expectancy, as well as being influenced by her condition, is also profoundly influenced by the type of care she receives, at the moment she appears to be receiving excellent care and her condition appears to be quite stable. How long that will continue for is impossible to say."

182. An average life expectancy for a woman of Margot's age is of the order of four years. There is no medical evidence to suggest that Margot's level of care will need to be increased in the foreseeable future, although the future is, of course, unpredictable.

183. The capital of the trust fund comprised in the 1972 settlement will soon be exhausted. At the current rate of expenditure the cash made available by equity release from Oak Tree Cottage will be exhausted at about the end of her actuarial life expectancy. Her entitlement to the residue of Mary's estate, and in particular the ability of the will trustees to make advances of capital may be essential in her maintenance if either she outlives her actuarial life expectancy, or the level of care needs to rise again.

The other beneficiaries

184. The other beneficiaries whose positions I should briefly consider are the remaining Baynes children and the Landmark Trust. None of the other Baynes children are well off, although all are housed. Nigel is himself a single parent and he devotes much time and effort to caring for Margot. None of the other Baynes children makes a claim against the estate.

185. The Landmark Trust is a substantial charity. It does not have any particular needs, although it will have to raise money in order to carry out repairs and refurbishment of Dunshay Manor if it retains the gift. The estimated costs are substantial: of the order of £500,000 or more.

Obligations and responsibilities

186. It is convenient to consider together the question what (if any) responsibilities Mary had towards Hetty, Margot and the other beneficiaries, and the basis and extent to which she assumed responsibility for Hetty's maintenance.

187. During her lifetime Mary had performed a quasi-parental role in relation to all the Baynes children. Hetty, having been born after Mary and Margot met, was Mary's

goddaughter as well. I think it probable that Hetty was Mary's favourite, but she was generous to all the Baynes children. I do not consider that it can realistically be said that objectively Mary owed any responsibility to Hetty arising simply out of her parenting role to favour Hetty substantially more than the other Baynes children. The converse is, of course, that having fulfilled the role of quasi-parent in relation to the other Baynes children Mary had a responsibility at least not to ignore them. Moreover, I do not consider that, objectively, Mary owed an obligation or responsibility to Hetty arising out of her role as quasi-parent to do more than give Hetty a sound financial start in life, which she did. She had the original "starter package" consisting of the flat in Abingdon Villas; and a "re-starter" package when she was helped to buy the flat in Morgan's Walk. In addition, the meeting in 2003 at which Mary said that there was to be no more help, and at which the two women shook hands on the deal, shows clearly that Mary regarded herself as having discharged any obligation that she owed to Hetty, and that Hetty herself agreed.

188. However, in Hetty's case Mary's obligations and responsibilities are bound up with the way in which she in fact treated Hetty during the last two years or so of her life; and in particular the discussions that took place between December 2005 and February 2006. This involves consideration of the extent to which and the basis on which Mary assumed responsibility for helping Hetty financially. Against the detailed background I have recounted, it is instructive to consider what Hetty said in her evidence in chief. The only evidence about finances in this period that she gave was in her initial affidavit, sworn on 14 December 2006. In paragraph 21 she referred to the loan of £30,000 which she repaid out of the proceeds of sale of the flat in Hampstead (which she dated to 2001 rather than 2000). She then said that she rented for a year and lived on her capital. When that ran out she turned to Mary for "financial help". Paragraph 22 continues:

> "From then on until her death, Mary helped myself and Rex. At first, and as I had so little income, Mary paid the deposit to buy a flat in Battersea and helped from time to time with my mortgage instalments. However, gradually Mary took complete responsibility for paying my monthly mortgage instalments, my household bills and my car insurance as well as my legal fees in trying to pursue my ex husband for an increase in the maintenance payments for our son. I found it hard to give up my independence but I had no choice as I had very little acting work coming in."

189. This bland statement does scant justice to the agreement in 2003 that there was to be no more help; to the detailed begging letters that Hetty sent Mary; to her constant professions that the payments that Mary made were no more than loans or business arrangements; or to the strain on the relationship that her requests for money had caused.

190. The arrangements made in March 2004 were expressly said by Hetty to be "arrangements for the following few months." The monies were repayable with interest on the sale of Hetty's flat. These arrangements, even if they were a "soft loan", cannot in my judgment be seen as any assumption of responsibility by Mary for Hetty's future maintenance. On the contrary, they were both repayable and time limited. When Ms Parmigiani asked Mary for money on Hetty's behalf, Mary kept her options open, even though she did not in the event ever refuse. But the point is that

Hetty had to ask every time. In addition the arrangements made in 2005 were made in the expectation that at the beginning of the following year Hetty would succeed in obtaining a significant increase in her maintenance payments from Ken Russell and, at the inception of the arrangements, the possibility of a large lump sum as well, out of which Mary would be repaid. Mary's agreement to pay the mortgage in the summer of 2005 was expressly limited to six months. As late as December 2005, when it was known that there was no possibility of a lump sum, but that there would shortly be a hearing of Hetty's application for increased maintenance, the payments that Mary made to Hetty were described as "stop gap". Again this was expressly a temporary arrangement. There is also Mary's significant annotation on Mr Sherbrooke's letter of 10 January 2006:

> "[Hetty] says if she can be freed from her debts she can maintain herself by her career and Russell maintains his son. I do not want her to feel she is supported by me or to feel that there is money for that purpose"

191. There are two points of significance about this annotation. First, what was being contemplated was the payment of Hetty's debts, and not the provision of a flat, let alone an unencumbered flat. Second, Mary was expressly disclaiming any responsibility for Hetty's ongoing support. Thus even after the pressure exerted on Mary at the meeting on 15 December 2005, she was still not willing to do more than pay off Hetty's debts. Hetty's furious reaction in her private journal, berating Mary for not taking what Hetty saw as her "responsibility", also shows that Mary was not assuming responsibility for Hetty's financial well-being and, importantly, that Hetty appreciated that.

192. During the meeting with Mr Sherbrooke and Mr Midgley Mary's attitude softened, and she was willing to give Hetty more help. This was a result of considerable pressure put on her by Hetty. But I find that she made no firm commitment to do so; and in any event by the end of the meeting, she was in no fit state to do so. But it is true to say that she said more than once during the meeting, and on a number of occasions thereafter, that Hetty was her first priority. Having said that, I find that Mary was not prepared to help Hetty to the extent that it might jeopardise her gift of the Dunshay Manor Estate to the Landmark Trust. There is a note made by Mary, to which I have not previously referred because it is undated. However, I think it probable that it records Mary's position at a point very shortly before her death:

> "Must live with what I have
>
> I must take the blame for my decision – whatever –
>
> I.E. SECURITY FOR "Bricks & Mortar" above human life for future"

193. There is another note, also difficult to date, but almost certainly after 14 February 2006, and thus very close to Mary's death:

> "Nothing further – she must make her own life in the future – that is what she is saying today "get my debts paid and then I can get on with my life""

194. I must not, of course, overlook what Mary said in hospital just before she died, but her expression of desire to help Hetty is consistent with merely paying her debts; and with the extent of the help not jeopardising the gift to the Landmark Trust.

195. I find therefore that Mary made no firm commitment of any sort to Hetty; that her primary concern was that Hetty's existing debts be paid, so that Hetty could support herself and get on with her life; that she did not want Hetty to feel that money was there for her continuing support; that she was willing to consider making up to £250,000 available; but that she was not willing to jeopardise the gift to the Landmark Trust.

196. It is not, I think, suggested that Mary owed any obligation to the Landmark Trust. Mr Pearce emphasised that, so far as the Trust is concerned, there was a "contract of faith" between the Trust and a donor. The Trust's position was that, having been given a gift subject to conditions, the Trust would do everything it could to honour those conditions. In the present case the most important condition, at least in Mary's eyes, was that the Dunshay Manor Estate should be preserved intact; and that is what the Trust would strive for. Mr Dumont also pointed out that Mary wanted the artistic tradition to be carried on at Dunshay, and suggested that the Trust would be unwilling or unable to fulfil that condition. The existence of the condition is correct, but I am not persuaded that the Trust cannot or will not fulfil it. Be that as it may, these are obligations owed by the Trust to Mary; not obligations owed by Mary to the Trust. They are legally irrelevant under this head.

The size and nature of the estate

197. I have already described the size and nature of the estate.

Any other relevant matter including conduct

198. The fact is that during her lifetime Mary was exceptionally generous to Hetty. Not only did Mary provide Hetty with £171,000 over the period of just over four years preceding her death, she also provided her with the flat in Abingdon Gardens when she left home. (I leave out of account the additional £30,000 or so that Hetty managed to repay out of the proceeds of sale of her flat in Hampstead). All of it was dissipated. Her current financial plight is, I regret to say, largely of her own making. She has not worked seriously for the last fifteen years. No doubt it would have been difficult for her when Rex was a baby, but there is little evidence that, like many "resting" actors, she has sought even part-time work.

199. In my judgment she exploited Mary's generosity at the end of 2005 and the early part of 2006 and brought pressure to bear on her to bail her out yet again. From December 2005 to the end of Mary's life Hetty mounted a sustained campaign to persuade Mary to pay off her debts and provide for her future. Mr Sherbrooke, Ms Ratuszniak and Mrs Wooster, all of whom are disinterested witnesses, all thought that Mary was being pressurised, if not bullied. So did Nigel and Mr Cooper. I think that they were right. Even Ms Parmigiani said that Hetty's demands for money put a "huge strain" on the relationship. For Mary to have succumbed to the pressure would have jeopardised either her ardent desire to see the Dunshay Manor Estate preserved as a memorial to eighty years of artistic endeavour, or would have deprived Margot of money which may be needed for her care. This is not conduct which, in my judgment, should be rewarded.

The value judgment

200. In *Re Dennis* Browne-Wilkinson J struck out the claimant's claim against his father's estate because it was hopeless, even though the estate was a very large one. The claimant had been given a substantial gift by his father with which he bought a farm, but he ran into financial difficulties and sold it. He was then given more money by his father but that, too, went. At the time of his claim he was on the verge of bankruptcy. The judge described him as "a spendthrift drifter who has spent substantial periods of his life depending on, and dissipating, moneys provided by other people." He said:

> "The court now approaches claims made by a son on the same basis as claims made by any other applicant, though in the past in might be said that the court viewed such claims with some disfavour. A son is in the same position as all other able-bodied applicants. A person who is physically capable of earning his own living faces a difficult task in getting provision made for him, because the court is inclined to ask: 'Why should anybody else make provision for you if you are capable of maintaining yourself?' The applicant is 38 years old. There is no evidence that he is in any way unfit. Although at present out of work he appears to have as much chance as anybody else of obtaining employment and maintaining himself. In addition, the court is reluctant to make further provision for someone for whom large sums of money have been provided and which have been dissipated by him."

201. It is difficult not to be struck by the similarity with Hetty's situation. The most powerful factor in Hetty's favour is her parlous financial position. But there are other, counter-balancing, factors which must be taken into account. Of these, Hetty's conduct is one of the most important.

202. In his letter of 8 February 2006 Mr Sherbrooke said that in his view Mary had been "very, very good to the Baynes family and Hetty especially, you have done your bit by them". Looking at the matter objectively, I agree.

203. It may be said that whatever the objective observer might think, that was not Mary's view. There is some truth in that; and I take into account Mary's desire to help Hetty. But Mary's primary concern was to pay off Hetty's existing debts. That concern was at least in part due to the unreasonable pressure that Hetty exerted on her. Hetty had run up those debts without any encouragement from Mary, or any reasonable expectation that Mary would pay them. Mary had tried once before to tell Hetty that there would be no more help; but Hetty came back for more anyway. When she did come back Mary tried to limit the help that she gave Hetty to the short term. Moreover, the payment of existing debts, which was Mary's primary concern, is not "maintenance" for the purposes of Hetty's claim. Mary had disclaimed any responsibility for Hetty's continuing support or for providing Hetty with a home; and Hetty knew that. Above all, Hetty had been given at least two "starter packages" by Mary; and there is no reason why she should have yet another one. As Mary's will said, Hetty was excluded "because she has already benefited". That cannot, in my judgment, be said to be unreasonable.

204. Moreover, as Goff LJ said in *Re Coventry* (in a passage approved by the Court of Appeal in *Re Hancock* [1998] FLR 346):

> "Indeed, I think any view expressed by a deceased person that he wishes a particular person to benefit will generally be of little significance, because the question is not subjective but objective. An express reason for rejecting the applicant is a different matter and may be very relevant to the problem."

205. However, in *Re Hancock* Butler-Sloss LJ also said that the goodwill felt by a testator towards members of his family were factors that it was proper to take into account; and that it is for the court to give such weight to those factors as may be appropriate in the individual case. In the present case, Mary's desire to help Hetty pay her debts is counter-balanced by her firm desire to leave the Dunshay Manor Estate, intact, to the Landmark Trust.

206. The policy behind section 1 (1) (e) was described by Stephenson LJ in *Jelley v Iliffe* (in a passage I have already quoted) as follows:

> "Its object is surely to remedy, wherever reasonably possible, the injustice of one, who *has been put by a deceased person in a position of dependency upon him*, being deprived of any financial support, either by accident or by design of the deceased, after his death. To leave a dependant, to whom no legal or moral obligation is owed, unprovided for after death may not entitle the dependant to much, or indeed any, financial provision in all the circumstances, but he is not disentitled from applying for such provision *if he can prove that the deceased by his conduct made him dependent upon the deceased* for maintenance, whether intentionally or not." (Emphasis added)

207. It cannot, in my judgment, be said that Mary "put" Hetty in a position of dependency; or that Mary's conduct "made" Hetty dependent on her.

208. Reading together section 1 (1) (e) and section 1 (2) (b) of the Act the first of the statutory questions I am required to answer is: does the will fail to make such financial provision as it would be reasonable in all the circumstances of the case for Hetty to receive for her maintenance? My answer is: No, it does not. The second question does not, therefore, arise.

Result

209. I dismiss both Hetty's claim and Margot's claim; and I declare that debts and administration expenses are payable out of residue.