



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 57

A71/22

OPINION OF LORD MALCOLM

in the cause

ALEXANDER DAVID NIVEN AND ANOTHER

Pursuers

against

IRENE ROBERTA HUNTER-FORBES NIVEN

Defender

Pursuers: Tosh; Anderson Strathern LLP

Defender: A Stevenson (sol adv); Waddell & Mackintosh

24 August 2023

[1] This case concerns an allegation that Irene Niven forged her late husband's signature on a codicil altering his will. An action seeking reduction (meaning quashing) of the codicil has been brought by David Niven and Carole Melaisi who are the children of the late Alexander Niven and his first wife. Irene Niven is their stepmother. She has defended the action.

The background circumstances

[2] In 2016 Alexander Niven made a will appointing his wife and his solicitor, Grant Johnston, as executors and trustees. He owned a one-half share in the matrimonial

home. Irene Niven owned the other half share. So far as the house was concerned, in summary the will provided that if he died before his wife the trustees were to hold his interest in the property for her in liferent. On her death or disavowal of the liferent it would be shared equally between his two children. The trustees were directed to give effect to any clearly expressed subsequent testamentary writings however informal so long as they were signed by Alexander Niven.

[3] Alexander Niven died on 27 April 2020. The trustees were confirmed in November of that year and proceeded to perform their executry duties regarding the distribution of the estate. In October 2021, when these were more or less complete, in a telephone conversation Irene Niven informed Mr Johnston of a document bearing the title "Codicil/Letter of Wishes to my Will". Amongst other things it stated that Alexander Niven bequeathed the house to his wife in its entirety. If she predeceased him, on his demise one half would go to Irene's son, Stuart Niven, with the remainder split equally between David and Carole. Earlier writings regarding the property were revoked. In the third paragraph Irene Niven bequeathed her interest in the property to her husband, and if he died before her, on her death it would be shared between David, Carole and Stuart in the same percentages. The codicil bears to have been signed by Alexander Niven at Jedburgh on 22 January 2020. It is also signed by Irene Niven and witnessed by a Carly March.

[4] An audio recording and a transcript of the telephone conversation between Irene Niven and Mr Johnston, who was also her solicitor, have been produced. (At the start of the proof I rejected a submission that this material was privileged.) Regarding the codicil, Irene Niven explained that her husband was agitated because he was not leaving Stuart Niven any money. After a chat they decided to leave that as it was. However he had never liked the liferent. They should control the house and their money in it. He was very

agitated. To appease him the codicil was drawn up. Irene Niven said that much later she saw the document when going through her files. She was about to tear it up, but at that time she was hoping to build a lodge in the garden of the house and wondered if she could leave the value of it to her son. It would be her funds invested in it. Mr Johnston made it clear that he could make no comment without seeing the document. Irene Niven stated that she would send it to him. The discussion then turned to matters concerning her will.

[5] On 20 October 2021 Irene Niven emailed Mr Johnston and stated that she would send a copy of the codicil to him the next day by recorded post. She wanted confirmation that it was legal. She said that she wanted to change the third paragraph which is the part where she bequeathed the house to David, Carole and Stuart. After receiving the document Mr Johnston copied it to David and Carole. Subsequently he resigned as executor and trustee. A disposition was executed on 21 January 2022 and registered the following month in which, as by then sole executrix nominate of her late husband, Irene Niven conveyed his one-half share of the house to herself as an individual. Reduction of this deed is also sought. Failing that Irene Niven will own the property outright and be able to sell it or bequeath it to whomsoever she chooses.

Why the signature is said to be a forgery

[6] The basis of the forgery allegation in the written pleadings can be summarised as follows. A guideline to the signature was marked in pencil, erased and then repeated. It was then overwritten in ink. The deceased did not so apply his signature. The signature displays a high degree of tremor, multiple pen lifts, and overwriting, all of which is consistent with Irene Niven's handwriting. On 26 January 2022 an application was submitted on her behalf for planning permission for the construction of an accessible chalet

in the garden of the house which certified that in the previous 21 days the property was wholly owned by her. The deceased would attend upon his solicitor and take advice on important legal matters such as a change to his will. He was a meticulous and careful man. The document contains simple and obvious errors which he would not have committed. Only his wife and her son benefitted from the change to his will. A report from a handwriting expert was lodged in support of the claim that the signature is not that of the deceased.

[7] In her written pleadings Irene Niven asserts that her husband intended to change his will and he signed the codicil. She accepts that normally he would take advice on important legal matters, however in January 2020 Mr Johnston was difficult to contact. Her husband knew that he was dying and there was a degree of urgency as to reorganising his financial affairs. While he was a meticulous and careful man, in the prevailing circumstances he was willing to alter his will without advice and to permit imperfections, such as leaving pencil lines, to ensure that his wishes were met. He kept a pencil case and was accustomed to using both a pen and a pencil. He picked up a pencil and began to append his signature. On realising his mistake he put the pencil aside and signed again using a pen. The pen had a clip, but otherwise it and the pencil resembled each other. There was no pencil "guideline". At the time her husband was almost 86 years of age. He was suffering from a number of health issues which led to an intermittent tremor and loss of gross and fine motor skills. He was generally frail. The change to the will did not benefit her son. Reference was made to a report from another handwriting expert.

[8] In a case of this kind it is appropriate to set out the evidence heard at the proof in some detail.

The evidence for David Niven and Carole Melaisi*Alexander David Niven (known as David)*

[9] David Niven was the first witness. He is 58 years of age and Alexander Niven's only son. Carole Melaisi is his sister. The salient parts of his evidence were as follows.

[10] About five years previously at a hotel in Troon his father told him that, in addition to a sum of money, his father's half share in the matrimonial home would be split between himself and his sister. Nothing was said about a liferent. Thereafter he never expressed unhappiness about his will nor of any desire to change it. Grant Johnston was his father's longstanding solicitor. On official matters his father would take legal advice. Though David Niven did not see him as often as he would have liked, he was very close to his father. They spoke regularly on the phone. His father generally kept good health though it was deteriorating with a decline in mobility. After his father's death he was sent a copy of the will. He was not told of any changes to it.

[11] He attended the wedding of Stuart Niven in June 2021. His sister was unwell and did not attend. Given the restricted numbers allowed at the wedding a larger party in celebration was organised for January 2022. Covid 19 was still rife so in about the November he intimated that he would not be attending this event. Carole did not go to the party. He was not aware that anyone was upset.

[12] His father married Irene Niven in the mid-80s. He and Irene have never been close. They have different personalities. He had no routine contact with her.

[13] When the codicil came to light he was astonished. His father would never do anything of a legal nature without involving a lawyer, almost certainly Grant Johnston. In the document he is designed as David Alexander Niven. His father would not make that mistake. His father's first name was Alexander as was that of David's paternal grandfather.

In the codicil there is an obvious error as to David's postcode. His father was a careful meticulous man who did things in a measured way with the utmost professionalism. In the second paragraph of the document regarding his sister's middle name, "Ann" should be "Anne".

[14] As to handwriting, his stepmother always had a shaky hand. She has a known problem with alcohol. The second signature on the codicil was Irene's, but the first was not that of his father. He had never seen his father with a pencil case. He had seen him use a traditional lead pencil when doing DIY or on the golf course. When signing a document he would use a pen, not a pencil.

[15] When the codicil was sent to him he was flabbergasted that his father would alter his will without informing him and his sister. Grant Johnston told him that he knew nothing about it. He said he would resign and seek advice from the Law Society of Scotland. About a week earlier David Niven and his sister had declined the invitation to Stuart's party the following January. He was aware that Irene wanted to build in the garden ground. Carole told him that she was unhappy about this.

[16] In cross-examination Mr Niven stated that he first learned of the liferent when sent a copy of the will after his father died. When it was explained, it made sense. It was expected that Irene could remain in the house. His relationship with her was fractious. She did send cards to the family. The 2016 will refers to him as "David Niven" but that was because it was written by Mr Johnston; his father would use "Alexander". To his knowledge his father did not use computers.

[17] In re-examination, when asked why he said that the relationship was fractious, he said that he and Irene did not see things in the same way. He regularly received late night

calls when she was under the influence of alcohol. His father could still do the garden and get out in the car. He was not housebound.

[18] David Niven gave his evidence in a calm and measured manner, and while plainly he has a direct interest in the outcome of the case, I have no difficulty in accepting him as an honest and truthful witness.

Carole Anne Melaisi

[19] Carole Melaisi stated that she was close to her father. She visited him often. He was “old school” and paid attention to detail. On 19 April 2020 he discussed his will during her last visit before his passing. Regarding the house, he said that one half would go to Stuart and the other half to David and herself, and that Irene could stay there till she died. He never said that he was unhappy about the will or wanted to change it. His birthday in February 2020 was celebrated at a lunch at a hotel. By that time his walking was slow, but cognitively and regarding motor skills he was fine. On 20 December 2019 he attended a ballet in Edinburgh and stayed overnight in a hotel. During the 19 April visit he ate his lunch without any need for assistance. There was nothing wrong with his fine motor skills and no sign of a tremor. His walking was slower but he was not generally frail.

[20] Grant Johnston was the family lawyer. Regarding the distribution of the estate he informed her of how the will dealt with the house. He made no mention of any changes to the will.

[21] Irene Niven was very angry that Carole’s children did not attend her son’s wedding. She ranted and raved at Carole’s daughter. This was not out of character. She herself had experienced her stepmother’s manipulative and controlling behaviour.

[22] Regarding the codicil, her father would have used Grant Johnston as the first port of call. His signature is “obviously” Irene’s writing, with a tremor. Her father would never have used Carly March, who cleaned the house, as a witness for anything of importance. The spelling was incorrect, for example regarding her middle name. Her father would not get his son’s name wrong. He paid attention to detail. She had never seen her father use a pencil. The document “absolutely stinks”. On its receipt she was bewildered, flabbergasted and angry.

[23] In cross examination, when asked about the 19 April 2020 conversation, her father said that one half would go to us, one half to Stuart. Her father had good and not so good days. He was fine during that visit. Subsequently he had a fall, injured his head, and died eight days later.

[24] Carole Melaisi was a more obviously partisan witness than her brother. I have reservations as to the conversation during her last visit to her father. She was keen to get it out at the start of her evidence, but when cross-examined on the matter seemed less confident.

Dr Rayner S Lazaro

[25] Dr Lazaro has been a GP for 15 years. He spoke to a report he had prepared on the instructions of the solicitors for David and Carole. He was asked to review Alexander Niven’s medical records and advise as to his medical condition prior to 22 January 2020 (the date on the codicil). In particular, were there entries demonstrating medical conditions which could have affected his fine motor skills, particularly resulting in an intermittent tremor? Was it likely that a deterioration in his health could explain the level

of tremor shown in the codicil signature when compared with earlier signatures?

(Understandably the witness declined to address this last question.)

[26] Dr Lazaro's evidence can be summarised as follows. In 2018 and 2019 Mr Niven had various health problems. In June 2019 he was considered fit for a hernia operation, suggesting that he was not frail or poorly at that time. The symptoms noted in July to December 2019 are fatigue and weight loss. An entry in the records dated 28 January 2020 was the earliest reliable clinical opinion that there was an overall deterioration in his functional capacity. Thereafter, because of his cancer, his condition was deteriorating rapidly. By 23 February there was clear evidence of frailty, loss of muscle mass and tiredness which would have had significant effects on his gross and fine motor function. Then there was a rapid decline into a terminal illness. In March/April there is definite evidence of general motor function loss, including poor mobility and falls with injuries.

[27] The main factor likely to affect his gross or fine motor skills in January 2020 was muscle mass loss and tiredness caused by the lung cancer. It would be beyond Dr Lazaro's remit to make a judgment as to the extent of this functional loss, thus he had noted the clinical records from around that time. There was no documented evidence of a tremor such as might affect Mr Niven's signature, nor that neurological deficits following suspected strokes caused motor function loss. Nothing in the ophthalmology reports suggested that glaucoma was causing falls.

David William Bogle

[28] David Bogle is a sole trader who repairs computers. Irene Niven has been a customer for some years. She has experienced minor issues with her laptops. She obtained her current laptop in, he thinks, February 2020. He set it up for her. He copied family

photographs from the old laptop onto the new one. There were other files on it but he was not aware what they were. He was not asked to wipe the old laptop which he returned to Mrs Niven.

Grant Johnston

[29] Grant Johnston is a solicitor specialising in private client, wealth planning and residential conveyancing. He first acted for the late Mr Niven in the 1990s. He came to know him reasonably well and they met on numerous occasions in respect of legal matters. Mr Niven was a careful and meticulous person. Mr Johnston had prepared Mr Niven's will. He received the codicil on 21 October 2021. Previously he had the already mentioned telephone conversation with Irene Niven. She was intending to build a lodge at the property and she wanted to leave its value to her son Stuart. This would require a change to the terms of the third paragraph of the codicil. Mr Johnston did not prepare a new will for Irene Niven. He resigned as an executor and trustee on 12 January 2022.

[30] Expert handwriting evidence was led by both sides. It will be dealt with later in this opinion.

The evidence for Irene Niven

Carly March

[31] Carly March is 37 years of age. She is a shop supervisor and has 11 cleaning jobs. She was employed as a house cleaner for Mrs Niven in about 2018, maybe earlier. Before then she had been a carer for Mrs Niven's disabled son.

[32] She spoke to being asked to witness the Nivens' signatures. By then she had been with them for about two years. It was a Monday. They both asked her to do this. They

were both fine. Mr Niven was his usual jolly self. His physical health did deteriorate because of old age. He became frailer. On the day he seemed nervous, maybe embarrassed. He realised he had signed the document in pencil and rubbed it out. He then signed in pen. The pen and pencil were similar in appearance. She and the Nivens were at the kitchen table. After Mrs Niven signed she added her signature as a witness. It all took about ten to fifteen minutes. The part above the signatures was covered over. The date on the document was not in her writing. It occurred about then.

[33] In cross examination she confirmed that Mr Niven wrote his name in pencil only once. It was like the posh pens you get and was coloured blue or green. She insisted that she was telling the truth. She had been Stuart's carer and was a Facebook friend. She stopped being a carer because she had made a mistake. She was convicted of fraud for using the bank details of people for whom she was caring to benefit herself.

[34] I discuss Carly March's evidence later in this opinion.

Dr Kevin Buchan

[35] Dr Buchan is a GP in Hawick. He first met Alexander Niven in 2014 and thereafter was one of his doctors. He was a lovely patient – kind, gentle, and easy to look after. Dr Buchan spoke to a letter dated 12 July 2022 which he had written to Mrs Niven's solicitors. Mr Niven died in April 2020 with lung and prostatic cancer. His health had been failing for a couple of years. The letter stated that Mr Niven deteriorated over a period of time with muscle and motor skill loss due to a previous stroke and TIA. In evidence he spoke of Mr Niven becoming increasingly frail. It was not uncommon that a combination of age and the disease would impact on motor skills and wellbeing. He saw this for himself.

[36] In cross examination Dr Buchan accepted that it was not predominantly him who had treated Mr Niven. He had not carried out a detailed review of the practice's medical records concerning Mr Niven. He had referred Mr Niven for specialist treatment for suspected lung cancer on 13 March 2020. In that letter mention was made of a recurrent cough and a chest lesion. Otherwise he was "pretty fit and healthy". The witness said that this was an accurate statement. He accepted that after this Mr Niven's health declined rapidly.

[37] When he wrote the letter to the solicitors he was aware of the issue in the case. He accepted that there was no evidence in the records of loss of fine motor skill. He deferred to the specialist opinion recorded in the medical records that the November 2016 episode was paraesthesia which was stroke-like in nature. He accepted that the November 2018 event may have been the result of low blood pressure rather than a stroke

[38] While an obviously honest witness, I consider that Dr Buchan was able to contribute little if anything from his direct personal knowledge as to Mr Niven's writing skills in and around January 2020.

Irene Niven

[39] Born in 1946, Irene Niven is a retired business woman and a published author. Her first husband died in 1983 when Stuart was five months old. She married Alexander Niven in 1986. He was a company distribution manager who retired aged 52. Their respective parents had been good friends and she had known his children all their lives. After living in France she and her husband returned to Scotland in 2010.

[40] Her husband's health began to deteriorate after he had a stroke in 2016. It affected his balance and general control. Glaucoma was also a concern. He had borderline diabetes

and underwent a hernia operation. In about 2018 his condition deteriorated quite rapidly. He lost weight and had several serious falls. He developed an intermittent slight tremor. He became depressed and concerned regarding his health. He still loved his gardening.

[41] David spoke to his father by phone but had visited only about five times in the last ten years. They visited him when they could. They saw Carole more often. Irene Niven was not conscious of a fractious relationship. She was upset that Carole's children did not attend her son's wedding. She did ask Carole's daughter for an explanation. They agreed to disagree, but did not end on unhappy terms. Family relations were generally amicable.

[42] The evidence turned to certain cheques which had been considered by the handwriting experts. In August 2019 when he was writing well, her husband pre-signed cheques intended for tradesmen or family members which he could thereafter complete at his leisure. This was a precaution given his tremor. He was a proud man and did not want to reveal ailments such as a tremor. In respect of a cheque issued on 14 February 2020, he was unable to pick up the pen, so she filled it in.

[43] In January 2020 her husband knew he was dying. With regard to the liferent, he asked – suppose one of us dies and the house has to be sold? Control of the assets would be lost. They always left houses to each other. Mr Johnston knew they had no intention of selling the house. They were both shocked at the conditions implied by the liferent and decided to leave the house to each other. They knew it would be legal if signed and witnessed. Normally they would contact Mr Johnston, but Alexander was incandescent about the circumstances and said – no, it does not have to be notarised. Alexander suggested the codicil. She typed the document on a previous laptop which was old and slow. That evening they printed a copy for each other. He never used computers and never sent an email.

[44] The next morning the cleaner was asked to witness it. While she (Carly March) had made a mistake, they found her to be trustworthy and honest. This was done at the kitchen table. Alexander had been doodling. There was a pen and pencil set. Her husband did not have a pencil case. This was not a good day for his tremor. He had been practising his signature. When Carly March arrived he picked up the propelling pencil which was almost identical to the pen. He was very embarrassed when he realised the error. He erased it and signed again. She signed it and Carly witnessed it with the substance of the document covered over. It all took a few minutes. They kept the principal and a copy for each of them. To her knowledge this was her husband's only signature between signing the cheques in the previous August and his death.

[45] Irene Niven was asked about the delay in her production of the codicil. She decided not to reveal it immediately. Her son's wedding was on the horizon. If David and Carole knew of the codicil and that she controlled the property they might not attend the wedding. In October 2021 she wanted to build a lodge in the garden for her tetraplegic son and his wife. When they were not visiting, it could be let out as self-catering accommodation for the disabled. This could help Stuart financially. He was unable to pursue his profession and the Council did not have funds for his care. She was concerned about his financial position. She stated that her concerns regarding the wedding were proven correct when after the codicil was revealed several family members did not attend the party in January 2022. This was disrespectful to Stuart and his wife, and a disgrace on the Niven family name.

[46] In the course of her cross-examination Irene Niven was informed as to the privilege against self-incrimination, however she answered every question. Counsel opened by pointing out that she had been shaking when giving evidence. She agreed that she had been shaking, but this was caused by the stress of being in court in the witness box. She did not

have a persistent tremor – only that morning. It was wrong to suggest that in late 2019 and January 2020 her husband's health was good. He was a proud man who tried to disguise his difficulties. He was able to go to the ballet in the December because she was with him.

[47] The codicil was only to take effect when the house was sold. Under reference to the confirmation of the estate, it was accepted that there had been no mention of the codicil to Mr Johnston. They had been told that a codicil was separate from the will and did not need to be notarised. In any event it did not alter the will at all. It was done to protect them if one died and the house had to be sold. The other conditions remained. They did not fully understand the liferent clause. The will did not address the position if the house had to be sold. She did appreciate that under it she would not own her husband's share of the house. There was no intention to implement the codicil because she had no intention to move from the property. It was accepted that the estate had been wound up by the time she told Mr Johnston about the codicil.

[48] Irene Niven was pressed as to inconsistencies between her evidence and her written pleadings. She said that she had suggested contacting Mr Johnston but her husband, who was incandescent about the liferent, refused to do so. She could not recall the day of the week when the document was witnessed. Four copies of it were made. She did not save documents on her laptop. She had disposed of it. It was old and the keyboard was jumpy. The pen and pencil were expensive being Mont Blanc - and in a presentation case, not a traditional pencil case. There was no way she would have kept them. It was like they signed his death warrant. She threw them out.

[49] At some stage she was told about a problem with her planning application for construction of a lodge in the garden. She denied that she was concerned that Carole would

object to the application. While Carole and David had expressed their views, it was not their father's garden – it was ours, and she had created and maintained the rose garden. The disposition was dated 21 January 2022, and the land ownership certificate in the application was dated five days later. She did not see the certificate at the time. The architect took control. He would have assumed that she owned the property.

[50] When she told Mr Johnston about the codicil she mentioned that she was wanting to make a new will. She was concerned that if Stuart and his wife separated, Stuart might lose half of his house and would have to stay with her. She would need to have control of the house. She would need to sell it to help him acquire a property. She wanted to pass the lodge or its value to Stuart. When it was suggested that her husband would not have wanted this, the reply was that he treated Stuart as his own son and would not object to him having an income. He felt he should have left Stuart some money. The reason for the codicil was that it could cause problems if the survivor of them had no control over the main asset.

[51] Regarding her desire to change paragraph three of the codicil, including as to the destination of the property on her death, she might leave the lodge to Stuart but no decision had been made. Being tetraplegic Stuart was unable to pursue his profession. There were problems with his care package. He had no pension. David and Carole were both in a better position. Her husband had recognised all this, so the decision was that after he died she should have control of what happened to their home. The concern was that if Stuart and his wife separated he would have to be with his mother. She would have to sell the house to buy one for Stuart. Her husband said that in that event David and Carole would get nothing from it. In effect he took the view that it would be up to her to decide what would happen to the property on his death.

[52] Counsel pointed to the second page of the transcript of the telephone call to Grant Johnston in October 2021 and the reference to the property being split. She did not mention the above decision because that was to be the position unless circumstances changed, and they hadn't at that point. She had to look at giving Stuart an income, perhaps from the property. His condition deteriorated in the October and his partner had moved to part-time work. Alexander Niven said that he would leave the decision to her regarding the house.

[53] In the transcript of the call she is recorded as saying that David and Carole had done well from their father. She did think that, but Stuart had also done well by him. It was put to Irene Niven that she would not want to see any part of the lodge going to David and Carole. Her response was that any monies spent on the lodge would be her investments, and naturally she would not give them to David and Carole. Under reference to a passage in the transcript she agreed that the matter became urgent because she wanted to get on with the planning application.

[54] In Irene Niven's affidavit it was said that she and her husband "googled" to check out the liferent condition. They did not tell Mr Johnston – Alexander refused to do so. It was pointed out that in an email she had said that they tried to contact him but failed. She was not sure which version was correct.

[55] As to the codicil it was put to the witness that she tried to trace her husband's signature in pencil, was not satisfied with it, rubbed it out and did it again, then signed in pen. This was denied. She was a published author and had she forged the signature she would have made a better job of it. It was not a good day for him when he signed the codicil. She first employed Carly March in 2016. She was aware of her conviction, which she thought occurred in 2017.

[56] I discuss Irene Niven's evidence later in this opinion.

The expert handwriting evidence

[57] Both parties lodged expert handwriting reports addressing the question as to whether Mr Niven's signature on the codicil had been forged. Evelyn Anne Gillies had been instructed by solicitors for David Niven and Carole Melaisi. She produced a report dated 24 March 2022 and an addendum to it dated 25 October 2022. Irene Niven's solicitors instructed Kathryn Thorndycraft-Pope who provided a report dated 14 July 2022 and an addendum dated 23 April 2023. Both were led in evidence and cross-examined.

Evelyn Gillies' report of March 2022

[58] Evelyn Gillies' report states that on viewing a copy of the codicil the illegible signature in question appeared as though there were two signatures, one written on top of the other. Close examination of the original document revealed at least two sets of pencil lines below the visible pen line. One set of lines had been "erased". The signature was written with a degree of tremor and multiple pen lifts. There were areas where the pencil line had not been followed. The presence of pencil lines under an ink signature is indicative of simulation.

[59] For her first report Ms Gillies was provided with some known signatures of Mr Niven and a letter written by him in 2013. This material was not enough to give an idea of the range of his signature. She was also provided with samples of Irene Niven's handwriting which included a signed cheque dated 21 April 2021. All of it displayed a high degree of tremor, multiple pen lifts and overwriting.

[60] The lack of sufficient examples of Mr Niven's signature prevented a full comparison. However it was unlikely that someone would sign their name in pencil then write over it in pen. Some of the literature on simulation/forgery is quoted in the report. In such cases an emphasis on making the forgery look genuine is to the detriment of the line quality. Simulations are most often associated with poor line quality, lack of fluency, tremor, retouching and overwriting. They lack the fine detail of a genuine signature, and there may be associated indentations or guidelines. Ms Gillies' opinion was that the signature in question is a poorly executed simulation.

Kathryn Thorndyraft-Popes' report of July 2022

[61] In her report Ms Thorndyraft-Pope notes that she took into account information she was given as to Mr Niven's infirmities at the time, including blurred vision and muscle and motor skill loss due to a previous stroke. She examined known signatures of Mr Niven and the questioned signature. There are pencil lines which appear to have been written before a very badly formed black ballpoint pen ink signature. The signature, including the shaky lines, is described.

[62] Pencil lines usually suggest simulation, but Ms Thorndyraft-Pope would not expect a forger to make such a bad job of copying the signature. Also more care would be taken to see that the pencil lines were erased. Mr Niven was very old. She had been told of medical problems affecting his sight and motor skills which could have affected his handwriting. Also she had been told that Mr Niven erroneously picked up a propelling pencil to append his name. When told of the error he used a biro, apparently trying to erase the initial pencil line. Having no handwriting samples from around the time of his death when Mr Niven's

health had deteriorated, she felt that the evidence was inconclusive. (She had been provided with copies of four signed cheques dated in November and December 2019.)

[63] In the report Ms Thorndycraft-Pope's conclusion is expressed as follows:

"In my experience I feel there is Insufficient (*sic*) evidence to rule out OR confirm whether this is the genuine signature of Mr Alexander Faulds Niven having also considered the possibility of his signature having been simulated by an unknown author."

The addendum to Evelyn Gillies' report provided in October 2022

[64] Ms Gillies was provided with Ms Thorndycraft-Pope's report. In response she comments that the ability to copy another's signature successfully varies from person to person. The circumstances as advised to Ms Thorndycraft-Pope did not explain the second pencil line. While she may not have had access to the signatures on the cheques completed immediately before and after the date of the codicil, Ms Thorndycraft-Pope did have signatures completed less than two months before, and they did not show any decline in line quality.

[65] For the purposes of the addendum Ms Gillies was given a large amount of additional documentation, including the 2016 will, which has several signatures, and the cheques drawn on Mr Niven's bank account dated from 2015 to 25 March 2020. There are similarities in the layout of the customer entries in all the cheques bar one, namely that dated 14 February 2020. Only it shows signs of tremor/poor line quality. (During her evidence Irene Niven stated that she completed that cheque.)

[66] Given the large number of comparable signatures provided to her, the comparison with the questioned signature was restricted to the 11 cheques dated from December 2019 to March 2020 and the original signatures on the will. All again bar one are of sufficient

quality to allow the judgement that they are genuine signatures of Mr Niven. There is no decline in the quality of those written before and after the date of the codicil. Comparison of them with that on the codicil indicated that it is not genuine. There are significant differences, all as illustrated in the addendum. The questioned signature does not fall within the range of signatures dated from December 2019 onwards.

[67] Ms Gillies re-examined examples previously provided of Irene Niven's writing. It is very poor with a high degree of tremor and some evidence of breaks within the writing line. Comparison of her writing with the questioned signature revealed a number similarities which are specified and illustrated in the addendum. Ms Gillies quotes a passage in *Forensic Handwriting Identification, Fundamental Concepts and Principles*, Ron N Morris 2000 at page 141:

"In a simulation, the author is generally not identifiable, partly because he is attempting to draw the handwriting features of another writer while concealing his own. However, there have been instances when a writer (drawer) did not adhere to the model before him and a sufficient amount of his own handwriting features and habits were incorporated into the simulated writing so that their significance for or against identification could be assessed."

[68] Ms Gillies expresses disagreement with Ms Thorndycraft-Pope's view that the evidence is inconclusive. Her opinion is unchanged, namely that it is unlikely that the questioned signature is genuine. It is probable that Irene Niven was the author.

Ms Thorndycraft-Pope's addendum of April 2023

[69] Ms Thorndycraft-Pope was provided with the cheques previously given to Ms Gillies. She had been told that none of the cheques dated after August 2019 were signed by the deceased after that month. This was because of his health and the deterioration in his motor skills. Almost all the pre-signed cheques were filled in by him, the exception being the

cheque dated 14 February 2020 which had been completed by his wife. She was provided with further documents bearing signatures and writings of Irene Niven. She was asked to compare these with the questioned signature. In the addendum once again reference is made to the information provided as to Mr Niven's health.

[70] The addendum then describes (1) the original of the questioned signature after a microscopic examination, (2) Irene Niven's handwriting, and (3) the signatures on the cheques, concentrating on the later ones. The cheque signatures were of common authorship. As to a comparison with the known writing of Irene Niven, the questioned signature was of such poor quality that there was very little the author could compare. There was insufficient evidence to come to any positive conclusion.

[71] Ms Thorndycraft-Pope acknowledges that usually one would expect pencil lines beneath a signature to have been put there as guidelines in an attempt at simulation. However if this was the case she would not expect such a bad job of the copying of the signature. Also there would have been more done to erase the pencil lines. The late Mr Niven's medical problems could have affected his handwriting. She had been told that he initially used a propelling pencil in error.

"Due to the circumstances and having no handwriting samples around the time of his death when his health deteriorated. I feel (*sic*) that the evidence is Inconclusive and it would be very difficult to prove this case one way or the other."
(paragraph 4.11)

The examination of the expert witnesses at the proof

Ms Gillies

[72] Ms Gillies spoke to her report and the addendum. She cast doubt on Ms Thorndycraft-Pope's qualifications. She is not a member of the Chartered Society of Forensic Sciences. The National Association of Document Examiners, an American

organisation, is not well regarded. She ventured that Ms Thorndyraft-Pope is probably the only UK member.

[73] With regard to the views expressed by Ms Thorndyraft-Pope, Ms Gillies made the following remarks. If someone with poor writing skills attempts to replicate another person's signature, it will tend to be of poor quality. As to the still visible pencil lines, they might think nobody will notice, or they may be concerned that erasure will damage the paper or smudge the ink. Ms Thorndyraft-Pope may not have had genuine signatures made immediately before and after 22 January 2020, but she did have one dated a month before which had no sign of tremor.

[74] Under cross examination Ms Gillies accepted that one did not have to be an expert to draw inferences from pencil lines under a signature. She had not been told that the cheques dated and completed after August 2019 had in fact been signed in the August. If that was the case she did not think that it would affect her opinion. She would still use them even if signed in August 2019. The other writing on the cheques by Mr Niven showed no difference in quality. There were so many mistakes in the codicil signature. Even in the case of dementia, the ability to write one's signature stays with you. Deep impacts on the back of the codicil indicated that a lot of pressure had been applied. It did not surprise her that the cheque dated 14 February 2020 had been written by Irene Niven. The variations in the signatures she relied on for the comparison exercise all fell within the range of genuine signatures.

[75] With regard to her first report, while the number of signatures supplied was at the lower level of what would be desirable, there was enough to see that the codicil signature was completely different, and pencil lines are a feature of forgeries. The forger might have thought that they would not be seen. When she had only a copy of the codicil, she did not

see the pencil lines. There was an attempt to erase one of the lines. She could not know what was in the mind of the forger or their capacity to think these things through. She had been told that Irene Niven was a heavy drinker, and that might be an explanation for the poor job. She had not been told by Mr Niven's children that they thought Irene Niven had forged her husband's signature. The body of Ms Thorndycraft-Pope's report was described as "quite sparse".

[76] In re-examination Ms Gillies spoke to the pressure applied by the author of the signature which is apparent on the reverse of the principal document. This suggested that someone was trying to follow the pencil lines.

Ms Thorndycraft-Pope

[77] Having spoken to her qualifications, Ms Thorndycraft-Pope commented on the very poor quality of the signature. There might have been a health problem. She could not say whether it was or was not the writing of Mr Niven. Her overall position was categorised as "inconclusive". However she would expect a forger to make a better job of it. She didn't receive many signatures of such poor quality – which she described as 1 out of 10. It is so hesitant and tremulous that it is difficult to make anything of it. Usually pencil lines would be erased – she had not seen many where they were not. She had seen the indentations underneath the signature. With regard to her addendum at paragraphs 4.11/12, by then she had been told that cheques had been pre-signed.

[78] In cross-examination the witness stated that, if healthy at the time, she would not have expected Mr Niven to write like that. She had taken into account the information supplied to her that he had an intermittent tremor. If he was able to drive she would not have anticipated such a poor signature. If the reason given for the use of a pencil was true,

she would have expected to see only one pencil line. If the cheque pre-signing was not true, her opinion might change.

[79] Later I discuss the expert evidence. The parties' submissions on the evidence were presented in writing.

The written submissions on the evidence

A summary of the submissions for David Niven and Carole Melaisi

[80] The evidence of Evelyn Gillies should be accepted. She gave clear reasons for her conclusions. The questioned signature has specific similarities with Irene Niven's writing style. It is wholly different from the deceased's signature. The pencil lines and the indentations in the original document point to simulation.

[81] Ms Thorndyraft-Pope's view was based on assumptions as to the deceased's state of health which were not borne out in the evidence. It indicates that in January 2020 he was reasonably fit and healthy. Ms Thorndyraft-Pope relied on the explanation for the pencil lines provided by Irene Niven and Carly March, but it does not fit with the presence of two pencil signatures, one partially erased, which could be identified in a magnified image. She was told that there were no post August 2019 signatures of the deceased, the later cheques having been pre-signed. It was said that he did this because of an intermittent tremor, but with one exception the later cheques were completed by him without any sign of tremor. There was no independent evidence of any such tremor. The evidence of pre-signing should be rejected. In any event it does not undermine the other evidence relied on by Ms Gillies. In short none of the factors mentioned by Ms Thorndyraft-Pope rebut her starting point, namely that pencil lines beneath a signature are usually indicative of simulation.

[82] The evidence of Irene Niven and Carly March as to the signing of the codicil should be rejected. Neither of them was a credible and reliable witness. Carly March has been dishonest in the past. She gave evidence in the manner of someone determined to stick to the party line. Her account was contradicted by the second pencil line. It was not credible that the signing would have taken 10 to 15 minutes. She said it happened on a Monday, however 22 January 2020, the date on the codicil, was a Wednesday.

[83] As to Irene Niven, the long delay in production of the codicil; the coincidence with the desire to build the lodge and make provision for her son; and the implausibility of the explanation of waiting until after his wedding to avoid family absences, all point to the falsehood of her claim that the codicil is genuine. Contrary to her evidence, in the telephone call she told Mr Johnston that she had forgotten about it and simply came across the document when going through her files.

[84] Consistently with the questioned signature and her handwriting, when giving evidence Irene Niven displayed a persistent tremor. In the October 2021 telephone conversation with Mr Johnston she claimed that the impetus for the codicil was her husband's diagnosis with lung cancer but that was not made till 12 March 2020. She promised him that she would not alter David and Carole's share of the house on her death, but that is exactly what she wanted to achieve.

[85] Irene Niven gave differing accounts as to how and why the codicil came about without input from their lawyer. She was inconsistent as to when she disposed of her previous laptop. It is not credible that a published author would not have saved a copy of the codicil on her laptop. She contradicted the assertion in her pleadings that her husband had a pencil case. The explanation for not keeping the pen and pencil set said to have been used for the codicil signing did not ring true.

[86] Earlier in the proceedings interim interdict was granted preventing Irene Niven from alienating, burdening or otherwise dealing with Alexander Niven's share in the house. Perpetual interdict was sought.

A summary of the written submissions for Irene Niven (lodged after sight of the above submissions)

[87] The burden of proof rests on those challenging the codicil. Given the seriousness of the allegation that Irene Niven forged her husband's signature and uttered a false document, and that Carly March has colluded with her, strong evidence of good quality would be required for its proof – *B v Scottish Ministers* 2010 SC 472.

[88] The direct testimony of Irene Niven and Carly March is the best evidence as to the circumstances of the signing of the codicil. It is supported by David Niven's evidence that during the conversation at the restaurant in Troon no mention was made of the liferent, suggesting that his father was unaware of it or did not understand it. In addition Carole Melaisi said that during her visit on 19 April 2020 her father said that the house would be split with 50% to Stuart and the rest divided between her and her brother. The codicil is the only testamentary writing spoken to in evidence which sets this out. This indicates that her father knew of it and consented to it.

[89] Both Irene Niven and Carly March were credible and reliable witnesses. Their evidence coincided on important points but were not so matched as to appear rehearsed or tailored. There is no evidence that Carly March will benefit, and after her conviction why would she take the risk of perjuring herself? Clearly Mr Niven had trust in her. It was natural and convenient that she be asked to witness the signatures.

[90] Mr Niven was not completely disinheriting his children – they would share moveable estate of about £140,000. He may have thought, albeit wrongly, that overall the codicil was a mutual will which in a manner similar to the liferent arrangement guaranteed that eventually a half share of the house would pass to David and Carole. As to the errors in the terms of the codicil, it remains a valid instrument, and it can be noted that the 2016 will refers to “David Niven” with no mention of his first name.

[91] The evidence indicates that Mr Niven wanted to change his will because once he learned of it he was unhappy about the liferent. There was no evidence that Mr Johnston had ever explained it to him. As to the delay in its production, had it been a fabrication it would have been as easy to produce it in May 2020, something which would have reduced the amount of attention given to it.

[92] The explanation of wanting to avoid a family split at the time of her son’s wedding is plausible. Plainly long before this David and Carole were hostile towards her. Neither attended the January 2022 celebration thereby demonstrating that Irene Niven’s concerns were justified. Calling Stuart Niven as a second defender could only be explained by animosity towards him. Despite inheriting all of the residue of their father’s moveable estate his children have acted as disappointed beneficiaries, with feelings of suspicion, resentment and antipathy towards a stepmother that would not be out of place in a Victorian novel. She has been subjected to a highly unpleasant experience. As well as being a criminal, in open court in front of family they have accused her of heavy drinking and of manipulative controlling behaviour. Without robust and solid evidence they have made offensive and defamatory allegations of the utmost gravity about a septuagenarian who has only recently lost her husband.

[93] A fraudster of even average intelligence would not have perpetrated a scheme in the incompetent manner claimed in this case. A swindler would have dated the document shortly before Mr Niven died thus providing an explanation for not making the journey to consult their lawyer. There was no need to involve Carly March; Irene Niven herself could have witnessed her husband's signature. A forger would not have made such a clumsy job of copying the signature. It is not plausible that such blatant pencil lines would not be erased.

[94] The medical evidence points to the deceased being frail and in declining health from at least the summer of 2019. It is not surprising that a loss of fine motor skills was not recorded in his medical notes given that priority would be given to his other problems.

Dr Buchan's "otherwise fit and healthy" comment was designed to facilitate treatment for his patient. Alexander Niven was not a man to make a fuss or cause distress to his children.

[95] Ms Thorndycraft-Pope's expert evidence should be preferred. She disclosed the evidence she was given, for example the affidavits of Irene Niven and Carly March. We do not know what Ms Gillies was told, or how she derived the proposition that Irene Niven is a heavy drinker. Some of the material relied on by Ms Gillies was of inferior quality, in particular the multigenerational photocopies of cheques. She made assumptions which have not been proven, such as that the pencil marks were guidelines and that in January 2020 Mr Niven had no problem with writing.

[96] Ms Gillies' willingness to find forgery, even using the insufficient amount of material provided for her initial report, indicates an eagerness bordering on bias. She should have postponed judgement until provided with further information such as the cheques dated within three months of the questioned signature. In respect of them plainly she had not read Ms Thorndycraft-Pope's report which revealed that they had been signed in August

2019. By contrast Ms Thorndycraft-Pope approached such a serious allegation with due caution and circumspection.

[97] Ms Gillies' reasoning as to why a forger might not have erased the pencil marks is easily refuted. For example they are so obvious they would be bound to be noticed and then erased without smudging or damage to the paper.

[98] In short, the evidence does not bear the weight of an allegation of serious criminal conduct.

Supplementary submissions lodged in response to those for Irene Niven

[99] The burden of proof rests on Irene Niven in that she claims to have seen the deceased sign the codicil and asserts that it is valid. Reference is made to recent decisions south of the border, including *Face v Cunningham* [2020] EWHC 3119 (Ch) at paragraph 46 and *Sangha v Sangha* [2021] EWHC 1599 (Ch) at paragraphs 130-132. If there is a burden on David Niven and his sister, it is only in respect of the claim that the signature is not that of their father. They do not have to prove who was responsible. The ordinary civil standard of proof applies.

[100] The evidence of Irene Niven and Carly March attracts no special status. Irene Niven is the primary beneficiary of the codicil and her evidence should be approached with caution. Carly March was unable to speak to what it was that she saw Mr Niven signing.

[101] The conversations between the deceased and his children relied on by Irene Niven are consistent with his 2016 will. The codicil changed their position and it is significant that he made no mention of this to them. There is no basis for the speculation about a mutual will. In the recorded telephone conversation Irene Niven says that her husband was always concerned about the liferent and never liked it. If that was true he would have raised it with

Mr Johnston. It was entirely appropriate that Stuart Niven be convened for any interest he might have.

Irene Niven's final written submissions

[102] The onus lies on those who challenge the validity of an *ex facie* probative document. Carly March did not require to see the substance of the document – she was witnessing the signatures. If her evidence is credible and reliable, it can be accepted that the document was the codicil. Much of this document is a recapitulation of earlier submissions and need not be summarised here.

Decision

[103] I accept the submission for Irene Niven as to the burden of proof resting on David Niven and Carole Melaisi. It is they who are pursuing the action and are claiming that the relevant part of the codicil should be set aside because their stepmother forged their father's signature. I also accept the submission as to the implications of the serious nature of the allegation. While the civil standard of proof on a balance of probabilities applies, cogent and sufficiently powerful evidence will be required to satisfy the court that the forgery case has been established, see *B v Scottish Ministers* 2010 SC 472. I have approached the assessment of the evidence with the guidance in that decision firmly in mind, particularly that at paragraph 42 which stresses the need for evidence of quality and weight carefully scrutinised by the court if a case of the present kind is to be proved.

[104] The evidence of Carly March supports that of Irene Niven on the crucial issue. For obvious reasons none of the other witnesses were able to assert from their direct personal knowledge that the late Mr Niven did not sign the codicil. David Niven and Carole Melaisi

required to rely on expert evidence and other indirect factors or circumstances which it is said undermine the credibility and reliability of the alleged eye witnesses. All of the evidence has to be considered and weighed in order to determine whether they have established their case.

[105] Beginning with the expert evidence, I prefer that of Evelyn Gillies (summarised above). Taken as a whole it is a careful and detailed examination of the relevant material. Her text, particularly in her addendum, is backed up by illustrations from the signatures and other writings placed before her. Her reasoning in support of her conclusion that it is probable that Irene Niven is the author of the questioned signature is clear, cogent and convincing.

[106] I am not so impressed by Ms Thorndyraft-Pope's evidence. Rather than a purely forensic examination of the signatures and other documentation put before her, much of it is based on an assumption that various matters told to her, for example as to the deceased's state of health and the pre-signing of cheques, were true and accurate. Ms Thorndyraft-Pope did not address the observation that the questioned signature displays features of Irene Niven's writing. She assumed that if Irene Niven was responsible for the signature she would have made a better job of it. However I have no difficulty with Ms Gillies' remark that the ability to copy another's signature successfully will vary from person to person. There is bound to be a spectrum in such matters, and it is worth remembering that a signature which looks to be an obvious forgery to an expert under microscopic examination may seem at least satisfactory to the person responsible. For example, so far as this codicil is concerned, and contrary to the submission for Irene Niven, at least to me the pencil lines at the questioned signature are not blatant if one is simply looking at the original document.

[107] Both expert witnesses acknowledged that pencil lines beneath a signature will usually indicate that guidelines were used in an attempt at simulation. In this regard Ms Thorndycraft-Pope was content to refer to the explanation tendered to her, but without making any comment on the fact that it did not account for the second pencil line. I accept the evidence that the indentations in the paper at the questioned signature suggest that it is not genuine. As to the August 2019 cheque pre-signing evidence, even if it were accepted as true, there was more than sufficient unchallenged examples of Mr Niven's writing shortly before and after 22 January 2020 to demonstrate that the questioned signature was the only item showing signs of tremor, overwriting and pen uplifts, all of which are features of Irene Niven's handwriting.

[108] In short, though not in itself determinative, I consider that Ms Gillies' evidence, all of which I accept, strongly supports the claim that Irene Niven forged her husband's signature on the codicil.

[109] More generally there are surrounding circumstances which militate against the evidence of both Carly March and Irene Niven. All the evidence points to the late Mr Niven being a careful and meticulous man. He instructed his longstanding solicitor to draft his will. On the salient points, including the liferent, it was an unremarkable document which would have been easily understood by anyone of ordinary intelligence. If there was anything which Mr Niven did not grasp or was unhappy about, there would have been no difficulty in consulting Mr Johnston, and likewise in respect of any desire to change his will. Different explanations have been given for the failure to do that, none of which are convincing.

[110] Both David Niven and Carole Melaisi were aware of the general position regarding the house on their father's demise. They understood that their stepmother, who owned half

of it, would not be evicted, and that in due course their father's share would come to them. If the evidence that Mr Niven signed the codicil is to be accepted, it would follow that he decided to alter his will in an obviously significant way and thereafter chose not to tell either his children or his solicitor. Given the evidence as to his character, his relationship with his children, and his longstanding reliance on Mr Johnston, both propositions are unlikely. Furthermore while various accounts have been proffered by Irene Niven by way of explanation for the change in his testamentary provision regarding the house, I find none of them likely or compelling.

[111] If the codicil is genuine, why did Irene Niven wait until October 2021 to reveal its existence? A number of implausible explanations have been tendered, for example that she was waiting until after her son's marriage, or that she had forgotten about it and just came across it when going through her files. She has claimed that she thought that the codicil made no difference, or would only come into effect if the house had to be sold, neither of which is credible. It can be noted that in January 2022, as by then sole executrix, she took advantage of its terms and conveyed the deceased's half share to herself as an individual. This paved the way for the planning application.

[112] It is plain from her evidence that by October 2021 Irene Niven wanted to build an accessible lodge in the garden and that she was concerned about the financial and personal circumstances of her disabled son. In the telephone call with Mr Johnston she told him that she was about to tear up the codicil (again an unlikely occurrence if it was a genuine representation of her and her late husband's wishes) when she thought about David and Carole benefitting from her expenditure on the lodge. She was seeking reassurance that the document would allow her to give its value to Stuart. And she was wanting to alter the third paragraph of the codicil, namely the part where she bequeathed the house to Stuart,

David and Carole. That conversation with Mr Johnston and her evidence in court reveals a motive emerging in 2021 for Irene Niven to take steps to defeat her stepchildren's ultimate interest in the house to the benefit of her and her son. During her cross-examination it became clear that essentially she had decided that she wanted to have sole control of the house, and as matters stand that desire has been fulfilled.

[113] There are other factors which adversely affect the credibility and reliability of the eye witness evidence. The explanation proffered by both Irene Niven and Carly March that Mr Niven signed once in pencil by mistake is not consistent with the microscopic examination which revealed a second pencil line. The physical evidence matches someone being dissatisfied with a pencilled guideline, attempting to erase it, then starting again. As in the questioned signature, Irene Niven's handwriting is shaky, as one would expect from someone with tremors. I do not accept that the shaking in court was wholly explained by stress, nor her evidence that she does not have tremors. Moreover the codicil has errors which it is unlikely that Alexander Niven would have tolerated.

[114] Particularly when regard is had to the medical records as spoken to by Dr Lazaro, I am of the view that throughout her evidence Irene Niven exaggerated the consequences of her husband's health problems for his writing skills. He completed a number of cheques shortly before and after 22 January 2020 with no sign of tremor or loss of line quality. This gives the lie to the evidence that in August 2019 he decided that it was necessary to pre-sign all the cheques which were completed thereafter till his death. That suggestion came late in the day, it can be inferred in an attempt to undermine the force of part of Ms Gillies' addendum to her report. It is mentioned for the first time in Ms Thorndycraft-Pope's addendum dated shortly before the start of the proof. For her first report she was provided

with post- August 2019 cheques which were not caveated with the pre-signing qualification. If the pre-signing was true she would have been informed about it when given this material.

[115] I agree with the submission that the explanation regarding the disposal of the Mont Blanc pen and pencil set does not ring true. At times during her evidence I formed the view that Irene Niven was endeavouring to hold to a prepared line, but when faced with difficult questions gave inconsistent and implausible responses which she seemed to be making up as she went along.

[116] I do not accept the submission that the defence case was supported by certain evidence from David Niven and Carole Melaisi. That his father did not mention the liferent to David at a lunch in Troon some years ago is of no real significance, especially since it was understood that his wife would be staying in the house if he died first. As to the conversation with Carole during her last visit, there is no inconsistency between it and the position as understood by her and her brother. The submission might have had at least some force if it had been demonstrated that the codicil innovated on Irene Niven's testamentary wishes as to her share of the house. The entirely speculative submission about a mutual will was not spoken to by Irene Niven, and indeed has been contradicted by her actions.

[117] As to other matters advanced on behalf of Irene Niven, it is true that Alexander Niven's children would still inherit his other possessions, but this is a factor of no real relevance. The 2016 will does indeed refer to "David Niven", but that is how he is known and it was prepared by Mr Johnston. It hardly deflects from the error regarding Alexander Niven's son's first and middle names and the other mistakes in the codicil. No adverse inference can be drawn from the understandable decision that Stuart Niven be

called for any interest he might have. In the event he did not enter the process and no order is sought against him.

[118] I do not accept the submission that the eye witness evidence should be given a special status. It is necessary to weigh up all of the evidence, both direct and indirect, which bears on the crucial issues. Plainly that includes the evidence of Carly March. She said that she was asked to witness the signatures of Mr and Mrs Niven on a document in their kitchen. Though she did not see what the document was, I consider that if her evidence is accepted the forgery claim must fail.

[119] In the past she has been a carer for Stuart Niven and was a Facebook friend. She has been employed by Irene Niven for some years. In that sense she is not wholly independent, though that alone would not be a problem. Her account as to what happened regarding the pencil is not borne out by the existence of a second pencil line. Her evidence was inconsistent as to how Mr Niven was on the day, initially saying that he was fine and his normal jolly self, then that he was frail, quiet and nervous. She has been prepared to act dishonestly in the past. As with that of Irene Niven, Carly March's evidence has to be assessed in the light of the facts and circumstances outlined above.

[120] I can now sum up my conclusions as to where the evidence leads. The burden of proof on those alleging the forgery is a heavy one; nonetheless after giving the matter careful consideration I am of the view that it has been discharged. For all the reasons outlined above neither Irene Niven's nor Carly March's evidence is accepted as being credible and reliable. It is true that that no clear motive for Carly March falsely stating that she saw Mr Niven sign the document has been established, but I am persuaded that, for whatever reason, that is what she has done. If the codicil was a true reflection of the late Mr Niven's testamentary wishes, it would have been exhibited long before October 2021. By then

Irene Niven had decided that she wanted sole control of the house. She prepared the codicil which contains errors that her husband would not have tolerated. She made a pencil guideline of his signature. Being dissatisfied with it she rubbed it out, albeit leaving traces, and repeated the exercise. She then simulated an ink signature, though she was unable to withhold features characteristic of her own handwriting. She signed her own name and then persuaded Carly March to witness both signatures.

Disposal

[121] I shall grant decree of reduction of (a) the relevant part of the codicil and (b) the disposition of Alexander Niven's share in the former matrimonial home to Irene Niven, all as sought in the first and second conclusions of the summons; and also interdict against Irene Niven or anyone on her behalf from transferring or dealing in any way with the late Alexander Niven's half share in the property as per the third conclusion. I shall accede to both sides' request to reserve all questions of expenses meantime.