

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT INVERNESS

[2022] SC INV 31

INV-A83-19

JUDGMENT OF SHERIFF SARA MATHESON

in the cause

(FIRST) FIONA MARGARET THOMSON, Solicitor, of 52-54 Rose Street, Aberdeen, AB10 1HA, borrowing the name of DOUGLAS SIMON STEWART qua Executor of Hugh McCulloch, late of Isle View Nursing Home, Aultbea, IV22 2HU,

AND

(SECOND) FIONA MARGARET THOMSON, Solicitor, of 52-54 Rose Street, Aberdeen, AB10 1HA, qua Guardian of Roderick Matheson McCulloch, residing at Isle View Nursing Home, Aultbea, IV22 2HU, conform to guardianship order dated 17<sup>th</sup> May 2019

AND

(THIRD) LEDINGHAM CHALMERS TRUSTEE COMPANY LIMITED, a company incorporated under the Companies Acts (Company Number SCO69050) and having its registered office at Johnstone House, 52-54 Rose Street, Aberdeen, AB10 1HA, qua Executor Nominated of the late David McCulloch

Pursuers

against

(FIRST) IVAN WARWICK, residing at Ardcruiddh Croft, Heights of Docharty, Dingwall, IV15 9UF; AND

(SECOND) JOCELYN LYDIA CROMARTY ROSE WARWICK, residing at Ardcruiddh Croft, Heights of Docharty, Dingwall, IV15 9UF; AND

(THIRD) DOUGLAS SIMON STEWART, residing at Brahan View, Arcan, Muir of Ord, IV6 7UL; AND

(FOURTH) MARIE CHRISTINE STEWART, residing at Brahan View, Arcan, Muir of Ord, IV6 7UL

Defenders

**Pursuers: MacLeod, Counsel instructed by Ledingham Chalmers, Solicitors  
First & Second Defenders: Dunlop, Counsel instructed by Stronachs, Solicitors,  
Third & Fourth Defenders: Self**

**Inverness, November 2021**

The Sheriff, having resumed consideration of the cause, finds in fact:

1. The late Hugh McCulloch was born on 22 January 1930 and died on 22 December 2020. Roderick McCulloch was born on in 1932. He is currently cared for within Isle View Nursing Home, Aultbea. The late David McCulloch was born on 12 November 1934 and died on 9 September 2019. These three gentlemen were brothers (hereinafter collectively referred to as “the brothers”). The brothers lived together at Logie Farm, Muir of Ord (“the farm”). They lived on the farm for many years and ran the farm together.
2. None of the brothers has or had a spouse or issue. Their nearest relative is Hugh Fraser who resides at Fearn, Tain. He is a second cousin of the brothers. Mr Fraser’s grandmother and the brothers’ father were brother and sister.
3. Hugh McCulloch left the farm to go into care at Isle View Nursing Home, Aultbea in or about August 2017. He later died there.
4. Roderick McCulloch left the farm to move into a property at Muir of Ord in or about August 2017. He moved from there in or about July 2018 to live at Poolewe. He was taken into residential care on or about September 2018 and remains there.
5. David McCulloch left the farm to go into hospital for a number of months in or about February 2017. He was then taken into care at Wyvis House Care Home, Station Road, Dingwall, in or about August 2017. He later died there.
6. Fiona Margaret Thomson, solicitor, was guardian of Hugh McCulloch by virtue of an interlocutor of this court granted on 17 May 2019. She was originally the first pursuer in this action *qua* guardian of Hugh McCulloch. Her appointment in that capacity ended on his death. On 9<sup>th</sup> April 2021 the court granted authority to sist Hugh’s executor, Douglas Stewart (the third defender) in room of Ms Thomson and for Ms Thomson to borrow his name to pursue the action on behalf of the estate of the late Hugh McCulloch.

7. The second pursuer is Fiona Margaret Thomson, solicitor *qua* guardian of Roderick Matheson McCulloch. Fiona Thomson was appointed as his guardian by interlocutor of 17 May 2019.
8. The third pursuer is Ledingham Chalmers Trustee Company Limited. Ledingham Chalmers Trustee Company Limited is the executor nominate of the late David McCulloch, conform to deed of assumption and resignation dated 29 September and 9 October 2019.
9. The first defender is Ivan Warwick and the second defender is Jocelyn Lydia Cromarty Rose Warwick. They are married and reside together at the address in the instance.
10. The third defender is Douglas Simon Stewart and the fourth defender is Marie Christine Stewart. They are married and reside together at the address in the instance.
11. This action concerns heritable property at Logie Farm ("the farm"), Muir of Ord, which is within this sheriff court district. This court accordingly has jurisdiction.
12. Until in or around 2011 the brothers had good relationships with their immediate neighbours, including Dorothy Fraser and Angus Ross. They would work together on each other's farms to jointly complete large tasks, such as harvesting. Following a fire at Logie Farm in or around 2000, Hugh McCulloch stayed with Angus Ross for a few nights. The relationship between the brothers and neighbours changed, so as to reduce their closeness, following increased contact between the brothers and the third defender in or around 2011.
13. From in or around 2011 the third defender became more involved with the brothers' affairs. He befriended the brothers. The brothers did not instigate his involvement in their lives. The brothers did not ask any of the defenders to intervene in their affairs. Despite this the third defender regularly attended at the farm. The brothers stopped interacting to the same extent with their neighbours.

14. On 18 February 2013, Hugh McCulloch signed a power of attorney (“POA”) in favour of the first and third defenders. He trusted them.
15. On 11 March 2013 Roderick and David McCulloch signed powers of attorney in favour of the first and third defenders. They trusted them. Roderick McCulloch revoked his power of attorney on 16 October 2018.
16. All of the said powers of attorney were prepared by Alasdair Fraser, solicitor, Inverness. All of the said powers of attorney were witnessed by him. The said powers of attorney were registered with the Office of the Public Guardian in June, July and August 2013.
17. Each of the brothers wished to live on the farm until his death. Each of the brothers expressed a wish that they did not wish to be placed into residential care.
18. The brothers each had separate roles on the farm. Hugh McCulloch managed the finances and most commonly dealt with the brothers’ shopping and banking. He also worked on the farm. Roderick McCulloch worked the farm and dealt with the cattle and sheep. David McCulloch managed the household and did all of the cooking. The brothers had a close relationship with each other and were private individuals.
19. David McCulloch was extremely shy. He rarely left the farm. He did not act independently of his brothers.
20. The brothers used a solicitor, Mr Alpin Stewart, latterly of Munro & Noble, Solicitors, Dingwall, to deal with their legal affairs from in or around 1998 until 2013. Mr Alpin Stewart carried out various legal transactions for the brothers during that period of time, usually involving the sale of small bits of farm ground to others.
21. The brothers met the third and fourth defenders some time prior to 22 January 2010.

22. The brothers met the first defender some time prior to 22 January 2010 and the second defender around March 2013. The third defender introduced the brothers to the first and second defenders.

23. On or about 1 April 2011 the solicitor for the third and fourth defenders wrote to Alpin Stewart, solicitor for the brothers at that time, offering to purchase 4.5 acres of the farm, being a piece of it at Highfield Park, at a price of £100. The third and fourth defenders intended to build a house on the land.

24. Alpin Stewart met with Hugh McCulloch after receipt of this offer. Hugh McCulloch was brought to Alpin Stewart's office by the third defender. Alpin Stewart saw Hugh McCulloch alone. He cautioned against selling the land to the third and fourth defenders for well below value. Hugh McCulloch indicated that the McCulloch brothers were to receive some form of care going forward in exchange for the land and that the third and fourth defenders would look after them as they got older. Alpin Stewart pointed out the possible shortcomings of this.

25. Hugh McCulloch accepted Alpin Stewart's advice that the offer was not acceptable. On 7 April 2011 Alpin Stewart wrote to A Fraser & Co. indicating that the offer was not acceptable as it would result in the brothers ending up significantly out of pocket, when the costs of transfer were taken into account.

26. Between 7 April 2011 and 17 May 2011 Hugh McCulloch was taken to Alpin Stewart's office by the first defender. Hugh McCulloch advised that the brothers wished to sell the land to the third and fourth defenders for the same price, but in addition that their legal expenses in connection with the sale were to be met. On 17 May 2011 Alpin Stewart wrote to A Fraser & Co. confirming this position.

27. On or about 11 January 2012 the brothers sold 4.5 acres of the farm to the third and fourth defenders for the sum of £100 plus payment of the attendant legal fees and outlays. The third and fourth defenders were not able to get planning permission to build on this land.

28. In or around early 2013 Alpin Stewart received a mandate from A Fraser & Co., Solicitors, Inverness, requesting the title deeds of Logie Farm and indicating that they were now instructed to act on behalf of the brothers. The brothers had not expressed any prior dissatisfaction, about him or his services, to Alpin Stewart. The involvement of A Fraser & Co was arranged by the first and third defender. The brothers did not require a different solicitor in light of their relationship with Alpin Stewart.

29. Alasdair Fraser, principal solicitor at A. Fraser & Co., had previously acted for the first and second defenders and, separately, for the third and fourth defenders. He had known them all for several years. He was not known to the brothers.

30. The third defender acted as the brothers' power of attorney following registration of the relevant documents with the Office of the Public Guardian. The first defender did so to a lesser extent. In or around 2013 the third defender signed a cheque in the sum of £40,000 from the brothers' joint account in favour of the first defender; said signature was in his capacity as Attorney. The third defender advised external agencies, such as the brothers' GP surgery that he was the brothers' Attorney.

31. Between August 2012 and August 2014 the first and second defenders lived in Paisley. They travelled to their home near Dingwall frequently.

32. Between 2013 and 2017 the third defender arranged a PO box to receive the brothers mail. This allowed the third defender or his family members first access to any mail sent to the brothers.

33. On 25 June 2014 the brothers signed a disposition of heritable property in favour of the four defenders. This conveyed the whole farm to the defenders for “love, favour and affection” and for no monetary consideration. The disposition was prepared by Alasdair Fraser, solicitor and witnessed by him. The brothers did not understand the nature of the document which they signed.

34. The circumstances of the said conveyancing transaction carried out by Alasdair Fraser, solicitor, were irregular in the following respects:

- i. He took initial instructions from the first and third defenders in respect of the proposed transaction, rather than from the brothers.
- ii. He failed to advise the brothers or any of the defenders that he would be acting as solicitor for both the disponers and disponees in respect of the transaction.
- iii. He took instructions from the third defender, a donee, as to the value of the farm for the purposes of calculating the amount of registration dues to be paid. This information should have come from the disponers.
- iv. He did not provide any written advice to the brothers that the proposed transaction was against their interests, nor did he discuss inheritance tax or future care home fees. He did not recommend that any independent financial advice should be taken in respect of the proposed transaction.
- v. His signature on the disposition *prima facie* differs from other examples of his signature.
- vi. He had not been made aware by the third defender that Hugh McCulloch was diagnosed with dementia and that David McCulloch was ill.
- vii. He did not keep file notes of any meetings with the brothers, including the meeting to sign the disposition.

35. At the time of signing the disposition on 25 June 2014 Hugh McCulloch was diagnosed as suffering from dementia. This definitive diagnosis was made on 21 January 2014. The third defender was present with Hugh McCulloch when this diagnosis was made. The third defender was aware of Hugh McCulloch's diagnosis and resulting mental frailty at that time and thereafter. In particular he was aware of it as at 25<sup>th</sup> June 2014. By October 2014 Hugh McCulloch had lost capacity.

36. On 21 March 2014 David McCulloch attended his general practitioners' surgery accompanied by the fourth defender. The nurse treating him recorded him as being unkempt and incontinent. On 1 July 2014 he presented with confusion at an out of hours clinic. On 25 June 14 his cognitive ability was impaired. He was suffering from dementia. The third and fourth defenders were aware of his mental frailty in June 2014 when the disposition was signed.

37. In or around August 2017 Helen and Phyllis Fraser moved into the farm. They did so at the request of at least one of the brothers. Helen Fraser attended the police station in Dingwall on 23 August 2017 in order to report alleged impropriety by the first and third defenders whilst acting as Attorneys.

38. Police and social work commenced an investigation of the first and third defenders following the said police report. They concluded that there was no irregularity and assisted the defenders in ensuring the Fraser sisters did not return to the farm.

39. On the removal of the Fraser sisters from the farm, Hugh McCulloch was moved to Isle View Nursing Home, Aultbea. Roderick McCulloch remained at the farm alone. He was then moved to a new build property at 11 Wards Croft, Muir of Ord.

40. 11 Wards Croft, Muir of Ord, was a property purchased by the brothers in their joint names by the first and third defenders as powers of attorney. Roderick McCulloch lived in

the property for a period of around nine months until he purchased a property in Poolewe.

This property was close to Isle View Nursing Home and allowed him to visit

Hugh McCulloch more frequently and to visit both his brothers on the same day.

41. Hugh McCulloch previously made a Will dated 1 November 2007. In terms thereof he bequeathed two pecuniary legacies of £50,000 each to Catherine MacDonald and Catherine Seager, respectively. He bequeathed the residue of his estate to his surviving brothers. Hugh made this Will with Alpin Stewart, solicitor. Hugh revoked this Will and made a fresh Will on or about 25 June 2014 (the same date as the signing of the disposition) with Alasdair Fraser, solicitor. In terms thereof Hugh McCulloch made no pecuniary legacies and left the residue of his estate equally between his surviving brothers, whom failing between the first and third defenders.

42. On or about 23 July 2018 the defenders disposed to and in favour of Martin John Coats and Jonathan James Coats 11 acres of Logie Farm for the sum of £50,000. On or about 22 January 2019 the defenders disposed to and in favour of Muir of Allangrange Limited 23 acres of Logie Farm for the sum of £140,000. On or about 28 May 2019 the defenders disposed to and in favour of Caitlin O'Connor Logie Farmhouse for the sum of £200,000. The lifetime alienation of the farm by the brothers for no consideration deprived them of capital of £390,000.

43. By allowing the brothers to gift Logie Farm to them the first and third defenders acted in breach of their fiduciary duties to the brothers as their powers of attorney.

44. No defender has offered to repay any sum to the pursuers or their estates. The second defender has transferred her share of the proceeds of the farm to her husband, the first defender. She considered the transfer of the farm to her to be unusual.

45. The second defender assisted the brothers in attending to cattle and sheep records, tagging and shearing on the farm from March 2013.

46. In October and November 2018 Roderick McCulloch alleged that he had no access to his money, that the third defender had been buying properties with his funds, paying for family member's weddings and had got rid of his cattle and truck without accounting to him for the proceeds. He maintained that he was fearful of the third defender. He said he did not want to replace Alpin Stewart as his solicitor.

Finds in fact and in law:

1. The disposition of Logie Farm was signed by the brothers when they were aged 84, 82 and 79 years respectively. It was signed when they were of deteriorating health and susceptible to influence.

2. The first and third defenders took advantage of the brothers by having the farm transferred to them and their respective spouses.

3. The first and third defenders had assumed an ascendancy in relation to the affairs of the brothers and had excluded others, including Alpin Stewart, Dorothy Fraser and Angus Ross, with whom the brothers had previously had good relationships.

4. The effect of the disposition was to prejudice, disadvantage and to the lesion of the brothers.

5. The first and third defenders improperly procured the disposition by fraud or circumvention when the brothers were weak and facile.

6. The brothers were not given any independent legal advice or proper financial advice in relation to the transfer of the farm.

7. The disposition signed on 25 June 2014 having been impetrated from the grantors, Hugh, Roderick and David McCulloch through fraud or circumvention *et separatim* undue influence when the grantors were weak and facile and easily imposed upon decree of reduction should be granted.

8. The defenders, having received money in consideration of disposing the property acquired by them through fraud or circumvention *et separatim* undue influence, are therefore liable to make reparation to the pursuers therefor.

9. The sum second craved being the sums received by the defenders for the sale of the farm and this being the loss to the brothers' estate, they are entitled to reparation therefore.

THEREFORE:

Repels Pleas-in-law One to Fourteen for the first defender and One to Ten for the second defender and Pleas-in-law One to Seven for the third and fourth defender; Sustains Pleas-in-law Three to Six for the Pursuers and grants decree in terms of craves One and Four for the pursuers; and reserves all question of expenses meantime.

**NOTE**

**Introduction**

[1] This case concerns three elderly brothers, Hugh McCulloch (hereinafter "HMcC"), Roderick McCulloch also known as "Roddy" (hereinafter "RMcC") and David McCulloch (hereinafter "DMcC"), collectively "the McCullochs or the brothers". They were all unmarried and lived together on Logie Farm. In 2013 they each appointed the first and third defenders as their powers of attorney. In June 2014 they each purportedly signed a disposition transferring Logie Farm to their attorneys and their respective spouses.

[2] The pursuers' case is that the disposition has been impetrated from the McCullochs through fraud or circumvention, *et separatim* undue influence when they were weak and facile and easily imposed upon. They crave reduction of the pretended dispositions and payment in the sum of £390,000 (this being the sums achieved by the defenders upon sale of the farm premises in or around 2018 and 2019).

[3] The defender's case is that everything was very much done in accordance with the brothers' wishes. They were close friends of the defenders and viewed, certainly the third and fourth defenders as family and instructed their independent solicitor to carry out the work involved in gifting the farm to the defenders.

### **Procedural history**

[4] The action was warranted on 17 June 2019. After sundry procedure, none of which seems noteworthy for present purposes, I presided over a commission to obtain the evidence of RMcC on 13 February 2020 at Isle View Nursing Home, Aultbea. The report of that commission is item 22 of process. I then presided over a debate between parties whereby I allowed parties a proof before answer of their respective averments. The judgment in respect of the diet of debate is dated 26 June 2020 ("the debate judgment").

[5] The proof before answer commenced on 18 May 2021 and proceeded over a further 10 days of evidence, concluding on 8 September 2021. The matter was adjourned to a hearing on submissions on 6 October 2021 at which point I made *avizandum*.

[6] The pursuers were represented at proof by Mr R MacLeod, Counsel. The first and second defenders were represented by Mr G Dunlop, Counsel. The third and fourth defenders were earlier represented in the action by Swarbrick Law, Aviemore, but by the time of the proof before answer were representing themselves. During the proof the fourth

defender had a lay supporter in terms of rule 1.3A of the Sheriff Court Ordinary Cause Rules 1993, being her daughter, Marina Berkenheger.

[7] The proof took place in person, this being the preference of parties and the court, with respect to the voluminous productions and with respect to the fact that the third and fourth defenders were representing themselves. In addition there were clear questions of credibility to be resolved; this being better done by witnesses being present in court rather than on video link. All witnesses appeared in person, with the exception of Dr Vickerstaff for the first and second defenders, who appeared by video link from her surgery (with all parties present in court).

[8] The parties entered into a joint minute agreeing formal matters, such as the fact that the copy medical records were true copies of the originals. At points during the proof various witnesses (mainly professional witnesses) were interposed, mainly for their convenience. This was done with the consent of all parties.

[9] The parties led evidence from a number of witnesses; I comment on each of them below.

#### **PURSUER'S PROOF**

[10] The first witness for the pursuers was the second pursuer. **Fiona Thomson**, is a Solicitor and a partner with Ledingham Chalmers, Solicitors. She works in the area of private client and has done since 2000.

[11] She was approached by Highland Council asking if she would be agreeable to being appointed as guardian to the three brothers. She was advised of some concern about funds that were available to the brothers. She was aware that there had been previous Attorneys

in place. Ms Thomson spoke to Production page 124, a copy of the court order appointing her as guardian for RMcC on 17 May 2019 and the duties conferred upon her thereby.

[12] Ms Thomson gave evidence about steps she then took regarding the brothers' finances. She gave evidence that Production pages 1-4 was the disposition transferring title of Logie Farm to the defenders for "love, favour and affection". She was not aware of any documents in the brothers' affairs that suggested any bilateral arrangement between the grantors and grantees of the disposition.

[13] This witness spoke to the three Powers of Attorney (hereinafter "POA") granted by the three brothers; all of which were apparently witnessed by "A Fraser", the same witness to the disposition. The witness gave evidence about the "Declaration of Certifier" pg 10g of Pursuer's productions and what that required the certifier to do. She gave evidence that you are certifying that the POA has been entered into appropriately and you are content that the person granting it is aware of what they are doing and is doing so of their own free will.

The certifier in each of the brothers' case was Alasdair Fraser.

[14] The witness then gave evidence that a welfare POA only takes effect when the adult becomes *incapax*, but for financial powers commencement depends on circumstances. In this case financial powers could have commenced immediately, if that's what the brothers wanted, but in respect of welfare powers they would have needed to be *incapax*. The witness gave evidence that the disposition of Logie Farm in favour of the defenders was signed by the brothers not their attorneys and gave evidence that we could take from that that the brothers must have been *capax* at the time of signing the disposition.

[15] The witness gave evidence that she had raised this action as she has a duty to the brothers to deal with their assets in their best interests. When she became aware of the transfer of land and no payment in return she realised she may have to account at a later

stage if any of the brothers were in residential care and their resources reduced so that local authority assistance was sought. In that event the authority could examine the alienation and ask questions about it. The witness was aware of no reason for the brothers to give the farm away for no consideration. There was no paperwork within their files that would explain why they did this, nor any other information. It might be a normal act of gifting, but the witness thought that would be very unusual and hadn't seen that kind of gift before, outwith a family. She struggled to see how it could have been in their interests to transfer the farm for no consideration.

[16] The witness was asked about Page 1294 of the Pursuer's productions, a file note from the file of A Fraser & Co, re the transfer (repeated in full at paragraph [131]). The witness was asked about what she thought the meaning of the note was. She responded that: "there is a thought that it is not quite the normal way of doing things." She said that if she had been asked to conduct this work she would "bend over backwards" to make sure there was another solicitor involved.

[17] Ms Thomson's current interest re the brothers is that she is no longer guardian for DMcC and HMcC, as both have died. Her firm's trustee company act as co-executors to DMcC's estate and the witness is still RMcC's financial guardian. RMcC is also the beneficiary of HMcC's estate.

[18] In cross-examination by Mr Dunlop the witness was asked:

"Where have three men in their late 80s to leave their estate when they die?"

to which the witness answered:

"It is entirely up to the brothers".

The witness confirmed that the disposition of the farm was signed by the brothers personally, not by their Attorneys, even though the POAs were in place by that point.

Ms Thomson gave evidence that her involvement with the brothers started in 2019 and she could not assist with the views or wishes of the brothers prior to that.

[19] It was put to Ms Thomson that the transaction causing RMcC's later concern was the 2011 transaction for £100, not the transfer to the defenders. The witness responded:

"His concern referred to "the farm", what he means by that I don't know.....he referred to it as "the farm" so if it was just land I would have thought he would have referred to it differently."

The witness was asked if she knew what was meant by the 2011 transaction and she replied she did not. She was directed to Item 6-7 of process, which bears to be a letter about the third and fourth defenders offering to buy land from the brothers for £100. It was put to the witness:

"that is effectively a gift?"

to which she responded:

"It is a sale for under value."

It was put to the witness that if we hear about a close relationship between the brothers and the defenders that would provide an explanation for the transfer of the farm to them, to which she responded in the affirmative.

[20] I found Mrs Thomson to be a credible and reliable witness; she was acting in the brother's affairs in a professional capacity and came across in a professional manner.

[21] **Ashleigh Dunnnett** is a social worker with NHS Highland for the past five years. She works in adult services and was allocated social worker for the brothers from October 18 to July 19. She took over from Catriona (Coll). In this capacity she attended a case conference about the brothers on 2 Oct 18 (page 1643 of the Pursuer's productions). She gave evidence her manager had asked her to attend as there was the suggestion the case was going down the adult support and protection route and that needed two council officers. This was an

initial case conference- at the enquiry stage where a worker looks into allegations made then presents these to a case conference where all findings are discussed with a multi-disciplinary team.

[22] At the meeting the allocated social worker provided information that the POAs were not acting in the best interests of the brothers and were obstructive. She told the meeting that it had become apparent that [the third defender] had a powerful influence over the brothers. Ms Dunnett met RMcC maybe a week or so after the meeting. He wanted to revoke his POA and wanted some support to do that. At that stage he was very frail and underweight, he had bruising on his face, around his eyes, he was very angry at what had happened to him and his brothers; very upset but quite relieved things were in the process of happening and that he was revoking the POA- which would give him more control back.

[23] The witness gave evidence that after the initial conference the case went to a large scale investigation, at which she was council officer. The witness had discussions with RMcC, who was quite open about what had happened to him; namely he alleged he had been defrauded by the third defender. The witness supported him to go to both of his banks to prevent the POAs accessing any further funds. The witness gave evidence that she had these discussions with RMcC fairly regularly. Whenever she met him he would talk about his farm, how he and his brothers lived together and his general frustrations- that it was not right that people could do this to him and his brothers- that he had no access to his money. He said the third defender had been buying properties for himself, paying for family members' weddings, getting rid of his cattle and his truck and RMcC said he got no money for it. These discussions were in the period middle of October 2018 up to Nov 18, when they were tailing off.

[24] The witness also gave evidence about arranging for RMcC to see Logie Farm house. RMcC asked to do this as he missed the farm a lot. RMcC said he thought his farm had been sold by the POAs, he thought houses were being built on the property and there was someone living in the farm house. The witness was not sure how he came by that information, but that is what he relayed to her.

[25] The witness was present when RMcC provided the affidavit at page 1177 of the pursuer's productions. The solicitor who prepared it asked open questions. RMcC had a discussion with this witness about Alpin Stewart. He said he was his family solicitor for a long period of time and he didn't instruct Mr Alasdair Fraser. RMcC said that on more than one occasion. He also said that he and his brothers had willed the farm to his cousin, Mr Fraser at Fearn. He said that to the witness a few times. He was quite frustrated and upset about losing the farm and his property.

[26] Asked if Roddy was confused or unreliable in April 2019 the witness said:

"he was assessed as having capacity by his GP, also by a psychiatrist and both assessed him as having capacity to make decisions."

When asked:

"Even if he had capacity it might be said he was a bit confused or unreliable?",

the witness responded:

"I wouldn't have said he was confused."

[27] In cross-examination by Mr Dunlop the witness accepted she couldn't speak to what the brothers were like in 2014, or their wishes or relationships with other people. She thought RMcC had capacity to revoke his POA in 2018. It was put to her that if he had capacity to revoke it he must have had capacity to enter into his POA 6 years earlier. The witness responded:

“Roddy was scared of his POA....”

[28] Various alleged inconsistencies were put to the witness. For example RMcC saying he had only met the first defender on one occasion, when approached by him at the mart and saying he had only met the third defender once in Lidl. It was put to the witness that if the court accepted both individuals knew RMcC (prior to meeting them at the mart and in Lidl respectively) then he must be mistaken. The witness accepted they could not both be correct.

[29] In cross-examination by the third defender it was put to the witness that all of her information came from Catriona Stewart, another social worker. She disagreed with this. It was put to her that the third defender had known the brothers for forty years. The witness indicated RMcC had said to her that he had not known him for that length of time. The witness was asked if she had any concern that some things RMcC was saying were not true; to which she responded: “No.” She was asked:

“Did you question him to provide evidence to back up allegations against the POAs?”

The witness replied:

“We have the bank statements but when someone comes to us in a state of fear it is our job to support them, not to tell them we don't believe them.”

She was then asked:

“When did Roddy come to you in a state of fear?”

to which the witness responded:

“He was referred to Social Work because he was scared. Concerns were shared by Wyvis House that Roddy was apparently very hungry and underweight and there were concerns information, such as letters, were not being shared with him. Sandra met with him and he disclosed he was scared and he was moved to a place of safety.”

This occurred in late September 2018.

[30] I found this witness to be credible and reliable. I formed the impression that she was trying to do her best to assist the court. However, as her involvement dates from October 2018 her evidence was of limited relevance as to what occurred in June 2014; save to demonstrate that four years on RMcC was clearly afraid of the third defender and unhappy with his actions. The difficulty with this is that, given I accept that RMcC knew the third defender far beyond having met him once in Lidl, the rest of the information that he was providing at a similar time is cast into doubt.

[31] The next witness for the pursuer was Mrs Karen Beaton, another Social Worker with NHS Highland. She is also based in the adult team and has been a Social Worker for 20 years. She became involved with the brothers in early 2017 as duty Social Worker. She was asked to make contact with the GP for the brothers, following on from a police concern that had come into the Social Work Department (SWD). HMcC, having previously surrendered his driving license, had been stopped when driving and police had followed this up with a visit to the farm and this had caused them to highlight welfare concerns to the SWD.

[32] The witness spoke to an email (Pg 1649 of the Pursuer's productions) that she received from the brother's GP on 3 March 2017. In the email Dr Fletcher spoke of a "social crisis waiting to happen".

[33] The witness again became involved with the brothers in August 2017 when she was again on duty and she met with both HMcC and RMcC that day. The meeting came about after a police concern received at the SWD office that a lady called Helen Fraser, who was residing with HMcC and RMcC at Logie Farm, had taken RMcC to the police station in Dingwall and raised concerns regarding the sale of land and about the farm house being sparse in furnishing. As a result the witness was asked to undertake a home visit and

attended at the farm with two district nurse colleagues. She met with Helen Fraser, her sister Phyllis and both HMcC and RMcC. The witness was told at the visit that Helen and Phyllis were second cousins of the brothers and had also been made aware of that by the police. The purpose of her visit was to check on the welfare of RMcC and HMcC. At the time of the visit the witness was aware there were POAs in place and that the Attorney's were not these ladies.

[34] The witness became the assigned Social Worker in December 18. In December 2019 the witness had discussions with RMcC in relation to the transfer of the farm, along with Victoria Leslie, solicitor. He said he was aware of paperwork being signed but that he didn't think that was anything to do with a transfer of the farm. The witness had had other discussions with RMcC as he would regularly bring up his concerns that he would always have wanted the farm to go to his cousin, Hugh Fraser, and he would never have signed anything over to anyone else.

[35] In cross-examination by Mr Dunlop the witness gave evidence of observing a marked deterioration in RMcC's mental capabilities between December 19 and February 20. The witness was shown an email (Pg 602) from Les Hood, who she agreed was her former boss in the SWD, dated 20 Sep 17. In the email, which was read to the witness, Mr Hood writes of:

"a lot of evidence of RMcC being inconsistent and unreliable in his memory and extremely suggestible and compliant to the last idea that is put to him."

The witness was asked if that reflected her own opinion in summer 2017. She said:

"When I was visiting it was the first time I had met him. Some of the conversation was being led by HMcC and while I was there he was also sharing information not prompted by me and which I felt satisfied was coming from him."

The witness could not comment on how Les Hood had formed his view.

[36] The witness agreed that the Attorneys remained in post and carried out their duties in 2017, although she said that there was an adult support and protection case conference held re DMcC and concerns re the third defender not acting in the best interests of DMcC when he was in Ross Memorial for six months and medically fit for discharge. A discharge planning meeting was held to which the third defender was invited but he didn't attend; it was felt by the SWD that the best interests of DMcC were not being met by the third defender at that time. That was in respect of his failure to attend the meeting, his failure to share contact details for the other POA- the first defender- and his insistence that the SWD not go to visit RMcC at the farm without him being present, despite RMcC having capacity. It was put to the witness that the SWD had pre judged their approach to meetings and were assuming wrongdoing without properly investigating matters. The witness did not think this was correct.

[37] In cross-examination by Mr Stewart the witness was asked if she had any concern that some of the things R saying were not true. She responded:

“I had no reason to believe that what he was saying wasn't true.”

The witness was asked if she was aware of the brothers having a 40 year plus relationship with Mr Stewart and his family, to which she responded;

“I am not.”

There were other questions in this vein.

[38] I found this witness to be professional and trying to assist the court, but I was not sure about the depth to which any social work witness had accessed or investigated the full picture of the brother's lives. In particular I was not clear as to how Les Hood had reached the positive conclusion that he apparently did about the POAs in September 2017.

[39] (Ms) Joanne Hammond or MacRae is Area Co-ordinator for Advocacy Highland and previously worked as an advocate in the same organisation for four years. Her role was to meet with individuals and report their views, if they are unable to do so for themselves. In this capacity she was referred the case of RMcC and went to visit him on 13 Dec 18. In advance of this meeting she was given certain information as part of the referral. She was told he was in a place of safety and not to disclose that and was asked to find out his views re where he would like to live and his views on POAs he had had. She was told he had two brothers and originally stayed on a farm then moved to Muir of Ord and had been in Poolewe before Isle View care home. She met RMcC in his room in Isle view Care Home and they were alone for the meeting.

[40] Ms MacRae described the meeting. She said when she first went in she introduced herself and showed her ID card and gave RMcC a leaflet about advocacy and her business card. She told him Ashley (the SW) had made a referral for him to speak to someone independent. They had a chat about things in his room, such as pictures from his family home and this helped to put him at ease. She started asking some questions, open questions, as in how he knew [the third defender] and he answered what she asked quite fully. He told her the story and his views and she made notes.

[41] The witness was shown page 1351 of the pursuer's productions, paragraph two and confirmed that information came from her handwritten notes from the meeting with RMcC. This information was contained in minutes of a Highland Council Health and Social Care Initial Multi-Disciplinary Planning Meeting under Adult Support and Protection Procedures in respect of the brothers. The information provided by the witness to the meeting was:

“Joanne expressed that he [RMcC] had said he didn't like it in Poolewe and he missing (*sic*) seeing people. [The third defender] was nasty and he did not trust him at all. When asked if [the third defender] hurt him or his brothers, RMcC stated not

physically but there is no trusting him. RMcC stated that [the first defender] is a minister and should not have done this. RMcC explained that [the third defender] had sold the farm to the policeman known as [redacted in original] and also mentioned [the third defender] was funding his son's university costs. RMcC was not sure if they (he and his brothers) still owned a house and didn't know how much money was left. He wanted to see Logie Croft again if it was possible."

[42] The witness was asked what her view would be if it was suggested to her that RMcC was susceptible to agreeing with something someone said to him. She responded:

"He didn't have anything to agree with me about. I knew nothing about it so I disagree with that from my experience."

She was further asked, with reference to page 602:

"When you were asking questions were you putting ideas to him?"

She replied:

"To be honest I hardly asked him any questions and he carried on telling me things on his own and he moved on from that naturally."

[43] My view of this witness was that she was very professional and skilled in her task as advocate. She was aware of the need to guard against "leading" any person that she was to advocate for, such as RMcC, and that she took care not to do so. Accordingly, I was confident that it was RMcC who was genuinely expressing his own concerns about the first and third defender when the witness met with him in December 2018.

[44] Hugh Fraser is a 75 year old man, partially retired but still working part-time as an undertaker. He lives in Fearn, about 7 miles from Tain. His grandmother and the brother's father were brother and sister. This makes him a cousin of some degree to the brothers. He gave evidence of visiting the brothers once a year, with his wife and aunt. When his mother was alive she would also visit. They also used to meet at the Black Isle show and have a cup of tea annually. However, this was prior to the early 2000s when the show got too big. Mr

Fraser used to phone on the Saturday before the Sunday to let the brothers know he was coming.

[45] Asked to describe the brothers, Mr Fraser replied:

“I found them ok, I didn't see anything wrong. [DMcC] had a disability and you couldn't make a lot of conversation with him, but with {HMcC} and [RMcC] there was no problem at all”.

Mr Fraser did not know what kind of disability DMcC had, but it made conversation difficult. He had always been the same in all the years the witness visited.

[46] Mr Fraser described his relationship with the brothers as very strong. He said when his mother died he phoned them and asked them if they could come to the funeral and take a cord and they did this and sat with him at the funeral. Mr Fraser was not aware of the brothers having any other relatives.

[47] Mr Fraser gave evidence that on two or three occasions HMcC and RMcC said the farm would be left to him and he could build a house wherever he wanted. One such occasion was on the day of his mother's funeral. The witness took this “with a pinch of salt”. They never said why they wanted to give him the farm and he never asked them. His relationship with the brothers never changed throughout the years.

[48] Mr Fraser never heard the brothers speak of the third defender at all. The first defender's name came up when the witness mentioned he was working for the undertaker. The brothers said they had met the first defender and he “liked a wee dram and telling dirty jokes”; this appealed to HMcC. The witness was shown page 1296 of the pursuer's productions, a letter purportedly from the first defender to him explaining that he was POA to the brothers and that they had all left Logie. He said he had received it after he had discovered the brothers were no longer living on the farm. He knew DMcC was in Wyvis House so he had left a letter for RMcC in Wyvis House, not wanting to lose contact and to

see if he wanted to get in touch. He assumed the first defender got hold of his letter to RMcC and got in touch with him by way of this letter as a result.

[49] The witness continued to visit RMcC, having been put back in touch with him via the first defender, and had spoken to him about the farm. All he could remember was that RMcC was a bit concerned about his money and the farm and “some solicitor he wasn't very keen on.”

[50] I found this witness to be understated and measured in his approach. I found him to be credible and reliable and clear in what he was saying. I accepted his evidence.

[51] (Mrs) Dorothy Fraser has worked as support staff at Police Scotland for 28 years. She lives at Kilbirnie, Millbuie which is next to Logie Farm. She previously lived at Tyree, Millbuie for 25 years, which bordered Logie Farm. Physically there was a fence where the boundary line was and a paddock field between Tyree and Logie farm. She could see Logie farmhouse from her property. Formerly the witness shared the daily paper with the brothers. They would see each other every day when the paper was delivered to HMCC or RMcC, who would come over to the witnesses' house every night to drop it off. That stopped in 2009 when the local shop shut and in around 2010/11 the witness started to see less of the brothers.

[52] By 2014 the witness was seeing a lot less of the brothers and in her evidence put this down to the third defender coming to Logie Farm a lot more often. The witness described the brothers as:

“Quite shy individuals. When we arrived there first in 1993 they were quite reclusive. They would hide when you saw them. As I got to know them they would come over and pass the time of day. They wanted to be your friend at the same time. They would like to come over and chat to you as if they were needing a blether. They were knacky men they liked to make things, do engineering.....[DMcC] was hardly ever seen. He was in the house, I believe he was the cook. {RMcC} worked the farm. {HMCC} was definitely more talkative than [RMcC].”

[53] The witness gave evidence about a fire at Logie Farm in March 2000. The house was completely damaged. The next day the brothers moved into a residential caravan at the farm. The witness gave evidence that she did not know the third defender. She did the brother's VAT for the farm and thinks she first heard of him in 2010. When he used to come about HMcC said to her that he was looking for a plot of land and came to see if HMcC had any land for sale. The brothers said they used to meet him at pipe band displays on a Saturday night at Strathpeffer. Before 2010 she would see him coming to the farm one night per week to take the brothers to accordian classes or recitals. He would also come on a Sunday morning when HMcC was on his own as RMcC and DMcC went to car boot sales then.

[54] Mrs Fraser gave evidence that she did VAT returns and kept the cattle and sheep records from shortly after the house went on fire in 2000 right up until the first defender began to come about. RMcC had asked her to take on this role. The witness said the brothers had a cousin down in Muir of Ord; her name was Catherine, but that was their only relative as far as she was aware. She had heard the name "Ivan Warwick" from HMcC. He told her he met [the first defender] on a Saturday night at pipe band displays and that he was a minister. She did see the first defender visit occasionally and said the second defender used to work with the cattle and the sheep at Logie Farm. This started maybe a year after the third defender came along. Latterly this witness saw the brothers far less frequently. She felt they kind of hid themselves away. They wouldn't ask for help with anything whereas previously they all did sheep shearing joined together- the three farms; the witness and her husband, Angus Ross and his wife and the brothers.

[55] When the witness was asked if she was aware of why it was the brothers moved out of the farm she gave evidence that she thought the third defender came along and basically took over everything and put them out. They all ended up in a care home.

[56] When asked about the brother's vulnerability to exploitation or if she was aware of people trying to "con" the brothers in 2014 the witness replied:

"They probably were. I do remember a caravan arriving at one point with not very nice people. They were young guys and maybe girls. I remember they used an extension lead into [the McCulloch's] house and they weren't very nice people. My father said to RMcC and HMcC that they shouldn't have people like that there. They moved in and they didn't tell them to go. They were vulnerable in that way."

[57] In cross examination by Mr Dunlop, Mrs Fraser agreed the brothers needed help on the farm by 2014 and that things such as animal passports needed attended to. She believed the brothers could express their wishes at that time. The brothers never raised any concerns with her about their attorneys but they would say [the third defender] was their cousin. The witness did question how they were related and the brothers said they thought he was related to them but did not know. In re-examination the witness confirmed it was HMcC who said this to her, maybe in 2010/11.

[58] The third defender made later allegations about Mrs Dorothy Fraser that he did not put to her. As a result I discount these. My impression of this witness was that she was straightforward and providing an accurate and true recollection of matters. It was noteworthy that she related the greater appearance of the third defender at the farm to a reduction in the brother's interaction with neighbours.

[59] (Mrs)Helen Fraser is 69, retired and lives in Inverness. She gave evidence that the brothers were her mother's first cousins. She gave evidence that, prior to 2017, she saw the brothers sometimes weekly, sometimes fortnightly, from about 2006/7 until 2017. When asked to describe the brothers in 2013 she said:

“Hugh’s mind was going then with dementia or alzheimers; Roddy’s was coming and going a little bit then; David was more shy and you had to get to know him he was a little bit backward.... reserved.”

[60] The witness gave evidence that her friend, Murdo Mackinnon from Railig Lodge, about half a mile away from Logie Farm, who the brothers knew, died on 21<sup>st</sup> August 2017. So on 22<sup>nd</sup> August the witness went to the farm to tell them he had died. She ended up staying as when RMcC let her in he started crying. He was shaking like a leaf (demonstrated by the witness). He said [the third defender] had told him he would be out of the farm next week and so did his son. The witness did not know the brothers had granted POAs in favour of the third and first defenders at this time. She didn’t find that out until she went to the solicitors in Dingwall. She did not know who the first and third defenders were, but had heard them mentioned by the brothers who said that they kept turning up at the farm.

[61] The witness was there when the SWD visited the farm and was referred to page 1299 of the pursuer’s productions, which bore to be minutes from that meeting, on 15<sup>th</sup> September 2017, from the social work file. Present were the witness, her late sister Phyllis, and Les Hood and Katrina Beattie, social workers. With reference to the minute the witness confirmed that about a week after moving in she found out about the POAs from Ross and Arnott (or Middleton, Ross and Arnott) solicitors in Dingwall. The solicitor told them to go to police and they did so.

[62] The witness was shown Page 613/4 of the pursuer’s productions, a Police Concern Report from 30<sup>th</sup> July 2017. This apparently related to RMcC contacting police to report that someone (the name being redacted within the productions) had entered his address and taken cash. The witness advised this was before she stayed at the farm and she had no involvement in it. The witness denied “ripping off” the brothers or having RMcC sign

anything, although she agreed a letter to the lawyer, being item 6/5/57/1 of the inventory of productions for the first and second defender, was likely to be about her. She did not think RMcC, 87 years old at the time, would have been able to type that letter.

[63] Mrs Fraser gave evidence of taking meals to the brothers, sometimes weekly sometimes fortnightly, but not being allowed in the house -the only time she was allowed in was 22 August 17 when RMcC became distressed, as already mentioned. She took the meals as they were three old men and she just felt sorry for them; they were at the same wedding as her, it was the wedding of one of her relations.

[64] The witness was show page 602 of the pursuer's productions, the email by social worker Les Hood at the conclusion of his investigation, where it talks of "evidence of RMcC being inconsistent and unreliable" and the witness was asked if she put things in RMcC's mind. Ms Fraser denied doing so. She said two social workers turned up. This was about 3-4 days after she moved in, the night after the first and third defender had turned up. The social workers said they wanted to take RMcC and HMcC to the Doctors to get them assessed. The witness phoned the Doctors and got an appointment. HMcC asked her to go in with him. The Doctor asked him who the Prime Minister was, what month and year it was and so on. HMcC didn't know. RMcC went in next, but the witness just sat in the waiting room so does not know what happened. The witness considered that in Sep 2017 both HMcC and RMcC were both unreliable in their memories.

[65] The witness was asked to compare the health of HMcC and RMcC in 2014 and 2017. She said they used to come to her friend Murdo Mackinnons for Sunday dinner and she noticed HMcC getting worse with senile dementia. She was asked if, after she went to see the solicitor in Dingwall and found out the farm had been gifted, she told the brothers. She

said she did and RMcC said: "We don't own the farm any more", and HMcC said "I never signed anything". He raised his voice. The witness remembered that clearly.

[66] In cross-examination by Mr Dunlop the witness did not think it surprising that the first defender had never heard the brothers talk about her as she had never heard of him. Similarly she did not think it surprising that Hugh Fraser had never heard of her as he was related through the other side of the family. She advised she picked the solicitor in Dingwall as that is where RMcC wanted to go. When the witness was asked how quickly she changed the locks she said she did so that day as RMcC had told her and her sister he was so scared- it was 22<sup>nd</sup> August. It was put to the witness that she changed the locks so she had control. She denied this and said it was because the brothers were so vulnerable. She said she did not have a key.

[67] It was put to the witness that she didn't allow the police into the farm when she was there. She disagreed with this. She agreed she wasn't letting the first and third defenders access to the house. The witness was shown page 250 of the pursuer's productions. This purported to be a police concern report from 23<sup>rd</sup> August 2017 relating to Helen Fraser's attendance at Dingwall police office. It mentions a previous report to police by RMcC to the effect that he had money stolen from him by two females. The witness was asked if this was a reference to her. She replied:

"I have never stolen anything. I never went into the house. I used to pop by with a pan of stew but I didn't want to go in as I didn't want to be pushy."

[68] The witness was asked if it did not strike her as strange not to be invited in. She did not want to go into the house with three men living there. She only stayed there in August 2017 as HMcC and RMcC asked her to. She agreed that RMcC could have been confused at that time but did not think he was confused about the things he was telling her, nor did she

think he would make these things up. The witness was shown page 1644 of the pursuer's productions, which were SWD Minutes of an Adult Support and Protection Initial Case Conference held about RMcC on 2<sup>nd</sup> October 2018. It records:

"There were concerns raised regarding the interest of the "cousins" as they had not had involvement with RMcC and his brothers prior to this."

It was suggested to the witness that this did not suggest that she was there every week with a meal. The witness said if she was not at the farm she would have been with the brothers at Murdo McKinnon's. It was put to the witness that one of the reasons RMcC left the farm and moved to Wards Croft was because he was concerned and scared about her. The witness denied this was the case.

[69] In cross-examination by the third defender the witness said that she knew who he was as she remembered him trying his key in the back door of the farm. When she was asked why, having known the men for over 40 years had they never mentioned her name the witness replied:

"You have never known them for 40 years, you only turned up about 12-15 years ago."

The witness gave evidence that she first met the men at her cousin's daughters' wedding 11 years previously. The wedding was in Strathpeffer and was Gillian Chisholm who she suggested the third defender knew.

[70] The witness was asked, since she knew the brothers well, to detail HMcC's job. She said he was a cattleman who worked on the farm and previously worked at Nigg, the witness thought welding or painting. She thought RMcC kept the farm and did not know of him having another job. She did not know of DMcC having a job.

[71] The witness was asked if she sent a letter to the Office of the Public Guardian and indicated that she did. She denied that she requested she be appointed a POA to the

brothers in the letter. The witness was asked if she was aware of the brother's new house they were having built in Muir of Ord and she indicated she was not. It was put to the witness:

"If RMcC was of sound mind why would he not tell you about this house?"

The witness answered:

"After all this happened in 2017 you put RMcC in one of your houses in the distillery in Muir of Ord."

[72] There are two possible constructions of Helen Fraser's evidence. In the first she acted out of concern for the brothers, prompted by how RMcC presented to her when she called at the farm and moved in with a view to assisting the brothers. In the second (this being the version promoted by the defenders) she (and presumably her late sister) held the brothers captive at the farm and sought to control them; to an unspecified end.

[73] On one level resolving this dichotomy is not relevant to the case, as it does not assist with the events near 25<sup>th</sup> June 2014 when the disposition I am concerned with was signed. However, it does potentially assist in establishing the views of the brothers about their POAs come 2017.

[74] I have concluded that the evidence given by the witness was credible and reliable. I have reached this decision for the following reasons:

a/ I had the benefit of seeing and hearing from the witness. Her demeanour in the witness box was appropriate and careful. I believed her evidence.

b/ One of the witness' first actions, upon learning of the reason for RMcC's distress was to report matters to the police and to seek their assistance. Similarly she attended at a solicitor seeking clarity on the ownership of the farm. Approaching

them would be an odd thing to do for someone who was themselves perpetrating some sort of scam.

c/ There was evidence that RMcC was expressing concerns about his POAs to other people in the same time frame. Page 1644 of the pursuer's productions: "RMcC said to Catriona Sutherland [social worker] that having the cousins [this witness and her sister] there keeps Doug Stewart and his wife away, he was well fed and indicated he felt safe with the women."

d/ The allegations RMcC made to this witness foreshadowed very similar allegations that he made later to his advocacy worker, other members of the social work department and to his solicitor as per his affidavit.

[75] Angus Ross is a 74 year old crofter. He has been a crofter for about 20 years. He was previously a police officer, having retired holding the rank of Chief Superintendent. He lives at Allangrange Park, Millbuie close to Logie Farm. He can see Logie Farm from his property. He has lived there for about 20 years and knew the brothers very well as a result. He met them in about 1971 as he used to visit Allangrange Park at New Year and the brothers were in the habit of visiting. When he and his wife took over the croft from his parents in law he and his wife were "clueless" about farming. The brothers were very helpful both by giving advice and providing practical physical help.

[76] Moving through the years his interaction with the brothers continued. He helped the brothers with cattle testing and with sheep shearing and dipping. They used to move cattle together. HMcC and RMcC helped him with machinery, by lending it to him and showing him how to weld and so on. As a result they developed a close relationship. In 2013 the witness would see the brothers frequently, HMcC in particular. He had a field just up the

road and would walk up there and the witness would walk his dogs and they would frequently meet up, and HMcC liked to talk.

[77] Mr Ross described the brothers in the following way:

“They were different. They were very close as a family and didn't make friends easily. There were a lot of people for whom they did work: they couldn't do enough for people. The youngest was a recluse, HMcC was very much the boss, RMcC did everything and had also trained as a cattleman as a youngster- he had worked on a dairy farm. Their agricultural practices were ‘different’ as well, so although they knew all the theory they didn't necessarily put it into practice; they were less anxious about complying with rigid agricultural rules.”

[78] The witness formed the view that HMcC was “the boss” as he never heard RMcC disagree with anything HMcC asked him to do. As far as he was concerned RMcC would always defer to his older brother. On many occasions he saw HMcC doing the shopping while the other brothers would wait outside. If you asked RMcC a question he would just say: “That s right”. He wouldn't contradict you in any way.

[79] The witness remembered a fire at Logie Farm which he thought was in about March 2000. Most of the farmhouse was destroyed. He invited the brothers to stay with him while they sorted out their affairs. HMcC did so and stayed three nights. DMCC wldn't come so RMcC stayed with him in a car at the farm until the insurance company sorted out a caravan. They all came to the witnesses' property for meals during that time: other people gave them food and clothes as well.

[80] The witness knew some of the brothers' relations. He remembered that every Saturday HMcC used to visit an aunt in Muir of Ord. Her daughter came to live with her when she became invalided. He believed the brothers had another cousin “Gill” who owned the Moorings Hotel. The brothers did not have many friends but had visitors who generally came for work reasons or to ask the brothers for a favour. By 2013 the witness

would tend to see HMcC every day, often in Tesco. However, in respect of work on the farm the witness said:

“By then [the third defender] had taken over largely.... we were excluded from all these things we offered to help and it was declined....”

The witness considered the reason for this was that the third defender was running things.

The witness spoke to HMcC about this several times but HMcC said the third defender was his cousin. The witness enquired about how they were related in different ways but did not get any further with HMcC. On one occasion HMcC said that he enjoyed the third defender's company and his involvement but did not think he was his cousin.

[81] The witness knew who the third defender was. He had seen him as he used to come round to the farm in a camper van, usually at the weekend. He had seen the van, generally on a Saturday night but had not met the third defender. This changed around 2008 or 9 when he was asked to help to move cattle. He went there on a Sunday morning and the third defender's family were there as well to help.

[82] The witness was aware from then on that the third defender was involved and from then he was gradually excluded. Prior to meeting the third defender himself he had been aware of the first and third defenders from the brothers. He knew that every Saturday they'd go to Strathpeffer or Beaully to see the pipe band. They spoke of meeting a minister, an Irishman who swore and told jokes. The witness thought that was in the early or mid-2000s. In relation to the third defender the witness subsequently learnt that he had come looking for a house site. He also saw HMcC in the front seat of the camper van and HMcC told him they had been to various places, Perth he thought was one, where the third defender's son was playing accordian and HMcC said he had been to Harry Ramsden's.

[83] The witness gave evidence of becoming quite anxious, as from his perspective it looked as if the third defender was preying on these vulnerable people, being the brothers. The witness viewed them as vulnerable because they were different. They wouldn't do things in a regular fashion, and they didn't interact with people very well. When asked what he meant by "preying", the witness responded:

"Grooming with a view to ingratiating themselves and taking over the farm or property.... if I could think of any more vulnerable trio this is it."

The witness gave evidence that he was saying that both as a former policeman and as a person. He took steps to address his anxiety. He spoke to Dorothy Fraser who worked at Dingwall police station. She had already spoken to police who said they wouldn't take action unless a formal complaint was made. He also tried to find out the brother's bank to make enquiries there.

[84] In around 2014 the witness was not having much interaction with the brothers. Whereas before HMcC would seek him out he was now hiding. The witness noticed him to be more unkempt and not healthy looking. He thought that a reason for Hugh hiding was that he had told him he was forgetting people's names and the witness thought his mind was going.

[85] In cross-examination by Mr Dunlop it was put to the witness that he would know who to go to if he had concerns. He agreed he would and said he did so later. He did not know the first and third defender were POAs for the brothers. He saw the second defender many times on the farm, working with the cattle and arranging things. He remembered seeing her clearing out a shed to prepare it for sheep that had lambed. She arranged a proper handling system on the farm. The witness agreed the farm needed maintenance and that the brothers were not attending to its upkeep; but they never did worry about

standards. The witness said he would describe the brothers as generous. He wasn't aware of a £1,000 gift to the vet, but he did know about a £200 gift to the vet and wouldn't be surprised about a £1,000 gift.

[86] In cross-examination by the third defender the witness gave evidence that they had met, he thought, in 2008/9. He did not recall meeting again but remembered seeing the third defender several times. The witness was not aware of HMcC asking the third defender for help or of any reason why he would do so; the witness was not aware of any help provided.

[87] In re-examination the witness explained that when he said in evidence to Mr Dunlop that he had reported his concerns later he did so in 2017. He spoke to DS Ranald who he was given to understand was leading the enquiry. He told him of his concerns. DS Ranald said there were two sides to every story and said he was working with social services and the Public Guardian and was completely satisfied that everything was in order.

[88] I found Mr Ross to be a highly impressive witness. I formed the impression that he had a genuine warmth for and fondness for the McCulloch brothers. He had a keen grasp of the train of events. The striking evidence he gave about the brothers being "groomed" by the third defender was not challenged by the third defender in cross-examination. It was evidence given in a thoughtful and considered manner. I believed it. Given his background as a police Chief Superintendent his view of the third defenders grooming deserved even more weight. The third defender, again, made later allegations about Mr Ross that were not put to him during cross-examination. As a result I discount these.

[89] (Mrs)Elizabeth MacDonald is a 70 year old lady. She lived in Rhynie Park, Muir of Ord from the early 1960s until 2007. Her croft bordered Logie Farm. As a result she knew the brothers. She gave general evidence about visiting the farm apparently after Helen

Fraser had been there. It was sparse and not homely at all. I did not find her evidence assisted me in dealing with the issues at hand.

[90] Dr Jonathan Fletcher is a 42 year old General Medical Practitioner at Dingwall Medical Group where the brothers were registered. He first met RMcC in 2012 and met HMcC and DMcC around 2016. He saw them at home together in 2016 and had concerns regarding their welfare. What had happened was memorable as Dr Fletcher was consulted by HMcC, but he could not tell the Doctor why he had come to see him. Dr Fletcher had to track down RMcC in the car park to find out why HMcC was there. HMcC was unkempt and smelling of urine. The consultation prompted him to liaise with the POA and to visit the farm to establish risk. Having done so he emailed the SWD expressing concerns. No SWD involvement resulted from his concerns.

[91] He was then contacted by the SWD by email on 3<sup>rd</sup> March 2017 asking for an update (page 255 of pursuer's productions). He responded later that same day (page 1649 of pursuer's productions). In his response he pointed out that he had previously expressed concerns to the SWD and old age psychiatry team by email of 14<sup>th</sup> July 2016. He also advised that HMcC lacked capacity, the brothers lacked insight and the POA was absentee. He ended with a paragraph beginning:

"This is a social crisis waiting to happen...."

He clarified that by that he meant that HMcC and DMcC were dependent on RMcC, who was himself elderly and frail. If RMcC became incapacitated for any reason it would be a crisis.

[92] On 22<sup>nd</sup> September 2017 Dr Fletcher referred RMcC for a psychiatric opinion (page 689 of the pursuer's productions). By that time he considered RMcC to be in the throes of a social and forensic crisis. The police were involved. He described the brothers as having a

“slightly unusual lifestyle”. He explained in evidence that he said this as they were three bachelors living alone together. They were highly visible as they drove a blue Ford Ranger motor vehicle with white stripes along the side. This was incongruous when aged 85: as a result they stood out. Dr Fletcher made a finding at that time of RMcC having a reduced score in his mental state examination, but also had suspicion that RMcC had a low IQ. As a result he didn't feel able to properly assess him, so asked for specialist help by this referral.

[93] Dr Fletcher was credible and reliable and, for the most part, speaking to medical records made at the time.

[94] Dr Thomas MacEwan was the next witness for the Pursuers. He is 53 and a Consultant Old Age Psychiatrist based in Aberdeen. He has been a Consultant for 20 years. He appeared as an expert witness, having prepared reports about the late DMcC (page 1301-1305 of the pursuer's productions) and the late HMcC (page 1307-1312) on instructions from the pursuers.

[95] He explained that dementia is a syndrome characterised by a progressive deterioration and decline in cognitive functions of the brain, including memory, concentration, orientation, and speed. The change occurs over a period of time, usually years. The resulting decline in social and executive functioning brings difficulties for an individual in managing their affairs. The commonest causes of dementia are Alzheimer's disease and vascular disease. There has to be a decline in both social and cognitive functioning for dementia to be diagnosed.

[96] Dr MacEwan spoke to both of his reports. He gave evidence that he perused both HMcC's and DMcC's medical records with a view to providing his reports. He then tried to highlight items that might be relevant to the individual's health during the period in question.

[97] In relation to DMcC he first highlighted an entry from 29<sup>th</sup> May 2012 where the records note that DMcC was at Raigmore Hospital quite confused, thinking he had an appointment there. Security phoned his brother to collect him. The witness explained he found this relevant as it was evidence, probably the first evidence in the medical history, of DMcC suffering from confusion. He did not know the nature and severity of the confusion DMcC had on that occasion, but he felt it was certainly evidence of impairment in his health and possibly in his mental health.

[98] Paragraph 9 of his report on DMcC referred to a nursing record of 21<sup>st</sup> March 2014, the original of which the witness was shown (page 772 of the pursuer's productions). The original note said:

"Dressing of wound.....Same clothes on today, socks soiled, appears to have been incontinent.....POA [the third defender]....didn't attend today but his wife [the fourth defender] did. The [third defender] POA and welfare to all 3 brothers apparently as all deemed no capacity."

Dr MacEwan did not know the context in which the reference to no capacity was made.

[99] Paragraph 10 ref of his report again referred to original notes at page 772. The entry for 11<sup>th</sup> April 2014 said:

"I have raised my concerns with [name] SWD under Adult Support and Protection (S) Act 2007. He appears to be unable to self-care, this is having an adverse effect on his health and it is due to cognitive impairment and frailty."

The witness considered it notable that the GP used the term "cognitive impairment" and the term "frailty". At that time, in March and April of 2014 the witness gleaned from the medical notes that DMcC was unwell and, specifically with regard to his expertise, he had a concern that at that time DMcC had impaired cognitive function. It looked to the witness that he was suffering from physical ailments that might impact on his mental function as well. He took that to be notable.

[100] Paragraph 11 of Dr MacEwan's report refers to an entry in social work records found at page 798 of the pursuer's productions in which it is stated:

"[DMcC] POA document was granted on 11/03/13, registered on 10/06/13 and activated on 22/04/14 due to having been medically assessed as having losing capacity (*sic*)."

[101] Paragraph 12 of Dr MacEwan's report referred to an entry from medical records dated 1<sup>st</sup> July 2014 (page 907) from an attendance at an out of hours clinic in the following terms:

"Walked in at 6pm with his brother. Had a swollen leg for several weeks but apparently much worse today, has been seeing practice nurse, unsure why he came today, but he's a little confused."

Dr MacEwan thought it possible his confusion was due to physical illness but this could not be separated from cognitive illness.

[102] Paragraph 14 of Dr MacEwan's report referred to a District Nurse entry of 4<sup>th</sup> March 2015 reporting that DMcC had exposed himself inappropriately and was living in dirty, messy conditions and was not smelling clean. The witness considered it relevant as, broadly it was within a year of the key time period. It fitted with the witnesses' knowledge of patients with dementia- it was an unhappy and unfortunate picture being painted by a reading of the medical notes. This note clearly suggests he was not well and not looking after himself very well; that fitted with the possibility that he was either suffering from dementia or confusion due to physical illness. It fits with the time span during which he may have been developing dementia.

[103] By February 2017 DMcC was admitted to Raigmore hospital and had a CT brain scan which showed brain atrophy. The witness explained this was shrinkage of the outer layers of the brain cortex meaning loss of brain tissue. It is commonly noted in CT brain scans of many older people and can be consistent with certain types of dementia. It was generally

difficult to tell when dementia started. In relation to DMcC it was possible to speculate that a few years before he was diagnosed with dementia he may have had dementia. In the opinion of the witness (per paragraph two of the Opinions section of his report) it was possible that DMcC was suffering from a condition which may have rendered him susceptible to influence on the 25<sup>th</sup> of June 2014. As he said in his report:

“the reason for stating this is that the GP had raised concern about cognitive impairment, frailty and neglect of personal care shortly before this date and very soon after this date he was noted to be physically unwell and ‘a little confused’”.

[104] The witness then moved on to give evidence about HMcC. He commenced by noting that HMcC was referred to Old Age Psychiatry by his GP in August 2013. He considered this relevant as, in his experience, such a referral would be made by a GP where there is a significant suspicion about dementia. He noted that this followed on from the GP carrying out a Mini Mental State Examination (MMSE) of HMcC at that time.

[105] He explained that MMSE is a routine test of people with possible cognitive impairment. It is routinely used when a patient is being assessed for dementia. The test has been around for nearly 50 years and is a very standard, well known, and reasonably good test of a range of cognitive functions and skills. HMcC scored 20/30; as noted in his report. A score below 24/30 would usually be regarded as low and would often prompt consideration of dementia. The GP referred to “vascular dementia”. This is a dementia caused by deficiencies in the blood supply to the brain. As the GP knew HMcC had vascular disease it was a reasonable term for him to use.

[106] Paragraph 6 of Dr MacEwan’s report on HMcC refers to HMcC having been seen by a Specialist in Old Age Psychiatry at Newcraigs Hospital. The original letter is at page 292 of the Pursuer’s productions. It refers to the fact that the consultation took place on 3<sup>rd</sup>

October 2013 and that HMcC was accompanied by the third defender “who was interviewed separately”. The letter refers to HMcC at the consultation being:

“himself aware of problems with his memory which he feels has been worsening over the last 10 years or so.....He specifically mentioned that he forgets what people say, he loses things and often forgets events that recently happened. He occasionally has some word finding difficulties and forgets names of friends and relatives but otherwise functions reasonably well around his own environment.”

[107] The specialist Doctor records that she performed an ACE III where HMcC scored 52/100. The Doctor noted:

“He was disorientated in time, performed very poorly on tests of memory, also impaired fluency and visiospatial skills.”

Dr MacEwan explained ACE III is the Addenbrooke’s Cognitive Examination. It was developed maybe 20 years ago and is a well validated, comprehensive cognitive examination. It is better than the MMSE as it is broader and more specific. It has been developed by specialists in this field. 52 is a very low score. Scores below 82/100 are often regarded as being indicative of dementia and certainly warranting of further investigation. HMcCs score was well below that cut off. Dr MacEwan’s opinion was that it was indicative of moderate dementia. The speciality Doctor diagnosed a “mixed etiology dementia”. This term meant dementia due to mixed causes. It was often a term for a mixture of Alzheimer’s and vascular dementia- the two commonest types.

[108] HMcC was seen by the speciality Doctor again on 21<sup>st</sup> January 2014 and was prescribed Galantamine (aka Reminyl). This is a drug developed to treat Alzheimer’s disease. It can have modest benefits in some patients and is thought to bring about a period of stability in the illness. He also had a CT brain scan that showed cerebral atrophy and other conditions.

[109] On 28<sup>th</sup> October 2014 the speciality Doctor saw HMcC again and noted a deterioration. Dr MacEwan's evidence was that was the speciality Doctor's clinical impression. The MMSE test score showed a drop to 18/30 but that was not massive, although it was consistent with the Doctor's global impression. Dr MacEwan took from that that between January and October 2014 HMcC's condition deteriorated. The speciality Doctor reported that HMcC now lacked capacity. Doctor MacEwan gave evidence that Doctors are sometimes asked to comment on someone's capacity at a given point. Sometimes a POA document is to be activated and sometimes it needs a Doctor to give an opinion on that.

[110] In conclusion of examination in chief Dr MacEwan confirmed that paragraph Two of his Opinion remained his view. This was to the effect that:

“...on the balance of probabilities, HMcC's dementia, in particular his impaired executive function and therefore ability to reason and exercise judgement, rendered him susceptible to influence and he was vulnerable on 25<sup>th</sup> June 2014.”

[111] In cross-examination by Mr Dunlop, Dr MacEwan confirmed he never examined either brother. He confirmed that it was difficult to look back at the mind of someone who has died and to make a reliably accurate assessment; it would be much better to have a face to face assessment at the time. It was important to listen to people who saw the individual on a day to day basis. A psychiatrist should routinely speak to family members and those who saw the individual on a day to day basis. Dr MacEwan agreed that some people's dementia progressed slowly and some quickly. It was not something that could be pinpointed on a chart. It was put to Dr MacEwan that he couldn't really know if DMcC or HMcC had capacity in June 2014. He agreed with this and said he had stated his opinion on the balance of probabilities. He agreed it was not possible to know how HMcC was on 25<sup>th</sup> June 2014. He agreed he was talking in terms of possibility, rather than any higher degree of

certainty. He agreed it would be valuable to look at what friends and family were saying about both DMcC and HMcC at the time.

[112] I found Dr MacEwan to be a credible and reliable witness. I found him professional and thoughtful in his approach when giving evidence. I considered his professional experience and qualifications to be considerable and I accepted his expert evidence, which was not seriously challenged in its essentials.

[113] **Mr Alpin Stewart** is 55 years old. He has been a qualified solicitor since 1990. He has latterly been mostly engaged in private client work and has experience of buying and selling property and in doing so for Attorney's. He knew the brothers as they were clients of his for a number of years from 1998, when his firm took over the firm of Duncan and Duncan in Dingwall, until 2013. During that time frame he was instructed in various transactions by the brothers, usually involving the sale of small bits of ground, for example to neighbours for additional garden. They did also sell some larger areas. These were suitable for house plots but were not sold with planning permission, which would have realised more money, but would have involved time and effort.

[114] Mr Stewart usually received his instructions face to face from HMcC initially. He would wish, as a matter of course, to confirm his instructions with the other brothers but HMcC was usually the spokesman. He presented as more talkative and outgoing. DMcC and RMcC would provide clear answers to direct questions but were not talkative.

Sometimes transactions were instigated by him being contacted by a solicitor instructed by the other party, in which case he would write out to the brothers. On other occasions one of them, usually HMcC, would call at his office to say they had agreed to do whatever and to instruct Mr Stewart to do it. In that event usually one of the other brothers would drive him and would wait in the car outside.

[115] Mr Stewart thought he maybe did about a dozen transactions for the brothers. He also made two different wills for HMcC. He described the brothers as typical old fashioned bachelor farmers; they were not particularly talkative, they were dressed in typical fashion. DMcC and RMcC were quiet. HMcC was more outgoing and knew some people Mr Stewart's mother knew, so they had that connection. As well as in the office he would occasionally see them in Tesco in Dingwall.

[116] Mr Stewart stopped acting for the brothers when he received a mandate from A Fraser and Co., Inverness, in 2013. He did not speak to the brothers, he simply complied with the mandate. He did not know why he received the mandate. As far as he was concerned nothing had changed in his professional relationship with the brothers. While he was acting for them Mr Stewart did no transactions where the consideration received was nil, there was always a consideration, even if it was small. He had no discussions with the brothers about gifting their farm.

[117] Mr Stewart was shown a letter from his firm to A Fraser and Co dated 7<sup>th</sup> April 2011 (1<sup>st</sup> Inventory of Productions for the Third and Fourth defenders, item 7). He confirmed he was the author. The context was that an offer had come in from A. Fraser and Co. on behalf of the third and fourth defenders for the purchase of a field of the brothers' farm, adjacent to Inchbroom, for the sum of £100. The sequence was: he received the offer from A. Fraser and Co., he wrote out to the brothers about it and HMcC attended the office, having been brought by the third defender.

[118] Mr Stewart had discussions with HMcC about the offer. He advised that proceeding would leave the brothers out of pocket, as they would need to pay the legal fees and outlays for the transaction, which would exceed the £100 offered. He told HMcC it would be against

his interests. HMcC suggested that the brothers were to receive some form of care going forward, that the third and fourth defenders would look after them as they got older. Mr Stewart advised HMcC that, in his experience, such an arrangement does not usually work out well and often falls down when faced with reality. Following this meeting he wrote the letter referred to above, rejecting the offer.

[119] Thereafter HMcC attended at his office again. He was brought by the first defender. HMcC said the third and fourth defenders would pay £100 for the land and would also meet the brothers' legal expenses. As a result the witness wrote back to A. Fraser and Co. in those terms (1<sup>st</sup> Inventory of Productions for the Third and Fourth defenders, item 8). That letter referred to the witness requiring to confirm these instructions with RMcC and DMcC. The witness gave evidence that, because of the nature of the transaction he was more anxious than usual to ensure all of the brothers agreed, so he arranged to speak to all of them. His normal pattern of dealing with the brothers was with HMcC as the spokesperson. In an ordinary transaction, where the price reflected the value more or less, it was Mr Stewart's view that he could proceed largely on the basis of HMcC's instructions, meeting RMcC and DMcC just to get the documents signed. Mr Stewart was generally willing to proceed on this basis. However, on this occasion, as the price in no way reflected the value of the ground he was anxious to ensure that all of the brothers were in agreement. He met with each of them and they did agree so he wrote on 10<sup>th</sup> June 2011 confirming the position (1<sup>st</sup> Inventory of Productions for the Third and Fourth defenders, item 9).

[120] The witness was shown the 2014 disposition by the brothers in favour of the defenders (page 1 of the Pursuer's Inventory), which he had not seen before. He gave evidence that the effect of the transfer being for "love, favour and affection" meant a transfer for no value. Most often this was done to a close family member. The implication in such a

transfer is the property is being transferred for no value because of a wish the individual has to benefit the recipient; in usual course the disposition would state a price. A deed for no consideration is normally exempt from tax and so the deed should reflect what is actually happening or that could be fraud. Other words, such as: "for certain good and onerous causes" could be used and they would imply that there was something going on in the background.

[121] The witness was shown page 47 of the Pursuer's productions, part of a Mental Health Officer's report to accompany an application for guardianship re DMcC, and a section which reads:

"Mr Alpin Stewart was approached by concerned neighbours of the ...brothers after Mr A Fraser took over as solicitor. Neighbours of the McC brothers were concerned about the intentions of [the third defender] in the McC brothers' affairs. These concerns were initiated by an unusual level of interest taken by [the third defender] in respect of [DMcC] and his siblings, this involvement/interest by [the third defender] was not evident before 2013."

Mr Stewart agreed this was accurate. Mrs Dorothy Fraser raised concerns with him when he was meeting with her on an unrelated matter. Mr Stewart thought she had been quite good to the brothers in the past- that was his impression from speaking to the brothers.

[122] In cross-examination by Mr Dunlop the witness agreed he prepared a will for HMcC (page 1180 of the Pursuer's productions). This was the second of two wills he prepared for HMcC over the course of acting for him. He did not know who either of the two ladies being left a sum of money were. He knew the brothers had relatives, but none who were particularly close. When he acted in the £100 land sale in 2011 he was content that there were no issues re the capacity of any of the brothers.

[123] In relation to the £100 sale it was correct to say that the witness was forthright in telling the brothers that the transaction was not in their interests, as it was for under value.

It was correct to say that the brothers were nonetheless clear that they wanted to go ahead. When it was put to the witness that the brothers moved to A. Fraser as they were not happy with his firm, as they felt they were being told what to do, the witness said that was certainly not something expressed to him. He confirmed he could not recall ever having visited Logie Farm and that he had no farming background. He confirmed that a solicitor in the predecessor firm had criminal proceedings taken against him regarding alleged embezzlement.

[124] In cross-examination by the third defender the witness gave evidence he was not aware of any relationship that the third defender had with the brothers until the transaction for £100 in 2011. He was not aware of the death of the third and fourth defender's son, nor of their plans to leave the mainland. It was put to him that the meeting which the third defender took HMcC to at his office was prior to the offer for land at £100 being received. Mr Stewart gave evidence that was not his recollection. It was put to him that the ownership of the farm as between HMcC and his father was what was discussed. The witness said he had checked his note of the meeting and had noted that it was the price of the land that was discussed.

[125] I found Mr Alpin Stewart's evidence to be credible and reliable. Everything about him in the witness box impressed.

[126] **Mr Alasdair Fraser** was the next witness for the pursuers. He is 59 and has been a conveyancing solicitor for 35 years. He has experience of preparing POAs and acting for POAs in the sale of property. He knew the brothers as they were clients of his. They became clients in 2011 or 12. Around 2012, he thought, HMcC attended at his office to instruct him. The other brothers attended later, but within the space of a year. The brothers came to instruct him as the third defender said to him that the brothers were looking for a

property lawyer and had expressed some dissatisfaction with their previous agent, Alpin Stewart, and asked him if he would be interested in assisting, which he was. The third defender brought HMCC to meet him. Mr Fraser knew the third defender as he was a previous client and had been a client since 2004/5.

[127] Mr Fraser thought he discussed a POA at his first meeting with HMCC. They did not discuss Alpin Stewart. The third defender was in the meeting room initially but was asked to leave when it came to confirming what HMCC wanted to do; he would go back to reception at that point. Page 4a-4g of the pursuer's productions was the POA prepared by the witness for HMCC. The handwriting on the certificate at page 4f and g was his secretary's, he thought. The witness completed the declaration on page 4g, certifying that HMCC understood the nature and extent of the POA, from his own knowledge of HMCC, who he had known for 7-8 months at least at that point.

[128] Mr Fraser disagreed with the proposition that RMCC would always agree with HMCC. He agreed that DMCC was something of a recluse. He gave evidence that he also knew the first and second defender before the first defender was appointed as POA to the brothers, as he had done some legal work for him and the second defender. On being asked who suggested the first and third defender as Attorneys the witness indicated he thought the third defender would have said "this is who the brothers want".

[129] Mr Fraser gave evidence that he witnessed each of the brothers POAs. He was directed to his apparent signature on the different documents at pages 8 and 10 and 10g. It was suggested to him that these seemed to look very different. Mr Fraser gave evidence that his signature varies. He explained that this had previously given him problems with his bank. He indicated it could depend if he was in a hurry or sometimes he just chose to vary his signature. He gave evidence that he met RMCC and DMCC at least twice before they

signed their POAs. They were brought to his office by the third defender. He met the brothers together with the third defender, but when it came to any signing he was asked to leave.

[130] The disposition transferring the farm to the defenders was prepared by Mr Fraser. The third defender mentioned that the brothers wished to consult him regarding transfer of the farm to the POAs and their respective spouses, to which he responded that he would need to go and see them. He visited the brothers at Logie Farm specifically with that in mind. Once he left the meeting he drafted the disposition and sent it to them, knowing that their mail was in fact received by the POAs. He later went to the farm to have the disposition signed by all of the brothers and he witnessed it.

[131] Mr Fraser was directed to a file note made by him about the matter (page 1294 of the pursuer's productions). It is dated 26/08/13 and says:

"Alasdair met with Doug and Ivan noting that the brothers wish me to make Wills and also that the brothers and (*sic*) contemplating transferring their farm as a until (*sic*) to Douglas and Ivan and their respective families. We are aware that this does not look particularly good but we are aware of the circumstances of which the brothers live and the fact that they have no relatives whomsoever who have any inserts (*sic*) in them. We feel the matter will be resolved if I pay a visit to the brothers to visit them on their own to clarify matters."

After being directed to the note Mr Fraser confirmed the initial meeting had been with both the first and third defenders.

[132] The witness was asked what he meant when he wrote "this does not look particularly good". He answered that where any client transfers property for no consideration one had to be very careful- the client has to be very clear as there would be a lot of scope for abuse. In relation to this proposed transfer to a close friend and Attorney the witness felt he "had to do a bit of checking" before he could carry out the brothers' wishes. Reference in the note to "we" meant him and the Attorneys. Reference in the note to "the

circumstances” meant the brothers were old, lonely and very few people had genuine concern about them. When the witness was asked how he knew the brothers had no relatives he replied he had heard from the third defender that no one was paying them particular attention and he gleaned it from that. “Whomsoever” meant anyone showing a real interest: if they had distant relatives they were not interested, to the witnesses knowledge.

[133] Mr Fraser was asked when he visited the brothers. He said he did go to the farm, he thought it was early the next year. He should have done another file note and hadn't. He had one more, if not two more visits and also tended to visit on an annual basis. He remembered this specific meeting. The witness met the third defender before the meeting and he took him to the house. The third defender was not in the living room for the actual meeting, the witness was alone with the brothers. He normally met the third defender prior to going to Logie Farm as he did not like going there without him and the third defender normally accompanied him there. That was the case on each of his visits.

[134] Mr Fraser gave evidence that the farm was 30-40 acres and had a farm steading. He gave evidence that he discussed the financial ramifications of gifting this property with the brothers. When he was asked what was said he gave evidence that he had a standard way of words for dealing with clients in this type of situation. He started by asking them if they did want to do this. He went on to ask if the third defender had “put a gun” to your head. He explained that they could be left homeless; this was all part of his routine in these type of situations. He was asked what was in this transaction for the brothers. He responded that they wanted to give their property to two men and two women, one couple in particular who they loved. They appreciated what the second defender did for them on the farm, although they resented the fact a woman was doing it. He agreed the POAs were

operational at this time but said he would not have let the transaction go through if the Attorneys had signed the disposition: it had to be the brothers of their own free will or he wasn't going to do it.

[135] Page 1292 of the pursuer's productions was a note from Mr Fraser's file. He was directing a member of his staff to look out the full names and addresses of the defenders from previous files. Page 1257 was a draft fee note. The witness gave evidence that the handwriting thereon was an instruction by him to his staff to email the third defender for the value of the farm so that the correct registration dues could be calculated. He was asking him (and not the brothers) because it would be quick. When asked why that would be quicker than picking up the phone to the brothers the witness said they were difficult to contact by phone and they "might have got confused if I phoned them out of the blue." He said he should have had all of this information ready before he prepared the disposition and a call like that would be the kind of thing they would get anxious about. When asked if the brothers were prone to getting confused Mr Fraser said he would not say that, but he thought they would certainly doubt his competence and it would not look good on his part. The witness agreed there were no other file notes of his meetings with the brothers or record of what they wanted. He said he was busy and knew now what such notes would have said.

[136] In relation to the earlier transfer of land to the third and fourth defender Mr Fraser was asked if it had any relevance. He gave evidence that the earlier transaction made him realise the brothers were very keen to convey the land to the third and fourth defenders and had given clear instructions to a different solicitor to convey land to them previously, which he felt was of assistance in his actings. The witness was not aware of any arrangement whereby the third and fourth defenders would look after the brothers, but thought the

transfer was in relation to a general friendship between them and that the brothers had asked them to remain in the locality when they were thinking of going to Lewis: this was information given to him by the third defender.

[137] Mr Fraser agreed he was acting for both the disponers and disponees in relation to the transfer. He pointed out that both were previous clients, but agreed that there should have been a conflict of interest letter sent to all parties stating this and that they were free to instruct another solicitor. He accepted there was the potential for conflict of interest and said:

“if you want to go completely by the book you would send them to another solicitor but I thought that was a waste of time and money.”

He clarified he meant if he had been going completely by the chapter and verse of the law, rather than the spirit of it if he felt there was a conflict, which he didn't, then one could get another solicitor involved.

[138] Mr Fraser was asked about the brothers saying they wanted their cousin Hugh Fraser to have the farm. He replied:

“I knew there was a cousin....if someone from a shop in Muir of Ord walked up and helped the brothers they would be offered a bit of the farm....”

He was shown a letter to HMCCs GP from old age psychiatry confirming his diagnosis of dementia and asked if he was aware of this. He could not remember being aware of it. He was asked if he was aware of the Doctor deeming HMCC to have no capacity. He said: “I think later in the year [the third defender] would have told me his dementia got a lot worse, which I think was after signing the disposition.” He was shown page 772 of the pursuer's productions (medical notes) and an entry from 21<sup>st</sup> March 14 referring to all three brothers “apparently all deemed no capacity”. He replied he did not think the author knew the

situation particularly well as the brothers certainly had capacity at that stage; they were messy and untidy and didn't like social workers prying around.

[139] Mr Fraser was shown page 1420 of the pursuer's productions. This was an email dated 30<sup>th</sup> May 2017 from the third defender to him. He was asked about the import of the email. He gave evidence that it related to an investment property the brothers bought together at 11 Wards Croft, Muir of Ord. The email related to a plan to get DMcCs name off the title of the property which had been purchased in 2015 after they had gifted away the farm in the joint names of the brothers. He gave evidence that the scenario that had arisen was that if an individual has certain assets the social work department expect them to pay for their own care home. If you don't have assets you may receive funding depending on how the social work department view matters- they will scrutinise any transaction carefully. He agreed the gift of the farm may thus have been prejudicial.

[140] Mr Fraser was directed to his email reply to the third defender. In that he had written:

“...there may be an issue with changing [DMcC's] will. [DMcC] did sign one before as we felt that he had capacity- just!”

He was asked who the “we” in the email referred to. He gave evidence that it was him and the third defender. He used the exclamation mark to emphasise the point that you have to be very careful with issues of capacity. He was not worried DMcC had no capacity in 2014, although he agreed the will he referred to was signed on 25<sup>th</sup> June 2014 (page 1183 of the pursuer's productions).

[141] Mr Fraser knew the farm gifted to the defenders has since been sold- he acted in the sale. He did not agree the third defender spoke for the brothers, in his view the third defender helped them. He agreed there was nothing in his file saying what the brothers

wanted regarding their farm. He said: "that's my negligence". He agreed there were no file notes about his dealings for the brothers, other than the one he had been referred to. He gave evidence that was his mistake.

[142] Page 1177 of the pursuer's productions was put to the witness (an affidavit by HMcC). He was asked about paragraph 4 thereof where HMcC depones:

"[the third defender] and [the first defender] changed our solicitor to Alasdair Fraser....I did not ask to change solicitors."

Mr Fraser did not agree with this and thought it was a consensual decision. Paragraph 5 of the affidavit was put to the witness who disagreed with it. He said RMcC had been in his office at least once and the third defender was always asked to leave when documents were signed. He disagreed with paragraphs 20 and 21. In relation to paragraph 23, where RMcC depones that the third defender asked him to sign something at Logie Farm the witness indicated the disposition was signed at Logie Farm, but that he met with the third defender there beforehand but that the third defender was not in the room when he asked the brothers to sign the disposition.

[143] In cross-examination by Mr Dunlop, Alasdair Fraser did not agree that the brothers' minds in June 2014 were such that they could be taken advantage of: in relation to RMcC in particular he would have said "No". He would think about a thing and if he was unhappy he would make his point. There was nothing about the brother's demeanour when the disposition was signed that made him think they were frightened. They were all sitting across from him side by side. The fact that he had acted for the defenders previously had no bearing on the advice he gave the brothers. The fact that he had not issued a letter about conflict of interest had no bearing: the brothers were determined about what they wanted to do.

[144] Mr Fraser gave evidence that the brothers wanted Attorneys as they were becoming more infirm and needed someone to deal with their affairs; to liaise with HMRC, their accountant and so on. They wanted the first and third defender because of their friendship. The only other individual who had been thought of was him, as he sometimes offered to do this for clients. He did not consider the brothers were susceptible to suggestion in 2013/14. He said all three of them were determined. He was not aware of any force or fear and he went over the disposition with them before signing to check their wishes about it. There was time for them to reflect as he had the initial meeting with them at the farm then drafted the disposition, posted it to them then had the final meeting to sign. He was also visiting the brothers once a year socially.

[145] Mr Fraser was asked if he could think of an example of the brothers being told to do something they didn't want to do. He remembered being asked to check about someone they thought was farming their land, but when he checked the title deed he found they had sold that land to someone else. Mr Fraser gave evidence the brothers knew the second defender and really liked her. He gave evidence that the brothers never discussed the consequences of not owning the farm or nursing home fees with him. He confirmed he drafted wills in 2014 and 2017 and what was in the wills was what the testator wanted. It was Mr Fraser's evidence that the brothers had a strong degree of proprietorship- they would not willingly part with money and would be very cautious about giving land or money to anyone. Mr Fraser purchased the property in Muir of Ord for the brothers. The Attorneys instructed him to do that. He purchased the property in Poolewe but does not know if it were ever sold.

[146] In cross-examination by the third defender Mr Fraser gave evidence that the brothers grew potatoes and sometimes corn on the farm- he got potatoes any time he visited. The brothers were happy to see him and talked about the farm and any local news.

[147] In re-examination when it was put to Mr Fraser that he had said the brothers could have been taken advantage of he said that he felt if someone had been trying to hoodwink them two of them might fall for it but not all three. There was "enough sense" in HMcC and RMcC not to give away assets they wanted to keep. He did not think RMcC would just go along with HMcC. He knew mail was received by the third defender at the PO Box.

[148] Mr Fraser's evidence was important to the case. I found it startling in several respects. Firstly, his evidence about what, to my naked eye, were considerable differences in his signature from one document to the other was odd. The very point of a signature is surely that it is supposed to be verification that the named individual has signed something. For a solicitor to seek to vary their signature did not ring true to me.

[149] Secondly, the starting point for the gift transaction was a meeting between Mr Fraser and the first and third defenders, notably in the absence of the brothers. The file note of the meeting contains the phrase "we are aware this does not look particularly good", signifying that, at the outset, Mr Fraser was "live" to the optics of the situation. Nevertheless he did not complete any further file notes, for instance a note in which he detailed the terms of his meeting with the brothers. He does not appear to have followed up any meeting with a letter, perhaps containing a written record of any cautionary advice regarding matters to the brothers; which might have been better sent as an individual letter to each. On close examination of his evidence he does not appear to have given any cautionary advice.

[150] Thirdly, Mr Fraser appears to have taken instructions about the value of the farm needed to calculate registration dues and thus to progress the transaction from the third

defender solely. An enquiry of that nature to the brothers would have been another opportunity to check their wishes and to focus in their minds the value of the asset they were proposing to gift.

[151] Fourthly, Mr Fraser accepts he was acting on behalf of all three disponers and all four disponees in the transaction. He conceded this was not “obeying the letter of the law”, but sought to minimise the importance of this. Again, a letter to the brothers outlining to them the conflict of interest that their solicitor had may have caused them to further reflect on their apparent instructions. Such a letter was never sent.

[152] Fifthly, it seemed odd to me that no stark warnings appear to have been administered to the brothers by Mr Fraser in relation to the possible future financial and/or practical impact of what they were apparently proposing. This contrasted with the evidence of Alpin Stewart, solicitor, in relation to the £100 transaction, where he was at pains to explain that what was being proposed was contrary to the brothers’ interests, and the later evidence of Patricia Black, solicitor, who spoke of tax and other implications of transfers.

[153] All of these startling aspects affected my view of Mr Fraser’s credibility and reliability and the reliance able to be placed on his evidence.

[154] **Dr Miles Mack** is a general medical practitioner and has been since September 1993. He is a partner at Dingwall Medical Practice where the brothers were registered as patients. Much of his evidence was under reference to the computer medical records. He was referred to page 772 of the pursuers’ productions which he confirmed was an extract of a computer record from Dingwall Medical Practice. He was referred to an entry about D McC dated 11 April 2014. He confirmed it was an entry made by him which said (of D McC):

“He appears to be unable to self care, this is having an adverse effect on his health and it is due to cognitive impairment and frailty. Duty SW will investigate.”

[155] The second entry for 11 April 2014 was made by Kelly Mowat, a practice nurse within Dingwall Medical Practice. Dr Mack spoke to the entry. It noted her concern about D McC's ability to care for himself. Dr Mack gave evidence that his note referring to "cognitive impairment and frailty" came about from a previous notification in the records about difficulties with DMcC's memory, made by Kelly Mowat and that entry was dated 21 March 2014. It said:

"21.03.2014 dressing of wound. Leg actually improved with viscopaste.... same clothes on today, socks soiled, appears to have been incontinent. ... power of attorney [the third defender] didn't attend today but his wife [the fourth defender] did. [the third defender] POA and welfare to all three brothers apparently as all deemed no capacity...."

[156] Dr Mack was referred to page 910 of the pursuers' productions. He gave evidence that this was a reference he made to the vascular surgery department at Raigmore Hospital for an outpatient appointment for DMcC. It referred, amongst other things, to DMcC's "poor social circumstances". Dr Mack gave evidence that by this he was referring to his concerns regarding DMcC's difficulty in managing and the three men living together with significant needs.

[157] Dr Mack confirmed that HMcC was also a patient at the practice. He was referred to page 1063 of the pursuers' productions. He confirmed that this was a letter that had arrived at Dingwall Medical Practice in respect of HMcC from Dr Wendy Kerr, Speciality Doctor in the Older Adult Team at Newcraigs Hospital, Inverness. It was dated 21 January 2014 and referred to HMcC attending at the Dingwall clinic on that same date. He was accompanied by the third defender. It indicated:

"His CT scan showed evidence of small vessel disease, ischaemia and vascular calcification. Also of significance was cerebral atrophy, particularly marked at the medial temporal lobes. This would confirm our suspicion that he has a diagnosis of dementia mixed type... and I discussed this diagnosis with H McC and [the third defender] today."

Dr Mack confirmed that this was a letter to the practice diagnosing HMcC with dementia (which had previously been suspected) as at 21 January 2014.

[158] Dr Mack was shown page 1059 of the pursuers' productions. He confirmed that it was a copy of an email from him to the specialist in old age psychiatry about HMcC dated 31 January 2014. He wished to have an ECG to check HMcC's heart before he was started on reminyl (which he gave evidence was a medication used to treat dementia). Dr Mack was shown page 1053 of the pursuers' productions. He confirmed that was a further letter from the speciality doctor in old age psychiatry to him dated 29 April 2014. It said:

"I reviewed [HMcC] at the Dingwall clinic... accompanied by his friend [the third defender]. [The third defender] has no specific concerns and described how the three brothers [HMcC, R McC and D McC] function together as one unit...."

Dr Mack agreed that that appeared to be information provided to the speciality doctor by the third defender.

[159] Similarly, Dr Mack received the letter at page 1047 but this time on 28 October 2014.

It refers, amongst other things, to:

"Unfortunately the situation has deteriorated since I last saw him in April... He himself is quite contented with no particular complaints but I was able to talk to [the third defender] in private who told me of his increasing concerns about [HMcC] and his brothers safety and vulnerability at home. ...there has been [*sic*] increasing concerns about the three brothers' vulnerability to exploitation, friends constantly having to be on their guard from people trying to con them out of money and to buy pieces of equipment and apparently people often visit the farm with this specific aim."

Dr Mack again considered that the information in the letter was mostly coming from the third defender. He confirmed the letter also said that HMcC no longer had capacity.

Dr Mack gave evidence that that changed the ability of the patient to make informed decisions about their own care and would inform the way that the GP obtained consent to any medical treatment.

[160] In cross-examination Dr Mack confirmed that the Addenbrooke's Cognitive Examination has now taken over in specialised clinics from the Mini Mental State Examination. He gave evidence that the speed in which a mind can go from being of normal fortitude to weak depends on the nature of the disability. With Alzheimer's type dementia it comes on slowly and progresses in that manner. A vascular type event may happen much faster. It could be weeks or years but more commonly months or years. A poor memory, in his evidence, makes people more vulnerable to exploitation as, if it is known to others, it provides a "way out" for them if challenged. He gave evidence that whilst dementia affects memory that is just the commonest presenting symptom. Dementia is a global reducer of functioning. If an individual with dementia makes a decision they could forget making it later.

[161] **RMcC** is the only brother who remained alive at the commencement of the proof. I previously presided over a commission to take his evidence at Aultbea Care Home on 13 February 2019. The report of the commission is in process. In addition to that evidence, an affidavit was lodged (page 1177 of the pursuers' productions), being an affidavit obtained from RMcC on 30 April 2019. Given RMcC's diagnosis of dementia, the way that he presented at the commission, and the fact that some parts of his affidavit, for example the suggestion that the floor boards were removed by the third defender from Logie Farm, are not supported by other evidence I conclude that much of his evidence at commission and in his affidavit is unreliable. However, I do feel able to place greater reliance on the information he was providing and views he was giving to other people earlier, for example to Helen Fraser in the summer of 2017.

[162] That closed the pursuers' proof.

**FIRST AND SECOND DEFENDER'S PROOF**

[163] The first witness for the first and second defenders was the second defender herself, **Mrs Jocelyn Warwick**. She is 58 years old and married to the first defender, the Reverend Ivan Warwick, since 1989. They have three grown up daughters. Mrs Warwick is a farm livestock monitor for the RSPCA. She has a background in agriculture, holding a BSc in agriculture and a post-graduate diploma in agriculture. She grew up on a family farm and has owned her own small croft near Dingwall since 1999.

[164] Mrs Warwick gave evidence that she met the third and fourth defenders after her husband met the third defender in a motorbike shop in Inverness in approximately 2002. They became good friends, as the third and fourth defenders' youngest son was ages with their daughters at the time. The children would play together and they saw a lot of each other. Mrs Warwick was aware of the third and fourth defenders knowing brothers who farmed (the McCs). In 2003 the third and fourth defenders' eldest son was killed in a motorcycle accident. At the time of his death, the third and fourth defender's youngest son was staying overnight with the Warwicks and Mrs Warwick described this loss as "a fairly horrific experience for them".

[165] After that tragedy, she was aware that the third and fourth defenders started to make plans to convert a steading on the fourth defender's family croft in Lewis. They began to travel there and to contemplate moving. She understood that they did not move as HMCC asked them not to and offered to let them build a house on Logie Farm.

[166] Mrs Warwick recollects first meeting HMCC in Tesco in Dingwall. He was already talking to the third and fourth defender and she was introduced to him. They spent 5 or 10 minutes speaking. She and her husband were living in Paisley at the time but had come back to do some work to the garden of their house, which they had just built at the time. She

first met RMcC in March 2013 when the third defender phoned to ask her advice about abortion in cattle. After she provided her opinion on the telephone the third defender asked her to go to Logie Farm and do a barn assessment. She went there sometime in March 2013 and walked round the farm with RMcC and HMcC. It was just her and them and she was on the farm for about 2 hours.

[167] Mrs Warwick's impression of the farm was that it was extremely untidy. There was broken farm machinery everywhere. There was a large hole where the brothers were burying dead animals, which was not permitted. The animal passports were in a mess. She gave evidence about production 6/3/17 onwards which were various photographs that she took on the farm with a view to matching up cattle and tags. Her impression at that time was that HMcC was very chatty and slightly embarrassed at the condition of the farm. RMcC was quiet and more interested in the sheep. Physically, she thought that HMcC was quite frail. He walked with a stick. RMcC was very fit and very knowledgeable about the cattle on the farm. As she got to know RMcC better he came out of his shell. There was nothing about her meeting with the McCs in March 2013 that made her concerned about their minds.

[168] Mrs Warwick gave evidence of returning to the farm about 10 days later. In the meantime she had spoken to the third defender about the issues there. One of these was a lot of potential hazards on the farm such as black plastic. The third defender arranged for his daughter and her husband to tidy that up. HMcC and RMcC also decided they wanted to sell some animals. They needed to be tested first and she was asked to get them ready for sale. It was the third defender who asked her to provide this help. Mrs Warwick had not yet met DMcC. She did not do so until about June 2013. She had seen him in the distance

but met him when she was emptying feed buckets at the back door of the house with RMcC and he came out to put something in the bin. She spoke to him at that point.

[169] Mrs Warwick did not know the background as to why her husband was appointed POA to the brothers. She knew that there were concerns about how they were coping. She knew that her husband had been POA for his mother in the past and had been asked to be POA to certain members of his congregation so she was not that surprised. He did not discuss his appointment as POA to the brothers with her. This did not surprise her as he kept a lot of things about his work confidential.

[170] Mrs Warwick's impression of DMcC was that he was very, very shy. He gave pretty much monosyllabic answers to many questions that she asked him. He was much smaller physically than the other brothers and not as well kempt. He was clearly uncomfortable in meeting new people.

[171] After March 2013 it took until May 2013 to sell the cattle as there were various things to be done with them. During that period Mrs Warwick used to be at Logie Farm weekly. She gave evidence about the various things that she was doing there. HMcC visited her and her husband in Paisley. He went to see a comedian with the third and fourth defenders. Mrs Warwick did not believe that the brothers could be talked into doing things that they didn't want to do. She gave an example of them refusing her advice when she saw RMcC and HMcC sitting on the back of farm machinery to provide ballast. She expressed concern that HMcC could be sucked into the machinery and lose an arm, but the brothers ignored this.

[172] Mrs Warwick gave evidence that she and her husband moved back to Strathpeffer from Paisley in August 2014. She continued to help at Logie Farm. Production 56 was her diary which she referred to and which noted her attendance or her doing things for the

brothers on various occasions. She found it very surprising that the brothers later stated that they did not know who she was, as in 2014 she felt that she did more at their croft than at her own. In July 2015 she was strimming the back garden at the farm when someone arrived who said they were a cousin. She now knows that this was Hugh Fraser. The brothers had not mentioned him to her but they would quite often say that people were a cousin. For example, they had told her that Dorothy Fraser, their neighbour, was a cousin.

[173] The brothers continued to do things for themselves in 2014. For example they sold animals at the mart. They used to go to the fiddle and accordion club and to the bagpipes. Mrs Warwick gave evidence that HMcC tended to be keen to give cash if somebody did something for him. RMcC did not tend to carry money. She gave an example of an occasion at the mart when a buyer asked HMcC for "luck money". HMcC pulled out a roll of cash and gave the buyer £300 and Mrs Warwick £1,000 in £50 notes. This was all very excessive. Mrs Warwick tried to give the money back but HMcC refused. She asked the third defender what to do with it and he said that she should put in an invoice in relation to it. On another occasion HMcC tried to give her youngest daughter £200 for two hours work that she had done at the farm cleaning out the shed. She gave this back to RMcC. On several occasions HMcC asked her if she would like to farm the farm or if her daughter would. Her daughter was studying agriculture. She laughed this off. HMcC was quite concerned that it should stay as a farm and RMcC had said to her that he wanted to stay there until he died. She never encouraged the brothers to give her the farm. She was not aware of any other defender having done so. She did not think that the brothers could have been persuaded to give the farm to somebody in June 2014 that they did not want to. She considered that HMcC was getting quite forgetful at that point but still had firm views. RMcC definitely did

not have a weak mind and she could not speak for DMcC as she had so few dealings with him.

[174] Mrs Warwick did not find out that the farm had been disposed to her until her husband told her in November 2014. She was very shocked as she did not really consider that she knew the brothers that well or had done anything for them that would make them want to dispose the farm to her. She had a stormy argument with her husband as she felt that they should not accept the gift. She phoned Alasdair Fraser, the solicitor, in December and asked if it was possible to change the disposition and he said it would be quite offensive to the brothers to do that.

[175] In cross-examination by the third defender, Mrs Warwick gave evidence that the third defender's family relationship with the brothers was close. RMcC was always delighted to see the fourth defender and "blossomed" when she was there. HMcC got on very well with Iain Stewart and was very proud of him and talked about him a lot.

[176] In cross-examination by Mr MacLeod, Mrs Warwick gave evidence that she did not know that her husband and the third defender had spoken to Alasdair Fraser about what the brothers wanted to do with the farm. She did not know in advance that her husband was going to be involved with the brothers as their power of attorney. In her view, HMcC was the boss in relation to some things but on the farm RMcC and HMcC bounced off each other equally. She accepted that RMcC would often agree with HMcC. She accepted that the brothers did not appear to have friends who called round to see them. She did not know that HMcC had a diagnosis of dementia in 2014. She did not know that in October 2014 he was assessed as having lost capacity. When she asked the brothers why they had gifted the farm to her and her husband they said that it had to go to someone. The reason that she had a row with her husband about it was that she felt it put them at risk of people locally

gossiping and that receiving half of the farm felt like a huge thing. Mrs Warwick agreed that none of the £390,000 that the farm had been sold for had been paid back to the brothers. She gave evidence that she had paid her share of the proceeds to her husband.

[177] My view of Mrs Warwick was that she was a decent lady who gave a credible and reliable account of most events. I noted carefully Mrs Warwick's view that she did not want to accept the gift and that she had paid her share of it to her husband.

[178] The **Reverend Ivan Warwick** is 67. He has lived at his current home in Strathpeffer since the house was built in 2010 or 2011. He is a retired Church of Scotland minister, a position he held for 38 years. He was latterly suspended on account of the raising of this action. He first met the third defender as they happened to be in the same motorcycle shop in Inverness at the same time in 2001. They became friends and spent quite a bit of time together in 2002 and 2003, particularly when they would go for motorcycle rides together. Within a couple of months of meeting the third defender he met the fourth defender. In the early days they would see each other once a week or so. He conducted the funeral when the third and fourth defenders lost their eldest son. The brothers attended but he did not meet them at that time. He thinks he met them properly in around 2008. He was aware that the third and fourth defenders took HMCC places as he was the most sociable of the brothers and liked an outing.

[179] The Reverend Warwick was aware that Iain Stewart changed high schools which meant that he had to be driven to school. The fourth defender did not drive and so when the third defender sustained an injury that meant he could not drive, RMCC stepped in. He transported Iain to and from school for some time. The brothers were very supportive of Iain generally, with HMCC in particular going to hear him play. The brothers had a photo of the Stewart children in their home and a very prominent photo of Iain Stewart with his

accordion. There was also a photograph of Rev Warwick with the Prince of Wales following a service he had conducted at a church which had been attended by the Prince.

[180] The Reverend Warwick recalled meeting the brothers first in around 2008 when Iain Stewart was being transported to Fortrose Academy by RMcC. He met HMCC first when he came into the third and fourth defender's home when he was visiting. He met RMcC shortly thereafter but did not recall meeting DMCC, but had certainly done so by 2011.

Reverend Warwick said that the brothers started out as friends of friends, but as he got to know them they also became friends of his. The brothers were keen for the third and fourth defenders to have a piece of land at Lochbroom and as HMCC could not drive he asked the Reverend Warwick to take him along to his solicitor. He took him to Alpin Stewart's office and sat in on the meeting. He was asked to take all three brothers to Mr Stewart's office later to discuss the land sale and did so.

[181] The Reverend Warwick would also see the three brothers out socialising, particularly at the Saturday evening pipe band. They would know quite a few people and would talk to them. HMCC followed Iain Stewart's progress with his accordion by attending competitions. The Reverend Warwick did not consider the brothers were vulnerable to being influenced. He thought they very definitely knew their minds and what they wanted. He gave an example of the fact that the brothers had an old white van with an armchair in the back of it. When they went out in the van, DMCC would sit in the armchair which was not bolted down and had no seatbelt. This was not legal and he did not think this was a good way for DMCC to be transported. He tried to persuade the brothers that it wasn't safe but he could not shift them at all. They only stopped this practice when the van did not pass its MOT, which was roughly 2013.

[182] The Reverend Warwick described the relationship between the third and fourth defenders and the brothers in 2013/14 as very strong. They had known each other for many years and particularly HMcC was very close to them. The Reverend Warwick considered that the third and fourth defenders were like a surrogate family for HMcC. He was used to going away whereas RMcC was tied to the land and had a strong tie to DMcC. RMcC was often reluctant to go places if DMcC did not want to go whereas HMcC loved to get away. In relation to the power of attorneys, it was the Reverend Warwick's understanding that at much the same time he suggested to the third defender to consider POAs for the brothers, a financial adviser, Lachlan MacGregor was saying the same thing to HMcC. The Reverend Warwick was very sure that nobody forced or coerced the brothers to change solicitors as he and the third defender were the only people really involved with the brothers at that time and they did not do so. He suggested a POA to the third defender as he had been attorney to his own mother for 7 or 8 years and he could see the third defender doing quite a lot for the brothers and so it seemed a natural thing to suggest.

[183] In relation to the sequence of events, he thought the third defender indicated to him that he was considering being POA for the brothers and they went together to see Alasdair Fraser to ask him what would be involved. He, Mr Fraser, made it clear to the Reverend Warwick that it was the brothers' wishes that he also be an attorney and he then spoke to the brothers and they confirmed they were absolutely delighted with that. He considered he would not only be helping the brothers but helping the third defender as otherwise it would be quite some task. He does not recall being at Alasdair Fraser's office at the same time as the brothers on any occasion. Once the power of attorney was in force the third defender did the lion's share of the work, particularly as the Reverend Warwick was in Paisley until August 2014. On returning to Strathpeffer he saw little difference in the brothers although

he knew HMcC was going to a memory clinic. He understood the problem to be forgetfulness. As far as he was concerned HMcC still had his own point of view and was very strong in it and was still holding conversations and recognising him. He considered that if somebody was trying to take financial advantage of HMcC he would have the wherewithal to pushback against it. RMcC was the same as always and the brothers all seemed quite delighted about what he and the third defender were doing for them.

[184] The third defender and Reverend Warwick arranged for Peter MacPhee, a former nurse with the NHS, to be the brothers' housekeeper and to tidy the place up a bit. He was there for 4 or 5 months and the brothers seemed to enjoy his food and the cleanliness of the place. With the benefit of hindsight, the Reverend Warwick thought RMcC was perhaps getting fed up with the intrusion. RMcC never said anything at the time about Peter MacPhee removing paperwork from the farm. DMcC had a fixation with paperwork and HMcC and RMcC would get frustrated as he would throw things out and that is why a PO Box was arranged so that the mail could be collected and put into the hands of HMcC or RMcC. The post office box was in Beaulieu and the mail would be collected by the third and fourth defenders' daughter and taken to the brothers.

[185] In June 2014 when the transfer of the farm was discussed the Reverend Warwick was operating under a misunderstanding. He thought that the meeting with Alasdair Fraser and the third defender was to talk about the brothers' wills. At the same meeting they started to talk about a disposition. As the two things were being talked about he thought that the disposition in relation to the farm would only happen when the brothers died. He did not become aware of the immediate nature of the gift until October or November of 2014. He knew of the disposition in Autumn of 2014 and that was because of a discussion with the third defender. He thought that the reason the brothers transferred the farm to him and his

wife was that he would help the brothers fulfil their wishes, which were to remain on the farm as long as they could, to have animals around them and not to go into care. He thought that by making the gift to him and his wife the brothers thought their assets would be being put to good effect and that the farm would continue as a farm. He agreed he could have taken steps to reverse the actions of the brothers but he felt that could cause great hurt.

[186] The Reverend Warwick gave evidence that the brothers wanted to give him £50,000 in 2013. He was unwell and signed off with anxiety and if he moved back to his home in Strathpeffer he would have to take on the mortgage again but would not be working. The brothers offered £50,000 and were pressing it on him. He “got them down” to £40,000 but it was clear that they were beginning to feel hurt and he therefore agreed to take that. He drew up a paper to get them to sign about it.

[187] The Reverend Warwick gave evidence about the circumstances in which RMcC moved in to the house in Muir of Ord. RMcC was delighted with it. He then decided to move closer to HMcC’s care home so he could visit both HMcC and DMcC in one day. The brothers never mentioned any relatives to him.

[188] In cross-examination by Mr MacLeod, the Reverend Warwick was shown page 1033. This was an email from Fraser Ross at NHS Highland to Wendy Kerr at NHS Highland on 7 April 2015, the second paragraph of which says:

“I had a meeting with [the first defender] to share my concerns that HMcC and his brother were happy for me to go back but [the third defender] had stopped it. ...[the first defender] said that he also has concerns about how controlling [the third defender] is. We don’t think there is anything wrong going on it is just that he appears to be over controlling and speaking for all the brothers without really asking what they want.”

[189] The Reverend Warwick did not recall saying that but could not deny that that was the gist of the meeting. The Reverend Warwick was asked again about HMcC and the fact

that in October 2014 he was deemed to have lost capacity. His position was that he did not notice a change in HMcC in October 2014. He did not agree that the brothers were confused and forgetful in 2013/14. In relation to the PO Box, he took nothing to do with the mail. He did not know if someone else was sifting the mail. The post office box was working well so even when DMcC went in to hospital there was no reason to suspend it. By working well he meant it gave "us" an opportunity for the mail to be collected and brought to the brothers and to consult with them if they needed help to respond to anything.

[190] Page 1583, being an excerpt from the Code of Practice for Attorneys, was put to Reverend Warwick. He gave evidence he was aware of his duties as attorney. He was aware of the term "fiduciary duty". He was directed to page 1584 which detailed the fiduciary duty of an attorney to keep records. He accepted that the transfer of title was a gratuitous disposal of the farm for his benefit. In terms of the Guidelines for Attorneys, he was never made aware of those. He accepted that he had a duty to act in the brothers' best interests but did not accept that gifting their main asset, the farm, was prejudicial. He indicated that it was not prejudicial to their state of mind as it was something they wanted to do and as it was not their only asset it was not leaving them without funds. He had access to their internet banking and was aware of the extent of their funds. There were no records about what he did to satisfy himself regarding their financial position upon gift of the farm. No independent financial advice was taken.

[191] In relation to the £40,000 gift, Reverend Warwick confirmed that this was made when he was an attorney of the brothers. The paperwork in relation to it was a document signed by all three of the brothers. He took £40,000 instead of £50,000 "as that was clearly what was going to please them".

[192] When he was referred to Alasdair Fraser's file note on the fact that the proposal "did not look good" he gave evidence that he was not thinking about that. It was a good thing in terms of it was what the brothers wished to do. He did not agree that it did not look good and considered such a suggestion to be discrimination towards unmarried men and gave evidence that people have the right to do what they want with their own property.

[193] Given his occupation, and that he took an oath to tell the truth, it gives me no pleasure to say that I did not find the Reverend Warwick to be a credible and reliable witness. In examination in chief he was verbose and comparatively relaxed. In cross examination by Mr MacLeod he was very different. He became agitated. He had his hand in his pocket constantly moving coins about, which I took to be due to his agitation or nerves. He had the habit of telling you what he wanted, rather than answering a question. I formed the strong impression that the reason his evidence coincided so much with that of the third defender was either that the source of the information was the third defender and not the Reverend Warwick, or because Reverend Warwick was parroting a "party line".

[194] There were aspects of his evidence that were implausible. His whole account of accepting £40,000 from the brothers rather than £50,000 was one of these. The fact that he thought Alasdair Fraser was talking about the brothers making wills to leave the farm to him, rather than an immediate transfer was another. I did not believe him about these matters (and others). That, in turn, leads one to question what agenda he is lying to promote.

[195] **Mr Roy McIvor** gave evidence for the first and second defenders. He is a crofter at Docharty, Dingwall and aged 69. He is a neighbour and friend of the first and second defenders but also knows the brothers. He has known them for over 40 years. He bought things off them and would see them at the pipe band in Strathpeffer and in Tesco, Dingwall.

As the last time the witness thought he dealt with the brothers on Logie Farm was probably in 2013, I did not find his evidence of a great deal of assistance.

[196] **Ms Jane Menzies**, aged 60 and the owner of the agricultural supply business Animal Health Highland gave evidence for the first and second defenders. She started working in the business in 2009 and the brothers were customers. She also knows the first and second defenders and has done for longer than 9 years as friends. HMcC would be the one who would come into the store. RMcC would be the driver and he would tend to wait in the car. A customer would sign a chitty for goods and would receive a statement at the end of the month. HMcC did that in relation to any purchases for Logie Farm.

[197] The store had a promotional event in 2014 on one Saturday in the summer. The brothers attended. They sat at a table with the witness and had a burger. They chatted and had a lovely time. By March 2017, RMcC was the one who came into the store. Prior to that she had noticed HMcC would come in and would then have forgotten what he had come for. She could not estimate when that was. By March 2017, RMcC was the one signing chitties.

[198] Again, the scope of this witnesses' evidence was of limited assistance.

[199] **Alexander (known as Hamish) Polson** gave evidence for the first and second defenders. He is 83 and a retired architect. He farms at 9 Drynie Park near Logie Farm. He has farmed there for 30 years and knew the brothers slightly. He saw the second defender working at Logie Farm but could not pinpoint the date of that. I did not find this witness' evidence of assistance given its limited scope.

[200] **Mr Euan Donald** gave evidence. He is a 53 year old solicitor and director with Innes and Mackay Solicitors. He has been a qualified solicitor for nearly 32 years. He gave evidence about events in 2018. His colleague, Eilidh Bain, was instructed by RMcC in

October 2018 to revoke an existing power of attorney. Ms Bain contacted Dr Vickerstaff to discuss the revocation and to ascertain if RMcC had capacity to revoke it. Dr Vickerstaff confirmed that he had such capacity.

[201] **Ms Cath McQuarrie** gave evidence. She is a 69 year old retired vet who previously worked at Conon Bridge Vets. She retired in 2015 but had been a vet there for 24 years previously. She knew the brothers as their vet. She did not know DMcC and described him as “a shadowy figure in the background”. She would see the brothers occasionally and at least once or twice a year. She was asked about their minds in 2014 when she was dealing with them and she indicated she thought they were pretty much as they always had been but that they were very quiet anyway. She noticed a deterioration after she retired.

[202] She gave evidence about an incident in January 2007 when she was at Logie Farm. RMcC keeled over. He had a severe pain in his arm when he came round and an ambulance was called. Ms McQuarrie gave evidence that after this episode she was given a bag with a bottle of whisky in it. Thereafter she was in her car and HMcC approached her and asked if she got the cheque. She discovered that there was a cheque for £1,000 in the whisky tube. She felt that she could not accept it, but that to give it back would be insulting, so she approached friends of HMcC and RMcC for advice. They told her that although the brothers looked like they “did not have two beans to rub together” they were quite well off. At that point her father had been admitted to a hospice so she filled out the cheque, as the payee had been left blank, with the hospice name and made it a donation to charity. She wrote to the brothers to tell them what she had done. They later gave her another cheque for £500 and again she made that out to another charity.

[203] **Mrs Patricia Black** is a 61 year old solicitor. She was enrolled in 1983. She knows Logie Farm as she was brought up near there. She knows the first and second defenders but

is not friendly with them. She would see the brothers at the Black Isle Show as a child. She would see them at the animal sales between the period 1978 – 2009. The witness knew of the brothers selling land at a discount. She bought two parts of Logie Farm from them for two separate clients. As a result she had examined the title. Over the period from their father's death there had been about 13 or 14 disposals. The witness gave evidence about the brothers' father's will saying that land could not be sold without all three agreeing and if any brother raised an action of sale and division they would lose their right to inherit. The witness gave evidence about a meeting she had with Fiona Thomson, solicitor and second pursuer in this action about another case. She had said several things about the present action but I do not find these relevant to the matter at issue before me. I found this witnesses evidence of limited assistance to the matters at hand.

[204] The final witness for the first and second defenders was **Dr Kirsten Vickerstaff**, a GP at Gairloch Health Centre. She has been a GP since August 1995 and based in Gairloch for about 19 years. She gave evidence that RMcC registered as a patient at her practice on 23 July 2018. On 4 October 2018 Dr Vickerstaff visited RMcC at home. She carried out an assessment of his mental capacity and concluded that he had capacity to make welfare decisions. She confirmed that position to solicitor Eilidh Bain on 12 October 2018.

[205] In cross-examination Dr Vickerstaff confirmed that a call she had with the third defender on 26 July 2018 had raised some concerns with her. This was because when RMcC was registered at the practice the third defender had made a very unusual request, which was that all correspondence and communications were to go through him.

[206] That concluded the proof for the first and second defenders.

### THIRD AND FOURTH DEFENDERS' PROOF

[207] The third defender generally presented the case for himself and his wife, the fourth defender. She was given the opportunity to present evidence and to ask questions of each witness but rarely took that opportunity. The exception to this was when the third defender gave his own evidence; on that occasion he was examined in chief by the fourth defender. Three issues arose with the presentation of their case by the third and fourth defenders. The first was that the third defender appeared to be following a pre-prepared "script" of questions, which some witnesses, particularly his family members, had already "rehearsed" answers to. The second was that lay supporter to the fourth defender, Mrs Berkenheger (daughter of the third and fourth defender) was called to give evidence. This was most irregular, as she had been present in court throughout the evidence of the preceding witnesses, but I allowed it. The third was that the third defender chose to give his evidence last, notwithstanding the fact that it was explained to him that his credibility and reliability may be commented upon as a result.

[208] **Miss Elizabeth Cameron** gave evidence for the third and fourth defenders. She is 65 and a close friend of the third and fourth defenders' daughter, Marina Berkenheger. She was Marina's bridesmaid at her wedding. She knew the brothers and first met them at the accordion and fiddle club in Inverness and in Dingwall. She used to sit with HMcC and RMcC at the club. They were very sociable and interacted with her and the Stewart family very well. She first met them probably around 2010 or 2011 and described them as being "very close" to the Stewart family. The witness did not notice any difference in HMcC or RMcC in June 2014. She described them as mentally and physically well. She did not consider them liable to be influenced because they were of strong character.

[209] In cross-examination the witness was surprised to hear that HMcC had been diagnosed with dementia and that his doctor said he no longer had capacity in October 2014. The witness never met DMcC.

[210] I found this witness' evidence of limited use in determining the issues at hand. Her interactions with the brothers were limited and in a social setting where music was being played.

[211] **John Williams** gave evidence for the third and fourth defenders. He is aged 73 and a retired electrical engineer. He has known the third defender and the fourth defender and their family for more than 20 years. He first met the brothers 5 or 6 years ago when he was asked to do small electrical jobs at Logie Farm. The person who asked him to do the jobs was the third defender.

[212] The witness gave evidence that he was in the bank at Dingwall about 3 years ago when RMcC appeared behind him. He asked the witness if he had been paid for work he had done at Logie Farm recently and the witness indicated that he was actually there to deposit the cheque he had been given. At that point a person appeared beside RMcC, a woman with brownish hair, and they were ushered into an office. She did not seem to be a friend of RMcC as he appeared a bit agitated when she appeared beside him. At that point the cashier told him there was a problem with his cheque and that it would have to be represented. The witness gave evidence about assisting RMcC to move to Poolewe and RMcC wanted to move there.

[213] In cross-examination the witness indicated that RMcC spoke very highly of the third defender and his family. The cheque that he received was signed by one of the brothers, as far as he could remember. Overall the witness' evidence was of limited assistance.

[214] **John Coates** gave evidence. He is 69 and owns a garage in Dingwall. He has known the brothers for 50 years. He was brought up on a croft up the road from them. When he started breeding cattle as a hobby they helped him out. The brothers were quite paranoid about people stealing things from the farm. He would see the brothers at the Dingwall Mart and at the Strathpeffer pipe band. They would always be clean and turned out tidily and were very sociable, apart from DMcC who was very quiet and would often sit in the car reading the paper.

[215] In cross-examination the witness confirmed that the brothers were generous with their time in helping other people. In his view, HMcC was still quite sharp when he was at the Mart auctions in 2014. The brothers referred to the third defender as a "distant cousin". He had seen the second defender at Logie Farm sorting out paperwork.

[216] In cross-examination by Mr MacLeod the witness advised that he thought the third defender put up a camera at Logie Farm, or maybe his son did. In 2014 he was aware of rumours that people were at the farm just to help out to see if they could get something in the end. He did not really take the rumours to heart. He did not consider that this was because the brothers were vulnerable, simply that they were getting old. Overall, I did not find the evidence of this witness to be of great assistance.

[217] **Iain Stewart** is 27. He is the son of the third and fourth defenders. He gave evidence that he knew the brothers all of his life. They would be present at his house for Christmas, Easter and so on. HMcC, in particular, looked upon him as a grandson or sometimes as a son. He was also close to RMcC and DMcC, but was closest to HMcC. He went on various trips with them. He went around the Black Isle Shows with them many times, to the Maryburgh Gala and all sorts of farming shows and Highland Games. This happened all through his childhood, more so in his teens and late teens. When his father injured his

Achilles in 2008, RMcC took him to and from school for several months and took his mother shopping.

[218] The witness gave evidence that he started to get even closer to HMcC when his brother, David, died as the third and fourth defender were grieving and HMcC and RMcC would take him away on various trips. The death happened when he was 9 years old.

When he was about 10, HMcC took him to Dumfries and bought him an accordion which he described as "a very special gift".

[219] The witness' evidence was that when he was in his early teens at the Black Isle Show the brothers sat him down and spoke about the future of the farm. They alluded to the idea that he could be a potential candidate for keeping the farm going. There were many further conversations in the same vein over the years. HMcC was the most vocal about passing it to him but DMcC and RMcC were present when HMcC would mention this and seemed "very agreeable" to the farm being passed down to him. The witness gave evidence that he was taken aback as he was very young and it seemed a lot of pressure to go through these kind of talks. However, he remembered quite vividly the conversation when they were saying they wanted the farm to go into good hands.

[220] He did not have any concerns about the mental wellbeing of any of the brothers, apart from a time when DMcC took ill quite rapidly following an infection in his leg. He could not place the date of this but there was a rapid change from DMcC being normal to losing his ability to speak and the witness was worried about him. HMcC and RMcC were pretty well alright up until the end of 2016 when HMcC started to show his age and became a bit more in need of assistance.

[221] The witness was asked the question: "What's your final assessment of the situation?" He replied:

“I would say we always listened to what they wanted in respect of their autonomy and never made any decisions for them. We always respected their way of life.”

[222] In cross-examination from Mr Dunlop the witness' evidence was that it was more after the death of his brother in 2003 that the brothers became closer to their family. He exchanged birthday and Christmas gifts with them. During the period 2010 to 2015 he would see HMCC once a week at least. It would usually be a Saturday afternoon or Sunday. The witness was asked again about the discussions of the farm being transferred to him. He said that this was very regular, almost every time he saw them they kept bringing it up. They wanted to pass the farm down and said they were getting older. They said they did not want the farm to go to unknown people and wanted it to be secure with people who would appreciate it and who knew them well.

[223] He gave evidence that he knew about the transfer of the farm to his parents at the time. The three brothers sat him down because it was something important and said that they wanted the Stewarts and the Warwicks to get the farm and they could organise it amongst themselves. They kept saying that they loved the Stewart and Warwick families.

[224] In cross-examination by Mr MacLeod the witness agreed that he prepared for giving evidence by his father making him aware of what he had to do for court in terms of preparing evidence and his father prepared him for the kind of things he would like to hear about. He gave him a rough idea of what he wanted him to say.

[225] The witness was pressed on his conversations with the brothers about the farm being transferred to him. He gave evidence that, when he was 12 or 13, the brothers sat him down and said he was a candidate to run the farm one day. Nothing was mentioned about the other candidates. They said they thought the world of him and his family and wanted the farm to go to someone who was close to them and who deeply cared for them. HMCC

expressed a love for his family, and him in particular, and said he wanted the farm to go to him in particular. At the time he was taken aback and did not want to push the idea and he just kept being polite. It was put to him that this was an odd thing to say to a 12 year old and the witness agreed.

[226] In re-examination the witness said that his father, the third defender, had not told him what to say in evidence.

[227] My overall impression of this witness' evidence was that he was dogmatically following a particular line. I found his evidence incredible, specifically in relation to the brothers repeatedly indicating that they wished him to have their farm from as early as age 12 onwards. I did not consider Iain Stewart to be a reliable witness. I considered he had a particular agenda, being to back up his father's position, whatever that took.

[228] **Gavin Berkenheger** is the son in law of the third and fourth defenders. He gave evidence about meeting the brothers when he started to date his now wife Marina at the beginning of 2013. Thereafter at some point he was on Logie farm picking up plastic. His evidence was that it was quite clear from the beginning that there was a close bond between the third and fourth defender's family and the brothers.

[229] In cross-examination the witness gave evidence that he lived in Ireland from 2007 until the end of 2012. He moved back to his parents' home at the beginning of 2013 but then had a company house in Aberdeenshire and was coming and going from there. In February or March of 2014 he and his wife bought the house in Muir-of-Ord. Given the witness' limited involvement with the brothers prior to and at the material time I did not find his evidence of assistance.

[230] **Marina Berkenheger** gave evidence. She is 39 and the daughter of the third and fourth defenders. She gave evidence that her earliest memories of the brothers were when

she was 5 or 6 and she would venture up to Nan Dickinson's croft and the brothers would come to visit her. That is where she met them. The brothers would deliver straw and hay bales to her and were good friends of Nan's.

[231] Mrs Berkenheger's piping teacher was a good friend of the brothers and she would often see them at pipe bank galas. She was in the band from aged 16. In 2013 the witness felt that the brothers' mental state was fine. She did not see any difference in them. HMCC could follow a conversation and had no problems. RMCC was more reserved but would still have conversations. They had been at her wedding in August 2013.

[232] In cross-examination from Mr Dunlop the witness gave evidence that she did not think the brothers were persuadable or vulnerable to suggestion in summer 2014. HMCC had his own mind but wanted to be your friend. RMCC was reserved and would weigh things up. DMCC was more reserved, he liked to read books and was strict about food. She knew about a couple of discussions about what would happen to the farm. On one occasion they said to her that they would like her to have the farm. She just laughed this off. This was said all through the years when she was a teenager.

[233] The witness worked near Beauly Post Office where the PO Box was. She would collect the mail from the post office and would deliver it to the brothers. She would take it to the farm and normally give it to HMCC or RMCC. If they were not in she would hold on to it until she saw them.

[234] My overall impression of this witness was very much the same as her brother. I found it incredible that she could recall events when she was 5 or 6 years old. I did not believe her evidence about the brothers repeatedly indicating that they wanted her to have the farm.

[235] **Mrs Mhairi Stewart** the fourth defender gave evidence. She is 69 and married to the third defender for forty years. She gave evidence that they used to live on a croft opposite a lady called Nan Dickinson. She would be regularly visited by the brothers. Mrs Stewart's daughter, Marina, also used to visit Nan Dickinson and as a result she got to know the brothers. Mrs Stewart gave evidence that Nan Dickinson was HMcC's girlfriend.

[236] Mrs Stewart gave evidence that she first met the first defender when he called to their house in 2001 to discuss his interest in motorbikes with her husband. When the witness' son, David, was killed she was in hospital at the time. The first defender helped them. The brothers visited them when they found out about her son's death and gave them support thereafter. Following his death, the witness and her husband thought about moving to her family croft on Lewis. The brothers did not want them to go and tried to persuade them to stay. The brothers would sometimes give them a lift to Ullapool to get the ferry to Lewis and the witness recalls a discussion when they said that they wanted them to have the farm. They proposed to transfer the title to them. In 2008 the third defender had a fall and snapped his Achilles. He was incapacitated for 9 months. RMcC would take Iain to school and take the witness out shopping.

[237] HMcC mentioned a piece of land on his farm where he thought the witness should build a house. He remembered the fact that Nan Dickinson had previously offered the couple her derelict house and land on her croft. The title that the witness and her husband acquired of land at Inchbroom has never been used. They continue to own it. The witness gave evidence that the brothers were invited to her home for a meal on many occasions. The witness gave evidence about RMcC deciding to move to Poolewe. The witness gave evidence about HMcC going on various trips with her and her husband, usually to accordion performances. The witness was shown various photographs, including a photo of

HMcC on his 80<sup>th</sup> birthday in January 2010, and a photograph at her daughter's wedding in August 2014 when RMcC and HMcC were both in attendance, but not DMcC.

[238] In cross-examination by Mr Dunlop the fourth defender confirmed details in relation to the photographs. She confirmed that she became friends with the brothers 40 years ago as they knew her husband through his musical and singing performances. She gave evidence that she thought RMcC's memory in June 2014 was good. She gave evidence that the brothers first proposed transfer of the title of the farm to her and her husband in 2004. RMcC was driving. HMcC and DMcC were in the back of the car and she and her husband were also present. She gave evidence that HMcC said that he did not want them to go to Lewis and that they could transfer the farm to them. They were still wanting to stay on it but they would know where the farm was going when they died. The witness gave evidence that she recalled RMcC indicating this would be a good idea. The witness gave evidence that DMcC was nodding and smiling. The witness gave evidence that they said the same thing again on lots of occasions. They did not take the brothers up on their offer as they had no intention of coming back from Lewis.

[239] The witness was asked if she would celebrate things with the brothers, for example HMcC's 70<sup>th</sup> birthday (rather than 80<sup>th</sup> which was seen in a photograph). The witness replied that the brothers would come to her house and they would give them a hamper for Christmas. They started to come to her house for Christmas in 2005. They would mainly go to musical events together as they loved those. The witness was asked what her position would be if it was suggested to her that HMcC's memory was failing. She indicated she did not notice anything different, but went on to say that he maybe started to forget some names but was quite good in knowing what he wanted to do.

[240] Mrs Stewart gave evidence that she was aware of the brothers being generous. She gave evidence about HMcC paying for the wedding of a woman from Muir-of-Ord's daughter. The mother had asked if she could put a marquee on his farm but HMcC thought that would be quite a lot of work. HMcC told the witness that he had paid £30,000 for the wedding instead.

[241] In cross-examination by Mr MacLeod, Mrs Stewart was asked about the trip to Ullapool in 2004. She confirmed that it was not long after her son had passed away and she was clear that all three brothers were in the car when they said that they would like them to stay on the mainland and that they would like to pass the farm to them. Her evidence was that her son Iain was staying with her cousin in Lewis in the next door croft at that time. Marina was at home working. She gave evidence that they said this again a few times over the years. HMcC said "there's no pockets in a shroud" and made it clear that he would like to see where his property was going when he was alive, rather than relying on a will. It was put to Mrs Stewart that it was odd that there was a gap between 2004 when that was said and the transfer happening. Mrs Stewart's position was that that was because they did not push anything.

[242] Mrs Stewart was shown page 772 of the pursuers' productions and a medical entry for 21 March 2014 (quoted at paragraph 155 above). She was asked if she recalled DMcC being incontinent at that time. She did not. She gave evidence that she was not aware of HMcC being diagnosed as having dementia in 2013. Her evidence was that her husband was giving a performance at the MacKenzie Centre (a facility for senior citizens) when HMcC saw a notice for the memory clinic and said that he maybe wanted to go to that. Her husband arranged that by phone straightaway.

[243] It was put to Mrs Stewart that the brothers were confused by 2014. She did not think that they were. It was put to her that the brothers were confused about what property they owned. Mrs Stewart was not sure about that. She agreed that HMcC spent £30,000 on someone else's wedding in 2012. She considered that it was really a gift.

[244] I did not find Mrs Stewart credible or reliable. I got the distinct impression that she was following a script provided to her by her husband. Her evidence about the journey to Ullapool when she maintains the brothers said that they wished her family to have the farm struck me as something that had been made up in advance to suit the third and fourth defenders' ends in this case. I say that because of the way in which the evidence was given by Mrs Stewart; it did not present as something she was recalling from her own memory. In addition it is not a position that is foreshadowed on record. In answer Two for the third defender in the final sentence thereof the third defender's position is:

"In 2013 the brothers advised the third and fourth defenders that they wished to transfer the farm to them".

i.e not in 2004 or 2007 on a car journey, as the witness is now maintaining.

[245] There were other aspects of Mrs Stewart's evidence that I found unsatisfactory. For example, her position that HMcC and her neighbour, Nan Dickinson, were in a relationship is not foreshadowed on record. What is said there (page 43, line E) is:

"HMcC and RMcC met the third and fourth defenders' neighbour Nan Dickinson when visiting the third and fourth defenders at their home. They subsequently let fields from Nan Dickinson."

Again this did not accord with Mrs Stewart's evidence. I do not consider I can place any reliance on her evidence, unless it is corroborated by other witnesses who I do believe.

[246] **Mr Douglas Stewart**, the third defender, gave evidence. He is 69 years old. He is a trained cabinet maker and gave his occupation as such and said he was a photographer and

photojournalist for a while and an entertainer/musician. He gave evidence that he first saw the brothers at musical events when he was 16 years old. He was singing with a band at Allangrange House and the brothers lived at Allangrange Farm so he saw them there. He gave evidence that there was a family connection between the brothers and his mother's side of the family; he said the brothers had a cousin who was a cousin of his mother's called Nan Tulloch. He gave evidence that the brothers visited his mother at home because she had had both legs amputated. She told the brothers at the time of the visit that the third and fourth defenders were to be married. That was in 1980. They attended his mother's funeral.

[247] Mr Stewart gave evidence that the first time he went to Logie Farm was in 1999 when the brothers' farmhouse had gone on fire. He gave evidence that after his son's death he no longer wished to work with customers in his furniture business and decided to leave for the Isle of Lewis. The brothers would help out in transporting materials to Ullapool for a renovation that he was doing on Lewis. The brothers appreciated the reason that they wanted to move to Lewis but were sorry to see them go as they did not want to see them disappear, particularly in their old age. They phoned asking how he was getting on and did so frequently. They looked upon him as their family and offered them land. Mr Stewart's evidence was that when this was rejected the brothers were upset that they were not taking them up on their offer and he explained that the reason for this was that it was not financially possible. He had a mortgage on his home and if he was not going to be earning from the furniture business he was not going to be able to pay the mortgage. They re-mortgaged their house to pay for the renovation on Lewis and he explained to the brothers that they would have to sell their house in Muir-of-Ord irrespective of feelings. HMCC said that he could help them financially and would give them a plot of land. This was land at Inchbroom, but they were not able to obtain planning permission.

[248] In relation to the power of attorney, Mr Stewart's evidence was that this came about after a meeting with financial adviser, Lachie MacGregor. He suggested it and Mr Stewart agreed but the agreement was that his position would only be as "legal assistant and witness on their behalf" and he would never make decisions on their behalf. They would make their own decisions. The first defender became involved because the brothers met him at the Stewart's home over a five year period and got to know him very well. They liked him and asked him if he would consider helping them out by taking on the position.

[249] Mr Stewart was asked the question:

"When you learned about the transfer of property what was your reaction?"

He answered:

"There was no shock. From 2004 these men, on regular occasions, not just once I would say at the very minimum once a month, would remind us of the offer of a field... they wanted it to be in our name when they passed...".

[250] Mr Stewart was asked if he knew about HMcC attending the memory clinic. He gave evidence that in the MacKenzie Centre in Inverness with HMcC he had seen the sign and said that he was in the right place. Mr Stewart's evidence was that HMcC was "a bit forgetful but it never affected him in any way". HMcC asked him to make an appointment for him at the memory clinic and he did that. The witness took him there and he was very pleased with the people he saw.

[251] Mr Stewart gave evidence about the brothers' purchase of Wards Croft. He gave evidence that the brothers used to drive round looking at all the houses for sale as they would never be able to be on the farm if they were getting older. He gave evidence about RMcC moving from Wards Croft to a house in Poolewe after he saw it for sale. Mr Stewart was asked whether any thought was given to having the siblings placed in the same care home. His answer was that the care home said they could not have siblings together.

[252] In cross-examination by Mr Dunlop, Mr Stewart was asked when he first became aware of the brothers. He replied that this was when he was 16. He was asked at what point they became friends. He said "in 2000.... no 1982". Mr Stewart gave evidence that the brothers looked upon his children as grandchildren. They used to buy them things like bikes at car boot sales. He went to see the financial adviser, Lachie MacGregor, with HMcC. HMcC told Lachie MacGregor that he did not want the Stewarts to go back to Lewis and then said, on behalf of the brothers, that they wanted to give all of their property to the Stewart family as they had no close family themselves. It was only HMcC who went to the meeting with Lachlan but once he got the information he would relate that to his brothers. Two people were appointed as POA as there was a meeting with Alasdair Fraser and he said it might be better to have a second POA as it could be a complicated situation for one person on their own. HMcC was then in the Stewart's house and asked the first defender if he would consider it.

[253] Mr Stewart was asked if he went to any medical appointments with the brothers in 2013/14 and he indicated that he did. He denied that any medical staff ever said any of the brothers suffered from dementia. He would remember that. His position was that in 2014 HMcC's short term memory was not good but his general memory was good and you could have a great conversation with him. It did not affect his decision making. He was certain of that because he had known him for so many years he would see a difference in him right away. Mr Stewart denied ever giving RMcC a document to sign in June 2014 apart from his bus pass form. He specifically denied putting any deed in front of the brothers in relation to the transfer of land. Mr Stewart agreed that a PO Box was set up for the brothers' mail. The reason for that was that McC used to take the mail and not tell his brothers about it.

[254] Mr Stewart met Catherine Seager, a relative of the brothers who Hugh had previously left a bequest to in his will. He had never met Hugh Fraser. He had never heard the brothers discuss leaving the farm to Hugh Fraser; when the brothers were talking of relatives they said that they did not have any relatives they knew and wanted to ensure that the farm would be passed on to somebody they did know while they were alive. Mr Stewart was shown a letter, item 6/5/57 of process, which RMcC delivered to Middleton, Ross and Arnot. He confirmed that he typed the letter. He gave evidence that he did so at RMcC's request. It was what RMcC wanted.

[255] In cross-examination by Mr MacLeod the third defender was obdurate. He had a particular pre-occupation with his belief that he was never "acting under the POA". When it was put to him that he was a POA he indicated:

"I would not say I was acting, I was appointed."

He gave evidence that if he was required to do something he would only do it for the brothers at their request. He denied ever signing anything in his capacity as POA. When it was put to him that he signed a cheque in favour of the first defender in 2013, he agreed that he did so. His position was that he only signed it because the brothers wanted him to do so and that it was easier for that to be done by one signature.

[256] Mr Stewart agreed that he had not been to the farm prior to 1999. When it was put to him that it was odd that the brothers did not stay with him and his family if they were such good friends, his position was that he did not know the house had gone on fire. He was shown a note from 21 March 2014 about DMcC appearing incontinent. His position was that it was because DMcC was out feeding sheep. He had no worries about him. DMcC was very independent and would not let anyone go near him. Mr Stewart's evidence was that he had no concerns about DMcC other than an infection in his leg.

[257] When page 1061, an entry of 21 January 2014, was put to Mr Stewart, specifically the reference to HMcC having a younger brother “who might have his own mental health problems”, he replied “That would explain [DMcC], yes.” When it was put to him that DMcC would go along with what the other brothers wanted to do he replied “Not at all”.

[258] When page 1047 of the medical notes (detailed in full at paragraph [159] above) was put to Mr Stewart, he indicated he did not remember having any private conversation with Dr Wendy Kerr. He did not understand the reason for the entry and said “this does puzzle me”. When it was put to him that he must have given that information to Dr Wendy Kerr he denied having done so.

[259] When it was put to Mr Stewart that Angus Ross was concerned that he was “grooming” the brothers Mr Stewart gave evidence that Mr Ross’ wife was Dorothy Fraser’s aunt and her brother would come round and collect money from the brothers on a regular basis. He did not put that to Mr Ross in cross-examination because it did not come into his mind at the time. Mr Stewart denied being over controlling of the brothers’ lives. He denied knowing that HMcC had dementia in 2013 and gave evidence that nobody informed him.

[260] Mr Stewart gave evidence that the only people who opened mail which arrived at the PO Box were the brothers. Mr Stewart agreed it was possible that he had been at every meeting with the brothers that Alasdair Fraser, solicitor, attended. He said:

“They were terrible loose cannons. It was to be absolutely sure they were in.”

It was put to him that there was no reason for him to be involved, but his position was that there was. Getting him to contact Alasdair Fraser was a “friendly way of dealing”. Mr Stewart agreed that he met Alasdair Fraser at Logie Farmhouse when the disposition was signed. He agreed that he informed the brothers that Alasdair Fraser was coming. He just

could not understand Alasdair Fraser's evidence to the effect that he had posted a disposition to the brothers. He did not know what Alasdair Fraser said to the brothers as he did not go into the house.

[261] Mr Stewart confirmed that the brothers had a financial adviser, Lachlan MacGregor. He was retired but he was speaking to the brothers on a friendly basis. He did not know of them speaking to anybody else for advice. Mr Stewart did not agree that the brothers had got rid of a huge asset which was prejudicial to their interests as:

"I made sure it wasn't. They had sufficient funds available, all they needed."

It was put to Mr Stewart that he had a moral obligation to the brothers to transfer the value of the farm back to them. He said:

"The whole purpose was to pay our mortgage. If I stopped going to Lewis we would lose everything. Any money paid our mortgage and any left paid for solicitors' fees so we basically have no money. Why would you give a gift back? They loved our family. This was a gift."

[262] He went on to say that he could not afford to transfer the funds back even if he wanted to. He gave evidence that his mortgage had to be repaid. It had reached the end of its term. He was not earning. He would have lost his house. It was put to him that these were three elderly men vulnerable to exploitation. Mr Stewart's position was that they were not vulnerable. They were three decision makers.

[263] I did not believe Mr Stewart while he was giving evidence. He came across as someone trying far too hard to promote a particular standpoint. He was, as I have already commented, obdurate at times. He delivered artful answers in chief, but his demeanour changed in cross-examination by Mr MacLeod. In certain passages of cross-examination he prevaricated and then obfuscated. The atmosphere in the court changed; there was an edge of awkwardness as we all witnessed his attempts to justify his position. His lack of

credibility and reliability were not, in my view, matters of fine balance, but were patent. An example of outright lying was his account of not being aware that HMcC had dementia; it is perfectly clear from the medical records that he was intimately involved with appointments up to, including and after this diagnosis being made. It is preposterous to suggest ignorance.

[264] Finally, the third and fourth defenders sought to lodge an affidavit by **Lachlan MacGregor**. This was objected to by the pursuers. I do not understand them to be insisting on their objection, but instead to be submitting that little weight ought to be given to the affidavit, given that Mr MacGregor has not been subject to cross-examination.

[265] Lachlan MacGregor's "affidavit" appears to have been prepared by the third defender. It does not follow conventional legal form. For example it doesn't give the deponent's age or occupation. It doesn't explain why Mr MacGregor is unable to attend court (yet is apparently able to attend Alasdair Fraser's office as he has notarised the document there). In any event the terms of the affidavit do not assist with the question of any independent advice provided to the brothers at the time of the disposition being signed and as such I shall attach little weight to it.

### **Submissions**

[266] All parties provided written submissions in advance of the oral hearing on submissions. I am grateful to parties for the obvious work that went into the provision of their written submissions. I do not propose to repeat the terms of these here, as they are available in process to be read if necessary. I simply propose to comment on specific matters, if and when they become relevant to my ultimate decision, as set out below. In addition, parties made various points at the oral hearing on submissions. Again, I shall refer

to them, as and when relevant. Mr Dunlop, for the first and second defenders prepared a written reply to the pursuers' closing submissions and this is also lodged in process.

[267] Parties agree that the burden of proof is on the pursuers. The pursuers require to satisfy the court, on the balance of probabilities, that the disposition of Logie Farm on 25 June 2014 is vitiated by facility and circumvention and/or by undue influence.

### **Fraud, Facility and Circumvention**

[268] As I said in my judgment following debate, there are three constituent elements to this legal concept which require to be proved:

“Parties referred to *Mackay v Campbell* 1967 SC (HL) 53. From that case it is clear (and it was common ground between parties) that there are three constituent elements which require to be proved to succeed in an action based on facility and circumvention. They are (summarised):

1. Weakness and facility;
2. Circumvention; and
3. Lesion

These three factors are all interrelated and they must be looked at as a whole and not in separate compartments. The strength of averments on one matter may compensate for the weakness of averments upon other matters.”

[269] To put this in another way, per Lady Smith in *Horne v Whyte* [2005] CSOH 115, at paragraph [51]:

“For the pursuers to succeed... it is necessary that they establish (1) the facility of the deceased at the time the codicil was made; (2) acts of circumvention or fraud which impetrated or procured the codicil; and (3) lesion. Direct evidence is normally required for the first and third of these elements but the second, for obvious reasons, is usually where the granter of the challenged deed is dead, a matter of inference. The three elements are clearly interrelated, they require to be looked at as a whole and the strength of a pursuer's case on one matter may compensate for weakness on other matters (*Mackay v Campbell*; *Pascoe-Watson v Brock's Executor*). Circumvention can be inferred from proof of facility and lesion, or a combination of both with circumstantial evidence.”

[270] In relation to the facility of the separate brothers they were 84 (HMCC), 82 (RMCC) and 79 (DMCC) when the disposition was signed. "Facility" means mental weakness (but not insanity) and may be attributable to age, grief or illness. As well as their age the pursuers offered to prove that the brothers were all in deteriorating health. The averment is:

"That the health of each of the brothers deteriorated from 2012 onwards. HMCC and DMCC suffered from dementia." (The first sentence of condensation 4, page 54).

What then was the evidence in relation to the brothers' health when the disposition was signed on 25 June 2014?

[271] In relation to HMCC, the medical evidence was clear. Dr Mack gave evidence about a letter received at the GP surgery, from speciality Doctor Wendy Kerr, dated 21 January 2014 diagnosing HMCC with dementia. The diagnosis had been made following a CT scan that showed evidence of cerebral atrophy, "particularly marked at the medial temporal lobes". By 28 October 2014 the speciality Doctor confirmed that HMCC no longer had capacity. The third defender was perfectly well aware of this fact as he had attended the memory clinic in Dingwall with HMCC on 29 April 2014. He could not have been other than aware of the fact that HMCC was being prescribed remynyl (a medication used to treat dementia).

[272] The letter from Dr Kerr makes this very clear as it says:

"He has been on remynyl XL for a few months and [the third defender] has already noticed quite an improvement." (Page 1053)

The matter of the third defender's knowledge of this is put beyond doubt by page 1063 and the letter of 21 January 2014 wherein the speciality doctor, Dr Wendy Kerr, writes:

"This would confirm our suspicion that he has a diagnosis of dementia mixed type F00.2 and I discussed this diagnosis with H McC and [the third defender] today."

[273] There is absolutely no other way than this can be interpreted, other than that the third defender knew perfectly well that H McC was diagnosed with dementia on 21 January

2014. His attempts in the witness box to deny this were, as I have said, a clear example of his lies. I have no doubt that HMcC's facility was affected when he signed the disposition of Logie Farm, by virtue of his old age and dementia. That dementia creates a mental weakness in an individual suffering from it was clear from the evidence of Dr MacEwan:

“He explained that dementia is a syndrome characterised by a progressive deterioration and decline in cognitive functions of the brain, including memory, concentration, orientation, and speed. The change occurs over a period of time, usually years. **The resulting decline in social and executive functioning brings difficulties for an individual in managing their affairs.** The commonest causes of dementia are Alzheimer's disease and vascular disease. There has to be a decline in both social and cognitive functioning for dementia to be diagnosed.” (my emphasis)

[274] It does not strike me from the evidence that HMcC's dementia could be said to be only very mild. On 3 October 2013 (nine months **before** the disposition was signed)

Speciality Dr Wendy Kerr noted him as scoring 52/100 on the ACE III- a score Dr MacEwan described in evidence as “very low”, with a score of below 82/100 raising the question of dementia. In the same letter she notes him as being:

“disorientated in time, performed very poorly on tests of memory, also impaired fluency and visuospatial skills.”

[275] The position in relation to R McC is different. To my mind there was no clear evidence of any weakness in his mind. On the contrary, we heard that he was able to execute a revocation of a power of attorney, with Dr Vickerstaff confirming that he had the capacity to do so, as late as 2018. There was a deal of evidence led about RMcC viewing his brother HMcC as “the boss” and going along with what he wanted. To the extent that I accept such evidence it was not, in my view, sufficient to establish any reduction in RMcC's facility.

[276] The position presented at proof was the least clear overall in relation to DMCC. I think the vet, Cath McQuarrie, probably summed it up best by describing him as:

“A shadowy figure in the background”.

Many witnesses who knew HMCC and/or RMCC well knew very little of and had very few dealings with DMCC. It may be that he suffered from a disability, as mentioned by some witnesses. The description given of him by many of the witnesses was redolent of someone with additional support needs. Whatever the true position in that regard there is clear information about his health within the records. Dr Thomas MacEwan had carried out a review of these. He noted that DMCC was “confused” on 29 May 2012 when he attended at Raigmore Hospital thinking he had an appointment there. Moving forward to 21 March 2014 (page 772 of the productions) there was an entry where DMCC was seen at his GP practice with:

“same clothes on today, socks soiled, appears to have been incontinent.”

On 11 April 2014 Dr Miles Mack raised concerns about DMCC and his apparent inability to self-care “due to cognitive impairment and frailty”, with the social work department. On 1 July 2014 (page 907) he attended an out-of-hours clinic and was “a little confused”. This is six days after the execution of the disposition with which I am concerned.

[277] Dr MacEwan concluded his report in relation to D McC with the statement:

“My opinion therefore is that, on the balance of probabilities it is unsafe to assume that D McC had capacity to sign the disposition on 25 June 2014.” (Page 1305)

Although I am concerned with his facility, not his capacity, this is an opinion with which I agree. Again, it is notable that, this time the fourth defender, was present at the GP surgery with DMCC on the occasion of 21 March 2014. Again, I find it incredible that she would have noticed nothing untoward at this consultation and I conclude that she was lying when she said that she did not. In my view, given his age at the time the disposition was executed and his medical difficulties shortly before and shortly after that time the only possible

conclusion is that DMcC was suffering from dementia at the time, which caused a resulting mental weakness. Accordingly, his facility was affected as at the date of 25 June 2014 when the disposition was signed.

[278] The second constituent element is circumvention. This is the act of pressurising or imposing upon a facile individual. As already noted this can be (and often is) established by inference. At debate Mr MacLeod's position was that the necessary circumvention could be inferred from the whole surrounding context. The defenders' position was that **no** acts of circumvention were averred and this was fatal to the pursuers' case.

[279] The impression that I formed from the evidence was that the brothers knew the third and fourth defenders as distant acquaintances for many years. As a result of their mutual interest in Scottish music they became closer. HMcC and RMcC attended performances given by the third and fourth defenders at various hotels in the late 2000s. HMcC celebrated his 80<sup>th</sup> birthday at the third and fourth defenders home around 22 January 2010 (photograph 10 from the third and fourth defenders Inventory). The third and fourth defenders, as a result of their closer relationship with the brothers, approached them in 2011 to purchase a plot of land from them to build a house on. From that point on the third defender pursued the friendship with the brothers as he considered there may be more for him to gain from it. I infer, from the evidence, that he involved the Reverend Warwick (and his wife) as his occupation would add a veneer of respectability to matters.

[280] The factors I draw on in reaching this conclusion by inference are these:

- a) The photographs placing the third and fourth defenders and any of the brothers together commence with HMcCs 80<sup>th</sup> birthday in 2010. I find it unlikely that, if the brothers were attending the home of the third and fourth defenders regularly prior to this (especially for notable events, such as Christmas celebrations)

that there are no earlier photographs (particularly by someone who gives his occupation as “photographer”).

b) There was a fire at Logie Farm in March 2000. The third and fourth defender agree they were not in attendance in the aftermath and it was neighbours, rather than them, that HMcC stayed with. I consider this unlikely, given that they lived nearby, if they were so close at that time. From these two factors I conclude that their close relationship only developed from the late 2000s onwards.

c) I accept the evidence that the brothers all intended and wished the farm to be left to their distant cousin, Hugh Fraser from Fearn.

d) I accept the evidence from Dorothy Fraser and Angus Ross that the third defender (and his family) and thereafter the second defender became far more involved in the lives of the brothers from 2008 onwards. Prior to then neither close neighbour was aware of them.

e) The evidence of Angus Ross, which I accept, was that he considered the third defender to be “grooming” the brothers. That was his view at the time, not just when their gift of the farm came to light.

f) RMcCs subsequent position, both to Helen Fraser and others at a similar time and since, is that he did not wish to gift the farm to the defenders. Whilst I comment elsewhere in this judgment on his current reliability, this is a position that he was expressing when he still had capacity.

g) The facts themselves. All the evidence is to the effect that these three brothers wished to remain living on the farm. They wanted to stay together. They did not want to go into care. They wanted their farm to be sold as one piece and for farming

there to continue. None of those four things happened: to my mind this makes it likely that their wishes were circumvented.

h) The legal work was not done by an individual who the brothers had chosen and used for many years; it was done by a solicitor known to and used by the defenders previously. My view of his shortcomings is made clear elsewhere in this judgment.

i) The defenders have come to court and lied about matters. That suggests there is something improper to be covered up. I infer the circumstances surrounding the farm being gifted to them is what they seek to cover up.

[281] The relevant averments on circumvention, which I consider proved are:

- i. "The third defender befriended the brothers.
- ii. The brothers did not instigate the third defender's involvement in their lives.
- iii. The third defender introduced the brothers to the first defender at the third defender's house.
- iv. The first and third defender said that they would arrange a good solicitor for the brothers.
- v. The brothers did not require a different solicitor in light of their relationship with Alpin Stewart.
- vi. In or around early 2013 the third defender instructed a different firm of solicitors (A Fraser and Co.) to act on behalf of the brothers.
- vii. The principal solicitor at A Fraser and Co., Alasdair Fraser, was not known to the brothers.
- viii. The brothers did not ask any of the defenders to intervene in their affairs.
- ix. The brothers trusted the third defender.

x.The brothers did not understand the nature of the document which they were asked to sign.” (all from *Condescence Three*).

[282] Accordingly, in terms of HMcC and DMCC, who were in my judgment facile, I am clear that they were imposed upon by the first and third defenders. I am clear that there is sufficient pled on record, as detailed in the preceding paragraph, taken together with a finding that the brothers did not receive separate and independent advice about the effect of transferring the farm; and the involvement of Alasdair Fraser did not result in the brothers receiving separate and independent advice about the effect of transferring the farm (see paragraph [297] below), to allow me to make a finding of circumvention.

[283] In relation to the third element, lesion, this is the adverse result or effect of circumvention. There is no dispute that: “The Farm was disposed for no consideration.” (*Condescence Five*). I accept that the brothers wished to bequeath the farm to Hugh Fraser. I accept the evidence about the estates of the brothers being negatively affected by the disposition. As a result I hold the third element established. I therefore conclude that the pursuers have been successful in proving, on the balance of probabilities, that the disposition signed by the brothers was wrongfully impetrated by fraud, facility and circumvention on the part of the first and third defenders.

[284] I should deal briefly with Mr Dunlop’s point about lack of involvement in the fraud or circumvention by the second and fourth defenders. I consider this is answered by Mr MacLeod’s submission referring to the following passage by the Lord Justice Clerk in *Taylor and others v Tweedie and Others*, (1865) 3 M. 928:

“George Gray is not called as a defender, because he has no interest in the deed. He is not said to have acted as agent for the parties, nor to have been put forward by them for the purpose of obtaining the deed. He is not even alleged to have been in the position of *negotiorum gestor*. But the averment merely is, that the testator being weak and facile, George Gray, for purposes unexplained, did use fraud and

circumvention to obtain the deed. And the question is, is that a relevant ground of reduction against parties not implicated in any way in George Gray's fraud? I think it is, and for this reason, that no party, however innocent, is entitled to take benefit by a fraud. I should be sorry if there was any doubt as to that."

[285] This decision is sufficient to dispose of the action, as although I do not find the case on facility and circumvention made out in respect of RMcC, as it is made out in respect of HMcC and DMcC the disposition falls to be reduced. However, for the avoidance of any doubt and given the alternative case on undue influence I should also give my view on that.

### **Undue Influence**

[286] Undue influence is the misuse of the faith or trust placed by one party in another. It is summarised in *Gray v Binny (1879) 7 R 332 at 347, Lord Shand*:

"The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the grantor and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the grantor, and the circumstance that the grantor entered into the transaction without the benefit of independent advice or assistance. In such circumstances the Court is warranted in holding that undue influence has been exercised."

[287] In his submissions Mr MacLeod breaks this down to four elements. In his Mr Dunlop breaks this down to three. Notwithstanding this they agree that what requires to be considered is the following:

- a) The existence of a relationship of trust between grantor and grantee. The relationship must have an imbalance of power such that there is a "dominant" influence by the grantee.
- b) The grant of a material and gratuitous benefit to the grantee to the prejudice of the grantor.
- c) The grantor has no independent advice.

Mr MacLeod submits all three elements are present in this case. Mr Dunlop and the third defender submit that only b) is present.

[288] Looking at factor a), Mr Dunlop submits that in *Wilson v Watkins [2019] CSOH 44* the court regarded it as significant that the party seeking to prove undue influence was capable of independent living and consulting solicitors. The passage is this:

“Here the pursuer may be taken to be a generation older than the defenders. She was widowed in 2003. However, beyond that there is nothing to suggest that she was at the relevant date or dates, and indeed now, other than an adult of full capacity and of at least ordinary intelligence and experience of life. That she was quite capable of understanding a legal document (and, incidentally, capable of independent living) is suggested by averments in article V of condescendence.”

The facts pertaining to the pursuer there were thus very different to the brothers in this case. In this case HMcC was suffering from dementia, as previously detailed. In my judgment so was DMcC. RMcC, in my judgment, had full capacity but he was not a man of “ordinary experience of life”. He led, from all the evidence, a sheltered life spending the majority of his time in a twenty-five mile radius.

[289] I consider there was a relationship of trust between the brothers and the first and third defender as they were friends. The brothers had enough confidence and trust in the first and third defender to appoint them as their Attorneys. That is a fiduciary appointment.

As Lord Brodie puts it in *Wilson*:

“As I would see it, a prerequisite of a relationship which might give rise to undue influence is not simply that it involves a degree of mutual trust but that it involves an imbalance of power, or knowledge, or experience, or moral or physical strength as between the parties to the relationship. It is because of that imbalance that the dominant party effectively owes fiduciary duties towards the dependant party.”

In my view it is clear that there was a dominant and ascendant influence by the first and third defender in respect of the brothers. They were the ones with relative youth and soundness of mind on their side in so far as HMcC and DMcC were concerned and

knowledge and life experience on their side in so far as all the brothers were concerned. They also appear to have been, by their own admission “dangling a carrot” that they would only provide support and assistance to the brothers (which they needed), or not leave the mainland for Lewis (which the brothers did not want) if the farm was transferred to them. Finally, there is the matter of the first defender’s occupation as a minister, “clergyman and parishioner or penitent” being one of the examples of dominant and ascendant influence given in *Gray*. Whilst the brothers were not parishioners of the first defender I have little difficulty in holding that they would have had additional trust in him as a result of his occupation. For all of these reasons I consider that factor a) is made out in this case.

[290] Parties agree the second element, factor b) exists in this case. The third element is the question of independent advice. The pursuers’ position is that the issue is not just whether the brothers had access to independent advice, but also the extent of that advice. They cite *Horne v Whyte*, [2005] CSOH 115, at para 65:

“It was submitted on behalf of the defender that the case of undue influence was not made out because the deceased had had the benefit of Mr Flett’s [solicitor’s] advice when the codicil was made. I cannot accept that his telephone discussion with Mr Flett amounted to the proper tendering to him of separate and independent advice given the evidence that the defender was present and she told the deceased what to say. His doctor, who witnessed the document, clearly did not feel it appropriate that he get involved with what it was about. There is no evidence of anyone else giving the deceased proper objective and independent advice. The case falls, in my view, to be regarded as one in which the deceased had no separate and independent advice prior to executing the codicil.”

The defender’s position is that the involvement of Alasdair Fraser, solicitor, in a situation where there are no averments that he acted fraudulently means that the brothers had independent advice.

[291] I consider that it is appropriate to look beyond the mere fact of Mr Fraser’s involvement to examine the nature and quality of the advice and whether it was proper and

independent, *per Lord Drummond Young in Horne v Whyte* at debate stage, reported at 2004

SCLR 197:

“I do not think, however, that the mere existence of independent advice is by itself sufficient to hold that undue influence cannot exist. Much will inevitably depend on the nature and quality of the advice. Thus the advice may extend to whether or not a bequest should be made, and if so the amount of the bequest; on the other hand it may be confined to the manner in which a bequest already decided on is to be implemented. In the former case, the existence of independent advice from, for example, a solicitor would be of the utmost importance. In the latter case, by contrast, it might not signify very much. Thus the precise terms of the advice are critical. The quality and practical effect of the advice may also be important. If, for example, the advice is given in a rather vague or half-hearted fashion, that may not be sufficient to overcome the existence of a clearly dominant or ascendant influence.”

[292] I note that in various of the cases cited to me, including *Gray v Binnie* and *Horne v Whyte*, solicitors have been involved, but nevertheless undue influence has been found to exist by the court. The involvement of the solicitor is described thus by the Lord President (Inglis) in *Gray*:

“The pursuer was thus entirely without advice or protection. Mrs Gray, on the other hand, was assisted by an able and experienced man of business, entirely devoted to her interests, although made to wear a different aspect in the eyes of the pursuer, partly from his position as the family solicitor and partly by acting throughout in so ambiguous a way as to seem to be acting for both parties, when in truth he had regard only to the interests of one.”

[293] I regret to say that I found it difficult to discern from his evidence what independent advice Alasdair Fraser gave to the brothers about the transfer of title. I have outlined what I considered to be five startling aspects of his evidence elsewhere in this judgment. I heard no expert evidence about whether the actings of Mr Fraser fell below a certain standard and there was no allegation of negligence on his part. Mr Dunlop submitted that any suggestion of a conflict of interest or similar is not averred and the only issue before the court on the pleadings is whether the three brothers **received** legal advice. He submitted that the “very narrow factual matrix” pled periled the pursuers cases.

[294] The difficulty for the pursuers in respect of this part of their case is, I imagine, the fact that two of the brothers are now deceased and RMcC is *incapax*. In preparing the case one presumes they have not been in a position to aver (or probably even to know) the nature and extent of legal advice provided to the brothers by Alasdair Fraser prior to him giving evidence. They appear to have been operating under a factual misapprehension that Alpin Stewart was first consulted in relation to the proposed gift of the farm to the defenders and advised against the arrangement. That is what is averred in condescence Three. The pursuers did make calls on the defenders in relation to legal advice; at condescence Five they call upon the first and third defenders to aver: "(i) what steps they took (if any) to satisfy themselves that the Pretended Disposition was in the interests of the brothers; (ii) what advice they took from independent parties, in that regard.....". These calls went largely unanswered.

[295] However, the defenders did make some general averments about the involvement of Alasdair Fraser. At answer Five for the first defender he avers:

"The brothers instructed their solicitor in connection with this matter unbeknown to the first defender."

At answer Six the first defender avers:

"Explained that the brothers obtained their own legal advice in relation to their affairs and in particular the transfer of the farm. The first defender was not involved with or aware of the brothers' instructions to their solicitor."

At answer Six the third and fourth defenders aver:

"The brothers took legal advice from a solicitor of their choosing, Alasdair Fraser.....Alasdair Fraser was satisfied that they knew exactly what they wanted to do, namely to transfer the farm to the defenders for no consideration."

It can thus be seen that the defenders sought to put forward a substantive line of defence to the pursuers' position that no such advice had been taken. Against this background I

consider it is appropriate for the court to consider the nature and quality of the legal advice provided by Alasdair Fraser, and its practical effect (much of which was led without objection) but I do also repel the objection by the first and second defenders to lines of questioning to Fiona Thomson and to Alasdair Fraser.

[296] The legal position in relation to independent advice is summarised by Lord Drummond Young in *Horne* above. After proof Lady Smith in *Horne*, paragraph 65 put matters thus:

“It was submitted on behalf of the defender that the case of undue influence was not made out because the deceased had had the benefit of Mr Flett's [the solicitor's] advice when the codicil was made. I cannot accept that his telephone discussion with Mr Flett amounted to the proper tendering to him of separate and independent advice given the evidence that the defender was present and she told the deceased what to say. His doctor, who witnessed the document, clearly did not feel it appropriate that he get involved with what it was about. There is no evidence of anyone else giving the deceased proper objective and independent advice. The case falls, in my view, to be regarded as one in which the deceased had no separate and independent advice prior to executing the codicil.”

[297] I consider we are in a similar position here. Alasdair Fraser appears to be entangled with the defenders; he was the solicitor for all four defenders before he acted for the brothers; his actings in relation to the transfer of the farm were instituted by the first and third defenders rather than the brothers; any meetings with the brothers involved the third defender being present, albeit sometimes not in the same room; he acted for all parties in the transfer of the farm; he corresponded with the third defender about matters such as the value of the property, when these instructions should have come from the brothers. In my judgment, and having heard his evidence, both his independence and the quality of his advice are seriously called into question. I consider factor c) is made out. As a result I have no hesitation in concluding that the legal test for undue influence in relation to this transaction is made out.

**Remedies**

[298] Mr MacLeod submitted that it would not be otiose to grant crave 1 of the writ; whilst he conceded that much of the property disposed to the defenders had been disposed of by them to third parties in good faith and for market value the terms of an ownership report by Bowlts, chartered surveyors (the conclusions of which are agreed by paragraph 5 of the Joint Minute of Admissions) made it clear that certain small portions of land transferred to the defenders remained in their ownership. As a result he moved for decree in terms of crave 1. Against that background I grant decree.

[299] The pursuers no longer seek decree in terms of craves two and three. In relation to crave four Mr Dunlop submitted it was not competent as the pursuers are three separate parties and each pursuer has a separate cause of action on the facts and that there should have been three separate actions. Mr MacLeod replied that this was common property not a disposition of *pro indiviso* shares. As a result there was no room for the court to, for example, reduce the disposition in respect of one party only. As such it was for the pursuers to determine how to account to each other if crave four were to be granted, and perfectly competent. I agree. I am satisfied it is appropriate to grant decree in terms of crave four.

[300] The pursuers ask that expenses be reserved. I shall so do and reserve all question of expenses meantime.