SUPREME COURT OF QUEENSLAND

CITATION:	*Londy & Pender as executors and trustees of the Will of Mary Hilary Kavanagh (deceased) v Kavanagh* [2017] QSC 161
PARTIES:	**ANNE LYNETTE LONDY and GERARD PHILIP PENDER as the executors and trustees of the Will of MARY HILARY KAVANAGH (deceased)** (applicants) **v** **MICHAEL ANTHONY KAVANAGH** (respondent)
FILE NO/S:	No 5574 of 2017
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2017
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the form of orders and costs.**
CATCHWORDS:	SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – where the respondent lodged a caveat in response to the applicants' application for probate – where the applicant seeks removal of the caveat – where the respondent resists this application on the ground that the relevant Will was executed in suspicious circumstances, or alternatively that the Will was the product of undue influence – whether the respondent has raised a doubt as to whether the grant ought to be made – whether the application to remove the caveat should be granted *Uniform Civil Procedure Rules 1999* (Qld) Rule 626 *Barrand v Coxall* [1999] QSC 352, applied *Garrihy v Garrihy* [2013] QSC 74, cited *Gillespie v Gillespie* [2012] QSC 335, cited *Green v Critchley* [2004] QSC 22, cited *Veall v Veall* [2015] VSCA 60, cited
COUNSEL:	RJ Oliver for the applicant RD Williams for the respondent

SOLICITORS: Walker Pender for the applicant
CLO Lawyers for the respondent

[1] By application, filed 5 June 2017, the applicants, as executors and trustees of the estate of Mary Hilary Kavanagh (deceased), sought removal of a caveat filed in response to their application for probate of the deceased's last Will dated 16 August 2013.

[2] The respondent opposes removal of the caveat. At issue is whether the respondent has raised a doubt as to whether the grant ought to be made.

Background

[3] The deceased died on 14 September 2016, aged 100 years. She had never married and had no children. Her death certificate records that she had been suffering from acute on chronic bronchitis for 3 to 4 days, chronic obstructive pulmonary disease for years, ischaemic heart disease for 5 years and Parkinson's disease for a few months.

[4] The respondent is related to the deceased. His grandfather was the brother of the deceased's father. Their relationship through the deceased's lifetime was limited for much of the deceased's life. Around the deaths of the deceased's sisters, the respondent resumed regular contact with the deceased. However, any closeness waned in the last years of the deceased's life for reasons which the deceased expressed in a letter prior to her death.

[5] The deceased made a number of Wills in her lifetime. The first known Will was dated 11 May 1972. It left her estate to her sister. Subsequent Wills were made on 3 April 2008, 6 May 2008, 9 October 2009, 18 March 2010, 24 April 2013, 29 May 2013 and 16 August 2013. All of the Wills made in 2008, 2009, 2010 and 2013 but for the last Will named the respondent as a beneficiary. The respondent was also named as an executor of the estate in each of those Wills, except for the last two Wills, made 28 May 2013 and 16 August 2013.

[6] The deceased's estate had total assets in excess of $2 million. Those assets included real property. One property, known as "Emerald View", had been in the deceased's family for generations. Its real property description is Lot 265 on Crown Plan CH3147

County Churchill Parish of Walloon and Lot 2 on Registered Plan No 101143 ("the property").

Last Will

[7] In her last Will, the deceased appointed the applicants as executors and trustees or, if they were unable to do so, two cousins Stephen Kavanagh and John Dennis Byrne. She gave her house property at 55 John Street, Rosewood to the female applicant. She gave her interests in property she owned at Walloon, being Lots 270, 271, 292 and 273 on Crown Plan CH3142, to her cousins Colleen Mary Fitzgerald and John Dennis Byrne. She gave John Dennis Byrne her interest in the property.

[8] The deceased gave all of her antique furniture to her trustees to be divided among those cousins and other members of the O'Connell family in the trustees' absolute discretion. After direction that the rest and residue of her estate be converted into money, the deceased gave a number of specified gifts to various charities and relatives, with the rest and residue being divided as to 60 per cent to the female applicant and 20 per each to her cousins Colleen Mary Fitzgerald and John Dennis Byrne.

Caveat

[9] On 15 December 2016, the respondent lodged a caveat requiring proof in solemn form of any Will of the deceased. This was subsequently replaced by a general caveat filed on 6 April 2017.

[10] The notice in support of the caveat claims an interest as a named beneficiary under the deceased's previous Wills and as named executor in respect of all but one of those previous Wills. The grounds relied upon are that the deceased did not know and approve the contents of the Will dated 16 August 2013 "because there were suspicious circumstances surrounding its execution and/or [the Will] was the product of undue influence".

[11] That ground is expanded upon in the affidavit material. In short, the respondent relies on the fact that the property had previously been gifted to him in the earlier Wills, and that such a gift was consistent with a written agreement entered into between the

deceased and the respondent on 11 February 2012 under which the deceased agreed to leave that property to him, his heirs and successors and which agreement had been part-performed at the time of the deceased's death. The respondent also relies on the fact that the female applicant, who is a significant beneficiary under the terms of the last Will, had "a significant involvement in the Will making process, from around April 2008 onwards".

[12] That involvement relates to the presence of the female applicant in meetings between the deceased and her solicitor prior to execution of the subsequent Wills. Particular reliance is had on the fact that the female applicant was present at a lengthy meeting between the deceased and her solicitor, the male applicant, on 31 July 2013. The purpose of that meeting was to consider whether the deceased should change her Will to remove gifts to the respondent, which the deceased determined not to do. Seven days later, the female applicant advised the male applicant that the deceased wished to change her Will to exclude the respondent. The last two Wills contained significant variations from the previous two Wills. It deleted a gift to the respondent of a 20 per cent share of the residue and the property, as well as his removal as executor of the deceased's estate.

[13] The respondent submits those factors, coupled with the number of Wills made over a short period of time by an elderly and physically frail testator, together with the deletion of a gift which is contrary to the terms of a written agreement entered into between the deceased and the respondent, give rise to suspicious circumstances. This is particularly so as at a meeting on 28 May 2013, both the female applicant and another major beneficiary of the last Will, Mr Byrne, were present.

Evidence

[14] The male applicant, a solicitor with over 30 years' experience, acted for the deceased for many years. He prepared all of her Wills from March 2008. That included preparation of the deceased's Will dated 9 October 2009 wherein the respondent was no longer to receive the property. John Dennis Byrne was to receive the property. The male applicant's diary note of the deceased's instructions at that time record that this change was to give the property "to the proper bloodline". The deceased had advised

that that property and another property had been her grandparents' and then her mother's home.

[15] The male applicant also prepared the deceased's subsequent Will made on 18 March 2010. That Will reinstated a gift of the property to the respondent. The male applicant's diary note of the deceased's instructions at the time of preparation of that 2010 Will recorded that the reason for the change was that if the property and another property were given to John Byrne they may not remain in the Kavanagh family. The male applicant's diary note records his express concerns that the deceased was being influenced or pressured to make these changes.

[16] That concern arose as the male applicant had on 11 February 2010 spoken to the respondent about the deceased's changed Will. The diary note of that conversation recorded that the respondent was not happy that he was to receive less property than in the 2008 Will. It also recorded that the respondent expressed concerns that the deceased had acted irrationally and in a confused and inconsistent manner on a range of occasions.

[17] The male applicant met again with the deceased on 24 April 2013. That meeting was for the purposes of preparation of a new Will. The female applicant was present with the deceased during that discussion. The male applicant's diary note records that the deceased confirmed that the terms of that Will were in order. During that meeting here was also a discussion about payment of an accommodation bond for the purposes of the deceased's entry into an aged care facility. The diary note recorded that whilst the female applicant was present she was "silent most of the time" and the deceased "asked questions and queried matters" for herself.

[18] The male applicant again met with the deceased on 6 May 2013 for the purposes of preparation of what became her Will dated 28 May 2013. His diary notes of his conversations with the deceased record that the primary issue for discussion was an agreement between the respondent and the deceased and a receipt for the payment to the respondent of $250,000 by the deceased. The diary note indicated this meeting took one hour and 18 minutes. Present was the deceased, the male applicant and the female applicant.

[19] According to the male applicant's diary notes of that meeting, the deceased advised him she had not obtained legal advice before signing the agreement, which had been negotiated directly with the respondent. The deceased felt pressured and manipulated to sign that agreement. The deceased did not know if many of the matters contained in the agreement were correct. The deceased said $200,000 of the $250,000 she had given to the respondent had been used to buy her house property, with the remainder being seen as compensation for various matters covered in the agreement. The agreement included disposal of various brands to the respondent. The deceased was happy to give them to the respondent but believed they were not part of the family's property originally. The deceased told the male applicant that as she was elderly and frail at the time she believed the respondent had taken advantage of her circumstances.

[20] The diary note records that the male applicant advised the deceased they could, if she wished, take action to recover the $250,000 paid to the respondent. The deceased was recorded as indicating she did not wish to take court action or to be involved in a dispute with the respondent. The deceased accepted the gift had been made by her to the respondent. The male applicant cautioned the deceased against making further gifts to the respondent.

[21] The diary note also records that the deceased complained about comments made by the respondent to neighbours concerning the past history of the families which had annoyed and frustrated the deceased. The male applicant assured the deceased she was not going to be sued by the respondent in respect of the matters contained in the agreement, most of which were from decades past. The male applicant advised the deceased there could be issues after her death in relation to the respondent's control as executor or that part of the agreement which gave him "the contents" of her home property.

[22] The deceased was recorded as indicating she had no objections to giving the respondent the home property as that was part of her Will and part of what she intended, but she believed it was different with the contents, much of which had nothing to do with the respondent's family. The deceased believed those items should be returned or given to other family members or friends. The male applicant told the deceased that while the respondent may dispute these matters after her death, there was no reason why she

could not make whatever gifts she wished of her property in line with any family obligations.

[23] Finally, the diary note records that the male applicant expressly raised with the deceased the respondent's continued suitability as an executor of the estate, given what had happened in the past and his attitude. The male applicant told the deceased she could change her Will to appoint another executor or executors. The diary note recorded the deceased did not wish to do so "at the moment".

[24] A further note of that meeting recorded that whilst the male applicant was not concerned about carrying out the terms of the deceased's Will in accordance with his duty as co-executor, it was likely the respondent would obtain control of the contents of her home after her death. Accordingly, it was important for her to consider what items she wished to give to others whilst she was alive. The deceased indicated she would make all necessary arrangements. This note concluded:

> "You advise that after speaking to me, you were now very much relieved as this matter had been worrying you for some months and the fact that you had discussed and dealt with it from your point of view was a great relief to you. You discussed the matters generally when you confirmed you wish to make no further no further changes to your Will at present. We also pointed out that Michael might use the agreement after your death as a means of contesting any Will which you have made after the date of the agreement which was inconsistent with the agreement. You understood this but had no intention of making any such Will.
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> You were very clear in your thinking and in your questions and answers and Anne Londy was present throughout, although played very little active role. You also produced the most recent letter from your GP, Dr Cruickshank, which was very supportive of your capacity and noted a full score on the many mental state examinations.
>
> Discussing matter generally when you wished us to take no action."

[25] The male applicant next spoke to the deceased in relation to her Will on 27 May 2013. Prior to that date the male applicant had been telephoned by Stephen Kavanagh, a solicitor, to discuss concerns that had been raised with him by the deceased about the conduct of the respondent. Present at the meeting of 27 May 2013 at the male applicant's office was the deceased, the male applicant and the female applicant. The diary note records the meeting took 54 minutes.

[26] According to the male applicant's diary note, the deceased advised she had carefully considered her position over many months and although she had recently changed her Will, the deceased was now "very clear" about changes she wanted including the replacement of the respondent as executor by the female applicant. Other changes were to bequests, including an additional major bequest to Margaret Bourke who had looked after the deceased's sister, and a wish that the respondent be given no part of the residue and that his 20% of the residue go to the female applicant. The deceased also discussed her requirements in relation to her antique furniture.

[27] The diary note records the male applicant again discussed the prospect the respondent might contest the Will if he were left out altogether. The deceased said she had clearly considered the matters thoroughly and was "very clear in her instructions and understanding". The note specifically stated the female applicant had played no active role in the conversation with the deceased unless she had been requested to do so. At the conclusion of that meeting the deceased signed an informal Will which was to be finalised the following day.

[28] The male applicant again attended on the deceased on 28 May 2013. The female applicant was present for this meeting. According to a diary note of that meeting the deceased confirmed she wished to change her Will in a number of ways. Relevantly, that included excluding the respondent as an executor and including in his place the female applicant, making some adjustments to various bequests including a significant additional bequest to Margaret Bourke and making some specific provisions about antique and other furniture. The deceased also wished not to give the respondent any part of the residue of her estate with his 20% to be given to the female applicant.

[29] The note records the female applicant again played no active role in the discussion with only occasionally making comments when requested to do so. The male applicant further noted:

> "I pointed out that it might be alleged that Anne had influenced you and manipulated you in the same way that you believed Michael had influenced, manipulated and bullied you but you confirmed this was not the case. You had been considering these changes for many months and I again advised of my concerns that if there were continual changes to your Will, this could potentially lead to more grounds on which someone might challenge it. You acknowledged this but wished to make changes."

[30] The diary note records that thereafter there was a discussion about the respondent not receiving the home property, said to be worth between $550,000 and $600,000. The deceased said she did not really want to give the respondent that property but felt obligated to do so, being very concerned at the risk of litigation after her death if the respondent contested her Will with significant costs, delay and upset. The deceased indicated the respondent would do this if she did not leave him the home property in her Will. The male applicant advised the deceased that was a concern for her executors and beneficiaries.

[31] The diary note records the deceased advised after this discussion that she did not wish to change her Will to not give the respondent the home property. The deceased was also recorded as indicating she had concerns about recent inquiries made by the respondent concerning her taxation affairs. She had advised her accountant not to have any dealings with the respondent and not to answer any of his questions concerning her taxation affairs. The deceased also advised she had made inquiries with a real estate agent about the value of her properties as she was still considering selling the home property. The deceased understood that if she did this the respondent would not receive anything under the Will. At the conclusion of this meeting, the deceased executed the Will dated 28 May 2013.

[32] The male applicant said his next involvement in the deceased's affairs was when he was contacted by the female applicant on 18 July 2013 in relation to an accommodation bond relevant to the deceased's placement in an aged care facility. There was a discussion about the payment of fees in relation to that placement. During that meeting, the female applicant provided the male applicant with a letter which had been written by the deceased and witnessed by her doctor. The deceased had instructed that she wished that letter to be read out to the respondent at the reading of her Will.

[33] The letter was a handwritten document over three pages. In it, the deceased referred to the misery caused by the respondent to the deceased's life since the death of her sisters. It stated the respondent had blackmailed the deceased to get what he wanted. It questioned the respondent's entitlement to various items of property. It referred to the unhappiness the respondent had caused when he accused members of the deceased's family of behaving badly in the past. It referred to the $250,000 the deceased had

transferred to the respondent and to the agreement signed between the respondent and the deceased. It also referred to her concerns about the contents of her home.

[34] The letter concluded:

> "I am very angry and hurt, miserable, enough Michael to really dislike the home of 80 years, my haven of security and safeness with a loving family.
>
> You really are a greedy lousy person Michael and I hope my ghost haunts you. I have no feelings for you, only resentment. You must have been planning this for many years because you are so bitter."

It was signed by the deceased and witnessed by her doctor who recorded the notation "Mary was competent and of sound mind when she wrote this statement."

[35] The male applicant next spoke with the deceased on 31 July 2013. The deceased attended his office with the female applicant. The diary note of that meeting records it took 1 hour and 6 minutes. It recorded the deceased was still very angry at the recent activities of the respondent, particularly in relation to the way he had treated and manipulated her. The diary note recorded the following:

> "You had been so upset by the whole episode with Michael that you now no longer wish to live in the house and were wanting to sell it but understood that the market was poor and it was not the best time to sell.
>
> You strongly believe that he had no right or entitlement to the house, that he had had no family association with it when he was younger, that he had nothing to do with the family until recent years and no real family association. You believe that you had been bullied and manipulated by him but were very concerned that he may take court action to contest your Will if you did not leave the property to him and did not wish to leave ongoing problems for your executor and beneficiaries and at the possibility of a very expensive legal action."

[36] The male applicant recorded in the diary note he had previously advised the deceased of the possibility the respondent would contest the Will having regard to the agreement previously been entered into between them and that he was more than happy to change the deceased's Will if she directed him to do so. While legal action could be very expensive, the male applicant advised the deceased the respondent's claim would be difficult to prove and the estate could afford such legal action.

[37] The diary note recorded that the deceased advised the male applicant that if the property were not given to Michael it would go to John Byrne who had had a long association with it and who would enjoy the property and probably live there and benefit from it, whereas the respondent had no interest in the property nor in living there and was motivated by money. The male applicant advised the deceased it might be worthwhile speaking to John Byrne to explain the situation to him "as on your death it would be both the estate and John who would have to defend any court action in relation to the Will and the property". The diary note recorded that the deceased again advised she did not wish to change her Will but would advise further in the future.

[38] The male applicant received a telephone call from the female applicant on 6 August 2013. According to the diary note of that telephone conversation, the female applicant advised the male applicant that the deceased wished to change her Will again, excluding the respondent. The female applicant advised an appointment had been made for the deceased, the female applicant and John Byrne to discuss the matter with the male applicant. The male applicant advised that if that change occurred he would require a very detailed and lengthy affidavit setting out the circumstances as evidence in the future against any possible contest of the Will. He also advised there would be significant costs.

[39] Subsequent to that telephone conversation, the male applicant wrote to the deceased's doctor, Dr John Saba. In that letter, dated 7 August 2013, the male applicant advised that the deceased had indicated she wished to prepare a new Will. The male applicant sought confirmation that the deceased had the capacity necessary to understand the nature and effect of any Will at the time she signed it.

[40] Dr Saba, by letter dated 15 August 2013, advised he had no doubts the deceased was of sound mind and capable of making her own decisions with respect to her financial affairs and with respect to her health. In his opinion, the deceased totally understood what she was doing, including understanding the significance of a Will and was fully aware of the value of her possessions and of the claims of various family members on her estate. The deceased was able to make judgments on the merits of those claims and had no signs of dementia. An examination performed by him to assess memory and understanding had scored a maximum score of 30 out of 30.

[41] On 16 August 2013, the deceased attended the male applicant's office, accompanied by the female applicant and John Byrne. The meeting took one hour. According to the male applicant's diary note, there was a discussion about the deceased ridding herself of a brand and its transfer to the respondent. The deceased requested the male applicant write to the respondent requesting he have no further contact with her other than strictly for personal reasons, that he not represent her in any way and that he not harass her in the future.

[42] There was also a discussion about the costs of actions now being taken which would be significant and the need for a client agreement. The male applicant referred to his intention to have a detailed statement in the form of an affidavit prepared to provide evidence as it was likely, now that the Will was to be changed to exclude the respondent, he would contest that Will. The deceased indicated she understood and agreed to that course.

[43] The diary note further recorded that the male applicant advised John Byrne:

> "I explained to John Byrne that this was an unusual discussion, that normally he would not be told of the contents of the Will, nor be involved in the discussions but I felt obligated as he was the beneficiary who would be receiving the property that Michael was to have received in the previous Wills, that if Michael contested the Will John also would be the person against whom he contested and needed to understand the consequences of this, that he may be involved in extensive and expensive litigation."

John Byrne indicated he understood this but was more than happy to inherit the property and deal with any consequences.

[44] The diary note further records that the male applicant went through in detail the provisions of the deceased's Will, reading them out and having the deceased confirm that she understood them. The deceased then signed that Will.

[45] Finally, the diary note recorded that the male applicant discussed with the deceased the basis upon which he expected the respondent would make a claim against the estate, being in contract for a promise made by the deceased and in exchange for all of the past family property matters as he saw them. The male applicant advised the deceased there may be some basis for this claim and that it might involve expensive and extensive

litigation. The diary note recorded the deceased was adamant she wished to change her Will.

[46] On 19 August 2013, the deceased executed an affidavit prepared by the male applicant. That affidavit contained details of the deceased's background, including members of her family and extended family. It set out details of her estate, including the fact that she had inherited the relevant real property from members of her family.

[47] The affidavit thereafter set out details of the deceased's previous Wills and the circumstances in which those Wills had been made by the deceased. It stated that on the night of the death of the deceased's sister, Kathleen Roache, in 2008, the respondent had attended upon the deceased demanding to see a copy of her sister's Will. The respondent was "very forceful" and thereafter began to become involved in the deceased's life. It asserted the respondent had encouraged her to make changes to her Will, noting that she should leave the properties within the family. The deceased said that she thereafter made changes to her Will to ensure the families of the original owners benefitted and, that the respondent received her share in the property.

[48] The affidavit set out that in her Will dated 9 October 2009, the deceased had decided to bequeath her real property to John Patrick Byrne so as to return the properties "to his bloodline as the properties had been his grandparents". Upon discovering this change, the respondent began harassing the deceased to change her Will to give him the property, arguing the properties would not continue along John Byrne's family bloodline as they would pass to his stepchildren. The deceased thereafter changed her Will in accordance with the respondent's request.

[49] The affidavit stated that the agreement entered into between the respondent and the deceased dated 11 February 2012 was entered into by the deceased after she had been continually harassed and manipulated by the respondent who referred to his so called "rightful share" and what he considered illegal dealings of the deceased's family. The respondent thereafter became more demanding and aggressive towards her causing her to doubt his sincerity. As a consequence, the deceased determined to reduce the amount of the inheritance to be received by him.

[50] The affidavit recorded the following circumstances in relation to the preparation of the deceased's last Will:

> "81. I strongly believe that my second cousin Michael Anthony Kavanagh has no right or entitlement to any property that I own. Apart from in recent years, he has had no family association with the properties or my family.
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> 82. I believe that I was bullied and manipulated by him into making the changes to my previous Wills, as he had a strong influence over me in the years that my sisters were ill and subsequently died.
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> 83. His threats of court action whereby he stated he would receive what he believed was rightfully his has made me concerned for the remaining executors and beneficiaries and I did not want to leave them with trouble. This was the only reason for my previous Wills in which he was left a share.
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> 84. As I no longer trust my second cousin Michael Anthony Kavanagh I have appointed my trusted close friend and niece of my sister Kathleen Roache, Anne Lynette Londy to be one of the executors and trustees of my Will."

[51] Finally, the affidavit dealt with the deceased's capacity. It noted the respondent had attempted on several occasions to argue that the deceased had lost the capacity to make legal decisions and was acting incoherently and irrationally. The affidavit stated this was not correct. It was also incorrect for the respondent to assert that the deceased had had an argument with Colleen Mary Fitzgerald over historical family property matters or that she had been giving money away to strangers. The affidavit confirmed that it was the deceased's express wish and desire that her property be distributed in accordance with her last Will and Testament dated 16 August 2013 and that the deceased did not believe the respondent had any right to make a claim upon her estate.

[52] On 23 August 2013, the male applicant forwarded a letter to the deceased's accountant. The deceased had previously provided to the male applicant a letter she had received from her accountant dated 8 July 2013 which had raised concerns about requests made by the respondent in relation to her taxation affairs. The letter expressly advised the accountant that the respondent had no authority to act for or represent the deceased in any matter and that none of her financial affairs should be discussed with him.

[53] On 23 August 2013, the male applicant sent the respondent a letter in response to his recent request for the transfer of brand. The letter indicated the deceased did not

believe he had any right to the brand but as she had no further use for it she was prepared to transfer it to him. The letter further advised the respondent that the deceased was concerned he had attempted to become more involved in the management of her affairs. It stated that whilst the deceased was elderly and frail, she had full legal capacity to make her own decisions and had an existing enduring power of attorney appointing the female applicant and Colleen Fitzgerald as her attorneys. It advised the respondent had no right to contact her accountant or to act on her behalf. It requested he desist in constant attempts to involve himself in the deceased's affairs. It concluded that if the respondent continued to harass her, legal action would be taken if necessary.

[54] Subsequent to receipt of that letter, the respondent contacted the male applicant's office. He later sent a letter in which he denied seeking to become involved in the deceased's affairs. He denied ever harassing the deceased and sought particulars of those occasions.

Relevant principles

[55] Rule 626 of the *Uniform Civil Procedure Rules* provides that a court may set aside a caveat if the court considers that the evidence does not show the caveator has an interest in the estate or a reasonable prospect of establishing an interest or raise a doubt as to whether the grant ought to be made.

[56] The statutory test of "raise a doubt" is a high threshold.[1] That threshold is not met by mere suspicion. As was observed by Atkinson J in *Green v Critchely*[2], "mere suspicion on the part of a disappointed potential beneficiary, without more, cannot be and, in this case, is not sufficient to suggest that the deceased lacked testamentary capacity or was overborn by undue influence. In these circumstances, there is insufficient evidence to excite the suspicion of the court".

[57] In *Gillespie v Gillespie*[3], McMeekin J considered the standard to be achieved when removal of a caveat was sought on the ground that the evidence does not raise a doubt as to whether the grant ought to be granted:

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1 *Barrand v Coxall* [1999] QSC 352 at [16].
2 [2004] QSC 22 at 19; see also *Garrehy v Garrehy* [2013] QSC 74 at [14]-[15].
3 [2012] QSC 335.

> "… it has always been the law that the degree of certainty that the court might require, and conversely the degree of doubt that would need to be shown to arouse concern, varies with circumstances. As Isaac J observed in *Bailey v Bailey*, 'the degree of vigilance to be exercised by the court varies with the circumstances'. So Cairns J said, in a different context, in *Re Muirhead*, "I approach the matter with the conviction that it is a duty of a court of probate to give effect, if it can, to the wishes of the testator expressed in testamentary documents. Sometimes it is impossible to discover the true intention of the testator, because there may be doubts about his testamentary capacity, or about whether he knew and understood the contents of some document propounded, or there may be doubts about the formalities of execution. In such cases comprise is often reached, and given effect to by the court. Where certainty cannot be achieved, it is often better that a Will which is prima facie valid should be admitted to probate than that there should be a prolonged investigation into allegations of incapacity or undue influence; and it is sometimes better that a Will or codicil should be pronounced against, where there are good reasons for suspecting its validity, although by full inquiry it might be possible to remove those suspicions." (citations omitted)

[58] In *Veall v Veall*,[4] Santamaria JA considered the relevant propositions in relation to the raising of suspicious circumstances as to the testator's knowledge and approval of the contents of the Will:

> "[173] 'Knowing and approving of the contents of one's Will is traditional language for saying that the Will "represented [one's] testamentary intentions"'. 'Testamentary capacity' and 'knowledge and approval' are distinct concepts. The former is a necessary but not a sufficient condition for the establishment of the latter. In *Hoff v Atherton*, Chadwick LJ said:
>
> > '[I]t may well be that where there is evidence of a failing mind — and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the Will — the court Will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his Will — that is to say, that he did understand what he was doing and its effect — it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a Will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document,

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4 [2015] VSCA 60 at [173]-[176]; [179].

> but needs to be satisfied that he did, in fact, know and approve the contents — in the wider sense to which I have referred.'

[174] The circumstances that arouse suspicion Will vary. The fact that a beneficiary took part in the preparation of the Will is only an obvious example of a circumstance creating suspicion. In *Wintle v Nye*, Viscount Simonds said:

> 'It is not the law that in no circumstances can a solicitor or other person who has prepared a Will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the Will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed.'

In *McKinnon v Voigt*, Tadgell JA said:

> 'The principle exemplified in such cases as *Barry v Butlin*, *Fulton v Andrew* and *Wintle v Nye* is not confined to a case in which suspicion is generated because a Will is prepared by or on the instructions of a person taking a benefit out of it, or who stands to gain from it. The principle extends:
>
> > ... to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the Will.

[175] In *Williams, Mortimer & Sunnucks — Executors, Administrators and Probate* the authors deal with particular matters which arouse suspicion. They say:

> 'A radical departure from testamentary dispositions, long adhered to, requires explanation, especially if the person in whose favour the change is made possesses great influence and authority with the deceased and originates and conducts the whole transaction; and such facts may raise strong suspicions that the change was not the result of the free volition of the deceased. But that suspicion may be dissipated by proof of a change of circumstances since the earlier Wills. There have been a number of cases in which Wills prepared by elderly testators in favour of their carers have been subjected to close scrutiny by the court, and often set aside.

> The testator's feebleness of body or mind may be relevant to knowledge and approval.'

[176] Proof that the Will was read by or read to the testator before its execution may not be sufficient; nor will evidence that the Will was explained to the testator.

…

[179] It is the testator's understanding that is decisive: the issue to be determined is whether the testator knew and approved the contents of the Will. Sufficiency of evidence will depend upon the circumstances of the case. In *Tobin v Ezekiel*, Meagher JA put it as follows:

> 'Evidence that the testator gave instructions for the Will or that it was read over by or to the testator is said to be 'the most satisfactory evidence' of actual knowledge of the contents of the Will: *Barry v Butlin* ...; *Gregson v Taylor* ...; *Re Fenwick* ... What is sufficient to dispel the relevant doubt or suspicion Will vary with the circumstances of the case; for example, in *Wintle v Nye* ... the relevant circumstances were described ... as being such as to impose 'as heavy a burden as can be imagined'. Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the Will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the Will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the Will takes a substantial benefit under it. In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction: *Fulton v Andrew* ...; *Tyrrell v Painton* ... That requires that it be affirmatively established that the testator knew the contents of the Will and appreciated the effect of what he or she was doing so that it can be said that the Will contains the real intention and reflects the true will of the testator: *Tyrrell v Painton* ...; *Nock v Austin* ...; *Fuller v Strum* ...; *Dore v Billinghurst* ..."
>
> (citations omitted)

Discussion

[59] The respondent asserts that suspicious circumstances arise in the present case having regard to the significant change in the contents of the deceased's last Will, shortly after having executed another Will, during the process of which the deceased, having been

given detailed advice as to the availability of changing the bequest to the respondent and of the risks associated with litigation in that event, expressly confirmed her desire to retain the Will in that form.

[60] Those suspicious circumstances are highlighted by the presence of the female applicant on each occasion and by, prior to the preparation and execution of the last Will, the presence of Mr Byrne. Both benefited by the change in the deceased's Will. The respondent also relies on the fact that there remains outstanding disclosure of documentation, including statements in relation to the preparation of the earlier Wills and no file notes or other documents in relation to the preparation of the affidavit sworn by the deceased on 19 August 2013.

[61] Whilst those matters are matters of concern, a consideration of the material as a whole dispels any proper basis for concluding that those matters give rise to suspicious circumstances.

[62] First, the change in Will was not a radical departure from previous testamentary dispositions. The deceased had provided for dispositions to Mr Byrne in the Will prepared in 2009. The deceased at that time gave a coherent, rational explanation for disposing of those properties to Mr Byrne. That explanation, namely, that the property remain in the relevant bloodline, was consistent with material referred to by the deceased in the affidavit executed by her shortly prior to her death.

[63] Second, while the female applicant was present at the time the male applicant had discussions with the deceased, it is clear from the file notes of the male applicant, a very experienced solicitor, that the deceased was at all times providing the instructions in those conferences. Further, the deceased was lucid, clear and coherent in those instructions.

[64] Third, prior to the preparation of her last Will, the deceased had prepared a handwritten letter to be read at the reading of her earlier Will in which she gave a clear, concise and coherent account of what she viewed to be the respondent's poor behaviour in recent years. That account was entirely consistent with the contents of the subsequent affidavit.

[65] Fourth, the deceased's affidavit provides cogent and compelling reasons why the deceased would determine to no longer leave the respondent as a beneficiary of her estate or as the executor of that estate. Nothing in the diary note or in the affidavit supports a conclusion that the deceased was confused as to the contents of her last Will or that she did not have a clear knowledge and understanding of its effect.

[66] Finally, there is nothing in the material to suggest the deceased lacked capacity at the time of preparation and execution of her last Will. This alone is a telling factor against any suggestion there is more than a mere suspicion of undue influence.

Conclusions

[67] The evidence does not raise a doubt as to whether the grant ought to be made. The respondent's assertions amount to no more than an allegation that the mere presence of the female applicant and of Mr Byrne constitutes grounds for a suspicion of undue influence in the preparation and execution of the deceased's last Will. In circumstances where there is a logical explanation for the change in the contents of the deceased's last Will, that allegation amounts to no more than a mere suspicion. It is not supported by any inferences to be legitimately drawn from a consideration of the material as a whole.

[68] It would be unjust in those circumstances to place the executors in a position where the assets of the estate continue to be depleted by proceedings as a consequence of the lodgement of the caveat.

[69] There being no basis to conclude the deceased lacked testamentary capacity and there being no sound basis for a contention that the deceased did not understand and approve the contents of the Will or was otherwise affected by undue influence, it is appropriate to order the removal of the caveat.

[70] The application to remove the caveat is granted.

Orders

[71] I shall hear the parties as to the form of orders and costs.