

SUPREME COURT OF QUEENSLAND

CITATION: *Wood & Anor v Trudinger; in the will of Alan Stewart Trudinger* [2017] QSC 245

PARTIES: **GEOFFREY WOOD**
(first applicant)
LOIS MARGARET TRUDINGER
(second applicant)

v

DANIEL ALAN TRUDINGER
(respondent)

FILE NO: BS10622 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 20 October 2017

DELIVERED AT: Brisbane

HEARING DATE: 11 July 2017

JUDGE: Brown J

ORDER: **The order of the court is that:**

- 1. The application be dismissed.**
- 2. The applicant and respondent be paid their costs out of the estate of Alan Stewart Trudinger on an indemnity basis.**
- 3. Pursuant to s 6(1) of the *Succession Act 1981 (Qld)* the Will executed on 15 May 2015 be granted probate subject to the normal requirements of the Registrar.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – GENERALLY – dispute that draft will purports to state the testamentary intentions of the deceased – whether Court satisfied that deceased had testamentary capacity when giving instructions for draft will – whether court satisfied that deceased intended draft will to operate as his Will

Succession Act 1981 (Qld)

Bailey v Bailey (1924) 34 CLR 558

Banks v Goodfellow

Briginshaw v Briginshaw (1938) 60 CLR 336

Fast v Rockman [2013] VSC 18
Konui v Tasi & Anor [2015] QSC 74
Le Bon v Lili; will of Klara Lane [2013] VSC 431
Lindsay v McGrath [2015] QCA 249
Parker v Felgate (1883) 8 PD 171
Re Spencer (deceased) [2015] 2 Qd R 435

COUNSEL: A Stobie for the second applicant
D Skennar for the respondent

SOLICITORS: Beenleigh Legal Solicitors for the applicant
Quinn & Scattini Lawyers for the respondent

- [1] This is an application for a declaration pursuant to s 18 of the *Succession Act* 1981 (Qld) (“the Act”) that a document dated 18 February 2016 which is Exhibit GT 2 to the affidavit of Graham Trudinger¹ forms the will of the late Alan Stewart Trudinger (“the testator”) who died on 19 February 2016. The application is opposed by the second respondent, Daniel Alan Trudinger, the testator’s son.

Background

- [2] The testator was 65 years old when he passed away. In 2015 he was diagnosed with cancer. Following his diagnosis he made a will dated 15 May 2015.² That will was properly executed and there is no issue that he had capacity at the time of executing that will. The will instructions in relation to that will which are undated are also attached to the affidavit of Ms Ceric and were signed by the testator.
- [3] The will of 15 May 2015 appointed Lois Margaret Trudinger (“Lois Trudinger”) to be his executor with Peter William Trudinger (“Peter Trudinger”) to be the alternate executor if Ms Trudinger predeceased him. The will provided:
- (a) For Peter Trudinger to be given two motor vehicles, a 1974 Citroen DS Special and a 1981 Mercedes Benz 280CE;
 - (b) For the sum of \$250,000 to be paid to his son, Daniel Trudinger;
 - (c) For the sum of \$40,000 to be paid to his sister, Lois Trudinger;
 - (d) For the sum of \$20,000 to be paid to his then partner, Treena Rea;
 - (e) For the residue of his estate to be given to his son, Daniel Trudinger and in the event he predeceased his father or it did not vest within thirty days to his sister, Lois Trudinger and brother, Peter Trudinger.
- [4] The will also contained a provision in paragraph 4(e) in the following terms:

“Having considered the extent of my estate and my responsibility to provide for my daughter KIMBERLEY RUTH PALMER whereabouts unknown I have determined to MAKE NO PROVISION for her for the following reason:

¹ CFI26.

² Exhibit A to the affidavit of E Ceric, CFI8.

I. There has been no contact between my daughter the said KIMBERLEY RUTH PALMER and I for twenty five (25) years and there is no relationship of love and affection between us. My responsibility for her welfare ended many years ago and I have no moral or legal duty towards her and have made no promises to her in respect of my estate. In these circumstances any gift to her would be contrary to the nature of our relationship;”

- [5] The testator had three other brothers, Graham Trudinger, Peter Trudinger and David Trudinger. Graham Trudinger and Peter Trudinger have provided affidavits in these proceedings. The testator had a sister, Lois Trudinger, who has also provided affidavits in these proceedings.
- [6] The testator had previously been married to Slavica Djirlic, who is Daniel Trudinger’s mother.
- [7] By February 2016, it appears that the relationship between the testator and Ms Rea had ended.³
- [8] On 2 February 2016, the testator contacted Slavica Djirlic and told her that his situation was very bad and he did not have long to live. Arrangements were made to fly Daniel Trudinger up to Brisbane to spend some time with him.⁴
- [9] On 8 February 2016, Daniel Trudinger flew up to Brisbane. The testator was meant to pick him up but did not apparently because he was in hospital. According to Daniel Trudinger, he had spent some time alone with his father on 10 February 2016 when his father told him he loved him, that he was proud of him, and that he was deeply concerned about him, his health and his medical issues. Daniel Trudinger also told his father he loved him and said he would be okay and for him to focus on getting better. According to Daniel Trudinger his father told him he would get \$250,000 and that his house was worth \$250,000 to \$300,000 and that he had some \$50,000 in the bank. He told Daniel Trudinger that Treena, his ex-de facto partner, would receive some money. Daniel Trudinger also states that the testator mentioned he would remove his sister, Lois Trudinger, from being the executor of the will.⁵ That conversation is disputed by Lois Trudinger on the basis that she was with her brother and Daniel that day and she does not recall Daniel Trudinger having had any time alone with his father.⁶
- [10] On 11 February 2016, the testator returned to hospital. Daniel Trudinger deposes of the testator being rushed to hospital, however Lois Trudinger said it was not done in any urgent circumstances.
- [11] On 12 February 2016, Lois Trudinger contacted Logan Legal at the request of the testator in order for him to make a second will due to his changed circumstances. Lucille Russell of Logan Legal had prepared the May 2015 will for the testator. Elzina Ceric had met the testator on the day that he executed the May 2015 will and had been a witness to the will but had not prepared it or taken the instructions for it.

³ Affidavit of E Ceric, CF18 at [18].

⁴ Affidavit of S Djirlic, CF111 at [2].

⁵ Affidavit of D Trudinger, CF110 at [4]-[6].

⁶ Affidavit of L Trudinger, CF120 at [5.2].

- [12] Daniel Trudinger left on 13 February 2016. He and Lois Trudinger had an altercation prior to doing so. There is no dispute an altercation occurred but there is a dispute as to the scale of it.
- [13] According to Daniel Trudinger's mother, Ms Djirlic, she rang the testator after receiving a very distressed phone call on that day from Daniel Trudinger and said to him that she did not know who was going to be the executor of his will but if it was Lois Trudinger he needed to remove her due to ongoing problems and dramas between her and Daniel Trudinger. She asserts that he agreed.⁷
- [14] Lois Trudinger disputes that the conversation between Ms Djirlic and the testator occurred because Ms Djirlic refers to Lois Trudinger and Graham Trudinger walking back into the room when Ms Djirlic was talking to the testator, whereas Lois Trudinger said they went straight home after dropping Daniel Trudinger at the airport.⁸
- [15] Some support for Lois Trudinger's version of events is found in Graham Trudinger's evidence. He has, in his affidavit, indicated that the facts and circumstances described in Lois Trudinger's affidavits, including that of 10 March 2017 insofar as they refer to attendances by him or references to him were true and correct.⁹
- [16] There is a file note of 18 February 2016¹⁰ which is annexed to Ms Ceric's affidavit prepared by Ms Ceric.¹¹ That refers to a phone call having been received from Lois Trudinger advising that the testator had been hospitalised, his cancer had progressed and he wanted to make another will. She requested someone attend the Princess Alexandra Hospital to take instructions. The note states that Ms Russell and Ms Ceric were present during the conversation. The note states that Lois Trudinger said the testator had recently brought some property in his name and that the monies he had initially given and bequeathed in his Will were much smaller than before because he had used the funds to purchase, *inter alia*, a house.
- [17] According to the file note, Ms Ceric contacted Lois Trudinger on her mobile phone and arranged for Ms Ceric to attend the hospital the following day. At that time, it was anticipated that the testator would be released and that Ms Ceric would then attend his residence at Mount Warren Park to execute the will. It is evident that Ms Ceric's recollection and file notes do not accord with the actual days that things were done. Ms Ceric made a file note of 19 February which records her attendance at the hospital and the instructions given and also completed a will instruction sheet on which she wrote "hospital visit 19 February 2016". The testator was unconscious on 19 February 2016 and as such the date cannot be correct. Ms Ceric deposed in a further affidavit that she thought it was actually on 18 February 2016 and she had wrongly recorded the date. That accords with the email attaching the

⁷ Affidavit of S Djirlic CFI11 at [7].

⁸ Affidavit of L Trudinger, CFI20 at [3].

⁹ Affidavit of G Trudinger, CFI18 at [5].

¹⁰ Exhibit A to the Affidavit of E Ceric, CFI8. It is likely the file note relates to 17 February not 18 February. It is clear that Ms Ceric attended the hospital on the 18 February which she thought was 19 February.

¹¹ Exhibit A to the affidavit of E Ceric, CFI8.

draft will and also the recollection of other parties.¹² I accept that Ms Ceric attended the hospital to obtain instructions on 18 February 2016.

Taking instructions for the draft will

- [18] Ms Ceric attended the hospital on 18 February 2016. According to her affidavit:¹³
- (a) She had spoken to the testator's doctor and was told that the testator had capacity;
 - (b) She also asked the testator what date it was to which she records he replied "19 February", although she said in cross-examination it should have said 18 February because she had the dates wrong;
 - (c) The testator was in good spirits, able to hold good eye contact with her and speak to her and knew the purpose of her attending the hospital. He was able to recall names and dates of when he did his last will and the solicitor who did it;
 - (d) She spent an hour and a half with the testator;
 - (e) She considered that the testator's instructions were clear. She observed that he only had some issues with his breathing. According to her he was engaging with his sister and brothers who would from time to time ask if he needed anything and would hand him a glass of water. Graham Trudinger indicated he was out of the room while instructions were given. Lois Trudinger agreed she stayed in the room;
 - (f) The testator was emotional, particularly when discussing items from his home and to whom they should go;
 - (g) The testator told Ms Ceric that he had bought a unit at Mount Warren Park.
- [19] According to Ms Ceric's oral evidence, she took a draft copy of the will of May 2015 to the hospital and discussed the content of that will with the testator, who then gave instructions in relation to the various items.¹⁴
- [20] Ms Ceric states that in the meeting with the testator the testator instructed that:
- (a) He wanted to give his sister, Lois Trudinger, a life tenancy of the property at Mount Warren Park provided she paid rates and appropriate levies. The property would then be sold after a period of five years, at which time the proceeds of sale were to be divided: 60 per cent to Daniel Trudinger and 40 per cent to Lois Trudinger. Ms Ceric stated that the testator did not give concrete reasons for splitting the proceeds of sale in such way;

¹² Exhibit GT1 to the affidavit of G Trudinger, CFI26; affidavit of S Djirlic CFI11 at [7]; T1-35/7-8 and T1-52/3-7.

¹³ Affidavit of E Ceric, CFI8.

¹⁴ T1-20/22-27.

- (b) The Mercedes Benz which he owned and the 1955 Morris convertible were to go to his brother Peter Trudinger;
- (c) The Toyota HiLux 1975 model was to go to his nephew, David Trudinger who was already in possession of the vehicle;
- (d) He was unsure what to do with his classic convertible Citroen. While he was talking to Ms Ceric he got a phone call from a friend named Jason and after speaking to him decided that Jason should be given the Citroen since he was a member of the Citroen Club and would really appreciate it and care for it as the testator had done;
- (e) The “Mercedes” painting was to go to his son, Daniel Trudinger, who he said “would really like that” and the “Horse” painting should go to Lois Trudinger;
- (f) The fridge and washing machine and kitchenware should go to Lois Trudinger, who he noted did not have a washing machine at the time;
- (g) As his relationship with Treena had ended, he would give her \$15,000 and the words “to my former partner” should be inserted;
- (h) His brother Graham Trudinger should get \$3,000 and the contents of the house, except for things that Lois Trudinger was to receive;
- (i) The rest and residue of his estate remain the same as his previous will and be divided equally between his son Daniel Trudinger, his sister Lois Trudinger and his brother Peter Trudinger.

[21] Ms Ceric states that after the testator finalised his instructions she went over the instructions one more time to ensure that he understood his wishes as expressed to her. They also discussed the question of the executor. The testator was worried his sister, Lois Trudinger, would not be able to cope with the stress of being an executrix of his will. The possibility of Janelle Rollo from Ms Ceric’s office was discussed but Ms Ceric indicated that Janelle could not take on such a role. As a result the testator decided to appoint Geoffrey Wood from Sydney who is an accountant. The testator told Lois Trudinger to call Geoffrey on his mobile phone, but he did not answer. The testator instructed that if Geoffrey Wood was not in a position to act as executor then the responsibility should fall to his sister Lois Trudinger. Ms Ceric explained to Lois Trudinger the responsibilities of being an executor and that she could get people to assist her in that role. Lois Trudinger indicated that she understood the role completely.

[22] In this regard I note that Lois Trudinger was already the executor under the 2015 will.

[23] Ms Ceric was with the testator, there was a discussion about him being released from hospital and that he would return home that afternoon. It was agreed that his brother or sister would call Ms Ceric when they found out he was going home so she could attend his home and he could execute the will and sign the will instruction

- sheet. According to Ms Ceric, by the time the meeting finished the testator was quite tired.¹⁵
- [24] Ms Ceric says that upon returning to the office at around 2:00 pm she started to redraft the will. She states that a receptionist told her that she had received a phone call from Lois Trudinger who had informed her that the testator had deteriorated and his condition was worse and the doctors had told them it was best if he remained in hospital.
- [25] Ms Ceric stated that she subsequently talked to Lois Trudinger and Graham Trudinger on the telephone about the testator's capacity and they told her "things are not looking really good" but still requested that she attend the hospital. Lois Trudinger agreed that she said words to that effect in a conversation with Ms Ceric.¹⁶ Graham Trudinger did not remember receiving a call from Ms Ceric, although he remembers making a call to her chasing up the draft will.¹⁷
- [26] Lois Trudinger said that by the time of her conversation with Ms Ceric, the family had been told by the doctors that the testator probably would not survive that night.¹⁸
- [27] The actual sequence of events after Ms Ceric returned to her office is a little unclear. However, I find that at approximately 3:30 pm her receptionist was informed by Lois Trudinger that the testator's condition was deteriorating. Ms Ceric then had a phone call with Lois Trudinger shortly thereafter. Ms Ceric said that she sent a draft will through to Graham Trudinger's mobile phone email between 2:00 pm and 4:30 pm. It is clear that such an email was sent. It is annexed to the affidavit of Graham Trudinger of 5 July 2017.¹⁹ The time that the email was sent is said to be 4:27 pm and it was sent from Ms Ceric's email account. I find that was the time it was sent. The draft will attached is dated 18 February.
- [28] According to Graham Trudinger, he read the will to the testator from his phone. His recollection was that he read the draft will word for word, but he could not recall how long that took.²⁰ He stated that he had been looking out for the electronic copy of the draft will and had read it to the testator soon after having received it on his phone.²¹
- [29] In cross-examination, Graham Trudinger stated that the testator was still able to follow what he was reading, though his condition had deteriorated.²² He stated that the testator was generally indicating "yes I agree with that" and even cracked jokes.²³
- [30] According to Lois Trudinger's evidence, the testator nodded agreement with the various terms of the draft will as Graham Trudinger had read it to him.²⁴ Graham

¹⁵ File note dated 19 February 2016, p 3 "I observed Alan to become very tired and fatigued".

¹⁶ T1-36/10-14.

¹⁷ T1-28/5-20.

¹⁸ T1-35/46-47; T1-36/6-9.

¹⁹ CFI26. The email is Exhibit GT1 and the draft will attached is Exhibit GT2.

²⁰ T1-29/9-15 and 30-35.

²¹ T1-28/5-20.

²² T1-29/46-47.

²³ T1-30/17.

²⁴ T1-37/5-21.

Trudinger's recollection was that from approximately 6:00 pm on 18 February the testator appeared to be unconscious.

- [31] Ms Ceric attended the hospital after being told that the testator was not going to go home. She said that she got held up in traffic and had left her office at around 4:50 pm but did not get to the hospital until approximately 5:50 pm. When she went into the testator's room, she recalls that Lois Trudinger had told her that Ms Ceric was there. Lois Trudinger asked him if he could sign the will to which he nodded. Lois Trudinger gave him a pen to hold in his right hand. Ms Ceric stated that he was unable to hold the pen properly, his eyes were closed and he had trouble keeping them open. Ms Ceric then said she stepped out of the room and asked a nurse whether the testator had been given any morphine. The nurse said he was given something similar about 5:15 pm. Ms Ceric then indicated to Graham Trudinger and Lois Trudinger that based on her observations, the testator had lost capacity to make decisions and there was nothing further to be done to execute the new will.²⁵

Nature of application

- [32] Section 18 of the *Succession Act* 1981 (Qld) provides:

- “(1) This section applies to a document, or a part of a document, that -
- (a) purports to state the testamentary intentions of a deceased person; and
 - (b) has not been executed under this part.
- (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.
- (3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to -
- (a) any evidence relating to the way in which the document or part was executed; and
 - (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.
- (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).
- (5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State.”

- [33] In *Lindsay v McGrath*²⁶ the Queensland Court of Appeal adopted the three conditions for the execution requirements of a will to be dispensed with, as outlined by Powell JA in *Hatsatouris v Hatsatouris*.²⁷ Those requirements are:

- “(a) was there a document,
 (b) did that document purport to embody the testamentary intentions of the relevant Deceased?”

²⁵ Affidavit of E Ceric, CFI8 [30] and [32].

²⁶ [2016] 2 Qd R 160 at [55] per Boddice J with whom Gotterson JA agreed.

²⁷ [2001] NSWCA 408 at [56].

- (c) did the evidence satisfy the court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, *then* intention that the subject document should, *without more on her, or his, part* operate as her, or his, Will?”

[34] The Court must also be satisfied that the deceased had testamentary capacity at the time of creating the document. In determining whether the deceased had testamentary capacity, the onus is on the applicants. Boddice J in *Konui v Tasi & Anor* stated:²⁸

“A presumption of testamentary capacity does not exist in the absence of a formally executed Will. The onus of proving testamentary capacity where there is an informal Will lies on the party seeking to convince the court the deceased intended the informal document to constitute his or her Will.”

[35] In *Re Spencer (deceased)*,²⁹ Dalton J set out the principles with respect to proving capacity and who bears the onus in the context of an informal will. Her Honour stated, *inter alia*:³⁰

“I accept the authorities as to evaluating the evidence with care, in accordance with the *Briginshaw* principle. Where there is a duly executed will, there will be a presumption of capacity. In the absence of a duly executed will, there is no presumption of capacity in the relevant sense. In *Phillpot v Olney*, White J said, in considering the onus of proving testamentary capacity where there was an informal will:

‘The onus of proving that the deceased had testamentary capacity lies upon the plaintiff. If the Court is not affirmatively satisfied that she had such a capacity it is bound to pronounce against the documents. Where a document has been duly executed in accordance with the formal requirements for the making of a will and is rational on its face, such execution raises a prima facie case that the person is of competent understanding which may place an evidentiary onus on the person disputing that the document is the deceased’s will to adduce evidence raising doubts as to the deceased’s competency... In this case no such evidentiary onus is thrown on the defendant.’” (footnotes omitted)

[36] In the present case the onus of proving testamentary capacity in relation to the proposed will for which instructions were given on 18 February 2016 is on the applicants.

[37] The classic statement of what constitutes testamentary capacity was set out by Cockburn CJ in *Banks v Goodfellow*.³¹ Applegarth J in *Frizzo & Anor v Frizzo & Ors* stated that:³²

²⁸ [2015] QSC 74 at [43].

²⁹ [2015] 2 Qd R 435.

³⁰ At [18].

³¹ (1870) LR 5 QB 549 at 565 confirmed by the Court of Appeal in *Frizzo v Anor v Frizzo & Ors* [2011] QCA 308.

³² [2011] QSC 107 at [21]-[22] confirmed by the Court of Appeal in *Frizzo v Anor v Frizzo & Ors* [2011] QCA 308 at [24].

“The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*. The relevant principles were restated by Powell JA in *Read v Carmody*:

1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.

In this last respect, in the words of *Banks v Goodfellow*, no disorder of the mind should poison her affections or pervert her sense of right, nor any insane delusion influence her will, nor anything else prevent the exercise of her natural faculties.

The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that case, ‘the mental power may be reduced below the ordinary standard’ provided the testatrix retains ‘sufficient intelligence to understand and appreciate the testamentary act in its different bearings’.” (footnotes omitted)

- [38] In *Bailey v Bailey*, Isaacs J stated the quantum of evidence necessary to establish testamentary capacity must always depend on the circumstances of each case because the degree of diligence to be exercised with the Court varies with the circumstances.³³
- [39] There was a dispute between the applicants and the respondent as to whether the *Briginshaw*³⁴ principle applied. The applicants contend that the *Briginshaw* principle does not apply to the assessment of evidence in this case. Their counsel contends that the *Briginshaw* principle only applies where the nature of the matters to be established warrant special caution in dealing with the evidence. He contends there are no such circumstances in the present case. That is contrary to present authority.
- [40] Habersberger J in *Fast v Rockman*,³⁵ stated that in the context of determining whether to make a declaration in favour of an informal will, the evidence needs to be evaluated with great care, in accordance with the *Briginshaw* principle. The relevant passage from *Fast v Rockman* was referred to by both Dalton J in *Re Spencer*³⁶ and by Boddice J in *Lindsay v McGrath*.³⁷
- [41] According to Boddice J in *Lindsay v McGrath* with whom Gotterson JA agreed:

³³ (1924) 34 CLR 558 at 570.

³⁴ (1938) 60 CLR 336.

³⁵ *Fast v Rockman* [2013] VSC 18 at [48].

³⁶ [2015] 2 Qd R 435 at [18] although her Honour was dealing with testamentary capacity when she referred to the passage, she referred to the passage in its entirety.

³⁷ [2016] 2 Qd R 160 at [60].

“[60] ... To satisfy the onus, the evidence must show more than that the particular document sets out the deceased’s testamentary intentions or that it is consistent with other statements the deceased made about what he or she wanted to happen to the property upon death. The evidence must establish on the balance of probabilities that the deceased wanted the particular document to be his or her final Will, and did not want to make any changes to that document...”

[62] Documents which contain only preliminary, tentative or incomplete expressions of a deceased’s testamentary intentions, or which on the evidence are demonstrated to have been prepared for consideration, further thought, deliberation or possible provision, will not suffice for the purposes of s 18 as the evidence will not establish the document in question embodied the settled testamentary intentions of the deceased.”
(footnotes omitted)

- [42] In the present case, Ms Ceric was given instructions by the testator while he was in hospital and she subsequently produced a draft will largely in accordance with those instructions. The fact that a testator has had a will drawn up by a solicitor is evidence of the testator’s obvious intention that the document be properly executed and taken as his will once it is properly executed. Where the will accurately reflects the instructions that were given when the deceased had testamentary capacity then, in order to satisfy the second requirement in s 18, it is sufficient to show that the deceased was able to form an intention and by some act or conduct show he or she had such an intention.³⁸ The fact that a will has been prepared by a solicitor does not necessarily mean it will be accepted as being a will for the purposes of s 18 if in fact the document was only a draft for consideration.

Testamentary capacity and the requirements of s 18

- [43] The evidence as to testamentary capacity relies only on those observing the testator, which is surprising given the circumstances of the present case. At the time instructions were being taken from the deceased he was in palliative care.³⁹
- [44] Ms Ceric’s evidence was that in determining that the testator had capacity she primarily relied on the fact she had been told by the doctor that he had capacity.⁴⁰ In the will instruction sheet she noted there were indicators that cast doubt upon the capacity of the testator but stated “Doctor deemed AT to have capacity at the time when went to APPT”.⁴¹
- [45] No medical evidence was given at the hearing. Lois Trudinger deposes to her solicitors having written to the hospital to obtain such evidence and to being told by her solicitors that the Princess Alexandra Hospital had denied requests for a confirming report due to a privacy policy. That is relied upon as an explanation for the lack of medical evidence and to address any *Jones v Dunkel* inference. Given the reliance by Ms Ceric upon the medical opinion, it is surprising that the hospital records were not subpoenaed nor the treating doctor, since the onus of satisfying capacity is borne by the applicants.

³⁸ See the decision of Dalton J in *Re Spencer* at [57] & [59]-[63] following *Parker v Felgate* (1883) 8 PD 171 and *Le Bon v Lili; will of Klara Lane* [2013] VSC 431.

³⁹ Affidavit of Lois Trudinger, CF120.

⁴⁰ T1-20/1-4.

⁴¹ Exhibit A to the affidavit of E Ceric, CF18.

- [46] That is not to say that medical evidence is required in every case to establish capacity. What is required depends on the circumstances of the case. The Court must assess the lay evidence available to determine whether that is sufficient to satisfy the onus on the applicants.
- [47] The evidence of Ms Ceric provides some support that the testator had capacity. Ms Ceric did carry out some tests to check the testator's capacity. She checked whether the testator knew the date. She states in her affidavit that he responded that it was 19 February.⁴² In evidence she states that, consistent with the fact she had incorrectly stated throughout her file note that it was 19 February, she believes that he would in fact have said 18 February.⁴³ However, she had no independent recollection of what she was told.⁴⁴ Ms Ceric's recollection was poor. I have principally placed weight on what she recorded in writing due to her poor recollection. I accept however that she was told by the testator that it was "18 February" consistent with her error in typing the file note and the will instruction sheet where she said instructions occurred on 19 February.
- [48] Ms Ceric's evaluations of capacity were fairly brief. She asked whether the testator knew the purpose for which she attended the hospital, and considered his eye contact and his recall of friends. She considered that they allowed her to be satisfied that the testator was orientated as to space and time.⁴⁵
- [49] No specific evaluation was carried out by Ms Ceric of the testator's knowledge of the value of the assets which he held nor the full extent of the assets which he held, in accordance with the principles in *Banks v Goodfellow*,⁴⁶ although she stated that he volunteered information about the assets while giving the instructions.
- [50] In her file note she recorded that the testator's instructions were clear and even though the testator was experiencing breathing difficulties, she did not consider his capacity to think through his instructions was affected in any way.⁴⁷
- [51] In that regard, the respondent submitted that there are some indicators that the testator may have lacked capacity at the time of giving those instructions:
- (a) No explanation was given as to why Lois Trudinger was being given a higher amount than she was to receive in the previous will. In Ms Ceric's file note⁴⁸ dated 19 February 2016 she states the testator wanted to change his will because "he had brought a house and there was not as much money left over as what he had the last time when he made his Will". While Ms Ceric said she did inquire as to why Lois Trudinger was being given a tenancy for five years⁴⁹ there is no evidence as to the response of the testator. Moreover, there is no evidence that the testator was asked whether he had considered the effect of the proposed division of the proceeds of sale between Lois Trudinger and

⁴² Affidavit of E Ceric, CF18.

⁴³ T1-23/16-24.

⁴⁴ T1-23/26-27.

⁴⁵ T1-20/10-16 and Exhibit A to the affidavit of E Ceric, CF18.

⁴⁶ (1870) LR 5 QB 549.

⁴⁷ File Note dated 19 February 2016 is Exhibit A to the affidavit of E Ceric, CF18.

⁴⁸ Exhibit A to the affidavit of E Ceric, CF18.

⁴⁹ T1-22/37-44.

Daniel Trudinger.⁵⁰ That relativity was of some importance given that the previous will instruction sheet completed in May 2015 identified Daniel Trudinger as having “dependency/special needs” and referred to his having a medical condition. There is no evidence that the position had changed in 2016.

- (b) When the testator gave Ms Ceric instructions, he received a phone call from Jason, who was apparently a fellow Citroen enthusiast and member of the Citroen club. He had fortunately rung the testator while he was giving instructions in respect of his will. As a result of that discussion the testator decided (having previously been undecided) that he would give the Citroen to Jason, because Jason would appreciate and care for it as he had. In his previous will however he had provided that it be given to Peter Trudinger, his brother. The testator was not questioned as to why he changed his mind in this regard and whether he made any assessment of the difference in value or whether he considered Jason was an appropriate person to benefit from his estate.⁵¹ No evidence was given as to the testator’s relationship with Jason.
- (c) There was no reference to clause 4(e) in the May 2015 Will or discussion about its omission.
- (d) In his instructions about the residue, Ms Ceric records that “when we talked about the rest and residue, Alan’s instructions to me were that the rest and residue shall still remain as per his previous Will in that it should be split equally between his son, Daniel Trudinger, his sister, Lois and his brother Peter Trudinger.” That was not, in fact, what his previous will of May 2015 provided. It provided for the residue to be given to Daniel Trudinger and only if Daniel Trudinger predeceased the testator or it did not vest in him was it to be given to Peter Trudinger and Lois Trudinger. The point was not clarified by Ms Ceric, although it is of some importance. She was not able to say whether the testator was confused or not.⁵²

[52] The inconsistency between the testator’s instructions as to the residue and the previous will does raise a real question as to whether the testator was confused or his memory was impaired such that it affected his ability to clearly determine and articulate his instructions. That, together with the percentage of the proceeds of sale and the gift to Jason, bring into question whether the testator had the capacity to assess and determine the matters referred to in the third and fourth requirements of *Banks v Goodfellow*.

[53] The change in the proposed residue clause also raises an issue about whether the draft will that was ultimately sent to Graham Trudinger accurately represented his instructions given to Ms Ceric at the hospital. The will of 18 February emailed to Graham Trudinger⁵³ had a rest and residue clause which did mirror the same clause that was in the 2015 will. No explanation was provided as to why it was changed

⁵⁰ Lois Trudinger was in the room at the time the testator was giving instructions but according to Ms Ceric was sitting in the background and giving water to the testator when necessary but was not seeking to influence him.

⁵¹ T1-21/25-35.

⁵² T1-21/1-21.

⁵³ Exhibit GT2 to the affidavit of G Trudinger, CFI26.

from the testator's instructions given in hospital.⁵⁴ Counsel for the applicants was permitted to lead further evidence from Ms Ceric to address the sequence of facts which occurred the afternoon of 18 February after she had first left the hospital. Ms Ceric could recall sending an email to Graham Trudinger with a draft will and believes there was a phone call but does not recall the time or the content of the call.⁵⁵ In cross-examination she agreed that she did not have any recollection of having sent the draft will dated 18 February by email to Graham Trudinger at the time she swore her affidavit.⁵⁶

- [54] Ms Ceric could not recall why two wills were produced, one dated 18 February and one dated 19 February nor which one she took to the hospital.⁵⁷
- [55] Evidence was given by Lois Trudinger, Graham Trudinger and Daniel Trudinger as to their observations of the testator in the period leading up to his death. Evidence was also given by Ms Djirlic, the testator's former wife and Daniel Trudinger's mother, as to phone conversations she had with him. As all parties have an interest in the will the subject of the application, save that Ms Djirlic's interest is only an indirect one because of her relationship with Daniel Trudinger, I have scrutinised all of their evidence carefully.
- [56] Peter Trudinger gave an affidavit in very similar terms to the one sworn by his brother Graham Trudinger which indicated that he was with his brother and sister for much of the week leading up to the testator's death and was present almost constantly in the last few days of his life. He deposed that the facts and circumstances described in the affidavits for the period 15 to 19 February by Lois Trudinger were true and correct in every respect in accordance with his understanding observations and knowledge of events. In particular he stated that he observed the testator to be completely lucid, communicative and capable of managing his affairs until the evening of 18 February 2016.⁵⁸ In cross-examination however, Peter Trudinger could seemingly remember nothing about the events leading up to the testator's death. He does not recall whether he was at the hospital when the testator was giving instructions to the solicitor or when the draft will was read to his brother later that day. He agreed with the proposition that the testator's condition went downhill rapidly on the day of 18 February.⁵⁹ He agreed the testator became unconscious by that evening. He cannot recall having had any conversations with Graham Trudinger that afternoon. In cross-examination he agreed that he could not say any of the matters in paragraph five of his affidavit because he has no recollection.⁶⁰ I therefore have had little regard to his evidence save for the matters he could recall in cross-examination.
- [57] Mr Graham Trudinger could recall very little about how the testator was at the time Ms Ceric arrived and could not recall whether the testator was fatigued by the time

⁵⁴ In this regard Ms Ceric's affidavit of 4 July 2017 was not relied upon by Mr Stobie, counsel for the respondents because it was incorrect. T1-10/28-40; T1-11/27-36. As a result leave was sought and given to lead oral evidence from Ms Ceric as to what took place between 2-6pm: T1-8/44-47 and T1-9/1-4.

⁵⁵ T1-13/2-5.

⁵⁶ T1-19/11-12, 25-26.

⁵⁷ T1-19/1-9.

⁵⁸ Affidavit of P W Trudinger, CFI17 at [5].

⁵⁹ T1-43/40-43.

⁶⁰ T1-44/8-9.

she left.⁶¹ Notwithstanding his lack of recollection in this respect, Graham Trudinger did not agree with the proposition that the testator's condition had deteriorated fairly fast after Ms Ceric had left, stating that he was fairly level for a while after that, though he did not put any timeframe on it.⁶²

- [58] Graham Trudinger received the draft will by email and read the will to the testator. He stated the testator was quite tired and he did not want him to further tire by reading the draft will himself.⁶³ He did not appreciate that the directions in the email were that the draft will be given to the testator to read.⁶⁴ His recollection was he did not skip anything in the draft will when he was reading the document to the testator.⁶⁵ I accept his evidence in that regard.
- [59] Graham Trudinger expressed the opinion that while the testator started to go downhill by the time he was reading the will, he was still able to follow what Graham Trudinger was reading. This was based on the fact that the testator was responsive by nodding, saying occasionally "Yes I agree with that" and cracked a joke.⁶⁶ The testator asked no questions about the draft will.
- [60] Graham Trudinger did not recall whether the testator's eyes were open or closed while the will was being read, nor whether the testator was able to keep his eyes open when Ms Ceric arrived.⁶⁷ He stated that the testator could hold a pen but could not sign the will when Ms Ceric arrived.⁶⁸ He stated that he appeared to be unconscious from approximately 6 pm.⁶⁹
- [61] Graham Trudinger agreed in cross-examination that he had rung Daniel Trudinger's mother during the afternoon and told her that she and Daniel Trudinger should come urgently because the testator's condition was deteriorating.⁷⁰
- [62] In cross-examination, Lois Trudinger stated that the testator was breathing heavily when Ms Ceric arrived and that towards the end, the meeting had tired him out a lot.⁷¹ As set out above, she confirmed she had spoken to Ms Ceric that afternoon and told her things were not looking really good in response to questions about this capacity.⁷²
- [63] Prior to Ms Ceric arriving, the testator was shifted to another room and had a minister attend there. Lois Trudinger stated that when asked what he wanted, the testator told the minister "I want to be with Jesus".⁷³ Her recollection was that the testator had nodded his head in response to the will being read to him.⁷⁴

⁶¹ T1-27/1-16.

⁶² T1-27/19-22.

⁶³ T1-28/47-48.

⁶⁴ Exhibit GT1 to the affidavit of G Trudinger, CFI26.

⁶⁵ T1-29/15.

⁶⁶ T1-30/5-20.

⁶⁷ T1-30/29-32 and 46-47.

⁶⁸ T1-31/4-5.

⁶⁹ T1-31/30-32.

⁷⁰ T1-30/40-41.

⁷¹ T1-35/30.

⁷² T1-36/10-14.

⁷³ T1-36/27-28.

⁷⁴ T1-37/18-21.

- [64] She also agreed by the time morphine or a similar drug had been administered to the testator, he was fairly sick.⁷⁵ She said that the testator could hold a pen but could not write when Ms Ceric arrived and could not open his eyes.⁷⁶
- [65] Daniel Trudinger also gave evidence. In his affidavit⁷⁷ he stated that the testator spoke to him about his will on 10 February, at which time the testator told him what he was being left in his Will. That is set out above.
- [66] Daniel Trudinger said that the testator was rushed to hospital on 11 February and was slipping in and out of consciousness and Daniel thought he was going to die. In cross-examination he could not recall that his father had slipped in and out of consciousness although he was sick but then suggested that perhaps his recollection was more accurate at the time he did the affidavit.⁷⁸ He also stated the testator was “making perfect sense” between 9 and 11 February.⁷⁹
- [67] According to Lois Trudinger, the testator was not rushed to hospital on 11 February but had gone back to hospital because he was feeling unwell.⁸⁰ She was not cross-examined about this. Given Daniel Trudinger had not seen his father for some time, and he was on any view a very sick man, it is likely he would have been shocked and would have viewed his father’s condition as being more acute than it was in fact.
- [68] Daniel Trudinger asserts that Lois Trudinger had been looking for the testator’s will and “he felt everything was done in a deceitful manner: my father is rushed to hospital and Lois Trudinger is rushing to the lawyer”. Lois Trudinger states she did not contact Logan Legal until 12 February and had made an appointment for 15 February but it then had to be rescheduled. She rescheduled the appointment on 17 February for 18 February.⁸¹ When cross-examined as to why she contacted the lawyers rather than the testator, Lois Trudinger responded that he had requested that she do so. I accept her evidence in that regard.
- [69] I do not accept that Lois Trudinger was acting in a deceitful manner. That is consistent with the fact that Ms Ceric went to the testator in hospital and gave evidence that she spoke to the testator for a lengthy period of time without any intervention by Lois Trudinger.
- [70] Daniel Trudinger also states that Lois Trudinger “kept on coming into the hospital asking my father for money”. When asked in cross-examination, he could only recall one occasion on which that occurred.⁸² That again was rejected by Lois Trudinger.
- [71] Further, Daniel Trudinger disputed that Lois Trudinger had spent time with the testator prior to his death on the basis that he had overheard a conversation between his mother, Ms Djirlic and Lois Trudinger where Lois Trudinger said she and the

⁷⁵ T1-37/32-34.

⁷⁶ T1-38/1-5, T1-37/46.

⁷⁷ CFI10.

⁷⁸ T1-47/29-35, T1-48/1-6.

⁷⁹ T1-46/34-35.

⁸⁰ Affidavit of L Trudinger, CFI20 at [5.3].

⁸¹ The latter accords with Ms Ceric’s file note dated 18 February although it is likely to have occurred the day before.

⁸² T1-47/39-45.

rest of the family had not spent much time with the testator from October 2015 onwards. Daniel Trudinger would have not have known the time that the family had spent with his father as Daniel Trudinger had been in Melbourne. He had only had one visit with the testator in May 2015 and could only recall one visit to Sydney prior to that time. He agreed that in 2015 he was not seeing his father frequently.⁸³ He also agreed that in the trip of May 2015, he had arguments with his aunt Lois Trudinger.⁸⁴

- [72] According to Lois Trudinger, the testator had moved in with her for six months before moving into the house he purchased. After he moved into the house she maintained regular contact with him but did not visit often because of discomfort with his partner. Lois Trudinger had continued to take the testator to medical appointments. I accept the evidence of Lois Trudinger in this regard.
- [73] Daniel Trudinger and his aunt had an altercation on 13 February. Daniel Trudinger's evidence was that they had had a number of arguments but at other times got on well. I consider Daniel Trudinger's recollection in relation to the actions of Lois Trudinger was coloured by the fact that they had had an altercation in clearly emotionally strained circumstances, with the result that he misconstrued her actions. I consider he was prone to a degree of exaggeration in his evidence in describing his aunt's conduct and his father's condition. In the circumstances of the case, little turns on this.
- [74] Daniel Trudinger's mother, Ms Djirlic, also gave evidence that she had a conversation with the testator on 13 February after Daniel Trudinger had told her on the telephone about the altercation with Lois Trudinger. She states that she told the testator that if Lois Trudinger was the executor of the will he needed to remove her, to which he agreed.⁸⁵
- [75] Accepting that was the case, I find it is unlikely that the testator had discussed removing Lois Trudinger as executor on 10 February with Daniel Trudinger. I accept that the testator did state to Ms Ceric that he was concerned that the position of executor might be stressful for Lois Trudinger and proposed Geoffrey Wood as executor. That may have been the result of the phone call with Ms Djirlic.
- [76] Daniel Trudinger states that when attended the hospital on the evening of 18 February, his father opened his eyes briefly to see him at 11:00 pm. He asked his father some questions to which he managed to say "yes" and "no" with great difficulty.⁸⁶
- [77] Ms Djirlic also stated that when she spoke to the testator on 17 and 18 February he did not make much sense and she could not understand his words.⁸⁷ In a further affidavit of 18 February she states that she had a conversation with him between 11:30 am and 12 pm (10.30 am to 11.00 am Queensland time) and that he had not made any sense.⁸⁸ That would have been just prior to the time that Ms Ceric was with the testator taking instructions.

⁸³ T1-46/6-7.

⁸⁴ T1-46/15.

⁸⁵ Affidavit of D Trudinger, CFI10 at [7].

⁸⁶ Affidavit of D Trudinger, CFI10 at [12].

⁸⁷ Affidavit of S Djirlic, CFI11 at [10].

⁸⁸ Affidavit of S Djirlic, CFI12 at [2]-[3].

- [78] Ms Ceric has no interest in the outcome of the litigation and while her recollection was very poor, it is evident from the file note which she prepared close to events as well as the draft will that she did speak to the testator at length. I consider her evidence, though affected by the fact she had poor recollection, was honest. I accept that the testator gave instructions to Ms Ceric on that day. It is accepted on all parties' evidence who saw the testator on 18 February that he was having difficulty breathing. That may explain why Ms Djirlic could not understand him. I find that it is unlikely that the testator when Ms Djirlic spoke to him was speaking gibberish, given that Ms Ceric spent an hour and a half with him taking instructions. Similarly I do not find that Ms Djirlic's conversations with the testator were reflective of his overall condition as it is not consistent with his disposition over 17 and 18 February as observed by Ms Ceric and Lois and Graham Trudinger. If he did not make sense it is possible she spoke to him at times when he had just woken up or may have taken medication.
- [79] There is some evidence that at the time the testator gave instructions to Ms Ceric the testator was acting rationally insofar as:
- (a) Wanting to make a new will was rational because the testator had spent the cash which he had in the bank at the time he had made the will in May 2015;
 - (b) His relationship with Treena Rea had come to an end;
 - (c) He did articulate instructions to Ms Ceric and was able to engage with her and remembered people's names and identified the extent of his assets in providing instructions; and
 - (d) Lois Trudinger had been providing care and support to the testator throughout his illness. The fact that the testator told Daniel Trudinger that he had to pay 33 per cent of the sale price to the retirement village if he did not live there for five years⁸⁹ provides a rational explanation at least in part for the gift to Lois Trudinger of a five year tenancy, although there are no corroborating statements to that effect.
- [80] What is unexplained and without rational explanation is the enlarged bequest to Lois Trudinger from the proceeds of sale and the decrease in the bequest to Daniel Trudinger⁹⁰ compared to the May 2015 will. While there was evidence that Daniel Trudinger and his father had had some rocky periods in their relationship, there was no evidence that was the case after May 2015. In making the May 2015 will the testator had made special note of Daniel's special needs and dependency issues. The gift to Jason similarly indicates that the testator was not able to evaluate and discriminate between the respective claims of persons who might reasonably be thought to have a claim on the testamentary bounty of the testator.
- [81] While I can accept that the omission of any reference to his daughter in his instructions may have been an oversight, the gift of the vehicle to Jason spontaneously on the basis of a phone call, the belief that his previous will divided

⁸⁹ Affidavit of D Trudinger, CFI10 at [6].

⁹⁰ Based on an estimated sale price of \$300,000 unaffected by the payment to the retirement village, 60 percent of \$300,000 is \$180,000 which is significantly less than the previous \$250,000 provided for under the testator's Will made in May 2015 for Daniel Trudinger.

the residue equally between Daniel Trudinger, Lois Trudinger and Peter Trudinger, the unexplained reduced gift to Daniel Trudinger and the absence of reference to his daughter are evidence that the testator's capacity was impaired such that his faculties were not fully functioning and he could not understand and appreciate the competing claims to which he ought give effect.

- [82] While I consider that Graham Trudinger and Lois Trudinger were honest witnesses, I do not consider that they were in a position to properly form an opinion as to the testator having capacity. I find that while they may have believed that the testator comprehended the terms of the will when it was read out to him, I do not find on the balance of probabilities that he had capacity at the time he gave instructions for the will, nor to comprehend the will read out to him, nor that he was capable of forming an intention that the draft will operate as his will. I accept that the testator's condition declined rapidly after Ms Ceric left. Lois Trudinger agreed that when asked by Ms Ceric about whether the testator had capacity about 3.30 pm, she had said things were not looking really good and that they had just been told that the testator would not survive the night. There was a very short time frame between when the will was received on Graham Trudinger's mobile phone and read to the testator, namely, after 4.27 pm, and when painkillers like morphine were administered around 5.15 pm. The weight of the evidence supports the fact that the testator was generally unconscious by about 6 pm.
- [83] When Ms Ceric first attended the hospital it was anticipated the testator would be able to go home that afternoon. While Graham Trudinger indicated that his brother was fairly level after Ms Ceric left, it could only have been for an hour or so given the first phone call indicating the testator had gone downhill occurred at 3:30 pm. Further, Lois Trudinger agreed that by the time that he was getting morphine or a similar drug he was pretty sick.⁹¹ While both Lois Trudinger and Graham Trudinger considered that he comprehended what was read to him in the will, I find that is unlikely given the events which had taken place. Neither his conduct of nodding and on occasion saying "yes I agree with that", nor his holding a pen with his eyes closed, is sufficient to demonstrate his comprehension of all that was read to him or that it was the testator's intention that the draft operate as his will upon his death. This is particularly so given the draft will was different from his instructions in respect of the residue. While Graham Trudinger indicated the testator made a joke, there was no evidence that that was connected with the substance of the will to demonstrate comprehension of its contents.
- [84] On the basis of the evidence before me I do not find that when instructions were given to Ms Ceric, nor when the will was read to the testator, that he had testamentary capacity.
- [85] The onus of proving testamentary capacity is on the applicants and I do not find that the onus has been discharged. I am not satisfied that the testator's mind was free to act in a natural or ordinary manner to enable him to truly understand the nature and effect of his actions⁹² such that he had testamentary capacity on 18 February 2016 when he gave instructions, or when the draft will was read to him.

⁹¹ T1-37/32.

⁹² *Konui v Tasi & Anor* [2015] QSC 74.

- [86] Given there is no evidence that the residue clause was altered upon the testator's instructions, there is also a lack of evidence satisfying the second requirement adopted by *Lindsay v McGrath*, namely that the document reflected the testator's testamentary intentions.
- [87] In any event, given the draft will read to the testator did not reflect the testator's instructions to Ms Ceric as to his testamentary wishes, it was also necessary for the testator to have capacity at the time the draft will was read to him. Even if he had testamentary capacity when he gave instructions, the draft will sent on 18 February did not accord with the instructions that he had apparently given to Ms Ceric, the principle in *Parker v Felgate* does not apply. However, even if it did apply, the outcome of my decision would be no different because I am not satisfied on the evidence that the testator was capable of forming an intention that the draft will was to operate as his will by the time it was being read to him.
- [88] Accordingly, I dismiss the application. It was however appropriate that the application be made given all the circumstances and that a draft will had been prepared. As such, I order that the applicants and respondent be paid their costs out of the estate of Alan Stewart Trudinger on an indemnity basis.
- [89] The respondent submitted that the will of 15 May 2015 should be granted probate subject to the normal requirements of the Registrar. The undisputed evidence was that the will made on 15 May 2015 as exhibited to Ms Ceric's affidavit was executed and signed such that there is a presumption of capacity and it was accepted by the parties that he had capacity at that time. As such, I order that pursuant to s 6(1) of the *Succession Act* the 2015 will be granted probate subject to the normal requirements of the Registrar.