

SUPREME COURT OF QUEENSLAND

CITATION: *Albury & Anor v Sammut* [2019] QSC 105

PARTIES: **LEANNE FRANCES ALBURY**
(first plaintiff)
TONI ANNE SAMMUT
(second plaintiff)
v
APINYATREE SAMMUT
(defendant)

APINYATREE WUTITUM under Part IV Sections 40-44
Succession Act 1981

(applicant)

v

**LEANNE FRANCES ALBURY and TONI ANNE
SAMMUT as Executors of the Estate of FRANK
ANTHONY SAMMUT Deceased**
(respondents)

FILE NOS: BS10519 of 2017
BS13643 of 2018

DIVISION: Trial Division

PROCEEDING: Proof of will in solemn form and family provision application

DELIVERED ON: 26 April 2019

DELIVERED AT: Brisbane

HEARING DATE: 18-20 February 2019

JUDGE: Mullins J

ORDER: **In proceeding BS10519 of 2017:**

- 1. The Court pronounces for the full force and validity of the will of Frank Anthony Sammut (the deceased) late of 55 Kensington Street, Bundaberg in the State of Queensland dated 23 February 2017, a copy of which is Exhibit A to the affidavit of Leanne Frances Albury filed on 6 February 2018 in proceeding BS13643 of 2018 (the said will).**
- 2. Subject to the formal requirements of the Registrar, probate of the said will be granted to Leanne Frances Albury and Toni Anne Sammut as executors.**
- 3. The counterclaim is dismissed.**
- 4. Adjourn the question of the costs of the proceeding to a**

date to be fixed.

In proceeding BS13643 of 2018:

- 1. It is ordered that adequate provision be made for the proper maintenance and support of the applicant Apinyatree Wutitum out of the estate of Frank Anthony Sammut deceased (the deceased) by substituting the following for clause 5.1 of the last will of the deceased dated 23 February 2017:**

“5.1 (a) I give and devise to my wife Apinyatree Wutitum the real property that I own at 55 Kensington Street, Norville in the State of Queensland described as Lot 4 on Registered Plan 72587 in the Country of Cook Parish of Bundaberg for her own use and benefit absolutely.

(b) I give and bequeath to Apinyatree Wutitum the sum of \$50,000 for her use and benefit absolutely.”

- 2. Adjourn the question of the costs of the proceeding to a date to be fixed.**

CATCHWORDS:

SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – GENERALLY – where the testator was survived by three adult daughters from his first marriage and his second wife – where the testator made a new will four days before he died that reduced his widow’s inheritance — where the widow challenges the validity of the will – whether the testator lacked testamentary capacity – whether the testator was suffering a delusion about the widow’s conduct – whether the will was procured by undue influence of the daughters – whether the testator knew and approved the contents of the will

SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – DUTY OF TESTATOR – DUTY TO SPOUSE OR PARTNER – where the applicant for adequate provision for proper maintenance and support out of the estate is the testator’s widow – whether the jurisdictional question is answered in favour of the applicant – where the applicant made withdrawals from the testator’s credit card and another account when he was in a coma – whether the applicant’s conduct amounts to disentitling conduct – where the application succeeded – where the will was varied to give the matrimonial home to the applicant in addition to the bequest of \$50,000 given to her under the will

Succession Act 1981 (Qld), s41

Bailey v Bailey (1924) 34 CLR 559; [1924] HCA 21, considered

Banks v Goodfellow (1870) LR 5 QB 549, followed
Cunliffe v Fielden [2006] Ch 361; [2005] EWCA Civ 1508, distinguished

Hamill v Wright [2018] QSC 197, considered

Hughes v National Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134; [1979] HCA 2, considered

Manly v The Public Trustee of Queensland [2007] QSC 388, considered

Manly v The Public Trustee of Queensland [\[2008\] QCA 198](#), considered

Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40, followed

Re Sutton [1980] 2 NZLR 50, followed

COUNSEL: R A I Myers for the plaintiffs
 M F Wilson for the defendant

SOLICITORS: I M Lawyers for the plaintiffs
 Harris & Company Solicitors for the defendant

- [1] Mr Frank Sammut died on 27 February 2017 at the age of 74 years from respiratory failure and end stage chronic obstructive airway disease. He made a will on 23 February 2017 (the later will) which is propounded by two of his daughters, Mrs Albury and Ms Sammut, who are the executors named in that will and the plaintiffs in the proceeding to prove that will in solemn form. Mr Sammut was also survived by his widow Ms Wutitum who is the defendant in the solemn form proceeding and a third daughter, Mrs O'Donnell. The defendant was 43 years old when Mr Sammut died and was residing in the matrimonial home at Kensington Street where she has remained in residence.
- [2] Mr Sammut and the defendant met in Thailand in October 2012. The defendant lived with her parents and also has a brother and sister in Thailand. Mr Sammut and the defendant decided to marry in April 2015, participated in a wedding ceremony in Thailand on 20 July 2015, and then officially married in Australia on 26 November 2016. After the marriage in Australia, Mr Sammut made a will on 28 November 2016 (the earlier will), with the assistance of solicitor Mr David Baker.
- [3] The defendant challenges the validity of the later will (which was also prepared by Mr Baker) on the basis that Mr Sammut lacked testamentary capacity or the later will was procured by the undue influence of Mr Sammut's daughters. In addition, the defendant puts the plaintiffs to proof that Mr Sammut knew and approved of the contents of the later will. The defendant counterclaims for a declaration for the force and validity of the earlier will.

- [4] The defendant applies for family provision from Mr Sammut's estate whichever will is proved. The defendant commenced her application for family provision in the District Court.
- [5] On 8 November 2018 Boddice J ordered that the family provision application be transferred to the Supreme Court, the solemn form proceeding and the family provision application be heard together, and the evidence in each proceeding be taken to be the evidence in the other proceeding. Costs of the applications were reserved.
- [6] The defendant swore three affidavits in the proceedings. In the family provision application, she filed an affidavit on 22 November 2017 (the first affidavit) and a further affidavit filed on 5 November 2018 (the second affidavit). She filed an affidavit by leave in the solemn form proceeding on 19 February 2019 (the third affidavit).

The earlier will

- [7] Mrs Albury and Ms Sammut were appointed the executors and trustees under the earlier will. The defendant was given the duplex property at McNeilly Street, Bundaberg, the sum of \$30,000 and the household furniture and chattels set out in schedule 1 of the will. The residuary estate was given to the three daughters. There was a direction that the defendant be allowed to remain in the home in which she was residing at the time of the deceased's death for a period of not less than three months following his death.

The later will

- [8] Under the later will, the only gift to the defendant was the sum of \$50,000 and the residuary estate was given to the three daughters.
- [9] Mr Baker suggested Mr Sammut write out in his own words why he was changing his will. The following day a handwritten statement signed by Mr Sammut dated 24 February 2017 was delivered to Mr Baker's office. It stated:

“To whom it may concern

I decided to change my will when I knew Apinytree had taken a large amount of money out of my account. I gave her my credit card some weeks before, just to do a bit of shopping for food. She was the only one who had my credit card. I could not believe it, she would still be taken \$1,000 per day out if the bank had not closed my account down, she tried on another card to get money out of the line of credit card. I caught her out in a lot of lies, slowly I knew I made a big mistake. But old men become lonely. She made me a lot of promises she did not keep. I was in an induced coma in hospital and she was stealing my money. She was to be my carer, what a mistake I made.”

- [10] There is no issue that this written statement by Mr Sammut and the similar statements made orally by Mr Sammut to Mr Baker about the conduct Mr Sammut ascribed to the defendant are admissible to provide evidence of the reasons for Mr Sammut making the later will, but are not evidence of the truth of the assertions: *Hughes v National*

Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134, 137, 150, 159.

Mr Sammut's background

- [11] Mr Sammut had been a successful cane farmer in the Bundaberg area. He then acquired real properties which he rented and described his occupation as landlord. He married his first wife in 1965 and the plaintiffs and Mrs O'Donnell are the children of that marriage. He and his first wife divorced in 1993. Mr Sammut banked with the National Australia Bank. One of the accounts that was still operative at the time of his death described as a "Flexiplus Mortgage" account was the account into which the tenants paid their rent and had approval for a line of credit of up to \$150,000, so that he was in a position, if he chose to do so, to use the line of credit for further investments without seeking specific loan approval.

Mr Sammut's last days in hospital

- [12] I will set out in narrative form the events that took place in the last couple of weeks of Mr Sammut's life. Much of the evidence was not contentious, but it was the interpretation the parties placed on what happened that was contentious. Where it is necessary to do so, I will identify where I have preferred the evidence of one witness over another.
- [13] Mr Sammut had lung cancer and contracted pneumonia. He was having difficulty breathing and was taken by ambulance to the Bundaberg Hospital on 9 February 2017. Mr Sammut had an NAB Visa credit card and an NAB Visa debit card (which is referred to in the evidence as the pink debit card). Although the NAB Classic banking account which could be accessed by the pink debit card was in Mr Sammut's name, he was in the habit of putting money in that account for the defendant to use and the defendant considered the money on the pink debit card to be a gift to her from Mr Sammut. From time to time Mr Sammut would allow the defendant to use his Visa credit card for small purchases by tapping it on a shop's EFTPOS device. When the defendant visited Mr Sammut on 10 February 2017, he wrote his PIN for the Visa credit card on a piece of paper and told the defendant that she would need that "to pay some bills and for living expenses" and that he wanted her to get the car repaired, to buy the paint that he had told her about, and she might need it to pay for the visa. The reference to the visa was an application for permanent residence that the defendant and Mr Sammut had investigated for the defendant, before he was admitted to hospital. They had ascertained that the cost of the visa would be \$1,156. On admission to hospital, Mr Sammut gave his wallet to the defendant that contained his Visa credit card, Medicare card, driver's licence, membership cards and some cash. Between 10 and 12 February 2017, the defendant used the credit card to make some small tap and go purchases.
- [14] By 13 February 2017 Mr Sammut's condition had deteriorated. The defendant and the three daughters met with a treating doctor who advised that Mr Sammut was very sick, he were not sure what his chances of survival were, and the rest of the family should come to see him. On that day he was intubated, sedated and induced into a coma. He was in the intensive care unit of the hospital. The defendant let Mr Sammut's daughters

know that she had his wallet after that meeting and showed them that there was some cash in it. (There was a difference in the estimated amount of cash in the wallet by the defendant and the daughters. The daughters described a wad of notes and estimated the amount was between \$400 and \$500, whereas the defendant considered it was less than \$400, but nothing turns on this difference.)

- [15] On 13 February 2017 the defendant withdrew \$1,000 as a cash advance on Mr Sammut's credit card. As at 13 February 2017, the credit balance of the Visa debit card was \$940.17. The defendant withdrew \$900 from the debit card account on 14 February 2017. The defendant also on 14 February 2017 withdrew another \$1,000 as a cash advance on Mr Sammut's credit card. On the same date the defendant used the Visa credit card to pay \$644 for paint. On 15 February 2017 the defendant withdrew another \$1,000 as a cash advance on Mr Sammut's Visa credit card.
- [16] Mr Sammut came out of the coma on 15 February 2017.
- [17] Mrs O'Donnell had access to Mr Sammut's online banking, so that she could ensure the tenants of his properties were paying the rents and she could pay the bills associated with those properties. In the late afternoon or early evening of 14 February 2017 Mrs O'Donnell noticed that there was a notification that one of her father's accounts had been temporarily blocked. It was then that Mrs O'Donnell noticed the credit card account withdrawals. Mrs O'Donnell took a screen shot of the listing of Mr Sammut's accounts that showed that one account associated with a NAB debit card was temporarily blocked. Mr Larcombe who is a bank officer with the National Australia Bank Limited at the Bundaberg branch gave evidence that a temporary block lasts for 24 hours only and usually results from invalid PIN usage. Mrs O'Donnell immediately informed Mrs Albury and Ms Sammut of the temporary block on one account and the credit card withdrawals.
- [18] Although there was much speculation by the plaintiffs that it was incorrect usage by the defendant of Mr Sammut's credit card at an ATM that resulted in the temporary block on one of Mr Sammut's account, there is not sufficient evidence to determine what attempted transaction resulted in the block and it is not necessary to make any finding on why the account was blocked.
- [19] Mrs Albury and Mrs O'Donnell were concerned about the withdrawal of \$1,000 per day which appears to have been the daily withdrawal limit on Mr Sammut's credit card.
- [20] The next morning Mrs O'Donnell, Ms Sammut and Mrs Albury collected their father's wallet from the defendant and they visited their father's bank.
- [21] As a result of advice given by a bank officer, the daughters obtained a letter from Dr Han at the intensive care unit of the Bundaberg Hospital dated 15 February 2017 that confirmed Mr Sammut was currently intubated and therefore lacked capacity to make decisions. They used the letter for the purpose of activating the enduring power of attorney in favour of themselves; in order to deal with the bank, and changed the access codes for online banking for Mr Sammut's accounts.

- [22] Mr Albury returned to Bundaberg on 15 February 2017. Mr Albury considered his relationship with Mr Sammut was more than son-in-law and father-in-law, as they were good friends. Without consulting his wife or her sisters, he decided that Mr Sammut should know about the withdrawals made by the defendant from Mr Sammut's accounts. In the morning of 16 February 2017, Mr Albury visited Mr Sammut who was still in intensive care at the hospital. Mr Albury told Mr Sammut that he believed the defendant "had taken money from his accounts in the bank on numerous occasions". Mr Albury told him there were multiple transactions and that he believed it was from the credit card. Mr Albury did not tell his wife or any other person at the time that he had spoken to Mr Sammut about the money taken from the accounts.
- [23] Mr Albury returned to visit Mr Sammut in the early evening of 16 February 2017. Mr Albury sat outside the intensive care ward with the defendant. Mr Albury said he asked her why had she taken the money and the defendant responded that "You won't get that money". The defendant went into visit Mr Sammut first and then Mr Albury was also allowed to visit him, while the defendant was still there. Mr Albury recalled that Mr Sammut asked the defendant whether she had taken the money, the defendant responded to him "You'll never get that money", and Mr Sammut said he was "very surprised". The defendant recalled only having a conversation with Mr Albury outside the intensive care unit, when she told him that she had taken money from the bank, but "it was under the order of my husband to do so".
- [24] I do not see any significance in the different recollections of Mr Albury and the defendant about the content of their conversation in relation to money that was withdrawn from the accounts or where and when the conversation (or conversations) took place. Each has recalled the conversations from his or her perspective. It is clear the defendant had rationalised that she was entitled to take the money to meet her expenses and the anticipated expenses that she had discussed with Mr Sammut for the car repairs, paint and the visa application and that she was keeping the money, because of her belief that was what Mr Sammut wanted her to do. Mr Albury understood her advice to him that she had the money and was keeping it in the context that he believed she was not authorised to take it.
- [25] The defendant recorded a video of a discussion with Mr Sammut, when she visited him on 16 February 2017 (exhibit 16). Mr Sammut's voice sounded very weak and he said he was dying. He said to the defendant that she will get a "big bundle of money" and she should go back to Thailand and buy a business. On 16 February 2017 the defendant took Mr Sammut's car to the garage for repair.
- [26] Mrs Albury gave evidence that she did have a discussion with her father about the defendant taking funds from his account when he was still in intensive care in the context that the defendant had said she would be calling the police, as she said Mrs Albury and her sisters were harassing her, and Mr Sammut told Mrs Albury to "Let her call the police".
- [27] Ms Sammut neither talked to her father about blocked bank accounts nor was present when there was any discussion by others with her father about money taken from his accounts.

[28] Mrs O'Donnell recalled that Mr Sammut talked to her about the money the defendant had withdrawn from his accounts, but he did not talk specific amounts. When it was put to Mrs O'Donnell in cross-examination that Mr Sammut "was talking about bigger amounts that had been sent to Thailand", Mrs O'Donnell was emphatic in her denial of conversation to that effect. Mr Sammut told Mrs O'Donnell and her sisters that, if he had more time left, he would have "pressed charges" in respect of the defendant's accessing his bank accounts. Mrs O'Donnell does not recall the dates on which she had conversations with her father about the withdrawal of the money from his accounts, but accepted that it was on a number of occasions.

[29] On 17 February 2017 the defendant visited Mr Sammut with a mutual friend, Ms Keighton. Mr Sammut asked the defendant:

"Why are you taking money out of my account?"

[30] The defendant said she responded to the effect:

"I told you everything yesterday. You told me to pay for the car, visa and to live on. I also took \$900 from the pink card you gave me."

(On the defendant's own evidence, she had a conversation with Mr Sammut on 16 February 2017 about her withdrawals of \$3,000 cash for the "car, visa and everything".)

[31] According to the defendant, Mr Sammut then said "Your visa is important. That is good." Ms Keighton also recalls that Mr Sammut said something to the effect that the visa was important.

[32] The defendant told Mr Sammut on 17 February 2017 that the daughters had asked for his wallet and credit card back and she had returned them. That is when the defendant filmed a video of Mr Sammut instructing his daughters to look after the defendant (to whom he referred as Aoy):

"Leanne, Toni, Liza, listen girls ... you've gone through taken my credit card and everything else. Aoy's my wife, I can give her what I want. Please obey me ... Make sure the car is in the garage and look after Aoy like I said to you to. And you promised me ... that you would look after her."

[33] The video recorded on 17 February 2017 (that was exhibit H to the first affidavit and exhibit FS1 to the second affidavit) shows Mr Sammut speaking in a clear and much stronger voice than recorded on the previous day. The video was not passed onto the daughters by the defendant, as the daughters visited Mr Sammut on 17 February 2017. I infer that at the time Mr Sammut recorded this video he did not have the same appreciation of the nature of the withdrawals made by the defendant from his accounts, as he did subsequently. Even though he had been provided with information by Mr Albury and the defendant about withdrawals on 16 February 2017, as the video on that date showed he was in a very weak state.

[34] The defendant asserted in paragraph 33 of the second affidavit that when she was visiting Mr Sammut on 18 February 2017 he said to her in front of Mrs O'Donnell that

“You withdrew \$15,000 which is a lot and sent many ten thousand dollars to Thailand” and that when she denied it, Mr Sammut responded that he had seen the bank statements. (There is no evidence that the defendant transferred any of the cash she withdrew between 13 and 15 February 2017 to Thailand, but I infer that Mr Sammut assumed that was what she did with excess cash.) This evidence of the defendant about the circumstances in which that conversation took place on that day is inconsistent with Mrs O’Donnell’s denial about being present during any discussion of that nature and Mrs O’Donnell’s evidence that after the meeting with the doctor on 13 February 2017, Mrs O’Donnell was not present with Mr Sammut, when the defendant visited him in the intensive care unit. Mrs O’Donnell’s evidence was very frank and convincing and I prefer her evidence where it differs from the defendant’s evidence on this aspect. I consider the defendant was therefore mistaken when she asserted this conversation occurred in the presence of Mrs O’Donnell. As to the content of the conversation, I am mindful that the defendant’s English has its limitations, particularly in stressful situations, and that she therefore required an interpreter for the proceedings. I accept that it is likely that the defendant had a conversation with Mr Sammut in which he said something to the defendant about her taking tens of thousands of dollars and sending it to Thailand, as it is consistent with messages he sent her. It is likely that the conversation was more complicated than is recorded by the defendant. I will refer again to this aspect of the evidence when dealing with the defendant’s allegation that Mr Sammut was suffering from a delusion in respect of these matters.

[35] The defendant visited Mr Sammut on 19 and 20 February 2017.

[36] Mr Sammut and the defendant communicated by an application on their mobile telephones called “Line”. The defendant exhibited their messages sent in February 2017 to the second affidavit. On 20 February 2017 Mr Sammut messaged that “have t finished this visa or we will be too late” and refers to writing a letter in hospital. The defendant collected the car on 20 February 2017 and paid \$675 in cash for the repairs.

[37] Mr Sammut messaged the defendant at 6.50am on 21 February 2017:

“We will get through this but I will not have any one lie to me and steel monet from me. you must tell me what you will do to bring gthi money back to me. you tried to blame my daughter’s. I want to know you will ring your brother and tell him about it all. I must be able to trust any one around me I cannot trust you Aoy”

[38] At 7.12am on the same day Mr Sammut messaged that he had no money to pay his bills because the defendant sent it to Thailand. He said he wanted the defendant to tell his daughters that she was sorry she lied to them. Mr Sammut stated “I was dying but you stole from me”. He then sent a message asking the defendant to bring up his battery charger and she responded that she would not be visiting that day, because she did not feel well. The defendant explained in her oral evidence that she was sad when she received Mr Sammut’s messages about the withdrawal of money from his accounts.

[39] Ms Keighton accompanied the defendant when she visited Mr Sammut on 22 February 2017 and stood at the door, when the defendant was talking to Mr Sammut. Ms Keighton observed that Mr Sammut was angry with the defendant and heard him ask

her why she withdrew a lot of money and transferred it to Thailand. When the defendant said she told Mr Sammut that she only withdrew \$3,900 in total to pay for bills, she said that Mr Sammut said that was wrong because he “saw from my bank statement that you withdrew many ten thousand dollars out of my bank account and enjoy spending all of my money with Pat. And you leave me at the hospital. I nearly died. I won’t believe you again”.

- [40] The message the defendant sent at 10.29am on 22 February 2017 confirmed that her visit with Mr Sammut that morning did not go well. Mr Sammut messaged at 2.11pm on the same day to note that the defendant had not brought him clothes. Mr Sammut was moved from the intensive care unit to the palliative care ward on 22 February 2017.
- [41] Ms Keighton returned with the defendant to her home after the visit on 22 February 2017. Ms Keighton described how someone had broken into the house, the door to the internal bedroom had been broken, and some jewellery was on the kitchen bench. The defendant gave a similar description of the bedroom door being broken and the safety deposit box that was kept in the second bedroom was open and the money that Mr Sammut had been saving for their honeymoon trip and the jewellery boxes that had been stored in the safety deposit box disappeared. Subsequently Mrs Albury returned the defendant’s jewellery to her. Although Mrs Albury could not remember the date on which she had visited the matrimonial home, she acknowledged that she and her sisters entered the home and broke the bedroom door to get the clothes that their father asked to be buried in, as their father had told them what clothes he wanted for that purpose. Mrs O’Donnell was unclear on the date she and her sisters entered the house, but confirmed that the only time was to collect the clothes their father had requested to wear in his coffin. I do not place any significance on the daughters’ entry to the home. The daughters took the steps that they thought appropriate in carrying out their father’s wishes at that time. Communications between the defendant and the daughters had broken down by that stage and the daughters acted unilaterally in circumstances where they were having difficulty in getting responses from the defendant.
- [42] The defendant did not visit Mr Sammut on 23 February 2017. She had an English class to attend, was preparing documents for her visa application, and was upset about Mr Sammut not believing her the previous day. On that day, the defendant sent a message to Mr Sammut at 8.27am professing her love for him and explained in her evidence that she used sources on the internet to put the message together. At 8.37am on that day Mr Sammut referred again to the defendant having “stolen” from him and said “you are the only one to have my credit card. The bank close[d] down the account down when there was so much money missing every day”. At 11.13am on that day, the defendant sent another message professing her love for Mr Sammut. Later at 6.41pm and 9.31pm, Mr Sammut noted that he was still waiting for shorts and tee shirts.
- [43] The defendant accompanied by Ms Keighton visited Mr Sammut on 24 February 2017, when Mr Sammut raised with the defendant again whether she had stolen money and transferred it to Thailand which the defendant said she denied. Later that day the defendant dropped some clothes off for Mr Sammut at the reception for his room, as she did not want to see Mr Sammut’s daughters.

- [44] Ms Field who was a friend of both Mr Sammut and the defendant visited Mr Sammut when he had been moved to the palliative care ward. It was a day or two before Mr Sammut passed away (and therefore after Mr Sammut made the later will). She said that Mr Sammut told her that “Aoy has been a very bad lady” and he told her that the defendant had taken a lot of money out of his account and then quantified it as \$40,000. Ms Field said she told Mr Sammut that it was not \$40,000, as Ms Field had been with her on the first two occasions when she had drawn out \$1,000 on each occasion. According to Ms Field, Ms Sammut told her “it was lots of money and now I can’t pay my rates”.
- [45] Although the defendant went to the hospital intending to visit Mr Sammut on 25 February 2017, there were many people visiting and the defendant felt that she was made to feel unwelcome. On 26 February 2017 Mr Sammut signed the form to sponsor the defendant to migrate to Australia on the basis of her marriage to him.
- [46] The defendant saw Mr Sammut briefly in the morning of 27 February 2017.

Size of the estate

- [47] The total assets available for distribution before taking into account any costs payable from the estate for these proceedings and any further administration costs are \$1,386,115. It is not a small estate, but it is better described as modest rather than a large estate.

Instructions for the later will

- [48] As at February 2017, Mr Baker had known Mr Sammut for approximately 40 years in both professional and social capacities. Shortly after lunch on 23 February 2017, Mr Sammut telephoned Mr Baker advising that he was in the palliative care section of Bundaberg Base Hospital and that he wished to change his will. He said he wanted to leave the defendant the sum of \$50,000 rather than the provision which he had made in the earlier will. Mr Sammut told Mr Baker that “he had made a mistake by marrying Apinytree and that he had been tricked”. Mr Baker prepared a new will and he and his secretary Ms Prichard travelled separately to the nearby hospital to see Mr Sammut at about 4.30pm. When Mr Baker went to introduce his secretary to Mr Sammut, he greeted her and said he remembered her from when she had witnessed the earlier will (which was the case). Although on oxygen, Mr Sammut seemed to Mr Baker to be in good spirits and “in no way disorientated or confused”. Mr Baker advised Mr Sammut that he had prepared the new will that simply left the defendant a cash sum of \$50,000. Mr Baker read the will to Mr Sammut word for word. Mr Sammut confirmed the will was what he wanted. Mr Sammut executed the subject will in the presence of Mr Baker and Ms Prichard who also executed it as witnesses. Ms Prichard then left for another appointment and Mr Baker remained and chatted with Mr Sammut for 20 to 30 minutes.
- [49] Mr Baker noted that throughout their meeting “Frank was totally relaxed, alert and coherent and showed no signs of anxiety or confusion”. Mr Baker noted there was no indication that Mr Sammut was suffering from any loss of memory or suffering from any other cognitive impairment. Mr Baker considered that Mr Sammut appreciated that

he was married and had three daughters. Mr Baker made contemporaneous notes of his conversation with Mr Sammut, recording that Mr Sammut said that the defendant had told him that she would look after him, but that had not occurred, and he did not feel that the defendant deserved anything from his estate, but he was prepared to leave her \$50,000, as he had married her. Mr Sammut told Mr Baker that his wife had been stealing money from him while he was in ICU. At the end of the meeting Mr Baker suggested to Mr Sammut that he write out in his own words and in his own handwriting why he had decided to change his will.

- [50] By letter dated 15 March 2017, the defendant sent a letter to Mr Baker’s firm setting out her belief that Mr Sammut lacked the necessary testamentary capacity to make the later will. On instructions from the plaintiffs, Mr Baker wrote a letter on their behalf rejecting that assertion. Mr Baker prepared a *Larke v Nugus* statement dated 7 July 2017 that was provided to the defendant’s solicitors. The solemn form proceeding was commenced on 10 October 2017.

Testamentary capacity

- [51] The classic statement as to the meaning of testamentary capacity set out in *Banks v Goodfellow* (1870) LR 5 QB 549, 565 remains applicable:

“It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and being about a disposal of it which, if the mind had been sound, would not have been made.”

- [52] The plaintiffs have discharged the onus they bear of establishing a prima facie case that the later will is the last will of Mr Sammut. The instructions for the later will were given by Mr Sammut personally and the later will which was drawn to accurately reflect those instructions was read over to him before he signed it in the presence of Mr Baker and Ms Prichard. The evidence of Mr Baker and Ms Prichard puts beyond question that Mr Sammut knew and approved the contents of the later will.
- [53] The issue that was the focus of the evidence was whether Mr Sammut when he made the later will was under a delusion that the defendant had stolen lots of money from his accounts.
- [54] I infer from the evidence of Mr Sammut’s daughters, the set up of his bank accounts and credit card, and the evidence of the defendant, that Mr Sammut exercised full control over his finances and the household’s expenditures. Although the debit card Mr Sammut had provided to the defendant operated his NAB Classic banking account, it is apparent from the use the defendant made of the card prior to Mr Sammut’s hospitalisation that the card provided access to an account that remained in Mr Sammut’s name and the defendant was authorised to use the card to pay for expenses,

such as her pre-paid mobile telephone, from that account. There was not an outright gift by Mr Sammut of all the funds in that account to the defendant, but they were available for her use as required. The submissions made on behalf of the defendant to the effect that her withdrawal of the sum of \$900 “was the defendant’s money which she took from her own account” therefore does not accord with the evidence.

- [55] Mr Sammut had authorised the defendant to use his credit card to meet expenses of the household and other specified expenses, such as the visa application fee and the outstanding paint account, by giving the defendant the PIN to enable her to use the card. The fact that the defendant withdrew the bulk of the money from the NAB Classic banking account (\$900) in one transaction and around the same time withdrew \$1,000 on each of three consecutive days by way of cash advance on the credit card would have been alarming to Mr Sammut and was not in accordance with the terms on which Mr Sammut provided the debit card and the credit card to the defendant. Withdrawal of a lump sum by way of a cash advance on the credit card is not the same as using the credit card to pay for a specified expense. In view of the defendant’s connections with Thailand, including close family members who still resided there, it was not an unreasonable inference on Mr Sammut’s part to infer that the defendant was remitting excess cash obtained from his accounts to Thailand.
- [56] The defendant bears the onus of showing that Mr Sammut suffered from a delusion that she had stolen lots of money from his accounts. To someone like Mr Sammut who had exercised such tight control over his finances, the withdrawal of \$3,900 over three days was “lots of money”. It is likely from the conversations with Mr Albury and then Mrs Albury and the defendant herself that Mr Sammut was cognisant of the exact quantum withdrawn by the defendant in lump sums from his accounts. To the extent that the defendant, Ms Field and Ms Keighton suggest that Mr Sammut had said that the defendant withdrew \$40,000, \$15,000 or “many ten thousand dollars”, I do not consider that displaces the evidence that indicates Mr Sammut’s appreciation after 17 February 2017 of the actual amount and nature of the withdrawals. My observations of both Ms Field and Ms Keighton was they tended to be partisan in favour of the defendant in their characterisation of the conversations they heard or events they observed. If something was said by Mr Sammut to the defendant or may have been said by Mr Sammut in the presence of Ms Keighton or Ms Field to the effect that the defendant had taken much larger amounts than \$3,900, it was conveying the potential for his losses, if the defendant’s access to the accounts had not been stopped, and she had continued to make a withdrawal of \$1,000 per day. That is consistent with the concerns expressed in the handwritten statement of Mr Sammut dated 24 February 2017.
- [57] Applegarth J has conveniently summarised the law relating to a delusion that may preclude a finding of testamentary capacity in *Hamill v Wright* [2018] QSC 197 at [141]-[146]. Mr Sammut’s concern about the defendant’s conduct in withdrawing from his accounts the amount of \$3,900 over three days and the consequences if that conduct had continued was not a delusion in the relevant sense of being a “fixed and incorrigible false belief”. Mr Sammut’s concern was based on what the defendant actually did. The defendant fails to discharge the onus of showing that Mr Sammut suffered from a delusion when he made the later will.

Undue influence

- [58] A will must be made freely by a testator and not the result of undue influence. The onus of proving undue influence rests upon the defendant, as the person who alleges it and there must be clear evidence that undue influence was exercised: *Bailey v Bailey* (1924) 34 CLR 559, 571.
- [59] The defendant submits that the plaintiffs, Mrs O'Donnell and Mr Albury discussed the withdrawals made by the defendant on the credit and debit cards with Mr Sammut from 16 February 2017 onwards which amounted to undue influence exerted on him to change his will.
- [60] In light of Mr Baker's evidence as to the manner in which he received the instructions for the later will directly from Mr Sammut and his observations of Mr Sammut at the time the will was executed, the defendant cannot succeed in the undue influence claim in respect of the later will. There is also no evidence whatsoever from which I could infer that the discussions by Mr Albury or any of the daughters with Mr Sammut about the defendants' withdrawals of \$3,900 from his accounts were done to influence Mr Sammut to change his will, rather than discussing the fact that the withdrawals had occurred.
- [61] The plaintiffs therefore succeed in their claim to prove the later will in solemn form.

The basis of the defendant's claim for family provision

- [62] Although the defendant and Mr Sammut were officially married for less than three months at the date of his death, they were in a committed relationship from April 2015 which was a period of approximately 22 months. Mr Sammut looked after the defendant financially from April 2015. There were periods of separation, when the defendant's visa or family reasons required her to return to Thailand. These periods were two months between April and June 2015, five months between August 2015 and January 2016, six weeks between 15 April and 29 May 2016 and three weeks between 22 August and 12 September 2016. At the date of Mr Sammut's death, the defendant was totally financially dependent on him. Mr Sammut paid the defendant's living expenses and all the bills of the household. The defendant did the shopping, cooking and cleaning and Mr Sammut provided his credit card to her to enable her to buy what was needed for these chores. She went to English speaking classes conducted by Mr Sammut and one of his friends for backpackers. When Mr Sammut was in hospital for treatment in March 2016 for three weeks, she maintained the home and visited him daily.
- [63] The defendant is in good health. After Mr Sammut's death she worked as a labourer on a potato farm between June 2017 and January 2018. She has continued taking English classes to assist in securing employment. She performs cleaning and lawn mowing for friends. She now earns between \$120 and \$500 per week.
- [64] The defendant obtained her permanent residence visa on 25 July 2018 and will not be eligible to receive any payments from Centrelink until at least 25 July 2019.

- [65] In order to conduct the court proceedings, the defendant has borrowed \$16,774.70 from friends which will have to be repaid and she expects to owe her lawyers at least another \$60,000. She also owes \$15,000 to friends and relatives in Thailand, as she borrowed from them for living expenses after Mr Sammut's death, because she could not access any of his funds for living expenses. The defendant has not paid any rent to the plaintiffs for residing in the matrimonial home since Mr Sammut's death. The defendant has had a friend living with her since December 2018 who shares the payment of the utility bills with the defendant. The defendant owns jewellery worth about \$15,000. She owns some farm land in Thailand which she estimates is worth only \$7,000.
- [66] The defendant would like to remain in Australia and continue living in the matrimonial home.
- [67] In late 2018 the defendant completed a training course in traditional Thai massage. She is also interested in hotel management, as she had worked as a marketing manager in a hotel in Thailand. She would have to undertake a TAFE course for about one year to obtain Australian qualifications in that area. If she were to open a shop offering traditional Thai massage, she estimates she would need at least \$25,000 to invest in the business.

Jurisdictional issue

- [68] The two stage process that s 41(1) of the *Succession Act* 1981 (Qld) (the Act) requires the court to undertake was explained in the joint judgment of Mason CJ and Deane and McHugh JJ in *Singer v Berghouse* (1994) 181 CLR 201, 208-209:
- “It is clear that, under these provisions, the court is required to carry out a two-stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the ‘jurisdictional question’.”
- [69] What is involved in the jurisdictional question and the second stage inquiry was described in *Singer* at 209-210:
- “The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.

The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of

maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant.”

- [70] Mrs Albury was 50 years old when her father died. She is employed as a library assistant by the Regional Council. She and Mr Albury have three sons, but they are independent. Mr and Mrs Albury own a house which she values at \$400,000 and a car worth about \$80,000. Those assets are subject to liabilities that total \$275,000. Mrs Albury described her relationship with her father as close, as they spoke most days.
- [71] Ms Sammut was 47 years old when her father died. She is a teacher employed by Education Queensland. She has two sons whom she raised as a single mother, working and supporting her family after the birth of her second son in 1998. She married in June 2016. She has a house valued at \$300,000 and a car worth about \$15,000. Those assets are subject to liabilities of \$160,000. Ms Sammut considers that she and her sisters had “a strong, yet different relationship” with their father. Her father became the male figure in her sons’ lives.
- [72] Mrs O’Donnell was 42 years old when her father died. She is employed at a private school as a Pathways Coordinator in education. She and her husband have two sons aged 11 and 13 years. She and her husband have assets that have a total approximate value of \$322,000 which are subject to a liability of \$180,000. She deposed to the “affectionate and demonstrative love” that her father had for his daughters and their families.
- [73] The daughters were not enthusiastic about their father’s relationship with the defendant, but until the withdrawals from the credit card between 13 and 15 February 2017, they treated her with respect. Their visits to their father after the defendant started living in the matrimonial home may not have been as frequent as they were before the defendant’s arrival, but their lifelong relationship with their father overall remained strong, as was Mr Sammut’s recognition of the importance to him of his relationship with his daughters and their natural claims on his bounty, as reflected in both the earlier will and the later will.
- [74] In addressing the jurisdictional question in respect of the defendant’s claim, the competing claims on Mr Sammut’s bounty must be taken into account. The submission was made by Mr Wilson of Counsel on behalf of the defendant that the competing claims of the three daughters are weak, as the daughters have houses and settled circumstances and no significant financial needs of health issues. The snapshot of each daughter’s circumstances shows that she is in modest circumstances, although each is better off than the defendant. The competing claims are not evaluated, however, on whether the daughters would succeed in a family provision application. That is not the test. The competing claims are taken into account on the basis they are the claims of persons who would expect to be benefited under a deceased’s will, even if those persons would not be eligible by virtue of their circumstances to make a family provision claim: *Re Sutton* [1980] 2 NZLR 50, 53. This is reflected in how the jurisdictional issue is described in *Singer* at 209-210.

- [75] The plaintiffs seek to draw an analogy between the defendant's claim for family provision and that of Mrs Manly in *Manly v The Public Trustee of Queensland* [2007] QSC 388 where Mrs Manly's application was dismissed on the jurisdictional question. Mrs Manly's appeal was dismissed with the Court of Appeal approving the seven reasons that McMeekin J had identified at first instance at [97]-[107] for Mrs Manly's failure on the jurisdictional issue: *Manly v The Public Trustee of Queensland* [2008] QCA 198.
- [76] *Manly* concerned a small estate comprising assets valued at about \$476,000, excluding specific bequests. Mr Manly was born in 1922 and died in June 2005. There were three sons of his first marriage born in 1947, 1950 and 1951. Mr Manly had no contact with his sons after he separated from his first wife in 1953 until about 1987. He was then living in a relocatable home on the Gold Coast and in receipt of a Veteran's Affairs pension. The sons lived interstate, but thereafter kept in contact with their father. Mrs Manly was born in the Philippines in 1954 and met Mr Manly in about 1994. They exchanged letters and telephone calls and commenced a sexual relationship in 1998. Mrs Manly worked as a nurse. In October 2001 Mrs Manly came to Australia and commenced to live with Mr Manly in the relocatable home. They married in December 2001. Mr Manly's brother died in September 2002 and Mr Manly inherited the sum of \$312,000 which purchased the house property that comprised the substantial asset in his estate at the date of his death. Mr Manly had also received from his brother's estate a one-half interest in certain land in New South Wales that he relinquished in favour of his sons which resulted in each receiving during Mr Manly's lifetime a sum of \$100,000.
- [77] McMeekin J at first instance at [40] found that there was an agreement between Mr Manly and Mrs Manly prior to their marriage to the effect that Mrs Manly was to use her skills as a trained nurse to care for Mr Manly until his death and that in return she would become his wife, be entitled to residency in Australia and entitled to a pension from the Department of Veteran's Affairs. Mr Manly left his residuary estate under his last will made in May 2005 equally to his three sons and Mrs Manly which was worth about \$110,000 to her. In addition there was a specific bequest of a motor vehicle valued at \$7,000 in her favour.
- [78] The seven reasons listed by McMeekin J that resulted in the dismissal of Mrs Manly's application can be summarised as the smallness of the estate, the arrangement in place between Mr and Mrs Manly before they married, the short duration of the marriage of about 42 months, there had been no contribution by Mrs Manly to the acquisition of the principal asset of the estate, the provisions in the will went a considerable way to meeting the duty of a testator to his widow described as a broad general rule by Powell J in *Luciano v Rosenblum* (1985) 2 NSWLR 65, 69-70, the sons had a legitimate claim upon Mr Manly's bounty, and the abandonment by Mr Manly of his sons for 34 years was not overcome by the gift made by Mr Manly of his interest in the New South Wales land inherited from his brother's estate to his sons in his lifetime.
- [79] The claim by the defendant for family provision can be distinguished from the position of the applicant in *Manly* on the basis that Mr Sammut's estate is significantly larger than the estate in *Manly*, Mrs Manly received about one-quarter of the small estate under Mr Manly's will and the merits of Mrs Manly's claim had to be viewed in the

context of the pre-matrimonial arrangement between Mr Manly and her. Mr Sammut did anticipate the defendant would provide the ongoing care he required, but his decision to marry the defendant was a deliberate choice to make the defendant his wife. Even though the relationship between Mr Sammut and the defendant was much shorter than the marriage in *Manly*, the short duration was attributable to Mr Sammut's death occurring earlier than he had obviously anticipated when he married the defendant. The defendant is not penalised in her family provision application by the untimely death of her husband.

- [80] On the basis that the defendant was Mr Sammut's widow and had a legitimate expectation of appropriate maintenance from him upon his death for her to continue to live in Australia, and having regard to both her circumstances and the size of Mr Sammut's estate, a bequest of \$50,000 falls short of being a proper provision for the defendant. The jurisdictional question is one that must be answered in the defendant's favour.

Disentitling conduct

- [81] Under s 41(2)(c) of the Act, the court may refuse to make a family provision order where there is disentitling conduct.
- [82] The plaintiffs rely on the defendant's conduct whilst Mr Sammut was in hospital and particularly the fact that she withdrew \$3,000 by way of cash advances from the credit card and \$900 from the debit card between 13 and 15 February 2017 as disentitling conduct. The plaintiffs also rely on the defendant's failure to respond to Mr Sammut's requests such as to bring his clothes and battery charger to the hospital and to visit him in hospital.
- [83] The defendant was foolish in withdrawing the full amount that she thought she could withdraw on a daily basis on Mr Sammut's credit card for three days running which was more cash than she needed for her immediate needs. She may have felt vulnerable because Mr Sammut was dying and was concerned as to how she would meet her expenses, when Mr Sammut passed away. Her conduct is more appropriately characterised as foolishness rather than so lacking in honesty as to amount to disentitling conduct. There was only a fortnight between the time when Mr Sammut was put into a coma and his death. During that time the defendant's relationship with Mr Sammut's daughters broke down and she was reluctant to visit Mr Sammut when the daughters were also visiting. The fact that the defendant did not respond to Mr Sammut's requests for things to be brought from home as quickly as he wished during this fortnight is conduct that falls far short of disentitling conduct in the circumstances.
- [84] The plaintiffs have not discharged the onus they bear to show disentitling conduct on the part of the defendant.

What provision should be made for the defendant?

- [85] One of the arguments advanced on behalf of the plaintiffs that was relevant to the adequacy of the provision made for the defendant under the later will was the fact that

by virtue of Mr Sammut's signing the visa application before he died, the defendant was given the advantage of being able to remain in Australia and to qualify for Centrelink benefits. The potential for Centrelink benefits is not a relevant consideration, in contrast to the conferral on the applicant in *Manly* of the right to succeed to a veteran's widow's pension. That was a pension that accrued to Mrs Manly by virtue of her being Mr Manly's widow and was expressly anticipated by the arrangement entered into by the parties before their marriage. The defendant's entitlement to apply for Centrelink benefits, if she happens to be unemployed from July 2019 onwards, is a right that applies to all qualified persons in Australia. It is a protection, if there are periods of unemployment. What is more relevant to the defendant's claim for family provision is the fact that she is healthy and of an age where she is still likely to find employment either in unskilled work or in the areas where she is qualified (Thai massage) or proposes to pursue further qualifications (hotel management).

[86] The defendant sought to rely on the approach of the English Court of Appeal in *Cunliffe v Fielden* [2006] Ch 361 to a family provision claim by a widow where the marriage was relatively short. The legislative provision under consideration in *Cunliffe* differs relevantly from s 41 of the Act and the jurisprudence applied in that case is not consistent with the two stage process endorsed in *Singer*.

[87] A proper provision for the defendant in the circumstances would be a place to reside and an additional amount of cash as a buffer which will assist in meeting such debts as those she has incurred whilst these proceedings have been unresolved and covering other vicissitudes of life, such as any period of unemployment. Under the earlier will Mr Sammut had proposed leaving the residential duplex at McNeilly Street to the defendant valued at \$330,000 (exhibit 4), so that she could live in one of the units and obtain income from renting the other. Prior to Mr Sammut's death, it appears that the defendant and Mr Sammut may have rented out a room or rooms in the matrimonial home and that the defendant has shown since his death that she is not averse to continuing that practice. The matrimonial home is valued at \$265,000 (exhibit 2). In view of the defendant's preference for continuing to live in the matrimonial home, I propose that be the real property that is given to her by way of further and better provision. The sum of \$50,000 that was the gift to the defendant under the later will remains an appropriate amount to ensure adequate provision is made under Mr Sammut's will for the defendant in conjunction with the matrimonial home. This further provision for the defendant recognises the daughters' valid competing claims on their father's bounty.

Orders

[88] During the oral submissions at the end of the trial, I endeavoured to explore the question of the costs of the proceedings with the parties. Subject to formal submissions being made on costs, I indicated my inclination to favour the defendant with a costs order on the indemnity basis in respect of the family provision proceeding and the applications that were heard on 8 November 2018, but it seemed that Mr Baker's evidence in the solemn form proceeding was so compelling, that there was a strong argument for ordering the defendant to pay the plaintiffs' costs otherwise of the solemn form proceeding to the extent that costs were incurred in respect of that proceeding that were additional to those incurred by the plaintiffs in the family provision proceeding.

[89] It was not possible to resolve the question of costs, however, without the parties knowing the outcome of the proceedings and the reasons for the decision. I will therefore publish these reasons, make the orders to dispose of the issues in the proceedings in accordance with these reasons and adjourn the question of the costs of the proceedings to a date to be fixed. That will give the parties an opportunity either to agree on the appropriate costs orders or to agree on a timetable for the exchange of written submissions on costs. Unless either party wishes to have a hearing to dispose of the question of costs, I will endeavour to deal with the question of costs on the basis of the parties' written submissions. Adjourning the question of the costs of the proceedings to a date to be fixed will facilitate this suggested method of disposing of the question of costs on the papers.

[90] The orders that I will make in the proceeding to prove the later will in solemn form are:

1. The Court pronounces for the full force and validity of the will of Frank Anthony Sammut (the deceased) late of 55 Kensington Street, Bundaberg in the State of Queensland dated 23 February 2017, a copy of which is Exhibit A to the affidavit of Leanne Frances Albury filed on 6 February 2018 in proceeding BS13643 of 2018 (the said will).
2. Subject to the formal requirements of the Registrar, probate of the said will be granted to Leanne Frances Albury and Toni Anne Sammut as executors.
3. The counterclaim is dismissed.
4. Adjourn the question of the costs of the proceeding to a date to be fixed.

[91] The orders that I make in the family provision proceeding are:

1. It is ordered that adequate provision be made for the proper maintenance and support of the applicant Apinyatree Wutitum out of the estate of Frank Anthony Sammut deceased (the deceased) by substituting the following for clause 5.1 of the last will of the deceased dated 23 February 2017:

“5.1 (a) I give and devise to my wife Apinyatree Wutitum the real property that I own at 55 Kensington Street, Norville in the State of Queensland described as Lot 4 on Registered Plan 72587 in the Country of Cook Parish of Bundaberg for her own use and benefit absolutely.

(b) I give and bequeath to Apinyatree Wutitum the sum of \$50,000 for her use and benefit absolutely.”

2. Adjourn the question of the costs of the proceeding to a date to be fixed.