SUPREME COURT OF QUEENSLAND

CITATION:	*Black & Anor v Scotson* [2019] QSC 272
PARTIES:	**LESLEY ANNE BLACK AND THOMAS WILLIAM BLACK** **as executors of the will of JAMES McINALLY** (plaintiffs) **v** **MICHAELA ALICE SCOTSON** (defendant)
FILE NO:	13032 of 2018
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	6 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 and 26 July 2019; written submissions received 28 July 2019
JUDGE:	Ryan J
ORDERS:	**1. I will pronounce in solemn form for the force and validity of the will of James McInally dated 4 February 2018;** **2. I will hear the parties further on the question of the grant of probate, including a grant on conditions; and** **3. I will hear the parties further as to the final form of order and costs.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTORY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where the testator executed wills in 2007 and 2018 – where suspicious circumstances attended the execution of the 2018 will – where plaintiffs seek a declaration as to proof in solemn form of the 2018 will – where plaintiffs to prove testamentary capacity and intention – whether testator knew and approved of contents of 2018 will SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – TO WHOM PROBATE GRANTED – PASSING OVER OF EXECUTOR AND OTHER MATTERS – fitness and propriety of named executor –

when named executor required to investigate transactions involving his wife

Evidence Act 1977 (Qld)

Powers of Attorney Act 1998 (Qld)

Succession Act 1981 (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

Bailey v Bailey (1924) 34 CLR 558

Baldwin and Neale v Greenland [2006] QCA 293

Baldwin v Greenland [2005] QSC 386

Banks v Goodfellow (1870) LR 5 QB 549

Barry v Butlin (1838) 12 ER 1089

Browne v Dunn (1893) 6 R 67

E Carr & Son Pty Ltd v Hood and Carr as Executors of the Estate of the late Edward Carr [2003] QSC 453

Frizzo & Anor v Frizzo & Ors [2011] QCA 308

Frizzo & Anor v Frizzo & Ors [2011] QSC 107

Hamill and Anor v Wright and Ors [2018] QSC 197

In the Lands and Goods of Richard Bond [1916] St R Qld 218

Londy & Pender as executors and trustees of the Will of Mary Hilary Kavanagh (deceased) v Kavanagh [2018] 1 Qd R 646

Pates v Craig [1995] NSWSC 87

Re Pleasance, unreported, Ambrose J, 14 December 1990

Read v Carmody, unreported, NSWCA, Powell JA, 23 July 1998

Ruskey-Fleming v Cook [2013] QSC 142

Veall v Veall [2015] VSCA 60

Vernon v Watson [2002] NSWSC 600

Worth v Clasohm (1952) 86 CLR 439

COUNSEL: G R Dickson for the plaintiffs
J A Sheean for the defendant

SOLICITORS: Michael Cooper Lawyer for the plaintiffs

Smith & Stanton for the defendant

Overview

[1] On 19 January 2018, James McInally was admitted to hospital after a fall. He was aged 86. He was a widower, with two daughters, Lesley Black and Carol Scotson. On 4 February 2018, in hospital, Mr McInally signed his last will and testament. He died a few weeks later. The plaintiffs, Lesley Black and her husband, seek a declaration for the force and validity of the will of James McInally, dated 4 February 2018, in solemn form.

[2] Mr McInally's 2018 will revoked an earlier will made in 2007.

[3] In his 2007 will, Mr McInally left his estate (if his wife did not survive him) to his two daughters, to be shared equally. Mr McInally's wife, Barbara, died on 24 June 2016.

[4] In his 2018 will, Mr McInally left $5000 to a neighbour and the balance of the estate to his two daughters and his son-in-law (Thomas, known as Bill, Black), to be shared equally.

[5] Ms Scotson was informed of the content of the 2018 will before it was executed. The 2018 will left her "worse off" than the 2007 will. Apart from the $5000 gift to a neighbour, the 2018 will reduced Ms Scotson's share of the balance of her father's estate from one-half to one-third. And of course, under the 2018 will, Mr and Mrs Black as a couple received two-thirds, to Ms Scotson's one-third, of the balance of the estate.

[6] Mr McInally died on 24 February 2018. His death certificate lists his cause of death as ischemic heart disease and chronic renal failure.

[7] Very shortly after his death, Ms Scotson and Mrs Black withdrew $90,000 from Mr McInally's term deposit and distributed it in accordance with the terms of Mr McInally's 22018 will – in that each of them, and Mr Black, received one-third ($30,000) of that amount.

[8] Mrs Black kept $10,000 of her $30,000 and placed $20,000 of it into her father's transaction account to pay for his funeral expenses and the gift to his neighbour. Her expectation was that the money would be sorted out in the course of the administration of the estate.

[9] Carol Scotson died on 26 April 2018.

[10] On 26 June 2018, on behalf of her estate, her daughter, the defendant, raised suspicious circumstances attending the execution of the 2018 will and caused a caveat to be filed in the Supreme Court, requiring proof in solemn form of any will of the deceased.

Matters in dispute

[11] The defendant initially put the plaintiffs to proof on the basis of circumstances said to raise a suspicion that Mr McInally did not know and approve of the contents of his will. Those circumstances included –

- Bill Black's involvement in the preparation of the 2018 will (which added him as executor and beneficiary);
- differences between the draft will (which referred to the deceased's dog "Molly") and the 2018 will (which referred instead to his "late wife Barbara");
- that while Mr Hoare was known to Mr and Mrs Black, Mr McInally did not know him;
- that Mr Hoare was not present when the deceased executed the 2018 will;
- that the deceased was 86, and died within three weeks of executing the 2018 will; and
- that the 2018 will changed the existing, long standing scheme of the deceased providing for his estate to be divided equally between his daughters were his wife to predecease him.

[12] By the time of the hearing, the defendant challenged Mr McInally's testamentary capacity also.

[13] Additionally, the defendant complained about the appointment of Mr and Mrs Black as executors of the 2018 will. She asserted that they were not fit and proper people to hold that position.

[14] The challenge to their fitness and propriety was based, essentially, on allegations that –

- Lesley Black, who (with her sister) held a power of attorney for her father's financial matters, withdrew from the deceased's bank account, whilst he was in hospital and after his death, over $31,000;
- her husband received $30,000 from the deceased's bank account two days after his death; and

- Mr Black became the registered owner of the deceased motor car – a Nissan Tiida – without paying the deceased for the car.

[15] The defendant alleged that, by virtue of section 87 of the *Powers of Attorney Act* 1998, the deceased was presumed to have been induced by Mrs Black's undue influence to make those payments and transfer his car.

[16] The defendant alleged, as further indications of the plaintiffs' unsuitability as executors, that –

- one or both of them withdrew $7000, and not $5000, to give to Mr McInally's neighbour;
- they made payments from the deceased's bank account which were not in pursuance of the administration of his estate; and
- Mrs Black did not keep records of the transactions she conducted on the deceased's bank account.

[17] In their reply to the defence, among other things, the plaintiff asserted that the Nissan Tiida was still in the deceased's name but that, in about June 2016, before Mrs Black became the deceased's attorney, the deceased "gifted" the car to Mr Black. Thereafter, the plaintiffs asserted, Mr Black paid for its registration and maintenance.

[18] They also asserted that the decision to pay Mrs Kennedy $7,000 rather than $5,000 was a joint decision of the executors, including Carol Scotson, although no evidence was led to that effect.

[19] By the time of the hearing, Mrs Black had renounced her right and title to the probate and execution of the will – leaving only Mr Black's fitness and propriety to be considered.

The history of the testator's 2018 will

[20] On 9 July 1992, the deceased signed a will which left the whole of his estate to his wife, Barbara McInally, unless she failed to survive him for a month, in which case he left his estate to his daughters in equal shares. He appointed his wife or, were she not to survive him for a month, his daughter Lesley Black, as his executor.

[21] On 23 February 2007, he signed a will, revoking all former wills and testamentary dispositions. In that will, he left the whole of the estate to his wife, unless she failed to survive him for a month, in which case, he left his estate to his daughters in equal shares. He appointed as

executor his wife, or were she not to survive him for a month, his two daughters, Lesley Black and Carol Scotson.

[22] Paragraph 6 of the 2007 will explained that it had been made in fulfilment of an agreement between Mr McInally and his wife to make mutual wills. It included the following –

> We agreed at the time of execution of this will and of her will (under which we benefit from each other's estate) that each of us is always entitled to revoke his or her will during our joint lives and the survivor likewise after the death of the first of us to die to the intent that each of us is free to execute a new will or codicil at any time containing such provisions as he or she sees fit.

[23] Barbara McInally died on 24 June 2016.

[24] In late 2017, Mr McInally spoke to Mr and Mrs Black about changing his will.

[25] A draft of the 2018 will was prepared by Mr Black on the strength of a conversation he had with Mr McInally whilst he was in hospital. The draft prepared by Mr Black provided for the appointment of Lesley Black, Carol Scotson and himself as executors and trustees. And it included the following bequest –

> I bequeath the sum of $5,000 to my neighbour Ann Kennedy acknowledging the support and care she has given both myself and Molly. I sincerely hope that Ann will use this money for a trip to Scotland.

[26] Mollie (not "Molly") was Mr McInally's dog.

[27] The draft provided for the residue of the estate to be divided, equally, between Lesley Black, Carol Scotson and Thomas Black.

[28] The draft will was reviewed by a solicitor (Mr Hoare) who redrafted it into a more formal document.

[29] The solicitor assumed that the "Molly" referred to in the draft was Mr McInally's late wife. Reflecting that assumption, the solicitor's first version of the 2018 will referred to the care that Ann Kennedy had given to Mr McInally and his "late wife Molly".

[30] The error was noted by Lesley Black and corrected by the solicitor. The version of the 2018 will which was signed referred to Mr McInally's "late wife Barbara". There was no change to the distribution of the residue between the draft prepared by Mr Black and the signed will.

Legal issues

[31] Before a will can be admitted to probate, it must be shown that its maker had sufficient testamentary capacity and testamentary intention.

[32] A testator of sound mind, memory and understanding has testamentary capacity. A testator who knows and approves of the content of his or her will has testamentary intention. It does not automatically follow that a testator with testamentary capacity has testamentary intention. However, in the absence of suspicious circumstances, proof of testamentary capacity and due execution of an instrument as a will creates a presumption that the testator knew, and approved of, the content of the will.

Authorities

[33] The classic statement of the meaning of testamentary capacity is found in the judgment of Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565:

> 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 bring about a disposal of it which, if the mind had been sound, would not have been made.

[34] Counsel for the plaintiff referred to *Hamill and Anor v Wright and Ors* [2018] QSC 197 and *Ruskey-Fleming v Cook* [2013] QSC 142, in which Justices of this Court have further explained the meaning of testamentary capacity.

[35] In *Hamill and Anor v Wright and Ors*, Applegarth J explained that the *Banks v Goodfellow* test may be said to have four elements; that is, the testator –[1]

1 must be aware, and appreciate the significance, of the act in the law upon which he or she is about to embark;

2 must be aware, at least in general terms, of the nature, extent and value of the estate over which he or she has a disposing power;

3 must be aware of those who may reasonably be thought to have a claim upon his or her testamentary bounty, and the basis for, and nature of, the claims of such persons; and

4 must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.

[36] In *Hamill*, his Honour had to consider whether the testator suffered from delusions which were material to his testamentary capacity. In that context, of the fourth element, his Honour said –

> As to the last element, in the words of *Banks v Goodfellow*, no disorder of the mind should poison his or her affections or pervert his or her sense of right, nor any insane delusion influence his or her will, nor anything else prevent the exercise of his or her natural faculties. In short, the test requires proof of the absence of delusions that are material to the testator's decision to make a testamentary disposition.

[37] In *Ruskey-Fleming v Cook*, Mullins J was required to determine whether a 91 year old had testamentary capacity and knew and approved of the contents of a will made in 2007. At the time he made his will he was, according to hospital records, displaying "marked cognitive impairment" and "nocturnal confusion" and test results suggested significant cognitive impairment.

[38] In determining the testator's testamentary capacity, her Honour began with the classic statement from *Banks v Goodfellow* and then considered *Pates v Craig* [1995] NSWSC 87, in which the court considered the question of the testamentary capacity of an elderly person in cognitive decline. Her Honour quoted from the judgment of Santow J at 4 (citations omitted) –

> "Unsoundness of mind may be occasioned by physical infirmity or advancing years. However, while extreme age or illness will call for vigilant scrutiny by the Court, neither is of itself conclusive evidence of lack of testamentary capacity. Age or illness will only displace a prima facie case of testamentary capacity if

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[1] At [140] – taken from *Read v Carmody* (NSWCA 23 July 1998, unreported; BC9803374) pre Powell JA.

> there is evidence the deceased's mental facilities had been so affected as to make him or her unequal to the task of disposing of his or her property. That is, the decay of intelligence must have been to such an extent that the proposed testator did not appreciate the testamentary act in all its different bearings …"

[39] In *Ruskey-Fleming*, Mullins J was dealing with a will signed by a testator on 8 June 2007 in the presence of his solicitor, after that solicitor (Mr Devlin) had satisfied himself of the testator's testamentary capacity.

[40] The testator's cognitive decline had been evident since mid-2006. Her Honour observed that although Mr Devlin genuinely believed that the testator had testamentary capacity at the time at which he executed the will, his opinion did not displace the court's role in deciding whether in fact the testator had testamentary capacity.

[41] Her Honour observed that the case was unusual because no medical opinion evidence was called about the effect of the testator's cognitive decline at the time he signed the 2007 will.

[42] Of a Mini Mental State Examination (MMSE), which was administered a few days after the will was executed, and on which the testator performed very poorly, her Honour said –

> [65] … The result of the MMSE may be an indicator of cognitive impairment, but it is a blunt instrument and must be considered in conjunction with other evidence of the testator's capacity at the time of making the will, as there were observed fluctuations in the testator's level of confusion and orientation.

[43] Her Honour reached the conclusion that the person propounding the 2007 had not discharged the onus of proving, on the balance of probabilities, that the testator's cognitive deficits, in conjunction with his advanced age and other illnesses, did not prevent him from having testamentary capacity, or being up to the task of disposing of his property, when he made his 2007 will.

[44] Applegarth J set out the operation of the burden of proof in matters of this kind in *Hamill*. His Honour said (footnotes omitted) –

> [147] The burden of proof lies with the party who seeks to propound the will. This includes satisfying the Court that the testator possessed the required testamentary capacity. A presumption of capacity arises where a will is rational on its face and duly executed. Where the evidence as a whole is sufficient to throw doubt upon the testator's competency, then the Court

> must decide against the validity of the will unless it is affirmatively satisfied that the testator was of sound mind, memory and understanding when he executed it. The issue is decided according to the civil standard of proof. The existence of a doubt is not enough to displace the presumption. Instead, a doubt requires "a vigilant examination of the whole of the evidence which the parties place before the Court". That examination having been made, a residual doubt is not enough to defeat the claim for probate unless "it is felt by the Court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possesses sound mind, memory and understanding at the time of its execution".
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> [148] …
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> [149] I respectfully adopt the summation of principle concerning the onus of proof stated by Meagher JA in *Tobin v Ezekiel*. In short, if the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally competent. That presumption may be displaced by circumstances which raise a doubt as to the existence of testamentary capacity. Those circumstances shift the evidential burden to the party propounding the will to show that the testator was of "sound disposing mind". That doubt, unless resolved on a consideration of the evidence as a whole, may be sufficient to preclude the Court being affirmatively satisfied as to testamentary capacity.

[45] Further, in the context of considering whether a delusion affected the testator's mind when he made the will, his Honour considered "lucid intervals". His Honour said –

> [152] A testator who suffers from delusions may make a valid will if it is shown that the will was made in a lucid interval, for example, if it is shown that there was no delusion at the time the will was made …

[46] In *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107, another case to which I was referred by the plaintiffs, Applegarth J discussed the onus of proof in the context of a testator who was ill. In remarks endorsed by the Court of Appeal,[2] his Honour said (footnotes omitted)–

> [22] 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". More recently, Kirby P (as he then was) has articulated the principle as follows [*Re Griffith; Easter v Griffith* (1995) 217 ALR 284 at 295]:

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[2] [2011] QCA 308, [24].

> "In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent – more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will … Were the rule to be otherwise, so many wills would be liable to be set aside for want of testamentary capacity that the fundamental principle of our law would be undermined and the expectations of testators unreasonably destroyed."

In part, this reflects the fact that the *Banks v Goodfellow* test is always brought to bear "on existing circumstances of modern life". Twenty-first century society is considerably more complex than that of 1870; life expectancy is much longer and the population older. The courts do not require a testatrix to know precisely the value of her individual assets, or even or certain classes of assets. That would particularly apply as one moves up the scale in terms of size and complexity of the estate.

[23] Of course, the onus of proving that the testatrix had testamentary capacity at the time she made her will lies on the party propounding that will. It is a question determined on the balance of probabilities, based on the whole of the evidence. A presumption of validity arises where the proponent demonstrates a duly executed will that is rational on its face. The party impugning that will must then displace the *prima facie* case with "clear evidence … that the illness of the [testatrix] so affected [her] mental faculties as to make them unequal to the task of disposing of [her] property". While extreme age or grave illness are circumstances that will attract the vigilant scrutiny of the Court, neither is, of itself, sufficient to establish incapacity. The question always is whether those or other circumstances so affected the testatrix's faculties as to render her unequal to the task of disposing of her property.

[24] If, however, doubt *is* raised as to the testarix's mind, memory and understanding, then the Court is thrown back onto an examination of the evidence as a whole to determine whether the proponent has established affirmatively that the testatrix was of sound mind at the time of executing the will. As was said in *Worth v Clasohm:*

> "The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution".

[25] In embarking on that examination, opinion evidence may be led, but courts are not obliged to give it a great deal of weight. Justice Mullins has recently

> reiterated the propositions put forward by Isaacs J (as he then was) in *Bailey v Bailey*. Those propositions, relevantly, are (1) that opinions of witnesses as to testamentary capacity are "usually for various reasons of little weight on the direct issue"; and (2) that, while such opinions are not without some weight, "the Court must judge from the facts they state and not from their opinions".

Suspicious circumstances

[47] In this case, the plaintiffs accepted that the defendant appropriately raised "suspicious circumstances" attending the making of the 2018 will. The suspicious circumstances bear upon the way in which testamentary intention (that is, Mr McInally's knowledge and approval of the contents of the 2018 will) must be proven.

[48] Counsel for the plaintiff provided me with an outline of the operation of the doctrine of suspicious circumstances which was not challenged by counsel for the defendant. Briefly –[3]

- If there are no suspicious circumstances suggesting that a testator did not know and approve of the will, the proof of his capacity and the due execution of the instrument creates a presumption that he knew and approved of its contents;
- That presumption does not arise where suspicious circumstances exist – in which case the proponents of the will have the burden of removing the suspicion by proving that the testator knew and approved of the contents of the instrument;
- The proponents of the will must remove the suspicion so as to show that the testators "mind" is to be "found" reflected in the will that is propounded (see *Vernon v Watson* [2002] NSWSC 600 at [3]); and
- Where there are suspicious circumstances, a court must be vigilant to ensure that the case is fully proved.

[49] The plaintiffs referred to *Barry v Butlin* (1838) 12 ER 1089, in which Baron Parke explained that suspicion was aroused by a will prepared by a party who benefited from it –

> If a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

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[3] Taken from Thomson Reuters Westlaw *Australian Succession Law* online [135.1210].

[50] The plaintiffs also referred to a decision of Boddice J in *Londy & Pender as executors and trustees of the Will of Mary Hilary Kavanagh (deceased) v Kavanagh* [2018] 1 Qd R 646 in which his Honour referred to *Veall v Veall* [2015] VSCA 60 for its consideration of propositions relevant to the raising of suspicious circumstances (citations omitted by his Honour) –[4]

> [58] In *Veall v Veall*, Santamaria JA considered the relevant propositions in relation to the raising of suspicious circumstances as to the testator's knowledge and approval of the contents of the Will:
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> "[173] Knowing and approving of the contents of one's Will is traditional language for saying that the Will "represented [one's] testamentary intentions"'. 'Testamentary capacity' and 'knowledge and approval' are distinct concepts. The former is a necessary but not a sufficient condition for the establishment of the latter. In *Hoff v Atherton,* Chadwick LJ said:
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> '[I]t may well be that where there is evidence of a failing mind – and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the Will – the court will require more than proof that the testator knew the contents of the documents that he signed. If the court is to be satisfied that the testator did know and approve of the contents of his Will – that is to say, that he did understand what he was doing and its effect – it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect ...'
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> [174] The circumstances that arouse suspicion will vary. The fact that a beneficiary took part in the preparation of the will is only an obvious example of a circumstance creating suspicion. In *Wintle v Nye*, Viscount Simonds said:
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> 'It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed.'
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> [175] …

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[4] I have removed some statements from the passages quoted by his Honour because they are not relevant to the present matter.

> [176] Proof that the will was read by or read to the testator before its execution may not be sufficient; nor will evidence that the will was explained to the testator.
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> [177] …
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> [179] It is the testator's understanding that is decisive: the issue to be determined is whether the testator knew and approved of the contents of the will. Sufficiency of evidence will depend upon the circumstances of the case. In *Tobin v Ezekiel*, Meagher JA put is as follows:
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> 'Evidence that the testator gave instructions for the will or that it was read over by or to the testator is said to be 'the most satisfactory evidence' of actual knowledge of the content of the will: *Barry v Butlin …*; *Gregson v Taylor …*; *Re Fenwick …* What is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case … Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it. In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction … That requires that it be affirmatively established that the testator knew the contents of the will and appreciated the effect of what he or she was doing so that it can be said that the will contains the real intention and reflects the true will of the testator …'

[51] In the present case, to succeed in their claim for a declaration for the force and validity of the 2018 will in solemn form, the plaintiffs must prove, on the balance of probabilities, on the whole of the evidence, that at the time of signing his will, Mr McInally had testamentary capacity and that he knew and approved of the contents of the instrument he signed.

[52] I will set out now the evidence relevant to testamentary capacity and intention in this case.

Hospital records

[53] On their face[5] (because expert witnesses were referred to almost none of these records), the following extracts from the notes are of relevance :

18 May 2017	**Occupational Therapy Initial Interview** The notes of this interview nominate "Lesley Black" as the deceased's "EPOA" (perhaps "external provider of assistance") Against "Toilet", they note "rails" and "supportive dtr"[6] Under the heading "Previous functional status and activity participation", they note that the following are undertaken by "daughter": Laundry Shopping Medication Management Finance Management Wheelie Bin Mail It is noted that the deceased "doesn't drive" "family".
18 May 2017	A student of Occupational Therapy, Lauren Webber, administered the "Montreal Cognitive Assessment" the "**MOCA**". The deceased scored 19 out of 30 in that assessment, which noted at the bottom "Normal $\geq$ 26/30".
18 January 2018	The deceased was admitted to the Mater Hospital after a mechanical fall, against a history of multiple falls, which caused a fracture to his spine.
19 January 2018	The "**Referral to Discharge Coordinator**" form notes that the deceased "currently receives services" and uses Anglicare. The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part A**" form

[5] To the extent that I was able to read the handwriting of the authors of the notes and the reports.

[6] Presumably "daughter".

	records: Q: Communication: Has the patient themselves been able to provide clearly an explanation in English their reason for hospitalisation? A: Yes. The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". An entry in the **progress notes** at 05.45 states – "pt still complaining on (sic) neck pain – refusing pain relief" An entry at 13.35 states – "Discharge co-ordinator: Referral received met with pts Daughter and Son-in-law. Pt lives alone in a single level house with ramp access. Pt well set up with modifications and equipment … Pt's Daughter and son-in-law assist 3+ times per day with stand transfers, hygiene, meals and medications. Daughter reports occasional cognitive/memory issues. Pt doubly incontinent … Daughter reports pt has personal alarm but rarely wears it. Pt was not wearing alarm and did not call out at time of fall – family were in the other room … Pt's Daughter states she believes the pt will want to return home. Pt's daughter and Son-in-Law are happy to continue caring for the pt as they have been on discharge …" An entry at 15.50 by a physiotherapist states – "…Able to t/f to mobility scooter and uses this exclusively to get around home. Daughter assists with household tasks and cooking".
20 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". An entry in the **progress notes** at 06.00 states – "…c/o pain but declined analgesia" Another entry at 06.00 states – "more alert today" An entry at 13.50 states – "Pt alert and oriented … Pt sponged in AM, improved pt's mood. Pt drowsy during the day stated he didn't sleep well overnight". An entry at 16.00 is to the effect that the patient reported pain which was normal for him. An entry at 22.00 states – "… can be impulsive & found sitting with legs over bed".
21 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "Alert + Oriented".
22 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "Alert and Oriented".

	Progress notes, under the heading "Communication Assessment/Observations" state – "not fomally Ax'd h/e functional for ward'. The progress notes at 09.30 note an attendance by Dr Tsahsarlis and state – "…did not recall meeting Dr Tsahsarlis over past few days …" The progress notes include an entry at 11.30 in which the patient informed a physiotherapist that he will ask his daughter to bring in his electric wheelchair from home.
23 January 2018	The "**Referral to Discharge Coordinator**" form notes "Son-in-law concerned" against the question "Are there concerns in regards to the patient's current living situation?" Against the question "Are there other significant concerns?" the form notes "Please speak to daughter and SIL as he lives with them". The **progress notes** at 15.30 note that the patient's mood has improved and at 22.30 note that the patient complained of pain but declined analgesia.
24 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "Alert +Oriented". **Progress notes** under the heading "Nutrition and Dietetics" at 09.50 state "…Vague historian at times…" At 10.22 they note that the patient is keen to stand and get home.
25 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "Alert +Oriented". The **progress notes** at 14.20 note a visit by Mr McInally's son-in-law.
26 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". The **progress notes** at 13.00 state – "… pt spent the day in bed. sponged in bed eating and drinking well obs stable can be verbally aggressive …"
27 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O".
28 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O".
29 January	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form

2018	records, against "Cognition": "A+O". In an entry at 13.00, the **progress notes** note that the patient was feeling unwell and "off" "this shift". At 14.20 he is reported to be feeling "much better". At 21.30, he is reported to be "very tired this shift" but awake, alert and oriented.
30 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". A note from the Discharge Coordinator in the **progress notes** at 09.50 states – "James & his family are keen for him to return home if able and when ready".
31 January 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". The **progress notes** at 0800 record that Mr McInally and his family want "discharge home". A **MOCA 7.2 Alternative** administered at 1030 resulted in a score of 18/30. The notes of the occupational therapist about the assessment state – "Referral received for cognitive screen w. thanks. Chart review conducted. Note previous OT input on previous admission – Initial AX and MOCA (19/30 May 2017). S/- Consent for referral - Pt states goal is to return home. Feels he can continue to manage with current service/family [assistance??] - Feels home well set up for his current level of function … - unable to recall details of fall O/ - RIB ATOR. Pleasant man. Engaged well with OT MOCA (version 2) 18/30 where N <u>> 26/30</u> • Visuospatial/executive Fx (3/5) • Naming (2/3) • Attention (6/6) • Language (3/3)

	• Abstraction (2/2) • Delayed Recall (0/5) (3/5) with cues/multiple choice • Orientation (2/6) Results fall below norm and may suggest moderate impairment with basic cognitive skills…"
1 February 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". **Progress notes** at 13.50 state that a physiotherapy review was attempted but the patient was drowsy and not suitable for review. He was rousable but very sleepy. Progress notes at 14.00 state – "Patient alert for voice & commands however is drowsy today … RN aware of Pt status today. Pt A & O on afternoon Rounding @ 14.45 and stated "He just felt worn out this morning". Progress notes at 12.35 state – "… son in law visited". A later entry states – "… Pt has little insight re future".
2 February 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". An entry in the **progress notes** states – "Pt remains [illegible] about progress. Mobility is however improving". An entry at 21.15 notes that his daughter will bring in lactulose syrup.
3 February 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". An entry in the progress notes at 15.30 states – "Pt unable to be woken, very sleepy. refused PT today". An entry at 21.10 notes that "family" visited.
4 February 2018	[I have referred to every entry made on this day.] The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O". An entry in the **progress notes** at 03.00 states –

	[Illegible] Nurse: Obs stable, afebrile, care attended as per care plan, no pain voiced, bowel not opened this shift, sats 95%, RA, asleep ATOR He was given B12, Folate and "Fe" at 05.15. The notes at 10.10, by a physiotherapist state – Ongoing RW Consent [tick] [Illegible] Happy for physio RW, C/o mild LBP, [illegible] cough O: [illegible] stable on RA. [Illegible] [tick tick] AUSC: AE [downward arrow] BB [nothing?] AS (supine) AE [tick] [nothing] AS (SOEOB) Cough: mod, dry, n/p Fx: N/s: 2 x ['A' in a circle] Supine $\underline{<}$ sara steady T/F Physio: 1 x ['A' in a circle] Stand & pivot T/F // verbal & tactile cues to [upward arrow] knee/hip ext Rx: T/F bed [illegible] commode x 2. Circ & [illegible] thing Impression: Will manage slide T'Fs if they are as James describes (difficult to tell w/out W/C [wheelchair, which Lesley was to bring in from home]. Pt not keen on rehab. Plan: [illegible] [upward arrow] ['F' in a circle] of T/F stand [illegible] An entry in the progress notes at 12.25 states – "Pt afebrile. SaO_2 94 – 97% on RA Assisted -/c ADLS. Stand T/F -/c Sara Steady -/c 2A Showered -/c I A. Tolerating diet & fluids. BNO. Refused [illegible]. RIB -/c self turn. No complaints voiced."

	An entry which seems to be written by Dr Hewson (Mr McInally's consultant) states – "Fe studies [illegible] for [illegible] 500g IV tomorrow Continue [with] physio" An entry at 20.00, which seems to be written by Kylie White, one of the witnesses to the 2018 will, states – "For [illegible] inject. tomorrow am. Will need IVC. Obs stable. Afebrile. Regular pressure sore care attended. Small reddened area of sacrum. Nursed from side to side. Pt c/o sore toes. Put bed cradle in but pt asked for it to be removed. Sat up on side of bed for dinner. Referral sent to discharge coordinator. Pt c/- nausea. Paracetamol for pain with good effect. [Illegible] Son-in-law in attendance for Pt dinner. Nil concerns voiced."
5 February 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O" A **referral to the Transitional Care Team** noted: "This gentleman lives alone in his home at Shailer Park and is very well supported by his daughter … both he and his daughter are keen for him to return home." An entry by the Occupational Therapist in the **progress notes** at 11.50 states – "… Pts dtr present ATOR …Pt drowsy ATOR – drifting to sleep throughout review …" The notes indicate that Lesley and James had a conversation with the Discharge Coordinator at 15.10 during which they indicated that they were keen for James to come home and that he was supported by Lesley who visited throughout the day.
6 February 2018	The "**Medical Admission Careplan Ongoing Integrated Pathway of Care Part B**" form records, against "Cognition": "A+O" Notes of the **Nutrition and Dietetics review** notes the present of Mr McInally's daughter and that she helps him at home with shopping and cooking. **Progress notes** indicate that Mr McInally was upset about the soft collar around his neck which he took off at times.
7 February 2018	**Progress notes** at 15.30 indicate that Mr McInally was pleased to hear that he did not have to wear the soft collar while he was resting in bed.

[54] Mr Black described Mr McInally as a Scotsman of "very firm mind".

[55] Mr Black and his wife helped her parents throughout their lives, as they needed it –providing more help and assistance to them as they aged.

[56] Mr McInally's wife died on 24 June 2016, soon after being diagnosed with cancer. Her death left Mr McInally alone in his house.

[57] From around September or October 2017, Mr Black saw Mr McInally every day. By then he required more care. He had outlived all his friends. He did not otherwise have visitors.

[58] In November or December of 2017, Mr McInally became "sentimental" and discussed changing his will. Mr McInally wanted to show his gratitude to those who cared for him, including his neighbour, Ann Kennedy, who was Scottish, like Mr McInally.

[59] Mr McInally told Mr Black that he wanted to give a gift to Mrs Kennedy, with the balance of the estate to be then split three ways, equally, between his daughters and Mr Black.

[60] Mr McInally was "very particular" about the gift to Mrs Kennedy. He originally wanted to leave her $1,000 so that she could travel to Scotland. Mr and Mrs Black convinced him that that amount was insufficient for that purpose. During conversations "over Christmas" he agreed that it should be $5,000. There was some discussion about purchasing a will kit from a newsagent, which Mr Black was unenthusiastic about. Not much more was discussed at that time.

[61] On 18 January 2018 Mr McInally had a fall and was admitted to the Mater Private Hospital.

[62] While he was in hospital, Mr McInally asked Mr Black to help him prepare a new will. Rather than spend money on lawyers, Mr McInally suggested that his new will could be based on the conditions of his old one (the 2007 will). Mr McInally told Mr Black that he wanted to note, in his new will, the care that Mrs Kennedy had provided to him and his wife (when she was alive) and, in particular, to Mollie, their dog.

[63] Mr Black prepared a draft of a will in accordance with Mr McInally's directions. The draft was in these terms:

THIS IS THE LAST WILL AND TESTAMENT of me JAMES McINALLY of 1 Burnier Crt. Shailer Park in the State of Queensland

1. I hereby revoke all former wills and testamentary depositions made by me.

2. I APPOINT Lesley Anne Black, Carol Jane Scotson and Thomas William Black (hereinafter called "my trustee") to be executor & trustee of my will.

3. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever kind and wheresoever situate unto and to the use of my trustee upon the following trusts:-

   (a) To pay all my just debts funeral and testamentary expenses and all my duties on my estate or arising in consequence of my death.

   (b) I bequeath the sum of $5,000 to my neighbour Ann Kennedy acknowledging the support and care she has given both myself and Molly. I sincerely hope that Ann will use this money for a trip to Scotland.

   (c) As to the rest and residue of my estate, I bequeath EQUAL SHARES to Lesley Anne Black (my daughter) Carol Jane Scotson (my daughter) and Thomas William Black (my son in law).

4. I declare that my trustee shall have all the powers contained and set forth in the Trust Act 1973.

[Signature block]

[64] Mr Black showed the draft to Mr McInally who read over it and said that he was happy with the wording of it. They agreed that it should be "verified" or drawn up by a solicitor.

[65] Mrs Black suggested they use Richard Hoare as the solicitor – a man whom the Blacks met many years before, through their children's primary school.

[66] Mr Black said that he, his wife and Carol Scotson discussed the proposed changes to Mr McInally's will before he took the draft of it to Mr Hoare. It was put to him that in his further and better particulars he said nothing about a conversation involving Carol Scotson prior to 31 January 2018 (when he took the draft to Mr Hoare). The particulars only referred to conversations on 3, 4 and 5 February 2018. He said he might have overlooked the earlier conversation.

[67] Mr Black delivered the draft will to Mr Hoare for him to look over and revise. Mr Hoare charged no fee. Nor did Mr Black sign a client agreement with him.

[68] The next day, Mr Black picked up Mr Hoare's first version of the 2018 will. It referred to Ann Kennedy's care of Mr McInally's "late wife Molly".

[69] Mr Black took Mr Hoare's first version of the 2018 will to Mr McInally. They had a laugh about it because it referred to Molly and not Barbara. Mr Black said that he would have it amended, which he did.

[70] On Friday evening (2 February 2018), Mr Black left the corrected version of the 2018 will with Mr McInally (which referred to his late wife "Barbara"). Mr McInally was "quite happy" with the corrected version. Mr Black and Mr McInally did not discuss whether the will should refer to Barbara *and* Mollie.

[71] Mr McInally said that he wanted to make sure that his daughters were aware of the 2018 will. He told Mr Black that his wish was that the "girls" would not "squabble".

[72] At Mr Black's visit the next night (Saturday), Mr McInally asked Mr Black to let Carol Scotson know that he wanted to see her and to give her a copy of the 2018 will. Mr Black did so and Ms Scotson went to see her father in hospital on the Sunday.

[73] I note that Carol Scotson's evidence[7] (discussed below) referred to her conversation with Mr Black about the will on the morning of 4 February 2018, before it was signed.

[74] After Ms Scotson's hospital visit, she telephoned Mr Black and told him that the first thing she and her father discussed was his will. She said, according to Mr Black, that her father was happy with it and ready to sign it on the Sunday afternoon (that is, 4 February 2018).

[75] Mr Black visited Mr McInally at his usual visiting time of about 5.30 pm. Mr McInally said that he had spoken to Carol and was ready to sign his will. Mr Black said he would have to find some witnesses. He went to the nurses' station and spoke to a nurse, Ashley Langridge, who was happy to act as a witness and to find another one.

[76] A little later, at about 6.30 pm, Mr Langridge and another nurse, Kylie White, came to see Mr Black and Mr McInally for the purpose of witnessing Mr McInally's will.

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[7] Admissible documentary hearsay.

[77] Mr Langridge told Mr Black that he was a law student (which he was) and, according to Mr Black, he "virtually took control of the procedures".

[78] Mr Black heard Mr Langridge read the will to Mr McInally. He considered Mr Langridge "very careful" to ensure that Mr McInally understood the contents of the will. Mr Black saw the will signed by Mr McInally and witnessed by the two nurses.

[79] At the end of the evening visit, Mr McInally gave Mr Black the signed will and asked him to make sure that his daughters received a copy of it.

[80] The next day, Monday, Mr Black left a copy of the will at Ms Scotson's place. In his discussions with Ms Scotson that evening, he said that she confirmed that her father was happy with everything and made no additional comments "one way or the other".

[81] While Mr McInally was in hospital, Mr Black and his wife tried to "cover" as many days, and as much of the day, as they could. Mrs Black normally visited her father during the day – spending three or four hours with him. It suited Mr Black better to visit in the evenings, after work. That had been the pattern of their visits to Mr McInally in his home.

[82] Their children visited Mr McInally. Ms Scotson went up on the weekend. Mr Black did not recall seeing her there during the week. (She worked during the week.)

[83] Mr and Mrs Black received a phone call at 11.30 pm on Saturday, 24 February 2018, letting them know that Mr McInally had died.

[84] Mrs Black immediately rang her sister.

[85] On Sunday (25 February 2018), Mr Black went to the hospital to collect Mr McInally's things. When he got back to his house, his wife and her sister were there, grieving.

[86] They spoke about the money in the deceased's bank account that afternoon. He said:

> Carol had been advised by her solicitor to carry out the bank transactions without delay, and Lesley and Carol had made arrangements for that to happen on the Monday. I'd been asked for my bank account details on the Sunday. On the Monday – I wasn't present, but on the Monday $30,000 was transferred into my

account, $10,000 was transferred into Lesley's account and $30,000 into Carol's account.[8]

[87] His understanding was that his wife received only $10,000 because she had taken money out of her father's account and she wished to "even things up".

Lesley Black

[88] Mrs Black described her father as "stubborn, cantankerous, argumentative".

[89] Mrs Black met her husband when she was 19. They married in 1980 and always had a close relationship with her parents. She provided her parents with assistance and support as they aged. She provided details of that assistance and support in her evidence. After her mother died, the support she provided to her father increased. She assisted him with mobility, medication and meals. He had vascular problems and "would just collapse at least two or three times a day". She cleaned the house, kept him company and took his dog for a walk. She did what her father needed her to do.

[90] Her father spoke to her about changing his will in November 2017. When he first mentioned it, she told him to tell Carol Scotson about his plans. In the first conversation he had with her about his will, he said that he wanted to give her two-thirds and Carol one-third and she told him he could not do that. She told him she did not think it was fair and he said he would think about it.

[91] In December 2017 – before Christmas – he observed that they had done nothing about the will and she told him to wait until after Christmas. She remembered that conversation occurring while they were having coffee. He was in a lot of pain and he said to her that he really needed something to be done about his will.

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[8] In this case, not infrequently, hearsay evidence was led for an apparently testimonial purpose without objection. Counsel for the defendant was concerned that I might rely upon the double hearsay in this part of the evidence to draw adverse conclusions about Ms Scotson's solicitor. Even apart from its extremely limited weight, I did not consider this double hearsay of any relevance to the matters in issue. Nor did I consider it to bear on Ms Scotson's credibility (see s 94 *Evidence Act* 1977 (Qld)). Nor did I consider it to have any reliable bearing on the character of Ms Scotson's solicitor.

[92] She knew, at that time, that Mr McInally wanted to leave something to Ann Kennedy, for the care she had given him, and that he wanted to include Mr Black in his will.[9] She contradicted herself later in her evidence when she said that the first time she knew her father wished to give something to Ann Kennedy was when she saw the draft will.[10] Initially, Mr McInally spoke to her about leaving his house to her son, Ryan, but she told him he could not do that.

[93] She visited her father every day he was in hospital after his admission. She fed him, took him to the bathroom, took him outside in his wheelchair for a cigarette and kept him company.

[94] She recalled her husband coming home from the hospital once night (after doing "the night shift") and asking her whether she knew a lawyer because Mr McInally wanted to change his will. She recommended Richard Hoare because her father had been dissatisfied with other lawyers he had used previously. Neither she nor her husband had used Mr Hoare for legal matters. She might have seen Mr Hoare after 2005 because their sons attended the same high school, but she could not remember.

[95] She read the first draft of the will prepared by Mr Hoare. She noticed that it referred to "Molly" rather than "Barbara" as her father's "late wife". It had some other typographical errors which she identified. She was unsure whether she saw the draft which her husband prepared. She thought she had not – because it spelt Mollie's name incorrectly (as "Molly") and she would have picked that up.

[96] She was present at the hospital on 4 February 2018 but was not there when her father signed his new will.

[97] Mr McInally had a conversation with Mrs Black about the 2018 will after he signed it. He asked her whether she had seen it or asked her whether she had a copy of it – and she said she had.

[98] After his death, on 25 February 2018, her sister went to her home. Mr Black was not there. They discussed the will and Ms Scotson said, on the advice of a solicitor friend, that they should distribute the money from Mr McInally's term deposit as soon as possible.

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[9] T 2-12.

[10] T 2-20.

[99] They did so. Of the $90,000 in the term deposit, Mrs Black put $30,000 into her husband's account; $30,000 into her sister's account; $10,000 into her personal account and $20,000 into her father's every day account. She intended to use that $20,000 (of her one-third) to pay for her father's funeral expenses and to pay Ann Kennedy – and then sort it out if necessary once "the will was finished on probate".

[100] In cross-examination it was put to her that it was her idea to take the money out of the bank account soon after the deceased death – not Carol's. She maintained that Carol told her not to let the bank know Mr McInally had died so they could access his money under their enduring power of attorney.

[101] She said Mr McInally was vague at times – depending on his medication. He was alert on his good days. She accepted that upon his admission to the Mater Private Hospital, she would have said he was "occasionally vague" – she did not know what "cognitive" meant.[11]

Richard Hoare

[102] Mr Hoare, solicitor, now retired, suffered a mild stroke in 2018. His memory has been affected. I bore that in mind when evaluating his evidence.

[103] Mr Hoare met Lesley and Bill Black through their children, who attended the same primary school. After 2004, Mr Hoare saw Mr Black only by chance.

[104] According to his diary, Mr Black made an appointment to see him on Thursday, 31 January 2018. He had a copy of a will, which his father-in-law wished to sign. He asked Mr Hoare to look over it, which Mr Hoare agreed to do. They arranged for Mr Black to return in a couple of days to collect the will for Mr McInally to sign.

[105] They had a conversation about whether Mr McInally was aware of what he was doing. Mr Black told him that Mr McInally was "sharp as a tack". Mr Hoare understood from Mr Black that Mr McInally wished to acknowledge in his will what Mr and Mrs Black had been doing for

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[11] That statement, that she did not know what "cognitive" meant, was in response to the cross-examiner's question which plainly referenced a note in the medical chart, dated 19 January 2018, which stated '"Daughter reports occasional cognitive/memory issues".

him. He also wanted to acknowledge a neighbour who had been supportive of him and his dog.

[106] He recalled the "error" in the first draft of the will – in which Mr McInally's wife Barbara was called "Molly". That was corrected and the revised draft will was given to Mr Black.

[107] Mr Hoare said that when he was given the draft will, he assumed that Mollie was Mr McInally's wife. His first appointment with Mr Black, when Mr Black handed him the draft will, was very brief.

[108] He said he probably should have made the final version of the will "more correct" by including Mollie and confirming and clarifying that she was a pet dog.

[109] He did not realise, at Mr Black's first visit, that Mr McInally was not able to come to his office. He gave instructions to Mr Black about how the will had to be witnessed and the need for independent witnesses.

[110] He opened no file. He charged no fee. His work was minimal. The amendment was not complicated and he had a practice of not charging for simple things, in effect, to build goodwill.

Dr Daryl Hewson

[111] Dr Hewson, MBBS, FRACP, MMSC is a consultant physician specialising in internal medicine.

[112] He treated Mr McInally from 14 September 2015 until his death. He saw him on the day of his admission to the Mater Private Hospital in January 2018, and every day thereafter. He did not see any indication that Mr McInally was impaired cognitively from the date of his hospital admission until his death.

[113] He saw Mr McInally on 4 February 2018. He was asked by a nurse on that day whether Mr McInally had the capacity to make a will. He told the nurse that Mr McInally would be able to make a will because he thought he had capacity. That was not an uncommon question to be asked of him.

[114] He said "normally we would have a background cognitive assessment, but I've known this gentleman extremely well over a period of time and there was nothing to suggest that he wouldn't have capacity, yep". He said, in examination in chief, that in his opinion, Mr McInally would have been aware of, and appreciated the significance of, making a will on 4 February 2018.

[115] His evidence was to the effect that he had no concern about Mr McInally's cognitive capacity and for that reason, did not administer any test of it, such as the MOCA or a mini mental state examination (the MMSE). Nor had anyone told him that they thought Mr McInally had any difficulties with cognition.

[116] He said he regularly assessed the capacity of his patients and had "a high awareness of whether someone would or would not have problems with cognitive perception". He said that Mr McInally was mentally alert from the date of his admission until early February and he was "quite confident" that he was capable of making decisions. As he approached death that was "less of the case".

[117] Under cross-examination he accepted that, were a person to achieve a score lower than 20 on the MOCA, that would be quite concerning. He said a score of 18 would indicate that the person was not able to make a decision about things like their will or their future management, nor would they be able to manage their day to day affairs.

[118] He was not aware that Mr McInally was assessed via the MOCA on 31 January 2018.

[119] He read through the notes of the results of that test. He was not aware of those test results at the time he expressed his opinion about Mr McInally's capacity. His attention was also drawn to an earlier MOCA assessment conducted in May 2017 where the score was 19. He said "Again that would – again that would not mean that he had capacity".

[120] In re-examination he agreed that the MOCA was not a definitive test of cognitive impairment. He continued:

> My clinical impression that he was – that he was capable of making a will, but then I had, I guess, not sighted that at the time that I wrote the report. So I'd have to say that you couldn't confidently say that he had capacity to make a will. So that would be my opinion.

[121] He agreed that the MOCA test had been administered at the time of Mr McInally's assessment for rehabilitation. However, he continued to explain that the MOCA was a standardised test and he would accept the interpretation of the standardised test. He said that Mr McInally always appeared quite sharp to him, during his daily visits between 19 January and 4 February 2018. He continued:

> He did appear to be quite sharp and there wasn't any obvious impairment in his cognitive levels, but I just have to say that the test would be contrary to this, yep.

[122] He explained that the MOCA results indicated that Mr McInally's short term memory was poor: in delayed recall he scored zero; in language he scored reasonably well. He was not able to score in the areas of the test which concerned "fairly complex reasoning"; that is, his executive function. Dr Hewson explained that executive function concerned the ability to comprehend a task and the ability to implement that task. Executive function was engaged in understanding, and acting upon an understanding of, financial matters.

[123] Neither counsel took this issue further to, for example, establishe whether the size and distribution of Mr McInally's estate upon his death was a financial matter which the MOCA suggested he would be unable to comprehend.

[124] Dr Hewson was not questioned by counsel for the plaintiff about the basis for his initial view that Mr McInally appeared quite sharp, with the capacity to make a will, at the relevant time; or why his impression of Mr McInally's cognitive capacity might have been inconsistent with the MOCA; or whether Mr McInally's cognitive capacity might vary from day to day or throughout the day and, if so, why.

Dr Maureen Fitzsimon

[125] Dr Fitzsimon MBBS, FRAGP is a general practitioner. She has many nursing home patients and over 40 years of experience. She had been Mr McInally's general practitioner for over 30 years.

[126] In the last two years of Mr McInally's life, she conducted home visits to see him – when he was not in hospital – sometimes as frequently as twice a week. She saw him twice on 18 January 2018. The second occasion was after he fell. Lesley Black called her. She went to his home.

He had injured his shoulder and was not coping with the pain. She called an ambulance and he was admitted to hospital.

[127] Mr McInally's general health was poor. He had "most things physically wrong" including renal impairment and heart failure and "lots of illnesses". He was a smoker even though he was advised not to smoke. He was also "deaf". The effect of her evidence about his personality was that he could not be told what to do.

[128] She did not test Mr McInally's cognition whilst he was under her care. She said –

> I didn't [undertake any formal cognitive testing] … because it wouldn't have done a thing to change my management. He wasn't fond of taking pills and medicines anyway, and treatments for any cognitive assessment are only for people who are more significantly impaired who have scores on Mini Mental State Examinations less than 25 and he certainly knew who I was, who he was et cetera et cetera …

[129] Dr Fitzsimon was aware of the results of the 2017 MOCA. She noted that the results indicated that Mr McInally was "oriented in space and time and he had minimal difficulty with recall".

[130] Speaking generally of cognitive tests, Dr Fitzsimon said that she used the MMSE in general practice. She considered cognitive tests "all very limited". They asked "a limited number of things".

[131] During the time she treated Mr McInally, he showed no signs that he was suffering from dementia or any other cognitive impairment.

[132] Dr Fitzsimon was asked to compare the results of the 2017 and 2018 MOCA. She was asked whether – despite how Mr McInally presented to her – the results indicated that he had cognitive difficulties. She said, in effect, that the evaluation of a person's cognitive capacity involved many factors "other than just a test". She was not present for the testing so she could not comment upon factors which might have borne upon the results.

[133] She was asked about McInally's health including questions about his weight loss (he was 61 kilograms in September 2015 and 50.8 kilograms in May 2017) which she said, in effect, was gradual and reflected the fact that he was a very sick man.

[134] She was asked whether his heart failure would "affect the oxygen in his body … [which] would have an effect on his cognitive ability". She referred to the possibility of delirium, but she was not in hospital with him, so could not comment. She agreed that generally, if Mr McInally had been experiencing delirium in hospital, there would be mention of it in the hospital notes.

[135] She was asked about the effect of oxygen levels or malnourishment on Mr McInally's cognitive ability. She said that oxygen levels might have an effect, but that nutrition was not his "biggest problem".

[136] Dr Fitzsimon was provided with an opportunity to read the notes of Mr McInally's hospital admission from 30 January 2018 until 1 February 2018 to allow her to comment on whether those notes suggested that there was something at play which might have affected the results of the MOCA administered on 31 January 2018. Her review of the notes did not suggest that anything (such as pain or delirium) might have affected the MOCA results.

Ashley Langridge

[137] Mr Langridge was a nurse at the Mater Private Hospital, on the respiratory ward, on 4 February 2018. He had then 18 years of experience as a nurse. He held a Masters in Mental Health Nursing.

[138] On 4 February 2018, he was working the night shift with Kylie White, another registered nurse. Without looking at Mr McInally's medical chart, he could not (in the witness box) remember his medical conditions in detail, but he was aware of his medical history.

[139] On 4 February 2018, he was approached by Mr Black, while he was at the nursing station, and asked to witness Mr McInally's will.

[140] Before agreeing to do so, he familiarised himself with the responsibilities of such a witness. He said –

> I did some research for myself. As you can appreciate. I'm studying law. Without the [indistinct] ethical requirements. I have [to stand before a] judge one day and [say] I'm a good and proper person, so signing a document such as this, I did quite conscientiously. I remember that I sought instruction. I can't recall the exact details of the instruction I sought, or where I sought it from, but as I said I'm a law student. I've got access to things like [indistinct] online. I'm not saying that's

> what I accessed. I could also access Google, either from my phone which I would've had with me or at the station … I would have been quite savvy, if it was a Google search, not just to take anything. I would have been looking for the jurisdiction …"

[141] There was an objection to Mr Langridge speculating about what he would have done. He said he sought out information about formalities and his own obligations. He obtained information which he considered was sufficient for his purposes.

[142] He also looked at Mr McInally's medical records –

> I was particularly interested in his past medical history … from a capacity point of view, rather than whatever the law is regards to will. I was – wanted to make sure, within myself, that I was certain that he had capacity or was capable of understanding and making that document.

[143] He also asked Dr Hewson, who was on the ward at the time, whether Dr Hewson thought it was appropriate for him to sign the will and whether there was any question about Mr McInally's capacity. Dr Hewson did not suggest that there was anything which would "prohibit" Mr McInally from signing the will.

[144] He was asked whether he relied upon Dr Hewson's view of Mr McInally's capacity. He said –

> I would say that he confirmed what I thought … as a nurse, we cannot diagnose, so I would not be able to say he has a diagnosis of something that affects his capacity, so I think all nurses are very acutely aware that they can't do that, so I sought further instruction from his consultant.

[145] He said that he did not "exclusively" rely on Dr Hewson's opinion. It was "a factor". If Dr Hewson had a concern – then he would not have witnessed the will.

[146] Mr Langridge spoke to Kylie White about what they were required to do. They went into his room and –

> … talked to Jim about the will and signing it. I recall that he was sitting on the bed, and I sat, as far as I remember, next to him. I had the will on his bedside table which you could move around, and it was positioned so that he could have it in his view. And Kylie was standing in close proximity, and Bill was also in the room but he was towards the door. And we had a general conversation as well. It wasn't straight in there, but we were talking about if that was – if he wanted us to sign the will. So obtaining consent, like we would do with any medical procedure. And then, I was quite meticulous in going through the will. I went through it in

> the – its entirety. That was also to satisfy myself as well, because I'm not someone who signed a will before, this is the first time I've signed a will. It – wills are quite complicated, they're not plain English, and I was going through and making sure I understood it, and making sure he understood it, and asking questions relevant to the meaning of it.
>
> [By "going through it" I meant] … literally reading through the whole will. I didn't read through it straight: I'd stop and ask questions as I went along and some things were of interest to me. Like his neighbour, the – I remember taking generally about his neighbour.

[147] He was asked whether, during that process, he had any concerns about Mr McInally's capacity to understand the nature, meaning and effect of the will. He said no – there were no indications from Mr McInally that caused Mr Langridge to question his capacity to understand the will at that time. His testimony continued –

> After you finished reading it through to him, what did you say to him? --- I'd already kind of made sure that it was [what] he wanted and, like, talking specifically about how he wanted to divide up the assets. And I would have asked him if he understood it, and if he was happy to do it. I guess, in terms of medical procedures, we've – like – consent's only valid if its voluntarily given, so I would have been making sure that it was him that wanted to sign, and he wasn't under duress or – or whatever.
>
> And then what happened? ---- He signed the will. We all – we all signed the will and witnessed the will.
>
> How long did the process take from the time you walked through the door? ---- It would have been at least a quarter of an hour …we weren't like, just, bang bang, it wasn't like – it was during a quieter period of the shift. We have a busy period around five o'clock and then it kind of settles down and then it's – eight o'clock's kind of the next round, so we weren't particularly rushed; I don't recall precise times, but … [a]t least 15 minutes.

[148] As to the kind of questions he asked, he said –

> I guess, the questions that I recall the most were about the dividing of assets. I asked him about the splitting in thirds and I asked about the neighbour, more so, because they interest me. I guess, also I was asking if he understood things and, kind of, saying it in lay person terms because it was complicated. I would have trouble understanding it if I just read it straight through just because of the language they use, so I was trying to make sure the – Jim understood because ----

[149] He was asked how he made sure Mr McInally understood. He could not recall the exact questions he asked but his impression was that Mr MrInally understood the will. He continued –

> … it wasn't like I was just asking closed questions just trying to get a yes, no, yes, no. Like, we had a conversation about different things in the will. The things that I recall the most about having a conversation about was the actual divide of the assets …About how some went to the neighbour and then it went, split three ways, with the children.

[150] Mr Landridge did not speak to Mr McInally about the contents of his estate – but he did not think Mr McInally had a lot, "pretty much just a house". He recalled Mr McInally talking to him about his two daughters and Bill, "his stepson" –

> As best I can recall, like I know the – the two siblings. So he would have talked about his two daughters and Bill being his stepson. As best I recall, he was talking about Bill being like a son to him and also he – I remember there was discussion about Bill being quite helpful and caring for him in his older years as well …

[151] He said that he was "quite convinced" that the will he signed was Mr McInally's "final will and testament".

[152] Although he looked through Mr McInally's medical records before signing the will, he did not see the MOCA. He said –

> … What I looked at … would have been his admission notes, because his admission notes would have contained his previous diagnoses …

[153] He had since become aware of the MOCA. He was asked whether knowing about that assessment would have caused him to "have some pause" about Mr McInally's capacity. He said –

> In terms of my own personal opinion? Like, I'd nursed him on multiple occasions and maybe up to a fortnight beforehand – or not quite that much – but I found him to be someone who had full capacity in terms of – I wouldn't have even questioned his ability … with my personal assessment and my conversation with Dr Hewson, I wasn't put to alarm.

[154] He said that if he had any concerns about Mr McInally's capacity he would not have put his name "to the paper".

Kylie White

[155] Kylie White understood that Mr McInally had a fall and was a frail old man. She had a discussion with Ashley Langridge before witnessing the will. He was a law student and they

discussed and looked up "on the Queensland Law site" the process. She wanted to know what her obligations were. She understood they were "just to be in the presence of the person that was signing the will".

[156] Before witnessing Mr McInally's signature on the will, she read through it and noted the gift to Mrs Kennedy. She had recently been to Scotland and discussed with McInally "the joys of Scotland".

[157] She had no concerns about his capacity to understand the nature, meaning and effect of his will. She was in Mr McInally's room, for the purpose of signing the will, for at the most, ten minutes.

Steven Scotson

[158] Steven Scotson is the defendant's father. After Carol Scotson's death, he and the defendant went through Carol Scotson's things.

[159] He found documents in Carol Scotson's handwriting in a folder than contained documents "pertaining to … James' estate".

[160] Among them was a note, in Carol Scotson's handwriting, and a type written 'File Note".

[161] The handwritten notes read –

> <u>Sun</u>
>
> <u>4/2/18</u>
>
> - Bill rang in the morning and wanted to see me
>
> Called round & showed me the will that had been drawn up by new solicitor
>
> Executors – Lesley
>
> – Bill
>
> – Myself
>
> Beneficiaries – Lesley
>
> – Bill
>
> – Myself

- Told me Dad wanted a new will

    1) To leave something for Anne

    2) was concerned "The girls will squabble"

        as there was tension between us.

- Bill said he wanted to tell me so it wouldn't be a surprise later.

- Bill emphasised about Anne's provisions & himself being included as Executor – no mention of now being a beneficiary with 1/3 share.

I spoke to Dad @ 10.45 at the hospital when I visited – the 1st thing he said when I arrived was about the will. He emphasised wanted to leave something to Anne. I couldn't get a definite answer from Dad if he wanted Bill as an Executor & Beneficiary. At one stage he said – "Bill's not getting anything" – but not sure how clear he was ??

I rang Bill @ 3.30 when I got home as had concerns around

1) Tension bet Lelsey & 1. News to me. Bill emphasise not to mention it to Lesley but there wasn't any tension.

- Dad perceived this (???).

2) I was only told of this new will & new provisions when ready to sign despite discussions going on for some time.

Bill then visited Dad @ 6 pm on 4/2/18 & had the will signed with 2 nurses as witness's. He told me 1 of the nurses had asked Dad if he understood what he was signing.

I'm not sure Dad does.

<u>To do</u>

-1/ Ring Lesley

2/ Ask Dad again on the weekend.

3/ Ask if Solicitor visited Dad?

Why was this not raised earlier. Alison could have done will ??

5/2/18

4.00 Rang Lesley

She said was Dad's wish to leave something to Ann & Bill also for his help.

Lesley didn't get involved. I asked her about the solicitor – whether he cam to Dad's or hospital – she didn't know.

Bill has organised the change.

I will ask Dad when he's home.

The File Note read –

File Notes

Carole Scotson

Date: 10 March 2018

Time: 12.10

I rang Lesley on Wednesday 07 March 2018 about getting together to organise the house and contents. She advised me her and Bill and Anne had already been round to the house this week, cleaning, re-arranging, gardening.

I suggested we get together on the weekend to sort out. Sat morning was agreed. She ran Sat am and couldn't make this so we organised for Sun PM. I postponed this until all 3 of us could get together and set a time for Wed 14 March 2018 after my work (5.30ish).

On Saturday 10 March 2018 I asked Lesley about Michaela wanting to buy Dads care (sic). She advised me that Dad had given the car to Bill and I would need to discuss with him.

Bill away the weekend 10/11 March at Phillip Island.

Evidential value of Ms Scotson's notes

[162] Ms Scotson's notes were admitted, without objection, under section 92 of the *Evidence Act* 1977 (Qld).

[163] Although the notes included a statement of Ms Scotson's opinion about her father's understanding at the time at which he signed the will, neither counsel had prepared, or was in a position to make, submissions about the admissibility of her opinion (as distinct from her factual statements) under section 92.

[164] I have treated her statement of opinion as relevant and admissible. This approach favours the defendant. I have taken that approach having regard to the vigilance with which I am to approach this matter.

[165] In my view, Ms Scotson's notes reveal that –

- in accordance with Mr McInally's request to Mr Black that he ask Ms Scotson to call on him (Mr McInally) to discuss his new will, Mr Black took a copy of the 2018 will (before its execution) to Carol Scotson on the morning of 4 February 2018;
- in his conversation with Ms Scotson about the new will, Mr Black did not mention that he was a beneficiary under the will, with a one-third share of the estate (after the gift to Ann Kennedy);
- Ms Scotson was aware of the changes to be made by the 2018 will – including Mr Black's inclusion as beneficiary;
- consistently with his desire to ensure that his daughters knew about the changes to be made by the 2018 will before he made them, and a keenness to execute it, the first thing Mr McInally spoke to Ms Scotson about when she went to the hospital was his will;
- Mr McInally was not clear, in his conversations with her, that he wanted Mr Black as an executor and beneficiary;
- At one stage – although Ms Scotson was not sure how "clear" he was – Mr McInally said that Mr Black was "not getting anything";
- Ms Scotson was "not sure" that her father understood "what he was signing" and she planned to ask him about it again.

[166] I infer that Ms Scotson's uncertainty about her father's understanding was based on her conversation with him on 4 February 2018, before he signed the will. The information I have about that conversation is limited to that which is revealed by Ms Scotson's notes of it.

[167] In evaluating the weight to give to Ms Scotson's evidence, section 102 of the *Evidence Act* applies. It states –

> **102 Weight to be attached to evidence**
>
> In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including –

(a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and

(b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

[168] Neither counsel made any submissions about these matters. I note that the statement was made reasonably contemporaneously with the facts it related. Nothing suggested any incentive to conceal or misrepresent the facts as stated in her notes.

[169] Viewed as a whole, Ms Scotson's notes suggests that she was concerned about not being included in discussions about the new will and concerned about her father's understanding of it. However, she does not express any surprise that her father wished to leave part of his estate to Mr Black (*cf* the notes of her surprise at the suggestion that her father believed there was tension between his daughters) in her notes of the conversations with her father on 4 February 2018; with Mr Black on 4 February 2018; or with her sister on 5 February 2018.

[170] There is nothing in this folder between the handwritten note dated 5 February 2018 and the "File Note" dated 10 March 2018.

[171] It would have been open for me to infer from –

- the absence of any note about it after 5 February 2018;

  in combination with

- the evidence that Ms Scotson and her sister arranged for the early distribution of $90,000 *in accordance with the 2018* will (that is, in thirds); and

- the level of detail into which her notes descend,

that any concerns Ms Scotson had about the deceased's knowledge and approval of the contents of his will had dissipated by his death.

[172] However, as will appear below, I have used evidence of Ms Scotson's uncertainty about the deceased's clarity on 4 February 2018 in the defendant's favour in proceeding on the basis that her evidence (in combination with other evidence) raised a concern about Mr McInally's testamentary capacity.

Michaela Scotson

[173] Michaela Scotson, the defendant, said her mother cared for her father "a great amount". She was concerned for his health and his welfare. She did what she could to assist, which included helping him clean the house, washing his clothes and checking in to see how he was. Ms Scotson saw her father once a week – on either Saturday or Sunday.

[174] Michaela Scotson also gave evidence about Mr McInally's car – a Nissan Tiida. She said that she borrowed that car, when her own was out of service, rather than hire a car. She used the car for two weeks and returned it in the same condition as it was in when she borrowed it. After Mr McInally died, she thought she would ask whether she could buy the Nissan from the estate. Her mother told her she would speak to Mr and Mrs Black about buying the car. Later, her mother told her it was a "no go" because "apparently, the car had been gifted to Bill".

[175] She went on to say that her mother appeared frustrated that she was "kept out of the loop" and that the level of care she provided to her father "wasn't fully appreciated" and was considered "secondary" to the care provided to him by Mr and Mrs Black.

Consideration of issues

Testamentary capacity – plaintiffs' submissions

[176] Counsel for the plaintiff submitted that I should conclude that Mr McInally had testamentary capacity at the time he signed his will, notwithstanding Dr Hewson's "reversal" of his opinion about it.

[177] He submitted that –

- the opinion evidence of Dr Hewson and Dr Fitzsimon was "not conclusive";
- I was not obliged to give it a great deal of weight; and
- the MOCA was not conclusive evidence that Mr McInally lacked testamentary capacity because it did not address *Banks v Goodfellow* requirements.

[178] He submitted, in effect, that the evidence of Mr Langridge about the circumstances in which he was prepared to witness Mr McInally's will, complemented by Ms White's evidence, would persuade me that Mr McInally had testamentary capacity.

[179] Further, he submitted that the evidence of Mr McInally wishing to discuss the changes he made to his will with his daughter Carol Scotson, and his raising his will as the first thing he spoke with her about on 4 February 2018, was persuasive evidence of his capacity. Also relevant, he submitted, was the fact that the will went through a drafting process in which Mr McInally was involved.

Defendant's submissions

[180] Counsel for the defendant submitted that I would conclude that Mr McInally did not have testamentary capacity. She submitted that no one "took" Mr McInally "through" the test in *Banks v Goodfellow* on 4 February 2018. And there was virtually no evidence that the deceased was aware of the extent of his estate.

[181] Counsel agreed that, even in the absence of a formal exploration of the deceased's testamentary capacity, I was able to draw an inference of it from the proven facts – but submitted that the proven facts were not sufficient for me to do so.

[182] She submitted that the medical notes were of "little assistance" in this regard.

[183] She relied upon the fact that Dr Hewson changed his opinion about Mr McInally once the MOCA results were drawn to his attention. She submitted that Mr Langridge's evidence was "largely based" on Dr Hewson's opinion (as at 4 February 2018) and that because Dr Hewson's opinion had changed, Mr Langridge's opinion "fell away". There was thus no evidence that Mr McInally had testamentary capacity when he signed his 2018 will.

Discussion

Doubt as to testamentary capacity

[184] Dr Hewson knew Mr McInally well, having treated him since 2015. Unaware of the fact of, or the results of, the 31 January 2018 MOCA, he was of the opinion that Mr McInally had capacity to make his 2018 will. He was experienced in this area and had seen no reason to require an assessment of Mr McInally's cognition. He found him "quite sharp".

[185] However, when the results of the MOCA were drawn to his attention, Dr Hewson could not "confidently say" that Mr McInally had the capacity to make a will. He acknowledged that the

test results were contrary to his impression of Mr McInally. He said that the diminished executive function which they revealed was the function engaged in understanding, and acting upon an understanding of, financial matters.

[186] As I have noted, Dr Hewson was not questioned about the basis for his initial view that Mr McInally was quite sharp. Nor was he questioned about other matters which might be thought to be very relevant to the questions for me, such as an explanation for the inconsistency between the MOCA results and his own impression of Mr McInally. Nor was he questioned about whether Mr McInally was likely to have – having regard to the MOCA – an ability to –

- understand the significance of a will and what it was designed to do;
- appreciate the size of his estate (or whether it was a "financial matter" which might be beyond his understanding);
- understand those who might have a claim upon it and why; or
- evaluate and discriminate between those claimants.

[187] Dr Hewson's evidence was to the effect that, as a person experienced in evaluating cognitive perception in his patients, his interactions with Mr McInally caused him to conclude that he was capable of making a will – although he conceded that that was inconsistent with the MOCA results.

[188] Dr Fitzsimon's evidence was to the effect that she saw no suggestion of dementia or cognitive impairment in Mr McInally when she was treating him. However, she was not present for the MOCA and could not explain its results, apart from noting that there was nothing in the medical chart to suggest a reason why those results might not have been reliable. I do not overlook that Mr McInally was reportedly pleasant and engaging well at the time the MOCA was administered.

[189] Dr Fitzsimon's evidence about the limits of a MOCA are consistent with the entry of the Occupational Therapist who administered the MOCA on 31 January 2018 – that is, that it *may* suggest moderate impairment of basic cognitive skills.

[190] In addition to the MOCA results, and Dr Hewson's revised opinion, I have taken into account Carol Scotson's notes about her conversation with her father on 4 February 2018 during which she could not get a clear answer from him about whether he wanted Mr Black as an executor

and beneficiary. I have also considered other entries in the medical chart which indicate that Mr McInally was, at times, drowsy during the day, or vague.

[191] I find that the evidence raises a doubt as to Mr McInally's testamentary capacity at the relevant time and thus will now consider the evidence as a whole on this point.

Evaluation of evidence

[192] While I have taken into account the MOCA results in my evaluation of Mr McInally's testamentary capacity, I have borne in mind that the assessment is a "blunt instrument" which *may* indicate cognitive impairment, but which must be considered with the other evidence of the testator's capacity at the time of making the will (*cf Ruskey-Fleming*).

[193] I do not consider the opinion evidence of the doctors of particular weight in my determination of Mr McInally's testamentary capacity on 4 February 2018. I am required to judge from the facts those witnesses state – not their opinions (*cf Bailey v Bailey* (1924) 34 CLR 558, referred to in *Frizzo*).

[194] I have taken into account that Dr Hewson saw nothing to cause him to doubt Mr McInally's ability to sign a will from the time of his hospital admission until 4 February 2018; and that his impression of Mr McInally was that he was "quite sharp" and without obvious cognitive impairment.

[195] I have taken into account Dr Fitzsimon's lack of concern about Mr McInally's cognition prior to his hospital admission.

[196] I have taken into account Mr Langridge's view, based on his having nursed Mr McInally on multiple occasions for about a fortnight before 4 February 2018, that he was someone of full capacity and that he would not have questioned his ability to sign a will.

[197] I have also taken into account Ms Scotson's notes about her father's lack of clarity (as she perceived it) about Mr Black's appointment as executor and beneficiary and whether he was to receive anything under the will. Her notes do not reveal a potential explanation for his lack of clarity – such as drowsiness at the time of her visit. Nor do they provide evidence of the content of the conversation she had with him about Mr Black's status under the will.

[198] Neither counsel referred me to any particular entry in the medical chart which might be relevant to the question of testamentary capacity. Regardless, I have considered the tendered pages of the chart in some detail and taken into account the following –

- Mrs Black described her father as "occasionally vague" upon his admission;
- Mr McInally was able to provide a clear explanation for his admission to hospital on 19 January 2018;
- Mr McInally's cognition was described consistently throughout the notes as "alert and oriented";[12]
- He was, at times, drowsy during the day;
- On 20 January 2018, it is reported that he could be "impulsive";
- An entry on 22 January 2018 illustrates a short term memory issue;
- On 24 January 2018, he was described as a "vague historian";
- On 26 January 2019, he was described as "verbally aggressive"; and
- He was also in pain from his fall – for which he sometimes declined medication.

[199] I have taken into account that he was very sleepy in the afternoon of 3 February 2018. However, nothing in the notes of 4 February 2018 refer to drowsiness or sleepiness that day.

[200] The hospital notes of 4 February 2018 (read in the context of earlier notes) suggest that Mr McInally participated that day in an assessment, by a physiotherapist, of his ability to transfer for the purposes of determining whether he was able to return home. The notes suggest that, on that day, he determined that he did not want the bed cradle in his bed. He complained about pain and nausea and was given Panadol to good effect. Nothing in the notes of 4 February 2018 suggest vagueness or a lack of clarity in his thinking or an inability to participate in the physiotherapy assessment because of cognitive concerns.

[201] Apart from her opinion about Mr McInally's lack of clarity on 4 February 2018, Ms Scotson's notes confirm Mr Black's evidence that Mr McInally was keen to ensure that Ms Scotson was aware of the contents of his 2018 will.

---

[12] The notes

[202] Mr McInally's appreciation of the importance of informing Ms Scotson of the content of the 2018 will before he signed it is, in my view, very good evidence of his testamentary capacity. In my view, it reflected his concern that Ms Scotson not be surprised by the reduction in her share of his estate effected by the 2018 will – which in turn reflected his appreciation of the effect of the testamentary act he was soon to undertake.

[203] I have taken into account Ms Scotson's note that the 2018 will was the first thing her father wished to talk to her about. I consider this further good evidence of his understanding of the testamentary act he wished to undertake that day.

[204] I considered Mr Langridge a credible witness and have placed significant weight upon his evidence.

[205] I find that he approached his role as a witness to Mr McInally's will with caution and diligence. He was concerned to ensure that Mr McInally understood the document that he was about to sign. His evidence about Mr McInally's understanding was not simply in terms of his opinion and nothing more. He explained the reasons why he was concerned to satisfy himself of Mr McInally's understanding and his approach to determining, for his purposes, whether Mr McInally understood his will. I disagree with the submission made by counsel for the defendant that his conclusion, that Mr McInally understood what it meant to execute the 2018 will, was "largely based" on Dr Hewson's opinion. I find that Mr Langridge reached his own view that Mr McInally had relevant capacity which was confirmed by Dr Hewson's view.

[206] I accept that Mr Langridge went through the will in its entirety with Mr McInally.

[207] I accept Mr Langridge's evidence that he spent at least 15 minutes doing so, in preference to Ms White's evidence that they were with Mr McInally for 10 minutes. I prefer Mr Langridge's evidence because of his role as the "leading" witness to the will and his greater engagement with the process than Ms White's.

[208] Having regard to the length and content of the 2018 will, 15 minutes was ample time for him to take Mr McInally through it. (Indeed, 10 minutes would have been enough.) The will is short document: a little over two pages, typed in large font, double line spaced with relatively large margins. It would not take long to read it aloud – even with discussion and explanation of its content.

[209] I find that Mr Langridge had the time, and took the time, to explain the will in plain language to Mr McInally and to ask questions of Mr McInally to satisfy himself that Mr McInally understood the will.

[210] I find that he spoke specifically to Mr McInally about the way in which Mr McInally wished to divide up his assets. I find that he questioned him particularly about the gift to his neighbour and the division of the residue into thirds.

[211] I am not concerned that Mr Langridge referred to Mr Black as Mr McInally's "stepson" in his evidence – rather than as his "son-in-law". The will itself, which Mr Langridge read through to Mr McInally, and the hospital chart, refer to Mr Black as Mr McInally's son-in-law. I do not consider it likely that Mr McInally was confused about Mr Black's status. And, I hasten to add, no point was made about this aspect of Mr Langridge's evidence by counsel for the defendant. It was likely to have been a slip in his evidence. Regardless, the effect of Mr Langridge's evidence was that Mr McInally made it clear to him that he wished his estate (after the gift to Ann Kennedy) to be divided between his daughters and the person who had been like a son to him; who had been helpful to him and had cared for him. That person was Mr Black.

[212] For completeness I note that Ms White had no concerns about Mr McInally's capacity to understand the nature, meaning and effect of his will – having herself spoken to him about the joys of Scotland.

[213] I find that while he might have been – as he was from time to time – vague or unclear during his conversation with Ms Scotson about the 2018 will sometime between 10.45 am and 3.30 pm on 4 February 2018, during her visit, by the time he spoke to Mr Langridge about the 2018 will later that day he was able to discuss the will with sufficient clarity.

Testamentary capacity – summary and conclusion

[214] I proceed on the basis that the evidence as a whole throws a doubt upon Mr McInally's testamentary capacity. I must therefore be affirmatively satisfied by the plaintiffs, to the civil standard, that Mr McInally had testamentary capacity when he executed the 2018 will.

[215] The question for me is whether, having conducted a vigilant examination of the evidence, I am left with a residual doubt about Mr McInally's testamentary capacity which is substantial

enough to preclude a belief that he possessed sound mind, memory and understanding at the time of the execution of the 2018 will.

[216] Perfect mental balance and clarity are not required for testamentary capacity (*cf Frizzo*). It is a question of degree. I must consider whether Mr McInally retained, on 4 February 2018, *sufficient* intelligence to understand and appreciate the testamentary act (*cf Banks v Goodfellow*).

[217] I must not unreasonably destroy Mr McInally's expectations – as expressed in the 2018 will – merely on the basis of his age, his ill health or his feebleness. Also, the plaintiffs do not have to satisfy me that Mr McInally knew precisely the value of his assets.

[218] I am to consider whether Mr McInally was – given his age and illness and cognitive state – equal to the task of disposing of his property (*cf Ruskey-Fleming, Frizzo, Banks v Goodfellow)*; or of "sound disposing mind" (*cf Hamill).*

[219] I have approached the issue of Mr McInally's testamentary capacity with the vigilant scrutiny required.

[220] I acknowledge the evidence of Mr McInally's drowsiness, vagueness and memory and cognition problems which were displayed from time to time during his hospital admission. Although he could not be said to have "perfect mental balance and clarity", and his mental power was "below the ordinary standard", I consider Mr McInally faculties to have been "equal" to the task of disposing of his property in the evening of 4 February 2018.

[221] I am satisfied that he then appreciated the testamentary act he was undertaking. I am satisfied that he was capable of understanding that, by his will, he could give effect to his desire to acknowledge the care he received from Ann Kennedy and Mr Black. That desire was reasonable and one which he had expressed a few months before he executed his will. I am satisfied that he was also capable of understanding the claims his daughters were entitled to make upon his estate.

[222] I am satisfied that Mr McInally conveyed to Mr Langridge that he owned a house. I am satisfied that he conveyed to Mr Langridge that his estate included cash, sufficient in amount to allow Ann Kennedy to travel to Scotland. I am satisfied therefore that Mr McInally was

aware in general terms of the nature of his estate. I have also taken into account that Mr McInally based his 2018 will on the contents of his 2007 will – reflecting his appreciation that the nature of his estate had not changed in that time.

[223] I am satisfied, on the evidence of Mr Langridge about Mr McInally's desire to acknowledge the care shown to him by others, that Mr McInally was aware of those who may be thought to have a claim upon his bounty, and that he had the ability to discriminate between the respective claims of those persons on 4 February 2018.

[224] The 2018 will was not a complicated document. Nor did it propose a complicated disposal of Mr McInally's estate.

[225] I am satisfied, to the requisite standard, that Mr McInally had testamentary capacity at the time he signed his 2018 will. I am satisfied that he was, at that time, equal to the task of disposing of his property in the uncomplicated terms of his will.

[226] While the evidence of the MOCA assessment, Ms Scotson's note and Dr Hewson's evidence leaves a residual doubt about Mr McInally's testamentary capacity at the relevant time, that doubt is not so great as to preclude my finding that Mr McInally was of sufficiently sound mind, memory and understanding at the time he signed his will on 4 February 2018 (*cf Frizzo, Worth v Clasohm* (1952) 86 CLR 439*)*.

Knowledge and understanding of the contents of the will – plaintiffs' submissions

[227] The plaintiffs relied upon the evidence of the nurses, Mr Black and Carol Scotson, discussed above, in support of the conclusion that Mr McInally knew and approved of the contents of his 2018 will.

Defendant's submissions

[228] Counsel for the defendant submitted that the plaintiffs failed to dispel the suspicious circumstances attending the execution of the will because there was "little to no evidence that the deceased knew and approved of the contents of the 2018 will".

[229] Counsel acknowledged that the evidence of the nurses who witnessed the will amounted to sufficient evidence that Mr McInally knew that he was signing a will and that there was

evidence that he was aware that its content included a gift for his neighbour for a specific purpose. But, she submitted, there was nothing beyond that.

[230] She observed that Ms White had not given evidence that Mr McInally knew and understood the contents of the document he signed (but I note Ms White's evidence about her conversation with Mr McInally about Scotland).

[231] Counsel also observed that Ms White's evidence did not include evidence that Mr Langridge read the entire will aloud to Mr McInally and submitted that I ought *not* to accept Mr Langridge's evidence that he did. She submitted that I should "prefer" Ms White's evidence on that point.

[232] It was not put to Mr Langridge in cross-examination that he did not in fact read the whole of the will aloud to Mr McInally. When I made that point to counsel, she submitted that she had in effect done so by challenging him about his ability to go through the will in 15 minutes.

[233] I accept, without hesitation, that Mr Langridge read the entire will aloud to Mr McInally. I find that Mr Langridge took seriously his role as a witness to a will. Reading the whole of the will aloud to Mr McInally, and discussing it with him, was consistent with his serious approach.

[234] Counsel for the defendant also submitted that I ought to conclude that Mr McInally was not aware of the contents of the 2018 will from the fact that it made no reference to the care Ann Kennedy provided to the dog Mollie.

Discussion

[235] The plaintiffs bear the burden of removing the suspicion attending the execution of the 2018 will by proving that Mr McInally knew and approved of its contents. I must be vigilant in my examination of the evidence in this regard and I ought not to pronounce in favour of the 2018 will unless I am "judicially satisfied" that it expresses the true will of Mr McInally.

[236] The authorities (including *Veall v Veall*) suggest that, in this context, I ought to consider matters such as whether the effect of the 2018 will was explained to Mr McInally; whether he knew of the extent of his property; and whether he comprehended and appreciated "claims on his bounty" to which he ought to give effect.

[237] I may also consider the degree of suspicion that arises and the effort required to dispel it.

[238] I consider the degree of suspicion to be relatively slight in this case. That Mr McInally relied upon his son-in-law, who had been closely involved in his care for some time, to assist in the preparation of his 2018 was not unusual in all of the circumstances, including that Mr McInally had been pressing for the will change since late 2017 and that there was nothing complicated about the estate or the changes to his will that he wished to make.

[239] In determining whether the suspicion has been dispelled, I must consider all of the circumstances, including Mr McInally's mental acuity and sophistication; the complexity of his estate; whether those with a claim upon it had been included or excluded; as well as the circumstances in which the 2018 will was drafted.

[240] The ultimate question is whether the plaintiffs have satisfied me that Mr McInally knew of the contents of the 2018 will and appreciated the effect of what he was doing when he executed it, so that it may be said that it reflected his intention and true will.

[241] It is plain, on the evidence from the Blacks and the notes in the medical charts, that Mr McInally relied primarily and significantly on Mr and Mrs Black to care for him in the last couple of years of his life, and in particular, in the last months of his life. Indeed, it was not suggested to the Blacks in cross-examination that they did not provide the care and support to Mr McInally that they said they did.

[242] To say that the deceased relied primarily and significantly on the Blacks is not intended as a criticism of Carol Scotson. It may be accepted that she provided whatever assistance she was able to. But the point is that the Blacks assumed responsibility for Mr McInally's care to such an extent that they were with him every day – or almost every day – at least in the last several months of his life. And there was no suggestion that they wished to stop providing care to him, notwithstanding his fall in January and his obviously failing condition, were he to be returned home after his January-February hospital admission. Indeed, the notes indicate that the Blacks were keen for him to be returned home.

[243] I consider those facts relevant to the content of the 2018 will, and to Mr McInally involving Mr Black in its preparation.

[244] It is of particular relevance, in my view, that the will was changed at Mr McInally's instigation.

[245] His motivation for the will change – feeling sentimental and wishing to acknowledge the support he had received late in his life – was reasonable and rational, particularly in the light of the evidence of the care provided to him by Mr Black.

[246] There was no challenge to Mr and Mrs Black's evidence about the conversations they had with the deceased at the end of 2017 when *he* first raised the prospect of changing his will. Nor was there a challenge to Mrs Black's evidence that she – in effect – talked her father out of leaving his house to her son.

[247] Apart from his raising the possibility of leaving his house to Mr and Mrs Black's son, Mr McInally remained consistent in his desire to acknowledge his neighbour and Mr Black in his will from the time he first raised the prospect of changing his will in late 2017 until he executed the 2018 will.

[248] That consistency over time is, in my view, relevant evidence of his knowledge and approval of the contents of his 2018 will.

[249] As I have already stated, I do not consider Mr Black's involvement in the drafting of the 2018 will particularly suspicious. In my view, it is understandable that, in the last few weeks of his life, Mr McInally pressed the will change that he had foreshadowed a couple of months beforehand, and as a frail, hospitalised man, not keen on spending money on lawyers, asked his son-in-law to assist.

[250] In my view, Mr McInally's approach to the cost-saving way in which the 2018 will was to be prepared (that is, it was to be drafted by Mr Black, based on the 2007 will) was not suspicious in the circumstances. Indeed, his desire to save costs was apparent when he suggested the use of a will kit at the end of 2017.

[251] Mr Black's concern to ensure that the 2018 will was "verified" by a solicitor was reasonable and appropriate in the circumstances. Indeed, on one view of things, it would have been more suspicious were he not to have involved a solicitor.

[252] Whilst there may be criticisms levelled at Mr Hoare for his hands-off approach to the preparation of the 2018 will, and his failing to appreciate the implications of Mr Black's involvement in the creation of the 2018 will, Mr Hoare's willingness to help out a friend as

requested, in all of the circumstances, arouses no great suspicion. Mr Hoare's preparedness to redraft the will is explicable by his failing to appreciate initially that Mr McInally would not be able to call on him personally to execute the will.

[253] His willingness to remain involved by preparing a will to be taken away by Mr Black for execution by Mr McInally is not suspicious. It may be inferred that he was prepared to bear the relatively light burden of re-drafting the will for Mr McInally on the strength of his relationship with Mr Black.

[254] Mr McInally was not left "out of the loop" of the process of creating his 2018 will. He was informed of the error made in Mr Hoare's first draft of the will and aware that it was to be corrected. The redrafted will was not kept from him until just before he was to sign it. Indeed, he wished to talk to Carol Scotson about it first.

[255] The defendant raised as relevant to the suspicion the difference between the draft will and the executed will when it came to the gift to Ann Kennedy (that is, the failure to mention Mollie in the signed will).

[256] I find that Mr McInally wished to acknowledge everything Ann Kennedy had done for him *and* his late wife *and* his dog, by way of a gift that would be substantial enough for her to take a trip to Scotland. I find that he told Mr Black that he wished to acknowledge the care she had provided to him, his wife *and* his dog in his will but that Mr Black overlooked the reference to Mr McInally's late wife when he prepared the draft will (to be verified by Mr Hoare).

[257] I find that Mr Hoare, reasonably, assumed that "Molly" was Mr McInally's late wife, and drafted the first draft of the 2018 will accordingly.

[258] As he acknowledged, he should have included a reference to Mollie as well as to Barbara in his second draft of the 2018 will, but he did not.

[259] Nothing in the evidence explains directly why Mr McInally did not ask for a third draft of the will, referring to his late wife *and* his dog. However, the evidence suggests that Mr McInally was keen to have his 2018 will executed. It is reasonable to assume that, in those circumstances, he considered the reference to the care which Ann Kennedy provided to his

wife and himself as sufficient to explain why he was leaving money to her. Any re-drafting of the will to include Mollie would have delayed its execution.

[260] Also, in terms of dissipating any suspicion around Mr McInally's knowledge of the contents of his 2018 will, of particular significance are –

- Mr McInally's keenness to ensure that Carol Scotson was aware of its contents; and
- the steps taken by Mr Black to ensure that Ms Scotson was –
    - aware of its contents; and
    - spoken to by Mr McInally about it before it was executed.

[261] Mr McInally's concern to ensure that Carol Scotson was aware of the contents of the 2018 will before he signed it is consistent with his appreciating that it reduced her share of the estate – in other words, it was consistent with his knowledge of the contents of the will. Mr Black's co-operation in bringing the content of the 2018 will to her attention and his prompting her to visit Mr McInally to talk about it dispel suspicion further.

[262] That the execution of his will in its 2018 form was at the forefront of his mind before he signed it is apparent from Ms Scotson's notes on her conversation with her father on 4 September 2018 – it was the first thing he raised with her. I acknowledge though that at some time during Ms Scotson's visit on 4 February 2018 Mr McInally was not clear about Mr Black's share of the estate (or his role as executor).

[263] However, I am satisfied that Mr McInally knew and approved of the contents of the 2018 will *at the time he signed it* having regard to the evidence mentioned above, taken with the evidence about –

- Mr Langridge reading through the will with Mr McInally;
- Mr Langridge explaining the will to him in plain language;
- Mr McInally's conversation with Mr Langridge about his will;
- Mr McInally's conversation with Ms White about Scotland,

[264] It follows that I will make the declaration sought by the plaintiffs.

[265] That brings me to the question of Mr Black's fitness and propriety.

Whether Mr Black is a fit and proper person to be granted probate of the 2018 will

Evidence

[266] In the context of establishing his fitness and propriety, Mr Black was questioned about his use of the deceased's Nissan Tiida, and the circumstances in which the deceased told him that he "may as well" have it, on 10 August 2016 (which was prior to the date of the appointment of Mrs Black and Ms Scotson as their father's attorneys).[13]

[267] In examination in chief, Mr Black said that the deceased held him in high esteem and had trust and confidence in him. The deceased had asked him to deliver the eulogies at Barbara McInally's funeral and at the deceased's his own funeral. Mr Black looked on the deceased as another father (his own father was deceased) and he hoped Mr McInally looked on him as a son (as the evidence suggests he did).

[268] He had been paying the expenses of the estate since Mr McInally's death and the cost of preparing the house for sale – in total he had spent about $13,000 as at July of this year.

[269] Cross-examination of Mr Black including questioning about –

- whether Mr Black paid for the wake *and* the funeral (Carol Scotson paid for the funeral, and was, according to Mr Black, reimbursed);
- whether the deceased would have given Mr Black his car, knowing that Mr Black owned two work utes and an old sports car;
- whether Mr Black took the benefit of the pensioner discount in maintaining the registration of the Nissan;
- why the car remained at the deceased house until November 2017 if it had been given to Mr Black in August of 2016;
- whether the deceased asked Mr Black if he could "lend" the Nissan to the defendant;
- his knowledge of Mrs Black's gambling/her attendance at the Casino;
- whether the deceased knew Mrs Black was using his money to gamble;

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[13] The date of their appointment was 13 November 2016).

- which of the transactions on the deceased's account Mr Black admitted were for his wife's benefit;
- whether he had overlooked certain transactions for his wife's benefit;
- whether he bought tyres and a battery for the car in June 2016 – or whether payment for the tyres came from the deceased's bank account;
- whether he gave Mrs Black money when she asked for it (which was deposited into the deceased's bank account);
- whether he agreed that everyone (he, Mrs Black and Ms Scotson) contributed to the deceased's care "as best they could" (he said "We all thought Carol could have done more. She lived nearby – two, two and a half kilometres away and drove past the turn off to her father's house on her way to work each day".); and
- his experience in not-for-profit organisations and the extent to which he dealt with their finances.

[270] He was reminded of the potential adjustment to his wife's entitlement under the 2018 will to take account of the deceased's money which she had used to her benefit and asked whether he was willing to, in effect, identify all relevant transactions. He said that he was "not aware of the requirements for that".

[271] He did not, or would not, make a claim on the estate for expenses relating to the car after the deceased's death – reflecting his belief that the car was his.

[272] In terms of matters arguably relevant to Mr Black's fitness, Mrs Black was cross-examined about –

- the circumstances in which she and Ms Scotson withdrew $90,000 from the deceased's account and distributed it;
- whether it was her idea (not Ms Scotson's) to withdraw the money "to ensure [she] didn't have to get probate for [her] father's will";
- entries contained in the deceased's Heritage bank statement from 1 April 2016 – with a view to identifying withdrawals from the account for her own purposes after she held power of attorney for the account;
- her gambling – and whether the deceased knew about it and knew that she was using his money for it (she said he did);
- lending the deceased's car to Michaela Scotson in November 2017; and

- being asked to sell the car to Michaela Scotson after her father's death.

[273] Also in her evidence, Mrs Black –

- confirmed that she deposited money on several occasions into her father's bank account;
- explained that the cheque deposits into the deceased's bank account were from her husband's account;
- stated that the deceased received his bank statements in the mail and also had access to internet banking; and
- agreed to repay to the estate the money she withdrew from her father's account, subject to an adjustment for the deposits she made into the account.

[274] Her sister had access to her father's bank statements. She had not raised any concerns about the account with Mrs Black. She also explained the reason for her father's willingness to allow her to use his money. That is, she had spent lots of money to rehabilitate her son Ryan after an overdose, and her father wanted to "replace" the money she'd spent because Ryan had rehabilitated so well.

Plaintiffs' submissions

[275] The issue of Mr Black's fitness and propriety to be granted probate was raised in the defence, but there was no counterclaim for his removal, nor did the defence nominate an alternative administrator of the estate. Nevertheless, the parties litigated the matter as if there were an application for his removal.

[276] The plaintiffs referred me to section 6 of the *Succession Act* 1981, which gives the Court a wide power to appoint any person as administrator of a the estate of a deceased person. Relevantly, that section provides as follows –

> **6 Jurisdiction**
>
> (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

…

(3) A grant may be made to such person and subject to such provisions, including conditions or limitations as the court may think fit.

(4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act* 1973.

…

[277] As illustrations of the court's exercise of its power under section 6(3), the plaintiffs cited *In the Lands and Goods of Richard Bond* [1916] St R Qld 218 and *Re Pleasance,* an unreported decision of Ambrose J, 14 December 1990.

[278] As to the *Richard Bond* matter: Richard Bond died intestate. His second wife (of 23 months) and two of his nine children of his first wife (two sons) applied simultaneously for administration of Mr Bond's estate. The estate included country property and stock. Lukin J concluded that it was in the interests of the estate as a whole to grant administration to the two sons, who were competent in their management of the stock and had "particular and peculiar knowledge" of the estate.

[279] As to the *Pleasance* matter: in his will, Charles Pleasance appointed his wife, Betina, and two men, to be his executors. Betina was incapable of performing the duties of executrix. The two men renounced their right and title to administration of Mr Pleasance's estate. The Trust Company of Australia applied for the grant of letters of administration. Ambrose J made such a grant (subject to the formal requirements of the Registrar), referring to the court's wide powers under the *Succession Act.*

[280] The plaintiffs also referred to rule 603 of the *Uniform Civil Procedure Rules* 1999 which sets out the order of priority of persons to whom the court may grant letters of administration, but noted the decision of Margaret Wilson J in *Baldwin v Greenland* [2005] QSC 386, in which her Honour said that despite the descending order of priority in rule 603, the Court may make a grant to any person in priority to a person mentioned in the list. That case involved an application by the children of the deceased to remove as executor a solicitor (Greenland) who had been careless in the management of the deceased's affairs during his lifetime. In the course of her reasons, her Honour noted that the court "will not lightly interfere with a

testator's selection of executors and trustees". Her Honour also observed that the court's overriding concern was the due administration of the estate in the interests of creditors and beneficiaries. Her Honour considered that the interests of the estate would be best served by the appointment of the Public Trustee as executor and trustee and adjourned the matter to enable the applicants to obtain the Public Trustee's unqualified consent.

[281] The removed executor unsuccessfully appealed against her Honour's order: *Baldwin and Neale v Greenland* [2006] QCA 293. On appeal, the court agreed that whilst her Honour had not gone so far as to find that Mr Greenland was not a fit and proper person – that finding was not necessary. It was necessary and sufficient to find that Mr Greenland's conduct fell so significantly short of the appropriate standard as to give a real apprehension that the estate would not be best administered by Mr Greenland and it was appropriate that he be removed. The Court of Appeal found that there were sufficient grounds for that conclusion. Jerrard JA said –

> [43] … the ultimate basis for the exercise of the statutory restatement[14] in s 6 of the *Succession Act* of the court's inherent jurisdiction is the due and proper administration of the estate.
>
> [44] The jurisdiction, both statutory and inherent, is a supervisory and protective one. It is always appropriate and necessary for a court aske to exercise it to have regard to the testator's wishes as to the identity of an executor or trustee. The testator's choice may be based on loyalty, or on respect, or on necessity or on the profession of the chosen person, or on other matters the testator knew about the chosen person; the reason for the choice might never be clear to the court. The overriding assumption must be that the testator thought the person chosen was worthy of trust, even when well aware when making a choice of existing hostility (from family members) towards the chosen executor or trustee, or of other grounds for doubt about the wisdom of the choice. The decision in *Gowans v Watkins* [unreported, Supreme Court of Victoria, Teague J, BC No 9601257, 21 February 1996] … is an example of a court respecting a testator's wishes, where no great mischief in administering the estate had been done by the person chosen by the testator, and where there were serious family hostilities. But the overriding object of the power remains the due and proper administration of estates.
>
> [45] Where circumstances have clearly arisen before a grant of probate, which impel a court exercising this jurisdiction to a firm conclusion that the due and proper

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[14] I note that McMurdo P was not persuaded that section 6 was no more than a statutory restatement of the court's inherent jurisdiction but her Honour agreed with Jerrard JA that the primary judge's findings were well open on the evidence and agreed with his Honour's proposed orders.

> administration of the estate would be put in jeopardy if a particular person were executor or trustee, it can properly exercise the jurisdiction to remove that person as either.

[282] I will not go through the evidence of the matters about which the defendant complained. It is enough to note that –

- all three of the residuary beneficiary received $30,000 in an early distribution from the estate and that Lesley Black and Carol Scotson were acting as the (joint) attorneys of the deceased at the time;
- as well as withdrawals from her father's back account during his lifetime, Lesley Black deposited money (included money she received from Mr Black) into the account; and
- Mr Black has paid all outgoings on the estate property (the deceased's house) since the date of the deceased's death (except the funeral expenses). Doing so has preserved the estate property, pending the outcome of this trial, for the benefit of the residuary beneficiaries.

[283] The evidence otherwise was that Mr Black had some experience in business and not-for-profit organisations. I note that the estate would be a simple one to administer.

[284] The plaintiffs submitted that Mr Black was a fit and proper person to be granted probate.

[285] During the course of the evidence, when Mrs Black was being cross-examined about her withdrawals from her father's bank account, for her benefit, whilst she was his attorney, counsel for the plaintiffs submitted that that matter could not be resolved until someone was appointed the executor. If that person were Mr Black, then he could review the transactions "and put a submission to the other side". If they disagreed, counsel submitted, it would be an appropriate matter to be decided by the court. Counsel also acknowledged the potential conflict.

Defendant's submissions

[286] Counsel for the defendant submitted that, as executor, Mr Black was in a difficult position because of the transactions on the deceased's account by his wife. She submitted that I ought to be concerned about Mr Black's view or attitude about Carol Scotson as revealed in the evidence and that his attitude towards her "would be a concern for the administration of the estate.

[287] Counsel accepted that she did not put to Mr Black that he would be unmotivated to investigate his wife's transactions on the account. Nor did she put to him that his attitude – that he and his wife did more and therefore deserved more than Ms Scotson – would further interfere with his motivation to investigate his wife's transactions. Counsel should have appreciated that fairness demanded that she cross-examine Mr Black about these matters if she intended to make submissions to the court about them.[15]

[288] Counsel submitted that the ownership of the Tiida was another matter that had to be investigated, and that because Mr Black asserted ownership of it, it was not appropriate for him, as executor, to investigate that matter himself.

[289] Counsel submitted that if Mr Black were not to be passed over as executor, there was likely to be further litigation. She also seemed to submit that the Public Trustee was the appropriate person to administer the estate and would consent to an appointment to do so. She had earlier submitted that her client, the defendant, could take on the role of executor – but she did not hold those instructions at the time of her submission.

[290] Counsel for the defendant did not prepare written closing submissions: the only submissions made on the issues were those made orally. In oral submissions, she referred only to the public trustee as a potential executor.

Discussion and conclusion

[291] Having regard to the estate matters outstanding – that is, the amount Mrs Black is required to repay the estate (if any), the status of the car, and perhaps the early distribution of $90,000 – and the way in which the parties are relating to each other (including the defendant's apparent suspicion of Mr Black), I am concerned that granting probate to Mr Black would ultimately not be in the best interests of the estate. In saying that, I make no finding about his fitness and propriety. However, even the plaintiffs' counsel acknowledged that were Mr Black's reconciliation of his wife's transactions on the bank account not accepted by the defendant – the court would need to decide the matter.

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[15] *Browne v Dunn* (1893) 6 R 67.

[292] It is in the interests of the estate to keep costs to a minimum and to avoid further litigation. It may be that it is appropriate to grant probate to Mr Black – subject to a condition that an independent person calculate the amount which Mrs Black owes to the estate and the issue of the ownership of the Nissan Tiida.[16] I wish to hear further submissions from the parties as to the most appropriate orders for the administration of the estate.

Final orders

[293] I will pronounce in solemn form for the force and validity of the will of James McInally dated 4 February 2018.

[294] I will hear the parties further on the question of the grant of probate, including a grant on conditions.

[295] I will hear the parties further as to the final form of order and costs.

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[16] See as an example of a similar approach, *E Carr & Son Pty Ltd v Hood and Carr as Executors of the Estate of the late Edward Carr* [2003] QSC 453.