SUPREME COURT OF QUEENSLAND

CITATION:	*Duncan v Gibson* [2020] QSC 204
PARTIES:	**DUNCAN, Michele Simone** (Plaintiff) **v** **GIBSON, Peter Michael** (First Defendant) and **GEBICKI, Karl Mark** (Second Defendant)
FILE NO/S:	BS 5172 of 2019
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	9 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	11 and 12 June 2020
JUDGE:	Boddice J
ORDER:	**I will hear the parties as to the form of orders and costs.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – EXECUTION – SIGNATURE OF TESTATOR – GENERALLY – where the plaintiff seeks declaratory and other relief in relation to a document said to be the last Will of the deceased – where one issue at trial was whether the deceased affixed her signature to the document – where the plaintiff contended a number of circumstances aroused a suspicion that the document was not signed by the deceased – where there was evidence from two witnesses that the deceased affixed her signature to the document, in their presence, before each affixed their own signatures to the document – whether the remaining matters said to constitute suspicious circumstances were sufficient to displace the direct evidence – whether the deceased affixed her signature to the document SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – GENERALLY – where one issue at trial was whether the deceased had testamentary capacity – where the plaintiff contended a number of circumstances raised a real doubt about the deceased's capacity to execute a valid will – where the deceased had a number of medical conditions – where there was evidence from two witnesses that the deceased was coherent on the day

she affixed her signature to the document – whether the deceased knew and approved of the contents of the document and intended that it would represent her last Will – whether the deceased had testamentary capacity

SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – GENERAL PRINCIPLES – where one issue at trial was whether the deceased made adequate provision for the plaintiff – where the estate was modest in size – where the plaintiff and the deceased were estranged – whether the plaintiff was left without adequate provision for her proper maintenance, education and advancement in life

Succession Act 1981 (Qld), s 41(1)

Banks v Goodfellow (1870) LR 5 QB 549
Blendell v Byrne & Ors; The Estate of Noeline Joan Blendell [2019] NSWSC 853
Collett & Anor v Knox v Anor [2010] QSC 132
Freeman & Ors v Jacques [2006] 1 Qd R 318
Goodchild v James (1994) 13 QAR 229
Grey v Harrison [1997] 2 VR 359
Hamill & Anor v Wright & Ors [2018] QSC 197
In the Estate of L E Jones; Incarnuti v Chambers, Supreme Court of Queensland, 4 April 1988, unreported
Nock v Austin [1918] HCA 73
Read v Carmody [1998] NSWCA 182
Singer v Berghouse (1994) 181 CLR 201
Veall v Veall [2015] VSCA 60
Vigolo v Bostin [2005] HCA 11
Williams v Public Trustee of New South Wales (No 2) [2007] NSWSC 974

COUNSEL: S Gerber for the plaintiff
The first defendant appeared on his own behalf

SOLICITORS: Sykes Miller Pearson for the plaintiff
The first defendant appeared on his own behalf

[1] By Claim filed on 15 May 2019, the plaintiff seeks declaratory and other relief in relation to a document dated 19 January 2017, which is said to be the last Will of her mother, Fay Lorraine Duncan ("the deceased").

[2] By that document, the deceased appointed the second defendant as executor of her estate, and left the plaintiff her jewellery, car and personal effects, with the rest and residue of her estate left to her "carer", the first defendant.

[3] The second defendant failed to file a defence in accordance with the requirements of the *Uniform Civil Procedure Rules 1999* (Qld). Accordingly, on 15 April 2020, judgment by default was entered against him.

[4] On the same date, the first defendant was granted letters of administration *ad litem*, for the sole purpose of defending this proceeding.

[5] At issue at the hearing was whether the deceased affixed her signature to the document and whether the deceased had testamentary capacity.

[6] Two further issues, in the event the document was found to be the last Will of the deceased, were whether the deceased and the first defendant were in a de facto relationship and whether the deceased had made adequate provision for the plaintiff.

[7] A further issue, in the event the document was found not to be the last Will of the deceased, was a claim by the first defendant for unpaid wages and other sums.

Background

[8] The plaintiff is the sole surviving child of the deceased, who was found dead at Cooroy in the State of Queensland on 19 October 2018. She was aged 67 years.

[9] The deceased was found by the first defendant, lying face down on her bedroom floor wrapped in a doona. An autopsy recorded the cause of death as "not ascertained", as smothering could not be completely excluded as a cause of death.

[10] At the time of her death, the deceased was living with the first defendant. He was her carer. He alleges they were also in a de facto relationship.

[11] The deceased was the registered owner of the real property at Cooroy. That property contained a modest home. It is in a poor state and requires substantial repairs. Its value is between $320,000 and $350,000.

Document

[12] The document is a typed document in the following terms:

> "**This is the last will and testament**
>
> of FAY LORRAINE DUNCAN of 11 Miva Street Cooroy in the State of Queensland, widow.
>
> 1. **I HEREBY REVOKE** all Wills Codicils and Testamentary Dispositions heretofore made by me and I declare this to be my last will.
>
> 2. **I HEREBY APPOINT** my dear friend Karl Mark Gebicki of Lot 72 Plan no: 16532 Mount Perry in the state of Queensland Sole Executrix of this my Will AND I DECLARE that in the interpretation of this my will the term "my Trustees" shall where the context permits mean and include the trustee or trustees for the time being here of whether original or substituted.
>
> 3. **I GIVE AND BEQUEATH** all jewellery personal effects money in accounts and any motor vehicle of which I die possessed including any duty and fees incurred. Unto my daughter Michelle Simone Rook in the state of NSW.

> 4. **I GIVE DEVISE AND BEQUEATH** The rest and residue of my property all furniture and fittings real and personal of whatsoever kind and wheresoever situate to my carer Peter Michael Gibson of 11 Miva Street Cooroy in the stale of Queensland.
>
> **IN WITNESS WHEREOF I the above named FAY LORRAINE DUNCAN have hereunto set my hand this day of 2017**
>
> **SIGNED** by the said Fay Lorraine Duncan as her last will in the presence of us both being present at the time who at her request and in her presence and in the presence of each other have hereunto subscribed our names as attesting witnesses"

[13] The date section contained "19TH" and "Janui" in handwriting, below which was affixed "Fay Duncan". The witness section contained two signatures, with the names Ernest Sanderson and Karl Gebicki beside those signatures.

Evidence

[14] The deceased was born on 19 September 1951. She had two older siblings, Kevin Cliffe ("Kevin") and Brian Cliffe ("Brian").

[15] When aged 23 years, the deceased married Sidney Russell Duncan ("Sidney"). The deceased and Sidney divorced in about 1979. Sidney died in 1993.

[16] There were two children from that relationship, a son, who died on 11 November 2014, aged 43, and the plaintiff.

[17] The deceased's son suffered from mental health issues. A failed attempt at suicide in 1993 left him with significant brain damage. He was difficult to manage and would, on occasions, be violent. During one violent episode, the deceased suffered some broken bones, which limited her mobility in the latter stages of her life.

Plaintiff

[18] The plaintiff was born on 9 March 1976. She is now aged 44 years.

[19] The deceased changed the spelling of the plaintiff's christian name, when the plaintiff was approximately 16 months old, from "Michelle" to 'Michele". That reflected the spelling of the name of the wife of one of the deceased's brothers, who was regarded by the deceased as her best friend.

[20] The plaintiff had not seen her original birth certificate until it was produced in an affidavit by the first defendant. To her knowledge, the deceased did not have her original birth certificate.

[21] The deceased struggled with addiction. She abused alcohol, prescription medication and illicit drugs. As a consequence, the plaintiff had a dysfunctional upbringing. The plaintiff was subjected to violence throughout her childhood.

[22] In her teenage years, the plaintiff lived with Sidney. The plaintiff had limited contact with the deceased. Since adulthood, the plaintiff had limited her contact with the deceased, on the advice of her psychologist and, later, her trauma counsellor.

[23] The plaintiff last saw the deceased approximately 20 years before her death. She last spoke to her some 17 years before her death. The plaintiff kept herself informed as to the deceased's circumstances through Kevin and Brian and her aunties.

[24] The plaintiff organised the deceased's cremation and memorial service. The plaintiff sent an email to the first defendant on 22 October 2012 confirming the arrangements and costs. That email referred to a funeral benefits policy. It also referred to the plaintiff's intention to collect the deceased's jewellery and other effects.

[25] The plaintiff said she had spoken to the first defendant before she sent that email. The first defendant told the plaintiff he was to receive $6,000 from a funeral benefits policy. The plaintiff said he expressed pleasure in the fact that as the deceased had died accidently he would have a greater pay out under the policy.

[26] The plaintiff said the first defendant also said he had typed up a Will for the deceased about one year previously, but he could not find it and it was not validated. He said he was getting the deceased's jewellery and family photographs together for her.

[27] On 17 November 2018, the plaintiff attended the property at Cooroy. She was met by the second defendant, waving a piece of paper, saying he had Fay's will.

[28] On 7 December 2018, the second defendant telephoned the plaintiff's solicitors. He said he had two wills of the deceased. The previous Will of the deceased had left everything to her son and nothing to the plaintiff. The deceased had made a further Will dated 19 January 2017, in which the house was left to the first defendant, with all jewellery, car and personal effects going to the plaintiff. The second defendant described himself as having known the deceased for quite some years. He had gone to school with the first defendant, whom he described as a life-long friend.

[29] On 10 December 2018, the second defendant sent a copy of the document to the plaintiff's solicitors. The plaintiff noted that that document spelt her christian name incorrectly. The plaintiff did not believe her mother would have prepared or signed a Will that incorrectly spelt her name.

[30] The plaintiff also said that the signature was different to what she knew to be her mother's usual signature. That signature was said to have been witnessed by the second defendant and Ernest Sanderson. The plaintiff had never heard of either person. Enquiries on Facebook revealed that neither were friends with the deceased. Both were Facebook friends with the first defendant.

[31] The plaintiff said the document described the first defendant as the deceased's carer. When she last saw the deceased in 1998, the only people living at Cooroy were the deceased and the plaintiff's brother. There was no evidence of the first defendant

being at that property at that time. Neither the deceased nor her brother mentioned the first defendant to her during that visit.

[32] The plaintiff was told later by her uncles that the deceased had invited the first defendant to visit her and that the first defendant had stayed and acted as her brother's carer. The first defendant stayed after her brother's death as the deceased's carer.

[33] An inspection by the plaintiff of the Cooroy property on 17 November 2018 revealed no indication that the deceased and the first defendant shared the bedroom. Further enquiries by the plaintiff revealed that the deceased had signed up to a dating website in 2017; that Centrelink recorded the deceased as single with no dependents; that relevant medical records recorded the deceased as single, with the first defendant being recorded as a carer only; that the deceased's bank accounts were held in her name only, with no joint accounts with the first defendant; and that the deceased held a single's health insurance policy. The first defendant also described himself as single on his Facebook page at the time of the deceased's death.

Uncles

[34] Kevin and Brian both kept in touch with the deceased on a fairly regular basis. They both acknowledged that the deceased drank to excess. At those times, she was incoherent and difficult to communicate with by telephone. On other occasions, however, she was coherent and lucid.

[35] Kevin said the first defendant telephoned him on 19 October 2018 to advise of the deceased's death. On 20 October 2018, the first defendant informed him of the details of house and funeral insurance, bank accounts and that there was a large Council rates debt. The first defendant also said there was no power of attorney and that he had typed up a proper Will for the deceased, which had been witnessed but he had no idea as to its location.

[36] Kevin visited the deceased's house on 21 November 2018. There was a "no trespass" notice attached to the front of the property. The first defendant said he had been told to put that notice up. Kevin observed that their father's Will was on top of the deceased's bed. He took that Will. Kevin said the first defendant gave him the deceased's mobile phone.

[37] During his conversation with the first defendant on 21 November 2018, the first defendant told him that the deceased had left her house to him, on the condition it went to her daughter on his death.

[38] Kevin said that on 1 November 2018, he received a message on his answering machine from the second defendant, advising that he was the executor of the deceased's Will. He had not heard of the second defendant before that time.

[39] On 3 December 2018, the deceased's mobile telephone received a number of calls. One purported to be from a superannuation fund. That call caused Kevin concern as he knew that people in receipt of Centrelink benefits did not have superannuation. Subsequent enquiries revealed that the address given for the superannuation fund

was false. The telephone numbers given in these conversations were registered to the second defendant.

[40] Kevin said he had regular telephone contact with the deceased in the last decade of her life. He visited her once or twice most years. The house was always in a poor state. On each occasion, the first defendant was sleeping on the lounge.

[41] The deceased told Kevin on several occasions that she wanted to get rid of the first defendant. The deceased talked about neighbours and friends. At no time did she ever mention the second defendant or Sanderson.

[42] Kevin received many calls from the deceased where she left messages on his answering machine. Two messages caused him concern. The first message, left some time in 2017, was in the following terms:

> "Hey Kevin. It's Fay here. I think Peter's cracked up. He's locked me in my room and won't let me use the bathroom at all and um yes he's sort of taken over. Get back to me as soon as you can will you. Okay get back to me quickly. I don't know what he's going to do to me. I don't think it's good. Bye."

[43] The second message, left at a time earlier than the first message, recorded a conversation between the deceased and the first defendant. The deceased is speaking with slurred speech. In that message, the deceased is recorded as saying:

> "I'm trying to get away from you. You don't want me around anyway, you made that bloody clear. Hi it's Fay. Ring me back please."

[44] The first defendant is recorded as repeating, in a mocking tone, "ring me back". The deceased's response is inaudible, except for saying "blah blah blah".

[45] Kevin said that over the years before her death the deceased often made little sense or was incoherent in their conversations. Her speech was slurred and slow. On occasions, the deceased would call him back five or ten minutes later with no recollection of their earlier call. The deceased would also recall conversations she said she had had with Kevin, when she had those conversations with Brian.

[46] Kevin expressed the opinion that the deceased became worse in the last few years of her life. She was unaware of the date, time and year, and of current affairs. The deceased was drinking heavily and taking prescription drugs. These substances caused her to be sleepy and drowsy. Whilst the deceased had discussed with him her financial affairs, she had never discussed having a Will. He did not consider she would be capable of understanding a Will.

[47] Brian also used to regularly speak to the deceased by telephone. The deceased was often incoherent. The deceased abused alcohol and took prescription medication.

[48] Brian described the first defendant as initially being a drinking buddy for the deceased. It appeared to him that the first defendant was better friends with the deceased's son. The deceased said to him at one time that she thought the first defendant was mildly retarded.

[49] At some point, the deceased told Brian that the first defendant had visited her in Queensland. When he joked about them dating, the deceased replied "yuck" and made gagging noises. She criticised the hygiene of the first defendant and said he slept on the couch. At another point, the deceased observed to Brian that the first defendant would not leave and would not give her any rent money to help out.

[50] Brian said that, after the deceased's son passed away, the deceased became more depressed and abused alcohol and medication with increasing frequency. The deceased's speech would be slurred and she did not know the time or day. More often than not she was completely incoherent. When he would call her the following day, she had no recollection of his earlier call.

[51] Brian said the deceased complained regularly of the amount of "junk" left by the first defendant. She also complained that the first defendant would not pay rent or clean up his mess. As a consequence, Brian discussed the building of a granny flat so the deceased could get away from the first defendant.

[52] Brian said, in September 2018, he noticed the deceased was more depressed, teary and seemed to have lost the will to live. He raised with her the need to prepare a Will. He told her to see a local solicitor. At no stage did the deceased mention anything about already having a Will. Some two weeks after that telephone call, he again spoke to the deceased. During that conversation, he could hear the first defendant ranting loudly. The deceased said "he's got the shits because I told him I am not leaving the house to him, and why would I".

[53] Brian said that in the years before her death, the deceased's drinking was so heavy he did not believe the deceased would have the capacity to read or understand any document typed up for her. He suggested seeing a solicitor as the solicitor would explain the Will and judge her capacity.

First defendant

[54] The first defendant met the deceased when she was living in New South Wales. They kept in touch when the deceased moved to Cooroy. In 1998, the first defendant moved to the Cooroy property. That arrangement continued after the death of the deceased's son. In the later years, the first defendant became the deceased's carer. He received a carer's pension from Centrelink.

[55] The first defendant said that whilst the deceased was a regular drinker of alcohol, she remained mentally alert. The deceased was clever to ensure that, when she undertook a cognitive assessment test in 2015, she answered questions in a manner that ensured she retained the benefit of a pension. He did not accept that the results of that test properly reflected her mental ability and acumen.

[56] The first defendant said the deceased asked him to prepare a will. He looked up the format for wills. He asked the deceased what she wanted to do and typed up the document on his laptop. He gave a printed copy to the deceased. He thought it was probably in November 2016.

[57] The first defendant said, when he gave the deceased the printed copy, she promised she would look at it later. Shortly after that time, he had to travel to Sydney. He does not know whether the deceased looked at the document at a later time. He did

not ever print another copy or make any changes to the document. He next saw the document after the deceased's death.

[58] The first defendant accepted that the printed document had the typed date 2017. He thought that date was inserted as part of his discussion with the deceased. He said she was "probably going to get it signed in 2017". When asked what the deceased said, he said "from memory, that she would need a bit of time to organise to sign it".

[59] The first defendant said he next saw the document when the second defendant told him on 25 October 2018 that he knew where the typed document was and that it was signed. The first defendant thought this conversation took place by telephone. The second defendant had not attended the Cooroy property between 19 October 2018 and 25 October 2018. The first defendant understood he had found the Will somewhere other than in the deceased's house. The second defendant brought the document down with him when he came to clean up the house.

[60] The first defendant said his relationship with the deceased evolved in the years prior to her death to being both carer and de facto partner. He accepted that, from the time of the deceased's son's death, the relationship became more a carer situation but said that that did not mean they were not together. He accepted they did not own any joint property or share any bank accounts.

[61] The first defendant accepted that he had never disclosed the existence of a de facto relationship with the deceased to Centrelink. The first defendant said it was common for people to gain a carer's pension without disclosing the existence of a de facto relationship with the carer. He also did not disclose the existence of that de facto relationship in any of the tax returns he had filed for the previous ten years. When asked why the deceased would have referred to him as her carer in the document, the second defendant replied "it's to keep things tidy".[1]

Other witnesses

[62] Sanderson gave evidence that the deceased telephoned him requesting he come around the next day at three or four o'clock to witness her signing. When he arrived at the deceased's residence, there was present both the deceased and the second defendant. He had not previously met the second defendant.

[63] Sanderson said that the deceased sat down and said "yeah. You have to watch me signing it and then you sign and then Karl watch you signing it, all of us". The deceased signed the document first. Sanderson witnessed her signature. The second defendant then witnessed her signature. The second defendant also wrote the date on the document. They each used the same pen.

[64] Sanderson said the deceased read the document before signing it. The second defendant also read it out to her and explained it. The second defendant asked the deceased if she knew what she was doing and that she was not drunk.[2]

[65] Sanderson said he left straight after completion of the document. He was at the house for 10 minutes. He did not see who took the document.

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1 T1-45/35.
2 T1-53/8.

[66] Sanderson did not accept that the signature on the document was different to his signature on affidavits he had signed in this proceeding. He did not write Sanderson in every signature any more.

[67] Sanderson said he first met the first defendant in 2003 or 2005. He did not meet the deceased until July 2008. He spent Christmas with them in 2016. Sanderson accepted that the deceased started drinking more heavily after the death of her son. She would often ring him when she was drunk.

[68] Sanderson described the deceased's relationship with the first defendant as "not married but they were together".[3] He said he had an experience, a few months before the deceased passed away, where he had gone to their residence but left after hearing "really embarrassing noises … like someone has fun with each other".[4]

[69] The second defendant gave evidence that he received a telephone call from the deceased, requesting he call in and sign a document. When he arrived at the deceased's residence, Sanderson was already present. He had not previously met Sanderson. There were no other persons in the house.

[70] The second defendant's recollection was that Sanderson was the primary witness for the actual document. The second defendant completed the day, month and year. He recalled Sanderson making a comment to the effect that the second defendant was the executor and needed to complete certain parts of the document.

[71] In cross examination, the second defendant said that, early in the piece he was contacted by the first defendant regarding witnessing a Will. He later had a telephone call from the deceased, saying "I need some assistance with some documents". The second defendant was returning from Sydney and agreed to call in on his way home. He told the deceased he would give her a call before he arrived in Brisbane.

[72] The second defendant said he had not seen the document before he arrived at the house. He did not know he had been named as executor until the time of signing the document. He thought he arrived at the property somewhere around 12 o'clock, but said he would need to check his travel diary.

[73] The second defendant said the deceased was sitting in a chair in the lounge area. The document was sitting on top of some plastic storage containers with other paperwork. He saw the deceased place her signature on the document. It was next signed by Sanderson. It then came to him to be signed. He filled in the date and passed it back to the deceased.

[74] When asked whether he read the Will to the deceased, the second defendant said:

> "I said to Fay "what's this document regarding?". She made some comments regarding her – Matthew, her son. Matt, as I knew him as, had passed away and she was going to redo her Will. I read the document to myself and I said something to the effect of "are you sure this is exactly what you want to do? You can change this at any time but you will have to destroy this Will and get a fresh Will

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3 T1-53/45.
4 T1-54/5.

> written. I don't know when I will be down here next". I said "is it your intention to make Peter Gibson the beneficiary of – basically the inheritor of the estate bar the other items?" And she said well by memory her comments were because I actually knew of her daughter and says "her – my daughter got enough assets from when her father passed away. She's set up and established". We had spoken about the – how much I had – how long I had known Fay for and she was sort of concerned if she was to pass away suddenly because of what happened to Matthew with having the cancer that she did not want – it was not her intention or her wishes to leave Peter Gibson out on the street and homeless."[5]

[75] The second defendant asked those questions to make sure the deceased was understanding what she was reading. The deceased also looked at the document for some time before she passed it to him. He could not say with any certainty whether she read it at that time.

[76] The second defendant said, after the document was signed, the deceased folded it and slipped it into a brown envelope located on the plastic storage containers. He did not take the document with him. He next saw it when he was helping the first defendant clean out the deceased's house.

[77] The second defendant said that when he was cleaning out, he mentioned to the first defendant that the deceased had a Will but said he had no idea where it would be, but that it was in a brown Government type envelope. The document was located towards the end of removing rubbish in the master bedroom, with other personal documents. The first defendant found the document.

[78] The second defendant obtained a certified copy of the document, before sending it to the plaintiff's solicitors.

[79] The first defendant's sister, Tina, gave evidence that she often spoke to the deceased by telephone. She always found her to be very aware and cognitively intact. The deceased would sometimes call Tina later in the evening, when she was intoxicated. On those occasions, the deceased could still hold a conversation. She was not incoherent or unaware of what she was saying to Tina.

[80] Tina travelled to Cooroy in January 2016. The deceased spoke freely and displayed no mental incapacity at that visit. Subsequent to that visit, they continued their telephone conversations. On each occasion, the deceased sounded fine. Tina always knew when the deceased had been drinking, but said she was never incoherent.

[81] Tina accepted that in the last two years of the deceased's life the first defendant was the deceased's carer. She said the first defendant was caring for the deceased and her son for a long time, but did not officially become the deceased's carer until the deceased's son died in 2014.

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5 T1-59/20 – 30.

Consideration

[82] The plaintiff contends that the following circumstances arouse a suspicion that the document was not signed by the deceased, or at least raise a real doubt about the deceased's capacity to execute a valid Will:

(a) The deceased's lack of testamentary capacity.

(b) The document was prepared by the first defendant, a principal beneficiary under it.

(c) The signature on the Will does not appear to be that of the deceased, being materially different to examples of her known signature.

(d) The plaintiff's name is misspelt within the document.

(e) The second defendant was not known to any member of the deceased's family.

(f) The document was prepared in 2016 but had a typed date 2017.

(g) Different versions were given by the witnessing parties as to the circumstances of the execution of the document.

(h) Different versions were given by the first defendant and the second defendant about the discovery of the document.

(i) The deceased's death was surrounded by suspicious circumstances.

(j) The deceased had no memory of having signed the document.

(k) Shortly prior to her death, the deceased told Brian that the first defendant was unhappy as she had told him she was not leaving the house to him.

(l) The first defendant has given conflicting accounts about the preparation of an earlier Will.

Legal principles

[83] In order to have testamentary capacity, a testator must:

(a) understand the nature of the act and its effect, that is, be aware of and appreciate the significance of the making of a Will;

(b) understand the extent of the property of which she is disposing, that is, be aware, at least in general terms, of the nature, extent and value of the estate;

(c) comprehend and appreciate the claims to which she ought to give effect, that is, be aware of those who may reasonably be thought to have a claim upon the estate and the basis for and nature of the claims of such persons;

(d) have no disorder of the mind which influences the disposition of his estate, that is, have an ability to evaluate and discriminate between the respective strengths of the claims on his estate.[6]

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6 *Hamill & Anor v Wright & Ors* [2018] QSC 197 at [140] per Applegarth J; *Banks v Goodfellow* (1870) LR 5 QB 549 at 565; *Read v Carmody* [1998] NSWCA 182.

[84] Material circumstances include the nature of the document, the rationality or otherwise of its provisions, the exclusion or non-exclusion of persons naturally having a claim on the testator, extreme age, sickness and the opportunity to exercise undue influence.[7]

[85] The existence of suspicious circumstances places an onus, on those propounding a document as the last valid Will of a deceased person, of proving that the Will was validly made and that it was the last Will of the deceased.[8]

[86] In order to satisfy that onus, the first defendant must establish not only that the deceased affixed her signature to the document but also that, at the time the deceased affixed her signature to the document, she had testamentary capacity and, further, knew and approved of the contents of the document as her last Will.

[87] This latter requirement is conceptionally distinct and separate from testamentary capacity.[9] As Santamaria JA observed in *Veall v Veall*:[10]

> "[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 document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will – that is to say, that he did understand what he was doing and its effect – it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents – in the wider sense to which I have referred."

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7 *In the Estate of L E Jones; Incarnuti v Chambers*, Supreme Court of Queensland, 4 April 1988, unreported, per Connolly J.

8 *Williams v Public Trustee of New South Wales (No 2)* [2007] NSWSC 974 at [60].

9 *Blendell v Byrne & Ors; The Estate of Noeline Joan Blendell* [2019] NSWSC 583 at [427].

10 [2015] VSCA 60 at [173].

[88] The applicable principles, where the knowledge and approval of a testator are put in question, were summarised by Isaac J in *Nock v Austin*[11] as follows:

> "1 In general, where there appears no circumstance exciting suspicion that the provisions of the instrument may not have been fully known to and approved by the testator, the mere proof of his capacity and of the fact of due execution of the instrument creates an assumption that he knew of and assented to its contents.
>
> 2. Where any such suspicious circumstances exist, the assumption does not arise, and the proponents have the burden of removing the suspicion by proving affirmatively by clear and satisfactory proof that the testator knew and approved of the contents of the document.
>
> 3. If in such a case the conscience of the tribunal, whose function it is to determine the fact upon a careful and accurate consideration of all of the evidence on both sides, it is not judicially satisfied that the document does contain the real intention of the testator, the Court is bound to pronounce its opinion that the instrument is not entitled to probate.
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> 4. The circumstance that a party who takes a benefit wrote or prepared the will is one which should generally arouse suspicion and call for the vigilant and anxious examination by the Court of the evidence as to the testator's appreciation and approval of the contents of the will.
>
> 5. But the rule does not go further than requiring vigilance in seeing that the case is fully proved. It does not introduce a disqualification.
>
> 6. Nor does the rule require as a matter of law any particular species of proof to satisfy the onus.
>
> 7. The doctrine that suspicion must be cleared away does not create "a screen" behind which fraud or dishonesty may be relied on without distinctly charging it."

[89] More recently, Hallen J in *Blendell* recited a number of factors which are relevant when considering whether circumstances excite suspicion. Those factors include the circumstances surrounding the preparation of the document, whether a beneficiary was instrumental in its preparation, the extent of the physical and mental impairment, if any, of the deceased, whether the document constitutes a significant change from a prior will and whether the document, generally, seems to make testamentary sense.[12]

[90] It is the testator's understanding that is decisive. Santamaria JA expressed the issue as follows in *Veall*:[13]

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11 [1918] HCA 73.
12 [2019] NSWSC 583 at [442].
13 *Veall v Veall* [2015] VSCA 60 at [179].

> "[179] It is the testator's understanding that is decisive: the issue to be determined is whether the testator knew and approved the contents of the will. Sufficiency of evidence will depend upon the circumstances of the case. In *Tobin v Ezekiel*, Meagher JA put it as follows:
>
> > 'Evidence that the testator gave instructions for the will or that it was read over by or to the testator is said to be 'the most satisfactory evidence' of actual knowledge of the contents of the will: *Barry v Butlin* ...; *Gregson v Taylor* …; *Re Fenwick* … What is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case; for example, in *Wintle v Nye* … the relevant circumstances were described … as being such as to impose 'as heavy a burden as can be imagined'. Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it. In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction: *Fulton v Andrew* …; *Tyrrell v Painton* … That requires that it be affirmatively established that the testator knew the contents of the will and appreciated the effect of what he or she was doing so that it can be said that the will contains the real intention and reflects the true will of the testator: *Tyrrell v Painton* …; *Nock v Austin* …' *Fuller v Strum* …; *Dore v Billinghurst* …"
>
> (citations omitted)"

Did the deceased sign the document?

[91] The fact that the document was prepared by the first defendant, in circumstances where he was a major beneficiary under the document, does give rise to suspicious circumstances, warranting careful consideration of the whole of the evidence before coming to a conclusion that the document does contain the signature of the deceased.

[92] However, there is direct evidence from both Sanderson and the second defendant, that each was contacted by the deceased, who requested they attend her residence; that when they arrived at the residence, the deceased had the document; and that the deceased affixed her signature to that document, in their presence, before each affixed their own signatures to the document.

[93] Sanderson's evidence was particularly compelling in relation to the circumstances in which those events took place. He impressed as both reliable and credible. I

accept his evidence as accurate. Once that conclusion is reached, there is no reason to reject the second defendant's evidence to similar effect.

[94] The remaining matters said to constitute suspicious circumstances are insufficient to displace an acceptance of the accuracy and reliability of Sanderson's direct evidence that the deceased affixed her signature to the document.

[95] First, whilst the document contains within it a number of curiosities, such as the typed date 2017, when it was prepared in late 2016, and a misspelling of the plaintiff's christian name, those matters in themselves are not suspicious. They are explicable by reason of the fact that the document was typed by the first defendant, knowing that the deceased intended to execute it sometime in the future. The deceased may also easily have missed the error in the spelling of the plaintiff's name.

[96] Second, having examined the various documents, I am not satisfied the signature on the document is so dissimilar as to give rise to a suspicion that the signature on the document was not affixed by the deceased.

[97] The plaintiff's contention that the signature itself gives rise to a suspicious circumstance, as it bears no resemblance to the deceased's normal signature, was based on a consideration of signatures of the deceased that were, as at 2017, quite dated. By contrast, the document said to have been completed by the deceased, when attending a dental clinic in 2016, only months before the execution of the document, contained a similar signature.

[98] Significantly, the deceased's brother, Kevin, opined that the word "Fay" appeared to be the deceased's signature. Whilst he did not accept that the word "Duncan" was consistent with her signature, he also did not accept that the signature affixed to the dental clinic's records was the plaintiff's signature.

[99] Third, the fact that the second defendant was not known to any member of the deceased's family is not unsurprising. The plaintiff had not spoken to the deceased in 17 years. Whilst her brothers regularly spoke with the deceased, they would not necessarily know of all of her good friends. They had limited physical contact.

[100] Fourth, the differences in the recollections of Sanderson and the second defendant as to the circumstances of the execution of the document were as to subsidiary matters, consistent with honest witnesses trying their best. There was no substantial difference between the two as to the core issues, namely, that each was contacted by the deceased and requested to attend; that the deceased affixed her signature to the document after having the document read to her by the second defendant; and that each affixed their signature to the document after the deceased had affixed her signature.

[101] Fifth, the differences in versions given by the first defendant and the second defendant about the discovery of the document do not detract from the fact that there is direct and accepted evidence of the circumstances of the execution of that document by the deceased, over 18 months before her death.

[102] Sixth, the existence of suspicious circumstances surrounding the deceased's death does not detract from an acceptance of direct evidence as to the execution of the document by the deceased, many months before the deceased's death.

[103] Seventh, conversations between the deceased and Brian shortly prior to her death, as to the preparation of a will and the disposition of the house, are open to a number of interpretations.

[104] One interpretation, consistent with the first defendant's evidence, is that the conversation overheard by Brian related to a dispute between the deceased and the first defendant as to the first defendant's intention to leave the house to the deceased's daughter after his death and the deceased's disagreement with her daughter receiving the house.[14] Another interpretation is that the deceased was considering altering her Will.

[105] On neither interpretation is there a basis to conclude that the deceased did not execute the document, intending it to be her Will. For similar reasons, conflicting accounts as to the preparation of an earlier will cannot constitute a basis to find, contrary to the accepted evidence, that the deceased did not affix her signature to the document.

[106] I find that the deceased did affix her signature to the document on 19 January 2017.

Testamentary capacity

[107] There is no doubt that the deceased had a number of medical conditions. The deceased also had the consequences of long standing alcohol and drug abuse, which impacted upon her cognition. Her memory score for a test conducted in 2015 is consistent with poor cognition.

[108] However, there is evidence from both Sanderson and the second defendant that the deceased was coherent on the day she affixed her signature to the document. I accept that evidence.

[109] That coherency is supported by the fact that it was the deceased who requested each of them attend her residence; and that the deceased gave positive responses to the second defendant when he read the document to her and explained its contents.

[110] Those positive responses were consistent with an understanding of her assets; an understanding of the document's contents; an acknowledgment of its consequences; and an acceptance and approval of its effects.

[111] The evidence of Sanderson and the second defendant support a conclusion that, at the time the deceased affixed her signature to the document, she was lucid and coherent; wishing to undertake the process (as evidenced by the fact that she asked them to attend the residence for that purpose) and responded consistently with an understanding of both the processes and significance of the document, including its effects and content.

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14 Exhibit 8, para 32 of Affidavit of first defendant.

[112] The contents of the document also support a conclusion that the disposition of the deceased's estate was not irrational. The deceased gave her only surviving child, effectively, her personal effects, being jewellery, motor vehicle, as well as any cash in her bank accounts. She gave her long term carer the house in which they had both lived for 20 years. There is no suggestion the first defendant had any other residence available to him.

[113] Finally, there is nothing in the medical evidence and the accounts of Kevin and Brian as to the deceased's deteriorating memory which support a conclusion that the deceased lacked testamentary capacity at the time she affixed her signature to the document on 19 January 2017.

[114] The memory test was conducted in 2015. That test is a blunt instrument. There is no evidence as to the circumstances of the completion of that memory test. The circumstances in which it is undertaken may explain the results.

[115] Further, occasions of deteriorating memory described by Kevin and Brian may be explained by the state of the deceased's sobriety and her abuse of medication at the time of those conversations. Each accepted that on other occasions the deceased was lucid and coherent.

[116] I find that, at the time the deceased affixed her signature to the document dated 19 January 2017, she knew and approved of its contents and intended by doing so that that document represent her last Will.

[117] The deceased had testamentary capacity.

Counterclaim

[118] The counterclaim was only pressed by the first defendant if the document dated 19 January 2017 was found not to be the last Will of the deceased. As the document is the last Will of the deceased, there is no need to consider this claim further.

De facto partner

[119] The first defendant's contention that he was the deceased's de facto partner was inconsistent with the position presented to Centrelink in support of the payment of Carer's pension. It was also inconsistent with the deceased's own characterisation of the relationship with the first defendant in the document, namely, that he was her carer. The first defendant sought to explain the inconsistency by saying it was "to keep things tidy".

[120] Both of the deceased's brothers gave evidence that the relationship between the deceased and the first defendant was, at all times, that of carer. They were unaware of any de facto relationship. They gave evidence of statements from the deceased which were inconsistent with the existence of such a relationship.

[121] There was no independent evidence supportive of the existence of a de facto relationship. There was no holding of joint property. There was no merging of bank accounts. Whilst Sanderson and the second defendant spoke of the deceased and the first defendant having a close relationship, the closeness of that relationship could be consistent with the first defendant having a relationship as carer of the

deceased. Further, an occasional sexual encounter does not establish a de facto relationship.

[122] Having considered the evidence as a whole, I am not satisfied, on the balance of probabilities, that the relationship that existed between the deceased and the first defendant, for the two years prior to her death, satisfies the definition of de facto in section 32DA of the *Acts Interpretation Act 1954* (Qld). The documentary evidence, and the lack of independent evidence of such a relationship, are consistent with the relationship being that of carer.

[123] I find that the first defendant was not the deceased's de facto partner at the time of her death or in the two years preceding her death.

Adequate provision

Legal principles

[124] Section 41(1) of the *Succession Act 1981* (Qld) provides:

> "**41 Estate of deceased person liable for maintenance**
>
> (1) If any person (the deceased person) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.
>
> (1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant."

[125] In *Singer v Berghouse*,[15] Mason CJ, Deane and McHugh JJ identified two questions or stages in resolving applications such as these:

> "The first question is, was the provision (if any) made for the applicant 'inadequate for [his or her] proper maintenance, education and advancement in life'? The difference between 'adequate' and 'proper' and the interrelationship which exists between 'adequate provision' and 'proper maintenance' etc. were explained in *Bosch v. Perpetual Trustee Co. Ltd*. The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature

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15 (1994) 181 CLR 201, 209-210.

> of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.
>
> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like *Ellis v. Leeder*, where there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors."

[126] Resolution of the first question necessarily involves an evaluative balancing of relevant considerations.[16] In *Grey v Harrison,*[17] Calloway JA observed that "the touchstone of what a wise and just testatrix would have thought to be her moral duty, supplies the norm that the legislature left unexpressed".

Consideration

[127] A consideration of need must take place in circumstances where the concept is relative. Here, the plaintiff has substantial assets and a reasonable income. However, she is not well off. The Plaintiff has significant commitments, is a single mother with health concerns and has primary custody of a child with medical and other needs, all of which place a demand on her available resources. Her overall financial position could properly be said to be modest.

[128] The estate itself is also modest. It largely comprises the deceased's real property. There was no relevant contribution, financial or otherwise, by the plaintiff to that property or, indeed, to the welfare of the deceased.

[129] The fact that the estate is modest does not of itself prevent a family provision claim. Even small estates are capable of accommodating the just demands of potential beneficiaries.[18]

[130] The relationship between the plaintiff and the deceased is properly to be described as estranged. They had not spoken for many years. Even the death of the deceased's son, the plaintiff's brother, in 2014 had not resulted in contact between them.

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16 *Freeman & Ors v Jacques* [2006] 1 Qd R 318 per Keane JA at [29], citing *Vigolo v Bostin* [2005] HCA 11 at [6], [16] – [18], [22], [25], [27], [74] – [75] and [114]; (2005) 221 CLR 191 at 197, 200 – 201, 202 – 204, 204 – 205, 218 – 219, 225.

17 [1997] 2 VR 359 at 365; cited by Keane JA (as his Honour then was) in *Freeman,* footnote 15.

18 *Collett & Anor v Knox & Anor* [2010] QSC 132.

[131] Estrangement will not necessarily be conduct disentitling a claimant to the benefit of proper provision, although it may reduce the moral claim a child might have to maintenance or support or advancement.[19]

[132] In the present case I am satisfied the estrangement does not constitute disentitling conduct. There was an explanation for the lack of contact, namely, the dysfunctional nature of the parenting relationship in the plaintiff's childhood and the impact it had had upon her emotionally and psychologically.

[133] The deceased clearly intended to provide a benefit to the plaintiff. She left the plaintiff her jewellery, motor vehicles and the proceeds of her bank account. In truth that benefit was of little value. The bank accounts held little funds and the valuable items of jewellery were unable to be located after the deceased's death.

[134] I find that the plaintiff has been left without adequate provision for her proper maintenance, education and advancement in life.

[135] A wise and just testatrix would have made provision to assist the plaintiff as a single parent in modest circumstances, particularly where the other call on the estate is the deceased's "carer", as the first defendant was characterised in the deceased's own Will.

[136] In the circumstances, a proper provision for the applicant would have been to leave the plaintiff 25 per cent of the rest and residue of the estate.

[137] In reaching that conclusion, I have had regard to the consequences of that determination, namely, that the deceased's residence will have to be sold. That consequence is unfortunate but necessary to provide for the plaintiff's proper maintenance, education and advancement in life.

[138] The division of the residue of the deceased's estate, as to 75 per cent to the first defendant and 25 per cent to the plaintiff, provides proper recognition for the significant contribution provided by the first defendant to the deceased's welfare over more than two decades, including during the difficult time when she had responsibility for her mentally unwell son, whilst providing adequately for the plaintiff's maintenance, education and advancement in life.

Orders

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

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[19] *Goodchild v James* (1994) 13 WAR 229 at 239; approved in *Collett & Anor v Knox & Anor* [2010] QSC 132 at [147].