SUPREME COURT OF QUEENSLAND

CITATION:	*Whiteside v Smyth* [2003] QSC 374
PARTIES:	**BRUCE RUGBY WHITESIDE** (plaintiff) **v** **ANDREW THOMAS SMYTH** (defendant)
FILE NO/S:	SC No 7493 of 2002
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	4 November 2003
DELIVERED AT:	Brisbane
HEARING DATES:	27-30 October 2003
JUDGE:	de Jersey CJ
ORDERS:	**1. On the claim, judgment for the defendant against the plaintiff.** **2. On the counter claim, declare against the alleged will dated 1 December 1999 which is ex 15 in the proceeding, and declare for the force and validity of the will dated 15 December 1998, ex 32, in solemn form of law.** **3. Order that the costs of both parties be assessed on an indemnity basis and paid out of the estate of Thomas Jowett deceased.**
CATCHWORDS:	PROOF OF WILL IN SOLEMN FORM – TESTAMENTARY CAPACITY – ALLEGED LUCID INTERVAL IN COURSE OF ENDURING VASCULAR DEMENTIA – KNOWLEDGE AND APPROVAL OF CONTENTS – TWO COMPETING WILLS – ONUS AND STANDARD OF PROOF – REVIEW OF CIRCUMSTANCES OF TESTATOR'S PRESENTATION OVER PERIODS PROXIMATE TO EXECUTION OF CHALLENGED WILLS *Guardianship and Administration Act* 2000 (Qld), s 5, s 7, s 10 *Mental Health Act* 2000 (Qld) *Banks v Goodfellow* (1870) LR 5 QB 549, considered *Barry v Butlin* (1838) 12 ER 1089, approved *Easter v Griffith*, Supreme Court of New South Wales, unreported, 7 June 1995, considered *Kinleside v Harrison* (1818) 161 ER 1196, considered

Shorter v Hodges (1988) 14 NSWLR 698, considered

COUNSEL: M K Conrick for the plaintiff
B J Clarke for the defendant

SOLICITORS: McDonald Chesters for the plaintiff
Robbins Watson for the defendant

[1] **de JERSEY CJ**: The testator Thomas Jowett died on 6 July 2001, aged 87 years. His wife Sheila predeceased him, dying in March 1996. The testator died as a result of a combination of bronchopneumonia, multi-infarct dementia and the consequences of previous strokes. It was common ground he left an estate now worth of the order of $500,000. The testator had no living children. His only relations were eight brothers and three sisters who lived in the United Kingdom, and with whom he had had no contact for many years. In the period October 1995 to December 1998, he had made as many as 11 wills and a codicil, leaving his estate to varying combinations of friends and charities, in various amounts. For a convenient summary see ex one. Two particular wills feature in this proceeding, respectively executed on 15 December 1998 and 1 December 1999. It is common ground each was duly executed.

[2] By the will of 15 December 1998 (ex 32), the testator appointed the defendant solicitor Mr Smyth as his executor, and bequeathed his estate to a number of friends and charities. His neighbours Mr and Mrs Whiteside were not beneficiaries. By the later will of 1 December 1999 (ex 15), the testator appointed Mr Whiteside as his executor, and gave his entire estate to Mr Whiteside, provided that should Mr Whiteside predecease him, the estate is to go to Mrs Whiteside. Mr Whiteside survived the testator. (Common to each will is provision for the care of the testator's dog Red: no doubt, notwithstanding this challenge, Red has been treated compassionately as befits man's best friend.)

[3] Mr Whiteside, as plaintiff, seeks to have the later will established, as against Mr Smyth who has lodged a caveat in the deceased estate. Mr Smyth, as defendant, alleges that as at 1 December 1999, the testator was not of sound mind, memory and understanding, and did not know or approve of the contents of that later will. Mr Smyth counterclaims for a declaration as to the force and validity of the will of 15 December 1998.

[4] It is convenient that I now set out, as briefly as may be, what I find to be the other significant facts of the matter.

[5] When the testator executed the earlier will on 15 December 1998, his solicitor Mr Smyth had some reservation as to testamentary capacity, arising from the number of wills the testator had made and the frequency of the changes he had wrought. But in the course of the interview on 15 December 1998, the testator made fine and discriminating changes in what was being proposed from time to time, and revealed sufficient understanding of all of the elements going to make up the requisite testamentary capacity. Those conclusions are to be drawn from the evidence of Mr Smyth, which I accepted.

[6] Over some years preceding his death, as noted by his treating general practitioner Dr Clark, the testator suffered short-term memory loss. A scan in 1996 showed

substantial carotid artery disease. Over the years he experienced multiple small strokes, and – on the evidence of Dr Chai – a probable major stroke in the mid to later part of 1996, although the resulting cognitive impairment would not necessarily have been apparent to an observer.

[7] Mr Whiteside developed an extremely close friendship with the testator, some 20 years his elder, akin to that of father and son. As the testator's ability to look after himself diminished, the testator became emphatically averse to the notion of entering a nursing home. Mr Whiteside was concerned that that should not occur.

[8] Carers assisted the testator on a substantial basis, especially following the death of his wife in 1996, and the carers' observations of his development may be seen from the diary notes collected in ex 36. I note that on the expert medical evidence, symptoms of cognitive impairment may in these cases pass unnoticed, even by professionals (transcript pp 212-3).

[9] After the death of his wife, the testator asked Mr Whiteside would he act as the testator's executor. That occurred in May 1996. Mr Whiteside did not then agree. The testator was expressing concerns that his solicitor, Mr Smyth, was wanting him to direct his money to charities.

[10] Matters came to a head in the first week of November 1999. The testator had what would in the vernacular be called a "turn" in the presence of Mr Whiteside, in which the testator appeared to freeze, with eyes staring ahead, saying incomprehensible things, including that he had buried his wife's ashes in the grave of a baby and that he had done so with the consent of the parents of the baby. (That was delusional.) He then insisted Mr Whiteside read a will in which the testator had given his money to charities, and asked Mr Whiteside to take charge of his affairs. This is an abbreviated account of that encounter. I accepted Mr Whiteside's evidence of the full event: see pp 29 to 32 of the transcript.

[11] Concerned about intruding as a non-family member into the testator's private affairs, and acknowledging the advanced age of the testator and the testator's memory impairment, Mr Whiteside arranged a meeting involving Dr Clark, the testator and himself. That occurred on 15 November 1999. The testator informed Dr Clark that he wished to grant a power of attorney in favour of Mr Whiteside, and to make Mr Whiteside the sole beneficiary of his estate. Dr Clark supported granting a power of attorney, and expressed the view that it was up to the testator where he left his estate.

[12] Two days later, Mr Whiteside took the testator to the offices of a solicitor Mr McCracken, selected particularly because his premises were at ground level, involving no need for the testator to negotiate stairs. (It was on one view unusual that Mr McCracken was consulted rather than Mr Smyth, who had acted for the testator for so long and had apparently followed his instructions.) Mr Whitehead told Mr McCracken that the testator was an elderly gentleman whose "memory [was] not too good" – as will emerge from what follows, that was in my view a substantial understatement of the testator's impaired condition.

[13] Mr McCracken had no concern about the testator's testamentary capacity. Mr McCracken said he addressed with the testator the relevant issues: the significance of a will, the extent of the testator's estate, and the range of possible beneficiaries.

The testator's demeanour was normal. In the course of that meeting, the testator said he wished to leave his entire estate to Mr Whiteside. The testator revealed that he had an existing will, which Mr McCracken asked to see. The testator told him not to bother, and Mr McCracken did not pursue that matter. Mr McCracken also asked who was to take in the event Mr Whiteside predeceased the testator. The testator indicated he would get back to Mr McCracken about that. I infer that it was Mr Whiteside who subsequently informed Mr McCracken's wife (who worked with Mr McCracken) that Mrs Whiteside was to take in that case.

[14] The physician and geriatrician Dr Chai, upon whose careful and persuasive evidence I rely, was prepared to acquiesce in Mr McCracken's assessment that the testator then had the requisite testamentary capacity, but that view was dependent, among other things, on the testator's having given instructions as to the range of possible beneficiaries. In not revealing the beneficiaries under his prior will, being his friends and various charities, the testator fell short of demonstrating sufficient capacity, on the submission of Mr Clarke who appeared for the defendant, although Mr Conrick, for the plaintiff, submitted that the relevant field was limited to family members.

[15] Although the point is not critical to my ultimate determination, I should say that I doubt the relevant field should in this particular case have been considered as confined to family members, where the testator had no living children and had, through many previous wills, persistently disclosed a wish to benefit friends who had rendered him assistance, and charities. (Exhibit one graphically illustrates that.) I note also this passage in Williams Mortimer and Sunnucks: *Executors Administrators and Probate* (18th ed) p 172, referring to a solicitor drawing up a will for an aged or ill prospective testator:

> "… if there was an earlier will it should be examined and any proposed alterations should be discussed with the testator. Whatever the circumstances it must be important for a solicitor instructed to draft a will to make enquiries about earlier wills, their contents and the testator's reason for revoking earlier wills. Earlier wills may be relevant and admissible in family provision proceedings and in probate actions whether or not apparently revoked."

I do not think *Banks v Goodfellow* (1870) LR 5 QB 549, 563, on which Mr Conrick relied, is to be read as establishing any hard and fast rule limiting the range to immediate family members. (I say this notwithstanding the view suggested in Mellows: *The Law of Succession* (4th ed) p 33.) The range may vary from case to case, and for reasons already expressed, in this case it was broader.

[16] Mr McCracken prepared the will, and arranged for it to be executed on 25 November 1999. The day before, Mr McCracken checked the issue of testamentary capacity with Dr Clark, who confirmed that in his view the testator had the requisite capacity, on the basis that although the testator suffered some lapses, he was good for most of the time.

[17] The testator failed however to meet the appointment to execute the will on 25 November, and when Mr McCracken later spoke with the testator by telephone, the testator effectively rebuffed him, saying that he already had a solicitor and did not need two solicitors. That was obviously not a rational response.

[18] On about 27 November 1999, the testator signed exhibit five, which is a set of instructions for a will written down by Mr Whiteside at the testator's direction. They essentially conformed with the will executed on 1 December 1999. Mr Whiteside faxed those instructions, on 29 November 1999, to Ms Canning of the solicitors firm Whitehead and Payne. He had earlier described the testator to Ms Canning as "an elderly friend … slightly physically incapacitated", which did not alert her to the true extent of his then impairment, and the consequent need for care. The explanation is not that Mr Whiteside was seeking to exploit the testator for his own material advancement. In his strong devotion to the testator, Mr Whiteside had blinded himself to the seriousness of the testator's cognitive impairment.

[19] On 1 December 1999, Mr and Mrs Whiteside took the testator to the offices of Whitehead and Payne. Ms Canning had prepared the will in advance. When they arrived, a secretary took the will to the testator in the reception area. Later they went into Ms Canning's office. Ms Canning explained the will and a power of attorney to the testator. Ms Canning said that the testator seemed perfectly lucid, and clear in his understanding of what was involved. She went however through no particular process designed to test testamentary capacity, and the interview apparently proceeded on the basis of her offering explanations which the testator simply accepted, rather than there being any interactive engagement directed towards testing his real level of comprehension. See her evidence at p 152.

Significantly, when a question arose whether the power of attorney should be of the enduring variety, Ms Canning called Mr Whiteside to the table where she had been sitting alone with the testator, and primarily discussed that aspect with Mr Whiteside, rather than particularly with the testator.

[20] The inadequacy in Ms Canning's approach to this obviously aged and enfeebled prospective testator may be gauged against this useful explanation of the need for caution expressed in Hardingham, Neave and Ford: *The Law of Wills* (1977) p 50:

> "… a solicitor should never assume that an intending testator is perfectly sound in mind, memory and understanding. … instructions should be taken from the client himself … Only then will the solicitor be assured that, after frank discussions concerning the subsisting circumstances, the situation in life, and the wishes of the client, a will is drawn up reflecting the freely expressed and clearly understood wishes of the testator. In taking instructions from an enfeebled testator it has been suggested that a solicitor should, in such case, take a note of them, so that he might be able to advise the testator specifically as to the effect of each part, if asked, and at any time justify what he may do by reference to them. The will should be read over to the testator. No reliance should be placed upon the ability of a sick or enfeebled testator to read and understand a legal document."

[21] Much against Mr Whiteside's true inclination, he and his wife went to New Zealand on 8 December 1999, returning on 5 January 2000. Mr Whiteside would strongly have preferred to stay behind to look after the testator, to whose welfare he was strongly and emotionally dedicated. The Whitesides had been giving the testator extensive assistance to that point.

[22] On 8 December 1999, the testator was behaving irrationally, including driving his motor vehicle unsafely, and was compulsorily admitted – with police involvement – to the Gold Coast Hospital under the provisions of the *Mental Health Act*. (He may have been driving in that way to evade hospitalization.) He remained there until 12 January 2000. He was then released, discharged into the care of the Whitesides who had by then returned from New Zealand, and remained living with them for three and a half months, until hospitalized again, with a discharge in May 2000. He then lived in his own house with a full-time carer Joy Willis.

[23] "Mini mental state examinations" were administered to the testator on 7 December and 15 December 1999. The results, 12 out of 30, were consistent, indicating the testator's inability to look after himself. I accept Dr Chai's view that when admitted to the hospital on 8 December, the testator was suffering vascular dementia reaching back quite some time. As to his condition on 1 December when he made the later will, it is significant that between then and 8 December, the testator had suffered no acute medical problem, although increasing anxiety over the imminent departure for New Zealand of the Whitesides, on whom he depended so strongly, would probably have aggravated his feeble state.

[24] Dr Chai convincingly expressed the view that it would however have been unlikely that anxiety or stress in that situation influenced the progression of the testator's deterioration to the extent suggested for the plaintiff (see p 217). There was no evidence of any sudden panic attack or the like on 7 December.

[25] Dr Chai assessed the testator in early December, when he was hospitalized. He assessed a moderate degree of cognitive impairment. When asked for his opinion as to the likely condition of the testator on 1 December, in the context of a fluctuating state, the doctor said, under cross-examination:

> "If we say … Mr Jowett had a dementia of a mild form, we could reasonably then say that he would be deemed capable most of the time and only in specific circumstances like an acute medical condition causing more confusion would his capability be questioned. As the dementia progresses – and … the weight of evidence points to at least a moderate degree of cognitive impairment – if the person doesn't know what day it is, can he remember what his assets are? Then the likelihood of fluctuating between a fully capable state of mind and a mostly incapable state of mind becomes much less."

[26] On 14 January, Mr Whiteside taped a conversation between the testator and himself. Exhibit six is a transcript of that tape, and of another conversation on 19 April 2000. The conversation on 14 January suggests a testator able to carry on a superficially coherent conversation, but apparently lacking recollection of past events. It is a conversation which in many parts had the testator led repeatedly by Mr Whiteside, with responses by the testator which might fairly be characterized as simply "compliant". It suggests a lack of capacity to formulate complex ideas, general non-responsiveness, and a willingness to express hostility against absent third parties as if to please the listener.

[27] A psychiatrist, Dr Ziukelis, saw the testator substantially later, in September 2000, by which time the testator was experiencing severe impairment: he was "totally

disoriented for place, person and time". Dr Ziukelis's view at that time carries some significance, contrary to a view I expressed at the hearing, because both Dr Clark and Dr Chai compare that assessment with the testator's condition on 8 December. See Dr Clark's evidence at p 193, and Dr Chai at p 223 – "in the ballpark".

[28] Other witnesses gave evidence of particular observations of the testator, for example, Jean Evans, Joy Willis, Irene McPherson, Belinda Pearsal, Kathryn Pavic and Brian Eldridge. I accepted their evidence, although it did not significantly advance the determination of the issue of testamentary capacity.

[29] The evidence of the nurse/carer Carole Crozier, who observed the testator regularly from 1995 until early 2000, confirmed his deterioration, with increasing forgetfulness and confusion. The case was put for the plaintiff at one stage on the basis that the testator was, as at the end of 1999, generally alright, but the position was, I find, much more precarious: certainly the testator was alright for some of the time, but his condition was subject to regular fluctuation, and it is not possible to say that, for most of the time, his condition was either good, or for that matter, bad.

[30] Pages 20 to 23 of ex 36, the diary notes of the carers, show that over the days preceding the date of execution of the later will on 1 December 1999, the testator was often troubled, confused and irrational. On about 25 November 1999, the testator had made his irrational response to Mr McCracken, when Mr McCracken enquired about the missed appointment to execute the will he had drafted. Then on 30 November, when Dr Clark saw the testator, he had been suffering chest pain, he was emaciated and unshaven, was showing signs of possible pneumonia, and refused to accept the doctor's reasonable advice that he be admitted to hospital. That suggested an inability at that stage, or an unpreparedness, to come to grips with an important health decision.

[31] The relevant principles of law are conveniently collected together in *Shorter v Hodges* (1988) 14 NSWLR 698, 704-707, repeating the well-accepted test of testamentary capacity enunciated in *Banks v Goodfellow* 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."

To similar effect is the analysis of Dixon J in *Timbury v Coffee* (1941) 66 CLR 277, 283.

[32] Gleeson CJ described the relevant approach in *Easter v Griffith*, Supreme Court of New South Wales, Court of Appeal, unreported, 7 June 1995, as follows:

> "Where the evidence in a suit for probate raises a doubt as to testamentary capacity, there rests upon the plaintiff the burden of

> satisfying the conscience of the court that the testatrix had such capacity at the relevant time. If, following a vigilant examination of the whole of the evidence, the doubt is felt to be substantial enough to preclude a belief that the testatrix was of sound mind, memory and understanding at the time of execution of the will, probate will not be granted … This formulation of the onus of proof, well established by authority and not in dispute in the present case, invites caution. The power freely to dispose of one's assets by will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter."

[33] The standard of proof is on the balance of probabilities (cf. *Fuller v Strum* [2002] 1 WLR 1097, 1120).

[34] Mr Conrick submitted ss 5, 7 and 10 of the *Guardianship and Administration Act* 2000 give rise to "a rebuttable presumption of capacity" reversing the onus of proof. In fact, the plaintiff in this case undertook the burden of proof. Those statutory provisions relate in any event to that particular statutory scheme, and do not impinge on the issue of proof in this proceeding.

[35] Counsel for the plaintiff properly conceded there were in this case circumstances which would excite the vigilance of the court, casting upon the plaintiff the burden of proving that the will was the product of the free exercise of a competent mind. Counsel listed those circumstances as "the existence of multi-infarct dementia from a time preceding the making of the will; the occurrence of an episode when the deceased clearly lacked capacity one week after the execution of the will; the age of the deceased at the time of execution of the will; that the instructions for the will were initially conveyed to Ms Canning by the executor and sole beneficiary, the plaintiff".

[36] As to the last of those matters, in *Barry v Butlin* (1838) 12 ER 1089, 1090 Baron Parke said that "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…" Mr Conrick submitted "the intervention of instructions to a solicitor by the testator … would appear to answer any suspicion which might otherwise arise from the beneficiary's involvement". He relied on this passage from *Kinleside v Harrison* (1818) 161 ER 1196, 1231:

> "Now certainly in this account there does occur a circumstance in the preparation of this instrument, that always excites the jealousy and vigilance of the Court, and it has been much pressed in argument; the codicil is prepared through the agency of the party benefited, and without the professional person who prepares it having had access to the deceased for the purpose of taking his instructions: but the Court must take care not to convert a circumstance, which is only a reason for vigilance and caution, into an actual defeasance of the right of testamentary disposition, and of the clear testamentary dispositions of a capable testator. The degree of alarm excited by such a circumstance depends upon the other circumstances which

> accompany it: the thing frequently happens, and without exciting much, though upon all occasions, a certain portion of caution."

[37] Whether the suspicion is dispelled depends on the court's assessment of all relevant circumstances. While a solicitor's involvement could, as a matter of fact, in a particular case, go to answer doubt arising from the benefit to the party who secures the execution of the will, that would not necessarily be so, and *Kinleside* does not suggest otherwise. Here, the benefit to Mr Whiteside is but one of the matters arousing suspicion: whether that suspicion is allayed depends on a review of all relevant features. The intervention of the lawyer Ms Canning could not, in short, of itself be conclusive in this case in favour of the instrument – although I acknowledge Mr Conrick's submission did not go to that extent.

[38] Mr Conrick characterized this as a case of a "lucid interval", and see para 5 of the reply and answer. The testator's mental state was fluctuating, and at its worst during the night-time. Mr Conrick referred to the following passage in Williams Mortimer and Sunnucks (p 174 ff):

> "It is recognised that a person who, in general, has lost testamentary capacity by reason of mental illness may have what have been termed "lucid intervals". These are periods when, even though all symptoms of mental illness have not been eradicated, the mind has returned temporarily to a sufficiently balanced state to weigh up the considerations which should guide a testator in making his will. Lucid intervals are a particular feature where disease of the brain causes mental illness, when it may be well known to the family doctor or attendant nurse that the testator is quite lucid early in the morning or in the evening, but is confused at other times. They should be consulted or asked to be present when the will is to be prepared or executed … where mental illness has been proved to have existed at times both before and after the purported making of the disputed will, the allegation that it was made in a lucid interval must be established by evidence as strong as that which is required to prove that testamentary capacity has been lost through mental illness. The reason for insisting on convincing proof of a lucid interval is that in many forms of mental illness the sufferer in many situations, on many occasions and to many people may give every appearance of normality."

[39] Having reviewed all of the evidence, in the context of the legal principles mentioned above, I am not satisfied that, as at the time of execution of the will of 1 December 1999, the testator was of sound mind, memory and understanding. I regret to have to say that I am left with the "substantial doubt" to which Gleeson CJ referred in *Easter v Griffith*. The evidence relied on by the plaintiff lacks the strength referred to in Williams, Mortimer and Sunnucks.

[40] In brief summary of the most significant features, the testator was as at that time a long-standing sufferer from dementia. A fortnight earlier he may have presented generally satisfactorily to another solicitor, although I am not satisfied that a completely comprehensive enquiry was then made. The testator's presentation over the days preceding 1 December was characterized by confusion, forgetfulness and irrationality. Only a few days after 1 December, he was found in a severely

demented condition. His situation was not, I believe, that of a person in generally good condition, with only occasional lapses. The lapses were regular occurrences, and that had been the situation for quite some time preceding 1 December 1999. The approach to the drawing up of the will by Ms Canning was cursory, and wholly inappropriate to the situation of an elderly prospective testator of feeble disposition, such that her confirmation of capacity, which Mr Conrick reasonably conceded to be of only "slight" assistance, does not in the end avail the plaintiff. A finding of testamentary capacity as at 1 December 1999 is therefore unwarranted.

[41] On the other hand, the evidence of Mr Smyth sufficiently clearly established that as at 15 December 1998, the testator had testamentary capacity, and that he knew and approved of the contents of the will he then made (cf. *Nock v Austin* (1918) 25 CLR 519, 529, *Bool v Bool* [1941] St R Qd 26, 39).

[42] The orders I make are:

1. on the claim, judgment for the defendant against the plaintiff;
2. on the counter claim, declare against the alleged will dated 1 December 1999 which is ex 15 in the proceeding, and declare for the force and validity of the will dated 15 December 1998, ex 32, in solemn form of law;
3. order that the costs of both parties be assessed on an indemnity basis and paid out of the estate of Thomas Jowett deceased.

[43] I record that the parties agreed that costs order would be appropriate.