SUPREME COURT OF QUEENSLAND

CITATION:	*Diamond & Anor v Massin* [2004] QSC 098
PARTIES:	**STEPHEN JOHN DIAMOND AS EXECUTOR OF THE ESTATE OF LUCIENNE SUZANNE MASSIN DECEASED** (first plaintiff) **DOMINIQUE MARTINE MASSIN AS EXECUTOR OF THE ESTATE OF LUCIENNE SUZANNE MASSIN DECEASED** (second plaintiff) **v** **GILBERT MASSIN** (defendant)
FILE NO/S:	SC 540 of 2002
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	5, 6 February 2004
JUDGE:	McMurdo J
ORDER:	**Declare that the will executed on 9 March 2000 by Lucienne Suzanne Massin is valid**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – where conflicting evidence as to the English proficiency of the testatrix – where instructions for the preparation of the will was given in English – whether the testatrix knew, understood and approved of the contents of the will – whether will is valid EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – CREDIBILITY AND WEIGHT – PARTY'S FAILURE TO GIVE OR CALL EVIDENCE – where co-executor of will – where reasonably expected to be called but was not called – whether inference must be drawn against the party who failed to call witness

Jones v Dunkel (1959) 101 CLR 298, cited

COUNSEL: B G Cronin for the plaintiff
P A Kronberg for the defendant

SOLICITORS: Pilgram Geddes Lawyers for the plaintiff
D M Wright & Associates for the defendant

[1] **McMURDO** J: This is a claim for a declaration of the validity of a will executed on 9 March 2000 by Lucienne Suzanne Massin. The issue is whether the testatrix knew and approved of the contents of that will.

[2] The defendant, who is the son of the testatrix, says that his late mother did not have a sufficient skill in the use of the English language to have known and approved of the contents of her will. Her first language, and he says her only language, was French. He alleges that her difficulty in conversing in English at least makes for a suspicion which requires the executors to prove her knowledge and approval of its contents. It is undisputed that any relevant instructions to the solicitor preparing the will, who was Mr Diamond, one of the plaintiff executors, were given in English. Mr Diamond's case is that the executrix was quite competent in the English language.

[3] The plaintiffs are the executors named in the will, who are Mr Diamond and the daughter of the testatrix, Dominique Martine Massin. When the case was called on for hearing, Mr Cronin appeared for Mr Diamond but not for Ms Massin, and explained that she had not been an active party since her former solicitors were given leave to withdraw on 6 August 2003. The parties agreed that this presented no impediment to Mr Diamond in seeking to prove that the will is entitled to probate. Dominique Massin was the principal beneficiary under this will, but most of the property has been in effect distributed in circumstances which I will discuss. Clearly there has long been an acrimonious relationship between Dominique Massin and her brother, the defendant, who was left nothing by this will, but who would be a beneficiary under a previous will. This circumstance together with the fact that Dominique Massin appears already to have the benefit of the will in question, could explain her absence. Undoubtedly Dominique Massin would have been a relevant witness, so that there is a potential operation of the rule in *Jones v Dunkel* (1959) 101 CLR 298. The impact of her not being called as a witness will be discussed below.

[4] The testatrix was born in France in 1929. She married Andre Massin and they had four children, two of whom predeceased her, as did her husband. Mr Massin was about nine months older than the testatrix. He died in January 2000. She died on 24 September 2000.

[5] When the Massin family arrived in Australia in about 1968, Mr Massin found work in the building industry and Mrs Massin had employment at first in the canteen at the migrant hospital where the family lived. After the Massins moved to their own home in Sydney, there was a period in which Mrs Massin did not work before she was employed in a number of unskilled occupations. She worked on the production

line at a fruit juice supplier at Blacktown. She also worked for a time for a small business doing sewing work. Although Mrs Massin was thereby exposed to the English language during many years of employment, it appears that none of her occupations required any particular communication skills and it is possible that she was able to perform her work with only a very limited knowledge of English.

[6] In 1986 Mr and Mrs Massin moved to Robina on the Gold Coast, after which Mrs Massin did not work. In 1990 the Massins went to see Mr Diamond who prepared wills which he says were then executed. Mr Diamond's file for these 1990 wills was tendered. It includes copies of each 1990 will, and I accept that Mrs Massin then executed a will in those terms. Under that will, she appointed her husband and her daughter, Dominique, as executors, and left the whole of her estate to her husband except if he predeceased her or failed to survive her for a period of 30 days, in which case the whole of her estate was left to Dominique and Gilbert Massin in equal shares. The original of this will is not available because, as I accept, it was destroyed within Mr Diamond's office once Mrs Massin had executed the subject will in 2000. Mr Massin made a will in corresponding terms. The file contains a handwritten note made by Mr Diamond which records certain details for the preparation of Mrs Massin's will, although not for her husband's will. Mr Diamond explained this by saying that, when receiving instructions to prepare wills for a husband and wife, it was his practice to interview first the wife in the husband's absence, and that his note records his interview of Mrs Massin. The effect of his evidence was that as the instructions from Mr Massin mirrored her instructions, it would have been unnecessary to have made a corresponding file note of Mr Massin's instructions. The file note provides some limited support for Mr Diamond's recollection that he was able to interview Mrs Massin alone.

[7] Prior to 1990, the relationship between Mr Massin and his son Gilbert had been very strained for many years. Yet it is clear enough that Mr Massin still considered in 1990 that his son should share equally with his daughter in his estate, and that Mrs Massin thought likewise.

[8] Subsequently however, the relationship between Mr and Mrs Massin and their son deteriorated. He and his family were living near Taree in New South Wales and he did not see his parents often. On Fathers' Day in 1996 Mrs Massin rang her son to express her disappointment that he had not telephoned his father on the day. His own evidence is that he responded by swearing at her, and that from that point the relationship between the Massins and their son was particularly poor.

[9] Mr Massin died in January 2000. The state of the relationship by then is demonstrated by the facts that Gilbert Massin did not learn of his father's death at least for some weeks, and Mrs Massin took no steps to inform him. On becoming aware of his father's death, Gilbert came to the Gold Coast to see or perhaps confront his mother. He knew that she enjoyed frequent trips to the Gold Coast casino, and he went looking for her there. When he located her at the casino on 17 February 2000, they argued to the extent that the incident became the subject of a letter of complaint written by Mr Diamond, for which he says he received instructions from Mrs Massin simultaneously with her instructions for this will. Gilbert Massin agrees that there was such an argument and that, in effect, he and his

mother were not on speaking terms at least by the time that she executed this will on 9 March 2000.

[10] By the subject will, the testatrix gave $30,000 to a teenage granddaughter, Dominique's younger daughter Roxanne Goodship, such funds to be held on trust until she is aged 30. The rest of her estate was given to Dominique with provision that if Dominique did not survive her then it would be also held in trust for Roxanne.

[11] At the date of this will, it would appear that the property of Mrs Massin consisted mainly of the house in which she had lived at Robina from 1986. It had been owned by Mr and Mrs Massin as joint tenants. On the date of her death, that house was the subject of an uncompleted contract of sale and there was also an uncompleted contract for the purchase by her and Dominique as joint tenants of a replacement residence for them. Those contracts settled very shortly after Mrs Massin's death and Dominique Massin thereby became the sole registered proprietor.

[12] On 29 February 2000, Mr Diamond took instructions in relation to three matters concerning Mrs Massin. The first was the preparation of a new will, the second the registration of the house in her name alone following her husband's death, and the third was the making of a written complaint about the incident at the casino. He says that he took instructions by speaking in English to Mrs Massin, although Dominique Massin accompanied her mother to his office. He says that Dominique was not within his own room at the time that he spoke to Mrs Massin in relation to her new will. He does not speak French and he says that he was able to readily converse with her as he had been able to do some ten years earlier when preparing her 1990 will.

[13] Mr Diamond says that he made notes of that meeting by writing on pages of a foolscap pad. Some seven sheets containing his handwriting were tendered as together comprising his notes. He was strongly challenged as to whether each of these pages had been written upon the occasion of this meeting. The basis for that challenge was that his affidavit of scripts sworn on 13 May 2002 did not refer to each of the pages. It identifies only one of them as a file note made on the occasion. That is a page which is dated the day of the conference and is in the nature of instructions, written by Mr Diamond but signed by Mrs Massin. Of the other pages now represented as notes of the same conference, it is clear that what is written upon two of them is relevant to recording the change of ownership in consequence of Mr Massin's death, and what is recorded on at least another two further pages refers to the proposed letter of complaint. There are then two pages which are apparently notes taken for the purposes of preparing her will which, upon their face, should have been included as part of the attendance notes referred to in the affidavit of scripts. Unfortunately, Mr Diamond seemed unable to produce something in the nature of a file from which it could be seen that these other two pages were written by him in the course of taking instructions on that day. However, I am satisfied that those two pages were written by him in the course of this same conference, as were the other pages within the bundle of seven pages now tendered as Exhibit 5. Although the two pages of instructions for the will which were omitted from the affidavit of scripts were not revealed to the defendant until immediately prior to this

hearing, it is clear that they were not made recently. This is because copies of them are amongst the papers delivered to counsel for the purposes of an application in related proceedings numbered 8778/01 in a brief dated 13 November 2001. Further, there is every indication from the terms of these notes that they were made during the course of an attendance on 29 February 2000, and it would be somewhat surprising if notes containing these details had not been made, but that instead Mr Diamond had set about preparing the will from memory. But whilst I accept that each of the pages now within Exhibit 5 was written by Mr Diamond on this occasion, the notes themselves do not demonstrate whether Dominique Massin was present for all or part of the conference, and nor do they prove that Mrs Massin was able to and did herself give particulars and instructions for the will.

[14] On 7 March 2000, Mr Diamond wrote to Mrs Massin referring to "your recent conference with the writer, concerning estate matters and also concerning taking instructions in relation to your last will and testament and general matters". He advised that he had lodged the required Record of Death application for registration and that he had drawn up her new will. He enclosed an account for those matters. He wrote a letter dated 10 March to Mrs Massin noting "your instructions that we are to hold the original will in securities, pending your further instructions" and enclosing "a copy of the executed will for your safe keeping". The will itself was executed on 9 March. On 10 April 2000, Mr Diamond wrote to Gilbert Massin in these terms:

> "We refer to the above matter and would advise that we have recently taken instructions from our client Mrs Lucienne Suzanne Massin and your sister, Ms Dominique Massin, in relation to a recent altercation which occurred between yourself and your Mother (our client) within the confines of the Casino at Broadbeach on the Gold Coast.
>
> Our client has provided instructions that she was very, very upset indeed in relation to your outbursts and has instructed us to advise that she wishes to have no further contact with you.
>
> We would advise that should you have further contact with our client, she has instructed us to immediately issue restraining order proceedings, which will be filed out of the Magistrates Court in Southport and the appropriate orders taken in the matter.
>
> We do hope that these measures will not have to be taken in the future."

Mr Diamond sent a copy of that letter, under cover of a further letter, to Mrs Massin dated 10 April.

[15] If Mr Diamond's evidence is substantially accepted, it is plain that Mrs Massin well knew and understood the contents of her will. Against his version, however, there is evidence from Gilbert Massin, his wife Suzanne Massin and Dominique's older daughter, Adrienne Goodship, to the effect that the testatrix was unable to speak

more than a few words of English. On the basis of their evidence, it is submitted that Mrs Massin could not have given instructions directly to Mr Diamond, so that his version is so discredited as to require his evidence as a whole to be rejected with the consequence, it is said, that the plaintiffs' case is not proved. Before going to the evidence of those three witnesses in the defendant's case, I shall discuss the other evidence supporting the plaintiffs' case.

[16] One of the witnesses to the will was Louise Byrne (then Louise Hammersley), who has been a legal secretary employed by Mr Diamond since 1995. She recalls meeting the testatrix a number of times, both in respect of this will and also her property transactions later in 2000. On her recollection, Mrs Massin was able to converse well in English. She described Mrs Massin as "very chatty". In one respect her evidence seems not to support that of Mr Diamond. He said that he interviewed Mrs Massin alone when he took instructions for the will, whilst Dominique Massin waited outside his office. Upon Ms Byrne's recollection, on that occasion Dominique Massin was with her mother in Mr Diamond's office when those instructions were given. She did recall an occasion when at first both women saw Mr Diamond before Dominique Massin left the room and waited outside his office, but she thought that was the occasion when the will was executed. Whilst this inconsistency casts some doubt upon the reliability of Mr Diamond's evidence, it is possible that Ms Byrne is mistaken in her recollection upon that precise matter; it is relatively easy to see how she could mistake the two occasions. More importantly, her evidence as to Mrs Massin's ability in English was clear and consistent. It may be the case that Ms Byrne showed a natural inclination to support her employer, although it was not suggested to her that she was giving a dishonest account.

[17] Of considerable weight, in my opinion, is the evidence of a long time neighbour of Mrs Massin, who is Mrs Therese Johnson. Mrs Johnson and her family lived in a house across the road from the Massins from the time the Massins arrived at Robina until, in effect, Mrs Massin's death some 14 years later. During that time, Mrs Johnson said that she spoke to Mrs Massin about once a week and usually for about ten to fifteen minutes. In addition, Mrs Massin would often seek out Mrs Johnson where she worked at the newsagency of the Gold Coast casino, where they would have a short conversation. Their discussions over the years were mainly about matters such as children, gardens, the weather and "life in general". Mrs Massin would often ask as to Mrs Johnson's family, and spoke about the Johnson children by their names. Mrs Johnson recalls speaking to Mrs Massin about her proposed move from the house in 2000, and Mrs Massin's enthusiasm about going to a smaller house saying that it would be easier to maintain. All of these conversations were in English; Mrs Johnson said that she spoke no French. There was no suggested reason for Mrs Johnson to give false or exaggerated evidence. Her account was challenged only upon the basis that the conversations must have involved very little speech from Mrs Massin with her contribution being little more than a "Yes" and a "No". Mrs Johnson rejected this suggestion. Mrs Johnson seemed to me to be an alert and intelligent woman and I cannot see any reason to reject her evidence other than that it is so inconsistent with the evidence at least of Gilbert Massin and his wife. But unlike those witnesses, Mrs Johnson has no interest in the outcome of this case.

[18] Mrs Johnson's evidence is in stark contrast to what Gilbert Massin said of his mother's difficulty with English. According to him his mother's knowledge of English was "basically none" and was effectively limited to "hello, goodbye, and thank you" that being "about the full extent of it". She did not speak any English to his children, with the result, he says, that she did not speak at all to them. When he was asked in examination-in-chief to recall the occasion when he confronted his mother at the casino in February 2000, he said that at first he spoke to her in English, before the conversation quickly changed to one in French. He did not explain why he at first spoke to her in English on this occasion if, as he maintains, she is unable to understand it. He has not met Mrs Johnson, but his recollection was that "my mother never talked to neighbours". He recalled that he found his mother at the casino by herself, and agreed that she often went there alone. But he added that she was driven to the casino either by her late husband or by her daughter, so that she did not have to speak to anyone in the course of using public transport or a taxi. When asked whether she ever ate or drank at the casino, or otherwise did something whilst there alone which would require her to talk to someone, he said that she limited herself to a "glass of water" and played with coins so that she would not need to, for example, purchase chips. He agreed that when he confronted his mother on that day at the casino, she had with her a mobile phone, but this, he ventured, would have been used only to call Dominique. As for friends, his recollection was that her only friends were French speaking.

[19] Mrs Suzanne Massin gave an account of her many attempts over the years to speak English to her mother-in-law but without success. She spoke no French and she instanced occasions when the testatrix would decline to read books in fairly simple English to her grandchildren because the books were in that language.

[20] There was evidence by telephone from Adrienne Goodship, the older daughter of Dominique and her estranged husband. Miss Goodship is now 26 and on her account, she had little contact with the testatrix after she was about 13 and last saw her in 1996. Her evidence is that her grandmother could not understand English and only spoke French. Miss Goodship claimed to be herself fluent in French, and thereby able to participate in family discussions involving her grandmother. She claimed that she acquired this fluency from spending "so much time with my grandparents".

[21] Within a social gathering of the Massin family, it is not difficult to understand why Mrs Massin would have preferred to speak in French, and why she would be keen to see that her grandchildren learnt and practiced this language. At least to a certain extent, that might explain the evidence of Miss Goodship. A refusal by Mrs Massin to speak English to her daughter-in-law might have been due more to a belief that upon becoming a member of the Massin family, she should speak French in a family context. Neither of those factors however could explain Mr Massin's version, which is irreconcilable with that of Mr Diamond, Ms Byrne and (importantly) Mrs Johnson. Whilst Mr and Mrs Massin have a direct financial interest in the outcome, the interest of Adrienne Goodship is not apparent, although the evidence shows some longstanding ill feeling between her and Dominique, her mother.

[22] I have mentioned the sale of Mrs Massin's house and the contemporaneous purchase of another residence in the joint names of Mrs Massin and her daughter. The circumstances in which these contracts were completed, and what Mr Diamond then said about them, is relevant to his credit according to the defendant's submission. The contracts were due for completion on 25 September 2000. As it happened, Mrs Massin died on 24 September. The house was being sold for $179,000 and the replacement property was being purchased for $137,500. The proceeds of the sale were required to complete the purchase, hence the proposed contemporaneous settlement of the two contracts. On 25 September, the solicitors for the purchaser from Mrs Massin sought an extension of time for settlement until 27 September. According to an affidavit sworn by Mr Diamond in the related proceedings 8778/01, the response to that request of 25 September was that "my firm received instructions from both Mrs Massin and Dominique about the proposed extension", and that settlement of both contracts then occurred on 29 September. That sworn statement was clearly wrong, but it was wrong on the face of the affidavit, for Mr Diamond referred to the request for the extension as one made by a facsimile of 25 September and he exhibited a copy of that fax to his affidavit. In the same affidavit he swore to her death on 24 September. It seems to me that this is not evidence of some attempt by Mr Diamond to misstate the matter in his affidavit. The statement in the affidavit is obviously wrong but it does not appear to me that it was made dishonestly.

[23] However the conduct of Mr Diamond in relation to the completion of these contracts and the subsequent distribution of the assets of the estate on or about 17 July 2001 was the subject of criticism by counsel for the defendant in the course of his address. As the new house was purchased by the purchasers as joint tenants, the assets of the estate totalled only $38,433.75 by July 2001, which Mr Diamond then caused to be distributed as to $30,000 invested in trust for Roxanne, $3,383 to his own firm for fees, and $5,550.75 to Dominique Massin. The defendant's submission was that this gave Mr Diamond a financial interest in the outcome of these proceedings, because should it be held that the will is invalid, then he would be at least potentially liable as a constructive trustee. Unfortunately this point was not put to Mr Diamond in cross examination so that I did not have the opportunity of hearing his answer to it. Presumably the sum held in trust for Roxanne is still available, and the other amounts distributed in July are relatively small. There was no submission developed on behalf of the defendant as to what Mr Diamond should have done in relation to the house which passed into the ownership of Dominique Massin. I am reluctant to find that Mr Diamond was falsifying or exaggerating his evidence for some self interest when he had no opportunity to respond to that allegation by its being put to him.

[24] He was challenged in cross examination as to his response to a letter written by solicitors then acting on behalf of Gilbert Massin, who wrote to him on 29 August 2001 asking "Are you or Ms Dominique Massin aware of any previous wills of the late Lucienne Suzanne Massin apart from the document dated 9 March 2000?". On 7 September 2001, Mr Diamond wrote referring to "your various letters" and saying, amongst other things, that "we note that there is no previous wills (*sic*) in our security system and note that Dominique Massin's last instructions were that she was not aware if (*sic*) any other wills predating the will this firm made for Lucienne Massin". This response is curious, because although there were no

previous wills held by Mr Diamond (assuming, which is likely, that he destroyed the 1990 will) it is difficult to think that Mr Diamond had overlooked the 1990 will when writing this response. Whilst his letter caused me some concern in assessing Mr Diamond's credibility, it is not in itself conclusive. Mr Diamond could have been prepared to write a somewhat evasive response on the urging of his client, but it is another think to say that he would give false evidence to suit her interests.

[25] I now turn to the absence of evidence from Dominique Massin. I am not satisfied that the absence of Dominique Massin as a witness is explained satisfactorily. It would be natural for Mr Diamond to have called her as a witness or, alternatively put, Mr Diamond is the party who might reasonably be expected to have called her. At present, she is a co-executor, and she and Mr Diamond are trustees of a fund for the benefit of her daughter. In these circumstances, it is open to me to infer that her evidence would not have assisted the plaintiff's case, because of the rule in *Jones v Dunkel* (1959) 101 CLR 298. However, I am not bound to draw that inference, nor am I bound to reject Mr Diamond's evidence for his failure to call Dominique Massin in his case.[1] I must consider that matter of course with the other facts and circumstances which go to the reliability or otherwise of Mr Diamond's evidence.

[26] Ultimately, I have concluded that I should accept his evidence for reasons which I shall now summarise. The first is that in the face of a substantial challenge to his credibility, he was adamant that he interviewed Mrs Massin in the absence of her daughter and obtained clear enough instructions to prepare this will. There is no real prospect that he is innocently mistaken in his recollection. Yet, the suggested reason for his giving false evidence was raised only in address, and it is not compelling. Secondly, but importantly, there is the evidence of Mrs Johnson which, if accepted, demonstrates a sufficient confidence and proficiency in the use of the English language to have made it likely that Mrs Massin was interviewed alone by Mr Diamond, and that she had a sufficient understanding to have known and approved of the contents of this will. I find it incomprehensible that Mrs Johnson could have spoken so often to Mrs Massin over a period spanning about 14 years without being aware of the fact that Mrs Massin had little ability to understand spoken English. I cannot conceive why Mrs Johnson would give false or exaggerated evidence, and when she gave her evidence, she seemed to me to be an alert and careful witness. I also found Ms Byrne to be an impressive witness who could not have been innocently mistaken as to Mrs Massin's ability to speak English, and there was no challenge to her credibility.

[27] Further, the will which was made was consistent with the likely intention of the testatrix in the established facts and circumstances at the time. Her decision to make a new will and in these terms has an objective explanation in those circumstances. Mr Massin had died in January, at which point Mrs Massin had not spoken to her son for years and such was their estrangement that he was not told of his father's death. Then there was the acrimonious meeting at the casino in February 2000. As Mr Massin appears to accept, his mother's state of mind at least at that point was that she wished to have nothing more to do with him. It was

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1 *Cross on Evidence*, Australian Edition at [1215] citing *Café v Australian Portland Cement* (1965) 83 WN (Pt 1) (NSW) 280 at 287 and *Flack v Chairperson, National Crime Authority* (1997) 80 FCR 137 at 148-9.

entirely likely then that in these circumstances she would seek to make a new will which excluded him. Moreover, Mrs Massin was fond of Roxanne but had not seen Roxanne's sister Adrienne for about four years; and because Mrs Massin was apparently disapproving of her former son-in-law, she would wish Roxanne's benefit to be secured by a trust until Roxanne was well into adulthood, for fear that the funds would come under his hands. Objectively viewed, it was very likely that she would wish to make this will and, accordingly, it is easier to accept that she knew and approved of it than it would be if it contained some term which was inexplicable from the circumstances.

[28] In addition, the essential terms of the will were relatively simple and could be easily discussed. A person having at least the proficiency in English as described by Mrs Johnson would have no difficulty in communicating that she wished all of her estate to go to Dominique, with the exception of a specific legacy to be held for Roxanne. It is unnecessary, of course, that Mrs Massin understood in every respect the legal concepts involved in this will.[2]

[29] I accept Mrs Johnson's evidence, as I do the substance of Ms Byrne's evidence, which is that the testatrix was well able to engage in ordinary conversation in the English language. There is also some support for this in the fact that not only had she lived in Australia for so long, and worked for substantial periods, but also that she felt confident enough to go, for example, to the casino by herself.

[30] I am unable to accept Mr Massin's evidence that his mother had such a limited use of English; this evidence is irreconcilable with that of Mrs Johnson and Ms Byrne. Similarly, I am unable to accept evidence to the same effect from Mrs Massin or from Adrienne Goodship. There is some relevance in the fact that there has for many years been a bitter relationship between the defendant and his sister, as there is, of course, a relevance in the fact that under the subject will he takes nothing, whereas under the previous will he would take equally with his sister.

[31] I find therefore that the testatrix had a sufficient ability to speak and understand English for her to have effectively communicated her instructions for this will and to have known and understood its contents. I am persuaded to accept the evidence of Mr Diamond, and I find that he was able to take instructions from Mrs Massin such that he could prepare a will the terms of which were known and understood by the testatrix. I conclude therefore that he has discharged the burden of proof upon him and that it should be declared that the will executed on 9 March 2000 is valid.

[32] I shall hear the parties as to the precise orders to be made according to these reasons and as to costs.

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[2] *Theobald on Wills*, 15th ed., 1995 at p 35.