

SUPREME COURT OF QUEENSLAND

CITATION: *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107

PARTIES: **SHANE DESMOND MATTHEW FRIZZO AND ALAN GRAHAM TAYLOR**
(plaintiffs)
v
DEREK VICTOR KENNETH FRIZZO
(first defendant)
and
ROBERT SERGIO EMIDIO FRIZZO
(second defendant)
and
RENATO ADRIANO GABRIEL FRIZZO
(third defendant)
and
ROSANNA LYDIA ANGELA FRIZZO
(fourth defendant)

FILE NO: 5422 of 2008

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 12 May 2011

DELIVERED AT: Brisbane

HEARING DATE: 21, 22, 24, 25 March 2011

JUDGE: Applegarth J

ORDERS: **The questions for separate determination should be answered as follows:**

- 1. The deceased had testamentary capacity at the time she made the 2006 Will.**
- 2. The photocopy of the will that is Exhibit 5 ought to be admitted to probate.**
- 3. The 2006 Will impliedly revoked the whole of the 2003 Will.**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where testatrix suffered longstanding but mild cognitive impairment – where testatrix made will in 2003 which favoured one child over his siblings – where

testatrix was hospitalised in 2006 and required hip surgery – where testatrix suffered episodic delirium in the days following admission – where no symptoms of delirium were observed for a period of 36 hours before surgery – where testatrix dictated new will to doctors before entering theatre for surgery – where doctors considered testatrix’s capacity before writing down her instructions – where 2006 will divided entire estate equally among all children – where medical staff did not observe symptoms of “quiet delirium” during preparation for surgery and dictation of will – whether testatrix was suffering quiet delirium at time of dictating will – whether testatrix had testamentary capacity

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – WHEN LOST, MISLAID, DESTROYED OR NOT AVAILABLE – IN GENERAL – where testatrix dictated will to doctors before entering theatre for surgery – where doctor wrote down will and a document naming the testatrix’s children – where original documents were retained by hospital staff when patient went into theatre – where photocopies were made for hospital records – where hospital staff annotated and signed photocopies to the effect that the originals had been sighted and the photocopies were true copies – where original documents were never found – whether photocopy of dictated will should be admitted to probate

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – REVOCATION – METHODS OF REVOCATION – OTHER WILLS, CODICILS OR WRITINGS – where former will contained appointment of executors, debt payment clause and miscellaneous provisions about trustees and administrative matters – where former will also contained numerous specific dispositions to different children – where testatrix expressed wish to “change” will and made a new will containing one clause disposing of entire estate equally to all children – where new dispositive clause inconsistent with former dispositions but former administrative clauses still capable of standing together with new will – whether new will partially or wholly revoked former will

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – JURISDICTION AND DISCRETION OF THE COURT – QUEENSLAND – where will made no appointment of executors – where previous will appointed one sibling and testatrix’s solicitor as executors – where siblings have been engaged in litigation against each other – where family antagonism may interfere in due administration of estate – where independent solicitor was granted letters of administration *pendente lite* by earlier order

of the court – whether the same solicitor should be appointed to administer estate

- CASES: *Bailey v Bailey* (1924) 34 CLR 558; [1924] HCA 21 cited
Banks v Goodfellow (1870) LR 5 QB 549 cited
Boughton v Knight (1873) LR 3 P & D 64 cited
Cahill v Rhodes [2002] NSWSC 561 applied
Conroy v Unsworth-Smith [2004] QSC 81 cited
Re Griffith; Easter v Griffith (1995) 217 ALR 284 cited
Re Hodges; Shorter v Hodges (1988) 14 NSWLR 698 cited
Kerr v Badran [2004] NSWSC 735 cited
Re Key [2010] 1 WLR 2020; [2010] EWHC 408 (Ch) cited
Nicholson v Knaggs [2009] VSC 64 cited
Payten v Perpetual Trustee Company Ltd [2005] NSWSC 345 cited
Read v Carmody (NSWCA, 23 July 1998, unreported; BC9803374); [1998] NSWCA 182 applied
Szozda v Szozda [2010] NSWSC 804 cited
Timbury v Coffee (1941) 66 CLR 277; [1941] HCA 22 cited
Worth v Clasohm (1952) 86 CLR 439; [1952] HCA 67 cited
Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197 cited
- COUNSEL: DRM Murphy SC with TW Quinn for the plaintiffs
 APJ Collins with M Horvath for the first defendant
 JC Bell QC with JI Otto for the second, third and fourth defendants
- SOLICITORS: North Coast Law for the plaintiffs
 Quinn and Scattini for the first defendant
 Murphy Schmidt for the second, third and fourth defendants

Introduction

- [1] After her husband’s death in 2002, Mrs Lydia Frizzo lived on her own in her home on rural property at Beerwah. She received care five days a week and on every second weekend from a professional personal carer, Ms Marshall. Typically, Ms Marshall would attend on Mrs Frizzo twice a day. She would spend one or two hours in the morning assisting Mrs Frizzo to prepare her breakfast, and assist her with showering, dressing and other aspects of personal care. She would go back to Mrs Frizzo’s home each evening before 5.00pm to help her prepare her evening meal. She took Mrs Frizzo shopping once a week. Ms Marshall says that, mentally, Mrs Frizzo was “on the ball”. For example, Mrs Frizzo would question bills that she received and compare invoices with time records in order to be satisfied that she was being charged properly.
- [2] On Friday, 20 January 2006 Mrs Frizzo fell and broke her hip. Before the fall she had been behaving normally, and Ms Marshall did not notice anything unusual about her behaviour. Fortunately, Ms Marshall was present and was able to go to her aid immediately. Mrs Frizzo was taken by ambulance to Nambour General Hospital that day. She reported having overbalanced while standing up from a chair. Whilst in hospital she suffered an acute myocardial infarction and congestive cardiac failure. At various times in the following days she was delirious. She received medical treatment, including analgesics and antipsychotic medication. In

the days following her admission she was visited by her five children. Doctors were waiting for her physical condition to improve so that she could undergo surgery to fix her fractured hip.

- [3] Mrs Frizzo was almost 81 years old at the time. The possibility existed that complications would arise as a result of her undergoing surgery and that she might be left in a parlous state. The risks of surgery were discussed by medical staff who wanted to ascertain whether Mrs Frizzo wished to be revived in the event of serious complications. At least four of her children, Robert, Rosanna, Renato (Rennie) and Shane participated in these discussions, and Robert asked his mother if she wanted to be revived in the event of serious complications. She said that she did.
- [4] Discussion about the risk that she might not survive the procedure was apt to concentrate Mrs Frizzo's mind on what was to become of her substantial assets. In September 2003 she had made a will that favoured her youngest son Shane ("the 2003 Will"). The contents of her 2003 Will were not known to her children in January 2006. Mrs Frizzo told the solicitor who prepared wills for her in 2003 that she did not want their contents to come to light prior to her death. She insisted that the solicitor, Mr Taylor, undertake not to disclose their contents prior to her death, and he respected this wish.
- [5] By Friday, 27 January 2006, Mrs Frizzo's physical condition had improved such that medical staff assessed that she should undergo the required surgical procedure. No operating theatre was available that day and so the surgery was scheduled for Saturday, 28 January. The pre-operative procedures that day, as on a previous occasion when the operation was cancelled due to her poor physical condition, involved the patient speaking to doctors and nurses. On 28 January 2006 pre-operative procedures for Mrs Frizzo started in the very early hours of the morning. Various checks were undertaken and an anaesthetist reviewed her condition at around 1.30am.
- [6] She woke at 6.30am and medical staff in the ward would have prepared her for the operation, including by asking her questions. The standard procedure was then for Mrs Frizzo to be taken to the theatre complex where another nurse would go through the same questions as to her name, the operation she was having and her fasting status. There was then another occasion when these things would be checked.
- [7] On the morning of 28 January Mrs Frizzo was in the care of, among others, an anaesthetic registrar (Dr Millar), a more senior anaesthetist (Dr Scolaro) and nurses (including Nurse Madden). Dr Scolaro attended because of the potential complications arising from the procedure. As a result, both he and Dr Millar were present to discuss with Mrs Frizzo what was happening and what they planned to do. Given her serious medical condition, Dr Scolaro estimates that he spoke to Mrs Frizzo for 10 to 15 minutes about these matters.
- [8] In the course of these discussions Mrs Frizzo informed the doctors and nursing staff that she wished to change her will. Dr Millar made the following contemporaneous entry on Mrs Frizzo's progress notes:

"When brought to holding bay pt. informed N/Staff that she wished to change her will. Had been thinking of this for several days."

This request was an unusual event for the medical staff, and inquiries were made with hospital authorities as to what should be done. Dr Scolaro, Dr Millar and Nurse Madden have given evidence about their assessment of Mrs Frizzo's mental state at the time the document was dictated and signed by her.

- [9] Mrs Frizzo expressed her testamentary intentions and Dr Scolaro recorded them. Omitting the signatures of Mrs Frizzo and witnesses, the document records:

“I Lydia Iolanda Elvia Frizzo wish to change my will.

I want all my children to have an equal share of my estate, both money and land.

I wish to change my will as Derek Frizzo was not getting enough. I did not think this was fair. Also Renato Frizzo was also not getting an equal share. He was not originally in the will.

Lydia Iolanda Frizzo says she wants to do this so there will not be fights amongst the children.

I, Richard John Scolaro, wrote and read this statement to Lydia Iolanda Elvira Frizzo at 10.10 am 28/1/06. At this time she was just about to be taken to theatre. She has not received any sedation prior to this. Lydia Frizzo spoke these words to me.”

For ease of reference, I will refer to this as the 2006 Will. Dr Scolaro thought it prudent to record the names of Mrs Frizzo's children on a separate document, and she dictated their names to him.

- [10] The 2006 Will was placed in the hospital's records, and Mrs Frizzo's children and her solicitors did not know of its existence until well after these proceedings were commenced.
- [11] Fortunately, the surgery on 28 January 2006 was a success. Mrs Frizzo returned to the ward at 2.40pm. Members of her family continued to visit her. In the days that followed, her needs upon discharge from hospital were considered by her family, hospital staff and social workers. On 13 February 2006 she underwent a Mini Mental State Examination (MMSE). On 14 February 2006 an aged care client record was completed. The information in it was drawn from a number of sources. The part concerned with cognitive behaviour/psychological aspects included the following comment:

“Mrs Frizzo has been a lady who likes to be in control of situations and not controlled. Has had depressive symptoms through life – very negative, constantly focusing on -ve aspects of life.”

The care recommendation indicated:

“She now has significant high care needs, not being able to weight bear and needing full assistance for all transfers and mobility. The current medical team have not considered her a candidate for

rehabilitation. There are a number of supportive children who will assist their mum to find appropriate nursing home level care.”

- [12] The issue of Mrs Frizzo granting a power of attorney to her children had arisen for discussion in the past, and arose again for discussion in February 2006. On 23 February 2006 her family’s solicitor, Mr Brown, who had been in regular contact with Mrs Frizzo for almost 20 years, and who had frequent conversations with her over aspects of her husband’s estate in more recent years, visited her at the Nambour General Hospital. He went there to discuss with her the making of an enduring power of attorney. Mr Brown had a discussion with Mrs Frizzo and also with one of the doctors who reported that Mrs Frizzo had scored reasonably well on the MMSE. Mrs Frizzo told Mr Brown that she was very concerned that if she gave the power of attorney to her children, they would just take all of her money. Mr Brown explained the legal position to her and the possibility of giving a power of attorney to some other friend or family member. He spoke to her about her long term care, about her need to look for alternate accommodation, and told her that he felt that her family would do the best by her in that regard. He explained to her that all of her affairs were being attended to by her children and that all of her accounts and expenses were being attended to.
- [13] Mr Brown next attended upon Mrs Frizzo at the Tricare Nursing Home at Kawana on 3 March 2006 when he again went through issues with her in relation to an enduring power of attorney. Mrs Frizzo was once again able to conduct a normal conversation, and Mr Brown was satisfied that she had the necessary capacity to grant an enduring power of attorney. Mrs Frizzo’s sons Robert and Shane and her daughter Rosanna joined the meeting, and discussions followed about the implications of granting or not granting a power of attorney. Mrs Frizzo decided to sign a power of attorney and did so in Mr Brown’s presence. Her three children who were present also signed it and undertook to arrange for their brother, Rennie, to sign it. On 29 November 2007 the Guardianship and Administration Tribunal declared that Mrs Frizzo had the capacity to execute an enduring power of attorney on 3 March 2006.
- [14] Mrs Frizzo died on 23 February 2008.

The issue

- [15] On 4 February 2010 P Lyons J directed pursuant to r 483 of the *Uniform Civil Procedure Rules 1999 (UCPR)* that certain questions of fact and law that arise on the pleadings in relation to the 2006 Will be tried separately from and in advance of other questions in the proceeding. The second to fourth defendants seek an order declaring for the force and validity of the 2006 Will in solemn form. In the alternative, and assuming that the 2003 Will that the plaintiffs propound was validly executed, the second to fourth defendants seek a declaration that, upon the proper construction of the 2006 Will, the 2003 Will was impliedly revoked or, in the alternative, that clauses 3 and 5 of it were impliedly revoked.
- [16] The essential issue is Mrs Frizzo’s testamentary capacity on the morning of 28 January 2006. That issue arises because of the serious injury she suffered on the morning of 20 January 2006 and its consequences.
- [17] There is no dispute that she would have had the capacity to make a simple will in the form of her 2006 Will before her fall and injury on 20 January 2006.

- [18] By the morning of 28 January 2006 Mrs Frizzo had decided that she wanted all of her children to have an equal share of her estate. The document that she dictated to Dr Scolaro explained why she wished to change her will. It specifically explained that certain of her children were not getting enough, and that she wanted to share her estate equally “so there will not be fights amongst the children.” This proved not to be the case.
- [19] In general terms, the 2003 Will left land known as Glenview and Pignata Road to Derek Frizzo, a residential unit to Rosanna Frizzo, land known as Mawson’s Farm to Robert and Rennie Frizzo equally as tenants in common, any shares owned in private companies to the children that survived her, a \$1,000 legacy to the Christian Childrens Fund and the residue of her estate to Shane Frizzo. The 2006 Will was simpler.
- [20] Mrs Frizzo’s intent that all of her children have an equal share of her estate was expressed clearly to the doctors and nurses present on the morning of 28 January 2006. The issue is her testamentary capacity at the time she gave these instructions, which were faithfully recorded by Dr Scolaro. That issue involves the application of settled principles in relation to testamentary capacity.

The law

- [21] The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*.¹ The relevant principles were restated by Powell JA in *Read v Carmody*:
1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
 2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
 3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
 4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.²

In this last respect, in the words of *Banks v Goodfellow*, no disorder of the mind should poison her affections or pervert her sense of right, nor any insane delusion influence her will, nor anything else prevent the exercise of her natural faculties.³

- [22] The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that case, “the mental power may be reduced below the ordinary standard” provided the testatrix retains “sufficient intelligence to understand and appreciate the testamentary act in its

¹ (1870) LR 5 QB 549 at 565.

² *Read v Carmody* (NSWCA, 23 July 1998, unreported; BC9803374), [1998] NSWCA 182 per Powell JA. See also the judgments of Dixon J (as he then was) in *Timbury v Coffee* (1941) 66 CLR 277 at 283, [1941] HCA 22; and of Mullins J of this Court in *Conroy v Unsworth-Smith* [2004] QSC 81 at [97]-[98].

³ (1870) LR 5 QB 549 at 565.

different bearings”.⁴ More recently, Kirby P (as he then was) has articulated this principle as follows:

“In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent—more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will.... Were the rule to be otherwise, so many wills would be liable to be set aside for want of testamentary capacity that the fundamental principle of our law would be undermined and the expectations of testators unreasonably destroyed.”⁵

In part, this reflects the fact that the *Banks v Goodfellow* test is always brought to bear “on existing circumstances of modern life”.⁶ Twenty-first century society is considerably more complex than that of 1870; life expectancy is much longer and the population older. The courts do not require a testatrix to know precisely the value of her individual assets, or even of certain classes of assets.⁷ That would particularly apply as one moves up the scale in terms of size and complexity of the estate.

- [23] Of course, the onus of proving that the testatrix had testamentary capacity at the time she made her will lies on the party propounding that will. It is a question determined on the balance of probabilities, based on the whole of the evidence.⁸ A presumption of validity arises where the proponent demonstrates a duly executed will that is rational on its face.⁹ The party impugning that will must then displace the *prima facie* case with “clear evidence...that the illness of the [testatrix] so affected [her] mental faculties as to make them unequal to the task of disposing of [her] property”.¹⁰ While extreme age or grave illness are circumstances that will attract the vigilant scrutiny of the Court, neither is, of itself, sufficient to establish incapacity. The question always is whether those or other circumstances so affected the testatrix’s faculties as to render her unequal to the task of disposing of her property.¹¹
- [24] If, however, doubt *is* raised as to the testatrix’s mind, memory and understanding, then the Court is thrown back onto an examination of the evidence as a whole to determine whether the proponent has established affirmatively that the testatrix was of sound mind at the time of executing the will.¹² As was said in *Worth v Clasohm*:

⁴ Ibid. at 566.

⁵ *Re Griffith; Easter v Griffith* (1995) 217 ALR 284 at 295.

⁶ *Kerr v Badran* [2004] NSWSC 735 at [49].

⁷ Ibid. The relevant passage of Windeyer J’s judgment was approved by the New South Wales Court of Appeal in *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [64] and [94].

⁸ *Bailey v Bailey* (1924) 34 CLR 558 at 570, [1924] HCA 21 per Isaacs J, Gavan Duffy and Rich JJ concurring.

⁹ *Timbury v Coffee* (1941) 66 CLR 277 at 283, [1941] HCA 22 per Dixon J; *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 706; *Conroy v Unsworth-Smith* [2004] QSC 81 at [100]; *Re Griffith; Easter v Griffith* (1995) 217 ALR 284 at 295.

¹⁰ *Bailey v Bailey* (1924) 34 CLR 558 at 571-2, [1924] HCA 21 per Isaacs J.

¹¹ See *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 707 and the cases there cited.

¹² *Timbury v Coffee* (1941) 66 CLR 277 at 283, [1941] HCA 22 per Dixon J.

“The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff’s claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution.”¹³

- [25] In embarking on that examination, opinion evidence may be led, but courts are not obliged to give it a great deal of weight. Justice Mullins has recently reiterated the propositions put forward by Isaacs J (as he then was) in *Bailey v Bailey*. Those propositions, relevantly, are (1) that opinions of witnesses as to testamentary capacity are “usually for various reasons of little weight on the direct issue”; and (2) that, while such opinions are not without some weight, “the Court must judge from the facts they state and not from their opinions”.¹⁴
- [26] In this case there is no evidence of any suspicious circumstances attending the making of the 2006 Will. It was duly executed. It can be said to be “rational on its face”. However, this is only one aspect of the relevant inquiry, and my task is to look at the evidence as a whole to determine whether it establishes affirmatively that it is more probable than not that Mrs Frizzo had testamentary capacity when she executed the 2006 Will.

Overview of the evidence

- [27] In deciding the issue of testamentary capacity I accept the independent and reliable evidence of Dr Scolaro, Dr Millar and Nurse Madden, each of whom gave oral evidence before me. I also rely upon the evidence given by those witnesses and by Nurse Bundgaard and Nurse Quinlan before a Registrar on 28 July 2009.
- [28] Dr Scolaro and Dr Millar had the opportunity to assess Mrs Frizzo’s mental state on the morning of 28 January 2006, and were satisfied that she had the capacity to make the 2006 Will. Their evidence is that if they had not been satisfied they would not have prepared the document (in the case of Dr Scolaro) or witnessed it (in the case of Dr Millar).
- [29] The doctors on 28 January 2006 were not undertaking any formal assessment of testamentary capacity of the kind that might be undertaken by a specialist in that field. That said, they understood the significance of the document that was prepared at Mrs Frizzo’s request, and I accept the evidence that they would not have participated in its preparation or witnessed it if they did not think that Mrs Frizzo had the capacity to dictate and execute such an important document.
- [30] In deciding the issue of testamentary capacity, I am also assisted by medical records from the Nambour General Hospital concerning Mrs Frizzo’s physical and mental condition during the relevant period. I am assisted by the expert evidence of Dr Byrne and Dr Hecker. Both are highly qualified to express opinions that are relevant to the issue of testamentary capacity. Dr Byrne has had over 20 years of

¹³ *Worth v Clasohm* (1952) 86 CLR 439 at 453; [1952] HCA 67 at [18].

¹⁴ *Bailey v Bailey* (1924) 34 CLR 558 at 572, [1924] HCA 21 per Isaacs J; *Conroy v Unsworth-Smith* [2004] QSC 81 at [102].

experience as a consultant in general adult and geriatric psychiatry. His doctorate from the University of Queensland was in that field. He is Director of the Geriatric Psychiatry Service at the Royal Brisbane and Women's Hospital and a visiting Consultant Psychogeriatrician to the Memory Clinic at that hospital. Dr Hecker is a Consultant Physician and, since 1992, has been a Specialist Physician in General Internal Medicine and Specialist in Geriatric Medicine. She has had experience in all areas of medical care of the elderly over the last 25 years. She holds numerous positions at hospitals, and has extensive experience in the assessment and management of memory disorders, cognitive impairment and dementia.

- [31] Dr Byrne was appointed pursuant to r 429G of the *UCPR* on 11 February 2010 by P Lyons J as single joint medical expert in relation to the question of whether Mrs Frizzo had testamentary capacity at the time she made the 2006 Will. His report of 17 March 2010 expressed the opinion that she did. On 27 July 2010 P Lyons J granted leave pursuant to r 429N, over the opposition of the defendants, for the plaintiffs to rely on the expert evidence of Dr Hecker. Dr Hecker reached a different conclusion to Dr Byrne. I will address their evidence later. However, the issue of testamentary capacity is not one decided by expert witnesses, even by expert witnesses of the standing of Dr Byrne and Dr Hecker.¹⁵ They did not have the opportunity to observe Mrs Frizzo and assess her testamentary capacity on 28 January 2006.
- [32] This is not a case in which instructions for a contested will were taken by a solicitor who was familiar with the testator. Mr Brown's observations of Mrs Frizzo and his assessment of her capacity to grant a power of attorney in February or March 2006 do not especially illuminate, let alone determine, the issue that I have to decide. Mr Taylor, a solicitor who was appointed as executor under the 2003 Will, and who had dealings with Mrs Frizzo on various occasions, did not have the opportunity to observe her on 28 January 2006. Mrs Frizzo did not tell these solicitors, or even her children, about the 2006 Will. Her conduct in this regard was consistent with her instructions to Mr Taylor in 2003 that she did not want the contents of her will at that time disclosed prior to her death. The possibility exists that Mrs Frizzo forgot making the 2006 Will. However, I conclude that she did not tell her children or anyone else about the 2006 Will after she recovered from her operation because she did not want anyone to pressure her to change it.
- [33] The contents of Mrs Frizzo's 2003 Will remained unknown to all of her children until Shane Frizzo's curiosity got the better of him some time after his mother was residing at Tricare, when he went through documents kept at her home. After Mrs Frizzo's death, Shane Frizzo and Mr Taylor, who were appointed executors under the 2003 Will, applied for probate. The defendants filed caveats requiring proof in solemn form of any will of Mrs Frizzo. The plaintiffs commenced proceedings on 11 June 2008 seeking a declaration for the force and validity of the 2003 Will. The first defendant pleaded that his mother lacked the testamentary capacity to make the 2003 Will. The second, third and fourth defendants also defended the proceedings and pleaded that at the time the 2003 Will was executed their mother was not of sound mind, memory and understanding. In essence, they alleged that, at the time: her memory was defective; she was prone to confusion; she did not understand the subdivision and development potential of the land; she did not comprehend the disparity between the provision she made for Shane Frizzo and

¹⁵ *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [65], [89]-[92].

the provision she made for her other children; and she did not recognise the claims of the second, third and fourth defendants on her estate.

- [34] Once the 2006 Will came to light the position of these defendants changed. They placed at the forefront of their pleading the 2006 Will and claimed that its force and validity should be declared. Their position in relation to the 2003 Will was amended and became their alternative position.
- [35] The first defendant, Derek Frizzo, has been separately represented. He supports the other defendants' contention that his mother had testamentary capacity on 28 January 2006 and that I should declare in favour of the 2006 Will. Derek Frizzo saw his mother in hospital on or about the day that she was admitted. He did not file affidavit evidence. He made himself available for cross-examination but the other parties did not seek to examine him.
- [36] His siblings gave affidavit and oral evidence. There are stark differences between the account given by Shane Frizzo and the accounts given by his siblings about their mother's condition when she was in hospital, both before and after her surgery on 28 January 2006. Shane Frizzo swore an affidavit:

“From the time of the fall and her admission to Hospital in January 2006 I can say that my mother was never able to conduct a normal conversation. She was unable to initiate conversation. She at times was able to respond to things that were said to her but usually only in the form of agreement or disagreement (yes or no). She never talked of what was to become of her. She never talked of dying or any such thing. She never really talked at all except to mutter things such as ‘stir the soup’ which she said quite often. She would see people who did not exist. To me she exhibited all the signs of someone who had completely lost her mental faculties and was simply existing pending her death.”

His siblings gave quite different evidence about their mother's ability to converse. They say that during the visits that they made to her in hospital she understood what was going on and was in command of her mental faculties. I will address later the evidence concerning Mrs Frizzo's condition after her admission to hospital on 20 January 2006. For present purposes, it is sufficient to observe that I do not accept the evidence of Shane Frizzo, as quoted above, principally because it is inconsistent with reliable independent evidence, particularly the evidence of the doctors and nurses who observed and assessed Mrs Frizzo's condition during her hospitalisation. These include Dr Scolaro and Dr Millar, both of whom had the opportunity and the obligation to assess her condition on 28 January 2006. Shane Frizzo's evidence, as quoted above, is also inconsistent with the evidence of Mr Brown, who visited Mrs Frizzo and conversed with her in hospital in February 2006, and with the results of the MMSE undertaken on 13 February 2006. That test resulted in a score of 21 out of 30 including a score of 5 out of 5 for attention and calculation. It is inconsistent with someone who, according to Shane Frizzo, had “completely lost her mental faculties and was simply existing pending her death.”

- [37] I will address the evidence in the following sections:

1. Background facts
2. The clinical course and observations of Mrs Frizzo after her admission
3. Preparation on 27 and 28 January 2008 for surgery
4. The making of the 2006 Will
5. Is it likely that Mrs Frizzo had delirium at the time she made the 2006 Will?
6. Medical opinion on testamentary capacity.

[38] I will then address the parties' submissions on testamentary capacity.

Background facts

[39] Although there are stark differences in the evidence of the children concerning their mother's mental state after her admission to hospital in January 2006, there is no great difference between them about their mother's character and personality. I have earlier quoted from the aged care client record completed in February 2006, which was signed by Shane Frizzo and which summarised that Mrs Frizzo liked to be in control of situations and was constantly focusing on negative aspects of life. This is consistent with other evidence about her personality. There is evidence that she was prone to antics and was often manipulative.

[40] Mrs Esther Frizzo has been married to the second defendant, Robert Frizzo, for 39 years. She gave evidence, which I accept, about Mrs Frizzo's knowledge of business matters, her dealings with her children, and her condition after she was admitted to hospital. Mrs Esther Frizzo explained that Mrs Frizzo had never done any business on the farm, and never really knew the value of the lands. Mrs Frizzo's late husband ran the farm and paid all the bills, and Mrs Frizzo was not involved in dealing with any of the farm's costs. After Mr Frizzo Snr's death it was his executors (Mrs Frizzo's children) who ran the family's businesses and managed the properties that were administered by the estate or owned by Mrs Frizzo by survivorship.¹⁶ I accept that Robert Frizzo used to tell his mother what was happening in terms of property developments and the like.

[41] Shortly after the death of Mr Frizzo Snr the executors of his estate received written and oral advice from taxation advisers about capital gains tax, income tax, stamp duty and other issues. The advice included the following:

“There is a clear tax advantage in slowing down the administration of the estate for a period up to and including a total of three years. Unless there is an urgency about the administration of the estate for reasons that I can't imagine, I am quite sure Adrian's instructions to me would be to save as much tax as possible. The call however has got to be that of the executors and we will deal with that next Wednesday.”

¹⁶ Four of the five Frizzo children—Robert, Renato, Rosanna and Shane—were appointed executors of their father's estate. Derek Frizzo was not an executor.

The executors acted on this advice. This proved to be a source of frustration to Mrs Frizzo, who was the sole beneficiary of her husband's estate. The delay placed Mr Brown in a difficult position in advising the executors and also in advising Mrs Frizzo. Eventually she consulted Mr Taylor, who represented her interests and who corresponded with Mr Brown's firm.

[42] I find that during this period Mrs Frizzo's children, who were executors of their late father's estate, were doing their best to preserve and enhance the assets and businesses that formed their father's estate. I also conclude that Mrs Frizzo's children had a genuine concern about her lack of commercial sophistication or experience. In the light of uncontradicted evidence that Mrs Frizzo did not know the true value of the property she inherited, and was previously a woman who had had nothing to do with business transactions, I apprehend that at least some of her children were reasonably concerned that she might be prevailed upon to enter an improvident contract to sell land at a substantial undervalue. Her daughter Rosanna received from the family's solicitor documents in relation to an application for the appointment of a Guardian and/or Administrator. This is indicative of a concern that Mrs Frizzo was not capable of managing such a large estate and making business decisions in relation to its development.

[43] On 30 August 2005 Rennie Frizzo emailed the estate's solicitors and copied other parties in relation to the administration of the estate. A meeting in early August 2005 had resolved that it would be better for the executors to carry on managing aspects of the estate and managing "the joint properties rather than transferring them over." The executors understood that Mrs Frizzo agreed with this position. The email contained the following observation:

"As always, she is very evasive, contradictory, difficult and never gives any direct answers when asked a direct question."

The email continued:

"As you are probably aware, Lydia takes no notice of our requests, submissions or explanations. A bit like a spoilt child, she will continue asking the same things to as many people as she can, until she has her way. We have questioned her as to the reasons why transfer of the property is important and how it will help the situation, but she either doesn't answer or claims it's because she doesn't have to worry about the bills and other issues about how to distribute the property. When we explain she already doesn't have to worry about those things she doesn't seem to hear. Because of her constant changing of position, self contradiction, fear of simple day to day expenses, lack of understanding of basic issues, we don't have confidence that she would responsibly deal with the assets of the Estate. I can't see how we can successfully complete the development of the Beerwah property, or any others if she has complete control."

This email, other correspondence and other items of evidence serve to highlight the strained relationship that existed between Mrs Frizzo and her children in 2005. Mrs Frizzo had a legal entitlement to have property that was jointly owned with her late husband transferred to her and to have her husband's estate duly administered,

which would have resulted in the transfer of other properties to her. Some jointly owned property was transferred to her in September 2003. However, there were delays in the transfer of other properties and the administration of the estate continued. Early in the administration Mr Brown had advised Mrs Frizzo that she should obtain her own legal advice. She did so in mid-2003. The administration of her husband's estate remained a source of friction between her and her children. Mrs Frizzo frequently contacted Mr Brown about the matter and he would do his best to explain the situation to her. However, Mrs Frizzo remained unhappy.

- [44] Under cross-examination, Mrs Esther Frizzo fairly acknowledged that Mrs Frizzo wanted everything to go through quickly and that when this did not happen she became unhappy with her children. Mrs Esther Frizzo's evidence was:

“She became unhappy with her children. She was always unhappy with her children. In all the years I've known her she's always put one child against another and she was never ever 100 per cent with all of her children at one time.”

I accept this evidence. There was other acceptable evidence that Mrs Frizzo was an unhappy and demanding woman. Ms Marshall described her as “very demanding”. She described Mrs Frizzo as being lonely and reluctant to engage in activities outside of her home. A friend of Shane Frizzo, Ms Ratu, who saw Mrs Frizzo on occasions between 2004 and 2006, noted that, before the fall, Mrs Frizzo seemed to have her faculties about her but was “rather a lonely old lady.”

- [45] Mrs Frizzo suffered a stroke in 1996 and was hospitalised for less than a week. She made a good recovery. According to Shane Frizzo, based on his observations of her, her mental faculties were such that there were no lingering effects.
- [46] The assessment of Mrs Frizzo's conduct that was made in Rennie Frizzo's 30 August 2005 email was generally accepted by witnesses who were cross-examined about it. Witnesses gave evidence of Mrs Frizzo's tendency to engage in “antics” by exaggerating and overstating matters. Rosanna Frizzo accepted in her evidence that her mother could carry on with antics in order to manipulate family situations. With some reluctance she described her mother as “a bit of a controller” and said that her mother could engage in attention-seeking behaviour. When pressed she gave as an example Mrs Frizzo's behaviour in a retirement home named “Eden”, where she was demanding on staff and would just keep calling out “Help” rather than simply wait for attention.
- [47] Rennie Frizzo agreed with the proposition that his mother would make things out to be worse than they were in order to get attention and to have her way. However, he did not agree with the proposition that his mother engaged in exaggerated conduct shortly after her admission into hospital in order to get her own way. He observed that “It could be very hard to tell with Mum.... She did act up – she liked acting up, yes”. He agreed that his mother tended to exaggerate and overstate matters.
- [48] Shane Frizzo disagreed with the proposition that his mother was prone to exaggeration, particularly when dealing with members of her family. He did not agree with the proposition put to him by counsel for his brother Derek that his mother liked to be in control of situations, or that she kept her children under control by exaggerating and overstating her position.

- [49] To the extent that there is a conflict between the evidence of Shane Frizzo and that of his siblings concerning their mother's behaviour in general, and her behaviour when she was in hospital in January 2006 in particular, I prefer the evidence of his siblings. However, the extent of conflict concerning Mrs Frizzo's character and general behaviour over the years should not be overstated. I find that Mrs Frizzo liked to be in control of situations and not controlled by others. The extent to which she was prone to exaggeration and antics is, to some extent, a matter of impression about which opinions could reasonably differ. Mrs Frizzo's tendency to engage in antics in order to get attention and have her way is relevant to an assessment of certain erratic behaviour recorded in hospital records after her admission to Nambour General Hospital on 20 January 2006. Since it is potentially relevant to that topic, I find that Mrs Frizzo was prone to engage in antics on occasions, particularly in her dealings with family members. I find, in reliance on Ms Marshall's evidence, that she could be very demanding, and I also accept Rosanna Frizzo's evidence that she was also demanding during her time in the Eden retirement home. However, I do not consider that my findings in this regard are particularly probative of whether her behaviour on occasions after her admission on 20 January 2006 was the product of attention-seeking and exaggerated behaviour. For reasons to be given when considering the medical records, I consider it likely that Mrs Frizzo's behaviour on occasions in removing drips was the product of delirium and disorientation. However, other records of her being combative with nursing staff and making demands on them are consistent with her character prior to 20 January 2006.
- [50] Whilst hospital records indicate that Mrs Frizzo was confused from time to time, neither those records nor the reliable observations of her during the eight days following her admission support Shane Frizzo's claim that, after her admission to hospital, she was never able to conduct a normal conversation, was unable to initiate conversation and "exhibited all the signs of someone who had completely lost her mental faculties". Shane Frizzo's evidence in this regard is inconsistent with evidence that commands acceptance, including the independent and reliable evidence of the doctors and nurses who closely observed Mrs Frizzo on the morning of 28 January 2006.
- [51] During certain periods after her admission Mrs Frizzo was unable or unwilling to communicate. I accept Ms Ratu's recollection that she visited the hospital and saw Mrs Frizzo asleep or semi-conscious. She thought it was a Friday and Derek Frizzo was there. It seems likely that this was Friday, 20 January 2006. There was a subsequent occasion when Ms Ratu visited and Mrs Frizzo mistook her for Robert's oldest daughter. Ms Ratu gained the impression that Mrs Frizzo had little comprehension of what was going on around her, and found it impossible to conduct a conversation with her. This is not to say that Mrs Frizzo was unable to converse on that occasion even if she wanted to. She may have chosen not to converse with Ms Ratu on that occasion because of her weak physical state or for some other reason.
- [52] I find that on other occasions in the days following her admission Mrs Frizzo was able to communicate with family and staff at the hospital. I accept the evidence of Mrs Esther Frizzo about an occasion at the Nambour General Hospital when she, her husband Robert, Rosanna, Rennie, Rennie's wife Karen and one of Rennie's daughters was present. Mrs Esther Frizzo gave this evidence in response to Shane Frizzo's evidence that his mother was never able to conduct a normal conversation

and was unable to initiate conversation after her admission to hospital. Mrs Esther Frizzo recalls that on the occasion in question Mrs Frizzo announced to those present: “you’re all just here for the money”. She does not recall anyone specifically responding and thinks that those present “just had a bit of a chuckle at her comment”. Mrs Esther Frizzo says that no-one took the comment seriously. It is possible that Mrs Frizzo’s provocative statement “you’re all just here for the money” was a flippant remark, intended in jest. The relevant point is that this episode contradicts Shane Frizzo’s evidence that his mother was incapable of initiating a conversation.

- [53] The evidence of Mr Brown confirms the evidence of Mrs Esther Frizzo that Mrs Frizzo had no business experience and did not know how wealthy she was. Mr Brown first met Mr and Mrs Frizzo in 1998, had regular dealings with them and got to know Mrs Frizzo quite well. Mr Brown’s evidence is that during his lifetime Mr Frizzo Snr operated the business activities of the partnership and Mrs Frizzo “was predominantly a farmer’s wife”. After Mr Frizzo Snr passed away the executors of his estate assumed management of the property and businesses. Mrs Frizzo would contact Mr Brown’s office regularly about the estate’s administration and, notwithstanding earlier advice which she had accepted, she continued to press for the property to be transferred to her. Mr Brown’s evidence is that Mrs Frizzo did not know how wealthy she actually was or was going to be. She did not understand the increase in the value of the land because of its subdivisational potential or its capital gain. On 30 August 2004 Mr Brown wrote to the accountants who had provided taxation advice to the estate:

“We are not quite sure what the widow will do at the end of the day with the property in her own name and we think that this is the concern also of some of the Executors.”

He explained in his evidence that some of the executors had expressed concerns that their mother may have been very vulnerable to people who would buy real estate from her at less than market value.

- [54] In early 2005 Mr Brown wrote to the executors advising them that Mrs Frizzo had telephoned his firm on a regular basis and was concerned that there was no formal action. Mr Brown explained that his firm had done its best to explain to her that the delays were based on advice from the late Mr Frizzo Snr’s financial advisers. Mr Brown raised the question whether his firm should continue to act for the executors. The matter dragged on into 2005 and seemingly was never satisfactorily resolved. Mr Brown continued to seek formal instructions and suggested that the executors inform their mother as to why there was a delay in the registration of property that had been held by her jointly with her late husband.
- [55] An affidavit from Mr Taylor explains that instructions given to him by Mrs Frizzo in mid-2003 arose because she formed the view at the time that the only one of her children who really cared for her was Shane and that Shane had asked her to consider making a will that favoured him. Shane Frizzo acknowledges that he told his mother in 2003 that he was the most deserving of the children.
- [56] Mr Taylor more fully explains the processes by which different wills were prepared and executed in 2003, culminating in the preparation of a will that was executed by Mrs Frizzo on 4 September 2003. At an earlier meeting on 5 August 2003

Mrs Frizzo had handed Mr Taylor a document which listed what she believed were the assets to which she was beneficially entitled. It apparently is a document that was prepared in 2001. Mrs Frizzo was not sure about business structures and she declined Mr Taylor's request to carry out a search to check if certain assets were owned by a family company. This was consistent with Mr Taylor's previous experience of her not wishing to incur legal costs and questioning bills that had been rendered to her.

- [57] Having regard to Mr Taylor's affidavit, and the oral evidence of Mr Brown and Esther Frizzo, it seems likely that Mrs Frizzo understood at the time she executed the 2003 Will that it tended to favour her son Shane over his siblings, but that she had a poor understanding at the time of the true value of the properties that were left to his siblings by that Will or the value of the residue of her estate that Shane, stood to inherit.
- [58] There is no evidence that by January 2006 Mrs Frizzo had any reasonable idea of the precise value of the property that she owned and to which she was entitled upon the administration of her husband's estate.
- [59] Her general practitioner saw her in December 2005 and considered that at that time she was quite capable of understanding and signing an enduring power of attorney.
- [60] Mr Taylor's affidavit states that in "about 2005" he was again contacted by Mrs Frizzo about the failure of her children to wind up her husband's estate. Mr Taylor says that he advised her of her possible remedies, and that she was unwilling to pursue any of them. He recalls her telling him in 2005 that if anything her children were treating her even worse than before "with the exception of Shane although she said that even he was not the attentive son that he had previously been". Mr Taylor says that Mrs Frizzo was thinking of disinheriting her children, or some of them, but that at no time did she give him any instructions for a further will. Mr Taylor's affidavit is not specific about when he saw Mrs Frizzo in 2005, and he does not specifically address a file note that he made and which was tendered by the plaintiffs at the conclusion of the evidence.
- [61] That file note is illuminating. It records a one hour meeting that Mr Taylor had with Mrs Frizzo at Beerwah on 12 December 2005. It records that she was "really not able to stand up to the children". It records that Mrs Frizzo said that she had "poor physical health but she is strong mentally". It noted that she was thinking of suicide. It records:

"She is very lonely and the children don't come near her and even her daughter Rosanna who has been the closest to her in recent times now seems to dislike her."

The file note records that Mr Taylor suggested that if she was to change her will then they would need to videotape the interview and possibly seek medical advice as to capacity. The file note records that Mrs Frizzo said that she would consider whether she wanted to change her will. The discussion also addressed the possibility of Mrs Frizzo moving to a retirement home or nursing home, and the fact that she had about \$500,000 in the bank to enable her to do such a thing. She is recorded as saying that she wanted to get away.

- [62] On 18 January 2006 the Aged Care Assessment Team of the Sunshine Coast Health Service District spoke to the agency responsible for Mrs Frizzo's care and recorded its opinion that Mrs Frizzo "most certainly has capacity for decision-making". The extent of personal care provided to her was recorded and Mrs Frizzo was described as a "very lonely lady" who wanted to go into residential care. Reference was made to "significant family difficulties" and to the fact that the family was not wanting Mrs Frizzo to go into residential care.
- [63] By way of summary of these background facts, by January 2006 Mrs Frizzo felt estranged from all of her children. She was sitting on millions of dollars of valuable rural property. Yet she lived in an isolated, humble home on farming property. She had assistance from Ms Marshall and others with household tasks. She was materially rich, but chose to live in modest circumstances. She had no shower inside her home, and had to go outside to shower. Her frail physical condition and needs made her a suitable candidate to enter a retirement facility, and she was contemplating this in December 2005 and January 2006. After her meeting with Mr Taylor on 14 December 2005 she was going to consider whether she wanted to change her will. Mr Taylor's file note of 14 December 2005 does not suggest that any of her children found special favour with her. She was upset at their failure to wind up her husband's estate, but was unwilling to pursue any legal remedies against them. Her reluctance to do so was consistent with her reluctance to spend money on legal fees. Earlier she had declined to instruct solicitors to undertake company searches and the like. She questioned their bills, just as she checked the invoices of her carers against records of hours worked.
- [64] By reason of her age, vascular condition and medical history, Mrs Frizzo had some mild impairment of cognition. However, contrary to Dr Hecker's retrospective opinion, there is no evidence that Mrs Frizzo was suffering "a significant vascular dementia".
- [65] In short, by January 2006 Mrs Frizzo was estranged from her children, in poor physical health, but mentally strong.
- [66] Senior Counsel for the plaintiffs fairly and properly conceded that if Mrs Frizzo had made a will before her injury on the morning of 20 January 2006, in essentially the same terms as the 2006 Will, then there would be no issue of testamentary capacity.

The clinical course and observations of Mrs Frizzo after her admission.

- [67] The medical records and other evidence about the course of events over the days following Mrs Frizzo's admission to the Nambour General Hospital establish a number of salient facts:
1. She was in a poor condition for extended periods; surgery planned for 24 January 2006, and to which she consented on 23 January 2006, was cancelled because of ongoing cardiac ischaemia. It was cancelled until her condition improved.
 2. On occasions she was recorded as confused or disoriented, being symptoms consistent with delirium.

3. This behaviour was episodic: it was not consistently observed and recorded by medical and nursing staff. Symptoms consistent with the hyperalert variant of delirium (also described as “agitated delirium”) were not observed by family members, including Shane.
4. She received drugs for pain and other conditions. These included large doses of an anti-psychotic drug, haloperidol. There is no suggestion that the drugs that were administered were inappropriate or affected her testamentary capacity on 28 January 2006.
5. The passage of time and the treatment that she received led to an improvement in her condition.
6. There is an entry in Mrs Frizzo’s progress notes referring to confusion and disorientation on the night of 26 January 2006. This is the last reference to those symptoms prior to the making of the 2006 Will (which occurred on the morning of 28 January).
7. She improved significantly on 27 and 28 January 2006, and was expected to undergo surgery on Friday 27 January, but the surgery did not proceed due to an overloaded list at the hospital that day and because the medical staff were awaiting an echo-cardiogram.

[68] I have had regard to the progress notes and other medical records that are in evidence. Entries in those records of interactions between Mrs Frizzo and hospital staff, and references therein to her mental state, are helpfully summarised in the reports of Dr Byrne and Dr Hecker and also in Appendix 1 and Appendix 2 to the written submissions of the second to fourth defendants. I shall not refer to all of them, but will refer to some of them which are relevant to the issue of whether Mrs Frizzo had the hypoalert variant of delirium at the time she made the 2006 Will, as Dr Hecker suggests. One of the texts to which Dr Hecker made reference defines delirium as:

“a transient organic mental syndrome of acute onset, characterized by marked attentional abnormalities, an impairment in global cognitive functions, perceptual disturbances, increased and/or decreased psychomotor activity, a disordered sleep-wake cycle, and a tendency to marked fluctuations.”¹⁷

The text states that although delirium is a syndrome with certain core characteristics, the clinical manifestations may vary widely. The aspects of cognition principally involved are those with a distributed cerebral basis—attention, memory and higher-order executive functions. Persons experiencing delirium have difficulty in formulating complex ideas and sustaining a logical train of thought. According to Professor Hodges’ work, attempts at history-taking reveal “the muddled, illogical and disjointed nature of the patient’s thinking. The capacity to select thoughts and maintain their organisation and sequence for the purpose of problem-solving and planning is drastically reduced”.¹⁸ A table in

¹⁷ John R. Hodges, *Cognitive Assessment for Clinicians*, 2nd ed (Oxford: Oxford University Press, 2007), 30.

¹⁸ *Ibid.*, 30-31.

Professor Hodges' work sets out the following features of delirium (acute confusional state):

1. Reduced ability to maintain attention to external stimuli, and to shift attention to new stimuli appropriately.
2. Disorganised thinking, as indicated by rambling, irrelevant, or incoherent speech.
3. Memory impairment: poor registration and retention of new material.
4. Perceptual distortions, leading to misidentification, illusions, and hallucinations.
5. Increased or decreased psychomotor activity.
6. A disturbed sleep-wake cycle.
7. Disorientation in time, and often in place.
8. Changes in mood, such as anxiety, depression, or lability.
9. A tendency to fluctuations and nocturnal exacerbation.¹⁹

Dr Hecker cited Professor Hodges' work in her evidence, and it is appropriate to set out a passage of that work relating to psychomotor behaviour, emotion and mood, which identifies two contrasting patterns, namely the hyperalert variant and the hypoalert variant:

“A disturbance of general psychomotor activity is virtually always present in delirium. Two contrasting patterns may be distinguished; but not infrequently patients alternate between the two.

In the **hyperalert** variant, the patient is restless, excitable, and vigilant. He or she responds promptly, and often excessively, to any stimulus. Speech is voluble and pressured. Shouting, laughing, and crying are common. There is increased physical activity often with repetitive purposeless behaviour, such as groping or picking. Often the patient tries to get out of bed, and attempts at restraint may produce violent outbursts. Autonomic signs of hyperarousal, such as tachycardia, sweating and pupillary dilatation can be observed. Vivid hallucinations tend to be seen most often in patients with this variant.

Patients with the **hypoalert** variant are, by contrast, quiet and motionless; they drift off to sleep if stimulated, and display reduced psychomotor activity. Speech is typically sparse and slow; answers to questions are stereotypic, and often incoherent. Despite outward appearances the patient may be experiencing delusions and

¹⁹ Ibid., 30.

hallucinations, although they are less frequent than in the hyperalert variant.”²⁰

- [69] From his review of the relevant records of Mrs Frizzo’s condition from the time she was admitted to hospital until 28 January 2006, Dr Byrne expresses the opinion that it is likely that she was delirious from shortly after admission on the evening of 20 January 2006 until late on 26 January 2006. He states that “This delirium fluctuated in intensity over time and there were lucid intervals”. He notes, however, that the medical and nursing notes of 27 January 2006 and the morning of 28 January 2006 do not indicate the presence of the confused state of mind or the disruptive behaviour that had been present up until then. Dr Byrne says that his opinion that Mrs Frizzo was no longer delirious on 27 January and the morning of 28 January is supported by the reported observations of medical staff in the anaesthetic bay prior to her surgery on 28 January 2006, and by the absence of any reference to confusion in the nursing entries on 27 January 2006 and the morning of 28 January 2006. As to Dr Hecker’s opinion that Mrs Frizzo was likely to have been in a state of “quiet” delirium, Dr Byrne considers that if that were so it is likely that Mrs Frizzo would have appeared confused to the nursing and medical staff who interacted with her on multiple occasions on 27 and 28 January. He says that he has seen no contemporaneous evidence that this was the case.
- [70] With that introduction to the relevant medical issues, I shall now summarise Mrs Frizzo’s clinical course and the observations made of her after her admission.
- [71] On 20 January 2006 ambulance officers recorded her Glasgow Coma Scale (“GCS”) as 15/15, indicating that Mrs Frizzo was fully conscious and alert. A GCS of 15/15 was also recorded in the Emergency Department of the hospital where she received drugs and treatment. Mrs Frizzo reported her history to medical staff and a consent to treatment was signed by her. She was transferred to the ward at 11.00pm on 20 January 2006, and she reportedly developed chest pain in the early hours of 21 January 2006. On 21 January 2006 her heart condition was assessed. A progress note at 5.45pm that day records that the family and the patient decided their wish was “for active and interventional measures in [the] event of cardiopulmonary arrest”. An entry at 11.00pm records that Mrs Frizzo was “very confused at times and pulling out all tubes. Needed continual reorientation”. Entries in her records on 22 January 2006 indicate that Mrs Frizzo had suffered an acute coronary syndrome and she was transferred to the coronary care unit. Entries on 22 January 2006 record her being confused at times. One records “periods of being lucid, other times disorientated, agitated and confused – wanting to get out of bed”.
- [72] On 23 January 2006 a note at 7.00am indicated that Mrs Frizzo was “pleasantly confused. Orientated to person and place but not time”. The orthopaedic plan was for her to go to theatre the next day if the anaesthetist was happy for the procedure to be undertaken. A theatre was booked and Mrs Frizzo signed a generic consent form. However, on 24 January 2006 the surgery was cancelled until her condition improved.
- [73] An entry in the progress notes for 24 January 2006 records that Mrs Frizzo pulled out her indwelling urinary catheter (IDC). It records that she was “distressed about

²⁰ Ibid., 32 (emphasis in original).

- delay in operation and wants to go back to her first room. Calling out and disoriented at times”.
- [74] On 25 January 2006 a nursing note records that she was “very confused o/night-calling out, uncooperative with medications, believes she was at home and shouting at staff to ‘get out of her house’”. This seems to be a reference to the night of 24 January and the morning of 25 January. She was given haloperidol. An entry at 12.50pm on 25 January records: “mentally-tired but lucid. No further calling out”. An entry at 9.00pm records that she was confused and ringing for nursing staff without reason. She was given a further dose of haloperidol and reassured about time and place.
- [75] At 7.00am on 26 January 2006 the progress notes recorded that she had “settled well – minimal calling out, but appears oriented to place + kept asking for the time”.
- [76] A registrar performed rounds at 9.20am on 26 January and recorded observations that Mrs Frizzo was “undistressed” and that her condition was “much improved”. A nursing note at 2.30pm records her being “alert and orientated. Co-operative this am”. Another note timed at 2.00pm reports that she was “confused, calling out, wanting to be taken upstairs”. Observations of her at 8.10pm on 26 January 2006 recorded her as being stable but being increasingly confused and disorientated. At 9.15pm she was found to have pulled out her IDC and to have been “combative with nursing staff” by, for example, pulling a registered nurse’s identity card off, spitting at the registered nurse and pulling the registered nurse’s finger back. She received a dose of haloperidol.
- [77] The progress notes indicate that she “settled well around 2400 hrs”. She had received analgesics for her pain and slept until 4.00am. The IDC and IVC (intravenous cannula) were not reinserted.
- [78] On 27 January 2006 Dr Keightley conducted a ward round and the clinical notes record “currently stable + likely to be at optimal physical condition for surgery now”. He records “I feel it would be in Mrs Frizzo’s best interest to expedite surgery”. Steps were taken to prepare for surgery. However, this was not possible due to an overloaded list and because medical staff were still awaiting an echo-cardiograph.
- [79] An untimed note of a ward round by an orthopaedic registrar recorded that Mrs Frizzo consented to the planned surgery.
- [80] At 2.00pm on 27 January 2006 a physiotherapist consulted Mrs Frizzo and recorded that she was “feeling OK”. She was also seen by nursing staff who recorded their observations at the same time. There is no recording of confusion or disorientation. The entry for 2.00pm records that Mrs Frizzo was visited by her family that afternoon.
- [81] A nursing record at 8.00pm, 27 January 2006 states:
- “Has been co-operative throughout shift: appears orientated: though some short-term memory loss. Has been drowsy + sleeping on + off.”

It records that she was visited by her daughter and her son.

- [82] She was reviewed by an anaesthetist at about 1.30am. The notes record that intravenous therapy (IVT) was to commence at 6.00am and haloperidol and oral hypoglycaemics were to be withheld. An entry at 2.10am on 28 January 2006 records that she had developed chest pain which she described as a constant, moderate ache. She was observed to be stable.
- [83] The nursing notes for 7.15am on 28 January 2006 record that Mrs Frizzo was settled and had slept until woken at 6.30am for routine observations. She reported that her chest remained pain free.
- [84] In addition to these and other medical records concerning Mrs Frizzo's condition following her admissions, I have regard to the evidence of witnesses who visited her and observed her condition in the days following her admission. I also have regard to the nursing progress notes which summarise whether she was confused or not each day.
- [85] The conduct of Mrs Frizzo in shouting at staff and pulling out catheters is consistent with episodes of delirium of the hyperalert variety. Not every instance in which an elderly patient such as Mrs Frizzo may be recorded as being confused or disoriented establishes that the person is suffering from delirium. Such behaviour is also consistent with someone in a poor physical state waking in the middle of the night in unfamiliar surroundings, and being disoriented and confused. However, it is more likely than not that the recorded episodes of pulling out tubes and her recorded states of confusion are indicative of delirium that she experienced in the days following her admission on 20 January 2006.
- [86] It is possible that instances of erratic behaviour and confusion went unobserved by staff and unrecorded. Also, the entries in hospital records that noted confusion and disorientation at different times do not establish that Mrs Frizzo was confused or disoriented for all or most of those days. The evidence establishes that she was able to speak with her family on occasions and on one such occasion initiated a conversation in which she told them "you're all just here for the money". She was visited by family members who did not observe the psychomotor behaviour which is indicative of the hyperalert variant of delirium. However, there is convincing evidence that she experienced episodes of delirium at various times in the days that followed her admission. There were lucid intervals between these episodes. These episodes of delirium occurred at various times until late on 26 January 2006. Between these episodes she was able to behave normally with hospital staff and visitors. This included communicating rationally with them, consenting to undergo surgical procedures and reporting her physical condition.

Preparation for surgery on 27 and 28 January 2008

- [87] As already noted, Mrs Frizzo was prepared for surgery on 27 January 2006 and was spoken to by a range of health professionals. These included Dr Keightley, an orthopaedic registrar and a physiotherapist on 27 January 2006, and an anaesthetist at around 1.30am on 28 January 2006. Observations by doctors and nurses were undertaken in the hours leading up to surgery. She was visited by her family on the afternoon of 27 January and again by her daughter and one of her sons that evening.
- [88] On the morning of 28 January she was seen by Dr Millar and Dr Scolaro, who spoke to her about her condition and the surgical procedure that she was about to undergo.

- [89] Dr Scolaro explained in his evidence that, during the pre-operative stage, a number of people do a number of different things at different times, and a number of processes are repeated in an effort to ensure that mistakes do not occur. This includes checks being undertaken by nurses in the wards. When the patient arrives in the theatre complex another nurse goes through the same questions, and then there would be a third occasion when these things would be checked. The matters checked include the patient's name, the operation that she was to have, her fasting status and the surgical site. Dr Scolaro said that he would then have gone back through Mrs Frizzo's relevant history and explained to her the risks involved with the procedure. Given her serious medical condition and her age, he thinks that he would have spoken to her for 10 or 15 minutes.
- [90] In summary, Mrs Frizzo was observed and spoken to by a number of doctors and nurses on 27 and 28 January 2006 prior to undergoing the planned surgical procedure. She did not display symptoms of the hyperalert variant of delirium during this period, and the plaintiffs do not contend that she had hyperalert delirium during this period.
- [91] It is possible that Mrs Frizzo had the hypoalert variant of delirium ("quiet delirium") during this period, and that it went unnoticed. However, she was not simply resting in a ward where such a condition is more likely to go undetected than in other situations. She was being prepared for potentially life-threatening surgery and she spoke to a number of doctors and nurses. This culminated in Dr Scolaro speaking to her for an extended period.
- [92] The discussion that Mrs Frizzo had with Dr Scolaro and Dr Millar about the procedure, and her request to change her will, were not two separate discussions. One discussion led to the other. Mrs Frizzo's condition, her coherent exchanges with medical and nursing staff in preparation for surgery on the morning of 28 January 2006, and her giving instructions about how she wanted to change her will and her reasons for doing so, are not indicative of a patient with the hypoalert variant of delirium as described by Professor Hodges. On the morning of 28 January 2006 Mrs Frizzo was not quiet and motionless, or drifting off to sleep. Her speech was not "sparse and slow". She was not incoherent. She was able to speak coherently for an extended period. Importantly, neither Dr Scolaro, Dr Millar nor Nurse Madden detected that she was suffering from quiet delirium. They were familiar with this condition. They were specifically concerned with Mrs Frizzo's mental capacity to give instructions to change her will and to sign the document that she dictated. In this unusual and important setting, they did not observe symptoms of delirium. On the contrary, Mrs Frizzo spoke coherently.

The making of the 2006 will

- [93] Dr Scolaro explained the process by which Mrs Frizzo gave her instructions. Based on advice from the hospital's medical superintendent, Dr Scolaro used Mrs Frizzo's words, not his own. He described the process of dictation as "probably a slowish process from our side", but stated that Mrs Frizzo was not slow in producing the information. The information was not produced by a question and answer process, and Dr Scolaro did not ask Mrs Frizzo questions about her estate or family history. After the process of taking the statement was completed, Dr Scolaro read its contents to Mrs Frizzo and she was "happy with the result". For clarification he had

Mrs Frizzo tell him the names of her children and these were written on another document. This document is in the following form:

“Children’s Names as stated by Frizzo

I Lydia Iolanda

Robert Sergio Emdio

~~Sergio~~

~~Emdio~~

Shane Desmond Matthew

Rosana Lydia Angela

Derek Victor Kenneth

Renato Desmond Matthew”

It is apparent that Dr Scolaro initially wrote Robert’s three given names, as dictated, assuming them to be the names of three sons, then corrected this. There is a mistake in Renato’s second and third given names.

- [94] Dr Scolaro believes that his interaction with Mrs Frizzo on the morning of 28 January 2006 took about 30 minutes. He gave evidence of his awareness of the medications that Mrs Frizzo had received and their possible effect on Mrs Frizzo’s condition, including her ability to function normally. Nothing in his interaction with Mrs Frizzo caused him to have a concern about her capacity to understand what she was asking of him and what he was doing in response to that request. She appeared to understand completely what she was doing, her speech was not impaired in any way and, according to Dr Scolaro, she was “communicating exceptionally well really under the circumstances that she was in at the time”. His evidence before the Registrar in 2009 was that he did not observe any signs of delirium in Mrs Frizzo. His evidence was that her mental acuity was sufficient to write a will. He felt that she was aware of what she was doing and the consequences of what she was doing. I accept Dr Scolaro’s evidence, including his evidence that he did not begin to write the document until he made a judgment about Mrs Frizzo’s mental capacity, and would not have proceeded to write the document if he had considered she did not have capacity.
- [95] I also accept Dr Millar’s evidence. As with Dr Scolaro, receiving instructions to change a will was an unusual event, and one which required her independently to consider Mrs Frizzo’s capacity to give the instructions that she did. Dr Millar was present as Mrs Frizzo gave the instructions, and when the document was read back to her. She made a contemporaneous note that Mrs Frizzo had been thinking of changing her will for several days. She witnessed the document, and would not have done so if she had not personally concluded that Mrs Frizzo did not have the capacity.
- [96] Like Dr Scolaro, Dr Millar brought to bear her general knowledge and experience as a medical practitioner. She was aware of Mrs Frizzo’s pre-existing conditions and the medications that had been administered to her. She was aware that delirium is a potential issue because it is “not all that uncommon in elderly patients”. Dr Millar appreciated that delirium can be “quite subtle”. Dr Millar gave evidence that she could clearly hear what Mrs Frizzo was saying, did not have any concern that what she was saying was other than what she genuinely wanted, and also did not have

any concern that Mrs Frizzo was delirious at the time. This period was from the time that she had her first interaction with Mrs Frizzo, when she double-checked matters that had been addressed the night before by the on-call anaesthetist, through to the time that Mrs Frizzo changed her will. Mrs Frizzo did not appear to be drowsy or lacking in concentration.

[97] Dr Millar's evidence was that in the course of a routine anaesthetic assessment one can often get an idea about the mental capacity of the patient. In the course of her conversation with Mrs Frizzo she did not have any doubts about her competency. In respect of Mrs Frizzo's testamentary instructions, Dr Millar had no recollection of Mrs Frizzo having difficulty at all in expressing her wishes. Dr Millar's evidence is that Mrs Frizzo gave what Dr Millar felt was an explanation, which was a sensible one, as to why she wanted to do it then and there. Dr Millar was not undertaking any formal test to establish competency, but was satisfied that Mrs Frizzo had the capacity to appreciate what she was doing. Dr Millar regarded the situation as a serious one involving a legal process in changing a will, and if she had concerns about Mrs Frizzo's capacity she would have raised them with Dr Scolaro and told him that she was uncomfortable with being a witness. I accept Dr Millar's evidence.

[98] Nurse Madden has been a registered nurse since 1993. She has experience of patients with delirium and is aware of the difference between "agitated" and "quiet" delirium. She met Mrs Frizzo in the holding bay of the operating theatre at around 9.30am on 28 January 2006. Nurse Madden's evidence is that Mrs Frizzo "was fearful that she may pass away" and wanted to put her affairs in order, and so asked to have a will done. Because of this unusual situation, Nurse Madden sought advice from the nursing manager.

[99] In her evidence before the Registrar, Nurse Madden stated that Mrs Frizzo "freely volunteered her intentions" and that her speech was clear. She did not slur her words, and her speech was not halting. Nurse Madden gave the following account of the circumstances under which Mrs Frizzo came to sign the 2006 Will:

"The only other thing I'd say was she seemed upset because she wanted to get this done. She – she was quite anxious that she wanted to make things right and that was – I thought that she wanted to make things right before--

Yes. Did she get agitated about that?-- Yes.

And how did she express her agitation?-- Hands moving, just – I guess you'd say she probably was talking fast then, just – she just – she was anxious, she – I don't know how to explain it.

Yes. Did she raise her voice?-- She wasn't yelling but it probably was a little higher than – that normal speech but that – that – because she was anxious.

Was she demonstrating anger?-- No. No anger at all."

[100] Nurse Madden was present during the process of Mrs Frizzo dictating the two separate documents to Dr Scolaro. During this time Nurse Madden looked at Mrs Frizzo's chart to make sure that she had not recently had any medication that

would affect her. Her evidence is that Mrs Frizzo was in command of her faculties. Nurse Madden was aware that sometimes patients can be in a state of quiet delirium, and over the years has dealt with many patients who have suffered from delirium. Nurse Madden did not believe that Mrs Frizzo was delirious. Nurse Madden did not make any kind of formal assessment of Mrs Frizzo's capacity, but I accept her evidence that Mrs Frizzo did not present with symptoms of delirium. Nurse Madden's role was that of a witness to the document, and she was somewhat unsure of that role. Nevertheless, she was satisfied that Mrs Frizzo wanted to change her will, believed that it was her right to do so and, accordingly, witnessed the document.

- [101] The following points in relation to the circumstances under which the 2006 Will was made assume importance. First, it was Mrs Frizzo who initiated the conversation about changing her will. Second, this was an unusual event which made the doctors and nurses present consider Mrs Frizzo's capacity to sign such an important document, and whether they should witness it. They would not have done so had they not been satisfied that she had capacity. Thirdly, the process of taking instructions took some time and, during the course of it, Mrs Frizzo spoke clearly and coherently, and explained her reasons for wanting to change her will. Fourthly, Mrs Frizzo displayed some signs of agitation during the process. In Nurse Madden's words she was "anxious to get it right". Finally, Mrs Frizzo's participation in the pre-operative anaesthetic procedures, and in the process of giving her instructions about changing her will, were not clearly the behaviour of someone displaying the symptoms of quiet delirium. The doctors and nurses who were present and involved in this unusual event were familiar with delirium, and made no observations of it. On the contrary, their observations were that Mrs Frizzo's conduct and speech were inconsistent with the symptoms of delirium. Mrs Frizzo's conduct was consistent with the normal behaviour of a person facing surgery from which they might not recover, and who was asking for a significant legal document to be prepared that recorded her wishes.

Is it likely that Mrs Frizzo had delirium at the time she made the 2006 Will?

- [102] Against that background, and with the assistance of the opinion evidence of Dr Byrne and Dr Hecker, I turn to consider whether Mrs Frizzo had delirium at the time she made the 2006 Will.
- [103] The plaintiffs do not contend that she had "agitated" delirium at the time, and this concession is well made in the light of the evidence.
- [104] I accept, in reliance on part of Dr Hecker's evidence, that instances of quiet delirium frequently go undetected, even by experienced doctors and nurses in hospitals. The present issue is whether Mrs Frizzo had that condition on the morning of 28 January 2006 and it went undetected by the various doctors and nurses who observed her and heard her.
- [105] Those doctors and nurses were not being asked specifically to assess the presence or absence of quiet delirium, and it might be said that they lack the same professional experience that someone like Dr Byrne or Dr Hecker has to detect its presence in an elderly patient. Still, their observations and assessment of Mrs Frizzo's capacity on the morning of 28 January were not being undertaken during a normal round of the ward, or even as part of a standard pre-operative procedure.

- [106] Mrs Frizzo's age and physical condition, and the risks that the procedure presented in the circumstances, required Dr Scolaro to take more time than he ordinarily would with pre-operative procedures, and he estimates that he spoke to Mrs Frizzo for about 10 to 15 minutes about the procedure. The request to make a will focused the doctors' and nurses' attention on Mrs Frizzo's mental state. The making of a request to change a will was an unusual event. The doctors and nurses were familiar with the condition of quiet delirium, and did not detect it.
- [107] Counsel for the second, third and fourth defendants complain that Dr Scolaro was not cross-examined about the presence of quiet delirium, and that it was unfair to those parties for the doctor not to be cross-examined if the plaintiff wished to contend for the existence of quiet delirium. I apprehend that counsel for the plaintiffs made the forensic choice not to cross-examine about that subject, preferring to rest the plaintiffs' case on an acceptance of the witnesses' evidence that they did not detect symptoms of quiet delirium, and an acceptance of Dr Hecker's evidence that such a condition can go undetected by doctors and nurses.
- [108] I prefer not to rest my findings on any issue of whether the plaintiffs were required affirmatively to put to the relevant witnesses that Mrs Frizzo was suffering from quiet delirium. Instead, I proceed on the basis that the evidence of these witnesses about what they saw, heard and assessed was not challenged in cross-examination. They gave independent, reliable and credible evidence which commands acceptance.
- [109] In assessing whether it is likely that Mrs Frizzo had quiet delirium at the time she made the 2006 Will, I take into account the experience of these witnesses and their familiarity with the condition of quiet delirium, and the fact that they were concerned to assess Mrs Frizzo's mental state at the time. The assessments undertaken, particularly by Dr Scolaro and Dr Millar, were not the result of a simple observation of the patient resting quietly in a ward, or a perfunctory conversation. They were made in the context of a patient speaking, at some length, on important issues of significance to her and, accordingly, of significance to those who were to record her wishes.
- [110] It is possible that a condition of quiet delirium went undetected by the doctors and nurses who spoke to Mrs Frizzo and who assessed her condition over a substantial period on the morning so 28 January 2006. However, I consider that this is unlikely. They made no observations of her falling asleep, of incoherent speech or anything else indicative of quiet delirium. No such symptoms are recorded in the hospital records. The evidence of Mrs Frizzo's conversations and of her condition on the morning of 28 January 2006 tends to negate the proposition that she was experiencing quiet delirium.
- [111] Dr Byrne, in his reports and in his oral evidence, addressed the effects of the medication that was administered to Mrs Frizzo. Relevantly, he explained that haloperidol was commonly used in the short-term management of delirium in hospitalised patients, that it reduces psychotic symptoms and agitation in a variety of psychiatric conditions and that it has only minor effects on cognition. He did not consider that the administration of haloperidol had an effect on Mrs Frizzo's cognitive ability on the morning of her surgery, and I accept his opinion. It is

supported by the observations of Dr Scolaro, Dr Millar and Nurse Madden that Mrs Frizzo was not sedated or drowsy when she gave instructions for the 2006 Will.

[112] Dr Hecker acknowledges that the doses of haloperidol that Mrs Frizzo received reduced her agitation, but does not agree that Mrs Frizzo's delirium abated on the night of 26 January 2006. In her report, Dr Hecker expresses the opinion that it is highly likely that a "quiet" psychomotor retarded delirium continued. Dr Hecker's oral evidence emphasised that care must be taken not to conclude too readily that quiet delirium does not exist in circumstances where medical staff do not diagnose it. I accept this approach.

[113] As to the possibility raised by Dr Hecker that Mrs Frizzo was in a state of "quiet delirium", the evidence of persons who observed Mrs Frizzo on 27 and 28 January 2006, particularly on the morning of 28 January 2006, and the hospital records, do not support the conclusion that Mrs Frizzo was delirious. There is no reference to confusion in the progress notes of 27 January or the morning of 28 January 2006. I accept Dr Byrne's opinion that if Mrs Frizzo had been in a state of "quiet delirium", it is likely that she would have appeared confused to the nursing and medical staff who interacted with her on multiple occasions on 27 and 28 January. There is no evidence that this was the case. Dr Byrne explained in his oral evidence that there was no particular reason to conclude that Mrs Frizzo had this different type of delirium on 28 January. He said that Dr Scolaro's evidence did not support Dr Hecker's hypothesis that Mrs Frizzo was suffering a quiet delirium. Dr Byrne explained that:

"in quiet delirium, if you talk to the person with the delirium you almost always notice obvious signs of confusion. The quietness is in the behaviour, so unless you talk to them you won't know whether they're confused because they'll appear to be resting quietly. So in that situation, had he not spoken to Mrs Frizzo then he may not have been able to assess whether she was overtly delirious, but he did over some period of minutes. And so, he would have been able to – in my view he would have been able to assess whether she was overtly confused."

Dr Byrne was not cross-examined on this aspect of his evidence, and I accept it.

[114] Given the reliable evidence of doctors and nurses who observed Mrs Frizzo on the morning of 28 January 2006, her behaviour and the content of their conversations, I conclude that Mrs Frizzo spoke clearly and coherently in relation to the operation that she was to undergo, about her desire to change her will, the manner in which she wished to change her will, and the reasons for doing so. She did not display symptoms consistent with quiet delirium. She was anxious to convey her intentions, and carefully did so to doctors and nurses who were interested in assessing her capacity to give the instructions that she did, and to sign a document that recorded them. In the circumstances, I conclude that it is likely that Dr Scolaro and others would have detected symptoms of quiet delirium during the time that Mrs Frizzo spoke to them on the morning of 28 January 2006 if she was suffering this condition. They observed, instead, a woman who spoke coherently about serious matters. Mrs Frizzo's anxiety to "get things right" and to have her intentions faithfully recorded was understandable. Far from displaying symptoms of either

agitated delirium or quiet delirium, she spoke coherently and behaved normally in the circumstances.

- [115] I conclude that it is unlikely that Mrs Frizzo was suffering from delirium at the time she made the 2006 Will.

Medical opinion on testamentary capacity

- [116] The plaintiffs' case relies on the theory that Mrs Frizzo had "quiet" delirium at the time she made the 2006 Will. My finding in this regard does not conclude the issue of testamentary capacity. The ultimate issue of testamentary capacity remains. Before addressing the parties' submissions, I turn to the medical opinions, appreciating that it is not for Dr Byrne or Dr Hecker but for the Court, on the basis of all of the evidence, to decide the issue of testamentary capacity.
- [117] Of course, the opinions of those doctors depend on the information upon which they relied, and the assumptions that they made, and it is necessary to have regard to whether the information relied upon by them and the assumptions made by them are supported by the evidence. For example, at the time that they gave their reports, neither doctor was briefed with certain evidence, such as the evidence of Ms Marshall about undertaking various tasks as part of her normal activities before Mrs Frizzo's accident. Both doctors in their reports and in their evidence were asked to give opinions about the ultimate issue of testamentary capacity, and did so without objection. I shall summarise their evidence.

Dr Byrne

- [118] Dr Byrne's report addressed a number of specific questions in relation to matters that might have affected Mrs Frizzo's testamentary capacity, such as her underlying medical conditions, the effects of any drugs administered to her, and her state of mind from the time she was admitted to hospital on 20 January 2006. He had access to medical records kept by Mrs Frizzo's general practitioner. On the basis of this material, Dr Byrne concluded that it is likely that Mrs Frizzo had "longstanding but mild cognitive impairment" due to the stroke she experienced in 1996. As previously noted, he considers it likely that Mrs Frizzo's delirium resolved on 27 January 2006 and that she was lucid on the morning of 28 January 2006 when she signed the 2006 Will. The medications that she had received in hospital were unlikely to affect adversely her cognition that morning. Dr Byrne considers that the presence of mild cognitive impairment or early dementia was unlikely to have deprived Mrs Frizzo of the ability to understand the nature and effect of what she was doing. In that regard, he notes that Mrs Frizzo was able to live alone and conduct a reasonably normal life, albeit with some daily assistance, before she fractured her hip on 20 January 2006. Dr Byrne considers that Mrs Frizzo was likely to have sufficient decisional ability to make a "straightforward Will". Dr Byrne was not aware of any material that provided any reassurance that Mrs Frizzo knew the nature and extent of the property and other assets that she was disposing. His medical opinion is that it is likely that she had the capacity to make a will on the morning of 28 January 2006.
- [119] In his oral evidence Dr Byrne gave a helpful account of the difference between issues affecting testamentary capacity, the capacity to consent to a medical procedure and the capacity to give an enduring power of attorney (being a document which is unfamiliar to many persons and to which they come afresh). By way of

contrast between a will and a power of attorney, he noted that a will is something that many people will think about over their adult lifetime and that there is usually a lot of background to an older person's decision about making a will. They have considered the pros and cons. Dr Byrne considered the contents of the 2006 Will on the basis that it expressed Mrs Frizzo's words about her desire for her children to have an equal share in her estate, both money and land, and that she did not think that her earlier will was fair. His evidence was that Mrs Frizzo had "an internal mental picture of what a will is" and "how you go about constructing it" and she dictated the same to the doctor.

- [120] Dr Byrne's evidence was that Mrs Frizzo would have been told that there was a risk of dying during the procedure. He disagreed with the proposition that it was hard to say that any reasoning had gone into the 2006 Will. He explained:

"I think it is probably the third paragraph of the 28/1/06 will provides reasoning. There's an internal reasoning in this document. Quite strongly expressed. Clearly – clearly expressed. And if they're her words, that's quite – that's quite a bit of internal support for the idea that she knew what she was doing."

- [121] I accept Dr Byrne's opinion that Mrs Frizzo had some longstanding, but mild, cognitive impairment, but this was unlikely to have deprived her of testamentary capacity.
- [122] The evidence, particularly Mr Taylor's file note of 14 December 2005, indicates that Mrs Frizzo had been thinking about changing her will in the period leading up to these events. As Dr Byrne explained, an elderly person in such a situation is not considering such a matter for the first time, as they may be when asked to consent to a procedure for a fracture. The division of their assets is something that has been rehearsed, and so "even a degree of cognitive impairment doesn't strip them of all of that prior learning" about their assets, who they are giving them to, who has a claim on their assets and how they should be divided up.

Dr Hecker

- [123] While acknowledging that it was not possible to be definitive about Mrs Frizzo's testamentary capacity, Dr Hecker thought it more likely than not that Mrs Frizzo "failed to retain the ability to evaluate and discriminate between the respective strengths of competing claims or fully appreciate the consequence of her decisions". Dr Hecker's opinion in this regard was founded substantially upon two matters. The first was her opinion that Mrs Frizzo was suffering "a significant vascular dementia". The second was a "superimposed significant delirium". In the light of these two matters, Dr Hecker's report concluded that it was more likely than not that Mrs Frizzo did not retain testamentary capacity at the time she dictated and signed the 2006 Will on the morning of 28 January 2006.
- [124] I do not consider that the evidence supports the two factual foundations for Dr Hecker's opinion. For the reasons previously given, I am not persuaded that Mrs Frizzo was suffering from delirium on the morning of 28 January 2006. The evidence that I have previously addressed persuades me that she was not. I am not persuaded that Mrs Frizzo was suffering "significant vascular dementia" at the time she made the 2006 Will. Dr Hecker's opinion that she was suffering that condition

was given without the benefit of all of the evidence, including evidence given by Mrs Marshall who had a responsibility for her care. I have had regard to file notes made by community service providers in January and February 2006, and also to a letter written by Mr Derek Frizzo dated 2 February 2006 to a social worker at the Nambour General Hospital. Mr Derek Frizzo lives in New South Wales, and his remoteness and less frequent visits than other family members gave him a different perspective on the state of his mother's health and its decline over time. This and other evidence indicates that by late 2005 and early 2006 Mrs Frizzo's living arrangements were not suited to someone with her needs. Her house was unsatisfactory to her needs. She still used an outside washhouse for showers, and was reluctant to spend \$1,000 to have an inside shower installed. Her house was isolated. There were no handrails to assist her. These and other matters point to the unsuitability of her living arrangements, even with the assistance she obtained each day from Ms Marshall. However, this evidence does not prove that Mrs Frizzo was suffering from "significant vascular dementia". Ms Marshall's evidence suggests otherwise. Her evidence was that Mrs Frizzo was "on the ball" mentally. Shane Frizzo's affidavit was to the same effect. The evidence indicates that Mrs Frizzo was "increasingly aware of her inability to live alone and care for herself between care provider visits", and was contemplating moving to a suitable care facility.

- [125] I do not accept Dr Hecker's view that Mrs Frizzo was suffering "significant vascular dementia". I prefer Dr Byrne's assessment that Mrs Frizzo had mild cognitive impairment. His first report dated 17 March 2010 was based, to some limited extent, upon a report that the Mini Mental State Examination of 13 February 2006 scored 24 points out of a possible 30. The correct total was 21 out of 30. Dr Byrne provided a further report and addressed the relevance and limitations of the MMSE and mental status questionnaires. The MMSE was not a test for cognitive impairment, let alone testamentary capacity. It has some relevance. It was not designed to test executive functions or capabilities that are relevant to assessing testamentary capacity. The MMSE that was undertaken on 13 February 2006 provided a snapshot, and one cannot say how it compared to results that might have been obtained a few weeks earlier or a few weeks later.
- [126] I consider that Dr Byrne's assessment of the extent to which Mrs Frizzo's cognitive capacity was diminished by age, the stroke she experienced in 1996 and other factors accords with evidence of those who observed her, including Ms Marshall and her children. Dr Hecker points to a number of features that are said to be consistent with a vascular dementia, including features that Mrs Frizzo presented after her admission to hospital on 20 January 2006. Although these matters, which include nocturnal confusion and agitation, irritability and depressive symptoms, can be consistent with dementia, her behaviour in the days immediately after her admission to hospital in January 2006 is also consistent with episodes of delirium. I agree with Dr Byrne that the matters identified by Dr Hecker do not provide very strong evidence of vascular dementia.
- [127] Dr Hecker's oral evidence powerfully conveyed the point that it is possible for an elderly person such as Mrs Frizzo to present to members of her family, treating general practitioners and others as quite capable, but that, on closer examination by a specialist such as Dr Hecker, the person is shown to lack certain capacities. I accept Dr Hecker's evidence in this regard. However, the evidence of people who saw Mrs Frizzo regularly, such as Ms Marshall and family members, people who

saw her less frequently, such as doctors, social workers and solicitors, and the relevant medical records do not persuade me that her cognitive impairment was as significant as Dr Hecker assumed it to be in giving her opinion. This is not intended as a criticism of Dr Hecker. She did not have the benefit of being briefed with all of the evidence that was relevant to this issue.

- [128] Ultimately, Dr Hecker’s opinion concerning Mrs Frizzo’s testamentary capacity was that her lack of capacity “resulted from both background vascular dementia and superimposed significant delirium”. I do not accept Dr Hecker’s opinion that Mrs Frizzo was suffering a “significant vascular dementia”. I do not accept the other foundation for her opinion concerning testamentary capacity, namely that Mrs Frizzo was suffering from delirium at the time she gave instructions for the 2006 Will. Because I do not accept the factual foundations for Dr Hecker’s ultimate conclusion, I do not accept her opinion on the issue of testamentary capacity.
- [129] Dr Hecker seemed disposed in the course of her oral evidence to find a lack of testamentary capacity because no-one on the morning of 28 January 2006 tested for testamentary capacity as she might have done if asked to examine Mrs Frizzo at that time. Dr Hecker discounted Dr Scolaro’s assessment of Mrs Frizzo’s capacity because he was an anaesthetist, and not experienced or trained to assess testamentary capacity. Whilst I accept that an anaesthetist would not normally assess someone for testamentary capacity in their day-to-day practice, and are not trained to do so, I consider that the evidence of Dr Scolaro, Dr Millar and Nurse Madden was deserving of more weight than Dr Hecker was prepared to give it. Dr Hecker’s report did not discuss the evidence of Dr Scolaro and Dr Millar. Her report stated that Nurse Madden’s evidence suggested that Mrs Frizzo was “anxious and agitated during the documentation and signing”. However, reference to Nurse Madden’s evidence before the Registrar indicates that Mrs Frizzo was “quite anxious that she wanted to make things right”. The fact that she seemed to Nurse Madden to be “upset because she wanted to get this done”, and anxious to make things right, does not support Dr Hecker’s opinion.
- [130] To the extent that their opinions differ, I prefer the opinion of Dr Byrne. That said, I was assisted by Dr Hecker’s expertise and evidence on the medical issues that she thoroughly addressed in her oral evidence.
- [131] Leaving aside the form in which the experts expressed their opinions, and which arguably swore the issue that I am required to decide, I accept Dr Byrne’s opinion that, from a medical perspective, it is likely that Mrs Frizzo had the capacity to make a will on the morning of 28 January 2006.

The parties’ submissions

- [132] As already noted, the issue of testamentary capacity is decided on the basis of all of the evidence, not simply expert medical opinion. I turn to consider the parties’ submissions. The parties were not at odds on questions of law. Their submissions invited me to make findings of credit.

Issues of credit

- [133] The plaintiffs’ written submissions canvass at length what was said to be the inappropriate conduct of Shane Frizzo’s siblings and co-executors in the administration of their father’s estate. They are also critical of Mr Brown’s conduct

in connection with the administration of the estate of Mr Frizzo Snr and a failure to register certain property in Mrs Frizzo's name. It should be recalled that Mr Shane Frizzo was one of the executors of his father's estate, and was party to conduct that prevented Mrs Frizzo from obtaining title to property to which she was entitled. He did not relinquish his position as co-executor or apply for the appointment of a guardian or administrator.

- [134] I think it likely that the executors of Mr Frizzo Snr's estate were motivated by both self-interest and a concern for the mother when they delayed transferring property to her. They delayed beyond the three years they were advised. It is likely that at least some of them were concerned that their mother might enter an improvident contract, and was incapable of personally attending to business decisions due to her lack of commercial experience. I do not consider that the legitimate criticisms that can be levelled at the manner in which the executors or Mr Brown attended to aspects of Mr Frizzo Snr's estate warrants my taking an adverse view of their credit on contested issues that are relevant to the issues in dispute in this proceeding.
- [135] The plaintiffs understandably point to the defendants' cases and their pleadings, particularly their pleadings in relation to their mother's capacity in respect of the 2003 Will, as matters going to their credit. The respective pleadings of the first defendant and the second to fourth defendants plead that Mrs Frizzo did not have testamentary capacity to make the 2003 Will. The particulars of their respective cases include allegations that Mrs Frizzo was unable to understand the extent and value of the property of which she was disposing, and was unable to comprehend and appreciate the claims on her estate to which she ought to have given effect. It may be said that the 2003 Will was not as simple as the 2006 Will and that the alleged lack of testamentary capacity to make it does not mean that Mrs Frizzo lacked testamentary capacity in January 2006 to make the 2006 Will, which provided for all of her property to be shared equally. I take the plaintiffs' submission about the defendants' stance in relation to the 2003 Will into account in assessing their evidence, save for Derek Frizzo who did not give evidence. However, I found the defendants who gave evidence to be generally reliable in their evidence.
- [136] Upon analysis, there are a few issues that require resolution in the evidence of the parties. The principal one is Mr Shane Frizzo's controversial evidence in paragraph 60 of his affidavit that from the time of the fall and her admission to hospital, Mrs Frizzo was "never able to conduct a normal conversation", and that she "exhibited all the signs of someone who had completely lost her mental faculties and was simply existing pending her death". As previously noted, this evidence does not command acceptance. It is inconsistent with reliable evidence, including the evidence of the doctors whose evidence I accept. I find that Mrs Frizzo was able to speak to persons after she was admitted to hospital and did so on various occasions. Contrary to Mr Shane Frizzo's evidence, she was able to initiate conversation, just as she did on the morning of 28 January 2006 when she indicated that she wanted to change her will. It is possible that Mrs Frizzo was not communicative with Mr Shane Frizzo or his companion, Ms Ratu, when they visited the hospital on occasions. However, I find that Mr Shane Frizzo's general description of his mother's condition at all times after she was admitted to hospital is inaccurate, and was deliberately overstated by him. I find that he also tried to distance himself from his involvement in becoming one of her attorneys on

3 March 2006 lest that conduct be treated as an acknowledgment of his mother's capacity to at least grant an enduring power of attorney at that time.

- [137] I found Mr Shane Frizzo to be an unreliable witness. I place little weight on the fact that he was nervous and hesitant in giving evidence. His background or education may have made him more nervous than his siblings in giving evidence, and I am reluctant to base findings of credit on his demeanour in the unfamiliar surroundings of a courtroom. I nevertheless found Mr Shane Frizzo to be an evasive witness. Despite having admitted as much in paragraph 27 of his affidavit, he hesitated for an extraordinarily long time in admitting that in 2003 he told his mother that he was more deserving than his siblings. I conclude that his hesitation in admitting this fact was because he realised that it put in a proper light the 2003 Will that favoured him. That will was, in part, the product of his influence in persuading his mother that he was more deserving of her bounty than her other children.

The plaintiffs' submissions

- [138] The plaintiffs' submissions commenced with the concession that, in spite of the unusual circumstances as to timing, place and method, the 2006 Will "might appear on its face to be a rational and fair disposition of Mrs Frizzo's estate to her five children equally for the simple reason given within the transcription of the direction given by her to Dr Scolaro." However, whilst acknowledging that "at first glance by any observer, this would present a tough case for the Plaintiffs", they submit that the evidence presents a very different scenario.
- [139] Their written submissions canvassed at length the dealings between Mrs Frizzo and her children from 2003 onwards. They submitted that the evidence provided an explanation as to why Mrs Frizzo might be more generous to one child than another in making the 2003 Will, and that the defendants had not adequately addressed the inconsistency between the 2003 Will and the 2006 Will. The substance of their submission, based upon the evidence of Mr Taylor, who took instructions from Mrs Frizzo in 2003, is that she had become disillusioned by the attitude of her children, who she felt were bullying her.
- [140] Next, on the basis of their challenges to the credit of the evidence of the defendants who gave evidence, the plaintiffs submit that I should prefer the evidence of Shane Frizzo to the evidence of the defendants concerning Mrs Frizzo's mental condition when she was in hospital in January 2006. For the reasons previously given, I do not accept Shane Frizzo's evidence in this regard.
- [141] The next substantial submission made by the plaintiffs, based largely upon the evidence of Dr Hecker, was that the medical evidence indicated that Mrs Frizzo did not have testamentary capacity on the morning of 28 January 2006. Reliance was placed upon what was said to be the greater practical experience of Dr Hecker compared to Dr Byrne. The plaintiffs rely upon Dr Hecker's opinion that there was a strong likelihood that Mrs Frizzo was suffering a continuance of her delirium, albeit in a hypoactive or quiet mode.
- [142] The plaintiffs submit that Mrs Frizzo did not have testamentary capacity, and that this conclusion is made out by the evidence of Dr Hecker and the evidence upon which Dr Hecker based her opinion.

- [143] Ultimately, the plaintiffs submit that the question is not whether Mrs Frizzo appeared to the anaesthetist or a nurse to be “normal” or that the document was rational on its face. They submit that Mrs Frizzo did not have a sufficient understanding of the detail of her family property arrangements stretching back decades, or of the relationships between family members, and did not address these matters when she made the will in the holding bay outside the operating theatre.

The first defendant’s submissions

- [144] The first defendant’s submissions commence with the undisputed fact that until 20 January 2006, there is little doubt about Mrs Frizzo’s capabilities and her awareness. The first defendant relies upon the evidence of persons who observed Mrs Frizzo in hospital, particularly the evidence of Dr Scolaro and Dr Millar. He points to the following indicia of mental acuity in the context of the contents of the 2006 Will:

- (a) she was generally aware of the contents of the 2003 Will, and its unequal distribution of property between the children, even though not in her possession;
- (b) she wanted to ensure there was an equal distribution to each of her children;
- (c) she was aware she had money and land;
- (d) specifically, she had identified the lack of fairness to Rennie and Derek;
- (e) she wanted the equal distribution so the children would not fight.

The first defendant contrasts the circumstances in which the 2006 Will was created with a situation in which a completed will might be placed before an elderly person. He relies upon the fact that the 2006 Will was made in circumstances in which there was an awareness of the issue of capacity by experienced medical staff, who did not perceive any issues in respect of her capacity. The first defendant places particular reliance upon:

- the rational nature of the content of the will;
- the detail contained in the will which indicates that Mrs Frizzo knew the effect of the document she was making;
- the evidence of medical staff, who had no interest in the outcome, who were present at the time of its creation and adopted a cautious approach;
- the fact that none of her children were present when the will was made nor apparently had any knowledge of its existence;
- Mrs Frizzo’s subsequent conduct in respect of her capacity to make an enduring power of attorney.

The second to fourth defendants’ submissions

- [145] The other defendants also rely upon the preponderance of evidence that Mrs Frizzo retained capacity up to the time of her fall and admission to hospital, and that not even Shane Frizzo doubts this. For the reasons canvassed in connection with the issue of delirium, they rely upon the absence of any evidence of quiet delirium on the morning of 28 January 2006 and the fact that the evidence of Dr Scolaro, Dr Millar and Nurse Madden strongly militates against a finding of quiet delirium. The defendants rely upon the fact that the 2006 Will was rational on its face. The rationality of the 2006 Will is submitted to be confirmed by reference to Mrs Frizzo's will-making history. They point to the fact that in 2001 she and her husband made wills that effectively passed their estates equally to their five children. They point to the fact that the 2003 Will was made at a time when she was apparently upset about her children bullying her and subject to the influence of Shane Frizzo, who asked her to consider making a will favouring him. They submit that by making the 2006 Will, Mrs Frizzo in fact reverted to the testamentary intentions that she and her husband had held in 2001. Whilst in 2003 she was apparently content for her children to "fight about my will after I am gone", by 2006 she was concerned to ensure that there would not be fights among them over her will. The plaintiffs submit that the desire to change her will in circumstances in which she had been warned that she may not survive the surgery is readily understandable, and that she knew the identity of those who had a claim on her testamentary bounty, and dictated their names. The incorrect dictation of Rennie's second and third given names is said not to detract from this fact.
- [146] The second to fourth defendants also rely upon the fact that the document explained the reasons why Mrs Frizzo wanted to change her will. The plaintiffs submit that she sufficiently understood the general nature and extent of her estate, and that it would be contrary to the authorities earlier surveyed²¹ to impose too exacting a standard on her state of knowledge of particular parts of her estate. Reliance is placed in this regard upon the fact that she did not discriminate between her children and between particular parts of her estate, which might have required her to have a more sophisticated appreciation of her estate than she in fact had.

Consideration of the parties' submissions on testamentary capacity

- [147] There is no dispute that the will is rational on its face. The differences between it and the 2003 Will are significant, but explained by the circumstances under which each came to be given, and by the explanation given in the 2006 Will.
- [148] The 2003 Will favoured Shane Frizzo because he found favour with his mother at the time it was given. Although he was an executor of his father's will and, it might be said, was equally responsible with his co-executors for the delay in administering it, Mrs Frizzo's displeasure towards the way she was treated in relation to the administration of her husband's estate apparently focused upon the other children. On 5 August 2003 she told Mr Taylor that Shane Frizzo was the only one of her children who really cared for her, and that he had asked her to consider making a will favouring him.
- [149] By December 2005 the position had changed. Neither Mr Taylor's affidavit nor his file note of 14 December 2005 indicate that Shane Frizzo was favoured over his siblings at that time. Mrs Frizzo told Mr Taylor that the children did not come near

²¹ *Kerr v Badran* [2004] NSWSC 735 at [49]; *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [64] and [94].

her, and that even her daughter Rosanna, who had been the closest to her in recent times, now seemed to dislike her. There is no record or other evidence that by December 2005 or January 2006 Mrs Frizzo took the view that Shane was the only one of her children who really cared for her. The file note of 14 December 2005 tends to indicate that she had equal regard for each of her children in terms of her relationships with them and their respective claims upon her testamentary bounty.

- [150] In the 2006 Will Mrs Frizzo advanced two basic reasons for wanting to change her will. The first was the perceived unfairness to some of her children. The second was that by leaving the property equally to her children she wanted to avoid fights amongst them.
- [151] As to the first matter, specific reference was made to Derek not getting enough, and this may be based on a recollection that he was to receive certain property and Mrs Frizzo's understanding of the value of that property. Specific reference also was made to Renato (Rennie) and that he was not getting an equal share. She stated that he was not originally in the will, whereas at least the 2003 Will provided for him to receive certain real property equally as tenant in common with Robert. The plaintiffs do not make specific reference to this apparent error. Instead, they point to the fact that the explanation for change said nothing about Rosanna, and the fact that she was not getting an equal share. They also make the point that under the 2003 Will Derek and Rennie stood to gain more than Rosanna. This last point seems to prove that Mrs Frizzo did not know the worth of the specific properties to be given to Derek, Rosanna, Robert and Rennie under the 2003 Will – a point made by the defendants in their challenge to the 2003 Will. It does not prove that Mrs Frizzo “didn't give a thought to Rosanna at all” as the plaintiffs submit. Mrs Frizzo thought enough of her to give her an equal share. The absence of any specific reference to Rosanna in the explanation for the change is not different to the absence of any specific reference to Robert. Relying on what she recalled of the 2003 Will, Mrs Frizzo knew that it made unequal provision and, based on her recollection of it and the property specifically left to her children, she singled out Derek and Rennie for special mention. She did not specifically refer to Robert, Rosanna or, for that matter, Shane. She did, however, explain that the unequal provision made in her previous will was unfair.
- [152] As to the second explanation, in 2003 Mr Taylor had advised Mrs Frizzo of the likelihood of a “family provision” application following her death. Her initial reaction was that she could not believe that such a thing was possible, and Mr Taylor responded that not only was it possible, but in the circumstances it was very likely. After considering the matter Mrs Frizzo said words to the effect of “oh well my children can fight about my will after I am gone.” The 2006 Will showed an awareness of the scope for siblings to fight over a will that made unequal provision for them, and communicated a desire to avoid such a fight.
- [153] I do not consider the fact that Mrs Frizzo did not, in the 2006 Will or in her explanation to Dr Scolaro on 28 January 2006, address in detail the reasons she made unequal provision in the 2003 Will proves that she did not evaluate the respective strengths of the claims of her children. The 2006 Will tends to indicate that she did and concluded that, acting fairly, they should share her estate equally. The extrinsic evidence indicates that she had been considering the matter since at least her discussion with Mr Taylor on 14 December 2005. According to Dr Millar's contemporaneous note, Mrs Frizzo said that she had been thinking for

several days about changing her will. The possibility that she might not survive the surgery was apt to concentrate her attention on the claims of her children and how best to decide them. She indicated to Nurse Madden and others that she wanted to make things right. I consider that the evidence shows that she was aware on 28 January 2006 of those who may be thought to have a claim upon her bounty, and that she had the ability to evaluate the respective strengths of their claims.

- [154] I turn to the medical evidence, particularly the opinion of Dr Hecker, upon which the plaintiffs rely to question Mrs Frizzo's testamentary capacity. I previously addressed the question of whether Mrs Frizzo was suffering from delirium at the time she made the will and, contrary to the plaintiffs' submissions, found that it is unlikely that she was suffering delirium of the hypoactive or "quiet" kind at the time she made her will. I conclude that she was not.
- [155] I do not consider that the mild cognitive impairment that pre-existed the injury on 20 January 2006, and continued after it, was of such a nature as to deprive Mrs Frizzo of testamentary capacity. The law does not require a "perfectly balanced mind".²² As Cockburn CJ stated in *Banks v Goodfellow* "the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains."²³
- [156] I take account of the fact that, whilst not suffering delirium on 27 January and the morning of 28 January 2006, Mrs Frizzo had experienced an eventful medical course in the previous week. Drugs had been administered to her, but they did not affect her testamentary capacity on the morning of 28 January 2006. Her age, frail physical health and pre-existing mild cognitive impairment call for a vigilant examination of the whole of the evidence. I do not assume that Mrs Frizzo would have achieved the same MMSE score on the morning of 28 January 2006 that she achieved on 13 February 2006. The fact that she had the capacity to grant an enduring power of attorney in February or March 2006 does not prove much about her testamentary capacity on 28 January 2006. Different questions arise in relation to the capacity to make an enduring power of attorney,²⁴ and her mental acuity on each day may have been different.
- [157] The question of changing her will was not something that Mrs Frizzo suddenly confronted on the morning of 28 January 2006. She told Mr Taylor on 14 December 2005 that she was going to consider changing her will. She raised the topic of the inheritance of her estate in conversation with family members who visited her in hospital, when she made the pointed remark "you're all just here for the money". The distinct risk that she would not survive the surgery on 28 January prompted her to record what should be done to change her will. The mild cognitive impairment did not deprive her of the capacity to do so in the form of the simple will that she dictated.
- [158] In reaching conclusions about testamentary capacity I do not equate the assessment of capacity undertaken by the medical staff on 28 January 2006 with the more comprehensive test of testamentary capacity that might have been undertaken by a

²² *Boughton v Knight* (1873) LR 3 P & D 64 at 66.

²³ (1870) LR 5 QB 549 at 566.

²⁴ *Szozda v Szozda* [2010] NSWSC 804 at [31]-[33].

solicitor or a medical practitioner in a different context.²⁵ I do not have the benefit of a formal, contemporaneous assessment of testamentary capacity. In the absence of such an assessment, I consider the whole of the evidence, including Dr Byrne’s and Dr Hecker’s retrospective opinions and the evidence of medical staff about Mrs Frizzo’s mental state on the morning of 28 January 2006. The medical staff’s assessment of her mental state, whilst not as thorough as a formal assessment of testamentary capacity, was undertaken by them in circumstances in which they appreciated the significance of the document that Mrs Frizzo dictated and the importance of assessing her capacity to make it. As to the retrospective expert opinions, I prefer that of Dr Byrne to that of Dr Hecker, particularly since his opinion is founded on the facts as I have found them to be in relation to the extent of pre-existing cognitive impairment and the absence of delirium. In addition, Dr Hecker was reluctant to make appropriate concessions under cross-examination. For example, she was rather dismissive of the evidence of Ms Marshall, preferring to rely upon file notes made by case managers, when Ms Marshall’s first-hand evidence of her daily dealings with Mrs Frizzo warranted appropriate weight. While I prefer Dr Byrne’s retrospective opinion to that of Dr Hecker, I appreciate the limitations on the retrospective opinions of experts who did not see and assess Mrs Frizzo.²⁶

[159] On the basis of the whole of the evidence, I am satisfied that on the morning of 28 January 2006, Mrs Frizzo:

- (a) appreciated the significance of the legal act upon which she was to embark, namely making a new will;
- (b) was aware, at least in general terms, of the nature and extent of her assets, principally rural property worth many millions of dollars and a substantial amount in cash;
- (c) was aware of those who may reasonably be thought to have a claim upon her bounty;
- (d) had the ability to evaluate, and discriminate between, the respective strengths of the claims of her children.

I have previously found that Mrs Frizzo was not suffering from delirium at the time. Her pre-existing mild cognitive impairment had not deprived her of testamentary capacity prior to the accident on 20 January 2006, and it did not deprive her of testamentary capacity on the morning of 28 January 2006. In the words of *Banks v Goodfellow* there was no disorder of the mind that poisoned her affections or perverted her sense of right. She was not suffering from any delusion or other influence that prevented her from exercising her natural faculties. I conclude that the evidence establishes affirmatively that it is more probable than not that she had testamentary capacity when she dictated and executed the 2006 Will.

²⁵ Kenneth I. Shulman et al, “Assessment of Testamentary Capacity and Vulnerability to Undue Influence” (2007) *American Journal of Psychiatry* 164(5), 722-27; Kenneth I. Shulman et al, “Contemporaneous assessment of testamentary capacity”, (2009) *International Psychogeriatrics* 21(3), 433-39.

²⁶ *Re Key* [2010] 1 WLR 2020 at 2040, [2010] EWHC 408 (Ch) at [98]; *Nicholson v Knaggs* [2009] VSC 64 at [41]; *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [65], [89].

The “lost will” issue – should the photocopy of the 2006 Will be admitted to probate?

[160] There is no dispute that the 2006 Will was made in accordance with the formalities required by the *Succession Act* 1981. An issue arises whether, the original of it not having been found, the copy of it found in the Nambour General Hospital’s files should be admitted to probate. The second to fourth defendants have comprehensively addressed the evidence on this issue in their written submissions. The other parties do not contest their submissions, and in oral submissions Senior Counsel for the plaintiffs conceded that the original will was probably lost in the hospital. I accept the submissions of the second to fourth defendants that the following findings of fact should be made:

- (a) After Mrs Frizzo made the 2006 Will and the children’s names document in the holding and anaesthetic rooms respectively, the originals were handed, most likely by Dr Scolaro, to a nurse, most likely Nurse Bundgaard.
- (b) Mrs Frizzo did not have the original 2006 Will and children’s names documents with her when she went into surgery.
- (c) Nurse Bundgaard caused the original 2006 Will and children’s names documents to be photocopied. She wrote on the photocopies that she had sighted the originals and that the photocopies were true copies. She signed both of her notations, having first asked Nurse Quinlan to witness her signature. Nurse Quinlan signed the notations on both photocopies.
- (d) It is not known what happened to the original 2006 Will and children’s names document after they had been photocopied.
- (e) There is no evidence that the original 2006 Will and children’s names documents were given to Mrs Frizzo. They were not seen by any of her children, including Shane, while she was in hospital nor subsequently. Indeed, they did not know of the existence of those documents until the photocopies made by Nurse Bundgaard were discovered after Mrs Frizzo’s death.
- (f) Mrs Frizzo was moved on three occasions after her surgery, from the coronary care unit to ward 1E, from the Nambour General Hospital to Tricare and from Tricare to Eden. Her family was not involved in packing her things or moving her on the first and second of those occasions. Robert had very limited involvement on the third of those occasions, as did Rosanna, who unpacked Mrs Frizzo’s things at Eden.
- (g) *If* the original 2006 Will and the document listing her children were given to Mrs Frizzo, her custody of them was not secure. She was frail and unwell throughout the rest of her stay at the hospital, her mental state fluctuated, and she was unable to mobilise independently.
- (h) The most likely explanation for the absence of the original 2006 Will and the document listing her children is that they were lost in the hospital. Either those documents were never given to Mrs Frizzo, or they were lost during her move from the coronary care unit to ward 1E or from ward 1E to Tricare.

- [161] In *Cahill v Rhodes*, Campbell J (as he then was) said that for a “lost” will to be admitted to probate, five matters must be established:

“First, it must be established that there actually was a Will, or a document purporting to embody the testamentary intentions of a deceased person; second, it must be shown that that document revoked all previous Wills, third, the presumption that when a Will is not produced it has been destroyed must be overcome, fourth, there must be evidence of its terms, and fifth, there must be either evidence of due execution or that the deceased person intended the document to constitute his or her will.”²⁷

- [162] As to the first and fifth matters, there was a duly executed will, and Mrs Frizzo intended the 2006 Will to constitute her will. As to the third matter the presumption of revocation has been overcome. There is no evidence that Mrs Frizzo revoked the 2006 Will. There is no evidence that it was in her control after 28 January 2006, or that any occasion arose for her to revoke it while she retained testamentary capacity. As to the fourth matter, the photocopy of the 2006 Will that is exhibit 5 is a true copy of the original.

- [163] The remaining issue is whether the 2006 Will revoked all previous wills. No party contested the submissions of the second to fourth defendants on this issue, and I accept those submissions. Mrs Frizzo used the words “my estate”, and I do not consider that the additional words “both money and land” were intended to limit the words “my estate”. They were probably intended to differentiate this will from the 2003 Will, which dealt with specific property. The question of whether a will is wholly revoked by a later will was addressed by Austin J in *Payten v Perpetual Trustee Company Ltd*:

“The approach of the older cases was that there would be no inconsistency unless the two sets of dispositions were incapable of standing together, and where they were, the later dispositions revoked the former only to the extent of the inconsistency... But the more modern approach seems to be that the issue is one of construing the testator’s intention, so that a later instrument may be held completely to supersede an earlier, although the two are not entirely inconsistent, if the court can discern that this was the testator’s intention.”²⁸

- [164] Clause 2 of the 2003 Will appointed Shane Frizzo and Mr Taylor as executors and trustees. A direction was made in cl 4 for the payment of “debts, funeral expenses and any duties or costs in connection with my estate”. Clauses 6 to 11 made provision for substitution, gave her trustees certain powers, and dealt with miscellaneous administrative matters. These clauses of the 2003 Will are capable of standing together with the 2006 Will. However, I consider that it was Mrs Frizzo’s intention that the 2006 Will replace her earlier will. Her express intention was to “change” her will. None of the dispositive clauses of the 2003 Will can stand with the 2006 Will. I interpret the will as indicating that Mrs Frizzo intended to change her will by replacing it with the 2006 Will.

²⁷ [2002] NSWSC 561 at [55]; this passage has been cited with approval in numerous subsequent cases.

²⁸ [2005] NSWSC 345 at [100] (citations omitted).

- [165] As a consequence, the photocopy of the 2006 Will, which is exhibit 5, should be admitted to probate.

The appointment of an administrator

- [166] Mrs Frizzo made no appointment of executors. Mr Klatt was appointed as the interim administrator of the estate by order made on 17 December 2008. He is familiar with it, and consents to Letters of Administration being granted to him. He is independent of the parties.
- [167] I take into account that in her 2003 Will Mrs Frizzo appointed Shane Frizzo and Mr Taylor to be her executors and trustees. However, I do not consider that it is appropriate in the circumstances for them to attend to the finalisation of her estate. The bitterness and antagonism that has divided Shane Frizzo from his siblings is apt to interfere in the due administration of the estate. I do not consider that he should be appointed. Mr Taylor is a solicitor, was obviously trusted by Mrs Frizzo and could be expected to act fairly and professionally. However, he has acted as solicitor for the plaintiffs and his position as solicitor for Shane Frizzo is likely to place him in an invidious position in finalising the estate, including the resolution of issues in relation to payment of legal costs. I do not suggest that the fact that Shane Frizzo's siblings lack trust in Mr Taylor, or would be likely to criticise his administration of the estate, is sufficient to preclude him from being appointed. It would, however, be apt to delay the already delayed finalisation of the estate and its due administration.
- [168] In all the circumstances, I consider that the due administration of the estate is best served by the appointment of Mr Klatt. An order should be made that Letters of Administration be granted to Mr Klatt with a photocopy of the 2006 Will attached, limited until the original will or a more authentic copy be proved.²⁹

Conclusion

- [169] I have addressed the factual circumstances in which Mrs Frizzo made the 2006 Will. I have concluded that she had testamentary capacity at the time she made it. The photocopy of the will that is exhibit 5 ought to be admitted to probate. The 2006 Will impliedly revoked the whole of the 2003 Will. Letters of Administration should be granted to Mr Klatt.
- [170] I direct the solicitors for the second to fourth defendants to submit draft minutes of order within seven days.
- [171] My provisional view is that the costs of and incidental to the proceedings should be paid out of the estate. However, I will hear from the parties, if necessary, on the issue of costs.
- [172] The questions for separate determination should be answered:
1. The deceased had testamentary capacity at the time she made the 2006 Will.

²⁹ *UCPR*, r 610; J. I. Winegarten et al, *Tristram and Coote's Probate Practice*, 30th ed (London: LexisNexis Butterworths, 2006), 459 [11.14].

2. The photocopy of the will that is Exhibit 5 ought to be admitted to probate.
3. The 2006 Will impliedly revoked the whole of the 2003 Will.