SUPREME COURT OF QUEENSLAND

CITATION:	*Frizzo & Anor v Frizzo & Ors* [2011] QCA 308
PARTIES:	**SHANE DESMOND MATTHEW FRIZZO** (first appellant) **ALAN GRAHAM TAYLOR** (second appellant) **v** **DEREK VICTOR KENNETH FRIZZO** (first respondent) **ROBERTO SERGIO EDMIDIO FRIZZO** (second respondent) **RENATO ADRIANO FRIZZO** (third respondent) **ROSANNA LYDIA ANGELA FRIZZO** (fourth respondent)
FILE NO/S:	Appeal No 4883 of 2011 SC No 5422 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2011
JUDGES:	Margaret McMurdo P, Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where the testatrix dictated a will to her doctors in 2006 immediately prior to undergoing hip replacement surgery – where the 2006 Will purported to change the testatrix's 2003 Will and divide the estate equally between her five children – where the 2003 Will left certain property to certain children, with the residue of the estate to the first appellant – where the estate included parcels of land, an entitlement under her late husband's estate, choses in action and shares – where there was evidence that the testatrix was confused and agitated in the days prior to her surgery and the making of the 2006 Will – where the primary

judge accepted the testatrix's doctor's evidence that she was not suffering from delirium at the time of making the 2006 Will – whether the testatrix had testamentary capacity – whether the testatrix was aware, at least in general terms, of the nature and extent of her assets – whether the 2006 Will was validly made

Bailey v Bailey (1924) 34 CLR 558; [1924] HCA 21, considered
Banks v Goodfellow (1870) LR 5 QB 549, considered
Frizzo & Anor v Frizzo & Ors [2011] QSC 107, approved
Groom v Thomas (1829) 2 Hag Ecc 434; [1828] EngR 80, cited
Kerr v Badran [2004] NSWSC 735, considered
McDonald v Watson (1872) 11 SCR (NSW) 4, cited
Nicholson & Ors v Knaggs & Ors [2009] VSC 64, cited
Tu v Tu Estate of Tu [2008] NSWSC 458, considered
Waters v Waters (1848) 64 ER 263; [1848] EngR 73, cited
Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197, considered

COUNSEL: W Sofronoff QC SG, with C A Brewer, for the appellants
A P J Collins, with M Horvath, for the first respondent
J C Bell QC, with J I Otto, for the second to fourth respondents

SOLICITORS: North Coast Law for the appellants
Quinn & Scattini Lawyers for the first respondent
Murphy Schmidt Solicitors for the second to fourth respondents

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for dismissing this appeal.

[2] The second to fourth respondents, all children of the deceased, sought a declaration that the 2006 will was valid and impliedly revoked the 2003 will. The first respondent, another child of the deceased, supported that application. The primary judge determined that the deceased had testamentary capacity at the time she made the 2006 will; that the photocopy of that will ought to be admitted to probate; and that the 2006 will impliedly revoked the whole of the 2003 will.

[3] The appellants, the executors of the 2003 will (the first appellant was also the youngest son of the deceased and the principal beneficiary under the 2003 will) contended that the primary judge erred in finding that the deceased was aware, at least in general terms, of the nature and extent of her assets when she made the 2006 will.

[4] The onus of proving testamentary capacity lay on the parties propounding the will, (the respondents) on the balance of probabilities based on the whole of the evidence. The primary judge well understood this.[1] His Honour also fully appreciated that to find the deceased had testamentary capacity he must find she was aware, at least in general terms, of the nature and extent of her assets at the time she made the will.[2]

---

1 *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107, [23]-[26].
2 Above, [21], [143], [159].

[5] In addition to the matters canvassed by Muir JA and by the primary judge in their reasons, counsel for the appellants placed emphasis on a conversation between the deceased and her then solicitor, Mr Taylor (the second appellant), at her home on 12 December 2005. They discussed the possibility of her moving into a retirement facility or nursing home, perhaps in Caloundra. She stated that she could contemplate such a move because she had $500,000 in the bank. Counsel for the appellants contended that this conversation suggested the deceased was unaware of her very extensive assets.

[6] The evidence was that at the time of this conversation the deceased was unhappy about the way her children were treating her. She was concerned about their tardiness in transferring her deceased husband's assets to her in accordance with his will. The clear inference from the evidence in the context of that background was that she was merely explaining to Mr Taylor that she had enough cash in the bank to allow her to immediately move to a retirement village or nursing home without having to sell assets or consult her children. This matter, neither on its own nor together with other matters relied on by the appellants, undermined the compelling conclusion from the evidence at trial that the deceased was aware, at least in general terms, of the nature and extent of her assets when she made the 2006 will.

[7] I agree with the order proposed by Muir JA.

[8] **MUIR JA**: **Introduction** After breaking her hip in a fall on 20 January 2006, the late Mrs Frizzo, then aged 80, informed doctors and nursing staff on 28 January 2006 before undergoing surgery that she wished to change her will. One of the doctors present, Dr Scolaro, an anaesthetist, hand wrote Mrs Frizzo's dictation as follows:[3]

> "I Lydia Iolanda Elvira 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."

[9] This document, on which Mrs Frizzo's signature was witnessed by Dr Scolaro's colleague Dr Millar and Nurse Madden, was referred to in the primary judge's reasons as "the 2006 Will".

[10] Shane Frizzo and Alan Taylor, the appellants, commenced proceedings in the Supreme Court on 11 June 2008 seeking, as co-executors, a grant of probate of a will of Mrs Frizzo dated 4 September 2003 ("the 2003 Will"). The defendants in that proceeding are the respondents to this appeal. They had caveated against a grant of probate in respect of the 2003 Will.

[11] On 4 February 2010, Peter Lyons J ordered a preliminary trial of the issues raised in paragraphs 2A to 2H of the second to fourth respondents' second further amended defence and in paragraphs 1A and 1B of the prayer for relief in the second to fourth

---

[3] Record p 1477.

respondents' amended counterclaim. Paragraphs 1A and 1B sought a declaration for the validity of the 2006 Will and a declaration against the validity of the 2003 Will as well as a declaration that the 2006 Will impliedly revoked the 2003 Will. After a four day trial, the primary judge, *inter alia*, declared that the 2006 Will revoked all previous wills of Mrs Frizzo and pronounced the 2006 Will valid.

[12] The appellants appealed against the orders of the primary judge on the grounds identified below.

The factual background to the dispute

[13] Before addressing the grounds of appeal, it is desirable to discuss the relevant facts. The appellant, Shane Frizzo, is the youngest of five children of Mrs Frizzo and her late husband. The other children are the respondents. The appellant, Mr Taylor, is a solicitor who commenced acting for Mrs Frizzo in about March 2003 in relation to her concerns about delays in the winding up of the estate of her late husband. He had died in June 2002 and Mrs Frizzo was the sole beneficiary under his will. Her children, other than Derek Frizzo, were the executors of the late Mr Frizzo's estate.

[14] On 2 April 2003, Mrs Frizzo instructed Mr Taylor that she wanted to start giving away her assets to her children. On 5 August 2003, Mrs Frizzo told Mr Taylor that her children "were continuing to bully her and that she had decided to make a will leaving very little to the children." She said that "the only one of the children who really cared for her was Shane but that he had asked her to consider making a will favouring him." Mr Taylor gave consideration to "the issue of [testamentary] capacity" at his meeting with Mrs Frizzo. In this regard he said:[4]

> "She was somewhat physically frail. She was able to walk but required a stick. She was somewhat overweight but not morbidly obese. She was able to move about her house freely. Usually when we called she was sitting in her Kitchen at the table or was in the garden. She took a great interest in her garden. From a physical point of view there was nothing that would lead to any suspicion of incapacity.
>
> I had known Lydia for some months. We had discussed her position and her possible remedies (as indeed we did after the will making time). During this time she was clearly able to understand a problem. She was clearly able to understand choices. For instance she asked me on a number of occasions what she could do about the failure of the children to distribute her husband's estate to her. Each time I advised her of the duties of the children as executors and the possibility that she could apply to court to either change the executors or for some type of order forcing the distribution of the estate. She always responded with words to the effect 'Oh but I could never take my children to court'."

[15] At the 5 August meeting Mrs Frizzo gave Mr Taylor a typed document setting out "what she said she believed were the assets to which she was beneficially entitled." The document, which contained an extensive list of real and personal property, had been prepared by Robert Frizzo and circulated to family members in about 2001.

[16] Mr Taylor recalls that Mrs Frizzo was concerned that the contents of her will not be divulged prior to her death. He said in this regard:[5]

---

4 Record p 1470.

5 Record p 1470.

> "She was very concerned that the contents of the will never come to light prior to her death. I recall her using the words 'my children will kill me'. She insisted that I undertake not to disclose the contents prior to her death which is the reason why I refused to disclose the contents to her Attorneys some years later."

[17] On about 15 August 2003, Mrs Frizzo changed her instructions with the result that specific assets were to be left to each of the children other than Shane and he was to have the residue of her estate. On 19 August, Mr Taylor, in company with the manager of his Landsborough office, Ms Stapleton, visited Mrs Frizzo with the will he had prepared and it was duly signed and witnessed.

[18] On 20 August 2003, Mr Taylor again visited Mrs Frizzo at her request. She instructed him that land at Palmview should go to all the children equally, "[s]he was again clear that this was a company and said that the shares should be left equally among all of her children." He said that she told him that "she had checked and that the correct entity was Palmview Sanctuary Pty Ltd." A draft will was provided to Mrs Frizzo on about 20 August 2003. At that time Mrs Frizzo told Mr Taylor that she would like to leave $1,000 to the Christian Childrens Fund and "was less clear about…whether the ownership of the Palmview Land was with a company called Frizzo Enterprises or a company called Palmview Sanctuary…".

[19] Mr Taylor recalled that Mrs Frizzo "was in a resolute frame of mind" at the meeting on 20 August. She instructed him to conduct searches into the properties she believed were jointly held. She also instructed him to obtain her husband's death certificate from the Registrar of Births, Deaths and Marriages and a copy of the grant of probate in respect of her husband's estate from the Supreme Court. In the course of drafting an amended will, Mr Taylor telephoned Mrs Frizzo and suggested that "to avoid any name confusion she leave any shares she held in private companies to the children equally." Mrs Frizzo agreed. The re-engrossed will was taken to Mrs Frizzo by Mr Taylor on 4 September 2003. It was signed by Mrs Frizzo and witnessed by Mr Taylor and Ms Stapleton after it had been read by Mrs Frizzo.

[20] Under the 2003 Will, Mrs Frizzo gave to her son, Derek, and her daughter, Rosanna, specified parcels of real property. Her sons, Robert and Renato, were given a parcel of farm land as tenants in common in equal shares. All of her children were given, as tenants in common in equal shares, all the shares owned by her "in any private companies". The Christian Childrens Fund was given the sum of $1,000 and Shane Frizzo was the residuary beneficiary.

[21] Mrs Frizzo sought Mr Taylor's advice again in 2005 concerning her children's failure to wind up her late husband's estate. Mr Taylor conferred with her for about an hour on 14 December 2005 and gave her oral advice.

[22] The primary judge accepted the evidence of Mrs Esther Frizzo, Robert Frizzo's wife, to the following effect. Mrs Frizzo had not done any business on the family farm and had "never really known … the value of the lands".[6] The late Mr Frizzo ran the farm and paid all the bills. Mrs Frizzo was not involved in dealing with any of the farm's costs. After Mr Frizzo's death, the children who were the executors of his estate ran the family business and managed the properties. Robert Frizzo "used

---

[6] Record p 172.

to tell [his mother] pretty much everything that was happening when it was happening … if they wanted to sell or develop a property, they would discuss it".[7] The executors were advised that there was "a clear tax advantage in slowing down the administration of the estate".[8] They followed the advice and that "proved to be a source of frustration to Mrs Frizzo" who eventually consulted Mr Taylor.

[23] On 20 January 2006, Mrs Frizzo fell and broke her hip. She was admitted to hospital that day and underwent surgery on 28 January, the day on which she made the 2006 Will.

Principles of law

[24] The appellants took no issue with the following statement of principle by the primary judge:[9]

> "The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*.[10] 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.[11]
>
> 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.[12]
>
> The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that case, 'the mental power may be reduced below the ordinary standard' provided the testatrix retains 'sufficient intelligence to understand and appreciate the testamentary act in its different bearings'.[13] More recently, Kirby P (as he then was) has articulated this principle as follows:

---

7 Record p 173.
8 Record p 575.
9 Reasons paras [21]-[25].
10 (1870) LR 5 QB 549 at 565.
11 *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].
12 (1870) LR 5 QB 549 at 565.
13 Ibid. at 566.

> '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'.[14]

In part, this reflects the fact that the *Banks v Goodfellow* test is always brought to bear 'on existing circumstances of modern life'.[15] 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.[16] That would particularly apply as one moves up the scale in terms of size and complexity of the estate.

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.[17] A presumption of validity arises where the proponent demonstrates a duly executed will that is rational on its face.[18] 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'.[19] 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.[20]

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.[21] As was said in *Worth v Clasohm*:

---

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

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

16 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].

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

18 *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.

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

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

21 *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.'[22]

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'."[23]

The grounds of appeal

[25] By an amended outline of argument filed on 17 October 2011 the appellants' abandoned all but ground 2.

[26] It is useful nonetheless to set out the substance of the original grounds of appeal in order to show how dramatically the matters in issue on this appeal have shrunk. By abandoning ten of eleven of the grounds, the appellants effectively accepted the previously contested findings in respect of those grounds. I hasten to add that my observations are not intended to imply any criticism of the approach taken by the appellants. It is seldom, if ever, advantageous for a litigant to mingle unarguable points with those which have some discernible merit. To do so not only distracts attention from the latter but often risks the identification of facts and circumstances detrimental to the better arguments which might otherwise have escaped scrutiny.

Ground One – The primary judge erred in finding that Mrs Frizzo was aware of and appreciated the significance of the making of a new will

Ground Two – The primary judge erred in finding that Mrs Frizzo was aware, at least in general terms, of the nature and extent of her assets

Ground Three – The primary judge erred in finding that the distinct risk that Mrs Frizzo would not survive the surgery on 28 January 2006 prompted her to record what should be done to change her testamentary instrument

Ground Four – The primary judge erred in finding that the evidence of Dr Scolaro, Dr Millar and Nurse Madden was reliable

Ground Five – The primary judge erred in accepting the evidence of Dr Scolaro, Dr Millar and Nurse Madden that each were satisfied that Mrs Frizzo had capacity to make a will

---

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

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

Ground Six – The primary judge failed to give any or any sufficient weight to the absence of a direct assessment of Mrs Frizzo's testamentary capacity on 28 January 2006

Ground Seven – The primary judge erred in finding that Dr Scolaro, Dr Millar and Nurse Madden made an assessment, or any adequate assessment, of the capacity of Mrs Frizzo to make a will on 28 January 2006

Ground Eight – The primary judge erred in failing to give sufficient weight to the errors and omissions contained in the 2006 Will

Ground Nine – The primary judge erred in failing to give adequate weight to errors in the document on which the children's names were written

Ground Ten – The primary judge erred in finding that Mrs Frizzo was aware of those who may reasonably be thought to have a claim on her bounty

Ground Eleven – The primary judge erred in finding that Mrs Frizzo had the ability to evaluate and discriminate between the respective strengths of the claims of her children

Mrs Frizzo's mental capacity on 28 January 2006

[27] Although the ground of appeal now advanced is very confined in scope, it remains necessary to carefully evaluate Mrs Frizzo's mental capacity at the time of making the 2006 Will.

[28] The primary judge attached considerable weight to the evidence of Dr Scolaro and Dr Millar and Nurse Madden, who were present when Mrs Frizzo gave her instructions to Dr Scolaro and, after those instructions had been written down and read back, witnessed Mrs Frizzo's signature on the 2006 Will.

[29] Dealing with Mrs Frizzo's physical and mental condition after her admission to hospital, the primary judge found:[24]

> "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.
>
> 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. … 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

[24] At paras [50]-[51], [62], [88]-[91], [101].

> 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.
>
> …
>
> 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.
>
> …
>
> 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.
>
> 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.
>
> 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."

[30] The hospital records, which were discussed by the primary judge in some detail, record that Mrs Frizzo was confused and agitated and disorientated and behaved inappropriately from time to time between 20 January and 27 January. The progress notes made at 2000 hours on 27 January state, "Has been co-operative throughout shift: appears orientated: though some short-term memory loss. Has been drowsy + sleeping on + off."[25]

[31] Nurse Madden was an experienced registered nurse. She said that Mrs Frizzo "freely volunteered her intentions", her speech was clear, she didn't slur her words and she was decisive. She recalls Mrs Frizzo saying that she had five children and telling Dr Scolaro this. She noticed no symptoms of confusion, disorientation, delirium or short term memory loss. When she was aware that Mrs Frizzo intended

---

[25] Record p 1072.

to make a will she checked her medication to ensure that she had not had any medication "like a narcotic" recently. Listening to Mrs Frizzo and talking to her, it seemed to Nurse Madden that she had her faculties. She was speaking normally, "seemed quite coherent" and appeared to know what she wanted. Nurse Madden commented on Mrs Frizzo's agitation. She considered her "quite anxious…she wanted to make things right…".

[32] Dr Scolaro's evidence was to the following effect. He was to administer Mrs Frizzo's anaesthetic. He was assisted by Dr Millar, the anaesthetic registrar, who was present when Mrs Frizzo asked if she could change her will prior to her operation. Dr Scolaro had previously warned Mrs Frizzo of a risk of death from the operation. After speaking to the medical superintendent about Mrs Frizzo's request, Dr Scolaro informed Mrs Frizzo that she should state in her own words what she wanted. He told her that after he had written down what she had said she "would read that statement and make sure that it was what she had requested and then…sign her name at the bottom…". Mrs Frizzo "wasn't slow in producing the information."

[33] After he had written down Mrs Frizzo's instructions, he read them out to her "word for word". Dr Scolaro had earlier asked Mrs Frizzo the names of her five children and had written them down. He would not have written the 2006 Will if he had considered that Mrs Frizzo lacked mental capacity.

[34] Mrs Frizzo was speaking normally and "what she was saying seemed a reasonable thing for her to say under those circumstances". There was nothing in her behaviour which "suggested [that] she did not have an understanding of the process." He felt at the time "that she understood what she was doing completely", that her speech was not impaired in any way and that "she was communicating quite well under the circumstances." Dr Scolaro "felt that her mental acuity was sufficient to write a Will…she was aware of what she was doing and the consequences of what she was doing." He also considered that she knew what she was doing when consenting to the operation and participating in his pre-operative discussion.

[35] Dr Millar gave evidence to the following effect. She did not recollect that Mrs Frizzo had any difficulty in expressing her wishes. Mrs Frizzo gave an explanation, which Dr Millar thought was a sensible one, as to why she wanted to do what she was doing. She recalls Mrs Frizzo giving the names of her children for Dr Scolaro to write down and Mrs Frizzo telling her that she had been thinking about changing her will in the days before she came into the operating theatre. She would have looked at the medication chart but could not recall doing so specifically.

[36] In accordance with her normal procedure in such circumstances, she asked Mrs Frizzo what her medical problems were. She did not have any doubts about Mrs Frizzo's "competency" and did not suspect that what Mrs Frizzo was saying was "inaccurate in any way". Nor did she have any concern that Mrs Frizzo might be suffering from delirium. She did not seem drowsy or lacking in concentration. If she had entertained any doubt about whether Mrs Frizzo was confused or if she had any doubts about what she was saying or that what she was saying was not what she truly wanted, she would not have witnessed the document.

[37] The primary judge took into account the fact that both doctors had held discussions with Mrs Frizzo in relation to the impending procedure. Mrs Frizzo appeared to them to understand what she was being told. These discussions, and the subsequent

one centring on her testamentary instructions, did not cause the doctors to entertain any doubts about Mrs Frizzo's capacity to understand what she was saying and what was said to her.

[38] The primary judge considered it significant that it was Mrs Frizzo who initiated the conversation about changing her will and that she had given a sensible reason for wanting to make the change.

[39] As the primary judge noted in his reasons, the appellants' case relied on the theory that Mrs Frizzo had "quiet" delirium at the time of making the 2006 Will.[26] That case largely depended on the evidence of Shane Frizzo and Dr Hecker, a consultant physician practising in the area of aged care and rehabilitation. The primary judge did not find Shane Frizzo a reliable witness and generally preferred the evidence of the respondents where there was a conflict between their evidence and his. The primary judge observed that Dr Hecker's opinion that it was 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"[27] was founded substantially on "her opinion that Mrs Frizzo was suffering 'a significant vascular dementia' [and]…a 'superimposed significant delirium'."[28]

[40] The primary judge, having regard to the evidence of Dr Scolaro, Dr Millar, Nurse Madden and the expert opinion evidence of Dr Byrne, rejected the view that Mrs Frizzo was suffering from delirium on the morning of 28 January 2006.

[41] In rejecting the view that Mrs Frizzo was suffering "a significant vascular dementia", the primary judge relied in part on the evidence of Ms Marshall, a Blue Care employee who was Mrs Frizzo's carer prior to her being admitted to hospital after her fall in January 2006. Ms Marshall said of Mrs Frizzo, "[m]entally she was on the ball". She instanced how Mrs Frizzo asked her to write out cheques for her because of her difficulty with handwriting. Mrs Frizzo would cross-reference the cheques with invoices and then sign them. She would converse normally, question certain accounts and point out whenever Ms Marshall arrived late even by only a few minutes. The primary judge also relied on the evidence of family members including that of Shane Frizzo.

[42] Shane Frizzo, who saw his mother regularly prior to her fall in January 2006, swore that he had "no indication of any cognitive issues on her part right up to early January 2006."[29] He also swore that his mother made a good recovery from a stroke in 1996 and that "her mental faculties were such that there were no lingering effects". He contrasted his mother's behaviour after her admission to hospital with her behaviour before the admission. He said, in effect, that she had lost the ability to think and converse rationally after her accident. The primary judge rejected his evidence in the latter regard and it was not submitted that it was not open to the primary judge to do so.

[43] Shane Frizzo's evidence of his mother's condition in hospital was contradicted by the evidence of medical practitioners, Nurse Madden and others. For example, Renato Frizzo said that he telephoned his mother shortly after her fall. In that

---

26 Reasons para [116].
27 Record p 1532.
28 Reasons para [123].
29 Record p 502.

conversation, his mother told him that she had had a fall, she was with her carer and that she was sore and they were trying to work out what they would do. He said his mother was very lucid. He also recalls having subsequent conversations with his mother in which his mother conversed normally and appropriately.

[44] Rosanna Frizzo swore that she conversed with her mother after her admission to hospital and "saw nothing unusual in [her mother's] mental capacity." She said she observed and heard her talking to the patients in nearby beds. Robert Frizzo's uncontradicted evidence was that, prior to her fall, his mother was a frequent reader of magazines. Shane Frizzo confirmed in his oral evidence that his mother read books, magazines and newspapers and was "mentally sharp" prior to the fall.[30] Although Mrs Frizzo did not have the management of the farm and other properties in her late husband's estate, she was kept abreast of developments by Robert Frizzo.

[45] It is implicit in the evidence of Mr Taylor, who had substantial dealings with Mrs Frizzo concerning the 2003 Will and subsequently, that he perceived no difficulty with her testamentary capacity. Her continued interest in and agitation for the completion of the administration of her late husband's estate and her particular instructions in that regard also supported the view that, if she had any cognitive impairment, it was not pronounced. The fact that Mrs Frizzo saw fit to engage her own solicitor rather than use the solicitor, Mr Brown, who had prepared a will for her in 2001 and who acted in the administration of her late husband's estate, also suggested a degree of understanding of business affairs.

[46] The 2003 Will and the other draft will prepared that year showed that Mrs Frizzo had turned her mind to the claims of her various children on her estate and to the distribution of her property between them. The draft will also contained a bequest of shares in a specified company. Her unease about the delay in concluding the administration of her late husband's estate may have pointed to a lack of financial sophistication but it provided evidence that she monitored her financial affairs and was aware that assets remained untransferred into her name.

[47] Having regard to the extensive evidence of the general normalcy of Mrs Frizzo's behaviour prior to the accident and the almost complete lack of evidence of any deficits in her level of comprehension at that time, it is unsurprising that the primary judge preferred Dr Byrne's opinions as to the extent of any vascular dementia suffered by Mrs Frizzo over the opinions of Dr Hecker.

[48] In evidence-in-chief, Dr Byrne, asked whether he agreed with Dr Hecker's opinion that Mrs Frizzo was suffering significant vascular dementia, said:[31]

> "…Because I – although I do think she probably has some – she obviously has cerebrovascular disease and had a stroke earlier in her life, she was able to manage in her community and had multiple assessments by the aged care assessment team and it was never clear at any point that she was so incapacitated that it was dangerous for her to remain living at home by herself with some supports coming into the home. So it is quite unlikely that she had significant vascular dementia. She might have had vascular cognitive impairment, a milder form of cognitive impairment, than dementia."

[49] It is obvious enough from the content of the 2006 Will dictated by Mrs Frizzo that: she understood that she was giving instructions for a change to her previous will; in

---

30 Record p 191.

31 Record p 105.

so doing she was dealing with her property; she wished the beneficiaries to be her children; she was troubled by the lack of equality in the treatment of her children in her existing testamentary disposition and she wanted to proceed on the basis that the children should be treated equally. She articulated a reason for her approach in this regard: she wanted to avoid conflict between her children. She said, and there is no reason for disbelieving her, that she had been thinking about changing her will for several days. It is a reasonable inference to draw that Mrs Frizzo was motivated to act as she did because of an understanding of the possibility, brought home to her by Dr Scolaro's pre-operative discussions, that she may not survive the operation. There was nothing in what Mrs Frizzo said when, or immediately before, dictating the 2006 Will which was irrational, delusional, illogical or suggestive of an inability on her part to comprehend the nature of the exercise she had initiated or the import of the words she was using.

[50] All of these matters coupled with the absence of any signs of confusion, her clarity of expression and the general normalcy of her behaviour strongly suggest that, Mrs Frizzo was well aware of the nature of a will and of the fact that she was making a new will. Against this background, it is convenient to address specifically the only remaining ground of appeal.

Ground Two – The primary judge erred in finding that Mrs Frizzo was aware, at least in general terms, of the nature and extent of her assets

The appellants' argument

[51] The appellants argued that the primary judge erred in finding that Mrs Frizzo "…was aware, at least in general terms, of the nature and extent of her assets…". The argument advanced was to the following effect. Mrs Frizzo's estate was extremely extensive. There was evidence of the content of the estate at a time in 2003 when Mrs Frizzo was giving Mr Taylor instructions for the 2003 Will and as at 8 March 2011. At both times, the estate assets included: many parcels of land; Mrs Frizzo's entitlement in respect of her late husband's estate; choses in action comprising claims for compulsory resumption of land; cash in bank accounts; shares; jewellery; plant and equipment; a motor vehicle and furniture. The value of the estate in 2011 was about $30 m.

[52] The 2006 Will refers only to "money and land" and nothing was said at the time of the making of the will of any other class of asset let alone the value of the estate or any part of it. There was no other evidence of Mrs Frizzo's comprehension of the value, nature or extent or her property.

[53] Although the phrase "money and land" may be a pragmatic summary of the general nature of what Mrs Frizzo owned, it is incapable of showing that Mrs Frizzo comprehended at the critical time that she was disposing of millions of dollars of property of various kinds. A testator may not need to know the exact address or precise current value of land he owns or other matters of detail but it is necessary to show that the testator is able to differentiate between his assets to a sufficient degree to satisfy the court that he is substantially aware of what he "does and doesn't own" and its general value.[32] *Kerr v Badran*[33] does not absolve a party propounding a will from proving that the testator knew the nature and extent of his assets. In *Tu*

---

32 See *Banks v Goodfellow* (1870) LR 5 QB 549.

33 [2004] NSWSC 735.

v Tu; Estate of Tu,[34] Windeyer J explained that in his decision in *Kerr v Badran* he did not intend to cast doubt on the test of competency laid down in *Banks v Goodfellow*.

[54] There was no evidence that Mrs Frizzo, at the time of making the 2006 Will:

- appreciated the great value of her property;
- was aware of the nature or extent of her assets; or
- knew what "money and land" really meant in relation to her estate.

It may be accepted that she had such knowledge and awareness when making the 2003 Will but she lost them as a result of "the shock of [her] injury" on 20 January 2006.

[55] There can be no affirmative answer to the critical enquiry as to whether the testator understood the nature of the decision being made in respect of the disposition of the testator's property if there is no evidence that the testator knew both the extent and nature of what was being disposed of. Nor can much weight be given to a witness' observation of a testator's apparent lucidity when a witness and, later a court, do not know whether the apparent lucidity masked a complete absence of comprehension concerning the very subject matter of the decision. That is why this element of knowledge constitutes a fundamental part of the classic test.

Consideration

[56] Although there is evidence that Mrs Frizzo, at least in the estimation of some members of her family, had no great grasp of business affairs, there is scant evidence to support the contention that she did not have at least a general understanding of the nature and extent of her assets. She had long been agitating for the finalisation of her late husband's estate so that the properties could all be placed in her name. She was frequently advised of what was happening in relation to those properties and her consent was sought to any development or disposition of the properties.

[57] Mrs Frizzo had told Mr Taylor of her intention to make *inter vivos* transfers of land to her children. Mr Taylor gave evidence of Mrs Frizzo identifying her assets for him in the course of giving instructions in 2003. In so doing she had given him a list of assets prepared by Robert Frizzo. She was aware that some assets were held by companies: she had instructed Mr Taylor in that regard. Counsel for the appellants accepted that reference to the list of assets provided by Mrs Frizzo to Mr Taylor prior to his preparation of the 2003 Will demonstrated that she had at least a general awareness of the nature and extent of her assets at that time. He contended, however, that there was nothing to show that this knowledge endured over the period between the 2003 and 2006 Wills. In particular, he submitted that it was not demonstrated that Mrs Frizzo's confusion and the other ill effects of her fall did not cause her to lose her previous limited understanding of her assets.

[58] The wording of the 2006 Will shows that Mrs Frizzo was conscious that her estate consisted of land and other property. She referred only to "money" and "land" but

---

[34] [2008] NSWSC 458.

it would, I think, having regard to the circumstances in which the will was dictated, be unrealistic and pedantic to conclude that Mrs Frizzo was attempting an exhaustive definition of the nature of all of her property. The use of the word "estate" supports that view.

[59] Having regard to her wish that the whole of her estate be shared equally between her five children, there was no need for Mrs Frizzo to descend into any detail concerning the nature or extent of the assets being disposed of by her will. Nor was there anything to be served by Mrs Frizzo's discussing the nature or extent of her assets with the medical staff. She was not seeking their advice. She was making a will and, by all accounts, she did so lucidly and without hesitation.

[60] It seemed to be implicit in the appellants' argument that in order for testamentary capacity to be established, Mrs Frizzo must have said or done things at or about the time of making the 2006 Will which showed her awareness "in general terms, of the nature, extent and value" of her estate. The hospital records described Mrs Frizzo as disorientated and confused from time to time between 20 and 27 January 2006 and it was contended that this evidence displaced any presumption of validity which may have flowed from the 2006 Will being duly executed and rational on its face.

[61] It is commonly the case that wills, even where the testator's assets are substantial and varied, do not list or describe the assets except in the most general terms. The giving of instructions for a will of this kind will normally require no discussion or itemisation of assets and, as was the case with Mrs Frizzo's instructions on 28 January 2006, it is not remarkable if no such discussion occurs. From the point of view of the appellants' argument, the best that can be said about the absence of such a discussion is that the evidence of relevant awareness that such a discussion would have provided did not exist.

[62] The medical evidence discussed earlier does not suggest that Mrs Frizzo's knowledge and understanding of her assets held at the time of her dealings with Mr Taylor in 2003 and 2005 and acquired and refreshed from her continuing discussions with Robert Frizzo were somehow lost by 28 January 2006. There is a presumption of the continuance of a mental state[35] but there is no necessity to rely on it in this case. A conclusion that Mrs Frizzo lost relevant cognitive capacity, understanding or recollection would be inconsistent with Shane Frizzo's own evidence, with the expert medical opinion evidence and with the evidence of Ms Marshall and family members accepted by the primary judge. Nor does the evidence give the slightest encouragement for the contention that on 28 January, as a result of her injury and her experiencing periods of disorientation and confusion over preceding days, Mrs Frizzo may have lost her memory and understanding of the extent of her assets.

[63] In Dr Byrne's opinion it was "likely that Mrs Frizzo's delirium resolved on 27 January 2006 and that she was lucid…when she signed [the 2006 Will]". He considered that the medications administered to Mrs Frizzo were unlikely to have adversely affected her cognition on the morning of 28 January and that it was likely that she "understood the nature and effect of making or revoking a Will." He said that the "presence of mild cognitive impairment or early dementia is unlikely to have deprived Mrs Frizzo of this capacity."

---

35 A R Mellows, *The Law of Succession* (4th ed, 1983) p 35; *Groom v Thomas* (1829) 2 Hag Ecc 433; *Banks v Goodfellow* (1870) LR 5 QB 549 at 570.

[64] In discussing the difference between a person's capacity to consent to an operation and a person's will making capacity, Dr Byrne explained:[36]

> "The other critical difference, I think, between the question of testamentary capacity versus capacity to consent for a medical procedure is that many people over their adult lifetime have thought about their will. In other words, when it comes to making the will, it isn't the first time you've thought about it. When it comes to consenting for a procedure for a fracture, it usually is the first time that you've thought about it. So there's a lot of background to an older person's decision about making a will. So it's something they've often done before, this is often not the first will, they've often considered the pros and cons of various ways of divvying up their assets. So it's a rehearsed – it's something that's been rehearsed. So they're not coming to it naively, and that's different…they've thought about the essential features of what they've got, who they're giving it to, and how they're dividing it up, who's got a claim on their assets. They've thought about those things over many, many years. So even a degree of cognitive impairment doesn't strip them of all of that prior learning."

[65] Dr Byrne accepted, in this context, that advice that a pending operation posed a risk of death would serve to concentrate the mind. As earlier discussed, there was clear and cogent evidence that Mrs Frizzo's cognitive function when making the 2006 Will was not noticeably diminished or lacking.

[66] The evidence "sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the Court varies with the circumstances".[37] Questions of testamentary capacity are not resolved by the blind application of rules or formulae. They are practical questions requiring the application of good sense.[38] A relevant circumstance is that Mrs Frizzo intended that her children share her estate equally. There was no necessity for Mrs Frizzo to be concerned with differentiating between different asset types or with the values of different assets.

[67] The discussion by Windeyer J in *Kerr v Badran*,[39] referred to with approval by Hodgson JA, Young JA and Bergin CJ in Eq agreeing, in *Zorbas v Sidiropoulous (No 2)*[40] illustrates of the need to bear all relevant circumstances in mind when assessing whether a testator understands the "extent of property of which he is disposing". Windeyer J observed that "the extent" of the estate "does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate."

[68] This test has long been recognised as imposing only a requirement that a testator have a general knowledge of the state of his property and what it consists of.[41] The primary judge's finding that Mrs Frizzo "was aware, at least in general terms, of the

---

36 Record p 117-118.

37 *Bailey v Bailey* (1924) 34 CLR 558 at 570 per Isaacs J.

38 *Bailey v Bailey* (supra) at 567.

39 [2004] NSWSC 735 at para [49].

40 [2009] NSWCA 197.

41 *Waters v Waters* (1848) 64 ER 263 at 276; *McDonald v Watson* (1872) 11 SCR (NSW) 4 at 33; *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64 at paras [98] and [584].

nature and extent of her assets, principally rural property worth many millions of dollars and a substantial amount in cash" was amply supported by the evidence which the primary judge examined meticulously. The criticism of this finding as being unsupported by a "chain of logic" was unjustified. The primary judge's careful analysis of the lay and medical evidence concerning Mrs Frizzo's physical and mental state at relevant times led inexorably to the conclusion that there was little doubt that Mrs Frizzo had the relevant capacity at the critical time.

[69] Counsel for the second, third and fourth respondents pointed out, accurately, that it was not surprising that the primary judge did not dwell on the state of Mrs Frizzo's awareness of her assets as no submission was made to him by the appellants in that regard. In view of my conclusion that the appellants have failed to demonstrate any error in the primary judge's findings, it is unnecessary to decide whether, as the second, third and fourth defendants submit, the appellant should not be permitted to argue ground two on the basis that there was no issue at first instance as to Mrs Frizzo's general understanding of the nature and extent of her assets.

Conclusion

[70] The ground of appeal has not been made out and I would order that the appeal be dismissed with costs.

[71] **WHITE JA**: I have read Muir JA's reasons and agree for those reasons that the appeal should be dismissed with costs.