SUPREME COURT OF QUEENSLAND

CITATION:	*Jones & Jones v Jones & Lindsay as executors of the Estate of T G Jones deceased* [2012] QSC 113
PARTIES:	**HAROLD GEORGE BENJAMIN JONES and LORNA JOAN JONES** (plaintiffs) **v** **GARY ROBERT JONES and CRAIG LINDSAY as executors of the Estate of Trevor Glynn Jones deceased** (defendant)
FILE NO/S:	Toowoomba 52/09
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 and 3 February 2012
JUDGE:	Martin J
ORDER:	**Plaintiffs to bring in minutes of order.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where the deceased executed two identical wills while being treated for lung cancer – where the deceased consented to a surgical procedure on one of the relevant days – where the plaintiffs contend the deceased was not of sound mind and lacked testamentary capacity – whether the deceased had the necessary capacity when the wills were executed *Banks v Goodfellow* (1870) LR 5 QB 549 *Boreham v Prince Henry Hospital* (1955) 29 ALJR 179 *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107 *Frizzo & Anor v Frizzo & Ors* [2011] QCA 308
COUNSEL:	J O McClymont for the plaintiffs M J Foley for the defendant
SOLICITORS:	Hede Byrne & Hall for the plaintiffs Clifford Gouldson Lawyers for the defendant

[1] Trevor Glyn Jones ("the deceased") died on 28 October 2008. He had been admitted to St Andrew's Hospital in Toowoomba on 8 October 2008 suffering from widely disseminated non-small-cell lung cancer. His specialist physician was Dr George Tucker.

[2] On 22 October 2008 the deceased executed a handwritten last will and testament ("the handwritten will"). On 23 October, he executed a printed last will and testament ("the last will"). They were identical.

[3] The last will revoked any previous will. Under the last will he appointed his brother, Gary Robert Jones, and a friend, Craig Lindsay, to be his executors. Mr Jones has since retired as executor. Apart from providing for payment of debts and reimbursement of medical expenses, he disposed of his property in this way:

> "1. AS TO my vacant land at Woodgate in the State of Queensland FOR my Friend the said CRAIG LINDSAY;
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> (c) AS TO all tools owned by me at the date of my death, my fishing boat and my fishing gear for my Friend the said CRAIG LINDSAY;
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> (d) AS TO any motor vehicle I own at the date of my death for my Brother the said GARY ROBERT JONES;
>
> (e) AS TO the rest residue and remainder of my estate UPON TRUST for the Children of my Brother the said GARY ROBERT JONES, the my [sic] Children of my Sister KARYN STYAN, the Children of my Sister DEBRA MORRIS and the Children of my Sister LYNETTE KLEASE (but excluding her son SHANE MILLINGTON) or the survivor of them in equal shares."

[4] The deceased's parents are the plaintiffs in this action. They allege that, at the time of executing one or both of the wills, the deceased was not of sound mind and lacked testamentary capacity. They also allege that the last will was executed in suspicious circumstances. This latter allegation was explored in cross-examination but was not pressed in final submissions.

[5] The plaintiffs seek orders declaring against both the wills and granting them letters of administration in intestacy.

Testamentary capacity

[6] The well accepted exposition of the meaning of testamentary capacity is to be found in *Banks v Goodfellow*:[1]

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a

[1] (1870) LR 5 QB 549, 565.

> disposal of it which, if the mind had been sound, would not have been made."

[7] The manner in which a court should deal with the question of testamentary capacity was described in *Boreham v Prince Henry Hospital*:[2]

> "The proper approach of the Court to the question whether a testator has testamentary capacity is clear. Although proof that a will was properly executed is *prima facie* evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, the Court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it or, if instructions for the will preceded its execution, when the instructions were given."

[8] In *Frizzo & Anor v Frizzo & Ors*[3] Applegarth J set out in greater detail the manner in which testamentary capacity is to be assessed and where the onus lies when capacity is in issue. His Honour's statement of principles was adopted by the Court of Appeal when they dismissed an appeal from his decision. This extract appears in the reasons of Muir JA:[4]

> "[24] The appellants took no issue with the following statement of principle by the primary judge:
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> > 'The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*. 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.
>
> 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.
>
> 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

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2 (1955) 29 ALJR 179, 180.
3 [2011] QSC 107.
4 [2011] QCA 308.

bearings'. 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.'

In part, this reflects the fact that the *Banks v Goodfellow* test is always brought to bear 'on existing circumstances of modern life'. 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. 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. A presumption of validity arises where the proponent demonstrates a duly executed will that is rational on its face.[5] 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'. 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.[6]

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. As was said in *Worth v Clasohm*:

> '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

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5 *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.

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

> 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.'
>
> 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'."
>
> **(footnotes omitted)**

The Issues in this Case

[9] The circumstances surrounding the execution of the handwritten will and the last will give rise to the following questions:

(a) Does the last will appear rational on its face and, thus, attract the presumption of validity?[7]

(b) Was the deceased's illness (and its treatment) sufficient to render him unequal to the task of disposing of his property?[8]

Appearance of rationality

[10] The last will devises the only real property owned by the deceased to a friend (Mr Lindsay) and not a member of deceased's family. This was the subject of some examination but not of any submissions of substance on the "suspicious circumstances" aspect of the plaintiffs' case. There was evidence that the deceased and Mr Lindsay had been friends for some time. Mr Lindsay visited the deceased in hospital on a number of occasions and his presence, at various times, appears to have caused some discomfort to some members of the deceased's family.

[11] The residue of the deceased's estate was left to the children of his siblings with two exceptions. He specifically excluded the son of one sibling and did not refer by name to another sister or her children.

[12] What will make a will appear to be rational will depend upon a number of factors including: the deceased's family history and relationships; any provision which was made to a likely beneficiary during life; the deceased's interests and relationships outside the deceased's family; and any indebtedness (both financial and moral) of the deceased to other persons.

[13] The deceased's last will could be regarded by some as being unfair or that it omitted some possible beneficiaries, but that does not necessarily demonstrate irrationality. The form and substance of the last will, when considered in the light of the evidence about the deceased, has the appearance of rationality; it thus attracts the presumption of validity.

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7 See footnote 5.

8 See footnote 6.

Capacity

[14] Evidence was called from the deceased's treating physician, Dr Tucker. I accept that through his experience, he was a person who was capable of providing an opinion as to the level of mental acuity and ability possessed by the deceased. He did not, though, undertake any specific examination of the deceased with that in mind. In a letter to one of the executors dated 21 October 2009,[9] Dr Tucker related the following information:

(a) The deceased was on narcotic analgesic medications from the time of his admission. He was also receiving benzodiazepine medication, antiepileptic medication and tricyclic antidepressants.

(b) On 22 October 2008 the deceased had a right lumbar 5th nerve root block performed. This occurred after providing his instructions to Ms Roberts and executing the handwritten will.

(c) On each of 22 and 23 October 2008 he received the following medication: Morphine, Lyrica and Fentanyl.

(d) As the effects of Morphine diminish over time, the deceased would have been more greatly affected by the Morphine immediately following its administration.

(e) A common side effect of Lyrica is somnolence and Dr Tucker recalled the deceased being so affected.

(f) The deceased's capacity would fluctuate depending on the time since the administration of his narcotic medication and the combination of medications affecting him at any given time.

(g) While the deceased's clarity of thought and mental processing were normal early in his hospital stay, as his pain progressed and his condition deteriorated Dr Tucker recalled the deceased at times finding it difficult to concentrate on a conversation.

(h) Some days he was obviously affected by medication and was drowsy.

(i) The combination of narcotic analgesia, benzodiazepines, antiepileptic medication, tricyclic antidepressants and Lyrica could all have interfered with his capacity to understand the purpose of a will, the extent and character of property to be disposed and the claims which could be made against it.

(j) There is a real possibility that he may not have had testamentary capacity on 22 and 23 October 2008 given the combination of medication he was receiving.

[15] Dr Tucker anticipated that he would be asked to make an assessment of the deceased's testamentary capacity at the time he made his will, but he was not asked to make any such assessment. Finally, Dr Tucker said:

> "Without knowing when Mr Jones gave instructions or executed his will in relation to his medication regime, and without being present or having medical records commenting as to his condition or state of mind at the time, I am not in a position to make an assessment of his testamentary capacity on 22 or 23 October 2008."

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9 Document 10 of exhibit 5.

[16] Dr Tucker provided a second report on 30 November 2010[10] in response to questions from the plaintiffs' solicitors. The questions related to the deceased's capacity at the time he was attended by the solicitor who drew his handwritten will and his last will. Dr Tucker said:

> "I believe it is possible Trevor was affected by medication at the times mentioned in your letter when he was attended by Angela Roberts, namely about 11:00-11:15am on 22/10/2008 and 'much earlier in the day' on 23/10/2008.
>
> I reiterate my opinion that, without being assessed at the time, I cannot definitively state whether or not Trevor did have capacity but I believe it is possible that he did not have capacity."

[17] In an affidavit sworn by Dr Tucker he exhibits a copy of a transcript of a conference he had with the plaintiffs' solicitors and counsel.[11] That transcript includes the following statements by him:

> "I can certainly recall that at some point before 22 October 2008 he became sleepy, often had to be woken up during conversations and he had a disordered thought process. My overall impression is that as time moved on through his admission his capacity became less and less. His clarity of thought deteriorated over time."

[18] Dr Tucker also said, during that interview, that the deceased's capacity could have fluctuated throughout the day and his capacity would have varied from day to day. Further, the medication he was taking certainly would have had an adverse affect on his capacity. He went on to say that he had been concerned when he heard that he had made a will because "I thought that he lacked the proper capacity to do so".

[19] The evidence of Dr Tucker was consistent with the evidence from the plaintiffs' witnesses that, at about the time of the making of the wills, the deceased appeared to experience hallucinations and that his conversation became disconnected.

[20] It was argued on behalf of the defendants that some care had to be taken with the evidence of Dr Tucker as he had changed his position with respect to the deceased's capacity. It is true that Dr Tucker did express himself in different ways at different times. In particular, he appeared to use the words "possibly" and "probably" interchangeably when dealing with the question of whether or not the deceased had lost capacity. The opinions expressed by him must be viewed against the background of him having to rely upon the hospital notes and his own recollection rather than upon an examination undertaken for the express purpose of assessing capacity. I am satisfied that despite this, his opinion is valuable so far as it explains the effect of the medication upon the deceased and, in particular, the observation of the deceased's capacity deteriorating over time from the date of admission.

[21] There was other evidence given as to the appearance, at least, of the deceased's capacity at the relevant time. I have already referred to the evidence given by the lay witnesses called for the plaintiffs. The defendants called Ms Angela Roberts, a

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10 Exhibit GT2 of Dr Tucker's affidavit sworn 24 June 2011.

11 Exhibit GT3 of Dr Tucker's affidavit sworn 24 June 2011.

solicitor of some experience, who was retained to draw the deceased's will. Her evidence, while I accept that it was completely honest and forthright, was not of great assistance because she had not previously known the deceased. She was therefore not in the position to compare his state of mind on the relevant days to his state of mind unaffected by disease or drugs. She did make some limited inquiries of the deceased – for example, she asked him what the day was, the date and year – but she spent only a short period of time with him on the 22nd and another short period of time on the 23rd.

[22] Dr Tucker was asked his opinion on the capacity of a lay observer to determine the extent of any impairment. He said that an impairment of cognitive capacity may not be obvious to a lay observer and that the type of questioning used by Ms Roberts would not necessarily demonstrate any disordered thought processes.

[23] Evidence was given by Mr Lindsay, the executor who was the main beneficiary under the will. He had known the deceased for some considerable time but his interaction with the deceased during the relevant period was limited to bedside visits where conversation was, deliberately, limited to light-hearted topics. I do not accept that he was able to provide useful information with respect to the deceased's capacity.

[24] The plaintiffs submitted that much could be taken from the actual terms of the will and the circumstances leading to its creation.

[25] First, the deceased was unable to recall his sister's surname, notwithstanding that she had been married and using that surname for 20 years.

[26] Secondly, the deceased referred to his sister as "Debra" when her name is "Debbie". It was submitted that either he had misnamed his sister or had failed to detect that she had been misnamed in the last will when it was read to him on 23 October.

[27] Thirdly, it was submitted that it would have been most unlikely for the deceased to deliberately to exclude the children of his sister, Susan, as the last will does. This was argued to be unlikely as the other residuary beneficiaries were the children of his siblings and not his siblings themselves. While he may have had strong feelings against Susan, it was argued that it would be most unlikely for him to have overlooked her children, given that one of them suffers from an intellectual impairment and was deserving. This is more likely to be demonstrative of incapacity on his part as he did specifically refer to one nephew as not being a beneficiary.

[28] It was argued that the failure to include the nephew with an intellectual impairment evidenced an incapacity such that he did not have a full appreciation of the persons who might have a claim on his estate.

[29] It was argued for the defendant that an important indicator of capacity was that, on 22 October, the deceased gave consent for a surgical procedure. It was submitted that the fact that informed consent was given for an operation which required an anaesthetic indicated that experienced specialist medical practitioners were satisfied that the deceased was able to give informed consent.

[30] I accept the argument advanced on behalf of the plaintiffs that a clear distinction can be drawn between the capacity necessary to give informed consent to an operation (which may lead to an amelioration of pain), and the necessary mental acuity to deal with the extent of a person's estate, the persons who might have a claim on that estate, and the manner in which the property within the estate should be distributed. Those latter functions are substantially more complex and require a greater sophistication of thought than simply an acceptance that the advice from medical practitioners to undertake an operation was appropriate.

Conclusions

[31] The absence of any specific examination designed to test capacity at the relevant time makes this a difficult case. I accept that on the relevant days the deceased had a capacity which could be best described as fluctuating, and which was dependent upon the extent of pain he was suffering at the time and the effect of the medication he was undertaking. Dr Tucker's evidence, notwithstanding that it was given in hindsight, satisfied me that the deceased's capacity was greatly diminished. It is then necessary to determine whether or not the wills were executed at times when the deceased did or did not have the relevant capacity. I find that it is particularly important that the deceased did not advert to the children of his sister Susan in the making of his will and misnamed another sister.

[32] The evidence from Dr Tucker and the observations of his family together with the omissions I have referred to above concerning the disposition of his residuary estate lead me to the conclusion that both the wills were made by the deceased when he lacked the necessary capacity. It follows, then, that the orders should be those sought by the plaintiffs.

[33] The plaintiffs are to bring in minutes of orders consistent with these reasons.