SUPREME COURT OF QUEENSLAND

CITATION:	*The Public Trustee of Queensland v Martin & Ors* [2012] QSC 279
PARTIES:	**THE PUBLIC TRUSTEE OF QUEENSLAND** **(Plaintiff)** **-and-** **Gladys Joy MARTIN, THE PUBLIC TRUSTEE OF QUEENSLAND as Personal Representative of the Estate of Jessie BUTLER and Margaret Joy BUTLER** **(Defendants)**
FILE NO/S:	S418 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	13 September 2012
DELIVERED AT:	Townsville
HEARING DATE:	4 April 2012
JUDGE:	North J

ORDER:

1. **The Court pronounces:**
    a) **against the force and validity of the will of George Henry Grubb, deceased, dated 31 July 2003, a copy of which is exhibit "SJF-29" to the affidavit of Stephen James Forster filed on 23 February 2012; and**
    b) **for the force and validity of the will of George Henry Grubb, deceased, dated 10 September 1992, a copy of which is exhibit "SJF-25" to the affidavit of Stephen James Forster filed on 23 February 2012.**
2. **Subject to the formal requirements of the Registrar, an Order to Administer the estate of the said deceased in accordance with his will dated 10 September 1992 be granted to the plaintiff.**
3. **The costs of the plaintiff and of the defendants of and incidental to these proceedings, including reserved costs, be paid from the estate of the said deceased on the indemnity basis.**

CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – whether the deceased had testamentary capacity at the time instructions were given for the preparation of the will and when it was executed
	Bailey v Bailey (1924) 34 CLR 558
	Banks v Goodfellow (1870) LR 5 QB 549
	Frizzo & Anor v Frizzo & Ors [2011] QCA 308
	King v Hudson [2009] NSWSC 1013
	Read v Carmody (NSWCA, 23 July 1998, unreported; BC9803374), [1998] NSWCA 182
COUNSEL:	R T Whiteford, for the plaintiff
	D W Honchin, for the first and third defendants
	No appearance, by consent, for the second defendant
SOLICITORS:	Official Solicitor to Public Trustee for the plaintiff
	Bill Petschler Lawyers for the first and third defendants

Introduction

[1] George Grubb (the deceased) died on 4 January 2004. The plaintiff is the executor and trustee under the will dated 31 July 2003. The matter to be determined is whether the deceased had testamentary capacity at the time instructions were given for the preparation of the will and when it was executed. In the alternative to the 2003 will the plaintiff seeks to propound a will dated 10 September 1992. The plaintiff is appointed as executor and trustee under that will. There are no intervening wills.

[2] The first named defendant is a sister of the deceased. The third named defendant is a niece of the deceased. The second named defendant was (until her death on 11 February 2006) a sister of the deceased.[1]

[3] Under the 1992 will the deceased directed that his estate be divided equally between his four living siblings.[2] Under the 2003 will the deceased directed that his estate be divided equally between eleven persons. These included the four siblings who were beneficiaries under the 1992 Will and to seven others. Six of those were nieces or

[1] The proceedings were amended to substitute the plaintiff (as personal representative of the estate of Jessie Butler deceased) as the second named defendant. In the circumstances that are explained by the correspondence in exhibit 1 before me the legal representatives who appeared for the other named defendants represented the interests of the second named defendant at the trial.

[2] Ernest Grubb, Gladys Martin, Jessie Butler and Evelyn Long.

nephews of the deceased and one was a third cousin.[3] The cause of death recorded in the Death Certificate concerning the deceased[4] was recorded as:

1(a) per rectal bleeding;

(b) carcinoma of prostate;

(2) dementia, non-insulin dependent diabetes.

The issue litigated before me was whether the deceased had testamentary capacity at the time that instructions were given for the preparation of the 2003 will and when he executed the will.

[4] Concerning the 1992 will there was no submission that the deceased lacked capacity when it was executed. There was no evidence impugning capacity at that time. The 1992 will[5] is apparently rational and the absence of any evidence impugning in 1992 it was common ground the capacity should be presumed. Further the 1992 will appears to have been duly executed, this can be presumed as the will has an attestation clause and, it was prepared by the Public Trustee and its execution was supervised by a Public Trustee agent for preparing wills. There is no dispute about due execution of that 1992 will. Further it was common ground that it could safely be inferred that the deceased knew and approved of the contents of the 1992 will from the fact that the deceased was of sound mind and executed the document declaring it to be his will.

[5] Consequently it was common ground that in the event I were to pronounce against the validity of the 2003 will, I should pronounce in favour of the validity of the 1992 will.

Principles of Law

[6] The only ground of opposition to the 2003 will is the want of testamentary capacity.[6] The particulars of the allegation pleaded in the Defence and Counterclaim were:

> "(i) The deceased was 87 years and suffering from dementia;
>
> (ii) In September 1998 the deceased was diagnosed with dementia;
>
> (iii) As a consequence of his mental disorder the deceased required a high level of care and was admitted to the Eventide Nursing Home;
>
> (iv) As a consequence of his mental disorder, at the time of executing the document dated 31 July 2003, purporting to be his last Will, the deceased did not have sufficient mental capacity to comprehend the nature of what he was doing and its effects;

[3] The comparison of the differences in beneficiaries and their relationship to the deceased can be gathered from exhibits 2 and 3 in evidence before me.
[4] See exhibit SJF-1 to the affidavit of Stephen James Forster filed 23/02/2012.
[5] See exhibit SJF-25 to the affidavit of Stephen James Forster filed 23/02/2012.
[6] See Defence and Counterclaim of the defendants at para 1(b) and 10.

(v) As a consequence of his mental disorder, at the time of executing the document dated 31 July 2003 purporting to be his last Will, the deceased was unable to realise the extent and character of the property he was dealing with or to appreciate the claims which he ought to give effect. The deceased required a high level of care. He was unable to recognise person (sic) previously known to him."

[7] In his written submissions counsel for the plaintiff summarised the principles of law applicable as follows:

"2. …The classic statement as to the meaning of testamentary capacity is in **Banks v. Goodfellow** (1870) LR 5 QB 549, 565:

> 'It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal if it which, if the mind had been sound, would not have been made.'

3. In **King v. Hudson** [2009] NSWSC 1013, this was expressed by Ward J in more contemporary language:

> '[51] Mr Wilmott referred in this context to the three "R's' adumbrated by Myers J (writing extra-judicially in the Australian Bar Gazette 1967, vol 2, p.3), those being the need for the testator to have the capacity to remember, to reflect and to reason:
>
> > 'He must be able to remember, so that he can call to mind the property at his disposal and those who may have claims upon him, to reflect so that he can consult within himself on the relative weight of their claims, and to reason so that he can judge, having regard to his assets, how far, if at all, he should give effect to them.'
>
> Mr Wilmott emphasised that His Honour went on to say:
>
> > 'It is to be observed that it is not necessary for the testator to do any of those things. All that is required is that he should be able to do them and, if he can, his will will be valid no matter how unreasonable or capricious it may be …'

4. Similarly in **Read v Carmody** [1998] NSWSC 182, Powell JA paraphrased the above as follows:

> '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 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 for such person;
>
> 4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.'

5. Mere evidence of *some* cognitive impairment in 2003 does not conclude this issue. In **Bailey v. Bailey**, supra, Knox CJ and Starke J said at pp. 566-567:

> '…'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'. The testator's 'memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all of the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator? As this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will?' It is 'a practical question, one in which the good sense of men in the world is

> called into action, and… it does not depend solely on scientific or legal definition.'"

[8] The submission accurately reflects the principles that have been consistently referred to and applied in this state.[7]

[9] With those principles in mind I propose to consider firstly the medical evidence tendered and thereafter the evidence of lay witnesses.

Medical Evidence

[10] Documentary evidence comprising four lever arched volumes of the medical records and relevant nursing home records relevant to the deceased were tendered into evidence.[8] That evidence was helpfully summarised by a chronology[9] that referred to the relevant entries. There was no challenge to the accuracy or reliability of the records contained within Exhibits 5, 6, 7 or 8. Nor was there any challenge to the summary contained in the chronology, Exhibit 9.

[11] The plaintiff sought expert medical opinion from Dr Donald Grant. Dr Grant is an experienced psychiatrist practising in Brisbane.[10] His opinion was sought by the plaintiff and at different times he provided reports to the plaintiff based upon the medical evidence and other information that was made available to him.[11] In addition copies of all letters of instruction given to Dr Grant and correspondence or communications made to the plaintiff by interested persons concerning the condition of the deceased were tendered into evidence.[12] In his first report to the plaintiff[13] Dr Grant said:

> "It is clear that in his state of progressive dementia Mr Grubb would have had difficulties with the more complicated or subtle aspects of making his Will. No mention is made as to whether Mr Grubb understood the extent of his estate and it is not clear whether he had a full understanding of potential beneficiaries. It is also unclear whether he understood the implications of the changes to his Will in widening the range of beneficiaries involved. In his demented state he would have been very vulnerable to outside influence and might not have fully understood the task he was undertaking. For example, he may well have agreed with a list of potential beneficiaries simply because they were all family members and he wanted them to benefit from his estate. However, he might not have been able to understand the subtleties of the differences in a way in which the estate would be distributed as a result of his 2003 Will as compared with the 1992 Will.

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[7] See for example *Frizzo & Anor v Frizzo & Ors* [2011] QCA 308 at [24] ff.
[8] Exhibits 5, 6, 7 and 8.
[9] Exhibit 9.
[10] Refer curriculum vitae exhibit DAG-1 to the affidavit of Dr Grant filed 30/01/2012.
[11] The documentation relating to the deceased's health and condition progressively became available to the parties. As the plaintiff obtained information it from time to time, sought from Dr Grant a review of his opinion based upon the information then available. It is clear that Dr Grant had available to him all the records (and for that matter affidavit evidence) that was tendered into evidence before me.
[12] Exhibit 4.
[13] Report dated 17 May 2006, exhibit DG-3 to the affidavit filed on 8/11/2007.

> Whilst Mr Grubb's condition when he was first admitted to the hospital appears to have been one of severe confusion overlying a dementing illness the degree of confusion may have cleared to some extent whilst he was in the nursing room. However, the assessments done in 2001 and 2003 are very similar and they do not suggest a great deal of variation in Mr Grubb's state from day to day or week to week. This would suggest that his condition was one of a continuing dementing process and not one in which one would expect clear, lucid intervals to occur. It may be that at times his level of confusion was greater because of intercurrent physical illness but it appears from the documentation that he never became completely lucid from 1998 onwards and that there was always a base level of dementia that was having a very significant effect upon his intellectual functioning.
>
> Having considered this material I am of the opinion that Mr Grubb's mental condition at 17 July 2003 when the instructions for his Will were given and on 31 July 2003 when the Will was executed would have been inconsistent with him having testamentary capacity. In my opinion the extent of his dementing illness would have deprived him of the ability to fully comprehend the nature of the task and the implications of his actions in signing the Will. In my opinion he would not only have lacked the intellectual capacity to be able to make a Will, but he would have also have been susceptible to outside suggestion and influence as a result of his dementing illness. This is not to say that any malevolent or adverse outside influence occurred, but simply to indicate that he would have been vulnerable to any such influence."

It is clear from the above that Dr Grant was well aware of the issues to be considered relevant to the matter I have to determine.

[12] It might be noted that in late March 2007 further information was provided to Dr Grant by the plaintiff and he was asked to review his opinion given in the report of 17 May 2006. Dr Grant provided an updated report[14] in which he stated that the further material did not alter his opinion.

[13] Dr Grant's second affidavit[15] exhibited a report prepared by him and provided to the plaintiff on or about 8 May 2010.[16] At that time Dr Grant had available to himself all of the documentary evidence[17] and much of the affidavit evidence before me. In his report Dr Grant concluded:

> "Having considered all of the relevant material and in particular the issues and documents raised in your letter of 8th April 2009, including the concerns of Mr Darren Grubb, I remain of the opinion that Mr George Grubb would have been unlikely to have possessed testamentary capacity in July, 2003 because of dementia and variable levels of superimposed confusion, combined with severe deafness. It is unfortunate that there was no medical assessment at the time of the making of the Will to clarify whether or not he possessed testamentary capacity. It is also of concern that no detail, documentation of the process of making the July, 2003 Will

[14] Dated 30 April 2007, refer exhibit DG-5 to the affidavit of Dr Grant filed on 8/11/2007.
[15] Filed 30/1/2012.
[16] Exhibit DAG-3.
[17] Exhibits 5, 6, 7 and 8.

> was made and kept, so as to provide a record of his testamentary capacity and wishes at the time."

[14] Dr Grant was called and gave evidence. He confirmed his opinion[18] and when he was asked to explain to the Court how dementia affects the minds of persons in terms of the mind's reasoning capacity Dr Grant said[19]:

> "There are different kinds of dementia and they affect a person differently. In Mr Grubb's case it's likely that he was suffering from an Alzheimer's dementia, and that is a slowly progressive disease which can take many years between diagnosis or beginning of – beginning of the disease and death, or it can be more rapidly progressive in some cases. It usually begins with memory dysfunction, so the person has difficulty remembering things from day to day. They become progressively more disoriented and the memory problems progress from affecting just day to day memory to more long term memories, and eventually the person has very – very poor memory functions indeed. Then that progresses to affect personality and other areas of cognitive functioning, so that they get deterioration of the parts of their brain, frontal lobe and the temporal lobes, which control personality, judgment, insight and emotions, and so you get changes to that extent in that area as well, and the person's functioning in general in terms of interpersonal functioning and looking after themselves deteriorates. They become progressively more sort of unable to comprehend what's going on around them clearly, and eventually, over a period of years, person deteriorates into quite a vegetative state where they don't recognise people, don't respond. Their speech becomes affected such that they don't really comprehend what's being said and quite often they become mute or virtually unable to speak, towards the end. So it's a very severe progressive disease, ultimately causing death."

[15] One of the symptoms or features of this dementia, particularly in its latter stages, is that sufferers frequently have difficulties with incontinence and consequently soil themselves.[20] A perusal of the chronology[21] reveals a number of instances of incontinence.

[16] When examined in re-examination by counsel for the plaintiff Dr Grant was referred to a number of the notations referred to in the chronology[22] documented in the records all of which Dr Grant said were evidence or strong indications supporting his opinion.[23]

[17] In addition to the cognitive impairment Dr Grant pointed to the evidence of significant deafness suffered by the deceased. As well as making it more difficult for persons to communicate with the deceased it would have further complicated the deceased's capacity to make a will. In addition Dr Grant pointed to the need for those who might take instructions to draw a will to be particularly careful to ascertain whether a person in the position of the deceased knew or understood what

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[18] Transcript 1-51 l 20-25.
[19] Transcript 1-51 l 30-55.
[20] See transcript 1-53 l 30-53.
[21] Exhibit 9.
[22] Exhibit 9.
[23] See transcript 1-60 l 20 – 1-65 l 30.

he or she was doing. Dr Grant emphasised that asking questions that merely sought a yes or no answer might not reveal the full extent of any relevant incapacity.[24] No medical witness was called other than Dr Grant. No expert evidence was tendered challenging or contradicting Dr Grant.

[18] The totality of the evidence before me including the lay witnesses who were called and examined (one of the witnesses knew the deceased very well) requires consideration. It is possible that the evidence of these witnesses might demonstrate that the deceased had testamentary capacity in that sufficient insight at the relevant time to make a valid will. Consequently I will make my findings after I have considered the lay evidence.

Summary Lay Evidence

[19] Instructions for the will were given on 17 July 2003 at the courthouse at Charters Towers. The will was executed on 31 July 2003 at the courthouse.

[20] Sandra Gatacre was called. At the relevant time she was an administrative officer employed in the Department of Justice and Attorney-General at the courthouse at Charters Towers. In her affidavit[25] she said that she could recall during the month of July 2003 Mrs Evelyn Long came to the courthouse at Charters Towers requesting information regarding making a will and mentioned that it would be for her brother. Ultimately an appointment was made for the deceased to attend at the courthouse on 17 July 2003 where he was interviewed by the Registrar, Mr Michael Bice. Also present was Mrs Long. In her affidavit she said that on the day when the instructions for the will were apparently given she recalled Mr Bice called her into his office. Mr Bice was speaking very loudly to Mr Grubb and she was informed that he was very deaf. She said that she could not recall the exact details of what was spoken about in her presence but she could recall a piece of paper with a list of names on it and that Mrs Long stated she had written out the names and addresses on the list in accordance with the wishes of the deceased. In her affidavit[26] she said that in the short time she spent with the deceased she ascertained that he was very deaf but she did not detect any indication verbally or by facial gesture that he was confused or disorientated with what he was being asked. He appeared to read the paperwork and he nodded and haltingly spoke his assent. When Ms Gatacre was called to give evidence she said that she no longer had a recollection of this interview. She identified her affidavit but was unable to recall the events she swore to in the affidavit.[27]

[21] Lisa Faye McGuire was at the relevant time an administration officer employed with the Department at the courthouse. Her evidence at trial of events on the day of the execution of the will included:[28]

> "Whereabouts was it executed? Physically, whereabouts was it?--
> The front counter of the registry of the Magistrates Court.

[24] See for example Transcript 1-65 l 35–60.
[25] Filed 20 January 2008.
[26] Paragraph 7.
[27] T1-46 – 1-49.
[28] T1-37 l 5 – T1-38 l 1.

Were you present when the will was fetched from storage to be given to Mr Grubb?-- Yes.

Tell his Honour what you recall happening?-- Mr Grubb come into the registry.

Was he alone?-- He was with his sister. Her name eludes me at the moment but he was with his sister. Our wills, when they come from the Public Trust Office here in Townsville, when they arrive in the mail, they go into a particular cupboard and I fetched that will from the cupboard when he come in.

Very well. You were the person who fetched it?-- Yes.

Where was it taken to?-- To the front counter.

What was done with it?-- The will – there's the original will and the copy of the will. The copy of the will was handed to Mr Grubb so Mr Grubb could read that will and make sure that -----

Who gave it to Mr Grubb?-- I did.

Who else was present at the counter when this occurred?-- I think just me, from memory.

What – what happened once you handed the document to Mr Grubb?-- He sat in the foyer area to read through his will.

Did you see him doing it?-- Yes.

What did you see him do?-- I saw him sit there and read his will.

Now what do you mean by saw him read the will? What do you observe?-- He had the will in his hands and after – oh, probably four minutes on the first page, flipped the page over and proceeded to read his will.

What occurred then?-- He come up to the counter. He and his sister come up to the counter and indicated that they were ready to – or he was ready to sign the will?--

How did he to that? Did he say or do anything to indicate that?-- No. He – Mr Grubb, from memory, was quite deaf and I'm pretty sure that it was his sister who said he's right, he's ready, yep.

What happened then?-- I asked Mr Bice to come to the counter."

[22] Ms McGuire's evidence concerning the execution of the will and the steps taken to ascertain that the will had been prepared in accordance with the wishes of the

deceased involved reference to a handwritten document that was Exhibit "B5" to the affidavit of Mr Bice.[29] Concerning this document Ms McGuire said:[30]

> "Do you recognise the document?-- Yes, I do.
>
> Would you tell his Honour how that document first came to your attention?-- I fetched a piece of paper, realising that Mr Grubb was quite deaf. Mr Bice wrote on it.
>
> What did Mr Bice write on it?-- He wrote, 'Is this the way you wanted your will', and then he wrote the yes and no on top.
>
> So this is the yes/no immediately below the words, 'your will' or some other yes/no?-- This is Mr Bice's handwriting here.
>
> The witness is indicating the words, 'Is this the way you wanted your will'?-- Yes. Yes. And this is Mr Bice's handwriting here as well.
>
> The witness is pointing to the words, 'yes/no' below the words, 'your will'?-- Yes.
>
> What did you see Mr Bice do with the page after he wrote those words?-- He put it in front of Mr Grubb.
>
> What then happened?-- Mr Grubb's sister actually wrote the next two yeses at yes and no.
>
> The witness is indicating the word, yes? – words, 'yes? no?'?-- Yes. Yes. Then Mr -----
>
> What then happened?-- Then Mr Grubb was given the pen and he wrote the word, 'yes'.
>
> The witness is pointing to the word, 'yes' below the word 'yes?'?-- Mmm-hmm.
>
> On the right-hand side of the page is yes circled slash no immediately below which appears yes slash no and the word no is circled. Who wrote that?-- Mr Bice.
>
> When was that written?-- I actually – this is going back quite a few years. My memory isn't as great as it once was. I'm reasonably sure that those words were written after Mr Grubb wrote the yes.
>
> Very well. That's your recollection. And then what happened?-- And then -----

[29] See affidavit Michael Andrew Bice filed 29 November 2007. A copy was Exhibit 10.
[30] T1-38 l 5 – 1-39 l 10.

> So Mr – we're at the stage then where, on your evidence, the second lot of yes no written?-- Okay. And then I wrote – Mr Grubb signed his will.
>
> Who was present when Mr Grubb signed the will?-- His sister was present, myself and Michael Bice.
>
> What then happened?-- Mr Grubb signed his will. I and Mr Bice witnessed the will."

[23] Michael Bice was called. In July 2003 he was the Registrar of the Magistrates Court at Charters Towers.[31] He swore an affidavit in the proceedings[32] in which he confirmed that instructions for the will were taken in his office at the Courthouse in Charters Towers on 17 July 2003. On that day the deceased attended with Mrs Long who was present when the instructions were taken. It was Mrs Long who handed Mr Bice a list of beneficiaries which she said had been written out by herself on the instructions of the deceased.[33] On this occasion Mr Bice also had available a printed document styled "Instructions for Will"[34] which had been completed in part by Mrs Long on the first page and was completed by Mr Bice in his handwriting on the second page. In his affidavit Mr Bice swore that it was his recollection that he asked Mrs Long whether there were any issues regarding the deceased's testamentary capacity and he recalled that Mrs Long indicated that the deceased was very deaf but otherwise of sound mind.[35]

[24] In his affidavit Mr Bice said that he could recall paying attention to the list of proposed beneficiaries (exhibit "B3" to his affidavit) and that he asked the deceased to read the list of beneficiaries. After satisfying himself that the deceased approved of the list of beneficiaries and of the information completed in the instructions document, in accordance with usual practice the will instructions were sent to the Public Trust Office in Townsville for preparation of the will.

[25] When Mr Bice gave evidence his attention was drawn to the handwritten list of beneficiaries that had been prepared by Mrs Long[36] and to the circumstance that three relatives (including a sister) had the word "friend" written beside. Mr Bice confirmed that the word "friend" was written by himself after he made specific enquiries of the deceased as to their relationship with him.[37] Concerning the meeting on 17 July when he took instructions he gave the following concerning his method of questioning[38]:

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[31] Mr Bice had worked in the Magistrates Court for many years. He was admitted as a solicitor in September 1995.
[32] Filed 29 November 2007.
[33] This document is of some significance for reasons that will be discussed. It was exhibit "B3" to the affidavit of Mr Bice.
[34] Exhibit "B2" to the affidavit of Mr Bice.
[35] In his evidence Mr Bice confirmed that his recollection of Mrs Long introducing the deceased in this way, that is that the deceased was very deaf but of sound mind. See T1-23 l 50-60.
[36] Exhibit "B3" to his affidavit.
[37] The significance, in hindsight, of the circumstance that on the day instructions were apparently given by the deceased he described three relatives as "friend" will be discussed below.
[38] T1-28 l 35–48.

> ""And that – you didn't ask him, or you didn't elicit from him whether there were others in the family other than those listed on that list, other nephews and nieces?—No.
>
> All right. When you spoke to Mr – I understand you said you – it was a - when you spoke with Mr Grubb it was mostly, 'Yes' "No" questions; is that right/ You'll have to ----?—That was the simplest way to ----
>
> Yes?-- ---- communicate with him, given the level of deafness.
>
> Right. So you weren't able to ask him open-ended questions, for example?—No."

[26] Concerning whether any enquiry was made of the deceased of his understanding of the nature or extent of his estate or whether there were any other relatives or persons who might be expected to have a call upon his estate Mr Price gave the following evidence[39]:

> "Right. You didn't inquire of him of his understanding of the nature of the estate that he had?—Not that I can recall, no. As I said, I didn't – I didn't turn my mind to the – how big his estate was or – or anything like that. I just relied on the information that was completed on the form and that's as far as I – I took the matter.
>
> And you didn't inquire as to what other relatives he had and what strengths and weaknesses there might be in relation to their call upon his estate?—No."

[27] As to the attendance on 31 July 2003 when the will was executed, Mr Bice said in his affidavit:

> "10. Subsequently on the 31st July, 2003, I attended upon Mr Grubb at the Court House, in Charters Towers, for the signing of his Will. Now produced and shown to me marked "B5" is a note which was made prior to George Grubb signing his Will on 31 July 2003. After I arranged for George Grubb to read his Will, I wrote on the note the words – *'Is this the way you wanted your Will'.* I also wrote on the right hand side the words of *'Yes/No'* twice with a circle around each as indicated. It is my recollection that the *'Yes?' 'No?'* on the left hand side of the note was written by Ms Evelyn Long who was present when George Grubb signed his Will. It is also my recollection that the *'yes'* written below the *'Yes? No?'* was written by George Grubb himself. *'Copy of your will please put in safe place'* was written by Lisa McGuire who was present when George Grubb signed his Will."

[28] The document referred to was exhibit "B5" to the affidavit of Mr Bice.[40] In his evidence Mr Bice was able to confirm that after he wrote the words, "Question put to Mr Grubb prior to signing will" he wrote below the words "Is this the way you

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[39] T1-29 l 30-40.
[40] Exhibit 10 is a copy of that document.

wanted your will?" and that he wrote below those words the words, "Yes/No." His evidence when questioned about the document included[41]:

> "And when you wrote down and showed it to him the first time – so you were writing it down and then I assume you were on one side of the counter and then you turned around to show him what you were writing. You have to say 'Yes' or 'No'?—Yes. Sorry.
>
> When you first turned it around to him did you have 'Questions put to Mr Grubb prior to signing will. Is this the way you wanted your will?' Did you then have – did you also have 'Yes', 'No' written there, or did you just put it that way to start with?—I had the 'Yes', 'No' there.
>
> All right. Now, he didn't give you any response, did he?—I don't believe so.
>
> And that's why you then wrote 'Yes' 'No' with a circle around 'Yes' and then 'Yes', 'No'----? – That's correct. Yes.
>
> ----so you could show him what it is you wanted him to do?—Yes. That's correct.
>
> And then I assumed you turned back around to him?—Yes.
>
> Still no response?—No.
>
> And at that point is that when Mrs Long wrote down 'Yes? No?'?—Yes.
>
> Okay. Did he then – he then wrote – you say he wrote the word 'Yes'?—I believe he then wrote the word 'Yes'.
>
> Right. Did you give him the pen already or did he grab a pen or ------?—I – I can't recall.
>
> You can't recall. But he had a pen, obviously, and wrote the word 'Yes'?—Yeah.
>
> Okay. You then gave him the will to sign; is that right?—That's correct."

[29] Mrs Evelyn Long gave evidence. She is a sister of the deceased. She had difficulty in giving evidence at trial because of hearing loss. Her evidence concerning the events on 17 July and the date of execution of the will differed from the other witnesses. Specifically she denied that her handwriting appeared on the pre-printed document which constituted the instructions for the will.[42] She denied that her handwriting appeared on the document prepared by Mr Bice at the time of execution of the will that had the writings Yes/No on it.[43]

[30] Mrs Long readily admitted that she hand wrote the original of the list of beneficiaries,[44] doing so she said, on the instructions of her brother, the deceased.

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[41] T1-30 l 60 – T1-31 l 38.
[42] Exhibit "B2" to the affidavit of Mr Bice. See T1-73 l 10.
[43] Exhibit "B5" to the affidavit of Mr Bice. T 1-74 l 50 – T1-75 l 5.
[44] Exhibit "B3" to the affidavit of Mr Bice.

Her evidence was that on the day that instructions were taken for the will by Mr Bice she remained outside the room where Mr Bice interviewed the deceased and that after a while Mr Bice emerged, approached her, showed her the document and asked if she could identify the relationship of the persons on that list to the deceased. She acknowledged that the word "friend" was written beside three names and that it was her who then wrote in the words that accurately described the relationship of the proposed beneficiaries.

Findings and Discussion

[31] I accept the opinion evidence of Dr Grant that at the relevant time the deceased was suffering from dementia and I find that in July 2003 it is unlikely the deceased had testamentary capacity. This finding is based upon the evidence of Dr Grant which I accept and also upon my evaluation of the evidence or that of the evidence which I accept.

[32] I am not prepared to accept the evidence of Mrs Long. Even making due allowance for her age and the difficulties she had in giving evidence in Court because of her hearing disability, there were aspects of her evidence that runs directly counter to evidence given by Mr Bice and by Ms McGuire whose evidence I generally accept on matters concerning events on the day or days in question.[45] I have already referred to Mrs Long's evidence where she denied her handwriting appeared on two important documents. She is contradicted upon this by the evidence of witnesses who I accept and that is one of the reasons for my inability to accept her evidence.

[33] I was also left with the impression that, for whatever reason, Mrs Long was at some pains to distance herself from direct involvement in the process leading up to the execution of the will. Her evidence of her involvement on the day the will was executed included her emphatic evidence that she did not read the will,[46] that she did not overhear any conversation with respect to the contents of the will that may have passed between the deceased, Mr Bice or included Ms McGuire[47] notwithstanding that the deceased had a significant hearing loss, that persons had to speak up to make themselves heard by him and that she was present during this although her evidence was she only watched from a distance.[48] Further when she was questioned concerning the evidence of Mr Bice that when he first met the deceased on the day instructions were taken that Mrs Long introduced him with the words to the effect, "He's a bit deaf but he's of sound mind", her response was, "Not that I remember, but you never know".[49] When Mrs Long gave that answer in evidence I gained the impression from her demeanour that her recollection was otherwise.

[34] The difficulties for Mr Bice and the others who were involved in either assisting in taking instructions or as a witness to the will was the problem of communication because of the deceased's profound hearing loss. It is likely that because of Mrs Long's assurance concerning mental capacity, the assumption was made that they were dealing with an elderly man whose only relevant disability was a profound

[45] In particular I was impressed with Ms McGuire as having a very accurate and reliable recollection of events.
[46] See for example T1-76 l 10.
[47] See T1-76 l 30.
[48] See T1-76 l 40.
[49] T1-79 l 48.

hearing loss. The circumstance that the deceased described relatives as a "friend" might have raised some suspicion in the mind of a more experienced solicitor with professional accreditation in the field of wills and estates but in light of the opinion evidence of Dr Grant of the care that was required when interviewing the deceased because of the combination of his hearing loss and his dementia the steps that were taken to confirm testamentary capacity were inadequate.[50]

[35] There is no satisfactory evidence that the deceased was aware in general terms of the nature and extent or value of his estate.[51] Moreover in light of the evidence of Dr Grant and the deceased's reference to relatives as a "friend" I am not satisfied that the third or fourth principles restated by Powell JA in *Read v Carmody*[52] are established. Further the evidence of Ms McGuire[53] and Mr Bice[54] concerning the circumstances of the execution of the will lead me to doubt that the deceased was aware and appreciated the significance of the act upon which he was to perform.

[36] Accordingly I will make orders set out below.

Orders

[37] 1. The Court pronounces:

(a) against the force and validity of the will of George Henry Grubb, deceased, dated 31 July 2003, a copy of which is exhibit "SJF-29" to the affidavit of Stephen James Forster filed on 23 February 2012; and

(b) for the force and validity of the will of George Henry Grubb, deceased, dated 10 September 1992, a copy of which is exhibit "SJF-25" to the affidavit of Stephen James Forster filed on 23 February 2012.

2. Subject to the formal requirements of the Registrar, an Order to Administer the estate of the said deceased in accordance with his will dated 10 September 1992 be granted to the plaintiff.

3. The costs of the plaintiff and of the defendants of and incidental to these proceedings, including reserved costs, be paid from the estate of the said deceased on the indemnity basis.

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[50] In making this finding I do not imply any criticism of Mr Bice or the others involved. It is likely that quite reasonably they were led into a false assumption as to capacity because of the assurance given by Mrs Long and that they assumed the only question to address was one of communication because of the hearing loss.

[51] Mr Bice's evidence was that Mrs Long completed the first page of the "Instructions for Will", exhibit "B2" to the affidavit of Mr Bice.

[52] See para [7] above and also *Frizzo & Anor v Frizzo & Ors* [2011] QCA 308 at [24].

[53] At para [22].

[54] At para [28] above.