

SUPREME COURT OF QUEENSLAND

CITATION: *Birt and Anor v The Public Trustee of Queensland and Anor*
[2013] QSC 13

PARTIES: **DALE ELIZA BIRT**
(First Plaintiff)
DEBORAH PATRICIA BROOKS
(Second Plaintiff)
v
THE PUBLIC TRUSTEE OF QUEENSLAND
as Executor of the Estate of Patricia Alice Brooks (Deceased)
(First Defendant)
WILLIAM JOHN BROOKS
(Second Defendant)

FILE NO/S: BS No. 9893 of 2010

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 February 2013

DELIVERED AT: Brisbane

HEARING DATE: 12-13 September 2012, written submissions 14 & 19 September 2012.

JUDGE: Ann Lyons J

ORDER: **1. Submissions from counsel as to the final form of orders and as to costs.**

CATCHWORDS: SUCCESSION -- WILLS, PROBATE AND ADMINISTRATION -- THE MAKING OF A WILL -- TESTAMENTARY CAPACITY -- UNDUE INFLUENCE -- Definition of "testamentary capacity" -- where testatrix had a diagnosis of dementia -- where testatrix not insane -- where testatrix had an application before Guardianship and Administration Tribunal for the appointment of a financial administrator -- where testatrix understood the nature and extent of her estate -- where testatrix did not understand the true nature of the will

Banks v Goodfellow (1870) LR 5 QB 549 at 565, discussed
Bailey v Bailey (1924) 34 CLR 558, discussed
Frizzo and Anor v Frizzo and ors [2011] QCA 308, discussed
Nicholson v Knaggs [2009] VSC 64, discussed
Hall v Hall (1868) L.R.1P. & D. 481, discussed

COUNSEL: L J Nevison for the First and Second Plaintiffs
 RT Whiteford for the First Defendant
 APJ Collins for the Second Defendant

SOLICITORS: Quinn and Scattini Lawyers for the First and Second Plaintiffs
 Official Solicitor to The Public Trustee for the First Defendant
 McLaughlins Lawyers for the Second Defendant

ANN LYONS J:

Family Background

- [1] Patricia Alice Brooks (“Mrs Brooks”) died on 22 January 2010. She was 86 years old. She was survived by her daughters, Dale Eliza Birt (“Dale”) and Deborah Patricia Brooks (“Deborah”), and her son, William John Brooks (“Bill”). Dale and Deborah are the First and Second Plaintiffs in these proceedings; Bill is the Second Defendant. At the time of her mother’s death, Dale was aged 66, Deborah was aged 48 and Bill was aged 58. Dale is Mrs Brooks’ daughter by her first marriage, to Edward Brooks. Deborah and Bill are Mrs Brooks’ children by her second marriage, to William Brooks. Edward and William Brooks were brothers and accordingly, Dale is the half sister of Deborah and Bill.

Mrs Brooks’ wills

- [2] On 23 September 2004, Mrs Brooks executed a will which named The Public Trustee as the sole executor and trustee (“the 2004 Will”). The Public Trustee is the First Defendant in these proceedings. In that will, she left the entirety of her estate to her son Bill and in the event that the disposition to Bill failed, she left her estate to Deborah.
- [3] Mrs Brooks had made a prior will. On 26 June 1990 (“the 1990 Will”) she made a will at the Legal Aid Office at Southport in which she appointed Dale as her executor and left her estate to her children who survived her in ‘equal shares’. The original of that will has not been found, despite the Public Trustee’s attempts to locate it. However, a signed copy of that 1990 Will is in evidence.

These Proceedings

- [4] Dale and Deborah argue that the 2004 Will is not a valid will. This argument has two bases. First, that Mrs Brooks lacked testamentary capacity at the time she executed the 2004 Will and second, that the 2004 Will was the product of undue influence by Bill over Mrs Brook. The sisters argue that the 1990 Will is the true last will of Mrs Brooks.
- [5] Bill, however, argues that the 2004 Will is valid as Mrs Brooks had testamentary capacity on 23 September 2004. He denies that the 2004 Will resulted from any undue influence from him.
- [6] The Public Trustee has taken no role in these proceedings and was given leave to withdraw at the commencement of the hearing. Leave was also given for The Public

Trustee to return, once judgment was delivered, to be heard on the form of the orders and as to costs.

The issues in this case

- [7] The leading cases in relation to capacity to execute a will and the requirements necessary to establish a case of undue influence will be examined in greater detail later in these reasons. It is clear that first, the essential issues in this case will involve a resolution of the following issues as at 23 September 2004;
- (a) Did Mrs Brooks comprehend the nature of the act of making a will and its effect?
 - (b) Did she understand the extent of the property which she was disposing by the will?
 - (c) Did she comprehend and appreciate the claims to which she ought to give effect when she made her will?
 - (d) Did she discriminate between those claims so that no disorder of mind should prevent her natural faculties and influence her in making her will; and
 - (e) Was she subject to undue influence at the time she executed her will?

Mrs Brooks' declining health and the application to GAAT in January 2004

- [8] In order to evaluate Mrs Brooks' capacity to execute her will, it is of course necessary to understand her physical and mental health. It is also pivotal to examine the context, particularly the family context, surrounding Mrs Brooks at the time she executed her will on 23 September 2004. I will examine these issues before turning to a detailed consideration of the medical evidence.
- [9] Mrs Brooks had resided for a long time in her own home at Southport. Bill had resided with her for a number of years as he had returned to live at the family home after the breakup of his second marriage. He admits that he has a drug problem, that he is a serious drinker and that he has lost his licence on six occasions due to drink driving offences.¹ Bill also admits that he "blows up" and that he is an "explosive character".² He did not work in the period between 2003 and 2004 and was in receipt of social security payments during that time. He was initially on a disability support pension and then a carer's pension and did not pay any rent or board to his mother throughout that period. Bill was clearly fond of his mother but there is no doubt that he has a longstanding drug habit, is chronically short of money and has an explosive temper.
- [10] As will soon become apparent, there is no love lost between Bill and his sisters. In his evidence, Bill conceded that there was a great deal of conflict with his sister Dale. Given the issues raised in relation to Mrs Brooks' capacity to execute a will as

¹ T2-21, lines 40-44.

² T2-27, lines 10-15.

well as the allegations of undue influence, it is necessary to consider in some detail Bill's behaviour and interactions with his mother and sisters during this period.

- [11] Dale and Deborah, as well as Dale's daughters Patrina and Merrilyn, all gave oral evidence and, in particular, gave evidence of Bill's behaviour in the years 2003 and 2004. There are also a number of affidavits in evidence. There are numerous objections to that affidavit evidence by Bill's counsel on a number of grounds, particularly on the basis that much of the evidence contains hearsay, draws medical conclusions, swears the issues, is a generalised allegation or is irrelevant. I accept that many of those objections are well founded and many are conceded by plaintiffs' counsel. The objections are however too numerous to rule on individually. Whilst I will not rule individually on each objection, I have only relied upon evidence which is based on the actual observations of a particular witness whose evidence I accept, is within the actual knowledge of that particular witness and is strictly relevant to the facts in issue. I will outline the evidence upon which I have placed particular reliance and the reasons for this.
- [12] Ultimately in this case, I have placed significant emphasis on the objective material such as the notes of the Gold Coast Hospital ("GCH"), Blue Care and the Public Trustee as well as the oral evidence and file notes of Mrs Brooks' general practitioner, Dr Cargill. I have also relied on the letters and material from her geriatrician Dr Merson which are in evidence. I note however that Dr Merson was unable to be located at the time of the trial and was not able to give evidence. Her letters to Dr Cargill, however, do contain her contemporaneous assessments of Mrs Brooks.
- [13] Some of the evidence in this case is uncontroversial and I will set it out in short compass by way of a general background. In February 2003, when she was in her late seventies, Mrs Brooks was admitted to the GCH with chronic gastritis. There were further hospital admissions in October and December 2003. The records of the GCH are in evidence and they indicate that Mrs Brooks' health had deteriorated in 2003 and 2004, primarily due to a number of strokes. Whilst she continued living at home with Bill, who had become her carer for Centrelink purposes, she was also receiving considerable daily assistance from Blue Care in relation to her everyday activities. Dale visited her frequently at home as did Dale's daughters.
- [14] It is also clear that Mrs Brooks experienced not only a marked decline in her mental functioning during 2003 and 2004 but also a fluctuation in her mental functioning. During her initial admission in 2003, her Mini Mental State Examination ("MMSE") rating was recorded at 13/30. In January 2004, during a two week admission to the GCH after she suffered a stroke, Mrs Brooks was noted to be confused and disoriented with an initial MMSE of 13/28, which subsequently improved to 22/30 prior to her discharge on 15 January 2004. There were documented delusional episodes during this admission. On 11 June 2004 the MMSE score was 16/30.
- [15] Whilst her mother was in the GCH, Dale, with the assistance of a social worker at the hospital, prepared an application dated 14 January 2004 to the Guardianship and Administration Tribunal ("GAAT") for the appointment of a guardian to make personal decisions for her mother and an administrator to make financial decisions on the basis that she lacked capacity to make those decisions for herself. She indicated on the form that she was prepared to be appointed to both those roles. The

application form made it clear that the Public Trustee of Queensland (“PTQ”) could also be appointed to this role. The hearing was initially scheduled for May 2004 but was adjourned to allow further information in relation to Mrs Brooks’ capacity to be obtained.

- [16] At the hearing of the adjourned application on 22 October 2004, GAAT was satisfied Mrs Brooks lacked capacity to manage her own financial affairs and the PTQ was appointed as administrator in relation to all financial matters. No formal appointment was made for a guardian as the informal decision making arrangements were considered to be sufficient.
- [17] The PTQ Client Service Plan (“CSP”) prepared for Mrs Brooks on 18 November 2004 indicated that she was suffering from dementia and living at home with her son but incorrectly indicated that both daughters resided in Sydney. That information was no doubt given by either Bill or Mrs Brooks. The CSP noted that, whilst she owned her own home, she had no other assets other than a small amount of cash in the sum of \$461.52 in her CBA bank account. Her only income was her pension of \$476.50 a fortnight.
- [18] At the time of her death, Mrs Brooks’ modest home and property at Fisher Avenue, Southport was worth about \$400,000. Bill continues to reside at that property and currently owes the estate an amount in excess of \$30,000 in unpaid rent. At the time of her death, Mrs Brooks had debts of approximately \$19,000. Debts continue to accumulate in relation to the property.

The evidence of Dale Birt

- [19] Dale gave evidence of the deterioration in her mother’s health and the history of her ongoing financial difficulties. Dale’s evidence was that her mother was always short of money and would often rely on loans from neighbours. I accept Dale’s evidence that she had witnessed Bill asking his mother for money. It was also clear that money would disappear from her mother’s purse and that, on one occasion, Dale saw Bill take money directly from her mother’s purse, which her mother had hidden underneath her mattress. Dale gave further evidence that, on numerous occasions when she visited her mother, there was no food or personal items in the house, that her mother often did not have enough food to eat and that some of her clothes were held together by safety pins. I also accept Dale’s evidence that in 2003, her mother told her she wanted Bill to leave and showed her the forms that she had obtained for Bill to apply to the Housing Commission for a home. However, Mrs Brooks had ultimately stated to Dale that she was going to put the forms away because “he” would just shout and carry on.
- [20] Having examined the evidence in this case, I consider that there is manifest evidence that Bill was always short of money and that he was reliant on his mother not only for accommodation and meals, but for financial assistance as well. I consider that this led to Mrs Brooks often not having enough money to manage given her only income was her age pension.
- [21] I also accept Dale’s evidence that the stimulus for the application to GAAT was her mother’s admission to the GCH in January 2004 due to her declining health as well as her frailty and her chronic lack of money. In her view, her mother’s stress and anxiety was increasing due to this shortage of money. When her mother was

admitted to the GCH, she took the opportunity to speak to the senior social worker at the GCH who gave her information about making the application to GAAT. Her evidence was that her primary motivation was to ensure that she would have money and would not have to obtain loans from Centrelink or her next door neighbour Beth.³ She stated;

“Because I could see mum, her stress and anxiety was increasing. She had no money. She had nothing to buy anything and when she came over to me at Walter Street and said, "I won't let him get to me, Dale. I won't let him get through to me.", and that's when I asked mum, "What's wrong?", and she said, "He's just coming down on me, but I won't let him get through to me", and then - and she didn't have any money. So I was just tired of seeing all this happening and so I thought there's got nobody (sic) some answer. So I went - and I was advised to go to the Guardianship by Melissa Dawe at - a senior social worker at the Gold Coast Hospital and that's what prompted me to go.”⁴

- [22] Dale indicated that after her mother came out of hospital in January 2004, she arranged for Blue Care to care for her and for a Webster pack to be made up for her at the chemist so it would be easier to take her medication. She ensured that she had a constant supply of hospital strength Sustagen. She also organised with Dr Cargill and Queensland Medical Laboratories for them to visit to check her mother's blood as she was on Warfarin.
- [23] Dale stated that the application to GAAT was the beginning of increased hostility from Bill. She stated that when she went to see her mother in February 2004 after her release from hospital, Bill told her to get off the property. When she refused to leave he called the police. Dale stated that after the police arrived, she left the house to diffuse the situation. She stated that Bill called her names like “fucking bitch” and “slut” whenever she went around to the house to see her mother. Dale gave evidence that she heard Bill call her mother a slut and tell her she was a liar. He would also tell her what she could and could not do. In February 2004, she became concerned that the phone was disconnected because this was the only means by which the family could contact their mother.
- [24] Dale gave evidence that when she visited her mother around the time of the GAAT hearing, she heard Bill tell her mother that Dale was "going to take all your money".⁵ Dale's evidence was that matters became progressively worse throughout 2004. In November 2004, Bill rang her after the GAAT hearing and told her that he was going to kill her as he now knew where she lived. He said that he was willing to “do 15 years.” Dale gave the following evidence in relation to the escalation of the conflict with Bill at the time the application was heard:

“And he expressed, did he not, some anger that you were doing that?-- Very much anger.

He didn't like that at all?-- No.

³ T1-22, lines 43-53

⁴ T1-21, lines 33-45.

⁵ T1-22, line 50.

He didn't think it was fair to your mother that you were doing that to her, did he?-- Actually, he - he walked through the house and he said to me, "What am I going to do now? How am I going to get my mail?" And he had a can of Bourbon in his hand and he said, "This is all I can have."

Okay?-- So he was very, very angry with me, because he could see that there wouldn't be as much money involved, because the Guardianship were employing Public Trustee, so they were going to take care of Mum's money...

"Did he express - I'm just trying to say did he say to you words to the effect, "Dale, you're a bad person for going to the Tribunal?", or, "How dare you go."?-- Yes, I got called F and B and all kinds of names because I was doing this and - and that's when all the anger and violence set in."⁶

- [25] In relation to the fact that her mother changed her will to leave her entire estate to Bill, Dale indicated that her mother denied having made a will in those terms. She stated that she came across the will whilst looking for her mother's glasses. She stated:

"-- I came into the lounge room and - and I was crying and Mum looked up and she said, "What's wrong, Dale?", and I said - I was shocked. I said, "Mum, Mum you've changed your will." And I said, "You - you've left it all to Bill?" And that's when she said, "I didn't do that.", and I said, "But Mum you have.", and actually, then I went up to Bill in the shed and I said to him, "How could you do that, Bill, to your sisters?" I said, "How could you do that?" I said, "I would never have done that to you.", and I wouldn't have.

And can you put a time estimate on when about that conversation occurred, bearing in mind the will was made in September 2004?-- Yeah. That would have been a couple of weeks later when Mum was home and I looked in her drawer for her - her glasses.

Very well?-- And Bill then became very abusive with me - and said you know I'd done nothing. It was his father's house. He said, "Debbie didn't deserve anything.", and I - I knew I had to get out. So I walked down the path and that's when he chased me down the path".⁷

- [26] Dale stated:

"I was going down the steps, and he followed me down and he pushed me over on the front pavement. Three - two girls on a bike stopped to help me. And another time, he followed me right down the end of Fisher Avenue and pushing me, and I turned around to ask him to stop and he said, 'How

⁶ T1-26, lines 3-17, 22-26.

⁷ T1-32, lines 14-34.

dare you turn around and face me' And that's when two other men stopped in their car to help me. I wrote a letter to The Bulletin to thank those men.⁸

- [27] Dale indicated that it became even more difficult when the Public Trustee commenced managing her mother's money for either her or her daughters to visit her mother because of the abuse from Bill. When her mother was finally admitted to the Leamington Nursing Home in 2007, she was able to visit regularly and consistently without the fear of threats from Bill.
- [28] I consider that Dale was a truthful witness who had a very good recollection of events. She also gave her evidence in a way which was direct and to the point. Many aspects of her evidence were corroborated. In particular, I accept Dale's evidence that Bill has an anger problem and that he is an abusive and bullying person because that evidence was corroborated by his attitude and behaviour in Court. He answered questions that were put to him in a belligerent and argumentative manner. Dale's evidence about his drug and alcohol use was essentially conceded by Bill during his evidence and he also agreed that he spent a lot of time smoking marijuana with his mates in the shed at the back of the house.
- [29] Dale's evidence was also corroborated by the evidence of Patrina Birt and Merrilyn Birt. Both gave evidence of their visits with their grandmother and her relationship with Bill. Patrina and Merrilyn both confirmed Bill's abusive attitude towards their grandmother despite her efforts to appease him. Merrilyn's evidence was that her grandmother "put a roof over his head. My grandmother cooked his meals. My grandmother did the shopping. My grandmother looked after him. My grandmother did everything".⁹ Patrina's observation was that Bill did not act in a respectful way towards his mother. Merrilyn indicated that she had witnessed "denigration" and "name calling" by Bill. She stated that before her grandmother got dementia, she was able to stand up to Bill but after she got ill "Bill started bringing his friends over. They started drinking, smoking drugs. They'd come into the house and take Nanna's food..."¹⁰
- [30] I accept that evidence. I consider that the evidence establishes that Bill was verbally abusive to his mother. I am not satisfied that there is evidence to support a finding that he was physically abusive to her.

The evidence of Deborah Brooks

- [31] Deborah also gave evidence by telephone at the hearing. It was clear that whilst she had telephone contact with her mother, she had not seen her since 1991. Deborah could give no relevant evidence about the interaction between Bill and her mother or Bill and Dale. She indicated, however, that in 2004, Bill telephoned her and told her that she should be careful of Dale as Dale was after the house and she should watch out. She gave the following evidence in relation to that conversation:

"And was that in the context of the application that your sister had filed to go to the Guardianship Tribunal?-- No, it wasn't in that context. He - as I said, at the time I remember thinking it was quite

⁸ T1-26, lines 52-60, T1-27, lines 1-2.

⁹ T2-17, lines 5-10.

¹⁰ T2-17, lines 15-20.

an odd conversation. He was quite emotive at the time and he - no, he didn't mention that at all. He said that he - that, as I said, that Dale was after the house and I should watch out and not to believe her and at the time I simply wanted to reassure him that I was aware that our mother had a will and that she'd left it to the three of us and that he really didn't have anything to worry about and I also told him that he really - he didn't have anything to worry about with Dale in that respect either. I was quite certain that she also was aware of our mother's wishes and would do no other thing other than that."¹¹

- [32] I consider that Deborah's evidence confirms that Bill had a great concern that Dale was taking over and that this caused him great distress.

The evidence of Bill Brooks

- [33] In his evidence, Bill outlined his care for his mother. Bill stated that before she had her initial stroke on 28 February 2003, his mother acknowledged that she was starting to become forgetful. Bill said:

“Physically, she was fine. Her skin was paper thin, like mine, so she would bruise very easily. I had to be very careful of her not falling, or anything, and her - her memory, you know - as mine is - her memory was starting to go.”¹²

- [34] Bill stated that Mrs Brooks was suffering also from low blood pressure and heart problems. Bill acknowledged that after Mrs Brooks was admitted to hospital for a further stroke on 2 January 2004, she was diagnosed with dementia. Bill confirmed that Dale and her daughters continued to have close contact with her. He stated that Dale visited on a weekly basis and one of her daughters visited regularly.
- [35] Bill admitted that he started using marijuana at a young age and had started drinking at the age of 15. He admitted that around the period of 2003 to 2004, he sold property from the house to pawnbrokers in exchange for cash, some of which was used to accommodate his drug habit. He argued that the property he sold was his property and denied that he sold his mother's property for cash.
- [36] When questioned whether he had an explosive character, Bill answered:

“I've got a bad habit of shooting my mouth.

Yes?-- I only open my mouth to put me foot in it.

And-----?-- I've got a bad habit of making threats that I do not carry out, and that's probably why I make them, so that it's been verbalised and then I won't.

And as Merrilyn been said occasionally people drop some swear words, you do that?-- Very few women in my life. It's all blokes. Yes, we swear. We drink. We swear.

¹¹ T1-40, lines 1-14.

¹² T2-31, lines 16-20.

You use bad language?-- I swear on a normal day to day basis.”¹³

[37] He stated, however, that he rarely swore at Mrs Brooks and did not recall calling her “a fucking bitch”, although he accepted that he possibly could have. Bill denied that he got angry towards Mrs Brooks about meals although he admitted that he complained to her when her cooking abilities “went downhill”.¹⁴ He stated that he had refused to be domesticated all of his life and that he had always expected to “have a girl on hand to do that”,¹⁵ so he sourced ready-made meals so that he could look after his mother. He said that food was not an issue for him; the importance was that his mother was well fed.

[38] Bill agreed that he did not support the application for the appointment of financial administration but stated he did not want to administer her affairs.

“It's the case, isn't it, you didn't want any third party administering your mother's affairs, you wanted to continue in that role, didn't you?-- I didn't administer her affairs. I never had any desire to. I am not real good with money. It goes through my hands like water. I wouldn't want to control my mother's affair, But you didn't want anybody else, a third party, administering her affairs, did you?-- I didn't think she - when this was - *she didn't need anyone to be in charge of her affairs. Once Dale started, she had an agenda. She had a plan.* My plan was to see that mum lived out her life at her home which was her wish.”¹⁶ (my emphasis)

[39] Bill stated that his mother had insisted that he take her to the Public Trustee's office because she wanted to make a new will. Bill denied that he had made his mother go to the Public Trustee to change her will. He stated that it was completely untrue. He said that he did not want her to make a new will and he did not want control over her affairs whilst she was alive:

“Mum wanted to make a will. Dale was trying to take control of her as (sic) affairs. I wasn't going to allow that to happened (sic), but I wanted no control and I knew the Public Trustee - I would aim to have the Public Trustee take over her affairs. Now, mum wanted to make a will out. So I said, “Mum, I don't want you to do it. You shouldn't do it, but if you want to do it you will have to go to the Public Trustee and do it there because they are going to be in control of your affairs...”¹⁷

[40] Bill stated that he was aware that in the 1990 Will his mother had intended that the property be left to the three children in equal shares. He stated that he wanted things to remain as they were, divided up equally¹⁸ and that the 2004 Will was “her decision, her will, not mine.”¹⁹

¹³ T2-27, lines 14-27.

¹⁴ T2-28, line 20.

¹⁵ T2-28, line 22.

¹⁶ T2-40, lines 7-19.

¹⁷ T2-22, lines 40-48.

¹⁸ T2-29, lines 37-41.

¹⁹ T2-29, lines 43-44.

- [41] I do not consider that there is any objective evidence that it was Bill's idea that Mrs Brooks change her will.
- [42] I also accept Bill's evidence that he took Mrs Brooks to see her GP Dr Cargill on the day she made her new will because the Public Trustee said that was necessary. Bill's evidence was that he had taken her to see Dr Cargill numerous times. When her dementia started to take effect, Dr Cargill would see his mother and then call him in. On 23 September, he told Dr Cargill the reason for which they were there, but his recollection was that he stayed in the reception area. Bill said that when Dr Cargill had finished talking with Mrs Brooks, Dr Cargill called him inside and said "she didn't require anything; she was fine."²⁰
- [43] As I have indicated, I accept those aspects of his evidence.
- [44] However, on many other occasions when giving evidence, Bill would initially deny an allegation but later concede that it was probably correct. At times he gave conflicting evidence. In particular, after initially denying that he rang an officer at GAAT on 1 November 2004, he later admitted that he did call him and verbally abused him. He also admitted that he called him later that day and apologised for talking that way. He said, however, that he did not remember promising to reduce his pot intake and drinking.

"So, if he made a note that you'd rung back and apologised and said that you'd reduce your pot intake and drinking at page 2004 of the record, would you agree that that's an accurate statement of what you probably said?-- Can you say that again?

Yes. If you rang him back later, after that call and apologised for calling?-- Yes."

And told him that you were reducing your pot intake and drinking and he made a note of it, that would be an accurate note of what you said?-- Yeah, I'd say so."²¹

- [45] The following exchange with Mr Nevison, counsel for the plaintiffs, is also very illustrative of Bill's attitude and his credibility:

"In February 2004, did you knock Dale to the ground out the front of your house?-- I don't recall that. I don't believe that. I do not believe that. No.

I suggest to you, in fact?-- No, no. She might have thrown herself on the ground but I didn't. No, no way, no way.

Well, do you recall an incident of her being on the ground?-- No.

In early 2004? You don't recall?-- I don't recall any of that.

²⁰ T2-22, lines 33-34.

²¹ T2-43, lines 2-13.

See, I suggest to you that, in fact, you did push her?-- I say, if she ended up on the ground, she would have thrown herself on the ground.

You threatened to kill her; didn't you? You made a threat to kill Dale in 2004; didn't you?-- Have you got that in writing? Have you got proof of any of this?

Yeah. You've just seen it before in the exhibit. That's the threat you made to QCAT, isn't it?-- Oh, that. Yeah.

You accept that, don't you?-- Yeah, they're words.

Oh, they're words, are they? They're your words, aren't they?-- I've threatened to kill a couple of people in the last fortnight-----

Right?-- -----but they're still walking around and they will continue. It's words.

You threatened to kill-----?-- It's just to express my – my grief I - that I'm not satisfy - not happy about the situation.

That's how you vent your frustration, is it?-- About the strength of it.

Thank you?-- Usually a threat - a threat of death will – will cause someone to back off a little bit and that's - that's about how - that's it.

That's why you threatened Dale, to get her to back off?-- I would assume so at the time.

Thank you. And you called the plaintiff's - sorry - Dale's daughter "a sack of puss" when you spoke to her on the phone, is that language you'd use?-- I don't recall, but possibly.

Yes, thank you. Was your station in life a happy time when you were living with your mother at the home in 2003? Were you a happy man then?-- 2003 no, of course not.

No. Why were you unhappy?-- Can I - mention two divorces, a number of other relationships, usually with a child involved, too many losses, too much grief.²²

[46] I consider that that evidence indicates that Bill did assault Dale and that he knew he had. His view that she ended up on the ground because she “would have thrown herself on the ground” is simply not credible. I also consider that the evidence clearly indicates that he makes abusive threats to others.

[47] I also consider that Bill was not only inaccurate with some of the information he gave in Court but that on other occasions he initially gave answers which he clearly knew were incorrect.

[48] Furthermore, Bill was often inaccurate with the information he provided to others during his mother's life, particularly the Blue Care Nurses. He initially denied in Court that he felt "threatened" at any stage, however, the Blue Care file recorded that he was very "Unhappy with shared lifestyle care of mother with step-sister Dale" and that he "Felt his home", "is threatened." He ultimately agreed with Counsel that he must have told the Blue Nurses that he in fact said he felt "threatened".²³

[49] Bill also ultimately accepted that the Blue Care notes record that on 6 May 2004 he told his mother and Blue Care that Dale had brought an application to remove him from his mother's house. He also said "Dale had tried to move me from mum's house a number of times."²⁴ The Blue Care notes record the following;

"Well, in the Blue Nurses' documents - this is now BC10, I have jumped to the back of that document - there's a form that they've completed about the role relationship. So this is your relationship to your mother as a carer and your mother's apparently said she's very anxious that "carer son will be asked to leave" and then over the page, "*Daughter instigated Court proceedings to remove brother carer from home due to perceived lack of care for mum. Client and carer very distressed. Arrange one hour advisory legal aid*" and that was information being provided by you. Do you accept that?-- I assume that that's true, but I don't recall."²⁵ (my emphasis)

[50] There is absolutely no evidence that Dale took any legal action to remove Bill from the house at any stage. Having considered Bill's evidence as a whole, I also have to conclude that Bill was not a completely truthful witness. He was prone to exaggeration about his personal qualities as the following exchange with Counsel for the plaintiffs indicates;

"I've become a carer for every clown in Southport now, mate, because I am a natural. I started doing it for my mother. Now I am doing it for everyone. There are two people in my house at the moment. I am putting them up for free. One of them is a Bandido, an outlaw biker and girlfriend who have just got out of gaol after five months. He's thrown the club away. They have two separate children from separate marriages. They want to get together and become a family. I will do anything I can to help them.

That's in the house?-- That's me, mate. That's the kind the person I am."²⁶

[51] Whilst Bill denied that he had abused his mother, I do not accept his evidence and consider that he was indeed abusive and bullying to her as well as Dale and her daughters.

[52] I also consider that the evidence indicates that not only was Bill convinced that he would be removed from his mother's house if an administrator was appointed but he convinced his mother that he was about to be removed.

²³ T2-41, lines 1-8

²⁴ T2-38, lines 20-21.

²⁵ T2-38, lines 27-37.

²⁶ T2-56, lines 53-60, T2-57, line 6

Mrs Brooks' functioning at the time she executed the will on 23 September 2004

- [53] There is no doubt that, at the time she made her will on 23 September 2004, there were significant concerns about Mrs Brooks' capacity to execute a will. It is clear from the evidence that Mrs Brooks had experienced a number of strokes in 2003 and 2004. She had in fact been hospitalised for two weeks on January 2004 due to concerns about her cognitive functioning. The hospital records clearly indicate that she was experiencing delusions during her stay in hospital. At the time of her appointment with the Public Trustee she had been diagnosed with dementia, was experiencing cognitive decline and was in the care of a geriatrician. There is also a record of her experiencing delusions in September 2004. Bill denied that his mother was confused at the time she made her will in September 2004 but significantly, in my view, indicated that "She was pretty angry at the time".²⁷
- [54] Mrs Brooks' functioning at home had also been of such a concern that her daughter had initiated an application to GAAT for the appointment of both a guardian and an administrator. That application was still pending at the time Mrs Brooks made her will in September 2004, as the May 2004 hearing had been adjourned.
- [55] Because of those factors, the officer from the PTQ, Brenda Gueizelar, insisted that a contemporaneous assessment of capacity be undertaken by her doctor and geriatrician. She also took the precaution of having a legal officer attend the appointment with Mrs Brooks. Ultimately, however, Ms Gueizelar considered that she could take Mrs Brooks' instructions for the will.
- [56] Dr Cargill also saw Mrs Brooks on 23 September 2004 just before the making of the will and he considered she had capacity to make her will.
- [57] Accordingly, both Dr Cargill and the officer from the PTQ, who took the instructions for her will, were satisfied that Mrs Brooks had capacity at the time she executed her will on 23 September 2004. That evidence is central to the resolution of the question of capacity and it is therefore necessary to examine that evidence in some detail.

The evidence of Dr Robert Cargill

- [58] Dr Cargill gave evidence that Mrs Brooks had been his patient for a number of years and she would come to the surgery about twice a month, usually accompanied by her son. Dr Cargill stated that on 23 September 2004, when he assessed Mrs Brooks in relation to her capacity to make a will, he distinctly remembered that she was very "adamant" on that day about what she wanted.²⁸ He also confirmed that her son Bill was with her at the time they had the discussion about her will.
- [59] Dr Cargill indicated that he had notes dated 23 September in relation to a visit by Mrs Books to him which recorded the following:

"aware of self, address, assetts (sic) [house] 3 children, wants to make will today to leave house to William, and nil to others.

²⁷ T2-58, line 44.

²⁸ T1-97, line 34.

Adamant as wiiiium (sic) has been carer, has also attended Dr Merson recently. dr Merson was ill yesterday and not there.

UTI under control

not on aricep yet.”²⁹

- [60] Dr Cargill also gave evidence that he wrote a letter to the PTQ dated 23 September 2004 in the following terms:

“Patricia Brooks suffered a mild to moderate dementia. She has been seeing Dr Elizabeth Merson, the geriatrician, as well as myself. Today she seemed quite well. She was aware of self and place. She knew her main asset was her house. She also knew that her three children expected a share of this in her will. She expressed the very definite opinion that her daughters were to get nothing and the house was to be left to her son William. She was to see the Public Trustee today to make her will. I feel she has the basic elements of testamentary capacity. My understanding of the process, in that she knew who she was, her basic assets and the potential beneficiaries. It may be prudent to also get an opinion from Dr Merson.”³⁰

Dr Merson’s opinions

- [61] Dr Cargill confirmed in his oral evidence that Mrs Brooks was being seen by the geriatrician, Dr Merson, throughout 2004. He stated that a letter to him from Dr Merson dated 30 July 2004 indicated “Son says she is depressed and anxious and is worried about her hearing. Constantly agitated about her money.”³¹
- [62] Dr Cargill also gave evidence of a letter to him from Dr Merson dated 24 August 2004 which indicated that a recent brain scan for Mrs Brooks showed “bilateral hypo perfusion of the temporal lobe consistent with Alzheimer’s Disease”.³² He also stated that on 9 October 2004, which was about a week before the GAAT hearing, he received a letter from Dr Merson. That letter indicated that treatment with an “atypical antipsychotic might help with her agitation, paranoia and hallucinations and delusions. She is concerned about money and the bills”.³³ The letter noted she was prescribed Risperdal. Dr Cargill also confirmed that in the letter of 9 October 2004 Dr Merson indicated “lately remembering that her deceased husbands are around. Quite often she thinks she had lunch with her husband, but it was her son. She says it was her imagination (today) but it comes back and she can’t think straight.”³⁴
- [63] Dr Cargill also confirmed that the letters from Dr Merson indicated that Mrs Brooks’ MMSE fluctuated and that there was a subsequent letter from Dr Merson

²⁹ T1-75, lines 8-21.

³⁰ T1-76, lines 4-16.

³¹ T1-86, lines 11-15.

³² T1-90, lines 36-38.

³³ Exhibit 10, Letter from Dr Merson dated 9 October 2004.

³⁴ T1-86, lines 45-48.

dated 11 November 2005 indicating that on that day Mrs Brooks was “quite lucid”.³⁵

- [64] Also in evidence was a pro forma GAAT document completed by Dr Merson and dated 23 September 2004 which had been filed in anticipation of the resumed GAAT hearing on 22 October 2004. On that form Dr Merson recorded that Mrs Brooks had told her that she said she needed help to manage her affairs and that she needed assistance with “general life decisions”. Dr Merson noted that Mrs Brooks had cognitive impairment (dementia) for about five years as well as atrial fibrillation and ischemic heart disease. On that form, Mrs Brooks’ MMSE was recorded as 14 out of 30.
- [65] Dr Merson also recorded that “She had impairment in ability to think abstractly. She displayed definite short term memory”. Dr Merson’s response in relation to a question about Mrs Brooks’ capacity to operate a bank account and manage her financial affairs was that “She understands all of the above but needs to have her son physically perform the task e.g. go to the bank for her.” She also noted that she did not think Mrs Brooks was influenced negatively by her son and stated that in her opinion, she was capable of making decisions freely and voluntarily.

The Blue Care Notes

- [66] The Blue Care notes were also tendered in evidence and commence from January 2004. Those notes record on many occasions Mrs Brooks’ distress about the GAAT application. On 23 March 2004 the notes indicate she was concerned about her son “being ordered to leave”³⁶ and on 6 May 2004 it was noted that she was very anxious about that prospect. Those notes also record ongoing chest pains and confusion on the part of Mrs Brooks on many occasions. An MMSE result of 16/30 was recorded on 11 June 2004. On 10 September 2004 the notes indicate that Mrs Brooks was “distressed re making of will” and record that Mrs Brooks was ‘Able to say she “wants to make (her) will before she gets sicker’ (dementia progresses).”³⁷
- [67] On 28 September 2004 the notes record “Concerned re forgetfulness and ‘delusion’-seeing dead brother”. On 25 October 2004 the notes record that both Bill and Mrs Brooks were “extremely upset” about the GAAT hearing and record that there was a “long emotional discussion” about it. The notes also record that Bill was “Agitated and angry’ about criticism of his care of his mother and that Mrs Brooks was also “upset’ about seeing Bill upset.”³⁸

The evidence of Brenda Gueizelar

- [68] Ms Gueizelar gave evidence that in September 2004 she worked for the Public Trustee as an estate planning consultant at Southport and that part of her employment consisted of preparing wills for clients. She stated that by September 2004, she had had significant experience in taking and witnessing wills. Ms Gueizelar outlined her standard practice. She indicated that she took a number of pieces of information from a client during the interview including their name and

³⁵ T1-88, lines 5-8.

³⁶ Exhibit 3.5 BC entry 23 March 2004.

³⁷ Exhibit 3.5 BC entry 10 September 2004.

³⁸ Exhibit 3.5 BC entry 25 October 2004.

date of birth, family history, an explanation of their assets and their instructions in relation to the will. She also discussed the possibility of a will being contested.

- [69] Ms Gueizelar stated that prior to Mrs Brooks coming to make her will she had had a conversation with Bill and she had advised him that, as Mrs Brooks had been diagnosed with early dementia, a medical certificate from her treating doctor, Dr Cargill, was required. She also noted that Bill told her there was an application for the appointment of an administrator before the GAAT.
- [70] Ms Gueizelar indicated that in accordance with the standard Public Trustee practice for potentially contentious matters she arranged for Mr Ian Caulfield, a legal officer with the Public Trustee, to be present during her attendance on Mrs Brooks. Ms Gueizelar indicated that on 23 September when Mrs Brooks attended at their offices she spoke to Bill who advised that they had attended on Dr Cargill's office and that he had confirmed that Mrs Brooks had capacity to make a will.
- [71] Ms Gueizelar indicated that notwithstanding that information she took the step of attempting to telephone Dr Cargill. Dr Cargill was unavailable but a staff member advised her that he had attended on Mrs Brooks that morning. She was told that they were unable to provide any information as to whether he considered she had capacity. Ms Gueizelar indicated she then attended on Mrs Brooks in the presence of Mr Caulfield and that Bill was not present. She stated she made a number of inquiries of Mrs Brooks which were designed to verify her capacity.
- [72] Ms Gueizelar stated that Mrs Brooks was very definite in regards to her instructions and that at the time she had specifically noted that she was 'very upset with her daughter Dale Brooks as she had assaulted her son'. She took a note of the actual words she had used in respect of her daughter as follows:
- "I am just not giving her my house. No way is she getting my house. I will sell my home and not give it to her. My son is my carer. He does the cooking. I am on the old age pension. I love the home. My husband and I worked hard for it. I won't give it to them. They are not getting my house. I will sell it privately, but my daughter and the whole lot of them are not having my house."*³⁹ (my emphasis)
- [73] Ms Gueizelar also stated that during her attendance on Mrs Brooks, Mrs Brooks was able to advise as to her assets and how she wanted them disbursed. Accordingly, she had no doubts as to the capacity of Mrs Brooks to execute the will.
- [74] I consider that Mrs Brooks' words to Ms Gueizelar indicate that Mrs Brooks believed that Dale was about to take possession or ownership of her house.

Findings

- [75] I am satisfied that the evidence supports the following findings;
- (i) Mrs Brooks had a diagnosis of dementia and was experiencing a marked decrease in mental functioning at the time she executed her will on 23 September 2004. In a form completed on that date Dr Merson recorded an MMSE of 14/30.

³⁹ T1-55, line 60, 1-56, lines 1-6

- (ii) Bill had a significant drug and alcohol problem and was chronically short of money.
- (iii) Bill was financial dependent on Mrs Brooks and was reliant on her for accommodation and financial assistance.
- (iv) Bill was verbally abusive to Mrs Brooks.
- (v) Bill had an intense dislike for his sister Dale and was abusive including physically abusive to her.
- (vi) This abuse escalated after the application to GAAT was made in January 2004 and became heightened after the hearing in May 2004.
- (vii) During 2004 Bill was convinced he would be removed from the house if an administrator was appointed.
- (viii) On 30 July 2004 Mrs Brooks was noted to be depressed and anxious, worried about the resumed GAAT hearing and constantly agitated about her money.
- (ix) Mrs Brooks was noted to be experiencing delusions on 28 September 2004 and on 9 October 2004 Dr Merson wrote to Dr Cargill noting her agitation, paranoia, hallucinations and delusions as well as her concern about money and bills.
- (x) Mrs Brooks become convinced that Dale was about to get the house.
- (xi) In the week surrounding the execution of the September 2004 Will, Dr Merson considered that Mrs Brooks was impaired in her ability to think abstractly and displayed definite short term memory problems.
- (xii) On 10 September 2004 Mrs Brooks was observed by a Blue Care nurse to be distressed about making her will.

The Leading Authorities on Testamentary Capacity

- [76] The test in relation to the term ‘*testamentary capacity*’ is well known and was set out in 1870 by Cockburn CJ, in *Banks v Goodfellow*⁴⁰, as follows:

“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 of it which, if the mind had been sound, would not have been made.”

- [77] It is clear that irrespective of Ms Gueizelar’s view about testamentary capacity or indeed the medical opinions of Dr Cargill and Dr Merson in this regard it is for this Court to be satisfied that Mrs Brooks had testamentary capacity at the relevant time. The courts’ approach to assessing lack of testamentary capacity was examined by Isaacs J in *Bailey v Bailey*⁴¹ and resulted in the following principles:

⁴⁰ (1870) LR 5 QB 549 at 565.

⁴¹ (1924) 34 CLR 558.

- (1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged the Court is bound to pronounce against the instrument.
- (2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence
- (3) The proponent's duty is, in the first place, discharged by establishing a *prima facie* case.
- (4) A *prima facie* case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the Court judicially that the will propounded is the last will of a free and capable testator.
- (5) A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments.
- (6) The quantum of 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.
- (7) As instances of such material circumstances may be mentioned: (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit.
- (8) Once the proponent establishes a *prima facie* case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof.
- (9) To displace a *prima facie* case of capacity and due execution mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.
- (10) The opinion of witnesses as to the testamentary capacity of the alleged testator is usually for various reasons of little weight on the direct issue.

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions

[78] The Court of Appeal in *Frizzo and Anor v Frizzo and ors*⁴² endorsed Applegarth J's approach to these principles at first instance. In *Frizzo and anor v Frizzo and ors*.⁴³ Applegarth J had stated:-

“[23] Of course, the onus of proving that the testatrix had testamentary capacity at the time she made her will lies on the party propounding that will. It is a question determined on the balance of probabilities, based on the whole of the evidence. A presumption of validity arises where the proponent demonstrates a duly executed will that is rational on its face. 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.

[24] If, however, doubt is raised as to the testatrix's mind, memory and understanding, then the Court is thrown back onto an examination of the evidence as a whole to determine whether the proponent has established affirmatively that the testatrix was of sound mind at the time of executing the will. 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 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.”

[25] In embarking on that examination, opinion evidence may be led, but courts are not obliged to give it a great deal of weight. Justice Mullins has recently reiterated the propositions put forward by Isaacs J (as he then was) in *Bailey v Bailey*. Those propositions, relevantly, are (1) that opinions of witnesses as to testamentary capacity are

⁴² [2011] QCA 308

⁴³ [2011] QSC 107

“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”.”

- [79] In my view the circumstances in the present case were such that there was a very real doubt when Mrs Brooks presented at the PTQ to execute her will that she had testamentary capacity. Mrs Brooks had a diagnosis of dementia, was under the care of a geriatrician and had an application pending before GAAT for a substitute decision maker to be appointed due to concerns about her capacity.
- [80] Because of those acute concerns the officer from PTQ took all the appropriate precautions before she would take instructions from Mrs Brooks. She interviewed Mrs Brooks without any family members present, she had a solicitor attend the appointment with her, she sought a medical opinion and she asked a number of questions of Mrs Brooks about her assets and her family to satisfy herself that she should proceed. She ultimately considered she should take her instructions. That does not alter the fact however that there were real concerns surrounding the execution which I do not consider were ever displaced.
- [81] In my view because of those serious concerns which existed at the time of the execution a doubt always remained about the validity of the 2004 Will. I consider that due to those very real concerns the onus is therefore clearly on the propounders of the 2004 Will to satisfy the onus on them that Mrs Brooks possessed the relevant capacity.
- [82] In my view the evidence indicates that Mrs Brooks understood the nature and extent of her estate. Her only real asset was her house and she knew this. She always struggled for money so there were no funds in a bank account. When the PTQ took over the only money she had were the proceeds of her last pension cheque. I am satisfied that Mrs Brooks understood the extent of the property of which she was disposing and she had a general knowledge of the property and its value. Those concepts were indeed simple concepts for her.
- [83] She also understood those who had a claim on her estate, namely her three children. That was specifically discussed with Ms Gueizelar who was satisfied she was aware of those who had a claim on her estate. Ms Gueizelar was a very experienced in this regard and I accept her evidence that Mrs Brooks had three children and that they may have had a claim upon her estate. Dr Cargill also discussed this with her and he was satisfied she knew that her three children expected a share in her estate.
- [84] However it must be remembered that the *Banks v Goodfellow* test requires, in relation to an appreciation of the claims to which she ought to give effect, not only a requirement that she knows who might have a claim on her estate but a further requirement that no disorder of the mind shall poison her affections, pervert her sense of right or prevent the exercise of her natural faculties. There must be no insane delusion influencing her will in disposing of her property such that a disposal is made which would not have been made if her mind was sane.
- [85] In the present case, there is no evidence that Mrs Brooks was ‘insane’ but she was suffering from dementia and was indeed experiencing a severe cognitive decline. I have set out the relevant factual findings which I consider are established on the

evidence. I note in particular Mrs Brooks' observable distress about her will and her money, her delusions, her short term memory problems, her difficulty with abstract thinking and a recent MMSE of 14/30. Against that background, the evidence which causes me to doubt her testamentary capacity is the evidence about Mrs Brooks' very firm view that Dale was about to 'get' her property. I also note Bill's evidence that his mother was "angry" on the day she made her will.

[86] There is clear evidence that Mrs Brooks was very adamant with both Dr Cargill and Ms Gueizelar about what she wanted. She was adamant that her daughter was not going to 'get' her house. Indeed, it was probably the forcefulness of these views which convinced both Ms Gueizelar and Dr Cargill that she had capacity.

[87] In *Nicholson v Knaggs*⁴⁴ Vickery J stated:

“41 In the end it is for the Court, assessing the evidence as a whole, to make its determination as to testamentary capacity. In the present case, the opinions of expert witnesses as to whether the testator was competent or not competent, while not without weight, cannot be decisive as to testamentary capacity at the relevant times. The Court must judge the issue from the facts disclosed by the entire body of evidence, including the observations of lay and professional witnesses who knew and saw the testatrix at the time of her making the relevant wills and codicils. The manner in which she gave her instructions, the content of those instructions, the setting in which the instructions were given and the outcome of enquiries made by the solicitor acting in the matter, all assume importance.”

[88] If one examines the content of Ms Gueizelar's notes of her interview with Mrs Brooks it is clear that Mrs Brooks believed that her daughter was about to take over her property. She said to Ms Gueizelar "*I am just not giving her my house. No way is she getting my house. I will sell my home and not give it to her.*"⁴⁵ At this point I note that Ms Gueizelar's evidence was that she took care to write down the actual words Mrs Brooks used. It seems to me that Mrs Brooks believed that Dale was about to take over ownership or at least possession of the house in some way.

[89] Significantly, Bill also believed this. Deborah's evidence was that Bill had told her to be aware that Dale was out to get the house. Bill stated in his evidence that he considered that Dale had a 'plan' to get her hands on the property. He had also told the Blue Nurses that Dale had instigated Court proceedings to 'remove' him from the house. The Blue Nurses notes record that Bill, as well as Mrs Brooks, was 'very distressed' by this. I consider that when she executed the document on 23 September 2004 Mrs Brooks was angry, confused, and distressed and that this was the result of her own vulnerable mental state due to her marked cognitive decline but also Bill's distress and anger towards Dale.

[90] In my view it is also significant that Mrs Brooks did not say to Ms Gueizelar "I am not leaving her my house" (that is in the future) but rather the word 'giving' was

⁴⁴ [2009] VSC 64 (27 February 2009); [2010] 1 WLR 2020 at 2040.

⁴⁵ T1-55, lines 58-60, T1-56, line 1.

used. In my view that denotes confusion by Mrs Brooks about two things. First, what an administrator can actually do and second, what a will can actually achieve.

- [91] As I have indicated, one view is that the use of those words meant that Mrs Brooks believed that Dale was about to get her house. That belief was most likely due to her belief that if Dale was appointed administrator at the upcoming GAAT hearing she would somehow take possession of the property and that she and Bill would be removed. This was of course inaccurate and was a total misunderstanding of what a financial administrator's duties encompass. It is clear from Bill's evidence that he shared this belief that Dale had a plan to take over the property and that she would remove him if she was appointed administrator. As the Blue Care notes make plain he felt very threatened by Dale's application and recorded the belief that he would be removed from the house.
- [92] Ultimately, it is Mrs Brooks' very fixed view that leads me to a conclusion that she did not possess testamentary capacity on 23 September 2004. I consider that the evidence indicates that Mrs Brooks believed that Dale was about to get her property and that this very fixed belief that had in fact poisoned her affections and perverted her sense of right such that it prevented the exercise of her natural faculties. This fixed view leads to the conclusion that Mrs Brooks' mind had been poisoned against Dale.
- [93] Mrs Brooks was not in a position to actually comprehend and appreciate the claims to which she ought to give effect and she was not able to discriminate freely between those claims because she was under a significant misapprehension about the state of affairs which actually existed.
- [94] It would also seem to me that Mrs Brooks' fixed and forceful view that she had to change her will to give it all to Bill meant that Mrs Brooks did not actually understand the true nature of a will and when a will took effect. It would seem that her solution to the dilemma she was in was to make a new will. She wanted to make a new will to avoid the possibility of Dale getting the house. The inference is that she thought that by making her new will she was giving her property then and there to her son Bill thereby preventing Dale getting it. In short, she wanted to make a will so Bill would 'get' the house and prevent Dale from making decisions about it as administrator. Clearly a will has no present effect and could not prevent such an impending occurrence.
- [95] Accordingly I consider that Mrs Brooks was not acting in a considered and rational way on 23 September 2004. In particular I am not satisfied Mrs Brooks was able to comprehend the nature of the act of making a will and its effect or that she was able to fully discriminate between those who had a claim to her will. Accordingly, I am not satisfied that Mrs Brooks had testamentary capacity on 23 September 2004.
- [96] Despite the fact that such a finding necessarily disposes of the current proceedings, I shall examine the second aspect of the plaintiff's case and consider the question of undue influence and whether the 2004 Will could also be considered to be the product of undue influence.

Was Mrs Brooks subject to Undue Influence?

[97] There are a number of cases which set out the law in relation to undue influence with the classic statement by Sir J.P. Wilde in the 1868 decision of *Hall v Hall*⁴⁶ that it amounted to “Pressure of whatever character...if so exercised to overpower the volition without convincing the judgment.” As the authors of *Williams, Mortimer and Sunnucks on Executors, Administrators and Probates* neatly express it, “There is no undue influence unless the testator if he could speak his wishes would say, ‘this is not my wish but I must do it’”.⁴⁷ The law and particularly the question of the onus and standard of proof in a case of undue influence was most recently exhaustively analysed by Vickery J in the 2009 decision *Nicholson v Knaggs* as follows:

- “110 In order to establish undue influence to vitiate a will it is not sufficient to establish merely a prima facie opportunity for its exercise. Late in the nineteenth century, the English Probate Courts confirmed that the presumption of undue influence which arises in courts of equity founded upon the relationship of the parties, was not open to be applied in probate matters. In *Parfitt v Lawless*^[79] the testator left the bulk of her estate to her live-in priest, who also served as her confessor. The Court held that functions undertaken by the priest and his position in the household were alone not enough to prove undue influence because “undue influence cannot be presumed”.^[80] There is thus no room for any presumption of undue influence in the application of the principle.^[81]
- 111 It is for a party making the allegation of undue influence to demonstrate on the balance of probabilities that there has been such undue pressure which has been brought to bear that the will can be said to have been a the product of this conduct.^[82]
- 126 Further, and consistently with Article 12 of the CRPD, in my opinion, the common law test for the assessment of circumstantial evidence in cases where testamentary undue influence is alleged ought to be the test as stated by the High Court in the Chamberlain case in the joint judgment of Gibbs CJ and Mason J. In adopting this approach, greater practical effect is likely to be afforded to the principle of testamentary undue influence in the common law of Australia. As such, the approach would be consistent with the recognition of the right to exercise testamentary freedom of persons with disabilities on an equal basis with others in conformity with the spirit and intention of Article 12(2) of the CRPD. Concordance would be achieved by providing a greater measure of protection to those testators who are most vulnerable to undue influence, namely those who suffer

⁴⁶ (1868) L.R.1P. & D. 481.

⁴⁷ Martyn, J.R. and Caddick, N (Eds), “Williams, Mortimer and Sunnucks on Executors, Administrators and Probate” 19th and 7th eds Sweet & Maxwell, London, 2008, at p 204 13-49.

from disabilities, and the increasing numbers of elderly persons who fall into this class.

127 The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.

...
150 The key concept is that of “influence”. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle. The effect can be achieved in the context of a variety of circumstances and relationships. It can be the product of a chain of events, or a single event. It may be achieved by the conduct of one person or several, whether acting in concert or quite independently. Further, the influence need not be intentionally exercised by any particular person or persons for the purpose of overbearing the free and independent will of the testator. Mens rea has no place as an element calling for proof, although more often than not an intention to bring about a desired result which is contrary to the true will of a testator will be present in cases where conduct amounting to undue influence is found.”

[98] Whilst I consider that Bill managed to convince his mother that Dale was taking over the house and removing him, I do not consider that there is any evidence that he convinced his mother to change her will so that she left her entire estate to him on her death. There is no evidence that Bill wanted a particular result other than to remain in the house at that point in time. There is simply no evidence that Bill was the stimulus for Mrs Brooks to actually change her will. There is simply no evidence that he wanted that particular outcome.

[99] There is no doubt that it is for the party making the allegation of undue influence to demonstrate on the balance of probabilities that there has been such undue pressure brought to bear that the will can be said to have been the product of this conduct. The plaintiffs in this case bear the evidentiary onus of making good that claim. I am simply not satisfied that this onus has been satisfied.

[100] Accordingly, it would seem to me that the plaintiffs are entitled to an order that the Court pronounce against the force and validity of the will of the deceased dated 23 September 2004, in solemn form of law.

[101] I have not, however, heard any argument as to why the 1990 Will should be considered a ‘lost will’ and why it should be admitted to probate although I note

that all parties agree that such an order should follow if the 2004 Will is not propounded.

- [102] I will also hear from Counsel in relation to that issue as well as to the final form of the orders and as to costs.