SUPREME COURT OF QUEENSLAND

CITATION:	*Ruskey-Fleming v Cook* [2013] QSC 142
PARTIES:	**SHARYN MAUREEN RUSKEY-FLEMING (plaintiff)** **v** **DONALD RADFORD COOK (defendant)**
FILE NO:	BS1647 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	3 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2013
JUDGE:	Mullins J
ORDER:	**1. The plaintiff's claim is dismissed.** **2. The court pronounces against the force and validity of the alleged will of the late Harold Radford Cook dated 8 June 2007.** **3. The court pronounces in solemn form of law for the force and validity of the last will of the late Harold Radford Cook dated 6 March 2000.** **4. The proceeding is adjourned to a date to be fixed for further submissions on consequential orders and the costs of the proceeding.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where the testator executed wills in 2000 and 2007 – where the testator's daughter seeks to propound the 2007 will – where the testator made the 2007 will at age 91 years when suffering from numerous illnesses and cognitive decline – where the testator experienced episodes of restlessness, confusion, wandering and disorientation – where the testator understood that the 2007 will was what his daughter wanted – where it was not apparent the testator could explain why changes were being made to the 2000 will by adjusting the proportions in which two real properties were given to his son and daughter – whether the testator's cognitive decline prevented his understanding how he was disposing of his estate by the 2007 will – whether the testator had testamentary capacity

Bailey v Bailey (1924) 34 CLR 558, followed
Banks v Goodfellow (1870) LR 5 QB 549, followed
Frizzo v Frizzo [2011] QCA 308, considered
Kerr v Badran [2004] NSWSC 735, considered
Pates v Craig [1995] NSWSC 87, considered

COUNSEL: D J Morgan for the plaintiff
L J Nevison for the defendant

SOLICITORS: Gleeson Lawyers for the plaintiff
The Estate Lawyers for the defendant

[1] Mr Harold Cook (the testator) who was known as Bill died on 13 October 2007 aged 91 years. The death certificate shows that the cause of death was acute respiratory failure, but that the testator had long term chronic obstructive airways disease (COAD). He is survived by his daughter who is the plaintiff (Sharyn) and his son who is the defendant (Don). Sharyn has three children, but Don has no children.

[2] The testator made a will on 8 June 2007 (the 2007 will) which the plaintiff seeks to propound. The defendant puts in issue whether the testator had testamentary capacity or knew and approved the contents of the 2007 will. The defendant seeks to propound the will made by the testator on 6 March 2000 (the 2000 will).

[3] The parties prepared a trial bundle of three volumes of documents (exhibit 1). This comprised the death certificate, the 2000 will, two draft wills prepared in 2006, the 2007 will, the file of solicitors O'Reilly Lillicrap relating to the preparation of the 2007 will, the Talbarra Nursing Home file, the Eagleby Family Practice file and the records of ACAT and the Princess Alexandra Hospital. The only oral evidence was given by solicitors Mr O'Reilly and Mr Devlin. The trial was completed in less than one day.

2000 will

[4] On his wife's death, the testator was referred by his accountant to Mr O'Reilly of the firm O'Reilly Lillicrap. The testator made a new will in August 1999 that was prepared by Mr O'Reilly. The 2000 will is identical to the will made in 1999, but it was printed out and re-executed on 6 March 2000 for some reason that has been forgotten by Mr O'Reilly (and is not relevant). Mr O'Reilly also prepared an enduring power of attorney for the testator which he signed on 5 October 1999 which appointed Sharyn and Don severally as his attorneys for financial and personal/health matters.

[5] The 2000 will provides for the following dispositions:

(a) the sum of $20,000 to each of Sharyn's three children;
(b) the Nerang land to be divided 75 per cent to Sharyn and 25 per cent to Don;
(c) the Palm Beach property (in which Don was residing) to be given to Don;
(d) the Annerley property to be divided equally between Sharyn and Don;
(e) the residue to be divided equally between Sharyn and Don,

(f) the forgiveness of the debt owed by the plaintiff and secured by mortgage over her Waterford property.

2007 will

[6] The 2007 will provides for the following dispositions:

(a) the sum of $50,000 to each of two of Sharyn's children who are identified;
(b) the sum of $30,000 to be held on trust for the other child of Sharyn (the errant grandchild) until such time as he addresses his personal problems and shows that he is capable of prudently handling his affairs and finances;
(c) the Nerang land to be divided equally between Sharyn and Don;
(d) the Annerley property to be given to Sharyn;
(e) the Palm Beach property to be given to Don;
(f) the residue to be divided equally between Sharyn and Don;
(g) the forgiveness of the moneys secured by mortgage over Sharyn's property at Waterford;
(h) the forgiveness of the loan to the errant grandchild which was approximately $20,000.

[7] In order to understand the effect of the changes brought about by the 2007 will, a comparison of benefits under each will based on valuations obtained in August 2012 was prepared (exhibit 4). These valuations show that the value of the Annerley property was approximately the same as the combined values of the Nerang land and the Palm Beach property. The 2007 will increased the value of gifts to Sharyn by about $207,000 and decreased the value of gifts to Don by about $277,000, with the estate having a total value about $2.6m.

The testator's circumstances prior to the 2007 will

[8] The testator was living independently at his Annerley property, when he had a number of falls including two on 7 June 2006 when he injured his left knee and was admitted to Princess Alexandra Hospital. Sharyn provided information to the hospital at that time that was recorded in terms the testator had become more confused in the previous six weeks with "occasional delusions" and "worsening memory." (Although this information is repeated subsequently on the hospital file, the repetition does not alter the fact that the information related to Sharyn's observations in respect of one period of six weeks prior to the testator's admission on 7 June 2006.)

[9] General medical practitioner Dr Tutt treated the plaintiff between 5 July 2005 and 7 June 2006 and has expressed the opinion that there was no reason to doubt the testator's testamentary capacity when he last saw him on 7 June 2006 (exhibit 5).

[10] The testator was admitted to the rehabilitation unit on 22 June 2006. He fell from his bed on 6 July 2006 and fractured his left ischium (a bone in the hip) for which he was treated conservatively.

[11] An occupational therapist administered the Mini Mental State Examination (MMSE) on 28 June 2006 when the testator scored only 10 out of 30.

[12] The hospital notes record a family meeting held on 18 July 2006 with the testator, Don, a social worker and three treating doctors. The opinion was expressed by one of the doctors that the testator would not be able to cope without 24 hour supervision at any time in the future. The records note that "cognitive concerns" arising from the CT scan and the MMSE score were discussed.

[13] The testator was assessed by an Aged Care Assessment Team (ACAT) on 27 July 2006 for his eligibility for care. His recall was recorded as "0/3". He was assessed as eligible to receive high level care on a permanent basis. From 14 August 2006 he was awaiting placement in residential care.

[14] The testator was transferred from the hospital to Talbarra Nursing Home on 13 September 2006. The discharge summary from the hospital recorded his background history as including dementia/Alzheimer's disease, gastric ulcers, gastritis and leg ulcers. The summary of the testator's medical history whilst in hospital noted that the testator "displayed marked cognitive impairment which was probably contributed by new environment, urinary tract infection and fracture of the hip." An X-ray of his chest performed on 13 June 2006 showed the lungs as mildly symmetrically hyperinflated with mild bronchial wall thickening bilaterally in keeping with COAD. A CT scan of his head performed on 20 June 2006 showed evidence of previous infarcts, particularly of the left temporal lobe, on a background of small vessel ischaemic change. The nursing report referred to his "nocturnal confusion" as "worse" and the discharge cognition was noted as 10 out of 30.

[15] The discharge summary did not report a diagnosis that the testator was suffering from dementia/Alzheimer's disease, but referred to it as part of the background history. There was evidence of cognitive decline, but no definitive medical opinion as to the stage that the testator's cognitive decline had reached when he was transferred to Talbarra.

Mr O'Reilly's attendance on the testator on 27 July 2006

[16] Sharyn telephoned Mr O'Reilly's office in July 2006 about discussions that she had with the testator on updating his will, because of the personal (and potential financial) problems of the errant grandchild and the need to protect any gift to him. She also advised that the testator had lent the errant grandchild about $20,000, but the testator did not expect that money to be repaid. Mr O'Reilly attended at the rehabilitation ward of the Princess Alexandra Hospital on 25 July 2006 to meet Sharyn and then to visit the testator. When Mr O'Reilly arrived the testator was receiving physiotherapy away from the ward, and Mr O'Reilly discussed with Sharyn the problems of the errant grandchild and the nature of her discussions with the testator about any gift under his will to the errant grandchild.

[17] When the testator returned to the rehabilitation unit, he was in a wheelchair and in a drowsy state, after having worked hard at physiotherapy. Mr O'Reilly's assessment was that the testator was physically unable to give instructions on that day for any amendment to his will. Mr O'Reilly was able to have only a very limited conversation with the testator at that time.

[18] In anticipation of that attendance and, as a result of what Sharyn had advised to Mr O'Reilly's office as the potential change required to the testator's will, Mr O'Reilly had prepared a draft will that deleted the gift of $20,000 to the errant grandchild and forgave the moneys that had been lent to him.

[19] On his return to the office, Mr O'Reilly prepared another draft will as a result of his discussions at the hospital with Sharyn which still did not have the errant grandchild receiving a gift of $20,000 that each of his siblings was to receive, but added a gift of $20,000 to the son of the errant grandchild and also included the forgiveness of the moneys lent to the errant grandchild. Mr O'Reilly left it that Sharyn would contact him to make another appointment for him to attend on the testator.

Instructions for the 2007 will

[20] Sharyn did not make contact with Mr O'Reilly's office until 6 March 2007 when she advised that the testator had asked her to contact Mr O'Reilly about updating his will. When Mr O'Reilly had not responded by 16 March 2007, Sharyn followed up his office again. Mr O'Reilly was not in a position to respond immediately, and referred the file to his partner Mr Devlin.

[21] Mr Devlin spoke to Sharyn on 20 March 2007 and advised her that he would have to see the testator by himself with neither Sharyn nor her brother present. Mr Devlin had not previously met or talked to the testator. It was left that Sharyn would see the testator to organise the visit with Mr Devlin. Mr Devlin did not have a telephone conversation with Sharyn until 23 May 2007 in which she asked him to see the testator and gave him details of the address of Talbarra. Sharyn asked Mr Devlin to send her copies of the draft wills that were on file (which were the drafts prepared by Mr O'Reilly in July 2006). They were sent by facsimile on 23 May 2007.

[22] Sharyn then contacted Mr Devlin and suggested changes to one of the drafts which Mr Devlin noted on the draft will. He consulted precedents to draft a clause for a trust of the gift to the errant grandchild. The instructions given by Sharyn included increasing the bequests to her other two children to $50,000 each, altering the interests of Sharyn and Don in the gift of the Nerang property to equal shares, and devising the Annerley property solely to Sharyn. That revised draft was sent by facsimile to Sharyn on 25 May 2007. During a subsequent telephone conversation, Sharyn advised Mr Devlin that she would take that will out to the testator the following weekend or Monday, and that Mr Devlin should go out on the following Tuesday or Wednesday.

[23] Mr Devlin may have made further changes, as he sent a further draft will to Sharyn by facsimile on 29 May 2007. She telephoned him on 30 May 2007 to say that the will was "okay", but that the testator did not want Mr Devlin to come out to see him, because he did not know him, but did know Mr O'Reilly.

[24] Sharyn telephoned on 5 June 2007 to advise Mr Devlin that it was now all right for him to go to Talbarra to see the testator.

Execution of the 2007 will

[25] Mr Devlin travelled to Talbarra with his secretary Ms Allen on 8 June 2007. Mr Devlin was able to give his evidence by reference to the comprehensive handwritten diary note that he made at the time of the attendance. After the testator died, Mr Devlin prepared a memorandum addressed to Mr O'Reilly dated 20 November 2007 based on the notes he took when the 2007 will was executed by the testator and his recollection of the events of that day. That memorandum supplements the handwritten diary note dated 8 June 2007.

[26] On arrival Mr Devlin reported to the staff member at the reception desk that he was the solicitor to do a will for the testator and asked for directions to him. Mr Devlin asked whether he could get a letter from a doctor to say that the testator was "okay" and the staff member indicated that the doctor was not around, but she took his card. The staff member directed Mr Devlin to the testator's room and told the testator that there was a solicitor to see him. Mr Devlin described the testator as being in good spirits and "joking along the way."

[27] Mr Devlin explained to the testator that he had prepared a will for him based on the instructions that Sharyn had given him, but that he needed to talk to the testator and go through the will with him to ensure that was what he wanted. Mr Devlin did not have a copy of the 2000 will with him and did not discuss with the testator the differences between the 2000 will and the draft will or explore why the testator wanted to change his 2000 will.

[28] Mr Devlin asked the testator his name and he told him correctly what it was. Mr Devlin then asked where he was and the testator indicated that he was at the Talbarra retirement home and they discussed what he thought of it.

[29] In response to Mr Devlin's question as to how many "kids" did he have, the testator said something about four kids (which was wrong), but then changed that to two kids. Mr Devlin then asked who his children were, and he identified Sharyn and Don. Mr Devlin then asked the testator to tell him a little bit about them. The testator told Mr Devlin a little bit about Sharyn and a little bit about Don and then said something about a son in the UK (which was not correct). Mr Devlin then asked the testator "Do you have any grandkids?" his response was "yes", but Mr Devlin has written down "Not sure" as the testator was not sure how many.

[30] In response to Mr Devlin's question as to what a will was, the testator responded "detail of what you want to do with your possessions after you die."

[31] The testator told Mr Devlin that Sharyn looked after his affairs and Don paid the bills. When asked whether he knew exactly how much he had, the testator responded "no, I don't know exactly how much I've got, but all I know is I'm not broke." He also said that Don and Sharyn knew what was available.

[32] The grandchildren then came back into the discussion and the testator correctly identified two of the grandchildren by their names Justin and Liana. The testator went on to say something about somebody going to Royal Military College at Duntroon and spending seven years working there, but Mr Devlin cannot recall to whom that referred.

[33] Mr Devlin asked the testator how old he was and he indicated he was in his 90's, he was born about 1916 in Murwillumbah, and was the first boy born there at the Mater Hospital. In response to Mr Devlin's inquiry about what the testator owned in terms of real estate, the testator said he owned three houses, one at Fanny Street, Annerley, one at Nakula Street, Nerang and one at Palm Beach/Coolangatta and Don lived in the beach house. (The property at Nerang was not, in fact, a house, but only the land.)

[34] The conversation reverted to the grandchildren and the testator expressed concern about one grandchild (whom he correctly named) and he thought was the oldest of Sharyn's children. The testator correctly identified the errant grandchild's personal

problems. The testator indicated he wanted to put $30,000 aside for the errant grandchild in case he wasted it and he advised Mr Devlin that he had given the errant grandchild money along the way. The testator stated that "Justin's in the UK" and he indicated that he wanted to give $50,000 to each of Justin and Liana.

[35] Mr Devlin asked the testator what was happening to the houses. Mr Devlin's diary note made at the time had limited detail about this aspect of the conversation. The diary note records "Own 3 houses. Fanny St Annerley. Nakula St Nerang. Palm Beach/Coolangatta. Don lives in the beach house." The memorandum of 20 February 2007 recorded that the testator "indicated quite clearly that the house at Annerley should go to Sharyn, the house at Palm Beach should go to Don and the house at Nerang should be shared by Sharyn and Don" without recording any reasons for why those properties should be disposed of in that manner. In oral evidence Mr Devlin recalled that the testator said that the house at Annerley should go to Sharyn because she lived in that area (which was not correct as she lived at Waterford) or "it was logical that she got the house at Annerley," Don got the house at Palm Beach because he lived down there, and that the house at Nerang should be shared between the two of them. Mr Devlin recalled that the testator explained it to him that "he thought it was logical that each child get a house and then they shared something." It was not clear from Mr Devlin's evidence in relation to the gift of the Annerley property whether Mr Devlin was unsure at the time of giving his evidence which explanation for leaving the entire interest in the property to Sharyn had been given by the testator or whether both explanations were given. Mr Devlin did not raise with the testator the relative values of the three properties. Mr Devlin was satisfied to proceed on the basis that the testator knew he had real property at three places.

[36] The conversation went back to the errant grandchild and the testator said that he "just blew his money that he got" and that "left a bit of a scar". The testator said that he would do all right out of the money he would get from the testator. The testator said the other two [grandchildren] were to get more than the errant grandchild because he had been given about $20,000 during the testator's life, although the testator could not remember the exact amount. The testator felt the rest and residue should go to Sharyn and Don. The testator said that Don had no children that he could remember and that his "memory is going."

[37] The testator told Mr Devlin that he had "loaned Sharyn to fund her horse business" and did not stipulate whether she had to repay the loan. The testator went on to say that he did not want anybody to repay any of the moneys that he had loaned them along the way. Mr Devlin noted in his handwritten notes:

> "Very bright, but memory is going. Very solid on the point that Sharyn looks after him and she has discussed it all with him – whatever she says we should accept."

[38] The emphasis that the testator placed on Sharyn's wishes was confirmed by how Mr Devlin recited this part of the discussion in his memorandum dated 20 November 2007:

> "He was very solid on the point that Sharyn looks after him and she has discussed everything with him and whatever she says he would accept. He said that I should speak with her to (*sic*) and I should accept whatever she says."

[39] Mr Devlin asked the testator about a power of attorney and he did not know whether he had done one. (Mr Devlin therefore telephoned his office and ascertained there was an enduring power of attorney.)

[40] Mr Devlin then recalls kneeling down beside the testator with the will out, reading it with him, and explaining what each clause did. The testator affirmed to Mr Devlin as he was going along that each clause was right, by responding "That's right." Mr Devlin was satisfied that he could take instructions for the will from the testator and that he did not "get lost in the whole process." Mr Devlin cannot recall any specific question that the testator asked of him as he went through each clause of the will. Mr Devlin could not recall anything which indicated to him that the testator did not agree with the clause or had a problem with any clause.

[41] Either the testator made a request to practise his signature or, because of Mr Devlin's experience in the difficulty an elderly person sometimes has in signing his or her name, he had the testator practise his signature on the diary note that Mr Devlin made about the power of attorney. The first practice was a squiggle that was unrecognisable as his signature. The second practice was recognisable as his signature "HR Cook". It resembled the signature on the 2007 will that was witnessed by Ms Allen and Mr Devlin. According to both Mr Devlin's recollection and the time recording for billing purposes, his attendance on the testator on this occasion lasted about one hour.

[42] Subsequently Dr Khan (who was the testator's treating doctor at Talbarra) sent a letter to O'Reilly Lillicrap dated 18 June 2007 in relation to the testator, stating:

> "Viewing the recent MMSE, I do not think that Mr H Cook can make legal decisions."

[43] Mr Devlin did not see the doctor's letter until it was brought to his attention after the testator's death.

Observations about the testator in the Talbarra file

[44] The health assessment that was undertaken of the testator on his admission to Talbarra appears to have been based on the discharge summary from the Princess Alexandra Hospital. The medical issues are listed as dementia/Alzheimer's disease, gastric ulcers and gastritis, weight fluctuation, falls, cognitive status, incontinence, recurrent urinary tract infections and COAD. Talbarra was provided with a copy of the enduring power of attorney in favour of Sharyn and Don. It is apparent from the Talbarra file that the staff had recourse to Sharyn and Don for the purpose of purchases required for the testator's care and decisions in relation to his care and treatment.

[45] The progress notes made daily by staff at Talbarra in respect of the testator from his arrival record persistent and frequent episodes of restlessness, confusion, wandering and disorientation.

[46] A registered nurse administered the MMSE to the testator on 31 October 2006. He scored 16 out of 30, where a score of less than 22 is indicative of significant impairment. The nurse recorded that his recall was poor and he was unable to calculate or comprehend, but his language was satisfactory.

[47] Although the progress notes immediately before and after the execution of the 2007 will are most relevant, some of the episodes in the preceding months indicate a significant degree of confusion. On 4 December 2006 the testator was observed using his denture container as a way of cleaning his urine bottle. On the same day the testator tried to cuddle the carer and touch her in an inappropriate way.

[48] When the testator's three monthly review of his health and care needs was undertaken on 16 December 2006 it was noted that "Level of Bill's dementia fluctuates daily but he continues to be able to communicate his needs but mostly confused about time and place."

[49] On 19 March 2007, the testator was noted as "wandering around … looking for his wife. Asking residents, staff and visitors if they had seen his wife." In view of the fact that the testator's wife died in 1999, it is not just the fact that the testator was looking for his wife, but that on this occasion the testator settled with the false explanation given to him by a staff member that his wife may be out shopping. On 18 May 2007 at 9pm, the testator was noted to be restless and "threatening to put a crowbar through window or door to escape" and "counting money in his room."

[50] The testator was noted on 2 June 2007 at 2:30pm as "restless and confused". Later on the same day he refused to eat dinner and was observed to be "restless wandering not knowing where he is or what he was doing."

[51] At 9pm on 5 June 2007, it was noted that the testator "offered staff sex numerous times tonight."

[52] On the day before the testator signed the 2007 will, he was visited by both Don and Sharyn. The progress notes record that a solicitor was coming the next day to get the testator to sign some papers. I infer that a staff member obtained that information from Sharyn. The staff member then discussed with Sharyn the testator's behaviour over the past days and recorded that "Sharyn's mother was Irish – may be Irish wife Bill was looking for." On 8 June 2007 at 9pm, it was noted that the testator "thinks he is on honeymoon again. Restless and looking for his wife."

[53] The progress notes for the testator for 10 June 2007 at 7pm record:

> "Standing at Nurses station wanting to pay the rent – all explanations given that Don pays all his rent etc – wouldn't accept this, completely confused and disorientated. This happens most PMs – last night looking for signs to Switerland (*sic*)?."

[54] Another MMSE was administered on 11 June 2007. The testator refused to undertake some of the tasks involved in the examination including writing a sentence and copying the design. He had no orientation as to time, date or place. His score was a very low eight out of 30 which was contributed in part by his refusal to do some of the tasks. The registered nurse who administered the examination noted, however, that the testator had "nil recall" and showed "poor planning/concentration."

[55] A review of the care plan for the testator undertaken on 12 June 2007 recorded that his communication "remains the same – confusion worse sometimes" and, in relation to mobility, that he "continues to wander day and night." On 13 June 2007 it was recorded that a staff member had talked to Sharyn about the testator's "increased confusion and disorientation."

[56] Dr Khan ordered a CT scan of the testator's brain that was performed on 26 July 2007 which showed "age appropriate atrophy" and the report noted that "Paraventricular and subcortical white matter hypodensities are reflective of chronic small vessel ischaemic change."

What is testamentary capacity?

[57] The starting point as to the meaning of testamentary capacity is the classic statement set out 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 being about a disposal of it which, if the mind had been sound, would not have been made."

[58] Where the issue is the testamentary capacity of an elderly person in cognitive decline, Santow J in *Pates v Craig* [1995] NSWSC 87 at p 4 observed:

> "Unsoundness of mind may be occasioned by physical infirmity or advancing years. However, while extreme age or illness will call for vigilant scrutiny by the Court, neither is of itself conclusive evidence of lack of testamentary capacity. Age or illness will only displace a prima facie case of testamentary capacity if there is evidence the deceased's mental facilities had been so affected as to make him or her unequal to the task of disposing of his or her property. That is, the decay of intelligence must have been to such an extent that the proposed testator did not appreciate the testamentary act in all its different bearings: Re Hodges at 707; Battan Singh v Amirchand [1948] AC 161; Bailey v Bailey (1924) 34 CLR 558; Banks v Goodfellow (1870) LR 5 QB 549; Public Trustee v Farrell, Estate of Fowler (Powell J, Supreme Court of NSW, 22 March 1989, unreported)."

[59] The application of the *Banks v Goodfellow* test has to be adapted to "modern life," as explained by Windeyer J in *Kerr v Badran* [2004] NSWSC 735 at [49]:

> "In dealing with the *Banks v Goodfellow* test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years: the average life expectation of males in Australia in 1995 was 75 years. Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today

> may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing 'the extent' of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate. What is required is the bringing of the principle to bear on existing circumstances in modern life."

[60] The statement from *Kerr v Badran* was applied in *Frizzo v Frizzo* [2011] QCA 308 at [24].

Did the testator have testamentary capacity?

[61] As Sharyn is propounding the 2007 will, she bears the onus of proving that the testator had testamentary capacity when he made the 2007 will: *Bailey v Bailey* (1924) 34 CLR 558, 570-572.

[62] As the testator's cognitive decline had been evident from at least mid 2006, it is necessary to carefully evaluate all the evidence relevant to his testamentary capacity on 8 June 2007. Sharyn cannot simply rely on the due execution of the 2007 will to discharge the onus she bears.

[63] Sharyn places great reliance on Mr Devlin's evidence as to his meeting with the testator that resulted in the signing of the 2007 will by the testator. Although Mr Devlin genuinely believed that the testator had testamentary capacity at the time he executed the 2007 will. Mr Devlin's evidence is not the only evidence before the court on the question of testamentary capacity. Mr Devlin's opinion does not displace the court's role in deciding the issue of whether the testator, in fact, had testamentary capacity on the basis of all the relevant evidence.

[64] There was a tendency for both counsel in their questioning of Mr Devlin and submissions to focus on the manner in which he went about satisfying himself about the testator's testamentary capacity before the 2007 will was signed. The greater the preparation and the care exercised by a solicitor when taking instructions from a client about a will and attending on the client for the purpose of having the will signed, the more likely there will be available to the court relevant evidence to determine the issue of testamentary capacity. Whether or not the solicitor has complied with what is reasonably required to carry out the solicitor's professional duty in those circumstances of a particular case does not dictate the conclusion as to testamentary capacity. That depends on the evaluation by the court of the evidence relevant to the testamentary capacity of the person making the will.

[65] This is an unusual case in that no expert medical opinion has been called as to the effect of the testator's cognitive decline at the time he signed the 2007 will. Dr Tutt's opinion as to testamentary capacity of the testator a year earlier is irrelevant. Dr Khan's opinion based on the MMSE administered on 11 June 2007 does not add anything to the result of the MMSE. It is also not apparent from Dr Khan's letter whether Dr Khan considered what is required to prove testamentary capacity under *Banks v Goodfellow*. The result of the MMSE may be an indicator of cognitive impairment, but it is a blunt instrument and must be considered in conjunction with other evidence of the testator's capacity at the time of making the will, as there were observed fluctuations in the testator's level of confusion and orientation.

[66] The testator had personally given the instructions for the 2000 will which, apart from the gifts of $20,000 to each of Sharyn's three children, divided his estate between Sharyn and Don. Using the valuation figures obtained in August 2012, the division of the assets between Sharyn and Don slightly favoured Don, but in broad terms could be described as approximately equal. What is noteworthy about the gifts in respect of the three properties under the 2000 will is that the proportions of each property given to Sharyn and Don are different, but accommodate overall an approximately equal division, after the Palm Beach property was given entirely to Don. There was absolutely no evidence adduced to suggest any reason that the testator had expressed to alter the division of his real property between his two children achieved by the 2000 will.

[67] It is apparent from the testator's conversation with Mr Devlin that he was aware of the errant grandchild's problems which was the original reason for Sharyn's approach to Mr O'Reilly in 2006 to prepare a new will for the testator. The instructions for altering the interests of Sharyn and Don respectively in the Nerang land and the Annerley property were given to Mr Devlin by Sharyn in May 2007. She did not convey to Mr Devlin a reason for making those changes that could be confirmed by Mr Devlin with the testator. From what the testator conveyed to Mr Devlin, he had sufficient understanding at the time of the meeting with Mr Devlin that the will that was being discussed was what Sharyn wanted. It is not apparent that the testator himself could explain why he was making the changes in the proportions of the Nerang and Annerley properties given to Sharyn and Don.

[68] It was suggested in submissions by Mr Morgan of counsel that the focus should be on the contents of the will that was executed rather than changes made to the 2000 will. It is correct to say that the focus is on the testator's understanding of the contents of the 2007 will in the light of his understanding of his wealth and the claims to which he should have had regard in disposing of his property. The way of testing that understanding, however, is to look at the changes effected by the 2007 will in the context of the claims of those to which the testator should have had regard. Apart from the errant grandchild's personal problems, there was nothing to suggest that the testator had any different relationship with Sharyn and Don when he made the 2007 will than when he made the 2000 will. In the circumstances of this case in which the instructions were generated for the 2007 will by Sharyn on the testator's behalf, without there being any obvious explanation for those changes (apart from those relating to the grandchildren), it must be clear from the evidence that the testator did have the capacity to understand all the changes that he was making by the 2007 will and the effect of those changes.

[69] The confusion which the testator experienced that had persisted in episodes from his arrival at Talbarra was present on the days leading up to 8 June 2007 and was again noted in the Talbarra's records on the evening after signing the 2007 will. Of concern is that the testator made fundamental errors initially in his meeting with Mr Devlin about the number of children and grandchildren that he had. Even allowing for the approach of adapting the *Banks v Goodfellow* test to modern life, the testator could not give Mr Devlin any detail of his financial worth and could not tell Mr Devlin that he had an enduring power of attorney. Mr Devlin used the terms of the 2007 will as the reference point for the discussions with the testator and the testator appears largely to have responded to Mr Devlin's questions within that framework. Although the MMSE score on 11 June 2007 was three days after signing the 2007 will, it confirmed the confusion and disorientation of the testator leading up to and including 8 June 2007 that was otherwise noted in the Talbarra file.

[70] To the extent that Mr Devlin recorded the testator's explanation that it was logical to leave one property to each child and then for them to share the third property, that logic proceeds on an assumption about the respective values of the properties which was not a matter that the testator from his own admission was capable of exploring with Mr Devlin.

[71] The testator's evident cognitive decline in conjunction with his other health issues requires the court to exercise vigilance in assessing the testamentary capacity of the testator when he signed the 2007 will. Despite Mr Devlin's opinion, I am satisfied from close scrutiny of what occurred at the meeting of Mr Devlin with the testator and the observations recorded about the testator on the Talbarra file, that Sharyn cannot discharge the onus of proving on the balance of probabilities that the testator's cognitive deficits (in conjunction with his advanced age and other illnesses) did not prevent him from having testamentary capacity (or being up to the task of disposing of his property) when he made the 2007 will.

Conclusion

[72] As the issue of testamentary capacity has been determined against Sharyn, it is unnecessary (and pointless) to deal with whether the testator knew and approved the contents of the 2007 will.

[73] It follows that the plaintiff's claim must be dismissed and the defendant succeeds on his counterclaim for a declaration as to the invalidity of the 2007 will and for proof of the 2000 will in solemn form. As the parties may require an opportunity after these reasons have been published to make submissions on the consequential orders that should be made in respect of an application for a grant in common form of probate of the 2000 will and the costs of the proceeding, I will make the following orders:

1. The plaintiff's claim is dismissed.
2. The court pronounces against the force and validity of the alleged will of the late Harold Radford Cook dated 8 June 2007.
3. The court pronounces in solemn form of law for the force and validity of the last will of the late Harold Radford Cook dated 6 March 2000.
4. The proceeding is adjourned to a date to be fixed for further submissions on consequential orders and the costs of the proceeding.