SUPREME COURT OF QUEENSLAND

CITATION:	*Sargent & Anor v Brangwin* [2013] QSC 306
PARTIES:	**BRUCE NEIL SARGENT AND TIMOTHY JOHN McQUAID AS EXECUTORS OF THE WILL OF WARWICK PAUL RYAN DECEASED** (plaintiffs) **v** **SUSAN ELIZABETH BRANGWIN** (defendant)
FILE NO/S:	BS 11050 of 2011
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 November 2013
DELIVERED AT:	Brisbane
HEARING DATES:	18, 19, 20 and 21 June 2013
JUDGE:	Dalton J
ORDER:	**Judgment for the plaintiffs**
CATCHWORDS:	SUCCESSION – TESTAMENTARY CAPACITY – where the deceased made a will in July 2010 – where this will left the majority of the deceased's estate to the defendant – where the deceased revoked all former wills in a February 2011 will – where this will left his main asset to someone other than the defendant – where the deceased was physically ill when both wills were made – whether the deceased had testamentary capacity

ASIC v Hellicar [2012] HCA 17
Banks v Goodfellow (1870) LR 5 QB 549
Frizzo & Anor v Frizzo & Ors [2011] QCA 308
Frizzo & Anor v Frizzo & Ors [2011] QSC 107
Gibbons v Wright (1954) 91 CLR 423
Government Insurance Office of New South Wales v Bailey (1992) 27 NSWLR 304
Grynberg v Muller; Estate Late M Bilfeld [2001] NSWSC 532
Jones v Dunkel (1959) 101 CLR 298
In the Marriage of J and KA Zantiotis (1993) 113 ALR 441
Nicholson v Knaggs [2009] VSC 64
Pates v Craig [1995] NSWSC 87
R v Martin [2000] SASC 436

Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197

COUNSEL: T Matthews for the plaintiffs
R Treston for the defendant

SOLICITORS: Payne Butler Lang for the plaintiffs
McCullough Robertson for the defendant

[1] This proceeding is for probate of the will of Warwick Paul Ryan dated 11 February 2011 brought by the executors named in that will. The defendant is Mr Ryan's daughter. She filed a caveat objecting to the grant of probate. She propounds a will made by Mr Ryan on 25 July 2010.

Provisions of the Wills

[2] The will dated 25 July 2010 is a home-made "kit will" in the testator's handwriting. It makes Mrs Brangwin his executor, or in the alternative, her husband. It leaves $10,000 split equally between Peter Drake, Eileen [sic] Drake and Neta Dunne [sic] (nee Drake). It leaves the rest and residue to Mrs Brangwin, or alternatively, to her husband.

[3] The will dated 11 February 2011 revokes all former wills. It appoints as executors two of the partners of the law firm CSG Law. It leaves the testator's house at Riverview Drive, Burrum Heads (his main asset) to Neta Jean Dunn. It leaves the testator's car to Gregory Leonard Dunn and $10,000 to Elaine Joyce Drake. Each of these people is described as a friend in the clause making the bequest. It leaves the rest and residue of the estate (about $300,000) equally to Mrs Brangwin, her husband and each of her two children (should they attain the age of 21 years).

[4] Mr Ryan was in poor health at the time he made both the 2010 and 2011 wills. It will be necessary to come to his health in detail, but to give an idea of where the two wills fall in relation to his history of hospitalisation, I give the following summary. On 14 May 2010 Mr Ryan presented as an emergency at the Hervey Bay Hospital. He had surgery for bowel cancer, complications ensued and he became very ill – intubated in ICU. He was moved from the Hervey Bay Hospital to the Wesley Hospital and discharged from there on 15 July 2010 for rehabilitation at the Port Macquarie Hospital. He made the 2010 will in the Port Macquarie Hospital. He remained there until 13 August 2010. He then spent three weeks living with the Brangwins in their home at Port Macquarie. On 9 September 2010 he was driven home to Burrum Heads by Mr Brangwin. He remained at home until he was taken by ambulance on 11 January 2011 to the Hervey Bay (and later Maryborough) Hospital. He was discharged home on 4 February 2011. He made the 2011 will one week later at his home. Nine days later he returned to the Hervey Bay Hospital by ambulance and remained there until his death on 1 March 2011. There was no doubt he was physically ill through the entirety of this period. The question before me concerns his capacity to make a will.

Making the February 2011 Will

[5] One of the plaintiffs, Bruce Sargent, was the solicitor who took instructions for, and attended at the execution of, the February 2011 will. He is a partner of CSG Law and one of the executors. He was admitted as a solicitor in New Zealand in 2002,

and in Queensland in 2005. Prior to that he had worked as a registered valuer in Queensland from 1994-1997 and in New Zealand as a valuer from 1997-2001. He attended on Mr Ryan in Mr Ryan's home on 9 February 2011 to take instructions for the will, and again on 11 February 2011 to have the will executed. On the first occasion he attended with a secretary, Ms Muratori, and on the second occasion with a paralegal, Ms Smith. I accept that these latter two witnesses gave honest evidence, and that their evidence was reliable. It is doing Ms Muratori and Ms Smith no disrespect to say that their evidence was chiefly supportive of, but not as detailed as, the evidence of Mr Sargent.

[6] Mr Sargent gave evidence that he had considerable experience in taking instructions for wills whilst living at Hervey Bay. He said because of the elderly population he was preparing wills at the rate of about five per week. Mr Sargent may not have done a perfect job in taking instructions for Mr Ryan's will,[1] but in my view he did a competent enough job. He has chosen the more relaxed surrounds of the North Coast as the place he prefers to practice, and some of his evidence was expressed casually and imprecisely. However, I think he did a conscientious job in taking instructions for the will and brought to bear a real and substantial consideration of the issues involved in that, including a consideration of Mr Ryan's capacity. I accept his evidence as honest and reliable.

[7] On the first occasion Mr Sargent attended Mr Ryan's house he was greeted at the door by Ms Neta Dunn, who showed him to the dining table where Mr Ryan was seated. Mr Ryan introduced Neta Dunn as his "friend and carer". After showing Mr Sargent to the dining table Ms Dunn left not only the room, but the house. She re-emerged at the end of the conversation, after instructions had been taken. Mr Sargent thought that the house was "very tidy and very well maintained". Mr Sargent described Mr Ryan as thin, frail and elderly. There was an oxygen cylinder nearby, but at no time did Mr Ryan use oxygen in Mr Sargent's presence. Mr Sargent thought that Mr Ryan coughed perhaps three or four times during the consultation. He thought the consultation lasted around 45 minutes. Mr Ryan said he had suffered from cancer and told Mr Sargent that he had been in hospital, but Mr Sargent could not recall medical detail beyond that. He recalled that Mr Ryan expressed the view that he was recovering from his illness.

[8] Mr Sargent prepared a written will instruction sheet and as well prepared a file note of his attendance on Mr Ryan. He said he only prepared the latter type of document where he had some concern as regards the capacity of the testator, so he did turn his mind to the issue. Mr Sargent did not have any doubt as to Mr Ryan's capacity. He said his practice, if he did have "any concern at all", was to seek a certificate from the testator's general practitioner and that he did this around 10 to 15 per cent of the times he took instructions for preparation of a will. He recalled Mr Ryan particularly: his strong personality made an impression on Mr Sargent; Mr Ryan died not long after making his will, and soon after that Mr Sargent received a letter

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[1] In particular, in circumstances where the solicitor's firm is to be executor of a will, the solicitor ought to specifically warn the testator about costs that might entail, and this was not done. Further Mr Sargent accepted instructions and drew a will which created trusts on behalf of Mrs Brangwin's two children who were quite young. The trusts were expressed to last until they were 21 years old. The trusts were of sums around $75,000 each. One might expect that costs would soon consume the trust property. It appears that Mr Sargent did not advert to this. I think it irrelevant to the questions which are central to my determination as to Mr Ryan's capacity.

from McCullough Robertson challenging the will. Mr Sargent said that Mr Ryan showed no signs of confusion or vagueness in the interview.

[9] It appeared that Mr Ryan had prepared for the interview with the solicitor: at the table with him he had the July 2010 will and a notebook in which he had recorded a list of six bank accounts and term deposits with their account numbers and balances. When asked by Mr Sargent, Mr Ryan said he had made a prior will and produced the July 2010 will. Mr Sargent read through it and questioned him as to why he wished to change his executor. Mr Ryan said that "he did not trust his daughter".

[10] Mr Sargent said it was his practice to ask intending testators to tell him what assets they had, and he asked Mr Ryan. Mr Ryan replied that he owned the home he lived in – 82 Riverview Drive, Burrum Heads – and a house at Urangan, with Vivian Gill. When asked he correctly instructed Mr Sargent that he was a joint tenant with Vivian Gill. There was a discussion as to severing that joint tenancy and Mr Ryan said clearly that he wanted the joint tenancy to subsist because he wanted the property to go to Vivian Gill when he died. He was asked whether he had any shares or life insurance. Correctly, he said that he did not. He was asked whether he had any superannuation. Correctly, he replied that he did have – in the New South Wales State Superannuation Fund – but that he had an annuity only and it was not transferrable. When asked about bank accounts Mr Ryan produced the list of accounts and term deposits and insisted that Mr Sargent write down the details. Mr Ryan had recorded this list in his own hand, presumably in preparation for the interview. Mr Sargent did not need these details, but he said Mr Ryan was "a little bit demanding" about the matter and he found it easier simply to comply with the request to write down the details.

[11] There was no evidence that any information which Mr Ryan gave Mr Sargent as to his assets was not correct. The information he gave him was specific and detailed.

[12] Mr Sargent then took instructions as to the way in which Mr Ryan wished to leave his assets. He recorded on the will instruction sheet that Mr Ryan wished to leave his home at 82 Riverview Drive to Neta Jean Dunn; his car to Gregory Leonard Dunn, and $10,000 cash to Elaine Joyce Drake. Both Neta Dunn and Elaine Drake were described in the instructions as friends and Gregory Dunn was described as Neta's husband.

[13] The spelling of Neta Dunn's name and Elaine Drake's name in the will instructions, and the February 2011 will is accurate, in contrast to the 2010 will. There was a small paper note found with the testator's papers which contained these full names of the Dunns and Mrs Drake and two addresses. It was not in the testator's handwriting, or in the handwriting of anyone from the solicitor's firm. The inference for which the defendant contended was that either Neta Dunn or Mrs Drake had prepared the note so that Mr Ryan could use it when giving instructions as to his will. That is a fair inference in all the circumstances. But there is no evidence that it was not done at Mr Ryan's request, or that that request was not free, voluntary and competent.

[14] As to residuary beneficiaries, the names Susan Elizabeth Brangwin, Robert Russell Brangwin (her husband), Blake Brangwin and Olivia Brangwin (her children) are listed on the will instruction sheet. Their relationship as daughter, son-in-law, grandson and granddaughter is listed. They are recorded as the residuary

beneficiaries to share equally in the rest and residue of the estate. Their address in Port Macquarie is recorded. All of these details are correct.

[15] Mr Sargent asked Mr Ryan whether he would prefer to leave the Riverview Drive home to his daughter as he had in his July 2010 will. Mr Ryan replied in the negative. He repeated that he did not trust his daughter and said something to the effect, "you can't choose your family but you can choose your friends". Mr Sargent discussed the matter a little more, explaining that leaving the home to Ms Neta Dunn might cause a claim to be made on the estate. Mr Ryan replied that he doubted such a claim would be made, but if it was, he did not care – he would be dead. Mr Ryan said that he wanted his Riverview Drive home to pass to Neta Dunn as she had done more for him than his daughter had. He also said that his daughter would be chasing his money after his death.

[16] Mr Sargent attempted to persuade Mr Ryan to give instructions for an enduring power of attorney. He "strongly suggested it", but Mr Ryan was not interested; he said he wanted to look after his own affairs. In cross-examination it was suggested to Mr Sargent that this response showed Mr Ryan did not understand the purpose of an enduring power of attorney. Mr Sargent rejected this, saying he thought Mr Ryan did understand, but was simply not going to give instructions in that regard.

[17] Mr Sargent was criticised by counsel for the defendant, both in cross-examination and in submissions, because he did not push Mr Ryan on points like this and further cross-question him as to his motives and intentions. Mr Sargent's explanation in evidence was that Mr Ryan was "the kind of guy that when he made his mind up … it was very hard" – t 1-60. This is very similar to the explanation given by Mrs Brangwin when she was asked why she did not pursue with her father the idea that his disinheriting his son's children was unfair – "My dad was a strong person … Dad was very strong, and I just didn't. Yep." – t 2-87. Provided that Mr Sargent did not have doubts about Mr Ryan's capacity, and I accept he did not, I do not think it was part of Mr Sargent's role to cross-question Mr Ryan on his motives and intentions. He was there to take his instructions.

[18] Ms Neta Dunn was the daughter of Mr Peter Drake. Mr Ryan spoke about Mr Drake to Mr Sargent. He said Mr Drake was his best friend. Mr Peter Drake had died – t 1-73 and t 2-58 – since the making of the July 2010 will. He explained that Neta was the daughter of his best friend and that he had known her for many years – t 1-71. Ms Muratori also remembered that he spoke very fondly of Neta's father and how they had enjoyed fishing together and that sort of thing – t 2-17. Mrs Brangwin knew of Mr Drake as someone who had worked for her father and been his friend over many years – t 2-92.

[19] At the conclusion of the interview on 9 February 2011, Mr Ryan wanted to sign the will as soon as possible. He was impatient that it would take two days to prepare, and as a result, Mr Sargent arranged for him to sign the will instructions on every page then and there.

[20] On 11 February 2011, Mr Sargent and Ms Smith, the paralegal, attended on Mr Ryan at his home. They were met at the door by Mrs Elaine Drake and again taken to the dining table. At first Mr Ryan showed no interest in reading his will and simply wished to sign it, but Mr Sargent insisted, and offered to read the will to

him. He did so, paraphrasing it. This was an interactive process and Mr Ryan made comments to the effect that he agreed throughout the reading. At the end Mr Ryan questioned why the bank accounts were not recorded in the will – he had been insistent two days earlier that they be recorded by Mr Sargent. Mr Sargent explained that they were part of the rest and residue and did not need to be specifically listed. Mr Ryan himself then took the written document and appeared to read it. It was then executed. Once again, Mr Sargent had no doubts as to his capacity.

[21] There were suggestions in cross-examination that Mr Sargent may have discussed matters in issue in this case with Ms Muratori and Ms Smith, or that Ms Muratori, Ms Smith and Mr Sargent may have read each other's file notes at some stage. Mr Sargent allowed for the latter possibility. This should not have happened, but it does not affect my view of Mr Sargent's evidence, which was that he was reliable. There was also cross-examination as to allegations in the reply originally filed by and on behalf of Mr Sargent. It pleaded that the defendant had said on questioning by Mr Sargent that Mrs Brangwin had forced the deceased man to make the July 2010 will. Mr Sargent was quite clear that he did not give those instructions. I accept his evidence as to this.

[22] There is no doubt that Mr Sargent was not told anything like the full extent of Mr Ryan's illnesses. To the contrary, Mr Ryan told Mr Sargent that he was looking forward to recovering and going fishing again. He had been released from hospital on 4 February 2011 and on 20 February 2011 was re-hospitalised and was dead only 18 days after making his will. No doubt had Mr Sargent been aware of just how ill Mr Ryan was, he may have considered obtaining a medical report as to his capacity, and in that regard the issues in this proceeding might have been different, or indeed the proceeding may not have been brought at all. As it happened, Mr Ryan did not tell Mr Sargent the truth about his illnesses; Mr Sargent turned his mind to capacity but had no doubt that Mr Ryan had capacity and did not obtain any medical report. It does not mean that Mr Sargent's observations and evidence as to capacity are not valid. I need to assess all the evidence and his is a very important part of it, albeit he was unaware of some important medical facts.

[23] Mr Ryan did not tell Mr Sargent that he had a son who had died leaving children. I do not consider this odd or an indication that Mr Ryan did not have capacity. Mr Ryan and his son were estranged during the son's lifetime and Mr Ryan was estranged from the grandchildren – tt 2-41 and 2-54. The estrangement was longstanding. Mrs Brangwin was well aware of it. While she regretted it, she accepted that she could not change her father's views. The 2010 will likewise made no gift to Mr Ryan's son or his son's family.

[24] When talking to Mr Sargent, Mr Ryan called Ms Gill by the name Phyllis. This was the name he had always used for her, and there was nothing odd about his doing so when talking to Mr Sargent – t 2-40. Mr Ryan did know, and supply Mr Sargent with, Ms Gill's full and correct name, Vivian Elizabeth Gill.

[25] There is one matter which might be considered odd. In October 2010 the Riverview Drive house had been listed for sale (for an amount of $790,000) including furniture. This was not mentioned to Mr Sargent. This is an equivocal piece of evidence, like many others in the case. Mr Ryan may have forgotten listing the home. He may not have realised, or have been capable of realising, how a sale of

his home before death would drastically change the distribution of assets made in his 2011 will. On the other hand, he may have formed a view that he would likely die before any sale – the house had been listed for some months. I cannot draw any inference from this fact alone, although no doubt it is something to be considered as part of the evidence as a whole.

The Testator's Social Circumstances and Medical History in 2010

[26] Mr Ryan was 76 at the time he died. He had been living by himself in his home at Riverview Drive, Burrum Heads. He was an intelligent man – t 2-54 – who had studied at university but apparently worked as a commercial fisherman – he owned his own boats and employed people to assist him in his business – t 2-41. It seems he was astute and had made money and invested it over time. Mr Sargent gave evidence that his firm had undertaken 10 conveyances between 2000 and 2005 on behalf of Mr Ryan. Buying and selling land was undertaken by Mr Ryan as an investment strategy – t 2-84. Mrs Brangwin described her father as a very strong person, in the context of explaining that she would not contradict his expressed wishes or attempt a discussion of them – t 2-87. Mr Ryan smoked until approximately 10 years before his last illnesses, drank too much at the time of his admission to hospital in 2010, and enjoyed fishing with his friends in the Burrum River. In 2004 he had an expensive boat built to his own design – t 2-95. He had been married twice and as well had had a de facto relationship with Vivian Gill. He was estranged from his son and his son's family and, as discussed in detail below, had relatively little to do with his daughter, Mrs Brangwin, before his 2010 illness. Overwhelmingly, I have the view that he lived an independent life, working hard and pursuing the things he enjoyed.

[27] By 2010 Mr Ryan was suffering from emphysema, chronic obstructive airway disease and cancer of the bowel. There is no evidence that he had been diagnosed with any of the conditions, but no doubt he was aware of at least the effects of the first two. On 14 May 2010 he presented as an emergency at the Hervey Bay Hospital with bowel obstruction. Surgery revealed advanced bowel cancer. Mr Ryan made a poor recovery from the surgery, both in terms of his bowel function (rupture and prolonged ileus) and in terms of his respiratory problems. He was too frail to be considered for chemotherapy to treat what remained of his cancer.

[28] By 23 May 2010 he was intubated in ICU and on 24 May 2010 he was transferred to the Wesley Hospital in Brisbane with respiratory failure secondary to his surgery and underlying COAD. From 20 May 2010 he is noted as suffering from confusion and respiratory failure. At the Wesley Hospital he was put into ICU, returned to the ward on 30 May and then returned to ICU on 6 June for another week. It is evident that Mr Ryan was very ill during his stay in the Wesley and that he was on oxygen via a mask or nasal prongs much of the time. There are notes in the chart as to his being confused from time to time. There is a medical note on 1-2 July 2010 that he is much improved and a physiotherapy note on 2 July that he appears more oriented and remembers discussions from previous visits. There is a further medical note on 2 July 2010 that due to patient's good progress, as well as concerns raised by daughter, it seems appropriate for patient now to be for full resuscitation. There is a record that Mr Ryan has discussed this with the doctor. A nursing note on 3 July records that Mr Ryan is more alert and oriented that shift, but still confused at times.

So far as I can see, that is the last note of Mr Ryan suffering confusion in the Wesley chart.

[29] Mr Ryan was moved to a hospital in Port Macquarie for rehabilitation on 15 July 2010 and remained there until 13 August 2010. The reason for this transfer was that Mrs Brangwin and her family lived in Port Macquarie. The hospital chart from Port Macquarie shows a slow improvement in Mr Ryan's condition. It is clear from notes in the chart that problems with his bowel never completely resolved. Throughout the chart the most common problems documented are his respiratory state and lack of condition. At first attempts are made to have him depend less on oxygen but, as time goes on, it seems to be accepted that he is oxygen dependent and by the beginning of August 2010, arrangements are in place for him to have oxygen at home. When he is eventually discharged it is with arrangements for home oxygen.

[30] At some stage in the Port Macquarie Hospital an occupational therapist administered a mini-mental state examination (MMSE). Mr Ryan scored 21/30. This occupational therapist expressed concern on 5 August 2010 and on 9 August 2010 that Mr Ryan did not understand his oxygen requirements; lacked insight into his poor state, and that both he and Mrs Brangwin had unrealistic ideas about his living independently. She was concerned that when he was discharged to Mrs Brangwin's house he would be alone for about eight hours each day and that Mrs Brangwin refused external care services for him whilst at her house.

[31] While notes about oxygen requirements, tiredness and shortness of breath on exertion are constant through the Macquarie Hospital chart, there is no note of confusion or of mental decline other than the above notes made by the occupational therapist. That is, there are no nursing notes or medical notes. The 25 July 2010 will was made while Mr Ryan was at that hospital and the notes for the day are unremarkable.

[32] As to the results of the MMSE, Dr Berry agreed that the test is a screening, rather than diagnostic, tool – t 3-82 – and she readily said in cross-examination that the score does not say anything about a person's capacity for various tasks. Nonetheless, she says that a score of 21 out of 30 indicates a significant cognitive impairment – t 3-82. The test was performed on 5 August 2010. In Dr Berry's report, at p 3 paragraph 6 she says that she thinks it is likely to be due to subacute delirium superimposed on the medical insult to Mr Ryan's cerebral reserve by the severe and prolonged post-operative delirium which he has suffered. As she remarks at p 9 of her report, all she can say is that the score is consistent with cognitive dysfunction. I would add it is a measure at that point in time, and it is clear that Mr Ryan's condition fluctuated throughout this period.

The Brangwins' Credit

[33] I have great difficulty accepting Mrs Brangwin's evidence as reliable on controversial topics. She was very emotional in giving her evidence. She expressed outrage that she had to, for example, comply with disclosure in the proceeding, and otherwise make a case in Court in the normal way. This stemmed I think from her complete belief in the righteousness of her own cause, which seemed linked to some very powerful emotions centring on her relationship with her father.

[34] Mrs Brangwin was at times angry and aggressive in giving her evidence, including in examination-in-chief. At the beginning of her examination-in-chief she was shown a family tree and took great offence because the fact that her mother had died was not recorded in the document. She refused to look at the document, turned it face down on the witness stand before her and then pushed it away from her, making an angry comment addressed to her own lawyers – "so maybe you should have updated it". The emotional content of this interchange is not apparent from the transcript – t 2-40. The proceeding had to pause a little for her to recover herself sufficiently to continue answering questions.

[35] In cross-examination there were other aggressive and emotional outbursts, at times displaying undue suspicion – t 2-78; tt 2-89-90, tt 2-95-96, tt 3-4, 3-5. At other times she used emotional assertion to avoid giving substantive answers – for example as to whether her father and Phyllis were "a couple". She refused to answer this question responsively because "it's disrespectful" – t 2-82. The answer to this question was quite important because as part of her pleaded case Mrs Brangwin alleged that one of the peculiar things which her father said – she would say one indicia that he was losing or had lost capacity – was that he had been married three times. When she gave evidence of this "very strange" – t 68 – comment, she said she asked, "Well, who have you married"; her father did not really answer her. "It was very strange. It was – I didn't press it, because I thought it was strange." In cross-examination it was put to her that in fact, if not in law, her father had been married three times, the third time to Phyllis. She refuted this, saying that she put that to her father during the conversation and he said he had not been married to Phyllis – t 2-82. When she was challenged on there being an inconsistency with her early evidence she reverted to her first version – t 2-83.

[36] Another specific example of what I find was unreliable evidence on the part of both Mr and Mrs Brangwin was that they both gave evidence that they never observed Mr Ryan not to be compliant with the need to directly access oxygen during the three weeks he stayed at their house. When it was put to them that there was considerable time when Mr Ryan was not under their direct observation, they were both quite certain that they had a reliable view of his behaviour during the time. As Dr Berry pointed out, from the time Mr Ryan was compelled to access oxygen via prongs or a mask, he was noted to be non-compliant. That this was so was evidenced in all the hospital notes, whatever hospital was involved, and no matter how sick Mr Ryan was. Dr Berry said, when it was suggested to her that Mr Ryan might have been oxygen compliant once he returned to live in his own home in February 2011, that she very much doubted that, given his behaviour in all hospitals. While I do not accept Dr Berry's assumptions as to the motive for this non-compliance (see below), I do take the same view as she did: it was most unlikely that Mr Ryan was consistently and regularly oxygen compliant at any stage. I have real doubts as to the evidence of both Mr and Mrs Brangwin as to his complying with oxygen in their home. I think this evidence was tailored to suit what they perceived to be their advantage in the case.

[37] As well as these matters which bear upon Mrs Brangwin's credit, her demeanour in evidence was that she was imprecise, to a quite extraordinary degree, about normal everyday matters – for example t 2-46, t 2-47, tt 2-50-51, t 2-53, t 2-54, tt 2-54-55, t 2-64, tt 2-65-66, and t 2-69. She presented as someone who resorted to a fussy, immature demeanour, both in examination-in-chief and cross-examination. During submissions when I put to her counsel that I did not think the evidence established a

close relationship between her and her father, Mrs Brangwin rose in Court, yelled at me that she loved her father and then stormed out of the Courtroom, pausing only at the doorway to yell in an abusive way at her husband. She called him a loser and instructed him to stay behind in Court, rather than follow her, as he was attempting to do.[2] She became upset and left a discussion with Mr Sargent soon after discovering the terms of her father's 2011 will, leaving her husband to continue the discussion. There are social work notes of 1 April 2011 in the Hervey Bay Hospital chart of her emotional interactions with that hospital after her father's death.

Relationship Between Defendant and Testator

[38] Mrs Brangwin was born in 1962. She was 17 when her parents divorced in 1979 and her father began living separately from the rest of the family. At some stage before she married she lived in a house which her father bought as an investment. She paid him rent. When she married in 1991 she moved to Western New South Wales, a considerable distance from her father. She estimated that between 1991 and 2007, when her family moved to Port Macquarie, she saw her father about once a year. Her husband thought that after Mr Ryan moved to Hervey Bay they probably only saw him every second year. Mrs Brangwin says that she would telephone her father every couple of months during this time. Mr Brangwin thought he spoke to him on the phone three or four times a year.

[39] When asked to describe the relationship between Mrs Brangwin and her father, both Mr and Mrs Brangwin had little to say. They used phrases such as "just normal".[3] The descriptions were brief and underwhelming. They tended to focus on communication at significant formal times, rather than describe the type of frequent spontaneous and incidental communications which characterise a close relationship. For example, both Mr and Mrs Brangwin gave evidence that Mr Ryan attended their wedding and gave Mrs Brangwin away – t 2-38; that they rang him when their children were born – t 2-39. They did not see each other at Christmas because of the demands of the farm, but they rang at Christmas.

[40] Mrs Brangwin conceded in cross-examination that she understood the closeness of the relationship she had with her father was an issue in the proceeding and that she was asked to disclose documents going to this. Notwithstanding that, she disclosed almost no documents. Those which were tendered showed that the relationship was remote rather than close – see exhibit 15 and in particular the letter dated 13 February 2010 written after Mrs Brangwin's brother died. She was asked about this letter in cross-examination. It was suggested that the letter read as though she and her father were almost not in touch at that stage at all. She denied that. She asserted that the things in the letter were things about which she frequently spoke to her father on the telephone. I disbelieve her having regard to the words of the letter, and my general findings as to her credit.

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2 While this conduct on the part of Mrs Brangwin was occurring, proceedings came to a halt as both counsel and I watched. Both counsel were aware of the behaviour and were aware that I was aware of it. I told counsel for Mrs Brangwin that I thought it bore on Mrs Brangwin's credit – cf *In the Marriage of J and KA Zantiotis* (1993) 113 ALR 441, 445-6 and the authorities cited there. See also *Government Insurance Office of New South Wales v Bailey* (1992) 27 NSWLR 304, and *R v Martin* [2000] SASC 436.

3 For example, tt 2-37; 3-4; 3-15.

[41] Three photographs of Mr Ryan with the defendant's family were disclosed. Mrs Brangwin claimed to be affronted by the need to make such disclosure and asserted in cross-examination that there were many other documents which she could have disclosed but did not, which would have illustrated the closeness of her relationship with her father. I disbelieve her about this. I have in mind my general credit findings as to her evidence but also the remote emotional flavour of those documents which were disclosed. Some telephone records were tendered in an effort to support this aspect of the defendant's case, but they add very little to the picture before Mr Ryan's 2010 illness.

[42] When Mr Ryan became ill in 2010 Mrs Brangwin was notified and she and her husband flew up to Hervey Bay. Mrs Brangwin stayed, although after a time her husband returned to work. She organised for Mr Ryan to be transferred from the Hervey Bay Hospital to the Wesley Hospital and stayed in Brisbane for a large part of the time Mr Ryan was in the Wesley. While Mr Ryan was in the Wesley Hospital he asked Mrs Brangwin to go to his Riverview Drive house and check it. He made a list of things for her to do, including dealing with his bank accounts. Mrs Brangwin was instrumental in moving her father from Wesley to Port Macquarie for rehabilitation. When Mr Ryan was in Port Macquarie Hospital he asked Mrs Brangwin to get a will kit for him, and she did so.

[43] After rehabilitation in the Port Macquarie Hospital Mr Ryan came to live in the Brangwins' home. The family had a spare bedroom. Their daughter shared Mr and Mrs Brangwin's bathroom so that Mr Ryan had a bathroom to himself. Mrs Brangwin and her husband made sure that Mr Ryan had all the equipment he needed and made an effort to come home from their respective jobs during the day to check on him, etc.

[44] The three weeks which Mr Ryan spent at the Brangwin family home (and indeed Mrs Brangwin's attendance during the course of his illness to this point) was by far the most interaction which he had had with Mrs Brangwin, and her family, since 1979 when he had divorced her mother and left home. Both Mr and Mrs Brangwin gave evidence that there was no unpleasantness, argument or upset during the three weeks Mr Ryan stayed at their home. Having regard to my general findings as to Mrs Brangwin's credit, and in particular her willingness to disregard, for example rules as to disclosure, because she was so convinced of the righteousness of her cause, I do not doubt that had there been any such argument or unpleasantness she would have denied it in her evidence. Mrs Brangwin's own counsel make the following submission: "Whilst Mrs Brangwin's evidence would be rightly characterised as highly emotional and disjoined, it was supported in every relevant aspect by her husband, who was sensible, measured and thoughtful in his responses." It is no doubt right that Mr Brangwin gave evidence in a calm and measured way. However, having regard to the really quite extraordinary emotional nature of Mrs Brangwin's attachment to the issues in this case, I am afraid I have no confidence that her husband would have departed from "her line" in this, or any other important respect.

[45] Mrs Brangwin said that Port Macquarie was too cold for her father and that that was the only reason he wished to return back to Hervey Bay. It was Mr Brangwin who drove Mr Ryan home to Hervey Bay and he spent four days there settling him in, performing necessary tasks around the house, including modifying it to take account of Mr Ryan's physical weaknesses. Mr Brangwin said that on the journey Mr Ryan

told Mr Brangwin he was grateful for the Brangwins having accommodated him during the last three weeks. I accept that this is so and I accept that after his return to Hervey Bay, Mrs Brangwin kept in touch with the testator much more frequently than before, by telephone. She visited him in January 2011 when she discovered that he had been readmitted to hospital, and she kept in telephone contact with him thereafter. At one stage Mr Ryan defined the times during which she would ring him, which she thought was strange, but may well have been explicable having regard to his physical fragility and the need for rest. At one point she broke his water filter which annoyed him, she thought disproportionately.

[46] There is insufficient evidence for me to reach a conclusion that there was any major argument or falling out between Mrs Brangwin and Mr Ryan after he left Port Macquarie Hospital, and his death. It is a possibility on the evidence, including the volatility of Mrs Brangwin's emotional behaviour, but no more than that. It is also possible that, having had more to do with his daughter than he had had since 1979, in this period, Mr Ryan reached the conclusion that they were not particularly compatible and were better pursuing the more distant type of relationship they had enjoyed prior to his illness in 2010.

Medical History 2011

[47] Mr Ryan called an ambulance on 11 January 2011. He was taken to Hervey Bay Hospital Emergency Department. He complained of abdominal pain over the last three weeks. The notes on presentation state that he was dehydrated, lived alone and was not coping. At one point these notes describe him as "alert" but at another point they describe him as a "poor historian". Mr Ryan remained in Hervey Bay Hospital until 28 January 2011. He was treated conservatively for a sub-acute bowel obstruction. Whilst in hospital he developed pneumonia, and on 28 January 2011 he was transferred to Maryborough Hospital for rehabilitation.

[48] Despite there being considerable notes over several different disciplines between 11 January and 22 January 2011, there is no note of Mr Ryan experiencing confusion or any mental deficit, in the hospital chart. The closest is on 14 January 2011, to the effect that the patient is a little bit "excitable". On 22 January 2011 there is a nursing note at 1.40 pm, "pt quite vocally abusive to his daughter – encouraged to settle down". The next day at 21:10 there is a note, "seems slightly confused at times. Daughter phoned concerned about father's deteriorating health. Also concerned with his language used, and abuse of her in front of staff and other patients. If continues will offer [social work] support." Mrs Brangwin gave evidence about this so-called abusive episode. Mr Ryan was in a ward with three other patients. Mrs Brangwin and her children were visiting him and were sitting around his bedside. She interrupted him when he was speaking, and he told her to "get fucked". She said that it was most unusual for him to swear and to swear at her. I accept that, but I think that too much might be made of the notes in the chart regarding this. That Mrs Brangwin would walk out of the hospital and then telephone the hospital the next day complaining about this language says, in my view, more about her over-reacting to circumstances than her father's state of mind.

[49] On 24 January at 3.10 am there is a nursing note, "pt hallucinated at 0200 hours stating that he had been threatened with physical harm by his daughter and a male person, pt wanted to ring police, lots of reassurance given to calm/settle pt. Pt realised he was hallucinating and quickly settled back into bed and was very

apologetic." Later that morning the surgical ward round resolved to ask for further medical review regarding pneumonia, noting hallucinations and "very bad chest". At 2.00 pm that day the nursing note is that the patient is "more settled today, still seeing objects/people at times though able to be re-directed". That evening there is a medical note that the patient was anxious and agitated and "? delirious" and that there was a complaint of short-term memory loss. There is a further note as part of this "? dementia early" and a note for a cognition assessment to be performed. There is no indication that it ever was. Later on 24 January there is a nursing note that the patient was very confused that shift and the morning note from 25 January is that he was confused overnight – not oriented to time or place. At 2.30 pm on 25 January 2011 there is a note that the patient "remains confused at times and verbally aggressive". Dr Berry conceded in cross-examination that medication prescribed to Mr Ryan during this period of time, while he had pneumonia, could account for delirium and hallucinations – tt 3-67-68.

[50] There are no further such notes of delirium or hallucinations. On 27 January Mr Ryan started on oral antibiotics, replacing IV antibiotics to treat pneumonia. Arrangements were made on 27 January for Blue Care "when [patient] is safe to be discharged to home". On the afternoon of 28 January 2011 there are some notes regarding an amount of $800 which the patient thought was in his drawer but which Mrs Brangwin told nursing staff she had taken home. The notes are consistent with the patient suffering from confusion or delusion, but also consistent with a normal misunderstanding. There is insufficient to treat them as showing confusion or delusion.

[51] Mr Ryan remained in Maryborough Hospital between 28 January 2011 and 4 February 2011. He was discharged home. By the time of his discharge his pneumonia had cleared. However, it was clear from the notes that he was having constant bowel problems. It was noted that he had COPD and had oxygen at home. In these notes it is apparent that on exertion he suffered shortness of breath but this is noted to resolve on resting. There are no notes of confusion, disorientation or any other mental deficit.

[52] On 20 February 2011 Mr Ryan again called an ambulance and was again taken to the Hervey Bay Hospital Emergency Department. He complained of abdominal pain and nausea since his discharge from hospital some 16 days earlier. His oral intake was reduced. He had abdominal pain, vomiting and was not coping at home. In his admission notes he is noted as "alert" and, at another part, "oriented". His surgical ward admission notes of 20 February 2011 note that he lives alone, has supporting friends, is independent and is alert with a Glasgow Coma score of 15. This was to be Mr Ryan's last admission to hospital, he died on 1 March 2011. Radiology revealed that he had a likely adhesion of the small bowel. It is evident from the notes that after some initial improvement, no doubt due to hydration and nutrition, his condition slowly declined through this admission. By 25 February he had a central line inserted and by 26 February he was receiving nutrition via this, naso-gastric feeding having been tried and failed.

[53] On 26 February 2011 a ward round is noted. The senior doctor appears to be Dr Hooshyari. The following note is recorded:

> "Pt undecided regarding treatment.
> Planned for surgery today – sigmoidoscopy + laparotomy and formation of ileostomy.

> Patient declines surgery today. Wishes to defer decision until later date. Does not want colostomy/ileostomy.
> Dr Hooshyari explained risks including ongoing obstruction possibility of necrosis, perforation of bowel, death.
> Patient aware of risks, and maintains decision not to have surgery today.
> Dr Hooshyari explained that time is unlikely to resolve the obstruction, and reiterated risks (sepsis/necrosis/perforation/death).
> Pt stated that he is aware that current obstruction may "kill" him, but ultimately does not want stoma formation. …"

[54] There is no time against the note but it follows one at 7.10 am and precedes one at 12.30 pm. At 13:10 on the same day Dr Hooshyari appears to have come back to see Mr Ryan by himself. He records:

> "I spoke to Mr Ryan in detail and for a long time re reasons to have any surgery. He understands that he has bowel obstruction and he knows that if this is not resolved he would die. He still wishes to have no surgical intervention and is happy with bad outcome. I could only respect his wish. He is fully *compos mentis* and capable of making an informed decision."

[55] At 6.30 that night there is a further note from a Dr Proudfoot:

> "Re discussion with pt
> Refuses to proceed with laparotomy
> Reiterated he is a high risk of … sepsis or dying
> He wishes only to be kept comfortable. He does not want surgery."

[56] The next morning at 9.00 am (27.2.11) the surgical ward round notes include:

> "Pt's daughter called yesterday requesting information on Warwick's condition. Discussed with pt whether he was happy for us to talk to her. Warwick is happy for limited information (basic clinical issue), but no further (additional detail of condition, surgical details etc)."

[57] At 10.15 am on the same day there is a note that Dr Hooshyari rang Mrs Brangwin and discussed with her the serious nature of Mr Ryan's condition; his refusal of any surgery and his being competent to decide upon, including declining, surgery. It is noted that Mrs Brangwin was aware of that and would comply with her father's preference for conservative treatment, and that she is aware that eventual death from this condition is likely.

[58] The junior house doctor, Dr Proudfoot, on 27 February 2011 filled out a resuscitation plan form which was that palliative care only was to be given and included the notation:

> "Warwick has clearly stated over the past admission that he does not wish for any life-sustaining surgery or emergency treatment in the event of deterioration. He is aware that his current condition is very likely to result in his death without these measures."

[59] At the same time as this is noted – 15:15 – the same doctor has made a note in the chart that she has had a discussion with Warwick regarding end-of-life choices. The note is quite detailed, and that afternoon tpn feeding is discontinued. Thereafter

palliative care only is administered. Mrs Brangwin and her husband attend on 28 February.

[60] In my opinion the assessment or assessments by Dr Hooshyari and Dr Proudfoot of Mr Ryan's capacity are significant evidence in this case. The decision which Mr Ryan was called upon to make was a very important one and it seemed to me, and Dr Berry, when I asked her about it, that the doctors were very thorough in checking to see that he had capacity to make it. That being said, the fact that the doctors assessed him as having capacity to make this decision does not determine whether or not he had testamentary capacity on 9 and 11 February 2011. To begin with Mr Ryan's condition, including his mental condition, was a fluctuating one. Secondly, the law judges the capacity necessary to make any decision by the type of decision made and a decision to refuse treatment is a different decision from the decision as to how to leave assets by a will.[4] The decision taken from Mr Ryan by Drs Hooshyari and Proudfoot was the decision of a very sick and fragile 76 year old man who had at least two illnesses which were likely to kill him – cancer and emphysema. It was made against the background of his having such a stormy course following his initial surgery for bowel obstruction that he was lucky to survive. Certainly the doctors were careful to assess his capacity to make the decision to refuse treatment, but it was neither an irrational, nor an irrational-seeming decision. Nor was it a decision which was connected in any direct way with his daughter, so that if Mr Ryan was suffering from a particular delusion affecting his view of his daughter (see below), that would not impact on his capacity to make the decision to refuse treatment.

Dr Berry

[61] The plaintiff engaged Glenise Berry, geriatrician, to provide her opinion on Mr Ryan's testamentary capacity. Dr Berry was engaged after Mr Ryan had died, so she had a rather unusual and difficult task. She was the only independent medical witness called in the case. I ruled that parts of her report were inadmissible on the ultimate issues before me, but my ruling was that I would admit the entire report as to the weight I gave Dr Berry's opinions.

[62] Dr Berry made some important wrong assumptions as to factual matters concerning the content of the two wills; the taking instructions for the 2011 will, and the execution of the 2011 will. First, she did not understand that the 2011 will made a gift of around $300,000 to Mrs Brangwin, her husband and two children – see her report, p 2 final paragraph and p 3 first paragraph. She understood that the rest and residue went to Mrs Brangwin and her family, but she did not understand the worth of this gift – see t 3-70. This having been explained to her, she agreed in cross-examination that the gift of the rest and residue to Mrs Brangwin and her family (one quarter each) was indicative of someone who had given serious thought to where assets of which he was aware should go – t 3-70.

[63] Associated with this is a second factual error. In her report Dr Berry said, "[the testator] did not reason as to the value of the residue of the estate which would pass to his daughter and her family. There was no discussion about the relative values which could substantiate his wish not to provide for his daughter as well as previously." – p 11, paragraph 2. Dr Berry was not aware of the evidence outlined

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4 cf *Gibbons v Wright* (1954) 91 CLR 423 as to the differing capacities needed for different decisions.

above as to the solicitor being instructed by Mr Ryan to write down the details of the bank accounts which formed the rest and residue of his estate – t 3-56, tt 3-62-64 and t 3-66. Dr Berry conceded in cross-examination that Mr Ryan did understand "in quite specific terms" the value of his estate so far as those values were documented and provided to his solicitor. Dr Berry was unaware of the discussion prior to execution of the will in which Mr Ryan asked why the bank accounts, which he had been insistent upon the solicitor recording, were not mentioned in his will. She conceded that this questioning tended to suggest the testator was critically understanding the content of his will and that he could recall his insisting two days earlier that the solicitor record the bank account details – t 3-56 and t 3-63.

[64] Dr Berry thought the testator had a "superficial appreciation of the value of his assets and the impact of the proposed new distribution" – report, p 13, paragraph 4. In light of her concessions in cross-examination; the evidence of Mr Sargent as to the details of assets Mr Ryan gave him, and the discussion between Mr Sargent and Mr Ryan as to Mrs Brangwin's challenging the 2011 will, I reject this. Not only did Mr Ryan give specific instructions as to the number of bank accounts and the amount in each, but he correctly informed Mr Sargent about all the assets he held, including such details as that the Urangan house was held in a joint tenancy and that the superannuation fund was an annuity only. In my view it was quite plain that Mr Ryan had a detailed knowledge of what assets he had.

[65] Dr Berry thought that the testator did not understand that his 2011 will was different from his 2010 will. In her report she said, "He, however at no time commented about a previous will nor how the will he was about to construct [sic] was different from any previous wills" – p 11, paragraph 1 and t 3-64. The evidence was that Mr Ryan was well aware of his previous will and produced it upon request by Mr Sargent; that he discussed with Mr Sargent the fact that he was excluding his daughter both as executor and substantially reducing the value of his gift to her under the will; and that Mr Sargent explained that the will might be challenged by his daughter. It seems to me from what Mr Ryan said to Mr Sargent after that explanation that Mr Ryan understood the explanation.

[66] Dr Berry stated in her report that Mr Ryan left the Urangan house to Phyllis "contrary to the advice given" by his solicitor – p 3, paragraph 1 and p 11, paragraph 2. This is incorrect. There was a discussion between Mr Ryan and Mr Sargent as to whether the house should be left as a joint tenancy and thus pass to Phyllis, or whether the joint tenancy ought to be severed so that the house could pass under the will. Mr Ryan gave "adamant" instructions as to this, and they were instructions consistent with the discussions he had had with Mrs Brangwin over time – tt 2-81, 2-82 and 2-83. The instructions reflected a position which Mrs Brangwin accepted, and accepted as competently reached, whatever her view about the rights and wrongs of that disposition. The instructions were not contrary to Mr Sargent's advice. He merely explored the matter with the testator. That Mr Ryan understood and gave sensible instructions consistent with his past wishes in relation to this rather technical matter indicates to me that he understood the discussion with Mr Sargent at a level of sophistication and detail.

[67] Lastly as to these factual errors, Dr Berry said that Mr Ryan did not read the will before signing it – p 3, paragraph 1 of her report. This is incorrect. When asked to assume the facts which I find are correct, Dr Berry answered that she still did not

think that Mr Ryan's behaviour indicated he understood what he was reading. Her criticism was based on the fact that he was not asked open questions so that he had to explain back to the solicitor the meaning of the will – t 3-56. Having regard to all the evidence as to the events of 9 and 11 February 2011 and in particular Mr Ryan's question about the bank accounts not being recorded, I find Mr Ryan did understand the will when it was read to him, and then he read it, on 11 February 2011.

[68] In cross-examination Dr Berry conceded that the first two limbs of the *Banks v Goodfellow* criteria were in fact met, though her report was to the contrary – t 3-66. By this she meant she accepted that Mr Ryan had the capacity to understand the legal nature and significance of making a will in February 2011, and was able to understand the nature and extent of his property. She did not resile from her opinion given on the other limbs of the *Banks v Goodfellow* test, but did concede at the end of cross-examination that she could not say one way or the other that the testator certainly did, or did not, have capacity at the relevant times – t 3-87. These remaining limbs of *Banks v Goodfellow* concern whether or not Mr Ryan was capable of understanding who might reasonably have had a claim upon his bounty; whether he had the capacity to evaluate and discriminate between the respective strengths of claims he did recognise, and whether there was any illness which contributed to his directing his major asset away from his daughter when he would not have done so had he not been suffering from that illness. I go on now to discuss Dr Berry's opinion as to these matters. Before I deal with her medical opinions, there are more assumptions and, I am afraid, partialities, which are evident in her report which must be dealt with.

[69] There are numerous dicta in the cases as to the difficulties confronting a medical expert who gives a retrospective report.[5] Relevantly here, the comments of Vickery J in *Nicholson v Knaggs*[6] seemed to me the most apposite:

> "… I accept that it is generally recognised that the evidence of treating practitioners is of more assistance to the Court than that of medical experts who lack the opportunity to observe and assess the deceased first-hand. The expert, who has not met the testator, is by necessity compelled to rely on secondary evidence in making his or her assessment, such as the untested affidavits of other witnesses, medical records and other relevant documents."

[70] Dr Berry did not meet the testator and did not meet Mrs Brangwin. Nor was she in Court to hear and see Mrs Brangwin's evidence and behaviour or hear the descriptions given by the solicitors as to Mr Ryan's behaviour, which necessarily involved information about his personality. Dr Berry made assumptions about the personalities of both Mr Ryan and Mrs Brangwin and their relationship. Dr Berry also formed a suspicious view as to Neta Dunn. These assumptions inform the opinions she reached.

[71] Dr Berry formed a view that Mr Ryan did not understand the terminal nature of his condition.[7] Of the admission to the Wesley Hospital she says, "There is no record

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5 *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107, [158], per Applegarth J and the authorities cited there.

6 [2009] VSC 64, [39]. See also *Grynberg v Muller; Estate Late M Bilfeld* [2001] NSWSC 532 at [56] for the extract from the medical opinion, particularly in the last four paragraphs preceding [57] of that judgment.

7 See for example p 6 of her report, last paragraph and p 7 of her report, paragraph 6.

of any prognosis documented … There is no record of discussion with the testator about the severity of his illness or prognosis even regarding his … cancer." – report p 5, paragraph 4. Mrs Brangwin's evidence was to the contrary. She said the deceased's treating doctor told him, while he was at the Wesley, that he needed to get his affairs in order. I draw an inference that he did understand this, and act in accordance with it, because at the Port Macquarie Hospital he asked his daughter to obtain a will kit and attended to executing a will.

[72] At p 8 paragraph 2 of her report Dr Berry says, "The testator said [when talking to the solicitors] he had cancer but that he was in remission and optimistic about making a full recovery, which is contrary to the reality of the terminal nature of his condition. This would indicate poor awareness of the gravity of his illness." Taken in isolation, Mr Ryan's optimistic comments could indicate a poor awareness of his grave state of health. But they do not necessarily do so. Mr Ryan had engaged solicitors to make a will. He wanted the will made quickly, to the point that he signed the will instructions on 9 February 2011 pending the drawing up of a proper will which would take only a matter of days. He had by that stage listed his house and furniture for sale, which to me indicates that not only did he understand he had a terminal illness, but he understood he did not have long to live. He did not discuss the nature of his illness or his thoughts about the likely duration of his life with the solicitors. He had never met the solicitors before. They were much younger than he was. On all the evidence, I see this as an indication that he was not inclined to have such a discussion, rather than that he did not understand his illnesses.

[73] Mr Ryan refused to make an enduring power of attorney. Dr Berry sees this as another indication that he did not understand how ill he was. Again, it is not the only conclusion. It may be that Mr Ryan could think of no one he wished to be his attorney. It may be that he did not think he would live long enough for care, in circumstances where he lacked capacity, to be a real issue – that is he may have thought he would have no need for an enduring power of attorney, just as he apparently envisaged not having a need for furniture.

[74] My view is that Mr Ryan was under no illusions that he was gravely ill. His preparation of the July 2010 will; his anxiety that the February 2011 will be made as quickly as possible, including his signing of the instructions on 9 February 2011, and his listing his house for sale, with furniture, in October 2010 all suggest to me that he well knew his days were rapidly coming to a close. I do not regard his remarks as to his recovery and his hopes to go fishing in the future as his not understanding that he was likely not to live very long before succumbing to his illnesses. I see him as simply having made optimistic remarks by way of "small talk" with a solicitor and his assistant who he did not know.

[75] Dr Berry refers to the occupational therapist's notes at the Port Macquarie Hospital (discussed above) to the effect that Mr Ryan lacked insight; was unrealistic about his return to live independently, and did not understand his oxygen requirements. Dr Berry says that "this would indicate significant executive dysfunction due to dementia plus or minus some possible contribution of ongoing delirium" – p 6, paragraph 3. Her recording of the occupational therapist's notes is incomplete. Dr Berry does not mention that the same notes also express concern that Mrs Brangwin has unrealistic ideas about Mr Ryan living independently and unrealistic ideas about his living at her home unattended for eight hours each day, and Mrs Brangwin's refusal to countenance external services for Mr Ryan while he

lived with her. No doubt it does not indicate executive dysfunction on Mrs Brangwin's part to be unrealistic (in the view of the note-maker) about these things. It is a small indication (but there are others discussed below) that Dr Berry is not taking an impartial view of the material she has. I would have no difficulty had Dr Berry expressed the view that the notes "could" indicate significant executive dysfunction. Undoubtedly they could. However, they might also indicate that the occupational therapist's view (contrary to both Mr Ryan and Mrs Brangwin) is too pessimistic, or that the patient is particularly independent and desirous of returning home and that Mrs Brangwin understands this. It is true that the Port Macquarie notes, like the Wesley notes, and even the earlier Hervey Bay Hospital notes, indicate that Mr Ryan is impatient with and non-compliant with the need to be attached to an oxygen supply. In fact (apart from Mr and Mrs Brangwin) all the evidence is that Mr Ryan was poorly compliant with this requirement. It might indicate a lack of understanding. It might also indicate an independent, impatient personality. However, alternative possibilities which do not indicate lack of capacity do not seem to occur to Dr Berry, for example, p 9 of her report, paragraph 3.

[76] At the end of p 9 and beginning of p 10 of Dr Berry's report she notes that during his first admission to the Hervey Bay Hospital in 2010 (on 17 May 2010) Mr Ryan expressed anxiety about money; said that he did not have an enduring power of attorney, and said that he did not wish his daughter to be contacted. Dr Berry says this could indicate poor reasoning and judgment and be indicative of paranoia. There is some support for this because the chart at that time notes Mr Ryan as being "confused at times" and "increasingly disgruntled about his health situation". She goes on to say, "A less likely interpretation because of the context of the statement, would be concern about worrying his daughter, when seriously ill." A third alternative is that Mr Ryan did not want his daughter to be present, not because he was thinking of her interests, but because he was consulting his own.

[77] Dr Berry's view was similar in relation to Mr Ryan's request to staff at Hervey Bay Hospital on 27 February 2011 to give his daughter only basic information about his health. This was in the context where doctors had discussed with him that he would likely die without surgery and he decided not to have surgery. Again the only two possibilities which seem to occur to Dr Berry to account for this, were that he was delusional in his decision-making, or that he did not wish to bother his daughter – tt 3-77-78. I suggested to her that the third possibility was that he chose not to have the daughter attend. She acknowledged that that was a possibility but then quickly followed, "But I'm not sure what that's based on." Her evidence revealed an overly emotive approach to this issue – she was very concerned to say how sad it was that (assuming he was not delusional) Mr Ryan did not wish to bother his daughter – t 3-77.

[78] Dr Berry took the view that there was nothing in the relationship between Mrs Brangwin and Mr Ryan which justified the change from the 2010 will disadvantaging Mrs Brangwin. She said, "there is no evidence provided to me which indicated a poor relationship of the daughter with her father, rather to the contrary". Dr Berry saw a small part of the overall picture of the relationship between Mrs Brangwin and her father, that part after Mr Ryan's illness. Mr Ryan was an independent and unsentimental man who had no relationship with his son or his son's children, and had infrequent contact with his daughter and her family for many years prior to his illness in 2010.

[79] Lastly, Dr Berry expresses negative views about Ms Neta Dunn in her report, without any basis that is proved in the evidence before me. At p 6, paragraph 4 she says, "Allegedly Mrs Neta Dunn provided shopping and transport assistance to the doctor. She did not receive a carer's allowance or carer's pension." Nearly all the information which Dr Berry was given was hearsay, including that about Ms Neta Dunn. However, she only uses the word "allegedly" in describing Ms Dunn's activities. At p 11, paragraph 1 she describes Ms Dunn's role as a "carer", again presumably she uses inverted commas to indicate a degree of scepticism. At the end of her report – last paragraph p 13 – she says, "There is a suggestion of undue influence exerted by Mrs Dunn, whose involvement in this gentleman's care seems superficial, although a friend of longstanding. There is no specific evidence of coercion." There is no suggestion of undue influence or coercion in the evidence in this case. In cross-examination Dr Berry said she was not asked for an opinion on this issue, but included it for completeness sake. It was no doubt right for Dr Berry to consider (just as I must consider) that there was a change in disposition between the 2010 and 2011 wills and that the change favoured a relative stranger at the expense of a family member. This calls for examination of facts rather than making assumptions.

[80] Dr Berry's review of the hospital records was one where she looked for entries which would support her view, rather than objectively review the records to see what was contained there and come to a view based on that. I look to her dealing with the testator's final admission at the Hervey Bay Hospital between 20 February 2011 and his death on 1 March 2011. Between pages 4 and 8 of her report she summarises each hospital admission between 2010 and 2011 under the heading, "Medical Circumstances of Relevance to the Construction of an Opinion Regarding Testamentary Capacity for the Will Signed 11 February 2011". In four pages, only four lines are devoted to this final admission. She records that Mr Ryan "was not for aggressive treatment" but she makes no mention whatsoever of Dr Hooshyari's efforts to ascertain whether he was receiving a reliable decision to decline treatment. In cross-examination Dr Berry said that those notes showed Mr Ryan did have capacity to make the type of decision he made – to decline treatment though it would result in his death. However, she denied that they showed he had capacity to make a will because capacity must be assessed in relation to the task at hand. That is no doubt correct as a proposition of law, but in a case where there is no direct evidence of capacity to make a will on 9 and 11 February, Dr Berry's task, like mine, was to consider a number of matters which bore circumstantially on the question. It is remarkable that where two doctors, one a consultant, have expressly considered in a thorough way whether Mr Ryan had capacity to make this very important decision, Dr Berry completely ignored it in her report.

[81] Separately to this point, Dr Berry discounted the relevance of Mr Ryan's decision not to have surgery. She said the question (whether to decline surgery) was academic because, "the surgeon would have been not proffering an operation on this man because of the severity of his chronic obstructive lung disease he would not have been a surgical candidate in any respect." – t 3-73. And further at t 3-74: "And, for this sort of man that there would have been no choice here, I don't think surgery would have been offered to him because of the severity of the chronic obstructive lung disease …"

[82] It is perfectly plain from the hospital chart that Mr Ryan was being offered surgery. On 25 February 2011 the nursing notes record that he is nil-by-mouth because he is

for the operating theatre tomorrow and very plainly on 26 February 2011 it says in the notes of the ward round that he is, "planned for surgery today" and the notes at 1.10 pm and 6.30 pm implicitly and explicitly (respectively) confirm that surgery was available to him if he wished it. Dr Berry accepted this when I put it to her specifically – t 3-80 – but very shortly afterwards – t 3-85 – she reverted to an assertion that, "no further surgical intervention was required or appropriate". Dr Berry had trouble simply reading the medical notes as a record of the care and management in fact provided, rather than getting drawn into questions about whether she thought that care was appropriate or not. The result is that she did not fully come to terms with the fact that surgery was being offered to Mr Ryan; that he refused it, and that Dr Hooshyari and Dr Proudfoot were very particular to make certain that they obtained a proper decision from Mr Ryan about not proceeding with surgery. She thus did not take into account a very significant piece of evidence in the case.

[83] I also have difficulty with Dr Berry's treatment of the medical evidence as to delirium. The opinion given at p 12, paragraph 3 of her report is, "There is qualitative evidence of severe delirium complicating all his hospital admissions, especially well documented in the Wesley admission" (my underlining). Dr Berry explained what she meant by delirium in a detailed and helpful way at tt 3-80-81. It is a fluctuating condition, usually manifesting over "a very short period of time, hours and days", and it had a direct physiological cause. In respect of Mr Ryan, his ongoing gut problems caused him dehydration and hypotension and caused his electrolytes to be imbalanced. As well, his chronic and deteriorating lung condition, and his attitude of non-compliance towards connecting to oxygen supply, meant that he was potentially hypoxic, and no doubt in fact hypoxic for some of the time, after his first surgery in 2010. These physiological factors were potentially a basis for delirium over the time Mr Ryan was at home between 4 February 2011 and 20 February 2011, during which time he made his will.[8]

[84] It was not entirely clear what Dr Berry made of the fact that during both the time he gave instructions for the will, and the time he signed the will, Mr Ryan was not using his oxygen via mask or prongs. As I understood it, the real effect of Dr Berry's concern was not so much the effect of 40 minutes or so off oxygen would have on Mr Ryan's capacity, but with the effect that his chronic non-compliance would have to the long-term erosion of his cerebral reserves – see t 3-56 and t 3-91. It seemed to be her view that if he did not use his oxygen at a particular time it might provoke symptoms of hypoxia, or alternatively might not – t 3-60. Clearly enough, from the notes in the hospital charts, and from Mr Brangwin's evidence as to what happened when Mr Ryan attempted to go to the toilet by himself without his oxygen cylinder on the trip from Port Macquarie to Hervey Bay, if Mr Ryan attempted any significant physical exertion without oxygen it was possible for him to run into quite dramatic difficulties. There are hospital notes in the Port Macquarie chart which show that Mr Ryan could have very low blood oxygen even resting in room air. At the time he gave instructions for his will, and the time he signed his will, Mr Ryan was sitting down and not outwardly displaying any symptoms of shortness of breath etc. That says nothing about his cognitive function of course. That he did not use oxygen at the time of instructing

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[8] See the Blue Nurses Report and GP notes referenced by Dr Berry at p 8 of her report, and dealt with by me below.

and executing his will is certainly a factor which I bear in mind, in deciding the case.

[85] Mr Ryan saw his GP on 7 February 2011. He had many physical problems, including diarrhoea, but his hydration is noted as good. Mr Ryan saw a GP on 10 February 2011 and while he was no doubt unwell, there are no symptoms noted which are particularly significant for this case. There are GP notes from 14 February 2011 that Mr Ryan was confused about his discharge medication; felt very weak and had vomited twice in addition to having loose bowels. He was noted as anaemic and having no appetite. His blood pressure was considerably lower (78/54) than it had been on 10 February (117/74). Medication to lower his blood pressure was discontinued. The GP noted "no psychotic" symptoms. The GP was not able to give evidence as to his testamentary capacity. I cannot draw much from the fact that Mr Ryan was confused about his medications without knowing the facts of that matter. I certainly could not draw the conclusion that the confusion was abnormal. There was a significant change made to his blood pressure medication that day. There is a note that on 17 February 2012 Blue Nurses attended Mr Ryan's home and he had misunderstood their function, he thought they were there to provide an ACAT assessment. Again, without knowing the facts of the misconception I cannot use it as indicative of abnormal misunderstanding or confusion.

[86] There is documented evidence of delirium in the 2010 Hervey Bay notes and the Wesley notes. There is also documented evidence of delirium at the Hervey Bay Hospital between 22 and 25 January 2011. However, there are no other notes through the Hervey Bay Hospital chart for this admission of delirium or confusion. There are no notes which indicate delirium or confusion at the Maryborough Hospital between 28 January and 4 February 2011. Dr Berry says there are. She cites a form entitled "Falls Risk Assessment" which she says records that Mr Ryan was at risk of falling because he was disoriented and impulsive. The form is at RPIA 29. It does not say this. It says to the contrary, that these are not risk factors and that he is oriented in time, place and person. Dr Berry has apparently misread the form, looking at the result for "ambulates with assistance device" which is adjacent to the relevant part of the form dealing with disorientation and impulsivity. Even if she had not mis-read it, it is a very slender basis to say that there is evidence of disorientation and impulsivity. The document is just a form with an option to essentially tick a box about a number of matters. Over six days there is not one nursing, physiotherapy, occupational therapy, dietician or medical note of confusion or delirium, although there are regular notes made in the chart by medical professionals over this time. I am sure Dr Berry's mistake in reading the form was not deliberate, but her resort to argument based on that form, when she completely ignores Dr Hooshyari's assessment of competence to decline treatment, strengthens my view that she was looking for evidence to support her conclusions, rather than making an objective assessment of all the available material.

[87] The admissions to Hervey Bay Hospital and Maryborough Hospital (11 January 2011 - 4 February 2011) are important because they so closely precede the making of the 2011 will. Dr Berry's conclusion as to these two admissions is, "… the documented behaviour occurring in Hervey Bay and Maryborough would be consistent again with a multifactorial delirium superimposed on the previously documented cognitive impairment … It is not documented to what degree delirium had resolved" – p 7 of her report. Again the last part of that extract demonstrates

what I regard as contrary thinking. Rather than look to the fact that, apart from a period of four days in a total of 24 days, there are no notes of delirium or confusion, Dr Berry seems to assume that the delirium would continue and sees the absence of notes as a barrier to her determining to what extent it continued. A more logical and objective approach in my view would be to say that no delirium or confusion was evident on any other days of the admission because it is not noted. I put that to her at t 3-72. Her response was that the delirium may have changed to a "much less obvious condition". Dr Berry has a general view (which may well be true) that delirium is under-diagnosed – eg. t 3-61. Of this period she said, "the evidence from the nursing staff [was] that he was intermittently confused" – t 3-61. Apart from four days in January, when he was taking drugs known to contribute to or cause delirium, there is no evidence at all that Mr Ryan was confused. It is wrong to describe his confusion as intermittent.

[88] Dr Berry's opinion rested upon Mr Ryan's having suffered delirium during illnesses post surgery in 2010 such that the delirium "eroded [Mr Ryan's] cerebral reserve and resulted in a degree of permanent cognitive impairment, i.e. dementia, which could have progressed due to ongoing hypoxia during and after discharge from Port Macquarie Hospital, because of poor insight into the necessity of oxygen use and poor compliance with continuous oxygen, which was recommended at Port Macquarie Hospital" – report p 9. She thought that his ongoing poor health would have further compromised his cognition and may have resulted in further fluctuating delirium during the period 4 February - 20 February 2011. To some extent the discussion of delirium and dementia became confused, but I think by the end of cross-examination Dr Berry made her position clear, "I'm not saying that delirium was a problem whilst he was giving instructions for the will, I'm saying that there were contributing factors to cognitive impairment during the whole of his course after the significant illness when he went from Hervey Bay to the Wesley in the first place, which may have precipitated a worsened degree of cognition than he would have had …" – t 3-86; that is, she was speaking of a dementia – t 3-81 and t 3-90. Dr Berry could not say that this condition deprived Mr Ryan of testamentary capacity on 9 and 11 February 2011, she said it might have. She conceded that her evidence in this regard was speculation as to possibilities – t 3-68. Dr Berry certainly conceded that it would not be possible for a person with an active fluctuating delirium to sit and talk seriously to a solicitor for 45 minutes and the solicitor not notice the delirium – t 3-81.

[89] Notwithstanding this, I do think there was one element of the case where Dr Berry did adhere to a view that delirium rather than dementia could have caused a lack of capacity, and that is her opinion that the testator may have had a delirium causing paranoid ideation, distrust, and dislike of his daughter – see the final paragraph at p 11 of her report. This does seem to have been a mainstay, if not the only basis, for her reasoning in relation to the third limb of the *Banks v Goodfellow* test – whether the testator was capable of being aware of those who had a claim on his bounty, and see p 12 of her report (did the testator have the ability to evaluate and discriminate between respective claims on his bounty). Likewise, her consideration of whether there was an illness which contributed to Mr Ryan directing his bounty substantially away from his daughter, seems to be on the basis that Dr Berry thought that paranoid ideation associated with mild to moderate dementia and the ongoing effects of hypoxia and serious terminal illness, caused the testator to direct his bounty substantially away from his daughter – see the final paragraph at p 12 of her report.

Jones v Dunkel

[90] The defendant argued that I should have regard to the principle in *Jones v Dunkel*[9] in relation to the plaintiffs' failure to call Neta Dunn, and, to a lesser degree, her mother, Mrs Elaine Drake. Both Ms Dunn and her mother came to Court and sat in the public gallery for part of the case, so clearly enough they were available to be called as witnesses. They were witnesses who would naturally be called by the plaintiff, and not naturally be called by the defendant.

[91] Care must be taken not to overstate the effect of the principle in *Jones v Dunkel* – see *ASIC v Hellicar*.[10] Ms Dunn could certainly have given evidence of what she had done for the testator by way of care for him, during his illness, and over previous years, as to friendship and other association. It was within her knowledge whether or not statements made by the testator to Mr Sargent – that Ms Dunn had done more for Mr Ryan than his daughter Mrs Brangwin ever had – were true or not. On all the evidence, however, I am not convinced that it is true that Ms Dunn had done more for the testator than his daughter ever did and, having regard to the principles in *Jones v Dunkel*, I am more confident in drawing that inference because she did not give evidence. This conclusion is not particularly significant as I did not understand the plaintiffs to run a case that such statements by the testator were literally true. As to friendship and association over the years, I have evidence from Mrs Brangwin as to the long history between her father and Ms Dunn's father; I infer the relationship between Ms Dunn and the testator was of considerably less significance and really derivative upon that friendship between the two men.

[92] Further as to the *Jones v Dunkel* point, I think the situation contrasts in respect of matters which bear upon Mr Ryan's capacity to make the will. Testamentary capacity must always depend on the drawing of inferences, as must the existence of any state of mind. However, the plaintiffs' case in this respect rested on two types of detailed evidence – that of Mr Sargent as to events on 9 and 11 February 2011, and the medical records collected in various notes and charts since Mr Ryan's initial illness in 2010. While both the plaintiffs' and defendant's cases depended on inference, it was the defendant's case which did more so. That the plaintiff did not call Neta Dunn does not diminish the evidence of Mr Sargent or the medical records, both of which I find to be reliable. In accordance with the principles in *Jones v Dunkel* I accept there is an inference that Ms Dunn's evidence would not have assisted the plaintiffs' case on testamentary capacity (and in any event her evidence would have to have been subject to intense scrutiny bearing in mind the self-interest she would have in giving evidence). Nonetheless, there is no basis for drawing an inference that Ms Dunn's evidence would have assisted the defendant's case.

Testamentary capacity

[93] The classic test for testamentary capacity is as stated in *Banks v Goodfellow*:[11]

> "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 property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give

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9 (1959) 101 CLR 298.
10 [2012] HCA 17 [168].
11 (1870) LR 5 QB 549, 565.

> 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."

[94] The Court of Appeal recently approved Justice Applegarth's statement of principles as to testamentary capacity.[12] The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in *Banks v Goodfellow*, mental power may be reduced below the ordinary standard, provided the testator has sufficient intelligence to understand and appreciate the testamentary act.[13]

[95] In this case there is no doubt that Mr Ryan was extremely ill, physically, at the time he made his 2011 will. There is also no doubt that his physical ailments had the potential to affect the functioning of his mind and that they had done so, demonstrably, at times since his initial illness in 2010. Equally clear is that the effect of his physical ailments on his mental capacity fluctuated from time to time, depending on the severity of his illness and the drugs which he was being administered.

[96] As to the onus of proof applicable in matters such as this, the Court of Appeal in *Frizzo*[14] approved this statement of Applegarth J, which has especial relevance to testators who, like Mr Ryan, were very ill at the time of making their wills:

> "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.
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> 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*:
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> > '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

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12 *Frizzo & Anor v Frizzo & Ors* [2011] QCA 308, and below at [2011] QSC 107.

13 *Banks v Goodfellow* at p 566; cited by Applegarth J at [155] and the Court of Appeal at [24].

14 Above, [24].

> 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.'"(footnotes omitted)

[97] There are any number of authorities to the effect that the Court determines the question of testamentary capacity on all the evidence before it, not just on medical evidence. In *Zorbas v Sidiropoulous (No 2)*[15] the Court of Appeal in New South Wales said the following:

> "[65] The criteria in *Banks v Goodfellow* are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the *Banks v Goodfellow* criteria. However, evidence of such understanding may come from non-expert witnesses. …
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> [89] In a probate suit, the vital evidence is very often not given by medical experts, but is given by experienced lay observers. I have said more than once in deciding probate cases at first instance, that the most valuable evidence is usually given by the experienced solicitor who witnessed the will as opposed to a very highly qualified psychiatrist whose evidence is based not on any personal observation of the testator, but who has reasoned his or her opinion from medical and hospital notes."

Likewise, in *Nicholson v Knaggs* (above) Vickery J said this at [41]:

> "[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."

[98] These principles are particularly important in this case because Dr Berry's assessment was retrospective, in parts quite inaccurate, and to some extent partial. The wider body of evidence bore on the personalities both of Mr Ryan and Mrs Brangwin. I find the observations of Hamilton J in *Grynberg v Muller*[16] apposite here. In a case which involved both lay and medical evidence, he prefaced his conclusions as to the testator's capacity as follows:

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15 [2009] NSWCA 197, [65] and [89].

16 [2001] NSWSC 532 [47].

> "I have not found the question of the testator's capacity to make the 1987 will an easy one. In the authorities which I have cited the point is made that the decisions as to whether particular conduct or speech bespeak merely eccentricity on the one hand or lack of capacity on the other, harsh judgments of people on the one hand or paranoid delusion concerning them on the other, are in the end matters of value judgment."

[99] On the basis of Dr Berry's concessions in cross-examination, and based upon my acceptance of the evidence of Mr Sargent, I conclude that on both 9 and 11 February 2011 Mr Ryan was not suffering from any active delirium – that would have been obvious to Mr Sargent who I accept was doing a careful enough job and turned his mind to these things. Further, I find that Mr Ryan was aware and understood the nature of his act in making a will and the effects that it would have. He had a perfectly sensible discussion as to his prior will and the changes he wished to make to it. He demonstrated an understanding that he was changing his prior will in a way which disadvantaged his daughter, and I find that he understood the nature of that disadvantage because he felt the need to explain the change to Mr Sargent, and because he participated with Mr Sargent in discussing, albeit briefly, whether or not his daughter would challenge the will. Further, I find on the basis of Mr Sargent's description of what transpired on both 9 and 11 February 2011 that Mr Ryan understood the extent of the property of which he was disposing. He had quite a technical discussion about the joint tenancy of the Urangan house; the annuity nature of his superannuation fund, and the detail of his six bank accounts. He gave accurate and detailed instructions to Mr Sargent about all the property he owned. Whilst discussing Mr Sargent's evidence I pause to note that while his opinion as to the testator's capacity is admissible, it is not to be accorded a great deal of weight. It is his evidence as to what was said and done – as to fact – which really matters.[17]

[100] Furthermore, I have come to the conclusion that Mr Ryan did comprehend and appreciate the claims to which he ought to give effect in making his will. There can be no doubt that he understood his daughter was someone he ought to consider as a beneficiary in his will. That is clear from the fact that he did in fact benefit her, and her family. The gift to the Brangwin family was a substantial gift, although less than the gift made by the 2010 will. It is also clear from the fact that he felt the need to explain a reason for giving a greater benefit to Neta Dunn than to his daughter. And his explanation was in comparative terms and showed he was comparing family with a friend. Apart from his daughter, there was no-one who readily fell within the category of persons to whom Mr Ryan ought to have considered leaving money. He had long ago severed his relationship with his son and his son's family. He had a longstanding relationship with Mr Drake and Mr Drake had recently died. Mr Ryan chose to benefit the family of this close friend. I am mindful that I must give this disposition appropriate scrutiny because to favour Mr Drake's family, rather than his own, invites close attention, particularly as it represents a change from a recent will which makes a more orthodox distribution. Weighing all the evidence, I am not persuaded that Mr Ryan did not comprehend and appreciate the claims to which he ought to give effect in making his will. My task is not to make a decision as to whom Mr Ryan ought to

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[17] See the Court of Appeal in *Frizzo*, above, [24], citing Applegarth J.

have benefitted. If he had capacity, he could choose to benefit whomsoever he pleased.

[101] There remains the question as to whether any disorder of the mind poisoned Mr Ryan's affections towards his daughter and perverted his sense of right towards her, to use the words of the last limb in *Banks v Goodfellow*. This is the aspect of the case which has given me the most difficulty. Dr Berry was of the opinion that it was possible for Mr Ryan to have a delusion specific to his daughter and to act in a way which, unless somebody knew the truth, would not reveal to an interested observer that he held that delusion – t 3-81. Of course, she could not say that Mr Ryan had such a delusion.

[102] It seems to me the strongest parts of the evidence for the defendant are the hospital notes of 22-25 January 2011 and the statements which Mr Ryan made to Mr Sargent about his daughter. On 22 January Mr Ryan was mildly abusive to his daughter. It was a reaction to her behaviour, although an over-reaction. As explained, I do not think much can be made of it. On 24 January 2011 the notes clearly document that Mr Ryan had a delusion and a delusion involving his daughter. It involved him thinking that his daughter would cause him harm. That is, it indicated negative feeling towards her whilst in a delusional state. This was at a time when Mr Ryan was taking drugs which might cause or contribute to delusions. He also had pneumonia and was thus very compromised in his oxygen supply. The behaviour on 24 January, so far as his daughter was concerned, settled quickly. There is no behaviour after this which shows that there was a continuing delusion about his daughter and his daughter was in regular contact with him, at least by telephone, over all of this time.

[103] Turning to the second matter, Mr Sargent's file note of 10 February 2011 recorded that Mr Ryan, "did not trust his daughter and that she would be chasing his money after his death. He explained that he wanted his residence to go to Neta as she had done more for him than his daughter had. He went on to say that you can choose your family but you can't choose your friends."

[104] Dr Berry assumed that statements the testator made about his daughter were either true or delusional – t 3-67. As discussed above, I find that the statement that Neta Dunn had done more for Mr Ryan than his daughter had was untrue. A similar statement was made to Mrs Brangwin on the telephone – that she was 3,000 miles away and wouldn't even make him a sandwich. This was untrue. Unlike Dr Berry, I recognise that there is at least one other possibility as to why Mr Ryan might have made these untrue statements, other than his suffering from a delusion about his daughter. Human nature being what it is, people make irrational and untrue statements. Mr Ryan was physically ill, suffering, and knew, in my view, that he was dying. His close friend Mr Drake had just died. He was on all accounts alone a lot of the time. That he would make the comment about the sandwich to his daughter and the comment that Ms Dunn had done more for him than his daughter, is quite consistent with his being angry or upset about any one, or all, of these or similar things. It is by no means only consistent with his suffering delusions.

[105] It is not possible to decide whether the statements that Mr Ryan did not trust his daughter, and that she would be after his money when he died, represented the true (rather than delusional) state of Mr Ryan's views or not. As I have explained, I have no faith that Mrs Brangwin would have revealed negative aspects of their

relationship in 2010-2011. I have explained my view of their relationship prior to 2010.

[106] Generally, as to these comments made to Mr Sargent, Mr Ryan did not know Mr Sargent. There was a gap of many years between their ages. Mr Ryan wanted Mr Sargent to make his will, and to make it quickly. Mr Sargent, rather than simply accept Mr Ryan's instructions unquestioningly, made attempts to explore some of the reasons behind changes to the 2010 will. It is quite possible that Mr Ryan said the things he did, not because they were true, and not because he was delusional, but because he wanted to present some explanation for his wishes which would satisfy Mr Sargent's enquiries; bring the discussion to an end, and achieve his aim of making a will in accordance with his wishes.

[107] In terms of whether or not there was a delusion affecting the testator's views of Mrs Brangwin at the time he made his 2011 will, it is relevant that he substantially directed his bounty away from a family member, and to the daughter of a longstanding friend. The 2011 will represented a departure, and a deleterious departure so far as Mr Brangwin was concerned, from the 2010 will. However, the 2010 will was not of long-standing. Mr Ryan had never been completely out of touch with his daughter Mrs Brangwin, but their relationship had not been close for most of their lives. Mr Ryan's illness in 2010 had dramatically increased the amount of time they spent with each other and the three weeks Mr Ryan lived with Mrs Brangwin and her family in 2010 was by far the most time they had spent together since 1979 when he left home when she was a 17 year old child. Mr Ryan did not entirely disinherit his daughter in the 2011 will. He left her a share in an amount of money totalling around $300,000. He knew the total amount of money. Rather than leave the entire amount to her, he split it in quarter shares across her family. It was submitted that this may have been a deliberately hurtful act on the part of the testator. There is certainly that possibility. I do not see the change from the 2010 will as so irrational that it alone, or in combination with all the other evidence, persuades me that Mr Ryan was probably suffering from a delusion.

[108] Turning back to the comments extracted above as to the applicable onus of proof, I think the evidence is sufficient to establish, as a presumption, the validity of the 2011 will. The matters raised by the medical notations, and to some extent Dr Berry's evidence, are not trivial or frivolous and they have caused me to give serious consideration to all the factual matters which bear upon Mr Ryan's capacity as at 9 and 11 February 2011. As I hope I have explained, there are parts of the evidence in this case that give rise to doubt and possibilities. There are parts of the evidence which are equivocal. However, when the evidence is viewed as a whole, it seems to me more probable than not that Mr Ryan did have testamentary capacity at the time he gave instructions for, and executed, his 2011 will. Accordingly I give judgment in this proceeding for the plaintiffs.

[109] I will hear the parties as to costs.