SUPREME COURT OF QUEENSLAND

CITATION:	*Konui v Tasi & Anor* [2015] QSC 74
PARTIES:	**MOLLY RAPIA KONUI AS THE EXECUTOR NAMED IN THE WILL DATED 5 MARCH 2012 OF MITA MICHAEL KONUI, DECEASED** (Applicant) **v** **RUIA TASI** (First respondent) **And** **MATTHEW JON ANDERSON** (Second respondent)
FILE NO/S:	S 432/14
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	9 April 2015
DELIVERED AT:	Rockhampton
HEARING DATE:	5 March 2015
JUDGE:	Boddice J
ORDERS:	**1. The application filed by the first respondent be dismissed;** **2. I declare the force and validity of the last Will and Testament of Mita Michael Konui Deceased dated 5 March 2012;** **3. Probate of the last Will and Testament of the Deceased dated 5 March 2012 in whole be granted to Molly Rapia Konui, subject to the formal requirement of the Registrar;** **4. The applicant receive remuneration in the sum of $9,210.00**
CATCHWORDS:	SUCCESSION – making of a Will – testamentary capacity – whether the deceased had testamentary capacity SUCCESSION – execution – whether informal document intended to be Will

Succession Act 1981 (Qld), s 10, s 18

Banks v Goodfellow (1870) LR 5 QB 549, applied
Barry v Butlin (1838) 12 ER 1089, cited
Briginshaw v Briginshaw (1938) 60 CLR 336, applied
Estate of Williams (1984) 36 SASR 1282, cited
Hatsatouris v Hatsatouris [2001] NSWCA 408, applied
Kenny v Wilson (1911) 11 SR (NSW) 460, cited
Macey v Finch [2002] NSWSC 933, cited
Mitchell v Mitchell [2010] WASC 174, cited
National Australia Trustees Ltd v Fazey [2011] NSWSC 559, considered
Nock v Austin (1918) 25 CLR 519 at 528, cited
Phillpot v Olney [2004] NSWSC 592, applied
Public Trustee v McKeon (1917) 17 SR (NSW) 157, cited
Smith v Hayler [1999] NSWSC 1282, applied
Re Estate of Angius [2013] NSWSC 1895, cited
Re Hodges; Shorter v Hodges (1988) 14 NSWLR 698, cited
Re Spencer (Dec'd) [2014] QSC 276, applied
Re Springfield (1991) NSWLR 535, applied
Re Stuckey [2014] VSC 221, cited
Timbury v Coffee (1941) 66 CLR 277, cited
Tyrrell v Painton [1894] P15, cited
Will of Wilson (1897) 23 VLR 197, cited

COUNSEL: A R Arnold for the applicant
S J Deaves for the first respondent

SOLICITORS: Swanwick Murray Roche for the applicant
Robert Harris Rivett for the first respondent

[1] **Boddice J:** The applicant and the first respondent each make application for declaratory and other relief in relation to what constitutes the last Will of Mita Michael Konui ("the Deceased") who died at the Princess Alexandra Hospital, Woolloongabba, on 14 November 2013. Various ancillary orders are also sought, depending on the determination of that primary issue. The applicant also seeks an order, by way of separate application, for the payment of remuneration.

[2] The applicant is the appointed executor and trustee of the Deceased's Will dated 5 March 2012 ("2012 Will"). The applicant seeks a declaration that the 2012 Will is the valid last Will of the deceased, and that probate be granted to her on those grounds. The applicant, first respondent and four of their relatives are the named beneficiaries under the 2012 Will.

[3] The first respondent seeks a declaration that a handwritten document dated 12 November 2013 ("the Handwritten Document") forms the last Will, or part thereof, of the deceased. The applicant and the first and second respondents are named beneficiaries under the Handwritten Document.

[4] The 2012 Will was executed by the Deceased and witnessed by two witnesses in accordance with the requirements of the *Succession Act 1981* ("the Act"). The Handwritten Document was not witnessed in accordance with those requirements. The issue for determination is whether, having regard to section 18 of the Act, the Handwritten Document forms the last Will of the Deceased or, alternatively, forms an alteration and/or partial revocation of the 2012 Will.

Background

[5] The Deceased was a single man, aged 67, at the time of his death. He had worked as a Machine Operator in the mining industry throughout his life. He also held a mining lease at Rubyvale in Central Queensland, where he would mine gemstones.

[6] The applicant is the Deceased's niece. Her father was the Deceased's brother. The applicant, who lives in New Zealand, maintained a close relationship with the Deceased throughout his life. The Deceased stayed with the applicant's family when visiting New Zealand, and kept in regular telephone contact.

[7] The first respondent is the Deceased's "daughter". Although not the Deceased's biological daughter, or ever legally adopted by the Deceased, the first respondent came to be called his daughter through a Maori custom. According to the affidavit of the first respondent, the Deceased and first respondent had a strained relationship, particularly between the years 1989 – 1999. After a reconciliation in 2000, they kept in regular telephone contact. The first respondent also visited him at Rubyvale. However, from 2013 this contact became less frequent.

[8] The second respondent is the son of Lucille Patricia Anderson ("Lucille"). The Deceased and Lucille were in a de facto relationship from 1986 to 1990. The second respondent lived with the Deceased and the first respondent during their relationship. The second respondent and the Deceased stayed in contact until the Deceased's death, visiting one another and sharing family occasions together. The second respondent has a sister, Tanya Lange ("Tanya").

[9] The Deceased was admitted to hospital in Emerald on Saturday, 24 August 2013. He was later flown to Rockhampton where it was discovered he had a burst bowel. A week later he was flown to the Princess Alexandra Hospital where he remained until his death. The death certificate records his death as being as a consequence of cirrhosis of the liver and alcoholism combined with surgery for his burst bowel, related clotting failure and uncontrollable bleeding.

2012 Will

[10] On 5 March 2012, the Deceased executed a "Prepare-Your-Own Legal Will Pack" and made the 2012 Will. The Deceased's execution of that Will was witnessed by Rhian Applewaite and another employee of Elders Financial Planning in Rockhampton. There is no dispute the 2012 Will was validly executed in accordance with the requirements for a valid last Will.

[11] The 2012 Will appointed the applicant as the executor of the Deceased's estate and made the following gifts: his Winnebago Motor Home to two of his nieces Tepare Marree Konui and Toni Awhina Konui and his personal jewellery (valued by the Deceased at $6000) and gem collection (valued by the Deceased at $300 000) to the applicant, Verina Konui and Edwina Herena Ellison (Clause 4); the residue of his estate to his nieces, the applicant, Verina Konui and Edwina Ellison to be shared equally (Clause 5). The deceased also gifted $500 to the first respondent.

The Handwritten Document

[12] On 12 November 2013, two days prior to his death, the Deceased signed the Handwritten Document. It was written under Lucille's hand. It provided:

> "To whom it may concern
>
> I have included Matthew Jon Anderson born 22-5-74 part of my will a Box of sapphires, gold chains is to go to Matthew which are under the front seat of my Winnebago.
>
> Ruia Kathleen is to have a green stone necklace which is the Box.
>
> All my possession is to be divided between Ruia & Molly with no interference from any members of the family or my family.
>
> Matthew Jon Anderson is to have my Toyota Landcruiser & Susuki Carry Van."

[13] The Handwritten Document was signed in three places by the Deceased. Once in the top right hand corner of the document above the date, which had been corrected, and twice at the bottom of the page. The signature appearing on the document is significantly different to other signatures of the Deceased before the court. No other signature appears as witness to the Deceased's signature.

Evidence

[14] The first respondent travelled to Brisbane on 1 September 2013 to visit the Deceased in the Princess Alexandra Hospital. She remained with him until his death on 14 November 2013. At some time during the first week the Deceased was in the intensive care unit of the hospital, the first respondent said the applicant made her aware the Deceased had made the 2012 Will.

[15] The first respondent said the Deceased's condition deteriorated in the days prior to 12 November 2013, and his prospects of survival were not good. She informed the applicant on the afternoon of 11 November 2013 a second procedure performed on the Deceased was unsuccessful. The first respondent also spoke with the second respondent on 11 November 2013.

[16] On the evening of 11 November 2013, shortly after the Deceased's surgery, the first respondent saw the Deceased. At that visit, a doctor informed the Deceased the last two procedures had not been successful and nothing more could be done to preserve his life. The applicant had apparently been informed of this fact by a doctor by telephone earlier that afternoon.

[17] On the morning of 12 November 2013, Lucille, the second respondent and Tanya visited the Deceased. The first respondent said they arrived at around 11.00 am. She showed them to the Deceased's room in the intensive care unit and left them to talk to the Deceased. They remained for most of the day. Later that afternoon, the Deceased was transferred from the intensive care unit back to the ward.

[18] In the late afternoon of 12 November 2013 a doctor spoke to the Deceased in the first respondent's presence. The first respondent recalls the Deceased was coherent. The doctor informed the Deceased about the severity of his condition, and discussed options should the Deceased stop breathing. The Deceased gave instructions to the doctor. After the doctor left, the Deceased asked that Lucille, the second respondent

and Tanya return to the room. They remained with the Deceased and the first respondent for some time.

[19] The first respondent said as they began to leave the room the Deceased called Lucille back and waved the first respondent to the waiting room. Only Lucille remained in the room with the Deceased. After about five minutes Lucille called them back into the room. The Deceased told the first respondent about a box of gems hidden under the front seat of the driver's side of his Winnebago. Inside the box was a green stone which was to be gifted to her. The gems and jewellery were to go to the second respondent. The Deceased also wanted two vehicles to go to the second respondent. The Deceased said everything else in Rubyvale was to be divided equally between the applicant and the first respondent.

[20] During this conversation, the Deceased told Lucille he had made a further Will since the Will he had when Lucille and he were together. The first respondent said the deceased was "insistent" they record his last wishes to writing. The Deceased dictated what he wanted and Lucille wrote it down "word for word". The first respondent said when Lucille finished writing the document, signatures were attached to it by the Deceased and Lucille. Others present in the room were the second respondent, Tanya, and the first respondent.

[21] The first respondent said later that afternoon or early evening the Deceased informed the applicant by telephone of the decision he had made. He said he did not want any interference from any of his family members. The second respondent, Lucille, Tanya and the first respondent were present during this conversation. After they left, the first respondent remained with the Deceased in hospital that evening. The Deceased again spoke to the first respondent about the document. He was insistent not to allow family members to interfere with his decision. The Deceased said he would speak to the applicant about his decision. During this conversation, the Deceased told the first respondent a copy of his 2012 Will was located with the gems lying flat on the floor in his Winnebago.

[22] The first respondent said when the Deceased woke the following morning, he again spoke about the Handwritten Document and his concerns the family would interfere with his decisions. The first respondent said about 30 minutes after the applicant arrived at the hospital at about 8.30 am on the morning of 13 November 2013, she

was handed the Handwritten Document. The first respondent told the applicant these were the Deceased's last wishes and that the Deceased had not been bullied, threatened or intimidated when the document was written.

[23] The first respondent said the applicant spoke to a Justice of the Peace at the hospital later that day. She was informed she needed to obtain a lawyer for the Handwritten Document to be validated or she could purchase a Will Kit. The applicant went across the road from the hospital and purchased a Will Kit. The first respondent said the applicant wrote on a rough copy and showed the Deceased, who told her to add the words "with no interference from any members of the family". The applicant added that to the rough copy and transferred it onto a good copy.

[24] On the following morning, the Deceased's health deteriorated rapidly. The Deceased was visited by the first respondent's family. Later that morning the applicant told the Deceased's "first cousin" Kyle about the Handwritten Document. The applicant read the details contained in it, asking if he would be a witness. However the Will Kit was not signed that day, as the deceased passed away.

[25] Lucille said she visited the Deceased at hospital on 12 November 2013 with her children. The first respondent was present at that time. Lucille did not remember ever being in the room alone with the Deceased on that day. Lucille described the Deceased as in great spirits. Lucille said the Deceased asked her to get him a piece of paper and a pen so that he could make a new Will. Lucille said she wrote down "everything word for word that he told me".

[26] Lucille accepted the Deceased did not use the words "To Whom it may Concern" in the opening line of the Handwritten Document. The Deceased also did not tell her to write "22-5-74" to represent the second respondent's birthday. Lucille added those words. Lucille described the Deceased as very alert and aware. He definitely had all of his faculties.

[27] After Lucille had finished writing the document, the Deceased signed the piece of paper in front of the first respondent, the second respondent and Tanya. Lucille "witnessed" his signature. Lucille did not read the Handwritten Document to the Deceased before his death. The deceased also did not read the Handwritten

Document to her knowledge. In evidence, Lucille confirmed she saw the Deceased sign the Handwritten Document but did not sign the document herself.

[28] Lucille said they asked some staff if there was a Justice of the Peace in the hospital to witness the Will and were informed there were none. After the document had been completed, Lucille said the Deceased rang the applicant and told her he had just made his Will and what was contained in it. He told the applicant these were his wishes and no-one was to interfere with what he wanted.

[29] The second respondent recalled arriving at the hospital on 12 November 2013 at approximately 9.00 am. Lucille and his sister Tanya also travelled to Brisbane that day. Lucille, Tanya, the second respondent and the first respondent then visited the Deceased in the intensive care unit. The Deceased was happy to see them.

[30] Later that afternoon the Deceased was transferred to the ward. The second respondent said a doctor confirmed at this time there was nothing more that could be done and the Deceased would pass away within the next few days. Upon receiving this news, the second respondent said the Deceased asked Lucille if she would write on his behalf his last wishes on paper for him to sign. The first respondent and Tanya were present at this time.

[31] The second respondent saw Lucille write down on a piece of paper as the Deceased relayed words of his final wishes. He heard the Deceased say he wanted the second respondent to receive a box of sapphires and a gold chain located under the front seat of his Winnebago. The Deceased also wanted the second respondent to have two vehicles located on the Rubyvale property. The Deceased wanted the first respondent to receive a greenstone necklace located in the same box of gems. All of his other possessions were to be divided equally between the first respondent and the applicant. There was to be no interference from any members of the family.

[32] The second respondent said he saw the deceased sign the letter written by Lucille. He also saw Lucille sign as a witness. The Deceased then rang the applicant and told her what he had asked Lucille to write on his behalf. The Deceased informed the applicant he had signed this letter as his final wishes. The second respondent said during this telephone conversation the Deceased told the applicant a box of sapphires was to go to the second respondent and the greenstone necklace was to go

to the first respondent. The rest of his possessions were to be divided equally between the applicant and the first respondent.

[33] Tanya said when she attended the hospital with her mother, the second respondent and the first respondent, the Deceased was in fine spirits. He was coherent and in a good mood. Tanya said after the Deceased had been transferred back to the ward and spoken to by a doctor, the Deceased's mood was more sombre. He knew he was going to die. The Deceased asked Lucille to obtain pen and paper so he could write down his last wishes. Tanya said the Deceased commented he thought the Will he had previously done "wasn't right".

[34] Tanya said the Deceased provided instructions to Lucille, who wrote it down "word for word". The Deceased was very precise. Tanya recalled Lucille asking how to spell the word "sapphires". When the document was completed, the Deceased had some difficulty signing at the bottom, so he crossed it out and signed it again. The Deceased also had the date wrong. Tanya said the first respondent told the Deceased the applicant would not agree with what he had told Lucille to write down. The Deceased then telephoned the applicant in New Zealand and told her what was contained in the Handwritten Document. He confirmed these were his last wishes. He said no family members should interfere.

[35] The applicant said when she arrived from New Zealand on the morning of 13 November 2013, after a telephone call from the Deceased on 12 November 2013 asking her to come urgently, the Deceased was in and out of consciousness. He was vague and confused. The applicant accepts she had a conversation with the Deceased about the Handwritten Document but says this conversation did not occur until she arrived at the hospital on 13 November 2013.

[36] The applicant said the Deceased raised the Handwritten Document on 13 November 2013. He told her he thought the gems and two old trucks should go to the second respondent. The rest was to be sold off and split between the applicant and the first respondent. The applicant considered the Deceased was unsure in his own mind as to whether the document executed by him was the right thing to do. He sought her opinion but she did not think it was appropriate to comment. At this time the Deceased was in a "very, very poor state". He had not had much sleep, he was in pain, and appeared exhausted by his circumstances.

[37] The applicant said following her discussions with the Deceased on 13 November 2013, she was concerned about whether the Deceased wanted to dispose of his estate in accordance with the terms recorded in the Handwritten Document and whether that document would be recognised as a valid Will. She discussed her concerns with the first respondent on 13 November 2013. A Justice of the Peace was approached, but was not prepared to be involved in any Will-making in the hospital. The Justice of the Peace suggested a solicitor be engaged or, alternatively, a Will Kit be executed by the Deceased. The applicant was told a Will Kit could be purchased at the Post Office across the road from the hospital.

[38] By that stage, the Post Office was closed for the day. On the morning of 14 November 2013, the applicant purchased a Will Kit. By that time the Deceased could not hold a pen and was drifting in and out of consciousness. The applicant did not feel it was right to have the Deceased execute a Will at that stage. The applicant said at no stage on 13 or 14 November 2014 did the applicant discuss with the Deceased the purchase of a Will Kit. Further, the Deceased never asked her to purchase one or to complete the Will Kit for him.

Medical evidence

[39] The Deceased's treating doctor in the Princess Alexandra Hospital, Dr Won, provided a report in which he opined the Deceased's mental state on 12 November 2013 was sound. The Deceased did not have obvious drowsiness. The Deceased was "able to participate" in a discussion about his end of life decisions and was "of sound mind".

[40] Dr Won agreed in evidence this report was provided in the belief that on that date the only drug the Deceased was taking was a small amount of Codeine Phosphate for the purpose of slowing his stomal output. After examining the Princess Alexandra Hospital records for 12 November 2013, Dr Won conceded the Deceased also had access to Fentanyl (an opioid) through patient-controlled analgesia.[1] This drug could make a patient drowsy, and affect short term memory. However, Dr Won maintained the Deceased was lucid during their conversation that day.

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[1] The patient could administer the drug to himself by pushing a button as he required it.

The Applicable Principles

[41] In order for a Deceased to have sufficient capacity to make a valid last Will, he or she must: understand the nature of the Will and its effects; understand the extent of the property he or she is disposing of, and understand and appreciate the claims to which he or she ought to give effect.[2] It has been recognised that "in order that a man should rightly understand these various matters it is essential that his mind should be free to act in a natural, regular, and ordinary manner".[3] This additional observation was approved by Dixon J in *Timbury v Coffee*.[4] The evidence must be evaluated in accordance the Briginshaw Principle.[5]

[42] Section 10 of the Succession Act identifies the execution requirements of a valid formal Will in Queensland. However, there is power for the Court to dispense with these requirements. Section 18 of the Succession Act provides:

> "**18 Court may dispense with execution requirements for will, alteration or revocation**
>
> (1) This section applies to a document, or a part of a document, that—
>
> (a) purports to state the testamentary intentions of a deceased person; and
>
> (b) has not been executed under this part.
>
> (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.
>
> (3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—
>
> (a) any evidence relating to the way in which the document or part was executed; and
>
> (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.
>
> (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).
>
> (5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State".

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2 *Banks v Goodfellow* (1870) LR 5 QB 549, 565.
3 *Will of Wilson* (1897) 23 VLR 197, 199 per Hood J.
4 (1941) 66 CLR 277, 283.
5 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 342.

[43] A presumption of testamentary capacity does not exist in the absence of a formally executed Will.[6] The onus of proving testamentary capacity where there is an informal Will lies on the party seeking to convince the court the deceased intended the informal document to constitute his or her Will.[7]

[44] The relevant test to determine the validity of an informal will was laid down in *Hatsatouris v Hatsatouris* ("*Hatsatouris*"),[8] when considering the New South Wales equivalent of section 18. The Court must answer three questions of fact:-

(a) Was there a document?;

(b) Does the document purport to embody the testamentary intentions of the deceased?; and

(c) Does the evidence satisfy the Court that the deceased, by some act or words, demonstrated that it was his intention that the document should operate as his will?

[45] There are a variety of factual circumstances that may attract an application under section 18.[9] Of particular relevance, to the current circumstances, are cases where the deceased has not made the document a third party is purporting to be the Deceased's last Will. In such cases, proving the third element in *Hatsatouris*[10] assumes particular importance.

[46] What is required to satisfy the third element in *Hatsatouris* was considered by Powell J, when discussing the equivalent NSW provisions, in *Re Springfield*:

> "… the ultimate inquiry remains, whether the document itself, the circumstances regarding its contents ... and other relevant circumstances ... lead to the conclusion that the relevant deceased intended the subject document to constitute his will;
>
> … while each case must depend upon its own facts, the greater the departure from compliance with the requirements of s 7 of the Act, the more difficult will it be for the court to be satisfied that the relevant deceased intended the subject document to be his will.
>
> …Where, the subject document was not seen, or read, or written, or in some way authenticated, or adopted, by the relevant deceased, or where the subject document, even if seen, or read,

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6 *Re Spencer (Dec'd)* [2014] QSC 276, [18].
7 *Phillpot v Olney* [2004] NSWSC 592, [12] per White J.
8 [2001] NSWCA 408, [56].
9 *Re Spencer (Dec'd)* [2014] QSC 276, *Mitchell v Mitchell* [2010] WASC 174.
10 [2001] NSWC 408.

> by the relevant deceased, was, in truth, no more than 'instructions', or a note of 'instructions', for a will…I would, I believe, find it very difficult, indeed, to find myself satisfied that it was intended by the relevant deceased that the subject document was intended to be his will.[11]"

[47] The interrelationship between the third element in *Hatsatouris* and the question of testamentary capacity was considered in *Re Stuckey*[12]:

> "… If the deceased lacked the capacity to make a will, then the Court could not be satisfied that the deceased intended the document to be her will. If the deceased did not know and approve of the document, then the Court could not be satisfied that the deceased intended the document to be her will. And if the deceased was unduly influenced in the sense recognized by the Courts of Probate, such that her will were overborne, then the Court could not be satisfied that the deceased intended the document to be her will."

[48] In *Smith v Hayler*[13] Santow J highlighted some circumstances which may cause suspicion to attach to a document:

> "The circumstance that the person who prepared, or procured the execution of, the document receives a benefit under it is one which should generally arouse suspicion and call for vigilant examination of the evidence as to the deceased's appreciation and approval of the contents of the will: *Re Hodges* at 705; *Barry v Butlin* (1838) 12 ER 1089; *Nock v Austin* (1918) 25 CLR 519 at 528; *Public Trustee v McKeon* (1917) 17 SR (NSW) 157.
>
> Where the alleged Deceased was enfeebled, illiterate or blind when he executed the document, it must be shown by affidavit that the will was read over to the deceased before its execution, or that the deceased otherwise was aware of the contents of the testamentary document: *Tyrrell v Painton* [1894] P151; *Kenny v Wilson* (1911) 11 SR (NSW) 460 at 469."

Submissions

[49] The applicant submits the Deceased's capacity to make a Will on 12 November 2013 is not established because of the Deceased's physical state at the time of the making of the Handwritten Document, and the influence of opioids. Dr Won's opinion failed to take the influence of opioids into account. The signature of the Deceased also shows his distress or difficulty in placing pen to paper. It is markedly different to other signatures of the Deceased.

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11 (1991) 23 NSWLR 535, 539-540; *Macey v Finch* [2002] NSWSC 933, 270, *Re Estate of Angius* [2013] NSWSC 1895, [270].

12 [2014] VSC 221 at [41].

13 [1999] NSWSC 1282, [9].

[50] The applicant submits the circumstances concern more than a case of mere ignorance or inadvertence of the formalities.[14] They may be contrasted with cases involving documents that were written by the deceased, often with serious and lengthy deliberation. In those cases, knowledge and approval were not in issue. The Handwritten Document is very different:

(a) it was written and signed in suspicious circumstances. It was written by a third party whose son stood to benefit from its contents;

(b) the physical state of the Deceased at the time of its creation was poor, and the Deceased had availability to opioids at a time when he rated his own pain as 7/10 at rest and 9/10 upon movement or cough.

(c) it contains wishes materially different from those expressed in the 2012 Will.

[51] The applicant submits the first respondent also has not displaced the high evidential burden of proving the Deceased intended the Handwritten Document to form his Will, and that he knew of and consented to its contents. Adoption of its contents, or knowledge and consent thereto is not satisfied:

(a) The document was not read to or by the Deceased;

(b) There is no basis to infer the document was read by the Deceased merely because he had it in his possession; and

(c) Although the first respondent can point to statements made by the Deceased that are similar to what is recorded in the document, in such extreme circumstances, such statements are unimportant because of the inconsistencies in the evidence, and between his statement to others and the contents of the Handwritten Document.

[52] The first respondent submits the Deceased had capacity to make a Will at the time he dictated the Handwritten Document. He was able to participate in a discussion with Dr Won about his imminent death, and was able to make end of life decisions. Further, the Handwritten Document encompasses the testamentary intentions of the Deceased:

(a) its terms, insofar as it makes reference to a Will, uses "dispositive" language;

(b) the Deceased referred to the document as his "last wishes";

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14 *Estate of Williams* (1984) 36 SASR 423, 425.

(c) the Deceased felt the 2012 Will "wasn't right"; and

(d) the document was made at a time when the Deceased knew his death was imminent.

The first respondent submits the terms of the Handwritten Document are not surprising because the Deceased made a Will in similar terms while he was in a de facto relationship with Lucille.

[53] With respect to whether the Deceased adopted the Handwritten Document as his Will, the first respondent submits:

(a) reading to or by the Deceased is not required because the evidence establishes the Handwritten Document was made in circumstances where death was imminent.[15]

(b) Despite Lucille's evidence the document was not read by or to the Deceased, it is still possible for the court to infer the Deceased read the document at some point prior to his death.

(c) The affidavits of the first respondent, second respondent, Lucille and Tanya all confirm the deceased told the applicant what was contained in the document in a telephone conversation on 12 November 2013.

(d) The applicant recounts a conversation with the Deceased on 13 November 2013 which confirms the content of the Handwritten Document.

[54] The first respondent submits that section 18 of the Succession Act applies to "part of a document". The part of the document that reflects the conversation can be the subject of a declaration under section 18 of the Succession Act, even though there is evidence other parts of the document were not dictated by the Deceased.

Discussion

[55] The onus of proving testamentary capacity for the Handwritten Document is on the first respondent. The first respondent has not discharged that onus. I am not satisfied the Deceased was in a state to understand the nature and effect of the Handwritten Document, or to understand and appreciate the competing claims to which he ought to give effect.

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15 *National Australia Trustees Ltd v Fazey* [2011] NSWSC 559.

[56] Dr Won's initial opinion of the deceased's capacity on 12 November 2013 entirely overlooked the fact the Deceased had been prescribed the opioid Fentanyl on a patient controlled regime. It is inconceivable the Deceased had not accessed that drug on 12 November 2013. The Deceased had undergone major surgery. When the Deceased moved back to the ward that afternoon, he rated his pain to be 7/10 at rest and 9/10 upon movement/cough

[57] Dr Won conceded it was likely the Deceased would have been using Fentanyl as a form of pain relief given that report of his pain. This drug can make a person drowsy and affect concentration. I do not accept Dr Won's opinion as to the Deceased's capacity.

[58] I also do not accept the evidence of the first respondent as to the Deceased's state at the time the Handwritten Document was written by Lucille. The first respondent's account of the days leading up to the Deceased's death was inconsistent with his physical state and reported levels of pain. This is particularly so in relation to the period immediately after his transfer to the ward.

[59] Lucille's evidence was also unreliable. Lucille initially asserted she had witnessed the Deceased's signature, and had written his instructions word for word. It was quite apparent in cross-examination that Lucille added her own words to the document. Further, her signature did not appear on the Handwritten Document as a witness to the Deceased's signature

[60] The only further evidence to suggest the Deceased had capacity at the time the Handwritten Document was created, comes from the second respondent, a major beneficiary under the Handwritten Document, and his sister Tanya. I do not accept their evidence on this aspect. Their accounts of the Deceased's presentation are inconsistent with his recorded pain levels The second respondent's account was also unreliable. He specifically recalled Lucille had signed the Handwritten Document. That was incorrect. Such a detail is of crucial significance. It, in itself, is sufficient to cause me to doubt the reliability of the second respondent's evidence.

[61] I am not satisfied the Deceased's mind was free to act in a natural or ordinary manner, to enable him to truly understand the nature of his actions and their effect.

The first respondent has not established the Deceased had testamentary capacity at the time the Handwritten Document was prepared on 12 November 2013.

[62] The evidence also does not satisfy me that the requirements of section 18 of the Succession Act are met in all the circumstances. There is no evidence the Deceased, by words or conduct, demonstrated the contents of the Handwritten Document signed by him should operate as his Will.

[63] The circumstances in which the Handwritten Document was executed are suspicious. The Handwritten Document expresses testamentary intentions that differ significantly from what is contained in the 2012 Will. Lucille and her children arrived at the Deceased's bedside after he had been very ill for many weeks and his death was imminent. I accept Lucille spent some time with the Deceased alone shortly before writing the Handwritten Document, which substantially benefited her son, the second respondent. Whilst the Deceased dictated words to Lucille, she also added words to the Handwritten Document. Evidence the Handwritten Document reflects a Will made during the Lucille's relationship with the deceased only furthers the suspicion as to the circumstances of its preparation.

[64] This case is not comparable to *Fazey*.[16] The Handwritten Document was not written by the Deceased or the Deceased's solicitor. The only evidence that points towards the Deceased's adoption of the document is his signature. However, there is no evidence its specific contents were made aware to him. There is evidence it was not read to him, and he did not read it before placing his signature on it. I am unable to draw any inference the Deceased read and adopted the contents of the Handwritten Document merely because it was left in his presence.

[65] The lack of any evidence to establish the Deceased adopted the contents of the Handwritten Document is especially significant in view of the concession by Lucille that she added content to the document,[17] and having regard to the inconsistencies as to the words said to have been spoken by the Deceased and the contents of the Handwritten Document. Those inconsistencies include:

(a) the first respondent said the Deceased said "the gems and jewellery" in the box were to go to the second respondent;

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16 *National Australia Trustees Ltd v Fazey* [2011] NSWSC 559.

17 *Smith v Hayler* [1999] NSWSC 1282, [9] per Santow J.

(b) the second respondent said the Deceased told the applicant on the telephone "a box of sapphires" was to go to the second respondent;

(c) the applicant said the Deceased told her "the gems" should go to the second respondent;

but the Handwritten Document referred to "a box of sapphires, gold chains"

[66] The evidence the Deceased subsequently spoke about the Handwritten Document in a conversation with the applicant provides no assistance in establishing this element. The limited evidence presented as to what the Deceased said in that conversation did not confirm the Deceased knew of the contents of the Handwritten Document, as written by Lucille. The evidence about this conversation is also inconsistent. The first respondent said a conversation occurred soon after the creation of the Handwritten Document. The applicant said the deceased spoke to her about the document the following day. I prefer and accept the applicant's account. That account is suggestive of the Deceased not having formed any concluded intention that the Handwritten Document form his Will, or any part thereof.

[67] The first respondent has not satisfied the onus placed on her of establishing the Handwritten Document forms the last Will of the Deceased, or forms an alteration and/or partial revocation of the 2012 Will. The 2012 Will is the valid last Will of the Deceased. There is no reason why Probate ought not to be granted to the applicant as executor.

Remuneration

[68] The final matter for consideration is the applicant's separate application for payment of remuneration in the sum of $9,210.00. The order sought by the applicant is not opposed by any of the respondents.

[69] The Court has a wide discretion in relation to the payment of remuneration. The relevant factors are varied and depend on all the surrounding circumstances. Those circumstances include the consequence of the determination of the primary application filed by the applicant, and the cross-application filed by the first respondent. The applicant is one of the primary beneficiaries of the estate. Her entitlement is sizeable. However, that fact does not deprive her of any entitlement to remuneration, if it is appropriate in the circumstances.

[70] Having regard to all of the surrounding circumstances, I am satisfied it is appropriate for the applicant to be compensated for her services to date by way of remuneration. The steps taken by the applicant in her role as executor have been arduous, having regard to the residence of the applicant. The amount sought is modest, in comparison to the size of the estate.

Orders

1. The application filed by the first respondent be dismissed;

2. I declare the force and validity of the last Will and Testament of Mita Michael Konui Deceased dated 5 March 2012;

3. Probate of the last Will and Testament of the Deceased dated 5 March 2012 in whole be granted to Molly Rapia Konui, subject to the formal requirement of the Registrar;

4. The applicant receive remuneration in the sum of $9,210.00.

[71] I shall hear the parties as to further orders, and as to costs.