SUPREME COURT OF QUEENSLAND

CITATION:	*Challen v Pitt & Anor* [2004] QSC 365
PARTIES:	**PETER LESLIE CHALLEN (AS EXECUTOR OF THE WILL OF HANNAH MABEL DUNNING, DECEASED)** (plaintiff) **v** **JAYNE LESLEY PITT** (first defendant) **&** **HELEN BICHEL** (second defendant)
FILE NO/S:	S140 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	14 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26, 27, 28, 31 May 2004 & 21 June 2004, 8 October 2004
JUDGE:	Douglas J
ORDER:	**1. THAT, SUBJECT TO THE FORMAL REQUIREMENTS OF THE REGISTRAR, PROBATE OF THE WILL OF HANNAH MABEL DUNNING (DECEASED) OF 4 DECEMBER 2001 BE GRANTED TO PETER LESLIE CHALLEN;** **2. THAT THE EXECUTOR'S COSTS OF AND INCIDENTAL TO THE ACTION BE PAID OUT OF THE ESTATE ON AN INDEMNITY BASIS;** **3. THAT THE FIRST DEFENDANT'S COSTS OF AND INCIDENTAL TO THE ACTION BE PAID OUT OF THE ESTATE ON AN INDEMNITY BASIS SAVE AND EXCEPT FOR THOSE COSTS OF AND INCIDENTAL TO THE ALLEGATIONS IN PARAGRAPHS 6, 7 AND 8 OF THE FIRST DEFENDANT'S AMENDED DEFENCE FILED ON 12 SEPTEMBER 2003.**
CATCHWORDS:	SUCCESSION - WILLS, PROBATE AND ADMINISTRATION - THE MAKING OF A WILL - TESTAMENTARY CAPACITY - SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – Evidence of dementia – Whether the testatrix' likely dementia was sufficient to infer a lack of testamentary

capacity – Confused intervals and lucid intervals

SUCCESSION - WILLS, PROBATE AND ADMINISTRATION - CONTESTED PROBATE PROCEEDINGS — COSTS — Testatrix' likely dementia — Whether party unsuccessfully opposing probate should have costs out of estate

Astridge v Pepper [1970] 1 NSWR 542, referred to
Bailey v Bailey (1924) 34 CLR 558, applied
Banks v Goodfellow (1870) LR 5 QB 549, applied
Boreham v Prince Henry Hospital (1955) 29 ALJ 179, referred to
Conroy v Unsworth-Smith [2004] QSC 81, followed
Davies v Gregory (1873) LR 3 P & D 28, applied
Harrison v Petersen [2000] QSC 415, referred to
In re Devoy; Fitzgerald & Pender v Public Curator of Queensland [1944] St R Qd 1, applied
Parker v Felgate (1883) 8 PD 171, reffered to
Perera v Perera [1901] AC 354, referred to
Perpetual Trustee Co Ltd v Baker [1999] NSWCA 244, applied
Re Hodges; Shorter v Hodges (1988) 14 NSWLR 698, applied
Read v Carmody (NSWCA, 23 July 1998, unreported), applied
Shorten v Shorten (No 2) [2003] NSWCA 60, applied
Spiers v English [1907] P 122, applied
Timbury v Coffee (1941) 66 CLR 277, applied
Worth v Clasohm (1953) 86 CLR 439, cited

COUNSEL: R M Treston for the plaintiff
R D Peterson for the first defendant

SOLICITORS: Hawthorn Cuppaidge & Badgery for the plaintiff
Fox Mildwaters for the first defendant

DOUGLAS J:

Background Facts

[2] Hannah Mabel Dunning ("Miss Dunning"), who was known as Mabel Dunning, died on 25 September 2002 aged 96. Her last will was made on 4 December 2004 when she was 95. She had made a number of wills in the last years of her life. The beneficiaries in each of the last three wills were the people then most actively engaged in caring for her in her old age. Until 12 February 1998 the beneficiaries were a Mr and Mrs Bichel. On that date Miss Dunning changed her will and the new principal beneficiary was the first defendant, Jayne Lesley Pitt ("Lesley Pitt"), whose father was one of Miss Dunning's cousins. Mrs Bichel remained a beneficiary under that will to the extent of being entitled to her choice of three horses from those owned by Miss Dunning. The beneficiaries under the next and

last will were Annette Forbes and her daughter, Kate West (née Tedge). They are descendants of another cousin of Miss Dunning. Annette Forbes had been a beneficiary under earlier wills dating back to the 1970s.

[3] The link between Miss Dunning, Lesley Pitt, Annette Forbes and Kate West, apart from the care of the latter three for Miss Dunning and their family connections, was the interest they shared with her in pony breeding. It was Miss Dunning's principal activity during her long life. She raised the ponies on her land near Kilcoy, the principal asset in her estate, which she left to Annette Forbes and Kate West in her will of 4 December 2001. The instructions for the last will were taken on 20 November 2001. This litigation focuses on her capacity when she made that will and its validity, the extent of her knowledge and approval of the contents of the will and the circumstances of its execution.

[4] The land forming the principal asset of the estate was situated at Dunnings Lane, Woodford. In addition to the land there were several Welsh mountain ponies, some personal effects, the contents of the farmhouse situated on the land and proceeds of Miss Dunning's bank accounts.

[5] Miss Dunning was a spinster. The focus of her life was breeding and raising Welsh mountain ponies on her land. She also had dogs on the property. Particularly as she became older she needed help to pursue her occupation. Annette Forbes helped her for about four and a half years from 1989. Between 1995 and 1997 Helen and Brian Bichel provided assistance. After 1997 Lesley Pitt took over the role until about November 2001 when Annette Forbes resumed the responsibility until Miss Dunning's death. Blue Care nurses also helped to look after her.

[6] There is evidence that she became more demanding on those who helped her in the later years of her life, that she was lonely, that she could sometimes be difficult or rude but was still capable of attracting affection; see the evidence of Mrs Leigh Robertson at T. 156:45-60. She had difficulty in keeping her house clean and seems to have been unaware of the squalor in which she sometimes lived through sharing her house with her pets. It was submitted to me, with some justification, that she had a limited lifestyle with few friends, particularly in the very late years of her life.

[7] The significant facts relevant to Miss Dunning's capacity to make a will, knowing what it provided, relate to her health, particularly her mental health, her relationships with the competing beneficiaries, her eyesight and the circumstances in which instructions were taken for the most recent will and when it was executed.

Miss Dunning's health from October 2001

[8] For present purposes it is relevant to consider Miss Dunning's health commencing with an episode of confusion she suffered on 12 October 2001. Dr Hirschfeld was aware of evidence that she had apparently suffered a transient ischaemic episode in 2000 but there was little reliable evidence about it or its effects on her. Her general health until then was reasonable taking into account her age and a number of physical ailments from which she suffered. Dr Jaravaza, who was her general practitioner and had seen her on about 9 or 10 occasions between 31 January 2001 and 24 May 2002, thought that she was mentally clear for her age except for the episode just mentioned. By that he meant that she would answer questions correctly and relevantly and could relate to him.

[9] The episode on 12 October resulted in her admission to Kilcoy Hospital for care. Dr Jaravaza described her as having had “a funny turn of sorts”. He considered she needed some low key management or “TLC”. Earlier that day she had been taken to his surgery at the Woodford Medical Centre when she was dehydrated, and perhaps had had a fall. She was not speaking very well or as clearly as normal.

[10] Lesley Pitt gave evidence that on 13 October 2001 Miss Dunning while in the Kilcoy Hospital was incoherent, describing a situation where she was taken to a hill and then horses came into the house and there were cows’ heads coming at her. But Kate West simply thought that Miss Dunning was describing her dreams.

[11] Dr Jaravaza described the episode overall as a “fluctuating episode of confusion” meaning that she was just not stable. That diagnosis is supported by the hospital records for 12 October 2001 which record “? SL confused”, probably meaning “query slightly confused”. Her confusion appeared to increase on admission when she was described as “confused + +”, but there is a reference to her having an infection in her legs which may have been “giving confusion” on Dr Hirschfeld’s interpretation of the notes.

[12] Both the infection and the dehydration could have given rise to the confusion but Dr Hirschfeld believed that if the infection was related to the confusion it was likely to have been because of a pre-existing state of dementia. Dr Jaravaza thought that dehydration could also help a patient with dementia present with confusion. He said that in the context of having said that it may not be easy to distinguish moderate dementia from confusion; see at T. 290:42-60.

[13] The Kilcoy Hospital records refer to a diagnosis of dementia. There is no elaboration of that diagnosis beyond its appearance on a form. The diagnosis was probably made by a Dr Weller who was not called to give evidence. One would expect that an attempt to call him would have been made on behalf of the first defendant rather than the estate but Mr Peterson argued that the onus of proof lay with the estate to establish the testamentary capacity of Miss Dunning and that it was not incumbent on him to discharge that onus. That may well be true but it is still fair to assume that if Dr Weller’s evidence could have helped the first defendant he would have been called.

[14] Dr Hirschfeld’s analysis of the hospital records suggests at T.429:47 to T.430:40 that the diagnosis of dementia was supported by Miss Dunning’s being dehydrated, suffering from a skin infection to the lower legs, confused, verbally aggressive, frail, trying to get over the bed rails and calling out and that the facts relied upon to form the conclusion in the discharge summary that she was suffering from dementia were those also superimposed on a pre-existing state of dementia. Dr Hirschfeld’s written report also refers to a CT scan carried out during Miss Dunning’s later admission to hospital in December 2001 as evidencing “underlying cerebrovascular disease which would account for her confusional state and probable dementia”. She died on 25 September 2002 and her death certificate also records “multi infarct dementia” as one of the causes of death.

[15] In contrast, Dr Jaravaza thought that Miss Dunning was mentally very alert apart from the episode in October 2001. He was not involved with a later admission of Miss Dunning to hospital on 1 December 2001 and did not see her again after October until he performed a “health professional assessment” on 4 January 2002.

It was not directed particularly to her mental state but nothing from that assessment caused him to believe that she had deteriorated from the condition that she had been in for a while.

[16] That evidence is consistent with the evidence of Mrs Leigh Robertson, a psychiatric nurse, registered as such since 1992, who met or spoke by telephone to Miss Dunning on 5 or 6 occasions between March and June 2002. She was an impressive witness, disinterested, experienced in dealing with psychogeriatric patients and in assessing them for, among other complaints, dementia.

[17] She only knew Miss Dunning through approaching her to find out more about the breeding of a pony she had bought. The pony was one bred by Miss Dunning. She was able to provide her with a great deal of detailed information about its breeding over the telephone. She invited Mrs Robertson to her property for morning tea about a week later. Miss Dunning remembered her the next time she rang just before the visit, remembered the conversation they had had before and the name of the pony. They met for an extended period in her kitchen having morning tea. There were three adults, a baby and two young children. She was able to remember names and to speak clearly and accurately for more than 90 minutes.

[18] She was also able to read Mrs Robertson's name, address and telephone number back to her in poor light in the kitchen. Mrs Robertson had given her the details in large print in a lined book. She appears to have used that information to ring Mrs Robertson on a number of later occasions when they had detailed conversations. There was also one other occasion when she visited the property with a friend to collect a pony. For present purposes her summary of her dealings with Miss Dunning at T. 155:1-15 is significant:

> "HIS HONOUR: … You said that you spoke to her by phone about four or five times after that over a period of two or three months. You gave us some detail of the conversations. Do you recall now how long those conversations were?-- Not as long as our initial phone call. In actual fact, I had to terminate the conversations in the end. I would say, 'Mabel, I am really sorry. I have to attend to my children.' Because they would be screaming, and she would say, 'No problem and I will talk to you soon.', but throughout her whole conversation I never found any problem with her mental state. I mean, I assess people regularly for dementia and I certainly wouldn't say that she suffered from dementia in any shape, manner or form. Her short and long term memory were very accurate. She was able to describe everything clearly in detail to me."

[19] Not all of the answer is responsive to the question asked, which attracted Mr Peterson's criticism in cross-examination, and Mrs Robertson was not purporting to give evidence as an expert, but her observations about Miss Dunning's short and long term memory appear justified on the experience she had with her as do her general observations about the clarity of her conversations with her.

The events of 31 October 2001

[20] On 31 October 2001 Miss Dunning was alone in her house at night when she thought she thought she heard an intruder. She hid, and pressed her Vitalcall to notify the police. She was neither injured nor ill and had no use for the ambulance which ultimately came to her assistance. The ambulance officers could find no

evidence of a break-in but that does not mean that Miss Dunning did not hear something. She did not confuse the ambulance officer for an intruder on that night but may have been confused about the night's events during the next day, 1 November 2001, when she spoke to Lesley Pitt.

[21] She appeared then to have believed that two intruders with a torch were in her house before the ambulance arrived. The ambulance officer who attended remarked on the squalor of her surroundings in the house but that was not unusual in his experience of her. The most one can conclude from this episode of itself is that Miss Dunning may then have been suffering from a degree of confusion. It would not be safe to draw a general conclusion about her overall mental state on 20 November or 4 December simply from this evidence.

Relations with Lesley Pitt and Annette Forbes

[22] Lesley Pitt had been looking after Miss Dunning since about Christmas Eve 1997. Miss Dunning executed a new will in her favour in February 1998. By late 2000 Lesley Pitt was having difficulty in continuing to look after Miss Dunning as well as her own family and business. She had also been injured in a car accident preventing her from driving for about three months. She agreed that during 2001 her time available to care for Miss Dunning was limited. Her own mother became ill and needed more help from her until she died in September 2001. Her husband took over some of the care of Miss Dunning but she and her husband separated by July 2001. They continued to help Miss Dunning but the frequency of their assistance decreased.

[23] Annette Forbes had come back onto the scene on Miss Dunning's birthday in February 2000 but particularly from about March 2001 when she was contacted by a Mrs Lyons, a close friend of Miss Dunning who asked her to contact Miss Dunning. There had been a falling out between Annette Forbes and Miss Dunning some years before but on this occasion Miss Dunning asked her to help her with the care of the horses and to do some shopping for her.

[24] When Miss Dunning was admitted to hospital in October 2001, Annette Forbes and Kate West told her that Brian Pitt had put her into hospital. Miss Dunning had been distressed at having been taken to hospital, was angry and said that she was going to get to the bottom of it. Lesley Pitt told Miss Dunning that Brian Pitt did not have the authority to put her into hospital and that the doctor was responsible for that decision. It seems that Miss Dunning continued to be distressed about her hospitalisation for some time after her return home. From this time Lesley Pitt said that she had increased difficulty in communicating clearly with Miss Dunning and believed that she began to mistrust her. From this time too Annette Forbes began to see her more frequently.

[25] Some time in October Annette Forbes made an appointment with Gayle Maskiel for Miss Dunning at her request. She was not told the reason for the appointment. Gayle Maskiel was a solicitor whom Miss Dunning had used to draw up the will executed in February 1998. The first appointment was cancelled because of Miss Dunning's ill health but Annette Forbes made another appointment that Miss Dunning failed to keep.

[26] She decided not to go because, apparently, Brian Pitt had a discussion at some stage with her about the proposed appointment and queried whether she wished to change

her will. Miss Dunning's perception was that he was angry with her when he questioned her about whether she had changed her will. She was also concerned that Brian Pitt had come to know of the appointment without her knowledge. Accordingly she decided to see a solicitor from Hawthorn, Cuppaidge & Badgery, a firm which had drawn other wills she had executed before. Brian Pitt did not give evidence so his version of these events is unavailable. Gayle Maskiell had no file notes relating to the making of an appointment to see her. The evidence relevant to Miss Dunning's perception of the episode is necessarily secondhand.

[27] Lesley Pitt did not speak to Miss Dunning in an attempt to distance herself from Brian Pitt's actions although it seems likely that she was at Miss Dunning's property during November 2001 helping to look for missing horses. Miss Dunning had been critical of her for failing to do more to look for the horses. She did not go to see her in hospital when she was admitted on 1 December 2001 and did not see her again before her death.

Instructions for the will

[28] The appointment with Hawthorn, Cuppaidge & Badgery for Miss Dunning to change her will was made by Annette Forbes by telephone, apparently on 3 November 2001. Miss Dunning was seen by the solicitor, Ms Diane Hopton, on 20 November 2001 at Hawthorn, Cuppaidge & Badgery's Kilcoy office. Ms Hopton was then in her late forties. She had been a solicitor only since 1999 but by the time she took instructions for this will had prepared many wills both during her two years as an articled clerk and more than two years as a solicitor. She had also spent 17 years as a teacher teaching students with intellectual and sometimes physical disabilities. She was familiar with the firm's file of earlier wills and with their contents. Annette Forbes brought Miss Dunning to the office in her wheelchair but was asked to leave the room by Ms Hopton while she took instructions.

[29] Ms Hopton saw Miss Dunning for at least 30 minutes. The estate was a simple one. Her contemporaneous file notes record Miss Dunning's instructions and are consistent with the will that she drew. They also provided sufficient detail to allow her to prepare the will. They provide a contemporaneous note that suggests that Miss Dunning knew what she was doing and approached the task coherently.

[30] Ms Hopton's assessment of Miss Dunning was that, although she was elderly and obviously physically disabled, she was mentally alert. At that appointment, on Ms Hopton's evidence, Miss Dunning knew, as Ms Treston accurately summarised, that she had made previous wills, that her last will was made with a solicitor, the name of the previous solicitor who had made the will, where the office of the previous solicitor was located, what her property was which she had to dispose of, to whom she wanted to leave her estate, why she wanted to remove a previous beneficiary, that she did not want to benefit Annette's sons, but only her daughter, apparently because she was interested in the horses, and that she wanted Hawthorn Cuppaidge & Badgery to provide the executor.

[31] She wrongly told Ms Hopton that both Lesley Pitt and her husband, Brian Pitt, were beneficiaries under her previous will. The truth was that Lesley Pitt was the principal beneficiary and Mrs Bichel was to take any three of Miss Dunning's mares. Brian Pitt was not a beneficiary. Otherwise it is fair to say from Ms Hopton's evidence that Miss Dunning was able to appreciate the significance of her

actions in making a will, knew of the valuable items in her estate, knew who might seek to have a claim against her estate, and was able to evaluate the claims against her estate after discussing options with Ms Hopton.

[32] Miss Dunning did say on more than one occasion to Ms Hopton that Brian and Lesley Pitt were only after everything they could get. Ms Hopton recorded that in her file note. The objective truth of that statement is not something that I must assess but it is an important issue relevant to the claim that Miss Dunning did not possess proper testamentary capacity. In other words, was her change in attitude toward the Pitts evidence of a delusion from which she was suffering or of some other mental incapacity? That is an issue of some significance to which I shall return.

Miss Dunning's health between 1 and 4 December 2001

[33] Miss Dunning was admitted to the Kilcoy Hospital on 1 December 2001, apparently after she fell and was found by the Blue Care nurses. The hospital records note that she was "talking coherently but does not use her glasses any more" and that she was seeing less than usual. On observation she could count her fingers when they were directly in front of her. There is also an entry on 1 December 2001 of "intermittent confusion" under the heading "Other". That may be a reference to her history, not her presentation on 1 December 2001, but in the absence of the witness who recorded the information I could not conclude that issue one way or the other.

[34] It assumes less significance because there is a reference on 3 December 2001 to Miss Dunning experiencing increasing confusion overnight, referring to the night of 2 December 2001. Earlier entries on 2 December had referred to her becoming very agitated and abusive. On the morning of 3 December 2001, however, she woke and was lucid. She "travelled well" during that day to Caboolture for a CT scan of her head. There is no entry on 4 December 2001 to suggest that she was experiencing any episodes of confusion on that day. That was the day she executed the will.

Miss Dunning's eyesight

[35] Miss Dunning's eyesight in March 2000 without her glasses was "tested at 1 metre less than standard distance as 5/7.5R, 5/15L" by Dr Cunningham who was not called as a witness. In his report of 22 December 2003 he said that these were "good acuities" and that when he saw her on 22 March 2000 she would have had sufficient vision to see what she was reading and what she was signing. He also reported, however, that she was seen by one of his colleagues on 26 July 2002, complaining of "increasing blur" in both eyes for the previous few months. Her vision was tested then as "6/30R & L" and 6/24 with both eyes open. She was diagnosed with a vascular occlusion that may well have "been the event that brought to her notice increased blur".

[36] Dr Keith Hirschfeld, not an ophthalmologist, but an extremely experienced physician specialising in, amongst other areas, geriatric medicine, did not ever treat Miss Dunning but had read the medical evidence and deduced from it that the rough assessment of Miss Dunning when she was admitted to hospital on 1 December 2001 indicated that her visual acuity was at best then 6/36 and that her fields of vision were markedly reduced. He believed that without her glasses she would then have been unable to read the will in normal typescript and may well have needed assistance even when using her glasses.

[37] There was other evidence relied on by the estate as to her capacity, however, which suggests that she was able to read during the relevant period. Ms Treston summarised it as follows:

- After Miss Dunning was released from hospital in December 2001 she would still be able to talk to Kate West about newspaper articles which she had read.
- Kate West observed Miss Dunning notice that one of Kate West's children had lost his dummy onto the ground some metres away, and that must have been between December 2001 and March 2002.
- Kate West observed that Miss Dunning could watch the cricket on the television and observe that a ball had "scattered the birds".
- Miss Dunning was able to re-read Mrs Robertson's name, address and phone number back to her in about March 2002 in a very dark and dingy light.
- Miss Dunning told Blue Care on 24 May 2001 that she could still use a telephone including looking up a number and dialling without assistance.
- Miss Dunning still had good vision for reading in March 2000 with acuities of 6/18.
- Miss Dunning had visual acuity in late July 2002 of 6/30 which was a lot better than simply counting fingers in front of her face, in circumstances where it would not have been possible for her vision to have improved between December 2001 and July 2002.

Execution of the will

[38] The will was signed by Miss Dunning in the presence of two witnesses who each witnessed her signature and then affixed their signatures to her will. There is a conflict in the evidence as to who was present at the time the will was actually executed. Ms Hopton recalls that only Miss Dunning and the witnesses to the will were present. Mr Weller, who was a witness, and Annette Forbes say that Annette Forbes was also there.

[39] Ms Treston submits that the latter version appears unlikely, asking rhetorically why would a solicitor who had taken the trouble to have a beneficiary leave the room, for the purpose of Miss Dunning reading and discussing the will, then ask that beneficiary to come back into the room while the will was signed? However, even if the other version is correct, it does not in any way affect due execution. There is nothing which prevents a beneficiary from being present at the time a will is executed.

[40] Mr Weller came to the hospital for the occasion as a witness. He had been Annette Forbes' de facto husband in the past but had been separated from her since 1989. They had a child together but he said he regarded her now as an acquaintance rather than as a close friend. He had known Miss Dunning for many years. She recognised him when he arrived, and acknowledged him by name. Both Mr Weller and Ms Hopton believed that Miss Dunning read the will in their presence. Mr Weller remembered that Miss Dunning said words to the effect "It seems right", after she had read it. His presence was criticised by Mr Peterson because of his connection with Annette Forbes but there is no evidence that his involvement had any effect on the validity of the will.

[41] The solicitor, Ms Hopton, had been advised that Miss Dunning was physically not very strong. She agreed she was "on notice" in relation to Miss Dunning's condition. Her recollection was that Miss Dunning was propped up in bed when she

arrived with no other patients in the room. She told Ms Hopton that she had read the draft will which had been sent to her but Ms Hopton explained the operative parts of the will to her and asked her to read it again. She appeared to do so and freely executed the instrument.

[42] The evidence does not reveal whether she used her glasses. They would have made it easier for her to read but it may be that she could read without them. The medical evidence about her eyesight without glasses suggests that she may not have been able to read the will easily or at all but it was explained to her and reflected the instructions that she had given Ms Hopton on 20 November 2001. There is other evidence to suggest that she was capable of reading well enough anyway, such as the evidence of Mrs Robertson referred to earlier.

[43] She also asked about a power of attorney and after hearing what a power of attorney was, asked for one to be prepared for her and nominated Annette Forbes to be her attorney. Ms Hopton prepared one for her that was executed later that month, again in circumstances suggesting that she knew what she was doing.

Testamentary capacity and Miss Dunning's attitude towards Mr and Mrs Pitt

[44] The main issue relevant to testamentary capacity is whether Miss Dunning was suffering from dementia and, if so, how that affected her. Although it was not addressed specifically in his written submissions, something was also made by Mr Peterson in evidence of the episode in mid-October 2001 when Annette Forbes and Kate West told Miss Dunning that Brian Pitt was responsible for putting her into hospital to the effect that it influenced Miss Dunning unfairly against him and Lesley Pitt. There was also the suggestion by Miss Dunning to Ms Hopton that the Pitts were only interested in helping her for her money.

[45] Ms Treston submits that even if the assertion that the Pitts were only after what they could get is unfair, it was perfectly understandable how Miss Dunning had reached that conclusion. She had changed her will in favour of Lesley Pitt only some weeks after Lesley Pitt had begun caring for her. She was going to change her will after Annette Forbes took over the task from Lesley Pitt. She believed that Brian Pitt had challenged her about her attendance upon Gayle Maskiel, solicitor, to change her will and that he was angry and led her to believe that he would not continue to help her. It seems that Lesley Pitt knew of this episode but did not try to distance herself from her husband's alleged behaviour and stopped going out to see Miss Dunning. Ms Treston's submission was that it was not surprising that Miss Dunning concluded that the Pitts' concern for her was directly linked to their financial interests in her estate.

[46] In the absence of evidence from Brian Pitt it is easier to infer that this episode may have had the effect on Miss Dunning described by those to whom she spoke about it and that her attitude to the Pitts was influenced not by irrational behaviour on her part but by concern about the motives driving them as well as the wish to reward Annette Forbes and Kate West for taking over the task of caring for her.

Testamentary capacity and the diagnosis of dementia

[47] There is evidence from Dr Hirschfeld that Miss Dunning was suffering from dementia at least since her admission to hospital in October 2001. The estate submits that, if Miss Dunning was in the early stages of dementia, at best her mental

state was fluctuating and she, irregularly, experienced some episodes of confusion. Ms Treston also submits that Dr Jaravaza was in a unique position to notice cognitive changes and to treat her, that he felt no need to and that, therefore, a diagnosis of dementia affecting her testamentary capacity was not so clear as to invalidate the will.

[48] Mrs Robertson's evidence seems to me to be also highly relevant. She was able to observe Miss Dunning over a period of about three months for extended periods from about three months after the will was executed. She was also used to assessing dementia in geriatric patients. She did not observe it in Miss Dunning.

[49] The first defendant submitted that Dr. Jaravaza's description of Miss Dunning as mentally clear for her age, and that she was connected, did not address the classic test of capacity enunciated in the authorities. Mr Peterson also submitted that the health professional assessment in January 2002 was used for the determination of supported care and could not be used as a reliable indicator of testamentary capacity at the material time. He argued that the hospital admission in October 2001 and Dr Weller's assessment was more reliable than Dr Jaravaza's episodic contact with the patient; see T. 292:20-30. He also pointed to Dr Jaravaza's lack of awareness of the results of the CT scan of Miss Dunning's brain and the lack of challenge to Dr Hirschfeld's opinion that Miss Dunning was suffering from dementia when she gave instructions for the will and executed it. Dr Hirschfeld had described Miss Dunning's confusion on the 12 October as an episode of delirium superimposed on pre-existing dementia; T. 399:30-40. In other words, he submitted, there is no scope for the suggestion or any finding that the last will was made during a period where Miss Dunning was having what has been suggested as a "lucid interval".

[50] Dr Hirschfeld describes the situation on 4 December 2001 compared to her presentation from the records on 2 December 2001 as " … an interval where her behaviour and aggressional symptoms seemed to have subsided"; T. 427;50-52. He was not happy about the lucid interval concept, from a clinical point of view, but conceded reluctantly that he could not reject the possibility entirely; T. 410:26-28.

[51] Apart from the conclusions of Dr Hirschfeld there is very little to suggest that Miss Dunning lacked testamentary capacity at the relevant times, when she gave instructions and when she executed the will. The evidence of Ms Hopton about each of those events coupled with the evidence of Dr Jaravaza and Mrs Robertson and others about her apparent competency to handle her affairs over the relevant period, with the exception of the episode in October 2001 and some events during her admission to hospital in December 2001, suggest that she was capable. When that evidence was put to Dr Hirschfeld at T. 402-408 he agreed that the behaviour of Miss Dunning described on those dates and when she later executed the power of attorney pointed to her having the necessary capacity; see the evidence at T. 409-410 also. He also agreed that it was extremely difficult to make a diagnosis by reconstruction from medical records and that her treating doctor would be in a better position to assess whether Miss Dunning suffered from dementia; T. 436:49-57. He had made his diagnosis from the records but had not heard or read the evidence of the lay witnesses in the trial, which Ms Treston also submitted weakened the strength of his opinions.

Testamentary capacity and the law

[52] Both counsel agreed that the classic test of whether or not a person has testamentary capacity comes from the judgment of Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 where his Lordship said at 565:

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

[53] Mr Peterson relied in particular on a passage from an unreported judgment of the New South Wales Court of Appeal in *Read v Carmody* (NSWCA, 23 July 1998, unreported) recently adopted by Mullins J in *Conroy v Unsworth-Smith* [2004] QSC 81 in a passage where her Honour conveniently sets out the law relevant to cases of this nature:

> “[98] A modern restatement of the test in *Banks v Goodfellow* is found in an unreported judgment of the New South Wales Court of Appeal *Read v Carmody* (NSWCA 23 July 1998 unreported) which is set out in *Grynberg v Muller* [2001] NSWSC 532 at para 18:
>
> ‘Powell JA restated the general test in *Read v Carmody* supra as follows:
>
> It is clear from the first of the passages in Brownie J's Judgment which I have set out above that his Honour was aware of the various matters which he was required to consider in determining whether or not at the relevant time the deceased had testamentary capacity. Those matters have, over the years, been expressed in varying forms and in differing language, but all formulations seem agreed that `testamentary capacity' encompasses the following concepts:
>
> 1 that the testator — or testatrix — is aware, and appreciates the significance, of the act in the law which he — or she — is about to embark upon;
>
> 2 that the testator — or testatrix — is aware, at least in general terms, of the nature, and extent, and value, of the estate over which he — or she — has a disposing power;
>
> 3 that the testator — or testatrix — is aware of those or (sic) may reasonably be thought to have a claim upon his — or her — testamentary bounty, and the basis for, and nature of, the claims of such persons;
>
> 4 that the testator — or testatrix — has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons.

> The necessary corollary of this is that, if, at the relevant time the testator — or testatrix — is found to suffer from a condition — whether 'mental illness' (or psychosis) in the strict sense or any other form of `mental disorder' (including, but not limited to, deterioration in higher intellectual function or dementia) — which detrimentally affects his — or her — consciousness or sense of orientation, or has brought about disturbances to his — or her — intelligence, cognition, thought content and thought processes, judgment and the like, then, even though that condition may be transient, or, if appropriately treated, reversible, the testator — or testatrix — will, more probably than not, be held to lack testamentary capacity.'

[99] It is common ground that the onus of proving that the 1992 will was made at a time when the deceased had testamentary capacity lies on the plaintiff as the party propounding that will. The onus continues throughout the whole case and is determined upon the balance of probabilities on the whole of the evidence: *Bailey v Bailey* (1924) 34 CLR 558, 570 ("*Bailey*").

[100] The proponent's duty is, in the first place, discharged by establishing a prima facie case which follows from a duly executed will that is rational on its face: *Bailey* at 570 and *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698, 706. Although the authorities speak in terms that once the proponent establishes a prima facie case of testamentary capacity, the onus probandi lies upon the party impeaching the will to show that it ought not to be admitted to proof (*Bailey* at 571), it becomes a question of looking at the evidence as a whole to determine whether it establishes affirmatively that it was more probable that not that the testator or testatrix (as the case may be) had testamentary capacity when he or she executed the will: *Timbury v Coffee* (1941) 66 CLR 277, 282.

[101] The significance of the onus and burden of proof where the issue of testamentary capacity is raised is made clear by the joint judgment of the court in *Worth v Clasohm* (1953) 86 CLR 439, 453:

> 'A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt by proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution.'

[102] The following working propositions extracted by Isaacs J from authorities and set out in *Bailey* at 572 are particularly pertinent to the task that must be undertaken in this proceeding:

> '(10) The opinion of witnesses as to the testamentary capacity of the alleged testator is usually for various reasons of little weight on the direct issue.
>
> (11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions.
>
> (12) Where instructions for a will are given on a day antecedent to its execution, the former is by long established law the crucial date.' "

[54] The evidence summarised above at [29]-[30] of these reasons of the instructions provided to Ms Hopton satisfies me that Miss Dunning met the four tests referred to in the authorities: that she appreciated the significance of giving instructions for the execution of the will, was aware of the nature, extent and value of her estate, was also aware of those who may reasonably be thought to have a claim upon her "testamentary bounty" and the basis for, and nature of, their claims and had the ability to evaluate, and to discriminate between, the respective strengths of their claims.

[55] It was she who instructed Ms Hopton and her actions had a certain inexorable logic compared to her previous behaviour. The logic of the connection between the identity of those caring for her and the beneficiaries under her will, where she had no competing potential beneficiaries such as children or other closer relatives, is significant. So is the refusal to entertain the prospect of including Annette Forbes' sons as beneficiaries. Kate West was interested in her horses, not the boys. That was an issue raised by Ms Hopton to ensure that other potential claimants were not overlooked. Mr Peterson criticised her for doing so but I would not. It seems to me that she was trying to perform her duty. What is more significant is that Miss Dunning would not be led and had logic behind her choice of beneficiaries.

[56] It is likely on Dr Hirschfeld's evidence and the evidence of the CT scan results that she had some form of dementia. On the whole of the evidence, however, that condition does not seem to have affected her behaviour grossly at the time she gave instructions on 20 November. There is more doubt about her state when she executed the will on 4 December because of her recent admission to hospital and the behaviour observed on 2 December but she was not confused or acting irrationally on the day that she executed the will.

[57] Although I can accept that a testator diagnosed with dementia may, more probably than not, lack capacity, on the whole of the evidence I am not willing to regard Miss Dunning's condition in this case as disabling when she gave instructions and made the will; see *Worth v Clasohm* (1953) 86 CLR 439, at 453 quoted by Mullins J above. I would not conclude that she suffered from disabling dementia simply on the basis of the use of that word, apparently by Dr Weller, in October 2001 in one hospital record where Dr Weller himself did not give evidence in support of the existence of the condition.

[58] The diagnosis of dementia by Dr Hirschfeld was made retrospectively, an admittedly difficult exercise. It is contrary to the almost contemporary observations of Dr Jaravaza and Mrs Robertson of Miss Dunning's conduct, an advantage that Dr Hirschfeld lacked. It seems likely to have only recently exhibited itself and has to be contrasted with the very significant evidence of rational behaviour by Miss

Dunning when she gave instructions before the will was executed and for a significant time after. Although Dr Hirschfeld did not embrace the concept of the "lucid interval", the whole of the available evidence suggests, rather, that Miss Dunning's behaviour was generally alert and aware with confused intervals. I am satisfied that she retained her mental powers to the necessary extent to make this a valid will.

Knowledge and approval of the will

[59] Mr Peterson's submissions were that at the time of execution, given Miss Dunning's poor eyesight, impaired hearing, physical frailties and dementia, it was improbable that she knew and approved of the document that was presented to her for signing. I disagree. There was evidence that she read the document after its operative provisions had been explained to her by Ms Hopton and then signed it before the witnesses. As Ms Treston submitted, there was also considerable evidence that Miss Dunning's eyesight was still quite reasonable in late 2001 and early 2002.

[60] There is no evidence one way or the other whether she had her glasses on when she read the will and Dr Hirschfeld's view was that without her glasses she would not have been able to read it. One logical inference is, therefore, that she probably had her glasses on when she appeared to read the will. Another is that vanity may have led her to pretend she could read when she could not. I would have thought that the former explanation was the more likely, given the other evidence about Miss Dunning's forthright behaviour, but the hospital record suggests that she had stopped using her glasses.

[61] Ms Treston submitted that Dr Hirschfeld's evidence about Miss Dunning's inability to read her will ought to be rejected. I would not have been inclined to do so, especially in the absence of contrary medical evidence, but the other evidence relied on by the estate referred to earlier does make a good case for her continuing ability to read. I think it more probable than not, therefore, that she did read the will. It is clear, in any event, that she was told what she was signing, knew what she was signing and had been given an explanation of the will's operative clauses, which were consistent with her instructions; see *Parker v Felgate* (1883) 8 PD 171, 173; *Perera v Perera* [1901] AC 354, 361; *Bailey v Bailey* (1924) 34 CLR 558, per Knox CJ and Starke J at 567 and per Isaacs J at 572.

[62] Ms Treston also submitted that while the time for determining mental capacity is at the time of executing the will, if a testator is of sound mind at the time of giving instructions but not at the time of execution, the will can still be admitted to probate if, at the time of execution, the testator was aware that he or she was executing a will for which he or she had previously given instructions, relying on the decisions just referred to and *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179 at 180. See also *Astridge v Pepper* [1970] 1 NSWR 542, 548 and *Harrison v Petersen* [2000] QSC 415 per Mullins J at [56].

[63] In these circumstances, I am satisfied that Miss Dunning read the will, that its operative clauses were explained to her and that she understood that it was the will for which she gave instructions.

Suspicious circumstances

[64] Mr Peterson also submitted that there were suspicious circumstances attending the execution because of the presence of Annette Forbes as the principal beneficiary at the bedside of the deceased when she was executing her will. He submitted that was troubling and something which must excite the vigilance of the court, as was the fact that it was witnessed by Mr Weller, Ms Forbes' former defacto spouse.

[65] I believe that it is more probable than not that Ms Hopton's evidence was accurate and that Annette Forbes was not present at the execution of the will. She had asked her to leave when Miss Dunning gave instructions and would be more likely to be aware of the niceties of such an occasion and to remember them accurately. Even if I were wrong that would not invalidate the will and there is no other evidence from which I could conclude that such a result should follow. I have already said that Mr Weller's presence should not prevent the will from being proved.

Conclusion

[66] Accordingly, as I am satisfied that Miss Dunning had the necessary capacity to make the will and executed it with the necessary knowledge and approval of its contents I shall admit the will to probate.

[67] Mr Peterson submitted that the general rule that costs should follow the event should not apply here because "the conduct, habits and mode of life of the testator have presented reasonable ground for questioning" her testamentary capacity; see *Davies v Gregory* (1873) LR 3 P & D 28, 31-34 referred to in *Mortimer on Probate* (2nd ed.) at p. 623. He relied on the fact that Miss Dunning was elderly, the evidence of dementia in the medical records, which he submitted was compelling and which I have concluded was likely to have existed, the incidents of confusion to which I have referred and the opinion of Dr Hirschfeld, an authoritative and respected medical practitioner.

[68] Ms Treston's primary submission was that costs should follow the event and that the first defendant should in no event receive its costs of the issues of undue influence and suspicious circumstances pleaded because of the absence of evidence relevant to them. The issue of undue influence was not abandoned by Mr Peterson until the submissions. It has been said that a plea of undue influence should never be put forward unless the party who pleads it has reasonable grounds upon which to support it; *Spiers v English* [1907] P 122, 124. I agree with Ms Treston as to those issues.

[69] Otherwise, however, it is my view that the evidence justified the conclusion that Miss Dunning's own conduct, habits and mode of life gave proper grounds for questioning her testamentary capacity; see also *Spiers v English* at 123; *In re Devoy; Fitzgerald & Pender v Public Curator of Queensland* [1944] St R Qd 1, 4; *Perpetual Trustee Co Ltd v Baker* [1999] NSWCA 244 at [13]-[15] and *Shorten v Shorten (No 2)* [2003] NSWCA 60 at [18]-[20]. It seems to me to be a case in that category rather than the potentially overlapping category where the facts are only such as "to lead reasonably to an investigation". There the result is, commonly, that there be no order as to costs with the result that each party bears their own costs. That is not an appropriate result here.

[70] The consequence is that each party's costs of and incidental to the litigation with the exceptions for the first defendant's costs to which I have referred should be paid out of the estate. For the sake of completeness I should add that the second defendant took no part in the action.

[71] The orders which I make are:

1. That, subject to the formal requirements of the Registrar, probate of the will of Hannah Mabel Dunning (deceased) of 4 December 2001 be granted to Peter Leslie Challen;

2. That the executor's costs of and incidental to the action be paid out of the estate on an indemnity basis;

3. That the first defendant's costs of and incidental to the action be paid out of the estate on an indemnity basis save and except for those costs of and incidental to the allegations in paragraphs 6, 7 and 8 of the first defendant's amended defence filed on 12 September 2003.