

SUPREME COURT OF QUEENSLAND

CITATION: *Fradgley v Pocklington* [2011] QSC 227

PARTIES: **JOHN WILLIAM FRADGLEY AS EXECUTOR OF
THE ESTATE OF MICHEL ISOBEL ROSE DRAKE
(plaintiff)**
v
**JO ANNE POCKLINGTON
(defendant)**

FILE NO: BS 4788 of 2009

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 10 August 2011

DELIVERED AT: Brisbane

HEARING DATE: 18-20 April 2011

JUDGE: Mullins J

ORDER: **The plaintiff's claim is dismissed.**

CATCHWORDS: SUCCESSION – WILL, PROBATE AND
ADMINISTRATION – THE MAKING OF A WILL –
TESTAMENTARY CAPACITY – soundness of mind,
memory and understanding – evidence – onus of proof and
weight of evidence – where 86 year old testator changed will
to give a bequest of \$200,000 to a friend who provided
support after her stroke – where bequest almost half of the
value of the estate - where testator's only daughter had a
lifetime of a close and filial relationship with the testator –
whether executor showed that at the time the instructions for
the will were given the testator appreciated the claim of her
daughter

Bailey v Bailey (1924) 34 CLR 558, considered
Banks v Goodfellow (1870) LR 5 QB 549, followed
Boreham v Prince Henry Hospital (1955) 29 ALJ 179,
followed

COUNSEL: R D Peterson for the plaintiff
D J Morgan for the defendant

SOLICITORS: Bell Legal Group for the plaintiff
Gleeson Lawyers for the defendant

[1] Miss Michel Drake died in March 2008 at the age of 86 years. She was survived by her daughter who is the defendant in this proceeding. The plaintiff who is a solicitor is the executor named in the will executed by Miss Drake on 6 December 2007 (the 2007 will). The plaintiff seeks to prove the 2007 will in solemn form.

- [2] The defendant claims that Miss Drake did not have testamentary capacity when she executed the 2007 will and counterclaims for relief based on a finding that the will executed by Miss Drake on 1 June 1999 (the 1999 will) was the last valid will of Miss Drake.
- [3] The defendant was the beneficiary of Miss Drake's estate under the 1999 will. The change made by the 2007 will was the inclusion of a bequest of \$200,000 in favour of Ms Karen Short who had worked as a legal secretary with Miss Drake between 1992 and 1995 and maintained her friendship with Miss Drake until Miss Drake's death.

Miss Drake's relationships

- [4] Miss Drake was married to the defendant's father. Apart from the defendant, there was another child of the marriage who died as a young child. Miss Drake and her husband then divorced. Miss Drake then brought up the defendant in Melbourne where Miss Drake worked as an executive secretary. The defendant left home at the age of 18 years to attend university in Melbourne, but maintained regular contact with her mother.
- [5] Miss Drake commenced a relationship in the 1970's with Mr Rolfe whom she referred to as her fiancé. They relocated to the Gold Coast in 1978 where Miss Drake acquired land at Nerang and built a house in which she and Mr Rolfe resided. The defendant was in the routine of having a weekly telephone call with Miss Drake, would exchange letters on a weekly basis, and would visit Miss Drake in Queensland once each year.
- [6] Miss Drake's second job on the Gold Coast was at Price & Roobottom as a legal secretary. In 1982 she became the secretary to Mr Bill Potts who was a newly admitted solicitor at that firm. He describes how Miss Drake gave valuable guidance to him in his early years as a lawyer. His practice developed from litigation into exclusively criminal law.
- [7] From about 1986 the defendant was in a relationship with Mr Tabart, a farmer in Western Victoria. The defendant relocated to the farm with her partner, but also travelled with him in connection with his involvement in gliding competitions. He accompanied the defendant when she came to Queensland for her annual visit with Miss Drake. The defendant continued her regular contact with Miss Drake by telephone and mail.
- [8] By 1992 Mr Potts required further secretarial assistance in his criminal law section. Ms Short who was then 19 years' old joined as a junior secretary. It was Ms Short's first full time job. Miss Drake became a mentor and friend to her.
- [9] Miss Drake retired in January 1995. Miss Drake had a favourite Chinese Restaurant in Surfers Paradise at which Mr Potts and Ms Short would occasionally join Miss Drake and Mr Rolfe for lunch. Ms Short commenced studying law part time in 1996 while she continued working for Mr Potts.
- [10] The plaintiff's firm prepared the 1999 will under which the plaintiff, another partner of his firm and the defendant were appointed executors and trustees. That will provided for Mr Rolfe to use, occupy and have the full benefit of the Nerang property during his lifetime, but if he predeceased Miss Drake, the Nerang property

was given to the defendant. Under the 1999 will Miss Drake set aside the sum of \$20,000 to be applied to meet the outgoings and repairs of the Nerang property. The residue of Miss Drake's estate was given to the defendant.

- [11] Between 2000 and 2002 Ms Short was busy with her studies and lost contact with Miss Drake. In 2002 Ms Short became a solicitor and worked in that capacity for Mr Potts.
- [12] Mr Rolfe passed away in November 2002 and Miss Drake was devastated. She was unable to attend Mr Rolfe's funeral. Although she had a tendency to be anorexic before Mr Rolfe died, that condition worsened after Mr Rolfe's death. Miss Drake was hospitalised in February 2003 just prior to a visit by the defendant and Mr Tabart for two weeks. While in hospital, Miss Drake contacted Ms Short.
- [13] The defendant and her partner came to the Gold Coast to visit Miss Drake while she was in Allamanda. The defendant had developed the habit of making an excuse to come to Queensland, even though her real purpose was to visit Miss Drake. The defendant explained that if she told her mother she was making a trip to Queensland to visit her, her mother would think she was dying or the defendant was coming to put her into hospital or wasting money. Sometimes the defendant would combine a visit to her mother with a trip to Queensland for a gliding competition.
- [14] Miss Drake was unable to return to live at her Nerang home. She was released from Allamanda Hospital to a retirement residence Hillview House for which the defendant was involved in making the arrangements. Ms Short visited Miss Drake there two to three times each week. Miss Drake was unhappy at Hillview House and organised herself to move into aged care accommodation at Ashmore called the Domain. Miss Drake paid the accommodation bond which was around \$100,000 from her own funds.
- [15] One of the defendant's friends who lived on the Gold Coast would call in on Miss Drake at the Domain usually each week and would let the defendant know of any concerns about Miss Drake. The defendant usually rang Miss Drake each afternoon at 4.15pm, but if she had any business to discuss with her, she would ring at 11.30am when Miss Drake was inclined to be more alert. The defendant described her mother as a very private person who did not like people "popping in and did not like to be caught not looking her best."
- [16] Ms Short developed the routine of visiting Miss Drake at the Domain on each Saturday at the fixed time of 11am and was aware that Miss Drake did not welcome an unscheduled visit. Mr Potts also visited Miss Drake, but on an irregular basis. On a couple of occasions each year, Mr Potts and Ms Short would take Miss Drake out to lunch. Ms Short was also in the habit of bringing small gifts with her for Miss Drake. They had a common interest in cats.

Miss Drake's stroke and recovery

- [17] When Ms Short visited on 4 August 2007, she observed that Miss Drake was flustered, complained of a headache, and wanted to see a doctor and that her speech was jumbled. Ms Short left messages for the defendant and sent her an email (exhibit 7) to express her concern. The defendant's Gold Coast friend had also left a message for the defendant who was travelling from Melbourne to the farm. The defendant telephoned Ms Short late on the evening of 4 August 2007, after the

defendant had arrived home. The defendant's inquiries the next day of staff at the Domain did not disclose any immediate concern for Miss Drake's health. The defendant had a confused conversation with Miss Drake. Miss Drake was taken to Pindara Hospital on 8 August 2007, after it was confirmed that she had suffered a stroke. The defendant did not travel to Queensland at that time as she was suffering from a recurring condition, in which she experienced Meniere's disease like symptoms, that left her debilitated.

[18] At Pindara Hospital Miss Drake came under the care of general practitioner Dr Mirakian who was a visiting medical officer. Dr Mirakian arranged for neurologist Dr Adams to see Miss Drake. The defendant spoke to Dr Mirakian and checked on her mother with the staff at the hospital.

[19] Ms Short visited Miss Drake at Pindara Hospital and was present when Miss Drake was examined by Dr Adams on 9 August 2007. The CT brain scan that was done on 8 August 2007 confirmed evidence of a recent infarction in the left parieto-occipital region. Dr Adams recorded his observations and the results of his examination of Miss Drake in the report that he addressed to Dr Mirakian dated 9 August 2007 (exhibit 22). Ms Short did not demur from the observations that Dr Adams recorded in his report dated 8 March 2011 (exhibit 13) of his examination of Miss Drake which was prepared by reference to his report dated 9 August 2007:

“Mrs Drake was alert and attentive. Her spontaneous speech was reasonable. It was possible to understand most of what she said. Every so often there was a word that was incorrectly used. For instance, she said that she had been brought to the hospital by ‘the insurance’. She had difficulties with naming. She couldn't name ‘eyebrow’, ‘earlobe’ or ‘ring’. She made mistakes with repetition of sentences. She could follow simple commands but anything with three steps in it was too difficult for her.

I tried to get her to read. She could only read a couple of very short words and this seemed to be by a technique of sounding out each letter. I also got her to write. She didn't do too badly with writing. She wrote ‘I am married’ but meant this to mean ‘I am worried’. I asked her to write a sentence about what she had for lunch and she wrote ‘I think I had babas and apple’. She seemed incapable of reading what she had written. Her writing was quite neat but she couldn't read ‘apple’.”

[20] Dr Adams diagnosed Miss Drake as having a right homonymous hemianopia which he explained as meaning that she could not see past the midline into the right side of her visual fields for both eyes. Dr Adams noted that when he saw Miss Drake on 9 August 2007 “she had quite marked dysphasia affecting receptive and expressive function” and that she also appeared to have “alexia without agraphia” which he described as a neurological syndrome due to a large area of infarction involving the occipital or visual part of the dominant cerebral hemisphere with the infarction extending anteriorly to involve the back of the corpus callosum. Dr Adams explained that with alexia without agraphia the person cannot read, although they can write, and they will not be able to read their own writing. (Although Dr Adams was asked to express opinions about the likelihood of Miss Drake having testamentary capacity in early December 2007 and the possible inference of significant cognitive capacity from the instructions given by Miss Drake for her

2007 will and the comments recorded about her in the Domain progress notes, I found such evidence unhelpful, because Dr Adams opinions were not sought by reference to all relevant factual circumstances that should be considered on the issue of testamentary capacity.)

- [21] Ms Short visited Miss Drake most mornings and evenings she was in Pindara and reported to the defendant on Miss Drake's condition. Mr Potts also visited Miss Drake at Pindara up to six times to give Ms Short a break. The defendant spoke daily to the nursing staff and also spoke to her mother by telephone at least once each day.
- [22] On 17 August 2007 Miss Drake was released from Pindara Hospital and transferred to the Allamanda Rehabilitation Unit. Dr Mirakian saw Miss Drake on 9, 10, and 13 to 16 August 2007. Dr Mirakian was also provided with a discharge summary about Miss Drake's progress when she was discharged from Allamanda. Dr Mirakian expressed the opinion that Miss Drake had suffered a stroke of moderate to severe degree that affected her speech and language centre and the effects of the stroke were still quite severe when she was discharged from rehabilitation.
- [23] For the first couple of weeks Miss Drake was undertaking rehabilitation at Allamanda, Ms Short continued to visit Miss Drake each day, and after that she visited on the weekends. Miss Drake expressed her appreciation to Ms Short for her visits and support. Ms Short liaised with the defendant about Miss Drake's needs and progress. Ms Short considered that Miss Drake's speech improved during her stay at Allamanda, but she still jumbled her words and communication with her was slower. Mr Potts visited Miss Drake a few times while she was in Allamanda and on at least two of those visits Miss Drake asked Mr Potts to arrange for her lawyer to visit, so she could do a new will. Mr Potts did not think Miss Drake was capable of doing a will at that stage and did not make any such arrangement. The defendant did not visit Miss Drake at Allamanda, but was involved in her mother's care through participation in weekly telephone conferences with the team that was caring for her and through her regular telephone contact with her mother.
- [24] Miss Drake was discharged from Allamanda on 12 September 2007 for return to the Domain. The defendant asked for Ms Short's assistance in moving Miss Drake back to the Domain. Mr Potts and Ms Short transported Miss Drake and her belongings back to the Domain.
- [25] On her return to the Domain, Miss Drake required assistance with many physical tasks and there were significant changes in her ability to communicate and to explain her needs. Ms Sanger was the care coordinator at the Domain and supervised the staff that provided the care for 60 residents who were divided into four houses each under the responsibility of a carer who was an assistant in nursing (AIN). Ms Sanger knew Miss Drake before she suffered the stroke and had dealings with her after she returned to the Domain. Ms Sanger observed that after the stroke Miss Drake was unable to express herself, in that she could not find words to express what she wanted and she would choose the wrong words. Ms Sanger accompanied the general practitioner when he visited Miss Drake and observed that Miss Drake was unable to tell the doctor how she was feeling.
- [26] Ms Ritchie was the AIN for Hanna House which was the section of the Domain in which Miss Drake resided. Miss Drake was therefore one of 15 residents for whom

- Ms Ritchie cared when she was at work. Ms Ritchie noted that after the stroke Miss Drake kept mixing up her words all the time, could not remember how to turn on the television and did not know how to turn the lights in her room on or off. She needed assistance showering, dressing and walking out to the dining room, because she was at risk of falling. Ms Ritchie stated that Miss Drake was unable to fill out the daily menu and she needed to be reminded to use her knife and fork when she was eating, as she would start picking up the food with her hands.
- [27] Ms Ritchie made notes in the progress notes for Miss Drake that was kept by the Domain. On 29 November 2007 Ms Ritchie wrote about Miss Drake:
 “Michel complaining about the food at lunch asking other residents at her table how they can eat such slops. Also complaining (*sic*) about radio being on. Michel stirs up male resident who will then get up & turn radio or T.V. off. Michel continually reminded to leave W/W beside her & not in lounge area.”
- [28] On 14 December 2007 Ms Ritchie wrote in the progress notes for Miss Drake:
 “At lunch Michel states to male resident arn’t (*sic*) you going to tell her to turn the Merry Xmas light of (*sic*). Michel complains to male resident to get him to speak up then Michel will sit & say nothing. Michel does this on a daily basis whether its about the fan - the food or the music.”
- [29] Endorsed enrolled nurse Ms King was employed in that capacity at the Domain and had contact with Miss Drake after she returned to the Domain in September 2007. Ms King found that Miss Drake could communicate with her, but that she had to give her time to speak. Ms King did not see Miss Drake often. She did recall that Miss Drake did not want assistance from the AIN. Ms King reviewed Miss Drake on 24 December 2007 for her care plan. She recorded in the progress notes for Miss Drake:
 “Michel is happy & independent lady who knows and decides what and how she wants it.”
- [30] Ms Short resumed visiting Miss Drake on a weekly basis. She considered that Miss Drake showed signs of improvement and noted that there were three areas about which Miss Drake consistently expressed concern to Ms Short. These were changing her general medical practitioner, doing something to improve her vision, and changing her will. Ms Short acknowledged that on her visits she would do most of the talking and conversed with Miss Drake by asking her questions to which Miss Drake was able to respond “appropriately.” Ms Short described the conversation as “slower” and that Miss Drake did get the occasional word mixed up, but the responses that she gave in conversations made sense.
- [31] Because the defendant formed the view that Miss Drake was unable to look after her financial affairs after the August stroke, the defendant who was one of the donees under her mother’s enduring power of attorney took over paying Miss Drake’s bills and operating her cheque account. The defendant telephoned the plaintiff’s probate clerk, Mrs Doris Boyd, who had prepared the enduring power of attorney to inform her that she was using it, as members of her firm were also donees. Mrs Boyd does not remember this telephone call, but I accept the defendant’s evidence that this occurred (as it was one of a number of calls made by the defendant giving notice of her intended use of the power of attorney) and that Mrs Boyd was not interested in

this advice, presumably as the defendant was not seeking any action from the plaintiff's firm at that time.

- [32] The defendant described her telephone calls to Miss Drake after her stroke as “non-substantial” but she continued to call her regularly to make sure that she was there, although it may sometimes have taken three or four minutes of the telephone call to get a meaningful sentence from her mother. She said that her mother became fixated on the food at the Domain, the television blaring during lunch and getting back her ability to read. The defendant visited Miss Drake at the Domain in September and October 2007. After the stroke, Miss Drake wanted to get new spectacles to assist her in reading. The defendant had explained to her mother that it was the effect of the stroke that prevented her from reading and that it was not a sight problem, but nevertheless took Miss Drake to an optometrist during her visit in October 2007. That confirmed that new spectacles would not fix the problem.
- [33] Emails were exchanged between the defendant and Ms Short informing each other of matters concerning Miss Drake. Ms Short had a tendency when giving her evidence to relate events as if she had first hand knowledge of them, when all she could be doing was repeating what she had been told by Miss Drake or others, such as her evidence that Miss Drake listened to the radio most of the days or repeating the contents of the defendant's email to her of 26 October 2007 that set out the results of Miss Drake's visit to the optometrist with the defendant. An initial impression that was given by Ms Short's evidence that she was closely involved in Miss Drake's care was displaced on closer analysis of the evidence, except in respect of Miss Drake's hospitalisation in August and September 2007.
- [34] Dr Wright was the general medical practitioner who treated Miss Drake at the Domain from November 2003 until her death. The last time that Dr Wright saw Miss Drake before she made the 2007 will was on 28 November 2007. He did not make any specific reference to her mental state in the notes he made at that time. Dr Wright had been provided with a copy of Dr Adams' report of 9 August 2007 and was aware of the diagnosis that Miss Drake suffered expressive dysphasia and receptive dysphasia, in addition to visual abnormalities and difficulty writing and reading. Dr Wright found it difficult to understand Miss Drake when she returned to the Domain after her stroke, but did note some improvement with her talking, but was of the opinion that she retained “quite severe” receptive dysphasia.
- [35] Dr Wright considered Miss Drake's mental state changed after the stroke. He observed that she was less able to use the correct words and was less able to understand instruction. He expressed the opinion that the deficits that she was left with after her stroke impaired her mental capacity and made her unlikely to understand complex speech or written word.

The making of the 2007 will

- [36] On three or four occasions on visits Mr Potts had with Miss Drake during October and November 2007, she raised with Mr Potts that she wanted to make a new will without disclosing any detail of the changes she wished to make. Miss Drake also raised with the defendant in November 2007 that she wanted to contact her lawyers to see whether she changed her will to take account of Mr Rolfe's death.
- [37] Mr Potts considered that Miss Drake's condition had gradually improved and he telephoned the plaintiff whom he knew on 27 November 2007. Mr Potts told the

plaintiff that Miss Drake had recently suffered a couple of mini-strokes, but that he believed that she was still competent, although she did have some residual problems. Mr Potts frankly conceded in his evidence that he was not an expert in the area of succession law. When he expressed the view to the plaintiff that Miss Drake was able to make a will, that reflected his understanding of testamentary capacity which he expressed in these terms (at Transcript 2-10):

“She understood her own mind. She understood – if I can put it this way: she understood her own mind, she understood her own circumstances. There was a logic in what she was doing in the sense that she had a determination to change her will or make a new will to fit her circumstances. Can I say this point: I was not ever made privy by her of any detail of what that was going to be. Michel over the years and the only times I ever tried to discuss with her her affairs, that is her business affairs, her monetary position, would rebuff me immediately, was none of my business basically. But she understood her own mind and was able to express that to me clearly.”

- [38] Mr Potts further explained that when he said that Miss Drake “understood her own mind”, he was referring to her understanding that she wanted to make a change to her will. When he was referring to her understanding of her own circumstances, he explained (at Transcript 2-11):

“I know it’s a somewhat junk term, but she had insight and an understanding of the fact that she had suffered a stroke and that it had caused her problems. It was very frustrating to her because one of the great loves of her life was to read and to do those simple things, and that was denied to her. But she was - I suppose and I’m not attempting to swear the issue, your Honour, but over the years whenever I was trying to get people to sign wills, those were the sorts of questions I’d ask, the simple things, you know, ‘Where are you?’ ‘What are you doing?’, ‘Who’s the Prime Minister?’ ‘What date is it?’, those sorts of questions. Now, I didn’t ask it in that sense, but it became clear through the discussions that I had with her that she was aware of all of those matters. She was a big John Howard fan, she was aware of events of the day, and she was determined to have a new will and didn’t appreciate, I suspect, the fact that I was fobbing her off.”

- [39] The plaintiff retrieved the security packet held by his firm for Miss Drake before telephoning her on 30 November 2007. He made an appointment for someone from his firm to see her on the following Monday 3 December 2007 at 4pm. The plaintiff recorded in his file note what Miss Drake had told him “Bill’s secretary has been very kind and I want to provide for her.” He recalled that Miss Drake did use the name “Karen” to identify the person she was talking about. It is curious that Miss Drake referred to Ms Short as Mr Potts’ secretary, when she had been a solicitor since 2002.

- [40] The plaintiff organised for Mrs Boyd to attend at the Domain to take instructions from Miss Drake on 3 December 2007. Mrs Boyd had a copy of the 1999 will with her. She was directed to Miss Drake’s room by nursing staff. Miss Drake was expecting Mrs Boyd and said she remembered her from previous dealings. Mrs Boyd had, in fact, been involved in the taking of instructions for, and the preparation of, the 1999 will. Mrs Boyd has a strong Scottish accent.

- [41] At the outset Miss Drake told Mrs Boyd that she wanted to amend her will and that she did not want her daughter to know that she had amended her will. Mrs Boyd had some general conversation with Miss Drake about the weather and the recent Federal Election in which Mr Rudd became Prime Minister. Miss Drake told Mrs Boyd that she had a friend called Karen and she wanted to leave some money to Karen in her will. Miss Drake told Mrs Boyd that she had had a couple of strokes and been in hospital and that she felt she would not have got through that, but for Karen who kept her spirits up. Miss Drake told Mrs Boyd that her daughter had not come to see her in hospital, but only visited when Miss Drake had returned to the Domain and that was because her daughter was visiting someone else in Queensland. Miss Drake told Mrs Boyd that she did not want her daughter's husband to spend any of the money. Mrs Boyd said that it was Miss Drake who told her that she wanted to leave Karen \$200,000. Mrs Boyd then asked Miss Drake if she had \$200,000 and Miss Drake responded that she didn't know how much money she had, because her daughter looked after her financial affairs, but she did know she had a house in Nerang, although she did not know whether it was rented out or how much rent she got or who managed the property and had not seen a bank statement for months. Mrs Boyd stated that Miss Drake "thought her house was worth \$500,000." Mrs Boyd said that Miss Drake told her that she really wanted to thank Karen and that Karen had been like a sister to her.
- [42] Mrs Boyd went through each of the clauses of the 1999 will with Miss Drake and made notes as to which clauses could be retained. Miss Drake told her that she only wanted the plaintiff as her executor, because if her daughter was her executor she would not give the sum of \$200,000 to Karen. The visit to obtain the instructions for the new will took about 40 minutes. It was Mrs Boyd's opinion that Miss Drake had no problem understanding what she was saying and that she did not notice that there was anything wrong with Miss Drake, apart from the fact that Miss Drake stopped to think about her answers. Miss Drake did not express any concern about understanding Mrs Boyd's accent.
- [43] During the course of Mrs Boyd's visit, Miss Drake's telephone rang. It was the defendant's usual afternoon telephone call to her mother. Mrs Boyd described that occurrence as "panicking" Miss Drake. Mrs Boyd knew that it was the defendant on the telephone, because Miss Drake greeted the caller by the name "Jo". When she answered the phone, Miss Drake gestured with her hand to Mrs Boyd to keep quiet. Mrs Boyd could recall that Miss Drake said something to the effect "Doris said I didn't have to change my will."
- [44] There are some aspects of Mrs Boyd's observations on 3 December 2007 and what she was told by Miss Drake that are not found in other evidence. Miss Drake's complaint about the defendant's failure to visit her when she was hospitalised for the August 2007 stroke and (after the defendant had visited in September and October 2007) that the defendant only visited when she had another reason to come to Queensland was not made to any other person who gave evidence. The concern that Miss Drake expressed to Mrs Boyd that she did not want the defendant's husband to spend any of her money was not conveyed to the defendant or any other person who gave evidence. The claim that Ms Short was like a sister to her was unusual in view of the age difference of 50 years between them. Mrs Boyd's failure to notice anything wrong with Miss Drake's speech (such as being unable to find the right word to use or word jumble) or understanding of all that was said to her

did not accord with the evidence of others about conversations with Miss Drake including the defendant, Ms Short, Mr Potts, Dr Wright and Ms Sanger.

- [45] Mrs Boyd telephoned Ms Short at work to obtain her full name and address. Mrs Boyd prepared the will. Clause 1 was the usual revocation clause. Clause 2 was the appointment of the plaintiff as the executor with provision for a substitute appointment in the case of the plaintiff's prior death. The balance of the will provided:

“3. I DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature or kind and wheresoever situate unto and to the use of my trustee UPON TRUST as follows:

(a) As to the sum of two hundred thousand dollars (\$200,000) for KAREN NICOLE SHORT for her own sole use and benefit absolutely.

(b) As to the residue of my estate for my daughter JO ANNE POCKLINGTON for her own sole use and benefit absolutely PROVIDED HOWEVER that if my said daughter shall predecease me or shall not be known to survive me then for KAREN NICOLE SHORT for her own sole use and benefit absolutely.

4. IN ADDITION to all other powers conferred upon a trustee by law I EMPOWER my trustee to exercise all or any of the following powers:-

(a) to sell and convert into money let lease or exchange from time to time and upon such conditions as my trustee may deem fit any part or parts of my estate.

(b) to postpone the sale and conversion of all or any part or parts of my estate for so long as my trustee may deem fit.

(c) to invest from time to time any part or parts of my estate available for investment in such investments (notwithstanding that they may not be permitted trustee investments) as my trustee may deem fit and to transpose and otherwise deal with any such investments.

(d) to stand possessed upon trust of the interest in terms of this my Will to which any beneficiary is or contingently entitled and at the discretion of my trustee to appropriate from time to time the whole or any part or parts of the entitlement or contingent entitlement of that beneficiary (capital as well as income) in and towards the maintenance education welfare and advancement in life of that beneficiary without being responsible to see to the application thereof.

(e) to appropriate any part or parts of my estate towards satisfaction of the share of my estate of any person and at such valuation as my trustee shall think proper.

5. I DIRECT that my trustee or any firm of which he is a member shall be eligible to be employed as solicitor or solicitors to my estate and in such event shall be entitled to make all usual and proper charges for both his or their professional and other services in the administration of this my Will and for his or their time and trouble that he or they would have been entitled to make if not a trustee and so employed.”

- [46] On 6 December 2007 Mrs Boyd and another employee of the Bell Legal Group, legal secretary Ms Sarah Whiers, went to Miss Drake's room at the Domain where she was waiting for them and greeted Mrs Boyd by name.
- [47] Miss Drake expressed concern that her daughter not find out that they had come to see her with a new will.
- [48] Ms Whiers read out the will word for word to Miss Drake. Miss Drake stopped her to ask a question about a particular provision. In relation to clause 3(a), she wanted to ensure that the bequest to Ms Short would come out of the estate first. She asked Mrs Boyd to explain clause 4(e) and asked about the charging clause. Miss Drake appeared to accept the explanations given by Mrs Boyd.
- [49] After Ms Whiers had finished reading the will, Miss Drake took it and went to her desk where she brought out a big magnifying glass and she spent several minutes looking at the will. Mrs Boyd recalled that it might have taken Miss Drake 10 to 15 minutes to look at the will. Ms Whiers suggested that it probably took about five minutes. When Mrs Boyd asked Miss Drake if she were happy with the will, she said that she was. Mrs Boyd said that Miss Drake knew where to sign the will.
- [50] Mrs Boyd explained in her evidence her understanding of the term testamentary capacity (at Transcript 2-50):
- “I like to be clear that the client understands what they're doing and what effect that's going to have on the people concerned and the outcome, and she seemed to grasp that. She knew Jo wouldn't be pleased. She actually said she didn't care, she'd be dead. But Mrs Drake - I said to her at one point, 'Karen' - sorry, 'Jo might contest this', and she - she just said she didn't care. She wanted Karen to - she wanted to thank Karen and this was her way of doing it. And she knew that there would be more - more for Jo than Karen was receiving.

The law

- [51] The classic statement as to the meaning of testamentary capacity is set out in *Banks v Goodfellow* (1870) LR 5 QB 549, 565 (*Banks v Goodfellow*):
- “It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing of his property and being about a disposal of it which, if the mind had been sound, would not have been made.”
- [52] How the court should approach the determination of the question of testamentary capacity was described in the judgment of the court in *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179, 180:
- “The proper approach of the Court to the question whether a testator has testamentary capacity is clear. Although proof that a will was properly executed is prima facie evidence of testamentary capacity,

where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, the Court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it or, if instructions for the will preceded its execution, when the instructions were given."

Does the evidence raise a doubt about Miss Drake's capacity?

- [53] In the light of the medical evidence that Miss Drake could see the letters on a page, but not read the word formed by the letters, I find that although Miss Drake gave the appearance of reading the will with her magnifying glass, all that she was doing was looking at the letters on the page and the set up of the document, but that she could not and did not read it. I also accept that the deficits that she continued to experience with her receptive dysphasia, as observed by Dr Wright, made it likely that she did not fully understand the explanations of the terms of the will made by Mrs Boyd, but she understood enough to appreciate that her instruction that she wished to benefit Ms Short had been implemented. The plaintiff has shown by the circumstances of the execution of the 2007 will that *prima facie* it is a properly executed will.
- [54] Despite Miss Drake's proper execution of the will and apparent approval of its contents, the medical evidence to the effect that Miss Drake had suffered a permanent brain injury as a consequence of the August 2007 stroke and the evidence of the staff at the Domain about their observations of Miss Drake's limitations after the stroke raise a doubt about her testamentary capacity.
- [55] It is therefore necessary to determine Miss Drake's testamentary capacity at the time she gave instructions for the 2007 will and/or signed that will. The plaintiff bears the onus of proving that Miss Drake had testamentary capacity when she made the 2007 will: *Bailey v Bailey* (1924) 34 CLR 558, 570.

Did Miss Drake have testamentary capacity?

- [56] For the purpose of considering the issue of testamentary capacity, it is relevant that at the time the plaintiff made the 2007 will (and at her death), her Nerang property was worth about \$400,000 and in addition she had the Domain accommodation bond worth about \$100,000. There may have also been a few thousand dollars in her bank account.
- [57] The plaintiff gained the wrong impression from Mr Potts as to the recent medical history of Miss Drake. It understated the seriousness of the stroke suffered by Miss Drake and significant consequences for her to describe her suffering a couple of mini-strokes.
- [58] This had the consequence that the plaintiff did not put Mrs Boyd on notice to be alert for signs relevant to a detailed assessment of Miss Drake's testamentary capacity. Although Mrs Boyd was clearly experienced in taking instructions for simple wills, it was apparent from her evidence that she did not have a full understanding of the concept of testamentary capacity. Mrs Boyd's understanding of testamentary capacity did not extend to ascertaining whether Miss Drake appreciated the nature of the defendant's claim on her in comparison to Ms Short's relatively recent support. Mrs Boyd's request to Miss Drake to consider the effect on the defendant of the change to the will did not ascertain from Miss Drake

whether she understood the extent of her daughter's claim on her as her only child in order to properly consider the effect on the defendant of the change to the will.

- [59] Ms Short's weekly engagement with Miss Drake on her return to the Domain in September 2007 was at a superficial social level. Her visits were primarily for the purpose of providing company to Miss Drake and their conversation seems to have been generated by Ms Short. Her descriptions of Miss Drake during the course of her evidence even after the stroke (such as "a very strong willed and independent lady") suggest a sentimental or less than objective view of Miss Drake's capacities. Ms Short stated that when Miss Drake returned to the Domain, she still did most of her own care with minimal assistance. That showed no appreciation that Miss Drake had been assessed at the Domain at risk of falling and was provided assistance with her daily care by Ms Ritchie.
- [60] The plaintiff relies on the comments in the progress notes of the Domain in November and December 2007 to suggest that Miss Drake was conniving and manipulative about aspects of the activities at the Domain and was independent and knew her own mind and that could be used to infer insight that was relevant to the existence of testamentary capacity. I found Dr Wright's response to questions about the relevance of these observations as reflecting my view. All these progress notes show is that Miss Drake had a capacity to complain about her surroundings. They give little assistance on whether Miss Drake could meet the *Banks v Goodfellow* test when she gave instructions for her will. Apart from the fact that progress notes must be understood in the context of a resident's experiences within the nursing home, Ms King's observation was made in circumstances when she admitted that she did not see much of Miss Drake.
- [61] The defendant argued that Miss Drake's lack of testamentary capacity could be put on the basis that at the time she gave her instructions for the 2007 will Miss Drake was either affected by delusion or paranoia about the defendant or she did not understand or comprehend the nature of the defendant's claim on her. I am satisfied that the plaintiff is unable to prove on the balance of probabilities on all the evidence that I have accepted that at the time Miss Drake gave her instructions for the 2007 will (or when she executed it) she understood and appreciated the claim of her only daughter to inherit her estate after a lifetime of her daughter's close, cordial and filial relationship with her as one to which she ought give effect. On all the evidence, I am not satisfied that Miss Drake met the *Banks v Goodfellow* test when she gave her instructions to Mrs Boyd for the 2007 will.

Orders

- [62] It follows that the plaintiff's claim in respect of the 2007 will must be dismissed. The defendant has counterclaimed for relief in respect of the 1999 will on the basis it is the last valid will of Miss Drake, if the 2007 will is not a valid will. There is no issue about the validity of the 1999 will and an application for a grant of probate in common form of that will should proceed in the normal course. As the advertising of the intention to apply for the grant of the 2007 will was undertaken, it is appropriate to dispense with those requirements in relation to the application for a grant of the 1999 will. I will give the parties an opportunity to make submissions on the form of orders that should follow to facilitate the making of a grant in respect of the 1999 will. It will also be necessary to hear the parties on the question of the costs of the proceeding.