

# SUPREME COURT OF QUEENSLAND

CITATION: *Rowe v Sudholz* [2019] QSC 306

PARTIES: **JUSTIN JOHN ROWE AND VIKKI MAREE ROWE**  
(applicants)  
**v**  
**KATHRYN LAURA SUDHOLZ**  
(respondent)

FILE NO: 5529 of 2019

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 13 December 2019

DELIVERED AT: Brisbane

HEARING DATE: 28 and 29 November 2019

JUDGE: Applegarth J

ORDERS: **A solemn form grant of the will dated 18 August 2016 should be made to the applicants.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where the testator made three wills in the two years before his death – where the testator’s last will, made two months before his death, increased the amount gifted to the respondent from \$500,000 to \$1.5 million – where the applicants were appointed executors in all three wills – where the applicants seek orders declaring against the force and validity of the last two wills and in favour of the third-last will – where the respondent seeks to uphold the validity of the last will, or alternatively, the second-last will – where the testator experienced physical and cognitive decline and suffered from dementia in the last years of his life – where the parties agree the testator had testamentary capacity at the time of making his third-last will – whether the testator had testamentary capacity at the time of making his last or second-last will

*Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch), cited  
*Bailey v Bailey* (1924) 34 CLR 558; [1924] HCA 21, cited  
*Banks v Goodfellow* (1870) LR 5 QB 549, cited

*Boyse v Rossborough* (1857) 6 HL Cas 1; (1857) 10 ER 1192, cited  
*Brown v Guss* [2014] VSC 251, cited  
*Craig-Bridges v NSW Trustee & Guardian* [2017] NSWCA 197, cited  
*Drivas v Jakopovic* [2019] NSWCA 218, cited  
*Frizzo v Frizzo* [2011] QCA 308, applied  
*Frizzo v Frizzo* [2011] QSC 107, applied  
*Hamill v Wright* [2018] QSC 197, cited  
*Nicholson v Knaggs* [2009] VSC 64, cited  
*Parker v Felgate* (1883) 8 PD 171, cited  
*Pates v Craig* [1995] NSWSC 87, cited  
*Re Crookes Estate* (Unreported, Supreme Court of New South  
Wales, Young J, 14 December 1994), cited  
*Re Key* [2010] 1 WLR 2020; [2010] EWHC 408 (Ch), cited  
*Revie v Druitt* [2005] NSWSC 902, cited  
*Ruskey-Fleming v Cook* [2013] QSC 142, cited  
  
*Veall v Veall* (2015) 46 VR 123; [2015] VSCA 60, cited  
*Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197, cited

COUNSEL: J Otto for the applicants  
C Brewer and P Coore for the respondent

SOLICITORS: McCullough Robertson Lawyers for the applicants  
Fox and Thomas for the respondent

- [1] A few months before he died, the testator changed his will to increase the amount gifted to a friend from \$500,000 to \$1.5 million. He was suffering from cognitive impairment attributable to dementia and was in a poor state of health at the time. He gave no explanation for the change. Did he have testamentary capacity when he made that will on 28 November 2017?
- [2] If not, did he have testamentary capacity when he made the previous will on 18 August 2016?

### **Background**

- [3] Norman Alfred Hottes died on 26 January 2018, aged 87 years. In the final years of his life he developed a number of chronic medical conditions. He increasingly relied upon his neighbours, Justin and Vikki Rowe, for assistance. Norm<sup>1</sup> lived alone on a property at Goondiwindi. Justin and Vikki helped Norm in many ways. For example, Vikki took him to medical appointments out of town. After Norm's bookkeeper retired in 2015, Vikki assisted him with his bookkeeping. Justin and Vikki helped him with problems he had with tenants at commercial sheds that he ended up selling in 2013 and 2014. In 2013, Norm appointed Justin and Vikki under an enduring power of attorney to be his attorneys for financial and personal/health matters. By a will dated 26 February 2016, Norm appointed them to be his executors and gave the whole of his estate to them.

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<sup>1</sup> It is convenient to refer to the parties by their first names, and this coincides with reference to them by their first names in much of the evidence and submissions.

- [4] Norm's health was in decline, and he was hospitalised between late February and early June 2016. Because of his cognitive and physical state he was unable to return to live in his home. After being discharged from hospital he lived in a nursing home at Millmerran. This was an unhappy period in his life. He did not like living away from Goondiwindi and was depressed. He was upset when Justin and Vikki went on a long-planned overseas trip in July-August 2016.
- [5] He changed his will in August 2016. His will dated 18 August 2016 gave a pecuniary legacy of \$500,000 to a friend, Kathryn Sudholz, who I will refer to as Kathy. The remainder of his estate was given to Justin and Vikki.
- [6] In early September 2016 a room became available in a nursing home in Goondiwindi, Kaloma, and Norm moved there.
- [7] Over the following year Norm's physical and mental health continued to decline. He was visited by friends. Their evidence assists in determining his testamentary capacity at different times. So do the contemporaneous notes kept by Vikki and (to a lesser account) Justin. The voluminous contemporaneous medical records also shed light on his condition and behaviour.
- [8] The accounts of independent witnesses and the contemporaneous documents indicate that, at various times in the last year of his life, Norm made repeated false claims about being grossly overcharged to live at Kaloma, despite assurances he received that this was not the case. While he exhibited a good memory for things in the distant past, his discussions with friends became more general in the last months of his life. For example, when his accountant and tax adviser, Mr Herden, would visit, they mostly made "small talk", discussing the weather, Norm's health and how he was finding living at Kaloma. When his financial planner, Mr Carlson, visited him in late 2017, Mr Carlson doubted whether Norm would have been able to understand recent transactions which had been undertaken on his behalf. According to Mr Carlson, in around November 2017 Norm was lucid and detailed about matter in his distant past, but less lucid about present happenings. Mr Carlson referred in his evidence to Norm's "vagueness" at this stage.
- [9] When another friend, Mr Brown, visited Norm in November 2017, he found him in an agitated state and very distressed about his finances. Norm claimed to Mr Brown that he only had \$3,000 left and that all of his money was gone. He falsely accused Vikki of having stolen it. Mr Brown was able to assure Norm that this made no sense and it was wrong. They were able to call Norm's accountant, Tim Herden, and after Tim told Norm the facts he settled down and was happier.
- [10] In November 2017 Norm made contact with his solicitor, Mr Wilson. On 23 November 2017 Norm gave Mr Wilson instructions about a new will. It will be necessary to return to the details of those instructions and the contents of Mr Wilson's file note. Relevantly, in outlining his assets, Norm referred to "Sheds". Mr Wilson took this to refer to the commercial sheds which he understood Norm owned. However, those sheds had been sold in 2013 and 2014. On 23 November 2017 Norm referred to his "Super Fund", and in cl 5 of the will he signed on 28 November 2017 made a direction in relation to the benefits he had under it. However, the self-managed super fund had been wound up in June 2016, more than a year before. In giving instructions to Mr Wilson on 23 November 2017, Norm referred to his accountant, Tim Herden, and told Mr Wilson the reason that he had left his previous accountant in favour of

engaging Mr Herden was that he had “paid \$400,000 capital gain”. This was untrue. Norm had not paid any such capital gain tax. This figure and the reason for changing accountants appear to have been simply made up to cover a memory loss.

- [11] Mr Wilson returned to the Kaloma nursing home on the afternoon of 28 November 2017, along with a paralegal employed by him, and witnessed Norm’s new will. This will increased the gift to Kathy from \$500,000 to \$1.5 million. Norm did not explain to Mr Wilson why he had made this substantial change and, unfortunately, Mr Wilson did not ask him despite “alarm bells” ringing about Norm’s testamentary capacity.
- [12] Norm was in very poor health by late November 2017. He had seen his doctor, Dr Nicholson, on 27 November 2017. He needed treatment for severe pain and was prescribed Endone. At some stage on 28 November 2017 he developed a fever. Staff requested Dr Nicholson to visit him and she examined him just after 6 pm on 29 November 2017. She noted that he had been unwell for the past 24 hours, with “spiking” temperatures of up to 38.8 degrees. His problems included leakage around his catheter and cloudy urine. He had a temperature of 37.8 degrees. He was in pain. Dr Nicholson concluded that his symptoms in the previous days, including tremors he had been experiencing, were the onset of an infective process. She diagnosed him as suffering urosepsis, a severe infection sourced to the urinary tract.
- [13] Dr Nicholson’s evidence is that when she saw Norm on 29 November 2017 he was “very unwell” and presented with a fever, faster than usual breathing and faster than usual heart rate. Such was his condition that evening that Dr Nicholson reviewed his advanced care plan and recorded in her consultation notes what had been planned. This entailed being cared for at Kaloma and being kept as comfortable as possible, and only being transferred to hospital if his condition became unmanageable. Dr Nicholson prescribed an antibiotic for the infection. The next day, 30 November 2017, she observed that Norm’s condition had improved and that his temperature had settled.
- [14] According to Dr Nicholson, Norm would have been sick in the days leading up to 29 November 2017, and it is likely that his capacity would have been limited or impaired on those days.
- [15] During the last years of his life, Norm suffered from a multiplicity of conditions. They included heart and renal conditions and chronic obstructive pulmonary disease which required oxygen therapy. He suffered infections including urosepsis. As noted, Norm died on 26 January 2018. The causes of his death were recorded by Dr Nicholson as:
- (a) renal failure;
  - (b) chronic heart failure;
  - (c) hypertension;
  - (d) coronary artery disease;
  - (e) pulmonary hypertension.

### The issues

- [16] There is no issue that Norm had testamentary capacity to make the will dated 26 February 2016. Because his executors, Justin and Vikki, felt unable to depose that he had testamentary capacity at the time of executing the 28 November 2017 will or the 18 August 2016 will, they commenced this proceeding. They seek orders:
- (a) declaring against the force and validity of those two wills; and
  - (b) declaring in favour of the force and validity of the 26 February 2016 will.
- [17] Kathy seeks to uphold the validity of the 28 November 2017 will, or alternatively, the 18 August 2016 will.
- [18] It is common ground that:
- (a) the ultimate burden of proof on the issue of Norm's testamentary capacity at the time he executed those two wills lies on Kathy;
  - (b) the evidential burden lying on Justin and Vikki to raise a doubt as to the validity of those wills has been satisfied.
- [19] Also, it is common ground that, whichever will is held to be Norm's true last and valid will, probate should be granted to Justin and Vikki as executors.
- [20] The parties helpfully identified the following list of issues to be determined:
1. Did the deceased have testamentary capacity to execute the will dated 28 November 2017?
    - (a) If yes, a solemn form grant of that will should be made to the applicants.
    - (b) If no, question 2 should be answered.
  2. Did the deceased have testamentary capacity to execute the will dated 18 August 2016?
    - (a) If yes, a solemn form grant of that will should be made to the applicants.
    - (b) If no, a solemn form grant of the 26 February 2016 will should be made to the applicants.
  3. In determining 1 and 2, was the deceased aware at the relevant time:
    - (a) at least in general terms, of the nature, extent and value of his estate;
    - (b) of those who may reasonably be thought to have a claim upon his testamentary bounty, and the basis for, and nature of, the claims of such persons, and did the deceased have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons;

or, were his medical conditions such that he was prevented from understanding and appreciating the same?

- [21] The parties agreed that it was not in issue that at both relevant times, Norm satisfied the first limb of the test for testamentary capacity, as set out in *Banks v Goodfellow*<sup>2</sup> and *Frizzo v Frizzo*,<sup>3</sup> namely that he was aware, and appreciated the significance, of the act in the law of making a will.

### Legal principles

- [22] The parties adopt the following statement of the relevant legal principles from *Frizzo v Frizzo*:<sup>4</sup>

“[21] The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*.<sup>5</sup> The relevant principles were restated by Powell JA in *Read v Carmody*:

1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.<sup>6</sup>

In this last respect, in the words of *Banks v Goodfellow*, no disorder of the mind should poison her affections or pervert her sense of right, nor any insane delusion influence her will, nor anything else prevent the exercise of her natural faculties.<sup>7</sup>

- [22] The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that

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<sup>2</sup> (1870) LR 5 QB 549.

<sup>3</sup> [2011] QSC 107 at [21]-[22] adopted in *Frizzo v Frizzo* [2011] QCA 308 at [24].

<sup>4</sup> *Ibid.*

<sup>5</sup> (1870) LR 5 QB 549 at 565.

<sup>6</sup> *Read v Carmody* (NSWCA, 23 July 1998, unreported; BC9803374); [1998] NSWCA 182 per Powell JA. See also the judgments of Dixon J (as he then was) in *Timbury v Coffee* (1941) 66 CLR 277 at 283; [1941] HCA 22; and of Mullins J of this Court in *Conroy v Unsworth-Smith* [2004] QSC 81 at [97]-[98].

<sup>7</sup> (1870) LR 5 QB 549 at 565.

case, “the mental power may be reduced below the ordinary standard” provided the testatrix retains “sufficient intelligence to understand and appreciate the testamentary act in its different bearings”.<sup>8</sup> More recently, Kirby P (as he then was) has articulated this principle as follows:

‘In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent—more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will ... Were the rule to be otherwise, so many wills would be liable to be set aside for want of testamentary capacity that the fundamental principle of our law would be undermined and the expectations of testators unreasonably destroyed.’<sup>9</sup>

In part, this reflects the fact that the *Banks v Goodfellow* test is always brought to bear “on existing circumstances of modern life”.<sup>10</sup> Twenty-first century society is considerably more complex than that of 1870; life expectancy is much longer and the population older. The courts do not require a testatrix to know precisely the value of her individual assets, or even of certain classes of assets.<sup>11</sup> That would particularly apply as one moves up the scale in terms of size and complexity of the estate.”

- [23] The testator is not required to understand their precise financial situation.<sup>12</sup> The testator may have a poor memory. The issue is not so much the testator’s ability to remember details, but the soundness of the testator’s ability to decide how assets are to be divided. Accordingly, the testator must be aware, at least in general terms, of the nature, extent and value of the estate.
- [24] Advanced age or illness does not prove a lack of testamentary capacity. Instead, it calls for “vigilant scrutiny by the Court” and will only displace “a *prima facie* case of testamentary capacity if there is evidence that the deceased’s mental facilities had been so affected as to make him or her unequal to the task of disposing of his or her property.”<sup>13</sup>
- [25] The time for determining testamentary capacity is at the time the will is executed. However, if a person has given instructions to a solicitor to make a will, and the solicitor prepares it in

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<sup>8</sup> Ibid at 566.

<sup>9</sup> *Re Griffith; Easter v Griffith* (1995) 217 ALR 284 at 295.

<sup>10</sup> *Kerr v Badran* [2004] NSWSC 735 at [49].

<sup>11</sup> Ibid. The relevant passage of Windeyer J’s judgment was approved by the New South Wales Court of Appeal in *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [64] and [94].

<sup>12</sup> *Brown v Guss* [2014] VSC 251 at [345].

<sup>13</sup> *Pates v Craig* [1995] NSWSC 87 at 4.

accordance with those instructions, the will may be admitted to probate if, at the time of execution, the testator was able to recall giving the instructions, had no doubt that the solicitor had given effect to them and accepted the document being executed as having given effect to those instructions.<sup>14</sup>

[26] As for the burden of proof, ultimately the Court must be affirmatively satisfied on the balance of probabilities that the testator possessed the required mental capacity.<sup>15</sup>

[27] Evidence that the testator had sufficient cognitive competence to engage in conversations and to make a range of decisions in daily life may be insufficient to satisfy the test for testamentary capacity. As the New South Wales Court of Appeal said in *Craig-Bridges v NSW Trustee & Guardian*:<sup>16</sup>

“... it is one thing for a person to convey the appearance of full cognitive competence in ordinary conversations; it is another for the person to have testamentary capacity.”

[28] In *Frizzo v Frizzo*, Muir JA stated:<sup>17</sup>

“Questions of testamentary capacity are not resolved by the blind application of rules or formulae. They are practical questions requiring the application of good sense.”

#### **The testator’s cognitive decline**

[29] Lord Cranworth LC observed:

“There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.”<sup>18</sup>

[30] The applicants submit that the issue for the Court is to determine “whether darkness had fallen when Norm came to make his 2017 and August 2016 wills.” However, as their other submissions indicate, the task of the Court is not to identify a date when Norm’s cognitive state had declined to a point where he lacked testamentary capacity. The inquiry is date-specific. It is whether he had testamentary capacity on 28 November 2017 when he made his last will, and (if he did not) whether he had testamentary capacity on 18 August 2016 when he made his second-last will. As the applicants’ submissions note, Norm’s deterioration did not necessarily follow a straight line: there were periods of exacerbation and fluctuation.

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<sup>14</sup> *Bailey v Bailey* (1924) 34 CLR 558 at 567 and 572, citing *Parker v Felgate* (1883) 8 PD 171 at 173.

<sup>15</sup> *Hamill v Wright* [2018] QSC 197 at [149] and [151].

<sup>16</sup> [2017] NSWCA 197 at [158].

<sup>17</sup> [2011] QCA 308 at [66].

<sup>18</sup> *Boyse v Rossborough* (1857) 6 HL Cas 1 at 45; (1857) 10 ER 1192 at 1210.



- [31] In some cases it is possible that a temporary illness exacerbates a person's condition, which has been in general decline for a substantial period, such that the person temporarily lacks testamentary capacity at the time a will is made. Therefore, it will be necessary to give close attention to Norm's mental and physical condition in August 2016 and in November 2017 at about the time he made the wills which are in contention. Before doing so it is appropriate to outline a chronology of events which are relevant to his condition at those dates, his intentions, his ability to recall, in general terms, what he owned and his ability to evaluate and discriminate between the respective strengths of claims of persons who may reasonably be thought to have a claim upon his testamentary bounty.

### **The estate**

- [32] The parties agree that Norm's estate comprised the assets referred to in the summary which became Exhibit 2, and which I include as an annexure to these reasons. This table is helpful in identifying the fact that the commercial sheds, which Norm thought in November 2017 he still owned, were sold in the 2013 and 2014 financial years. It also helpfully identifies how his self-managed superannuation fund was wound up prior to 30 June 2016 and that its assets, which remained the same, were transferred to his share portfolio where they continued to be managed by Morgans.
- [33] In the 2015 financial year, Norm had a taxable income of \$235,664, on top of which he drew down the minimum pension of \$75,000 from his self-managed superannuation fund, giving him a total income of \$310,664.
- [34] In the 2016 financial year, Norm had a taxable income of \$217,372, on top of which he drew his entire superannuation fund balance as a pension payment of \$1,105,629.93.
- [35] There is no evidence in Norm's financial statements of his having realised a taxable capital gain or paid capital gains tax of \$400,000 in any financial year between 2013 and 2017.
- [36] Norm spent very little of his income. Most of it was reinvested from year to year.
- [37] Norm paid a refundable accommodation deposit ("RAD") at Millmerran of \$290,000 and daily fees at entry of \$209.25.
- [38] At Kaloma, Norm paid a RAD of \$400,000 and average daily fees of \$119.78. The total fees paid by Norm during his 17-month stay at Kaloma were \$73,245.98.

### **Chronology**

- [39] Norm was a bachelor and had no children. He lived with his father and mother until their deaths in 1993 and 1994 respectively. He had a sister, but after falling out with her husband, apparently had little to do with her or her children. The exception was his nephew, Brent, but he fell out with Brent when he failed to repay money lent to him by Norm.
- [40] Norm was described as a "bushy" at heart. He grew up during the Depression and was not inclined to spend much money. He hated paying taxes and was careful with his money.

- [41] After his parents died, Norm lived on his own for a time. In 1998, he bought a property situated at 30 Old Kildonan Road, Goondiwindi. He lived there with the Kilner family until 2004. From 2004, he lived there alone.
- [42] Norm's neighbours were the applicants, Justin and Vikki Rowe, who lived at 32 Old Kildonan Road. Justin first met Norm as a schoolboy in 1978, and from 1983, when he returned to live in Goondiwindi, would occasionally see Norm around town. Vikki first met Norm when he came to live at 30 Old Kildonan Road. Justin, Vikki and their children came to see a lot more of Norm after 2004. Almost every Sunday, Norm came over to Justin and Vikki's home.
- [43] Until 2008 (when he was 77 years old), Norm continued to carry on his business transporting livestock and grain. He only stopped when he rolled his truck, leaving him pinned upside down in the cab for some time before the SES rescued him.
- [44] After his accident, Norm kept himself busy tinkering in his shed, going to the dump to search for items he thought useful, picking fruit and looking after the animals on his and Justin and Vikki's properties. On weekday afternoons he drove into town to sit outside the Goondiwindi Town Council with other old town folk on what was known by locals as the "Seat of Knowledge".
- [45] When Justin's job allowed for it, he took Norm with him to visit work sites on farms. He and Norm collected firewood together, and Justin chopped Norm's firewood for him.
- [46] As Norm's health declined and he needed more assistance, he turned to Justin and Vikki for help. Their assistance included tasks around his property, or helping him with his car. As noted, they also helped him with some business problems, such as when Norm had problems with tenants at the commercial sheds he owned in Goondiwindi. In 2013, Norm made an enduring power of attorney appointing Justin and Vikki to be his attorneys for financial and personal/health matters.
- [47] Dr Nicholson treated Norm between 2009 and his death on 26 January 2018. From 2016, Norm suffered from a number of illnesses which required complex management:
- (a) Urinary retention as a result of a large multi lobar prostate that was not suitable for surgery. As a consequence, from May 2016 he required a permanent indwelling catheter, which on 18 January 2017 was changed to a supra-pubic catheter because of complications with the indwelling catheter. Norm was prone to suffer from urinary tract infections and subsequent urosepsis;
  - (b) Decompensating heart failure and pulmonary oedema as a result of severe stenosis of the aorta valve. He was treated by aortic balloon valvuloplasty on 7 March 2016;
  - (c) Coronary artery disease with an 80-90 per cent proximal right coronary artery lesion that required medical management;
  - (d) Severe pulmonary arterial hypertension;
  - (e) Non-valvular atrial fibrillation;
  - (f) Chronic obstructive airways disease that required home oxygen. Norm needed permanent oxygen from 9 March 2016 to treat his heart failure and pulmonary disease;

- (g) Diverticulosis with colonic polyposis;
- (h) Chronic venous thromboembolic disease with a combination of acute and chronic pulmonary embolism and deep vein thrombosis of both legs that required lifelong anticoagulation treatment;
- (i) Anaemia of chronic disease.

- [48] In early 2016 Norm had to be admitted to the Goondiwindi Hospital. One emergency admission led to him being transferred to a hospital in Brisbane where he underwent an aorta balloon valvuloplasty. In March 2016 he was transferred back to Goondiwindi. He had mobility problems and plans had to be made for him to live on one level of his house upon discharge. He required oxygen at home. Justin and Vikki organised ramps to his house, home oxygen, Meals on Wheels and Blue Care. They took him home from hospital on 4 April 2016. However, he had to be readmitted to Goondiwindi Hospital on 20 April 2016 with a number of problems, including fluid overload and an inability to mobilise. In May 2016 he was transferred to Brisbane and underwent further treatment. An occupational therapy initial assessment at St Andrew's Hospital on 18 May 2016 assessed his general cognition for conversation as appropriate. He had a Montreal Cognitive Assessment ("MOCA") score of 16/30. He scored poorly on the visuospatial, executive, delayed recall and orientation sections of the test.
- [49] Vikki remained in contact with the medical and rehabilitation staff at St Andrew's. On 20 May 2016 she was told by a member of the rehabilitation staff that they were not able to do any rehabilitation on Norm on doctor's orders as he had scored badly on the occupational therapy test. She was told "We are not able to teach him new things", and that she would need to find respite or permanent care for him.
- [50] There was no vacancy in any nursing home at Goondiwindi. A place was found at the Millmerran Nursing Home and Norm was transferred there from St Andrew's on 1 June 2016.
- [51] Norm had known Kathy Sudholz for about 30 years. After March 2013, Kathy's former husband lived next door to Norm. Because of a shared parenting arrangement, she visited her former husband's house at least once a week and would see Norm on occasion. Norm and Kathy had a good relationship. Around that time, Norm told Kathy he would like to leave her his house. Kathy did not take this comment seriously, because she knew Norm wanted to give her his house in return for her looking after him. She declined the offer because she was not comfortable with the idea of moving her partner and three children into Norm's house so that she could look after him. In May 2016 she was told by Norm about his disappointment in not being able to return to his home. However, it was quite clear that he could not do so. A few days before Norm went to Millmerran he told Kathy that he would pay her to become his fulltime carer. However, she did not wish to put her children or her partner in that situation. She told him that she did not have the medical or healthcare knowledge to nurse him.
- [52] Norm was visited at the Millmerran Nursing Home by Justin and Vikki and, on occasion, by other friends, including some of the lay witnesses in this case. Because of Kathy's work and family commitments and the distance between Goondiwindi and Millmerran, Kathy was not able to visit him. However, she phoned him at least once a week.

- [53] In June 2016 Norm was assessed as suffering from depression, mood and affective disorders. He scored 10/21 on the Psychogeriatric Assessment Scales ("PAS") when assessed on 28 June 2016. His behaviour was poor and on one occasion he told Kathy that he was trying to cause as much trouble as he could. He continued to be confused about how much it was costing him per day to stay at the Millmerran Nursing Home.
- [54] Vikki and Justin went overseas on a prearranged trip between 11 July and 5 August 2016. Norm's accountant, Tim Herden, remained in contact with Norm during this time. Tim recalls seeing Norm in Millmerran while Vikki and Justin were overseas. His recollection is that on that occasion Norm was stressed at being away from his home in Goondiwindi and had trouble focusing on their discussion.
- "... there was a period when Justin and Vikki Rowe went overseas, and that triggered Norm to be depressed, feeling abandoned, feeling neglected ... I was concerned about him while Vikki and Justin were overseas ..."
- [55] Tim discussed with Norm loans Norm had made to Keri Brown and Rodney Kilner. In light of their discussion, Tim wrote to each of them on 3 August 2016. Norm changed his mind as to whether or not the loan he made to Keri Brown was to be recovered. On 15 August 2016, he rang Tim to say he would be changing his will to forgive the loan. Tim understood, however, from a discussion with Norm on 22 August 2017 that the loan was to be collected. On that occasion, Norm said he wanted to keep getting the 10 per cent interest, leading Tim to say that if interest was payable there must be a loan, which would be collected. Norm was satisfied with that.
- [56] Justin and Vikki returned from their overseas trip on 5 August 2016 and visited Norm at the Millmerran Nursing Home the next day. They found him unsettled and in a state of some confusion. In particular, Justin says he was confused about the length of time they were away and about the management at Millmerran. Norm told Justin that some of the visitors he had seen while they were away had offered to take him home and care for him. There is no evidence that any such offers were made.
- [57] During their visit, Norm said he had spoken to Lachlan Wilson who said he could get him into Kaloma straight away and get him a discount of \$40,000. He said that Lachlan's parents were in Kaloma. Neither of these things were true. Vikki told Norm that Lachlan's parents had passed, as was the fact.
- [58] On 11 August 2016, Norm told Vikki that Kathy had offered to look after him at his home and that he spoke to the doctors in Brisbane and he did not need a nurse to look after him at home. This also was untrue. According to Kathy, whenever Norm voiced disapproval or doubts about staying in Millmerran, she reminded him that he was unable to care for himself at home and that if he wanted to stay healthy and happy, he was in the best place. She also assured him that, in her opinion, Vikki and Justin were doing a terrific job and looking after his needs.
- [59] While Justin and Vikki were overseas in July-August 2016, Norm made several false complaints, including that Justin and Vikki had signed a document stating he was in Millmerran to die and could not leave. On 14 August 2016, Justin and Vikki spoke to Norm. Norm went over what

happened while they were away. Vikki reminded him about a meeting he had with the manager at Millmerran. Vikki told Norm (as he had already been told by the manager) that “there is no document signed to say you have to stay at Millmerran”.

- [60] On 15 August 2016, Mr Wilson obtained instructions from Norm to prepare a new will. It seems these instructions were given over the telephone at around 3 pm. Mr Wilson took a file note, but has no independent recollection about how he took those instructions. It will be necessary to return to them in greater detail in considering the issue of testamentary capacity at the time the instructions were given and when the will incorporating them was signed in Mr Wilson’s presence on 18 August 2016.
- [61] It also will be necessary to return to the instructions Norm gave in August 2016 about repayment of the loan which he had made to Mr Keri Brown, since they evidence some indecision on Norm’s part about financial matters.
- [62] It is apparent that Norm was suffering some form of dementia during his time at Millmerran.
- [63] On 1 September 2016, Vikki and Justin transferred Norm from Millmerran to Kaloma in Goondiwindi.
- [64] On 6 September 2016, Vikki explained to Norm that he had paid a RAD of \$400,000 to Kaloma and that it would cost him \$120 per day to live there. On 7 September 2016, Vikki showed Norm a printout she prepared showing him how Kaloma charged its fees.
- [65] Vikki visited Norm on 2 January 2017. He said it was costing him \$600 per day at Kaloma. Vikki said, “No Norm, it is \$120 per day averaging out over the twelve months.”
- [66] Despite regular assurance about what it was costing him to stay at Kaloma, Norm continued to make false statements about what it was costing him to stay there.
- [67] When Vikki visited Norm on 13 June 2017, he was worried and said he had calculated that it was costing him \$70,000 per year at Kaloma. Vikki pulled out the spreadsheet she had prepared from his second drawer and explained the costings to him again. Norm appeared to understand what Vikki explained. He said he had thought he would not have any money left.
- [68] Kathy says that Norm made false claims, saying it was costing him \$400 per day to stay at Kaloma. He told her different amounts that Kaloma was charging, which she knew to be untrue. She says they were ridiculous amounts and she could tell he was just making them up out of his head. He would regularly say that he would pay her the same amount of money or more to look after him in his own home.
- [69] When Vikki visited Norm on 12 July 2017, he again asked her how much he was being charged at Kaloma and Vikki showed him he had been charged \$1,472.10 for the month. He said he had watched *Four Corners* on TV about a retirement village and had rung Tim Herden because he was worried that Kaloma was going to take all his money and wanted to know how much it was costing him. Vikki again explained to Norm how much it was costing and how much he was paying per day on average. Vikki explained the cost to him again and reminded him of the spreadsheet she had left in his cupboard. He said that if he was at home it would only cost him \$20 per day. Vikki observed that he seemed to be worried about his money. She also

observed that his mouth on the left side had drooped and she struggled to understand him when he was talking.

- [70] On 20 July 2017, Vikki visited Norm. He told her he had been to a residents' meeting chaired by the CEO, Penni Roberts. He said he was happy with everything at Kaloma, staff, facilities, etc, but not with how much it was costing him. He said it was costing him \$600 per day, and that Penni had said that as he was self-funded the cost was going to increase to \$1,300 per day. Norm said that was unacceptable. Vikki asked Norm where he had got \$600 a day from. He didn't answer, then said that Vikki had told him it was costing him \$129 per day. Vikki again told him it was costing him \$120 per day, then pulled out and showed him the spreadsheet she had prepared and left in his second drawer. When she had finished, she did not think he was convinced that he was only paying what she had told him. In July 2017, Norm told another resident that he was paying \$600 per day and that it was going up to \$1,300 per day.
- [71] On 25 July 2017, Vikki visited Norm. She took with her a printout showing Norm how much it had cost him since he had been in Kaloma and copies of the Kaloma invoices that had been paid. She asked him again where he had got \$600 per day and he said "The staff and Penni". Vikki reassured him that he was not paying that amount and thought he seemed more settled with it.
- [72] When Vikki visited Norm on 15 August 2017, he said that Keri Brown had borrowed money from him about two years ago. Vikki reminded him that it had been longer than that, because she had been doing his books for two years and the loans had been made before that. In fact, they were made in the 2012/2013 financial year. Norm said he wanted to ask Keri to borrow more money from him and pay him 10 per cent interest. He also said that he had been watching *The 7.30 Report* and *A Current Affair* and that 100 people at a nursing home had gone missing with no trace.
- [73] On 22 August 2017, Vikki saw Norm at Kaloma with Tim Herden. She arranged the meeting. When they saw Norm, he again spoke about the residents' meeting he had with Penni and how much it was costing him at Kaloma. Tim told him he was paying \$120 per day. Norm brought up Keri Brown and Tim asked Norm whether he had put in his will that Keri does not have to repay the debt when he passes away. Norm said, "No". Tim then said that his estate could pursue the debt and if Norm wanted to give the money to Keri he should change his will. Tim advised Norm not to lend more money to Keri. Norm repeated the story about a nursing home where 100 people went missing and the nursing home kept the RAD.
- [74] By September 2017, Norm was very unwell and exhibited extreme tiredness and confusion. Dr Nicholson consulted Vikki about the circumstances in which Norm should be admitted to hospital. Consideration was given to Norm's ability to consent to a blood transfusion. Vikki, Justin and nursing staff at Kaloma often found Norm confused, and unable to remember what had happened in the last couple of weeks. There was a case conference on 4 October 2017. On 16 October 2017, Norm told Vikki that Kathy wanted to buy his house and live there with her three children, and that she was asking about his super fund.
- [75] On 8 November 2017, Norm told Vikki that he had telephoned Keri Brown to ask him why he was not paying interest on the \$500,000 he had borrowed. Vikki reminded Norm that Keri had

been paying him weekly for years. Norm thought he had only lent Keri the money six months ago. Vikki observed Norm to be confused. She had brought a recent bank statement she had received in the post and showed Norm the deposits that had been made by Keri. Norm said, "I don't have to worry now and I will have a good night's sleep tonight". Norm then said that Vikki only showed him his statements occasionally, when in fact she showed him his statements every month. Vikki left the bank statement in his drawer.

- [76] A significant episode occurred in November 2017. Norm formed the belief that he had no money.
- [77] His friend, Keri Brown, who was a solicitor in the 1980s and who later went into business in the transport industry, visited Norm at Kaloma. Based on Vikki's file notes, it seems that the visit was on 9 November 2017.
- [78] Keri recalls that Norm was "quite agitated" and expressed "confusion on the details of his investments and his finances more widely". When Keri arrived to visit, Kathy was there. He said that when he walked in:

"Kathy was standing behind Norm. She had her arms around Norm's neck, was very close to him. Immediately, I walked in the room. She said 'I've got to go', and left, and I didn't even get to speak to her."

- [79] After she left, Norm was "very agitated" and "distressed about his finances".

"He held up a piece of paper, like, a bank statement and said, 'I've only got \$3000. That's all I've got. I've got \$3000. All my money is gone.' He then said that Vikki must have stolen it. I then said to Norm, 'This is not making sense.' And we sat down and had a short talk. During that, I said to him, 'Norm, this doesn't make sense. You know Tim goes through your accounts every year. Whatever Vikki does with your accounts, Tim goes through them. There's no way that could be happening.' And the moment I mentioned the name Tim he settled down again, and he was – started to become – and that's when I made the suggestion, 'Look, how about I ring Tim and see if we can get him.' And I got – I then rang Tim on my mobile, handed the phone to Norm, and I walked outside."

- [80] Tim Herden received a telephone call from Keri Brown, reporting that Norm was confused and thought he had no funds. Tim then rang Vikki and reported what he had been told.
- [81] Vikki visited Norm on 10 November 2017 and showed him his term deposit certificate, his wealth account statement and his bank statements. Norm said that Keri Brown had visited and told him that he was not going to pay back the \$500,000 but would continue to pay interest. Norm asked about the "blood poisoning" he got in Toowoomba and why he could not walk. Vikki reminded him about his infection, that he had been on antibiotics for a month, that he could not walk when he came back from Toowoomba, and that he had since had a blood transfusion.
- [82] Justin visited Norm on 10 November 2017. During his visit, Norm said that he had got himself worried over the last couple of days that he had no money. He said Vikki set him straight with

how his money was placed so he was able to rest again. He talked about his loan to Keri Brown. He said that he was good since talking to Vikki and had just got confused in his head.

- [83] According to Kathy, in the last six months of 2017, Norm's complaining and "making up silly stories about Justin, Vikki and Kaloma increased." He complained about not being properly fed at Kaloma. Kathy's evidence includes the following:

"He complained to me that Vikki was not showing him his bank statements, and not leaving him with any petty cash to buy cans of coca cola. I told him that I did not believe him and that he was making stories up again. I told Norm that I did not believe that Vikki would do that, and that he had plenty of cans of coca cola in the fridge."

- [84] Thursday, 23 November 2017 is a date of some significance. This is the date upon which Mr Wilson attended upon Norm at Kaloma and took instructions in respect of what was to become Norm's last will, dated 28 November 2017. It will be necessary to return to Mr Wilson's file note and evidence about those instructions as well as the circumstances under which Norm signed the will on 28 November 2017. As for Norm's medical condition on 23 November 2017, he was seen shortly after 5 pm that day by Dr Nicholson. Her evidence and her consultation notes record that he had been suffering with episodes of nausea and vomiting in the previous days. Those episodes had since subsided and he appeared to have improved.
- [85] Because Dr Nicholson was not working on Saturday, 25 November 2017, Norm was seen by Dr Nicholson's colleague, Dr Bradshaw, who was on call. Norm reported sharp chest and shoulder pains and she observed him noticeably "cogwheeling". This is a term to describe muscular rigidity in which passive movement of the limbs occurs. The tremors in Norm's arms led Dr Bradshaw to suspect that he may have had Parkinson's Disease. Norm reported that he was lifted around the chest the other day by a male nurse and was in pain. He was given a prescription for Endone, a drug which is prescribed for severe pain.
- [86] Dr Nicholson saw Norm again on Monday, 27 November 2017 and he again complained about the pain in his ribs. He still presented with a tremor, but appeared comfortable. Dr Nicholson continued the treatment with Endone.
- [87] The last will was signed on the afternoon of 28 November 2017. It appears that Norm became noticeably unwell on the evening of 28 November 2017. As noted at the start of these reasons, when Dr Nicholson saw him shortly after 6 pm on 29 November 2017, the staff reported that Norm had been unwell for the past 24 hours, with spiking temperatures of up to 38.8 degrees, leakage around his catheter site and cloudy urine. When Dr Nicholson saw him that evening, he was "very unwell", presenting with a fever, faster than usual breathing and faster than usual heart rate. She diagnosed urosepsis, a severe infection to the urinary tract and reviewed his advanced care plan which had been discussed at the case conference on 4 October 2017.
- [88] Vikki visited Norm again on 29 November 2017. She took his tax return, which she had received from Tim Herden, for him to sign, but Norm was too unwell to sign it. She noticed a letter from Lachlan Wilson dated 28 November 2017 which included a bill for drawing a will and asked Norm about it. He said, "I changed my will back to the original one".



- [89] In the following days, Norm remained unwell.
- [90] By 6 December 2017 when she visited him, Vikki thought that Norm was starting to look much better. She tried to show him his tax return again, but he would not put his glasses on and closed his eyes while she spoke to him about it. He said that Don Carlson had come to see him to explain how his super fund (then his wealth account) was going, but he could not remember the percentage it was earning. Vikki thought he seemed a bit confused.
- [91] Vikki said she had received an account from Doyle Wilson. Norm said that Lachlan had contacted him wanting to check on his will and whether everything was right for him. Then he said that he contacted Lachlan because he could not remember what was in his will and he wanted to make sure the his nephews were not on it and that “you and Kathy” were on the will. Vikki said the account suggested that he had made a will. He said he wanted to make sure that Kathy was on the will. Vikki asked what he had left Kathy, but he could not remember. She asked if he had left her \$500,000 like he left his nephew, Brent Robinson, before he crossed him off.
- [92] Norm said, “You and Justin are getting more than Kathy” and “you are getting about \$2 million, is that right?” Vikki said she did not know. She asked him what he was doing with the house, and he said it was for Vikki and Justin and was worth about \$800,000. Vikki said, “Probably not in the condition it is in now”. Vikki asked whether he had discussed with Kathy what he was leaving her in the will, and he said he had. She asked if Kathy knew he had done a will and that she was in the will, and he said she did. He said he could not really remember what he had put in the will. Vikki said she was concerned that he could not remember what he had put in the will, and he said he thought he did equal shares. He said Lachlan had visited him twice and he came with his daughter.

### **Assessment of lay evidence**

- [93] The foregoing chronology is drawn principally from the evidence of lay witnesses, including contemporaneous notes recorded by Vikki and Justin (the reliability of which was not challenged) and from contemporaneous medical records. Vikki and Justin also gave affidavit and oral evidence, and I found them to be honest and reliable witnesses. I was also assisted by evidence of witnesses who spoke to and observed Norm in 2016 and 2017. These included persons who had a professional relationship with him over many years and who developed a friendship with him, namely Tim Herden. Save for a period between June 2013 and February 2014, Tim acted as Norm’s accountant from 1997 until his death. He regularly saw Norm when he lived in Goondiwindi, when Norm was at the Millmerran Nursing Home and when he moved to Kaloma. I also benefited from the evidence of Don Carlson who worked for Morgans and advised Norm about his investments. I also was assisted by the evidence of Mr Keri Brown, who was involved in the transport industry, shared a friendship with Norm and visited him twice at the Millmerran Nursing Home in mid-2016 and at least six times at Kaloma.
- [94] Some consistent themes emerged from the evidence of these witnesses. One was that, as time progressed, their discussions with Norm became more general. For example, Mr Herden visited on 11 December 2017 and remarked that their discussions around this time became more general. Rather than discuss financial matters, which Norm had a good grasp of earlier in 2017, their discussion consisted of small talk about the weather and such things.

- [95] Don Carlson, who saw Norm about every six to eight weeks after Norm moved to Kaloma, gave evidence about Norm's condition in about November 2017. Whereas in June 2016 Norm was able to discuss with Don the tax advantages of transferring money out of the superannuation fund as a tax free transaction and give approval to the transfer, by November 2017 Don thought it would be "a bit much" to talk to Norm about his investments. By this time, Norm spoke quietly and with difficulty. Norm "switched on" when he was recalling his early life and past events. As Mr Carlson said, Norm was "far more lucid about these past events than present happenings". On this last occasion that Don saw him, probably in November 2017, he did not go through Norm's portfolio with him because of a "vagueness" he observed in Norm. Don doubted whether Norm would have been able to understand the detail.
- [96] Another theme of this evidence was Norm's confusion at different times. A further theme is the making of false claims. I have referred to some of the evidence in this regard in recounting the chronology. This includes false claims that people had offered to care for him in his or their home and frequent and persistent claims about being grossly overcharged by Kaloma. There was also the episode on about 9 November 2017 where Norm claimed that he had no money.
- [97] There was evidence that Norm would occasionally say outrageous things. On one occasion he claimed to be a prisoner and he asked Justin to ring 000. On another occasion he said that the Chinese ran Kaloma. I place limited weight upon these occasional bizarre statements. On occasions the Kaloma nursing home was in lockdown to prevent the spread of infection and Norm was required to stay in his room. It is possible that his mind played games on him during these lockdown periods and he imagined that he was being held there against his will. Occasional deluded statements might also be the product of a delirium brought on by a temporary illness and fever. I have regard to, but place limited weight upon Norm's occasional confusion about where he was, particularly during lockdowns.
- [98] The evidence also raised what I regard as a false issue about whether Norm was a racist. For example, he would refer to "Indian doctors", sometimes in unflattering terms. The reference to "Indian doctors" may be explained as a purely descriptive term used by an elderly man of his background who did not know, or could not remember, an unusual name. Any negative comment may have arisen due to problems of communication. Norm also expressed concern about the Chinese takeover of rural properties. But concerns about Chinese ownership of land and other property are widespread. On one occasion on 27 September 2017 he said to Justin "This country is under attack by the Chinese, I will buy you a box of bullets". This was a provocative remark. I place little significance upon it. Kaloma was in lockdown at the time to prevent the spread of infection. A recent illness had severely weakened him. He was confused at the time and deluded that Kaloma was run by the Chinese.
- [99] A more general and significant issue is Norm's saying false things. Kathy says that he said lots of things that were incorrect, including false stories that she thinks he told in order to confuse or test others. Her view is that he was saying these things just to upset individuals or to manipulate them. This may be true for some of his stories. For example, it is possible that he told Vikki and Justin that certain people had offered to look after him, and did so under the naïve belief that telling the story would prompt them to make a similar offer. A general discussion with a friend about the possibility of moving out may have been misinterpreted by Norm as an offer to care for him. In any case, it is unlikely that Vikki and Justin would act on

such a story, without first talking to the people who supposedly made the offer. It is impossible and unnecessary for me to resolve the question of what motivated Norm to say on different occasions that certain people had offered to care for him, save that he hoped that this would lead to him leaving the nursing home.

- [100] Of greater relevance to an assessment of his cognitive state is his persistent making of false claims about being overcharged by Kaloma. He continued to make these claims despite being assured of the facts and provided with documentary evidence about how much was being paid for his accommodation. When told the truth he seemed to accept it. However, later he would repeat a false claim about how much he was being charged. It seems that he could not recall the assurance that he had been given or that documentary proof of what he was paying was at hand in his room. Norm's inability to recall these matters shows that he had a bad memory of recent events and discussions.
- [101] The existence of such a poor memory does not prove a lack of testamentary capacity. However, it confirms the body of evidence from reliable independent lay witnesses about his cognitive decline. He had a good memory of his early life and work and could hold up general conversations about community life and politics. However, his recollection of specific matters became more vague and he seems to have shown an increasing inability to understand detail. He also showed an inability to recall timeframes, such as his error about how long ago he had lent money to Keri Brown. The loans were made in 2012 and 2013, yet he suggested to Vikki that they had been made much more recently.
- [102] I find that Norm was increasingly prone to forget matters by late 2017. When he could not remember something he would fill the memory gap with a story. A highly relevant example of his confabulating occurred when he spoke to Mr Wilson on 23 November 2017 and gave a false explanation as to why he did not continue to engage the accountant who acted for him in 2013 and 2014, and reverted to using Mr Herden's services. Norm simply created a story about a capital gains tax of \$400,000.

### **The presence of dementia**

- [103] The evidence, including the expert evidence of Professor Byrne and Associate Professor Rosenfeld, is that Norm suffered from cognitive impairment attributable to dementia. Norm had the risk factors for vascular dementia. His cardiovascular system, which was "in poor shape", does not, in itself, demonstrate that he had vascular dementia. However, those conditions, and the facial drooping which might have indicated a stroke, support the conclusion he suffered from a dementing illness.
- [104] Professor Byrne refers to the MOCA administered to Norm when he was in St Andrew's on 18 May 2016 on which he scored (or should have scored) 17/30, a score which, in the absence of delirium, "would normally be found in people with major neurocognitive disorder (dementia)". Dr Byrne goes on in his report to opine:

"The pattern of deficits on the MOCA is also in keeping with dementia. Delirium seems unlikely on 18 May 2016 because Mr Hottes scored 5/6 on the MOCA tests for attention whereas delirium is usually associated with marked impairment of attention..."

... older people who lose the capacity to manage their own finances and lose the capacity to manage their own medication, even when the latter is provided in a WebsterPak™ (as was the case with Mr Hottes), are commonly suffering from dementia. Second, a score of 16/30 or 17/30 on the MOCA provides further evidence of dementia. Thus, it is likely that Mr Hottes was suffering from dementia on 18 May 2016. As most causes of dementia lead to persisting or progressive impairment, it is likely that Mr Hottes was suffering from dementia at the time of making both his penultimate and last wills. His dementia appears to have been complicated by intermittent delirium.”

- [105] On the basis of his experience and the review of the clinical notes, Associate Professor Rosenfeld thought it very likely that Norm suffered from brain vascular disease. He wrote on his report:

“... narrowing of the aortic valve, the occurrence of facial droop, hypertension, coronary artery (ischaemic) heart disease, atrial fibrillation (irregular heart rhythm) and a range of other risk factors in Mr Hottes’ medical history indicate that Mr Hottes was likely to suffer from brain vascular disease ...

... it is very likely that Mr Hottes suffered from brain vascular disease. This would have comprised a significant factor and cause of Mr Hottes’ frailty, disabilities, need for care and assistance as well as the underlying cause of a dementing illness.”

- [106] The experts agree that a person with vascular dementia may have relatively well-preserved memory, even late into the course of their illness. In contrasting vascular dementia with Alzheimer’s Disease, Associate Professor Rosenfeld explained:

“Vascular dementia, on the other hand, presents with a wider range of symptoms specifically related to the area of the brain most prominently affected by the vascular disease process. So for example individuals with vascular dementia may have relatively well preserved memory even late into the course of their illness with their most prominent symptoms and signs associated with brain injury/ischaemia/stroke such as a walking disorder with falls and ‘frailty’. Vascular dementia is much less predictable in nature of its progression and course over time. Vascular dementia is more likely to have exacerbations associated with vascular events affecting the brain (small stroke, or brain ischaemia – reduced blood flow) but which often improve over time to at or below the previous steady state.

It seems more likely than not that, in my view, taking into account the nature of his medical problems, the clinical notes and my experience, Mr Hottes suffered from a vascular dementia ...”

- [107] The experts also agreed that the cognitive functioning of a person with vascular dementia may vary from time to time. A person’s condition may worsen when there is a change in their environment, such as an admission to hospital or when they become ill with an infection. Their dementia symptoms may become worse. The fluctuation in Norm’s cognition is

apparent from the medical records and also from the contemporaneous records kept by Vikki and Justin.

- [108] I do not make the assumption, and nor did the medical experts, that someone suffering from a dementing illness lacks testamentary capacity.
- [109] The screening tests which were administered to Norm are of limited assistance and Professor Byrne did not treat them as conclusive on the question of capacity. Instead, he referred to the tests that were administered on 18 May 2016 at St Andrew's in July 2016 at the Millmerran Nursing Home. These were said to be indicative of dementia, moderate cognitive impairment and probable depression.
- [110] These kinds of screening tests have been referred to elsewhere as a "blunt instrument" which must be considered in conjunction with other evidence of the testator's capacity at the time of making the will.<sup>19</sup>
- [111] I should note that the contemporary assessments about Norm's capacity for decision-making about health matters concern a different kind of capacity to the one with which I am concerned, testamentary capacity. The parties do not place reliance upon this evidence as determinative on the issue of testamentary capacity. Instead, it is further evidence of Norm's cognitive decline and capacity for decision-making at the particular time when those assessments were made. By September 2017, Norm was thought to lack decisional capacity to consent to a blood transfusion. Given his physical state, that procedure carried risks. It was not a simple decision for someone in Norm's condition to make and Associate Professor Rosenfeld expresses the opinion that a decision in relation to Norm's "multiple and chronic health problems" would be "considerably more complex than those involved in decision-making about his will".
- [112] Dr Nicholson thought that on 27 November 2017 Norm would have been able to make decisions about his health care, provided they were simple.
- [113] So far as Norm's testamentary capacity in late November 2017 is concerned, the starting point is that he suffered from dementia. His cognitive decline in 2017 was evident to persons who knew him and who spent time with him on regular visits to Kaloma, including the independent witnesses, Mr Herden, Mr Carlson, Mr Brown and Dr Nicholson. His ability to hold up a conversation with visitors, and to remember matters from the past, does not alter the fact that by late 2017 his cognitive impairment attributable to dementia was significant and likely to affect his decision-making capacity, including his capacity to make a will.

#### **Mr Wilson's evidence about the November 2017 will**

- [114] Mr Lachlan Wilson, a solicitor from Goondiwindi, first met Norm in early 2013 when he received instructions to prepare a will and an enduring power of attorney. He obtained instructions again from Norm to prepare a new will in early 2016. I will return to consider, in the context of Norm's testamentary capacity, a will which Mr Wilson prepared in August 2016. Mr Wilson does not have an independent recollection of how he took those instructions, but

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<sup>19</sup> *Ruskey-Fleming v Cook* [2013] QSC 142 at [65].

recalls attending at the Millmerran Nursing Home to have the will signed. Mr Wilson knew that Norm had been a truck driver and in the trucking business and was not very sophisticated. As Mr Wilson explained, he did not have a lot to do with Norm, and did not know him all that well. Apart from preparing the wills, he gave him some advice in relation to a tenant in one of Norm's commercial sheds.

- [115] It seems that in November 2017 Norm made contact with Mr Wilson, and Mr Wilson visited Norm at Kaloma on 23 November 2017. Norm may have been in a wheelchair. Mr Wilson could not recall. Mr Wilson was concerned about Norm's capacity and kept a file note. Mr Wilson's evidence was that "alarm bells started ringing" because of Norm's age and he was "obviously in poor physical health". Mr Wilson wished to establish whether it was necessary to contact a doctor to have a further test done but decided that this was not necessary. Mr Wilson asked Norm what his assets were and his file note recorded "Suncorp. \$3.5 mill". There was a reference to "3 - 4 acres on river" which he understood to refer to Norm's house and land. The next line on the file note reads "Sheds". Mr Wilson's recollection is that Norm was referring to the commercial sheds, but he could not be "100 per cent positive" about that. The next thing noted is "hard to understand". Mr Wilson explained in his evidence that Norm's voice was faint or low and some of his words were garbled. However, if you listened carefully, they made sense.
- [116] The next entry on the file note is "offered \$500,000 house and land". The following entry is "about 6 mill in assets". After a few other entries there are further entries about his assets. On one line the words "Super Fund" appear. The line below it reads "Morgans \$2 million". Mr Wilson's recollection is that Norm told him that he had a super fund of about \$2 million. Entries then appear about Mr Carlson and then Mr Herden. In the context of a reference to his previous accountant and why he re-engaged Mr Herden, Norm apparently said that he did so because he ended up paying a capital gains tax of about \$400,000. As a result, he rang Tim Herden about who would be a good accountant and Tim Herden explained that he was available.
- [117] There is an entry "Explained about heart" but Mr Wilson could not recall that conversation. The file note goes on to record that Norm did not wish to leave any money to Kaloma or to a charity, and that he did not want to leave anything to his family. There were references to a nephew and his sister and the entry records that Norm had not spoken to his sister for 30 years before she died.
- [118] Returning to the earlier entries, there is a line "Tension between Cathy [sic] and Rowes". Mr Wilson explained that Norm did not use the word "Tension". That was his word. He could not recall the exact words that Norm used but said they were to the effect that Justin and Vikki did not get on with Kathy and they would not be happy with the change in the will.
- [119] A critical line in the file note is "Like to give Cathy [sic] \$1.5 mill". According to Mr Wilson, Norm did not give any explanation for why he wanted to make that gift. Mr Wilson could not recall taking the August 2016 will with him. Mr Wilson did not ask Norm why he wanted to give Kathy \$1.5 million. If he had asked and received an answer, he would have made a file note of it. Mr Wilson thinks that Norm knew that the earlier will had gifted \$500,000 to Kathy, but he could not explain why he thought this.

- [120] On the final page of the file note, Mr Wilson wrote "Satisfied has full capacity" and after initialling the file note added "Knows about Queensland election". He had a vague recollection that there was a discussion about the election which was about to be held.
- [121] Mr Wilson returned on 28 November 2017 with a paralegal, Ms Sullivan, for the purpose of having Norm execute the will. He thinks that on that occasion he would have been there for 15 or 20 minutes. He asked Norm how he was going and Norm explained that he had sore ribs as a result of being lifted in a bear hug by one of the staff at the nursing home. Mr Wilson's file note for that day records "a lot general discussions". Mr Wilson did not have an independent recollection of those general discussions but recalled that Norm would often talk about his days as a truck driver. The file note also recorded "have to listen carefully as speech not clear. However, conversation where all indication that understood". Again, Mr Wilson could not recall the conversation, but formed the belief that Norm understood that he was there to go through the will with him and sign it. The purpose of the conversation was to make sure "he was pretty lucid and understood what was going on around him". He also asked Norm about the election.
- [122] Mr Wilson could not recall whether Norm read the will or had the will read to him.
- [123] There was no further discussion on 28 November 2017 about his assets and there was no discussion about cl 5 of the will. There was no further discussion about Norm's family, and Mr Wilson did not give any evidence about any further discussion about the specific gift being made to Kathy.
- [124] Under cross-examination, Mr Wilson gave evidence of his experience in drafting wills and that he was familiar with the legal test for testamentary capacity. As to the file entry for "Sheds", Mr Wilson was "100 per cent satisfied" that Norm used the word "sheds". Mr Wilson did not take it to be referring to large sheds on the home property (and there is no evidence of there being more than one shed on that property). He understood the reference to be to the commercial sheds.
- [125] As for the \$1.5 million gift to Kathy, Mr Wilson had some recollection of Norm telling him that Kathy used to come and visit him. Mr Wilson made reference to time sheets kept for the attendance by him and his paralegal. There may have been travel time. Mr Wilson's recollection is that he would have spent about 20 minutes with Norm on the day the will was executed.
- [126] I turn to consider the parties' submissions in relation to Mr Wilson's evidence, including his file note, in relation to the making of the will dated 28 November 2017.
- [127] Kathy submits that the reference to "Sheds" is equivocal and that Mr Wilson assumed that Norm was talking about his commercial sheds because Mr Wilson had previously acted for him in relation to them. Mr Wilson could not discount the possibility that Norm was referring to sheds that were located on his property. No value is attributed to the sheds and Kathy submits that all that can be truly concluded is that the word "Sheds" was used.
- [128] I do not agree. The word "Sheds" was used. The evidence indicates that the house property had only one shed. There would be no reason for Norm to refer to it in the plural or to refer to a shed, let alone sheds, at his home. It is more likely that Norm was referring, in the context of

a discussion about his substantial assets, to the two commercial sheds that he owned in Goondiwindi.

- [129] As to the value of the house property, there is no evidence that Norm received an offer of \$500,000 for his house and land. The figure overvalued the property's worth at the time. However, this does not suggest that Norm lacked a general understanding of its value. Many people must overvalue their home when giving an informal valuation of it. Incidentally, the figure of \$500,000 differs from the value of \$800,000 Norm told Vikki about on 6 December 2017.
- [130] Justin and Vikki's submissions make the point that in stating on 23 November 2017 that his assets were worth about \$6 million, Norm understated the value by more than \$1 million. Having overstated the value of the house, he understated the value of his Morgans portfolio by more than \$500,000. Such an understatement is submitted to be not immaterial in the present context.
- [131] In my view, Norm's significant understatement of the value of his assets is of limited weight in determining his testamentary capacity at the time. A testator is not expected to know the precise value of their assets. Against that, in the past Norm had been attentive to his wealth and he continued to receive regular visits from Mr Carlson from Morgans. The share portfolio had a value in excess of \$2.5 million as at 30 June 2017. Mr Carlson was likely to have reported its value on one of his visits. Norm's apparent inability to recall that the share portfolio was worth about \$2.5 million shows a failing memory or that he was tired or unwell when he gave the instructions on 23 November that it was worth \$2 million. However, I would not regard the difference as showing that he lacked testamentary capacity.
- [132] The reference to his "Super Fund" with Morgans is a matter of some significance. It had been wound up in June 2016 and Norm's professional advisers at that time formed the view that he understood the difference between his personal and superannuation portfolios and the reasons why the Super Fund was being wound up.
- [133] It is possible that on 23 November 2017 Norm was referring in a general way to what had been in his self-managed superannuation fund and the assets which had been transferred to form part of his share portfolios. However, if he intended to refer to this body of shares, as distinct from his personal share portfolio, he would not have attributed a \$2 million figure to it. Individuals with superannuation funds are not expected to know the precise legal structure upon which their superannuation is held. Understandably, they may refer to an amount of superannuation which they "own" when, in fact, their entitlement or benefit is of a different legal character. This is not such a case since after June 2016 Norm did not own in any sense any assets held by a superannuation fund. He had wound up the fund. The reference to a "Super Fund" may have been a slip of the tongue, when Norm intended to refer to his share portfolio. However, in the context of his poor memory in late 2017, I think it more likely that he simply forgot that his superannuation fund did not exist anymore and had been wound up.
- [134] This conclusion is reinforced by the fact that he read cl 5 of the will or had cl 5 of the will read back to him. This did not prompt a recollection of the fact that the self-managed superannuation fund specifically referred to in cl 5 had been wound up, and that it made no sense, therefore, to direct that fund to pay any benefit to which he was entitled to his trustee



in his will to form part of the rest and residue of his estate. The fact that the reading of cl 5 did not prompt this recollection suggests that Norm simply had forgotten that the superannuation fund had been wound up.

- [135] Kathy's submissions make the valid point that even if Norm had forgotten he had wound up the superannuation fund, this does not affect the "asset limb" of the test for testamentary capacity. He still recalled the approximate total of his accumulated share portfolio. Norm's inability to recall that the superannuation fund had been wound up does not have a direct bearing upon his awareness of the approximate value of his share portfolio. It does, however, support the conclusion that he was cognitively impaired to a significant extent because of dementia.
- [136] As noted, I would not regard his substantial underestimate of the total value of his assets as indicating that he was not aware, in a general sense, of the nature, extent and value of his assets. However, forgetting the sheds that he owned had been sold and forgetting that his self-managed superannuation fund had been wound up further evidences the effects of his dementia. Coupled with his confabulation about having to pay \$400,000 in respect of capital gains, it provides substantial evidence of impaired memory. The evidence of Norm's dementia has implications for his capacity to evaluate the relative strengths of the claims of persons like Kathy and of Justin and Vikki. As Professor Byrne explains:
- "... impaired memory shortens a person's temporal perspective and gives greater salience to those present at around the time instructions for a will are given. Executive dysfunction impairs insight, judgment and error detection. In combination, memory impairment and executive dysfunction lead to impaired capacity for decision-making, including the decision-making needed for testamentary capacity."
- [137] The absence of any explanation for a threefold increase in the gift to Kathy merits consideration. At once, it should be recognised that providing for a gift of \$1.5 million to her and making an increase in the gift to her from \$500,000 to \$1.5 million does not make the will irrational. The absence of an explanation for such a significant increase does not mean that there could be no explanation or that Norm lacked testamentary capacity. However, the absence of an explanation for such a significant increase creates the suspicion that Norm placed excessive weight on recent acts of friendship by Kathy, and that his impaired memory and executive dysfunction affected his ability to discriminate between her claim and the claims of others, including Vikki and Justin.
- [138] Norm and Kathy had a long-term friendship. It appears that she had been a good friend to him. At times he had expressed a wish to help her buy a property or to pay out her mortgage. Their long-term friendship and her apparent needs explain why Norm, in August 2016, made a provision of \$500,000 for her in his will.
- [139] A relevant question is what, if anything, changed between August 2016 and November 2017 to justify a threefold increase in the provision for her? Their friendship was not materially different in terms of its duration or intensity. Kathy's circumstances and perceived needs had not materially altered. There is no suggestion that Vikki and Justin were thought less deserving

of provision because of any changes in their circumstances or things that they had done. Therefore, the threefold increase remains unexplained.

- [140] While Mr Wilson thinks that Norm was aware in November of the provision which had been made for Kathy in the earlier will, there is no reliable evidence of this. Further, if Mr Wilson had mentioned it, or Norm had recalled the amount of \$500,000 in the earlier will, then one would have expected Norm to say something about why he was making such a substantial increase. There is no evidence of anything said about the increase or the reason for it.
- [141] The absence of any questioning by Mr Wilson on this topic in circumstances in which “alarm bells” were sounding is perplexing. Although Mr Wilson may have formed the view that Norm had testamentary capacity, he seemingly did not direct any questions about the reason for the change in provision for Kathy and to thereby test Norm’s ability to evaluate and discriminate between the respective strengths of claims upon Norm’s estate.
- [142] Another aspect of Norm’s instructions to Mr Wilson on 23 November 2017 addressed in submissions is Mr Wilson’s note “Tension between Kathy and Rowes”, which Mr Wilson explained summarised words to the effect that Justin and Vikki did not get on with Kathy, and would not be happy with the change he was making to his will. Justin and Kathy point out in their submissions that there is no real evidence of tension or conflict. However, it is possible that Norm perceived there to be more tension or conflict in the relationship than there in fact was. A wrong perception about that would not be evidence of a lack of testamentary capacity. Also, the prediction that Justin and Vikki would not be happy with his changing his will was not an unreasonable one.
- [143] Norm’s instructions about charities and relatives shows some capacity to evaluate claims on his testamentary bounty. However, as I have indicated, the absence of any explanation about the reason for the trebling of the gift to Kathy, and the absence of any inquiry by Mr Wilson of Norm in this regard, calls into question Norm’s capacity to discriminate between claims. It also reduces the value of Mr Wilson’s opinion that Norm had testamentary capacity at the time he gave those instructions and at the time he made his will five days later.
- [144] I have regard to the fact that Mr Wilson was experienced in taking wills. Kathy’s submissions point to authority for the following statement:
- “An experienced solicitor or solicitor’s secretary gets used to dealing with people making wills and are usually attuned to the red lights that flash when a person who is of suspect capacity comes across their paths.”<sup>20</sup>
- [145] This is a case in which there were red lights flashing, or to use Mr Wilson’s words, “Alarm bells were ringing.” The difficulty is that, with those alarm bells ringing, Mr Wilson did not ask Norm questions about how much he had left Kathy in his previous will, the reasons for doing so at the time and his reasons for substantially increasing that amount. He did not seek the input of any treating doctor or get an expert medical assessment of testamentary capacity. He did not inform himself about Norm’s mental condition, as assessed by his doctor or those treating him.

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<sup>20</sup> *Re Crookes Estate* (Unreported, Supreme Court of New South Wales, Young J, 14 December 1994) at 29 cited in *Drivas v Jakopovic* [2019] NSWCA 218 at [52].

None of this means that Mr Wilson should not have taken instructions, prepared a will in accordance with those instructions, and then had it executed. Instead, it means that Mr Wilson's assessment of Norm's testamentary capacity could have been much better informed.

- [146] The assessment of the paralegal who attended with Mr Wilson and witnessed the will, as reflected in her file note, is of limited weight. It indicates that there were a lot of general discussions and that Mr Wilson had to listen carefully as Norm's speech was not so clear. The note "he appeared to understand everything and agreed" seems to reflect the fact that Norm indicated that he understood what he was doing. Mr Wilson's file note of 28 November concludes "Read Will. Expressed agreement with it". It does not record whether Norm read the will or had it read to him. The paralegal's file note records that Mr Wilson "went through the will with Norman and he told Lachlan he understood".
- [147] It has been said that the most valuable evidence in probate cases is usually given "by the experienced solicitor who witnessed the will as opposed to a very highly qualified psychiatrist whose evidence is based not on any personal observation of the testator, but who has reasoned his or her opinion from medical and hospital notes."<sup>21</sup> In a case such as this it is necessary to distinguish between the evidence of facts given by a solicitor who witnesses a will and expressions of opinion by such a witness about testamentary capacity. As to the former, Mr Wilson appeared to have some independent recollection of events, but was heavily dependent upon his file notes. Norm's age and condition rang alarm bells. Mr Wilson was not aware that the commercial sheds had been sold and so his opinion about that testamentary capacity assumed that Norm had a good recollection of what he owned. Similarly, Mr Wilson did not detect the fact that the self-managed superannuation fund had been wound up (such that there was no need for cl 5) but that Norm was labouring under the misapprehension that it still existed. Most importantly, Mr Wilson did not ask Norm important questions about what he had left to Kathy in the past, why he had done so and the reasons for making the change which he proposed. Those kinds of inquiries were relevant to the formation of an informed opinion about Norm's ability to evaluate, and discriminate between, the respective claims of Kathy on the one hand and Justin and Vikki on the other. In my view, Mr Wilson's contemporaneous opinion about testamentary capacity, whilst that of an experienced solicitor, was not as well-informed as it should have been. His evidence did not satisfactorily explain why he reached the opinion about testamentary capacity which he reached.
- [148] Although a solicitor may genuinely believe that the testator had testamentary capacity at the time he executed the will, that opinion does not displace the Court's role in deciding whether in fact the testator had testamentary capacity.<sup>22</sup>
- [149] The weight to be accorded to the opinion of the solicitor who prepared and witnessed the will depends upon the circumstances, including what was said when the will was read through, and the extent to which apparently reliable statements made by the testator to the solicitor are shown to be false. In this matter Mr Wilson's opinion that Norm had testamentary capacity was seemingly based in part upon Norm's ability to recall that he owned sheds, had a

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<sup>21</sup> *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [89].

<sup>22</sup> *Ruskey-Fleming v Cook* [2013] QSC 142 at [63] and [71].

superannuation fund and had changed accountants because of the \$400,000 capital gains tax liability. None of these things were true. I would not go so far as to say that “any view the solicitor may have formed as to the testator’s capacity must be shown to be based on a proper assessment and accurate information or it is worthless.”<sup>23</sup> I prefer to say that if the solicitor’s view as to testamentary capacity was not based on a proper assessment and accurate information, it may be worth very little.

[150] In summary, I consider that Mr Wilson’s *opinion* as to testamentary capacity was not based upon a proper assessment and accurate information. Therefore, I place limited weight upon it. Mr Wilson’s *observations*, on the other hand, which prompted alarm bells to start ringing, tend to confirm the doubts about Norm’s testamentary capacity.

**Did the deceased have testamentary capacity to execute the will dated 28 November 2017?**

[151] Norm suffered from a significant cognitive impairment at the time he gave his instructions on 23 November and at the time he signed the will on 28 November 2017. There is no doubt that he was suffering from dementia.

[152] In addition, he was unwell. It is possible that the infection, with associated fevers, observed by nursing staff on the evening of 28 November, and which was diagnosed by Dr Robinson on the evening of 29 November, was already making Norm unwell at the time he signed the will at around 2 pm on 28 November 2017. This does not mean that he was suffering from a delirium. It simply means that he was unwell and this may have exacerbated his condition.

[153] I should add that, according to Professor Byrne, a person with a mild delirium caused by the onset of an illness, may “appear normal to lay interviewers”.

[154] The fact that Norm was able to converse with some difficulty in being understood about his assets and his testamentary intentions is some evidence of his testamentary capacity. However, the errors which he made on 23 November in giving instructions about his assets and his confabulation in relation to the \$400,000 capital gains tax raises significant doubts about his memory loss and capacity for decision-making.

[155] The contemporaneous observations of friends and the contents of medical records indicate that his cognitive capacity was substantially compromised at around the time he made the will on 28 November 2017. He did not have a good appreciation of his assets. His impaired memory shortened his temporal perspective about matters such as how long ago he had loaned money to Mr Brown. As at 28 November 2017 he had a substantial cognitive impairment due to dementia, was feeling unwell, was in pain due to the recent “bear hug” and was suffering from the onset of an infection which soon led him to develop fevers and urosepsis.

[156] I take account of the fact that, despite these difficulties, he had been able, several days earlier, to give an approximate value of his net worth and to explain why he was not inclined to leave

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<sup>23</sup> *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch) at [43] per Christopher Pymont QC. This passage was quoted with approval in *Veall v Veall* (2015) 46 VR 123 at 183-184 [192] per Santamaria JA (with whom Beach and Kyrou JJA agreed).

any money to his family. His inability to accurately recall on that date that he had sold the commercial sheds and had wound up his self-managed superannuation fund does not have a direct consequence on his ability to know the approximate total value of his estate. However, it evidences his cognitive state being impaired and this has consequences for his ability to evaluate the competing claims of individuals.

- [157] Persons who knew him well, such as Mr Herden and Mr Carlson, and who knew him much better than Mr Wilson, were able to remark upon Norm's cognitive decline by November 2017.
- [158] In circumstances in which Norm was suffering from a dementing illness, had demonstrated memory problems, made errors in recounting his assets and was unwell at the time of executing the will, I conclude that there is not sufficient evidence that he was able to evaluate, and discriminate between, the respective strengths of the claims of persons who may reasonably be thought to have a claim upon his testamentary bounty. One aspect of the insufficiency of evidence is the absence of any explanation for a threefold increase in the amount to be left to Kathy. Her circumstances and the claim which she had upon Norm's testamentary bounty had not changed to any great extent from when Norm made the previous will in August 2016.
- [159] Norm's memory impairment and compromised capacity for decision-making, together with contemporaneous evidence of his physical and mental state in November 2017, leads me to conclude that there is insufficient evidence to be satisfied that he was able to evaluate and discriminate between the respective strengths of the claims upon his testamentary bounty at that time. The evidence strongly suggests that his mental faculties had been so affected as to make him unequal to the task of making a will, even a relatively simple will of the kind which he made. Although I do not make a finding that he clearly lacked testamentary capacity as at 28 November 2017, I am not affirmatively satisfied that he did. Therefore, Kathy has not discharged the onus upon her and I should declare against the force and validity of the 28 November 2017 will.

#### **The August 2016 will**

- [160] As noted, on 15 August 2016, Mr Wilson received instructions from Norm about making a new will. Mr Wilson does not have an independent recollection as to how he came to take those instructions. However, the evidence points to them being given over the telephone, with Mr Wilson making a file note. Based on the file note, Mr Wilson was able to recall that Norm wanted to change his will to give Kathy \$500,000. Norm described her as a friend who he had known for 25 years. The file note records "She did not want to accept". Mr Wilson could not recall what those words specifically referred to. However, they are consistent with an earlier offer to gift Kathy an amount, which she declined. Some years earlier Norm had offered to pay the whole of Kathy's mortgage debt to ease her financial burden. She declined.
- [161] After an unrelated note about a prostate operation, the note continues:
- "Kerry [sic] Brown \$500,000. Solicitor in Inverell. Owes you money. Paying you interest 10% paid weekly."
- [162] The note goes on to refer to Norm's accountant, Tim Herden. Mr Wilson's recollection is that Norm had spoken to Mr Herden about sending a letter to Keri Brown. The file note continues:

“Letter want money repaid. Just talking to Kerry [sic] Brown. Did a lot for you. Don’t want letter sent. Will contact Tim. Do not want to an assignment [of] the debt to Cathy [sic] just outright gift”.

- [163] Mr Wilson’s recollection is that he suggested to Norm that perhaps another way of gifting the money to Kathy was to assign the debt, but Norm did not want to do that.
- [164] Mr Wilson does not recall discussing Norm’s assets with him. He does not recall Norm giving him instructions to forgive the loan to Keri Brown. He says that if he had been given those instructions, he would have made a note of it.
- [165] The file note is unclear as to whether Norm or Mr Wilson was to contact Tim Herden about the letter. Mr Wilson could not recall contacting Tim Herden, and assumed it was for Norm to do. Tim Herden’s evidence is that Mr Wilson did ring him and asked him about Norm’s superannuation fund and whether he had a binding death nomination, and he told Mr Wilson that the fund had been wound up.
- [166] During a conversation in August 2016, Norm complained to Mr Wilson about being in the Millmerran Nursing Home and about wanting to be transferred to Kaloma at Goondiwindi. Mr Wilson recalls such a conversation and Norm asking him what he could do about it.
- [167] Mr Wilson prepared a new will based upon the instructions given to him on 15 August, and visited Norm on 18 August 2016 at the Millmerran Nursing Home. He made no file note of that visit. He was on his way to Brisbane with a friend, a surveyor from Goondiwindi, and they stopped into the nursing home. They arrived at around 5.30 pm or 6 pm. Norm was sitting at a table having his evening meal. After Norm met Mr Wilson they moved to another table in the dining room. Mr Wilson could not recall whether Norm read the will or whether he read the will to him. It was Mr Wilson’s policy to always have a client read the will, but he had no independent recollection of what occurred on this occasion. However, Mr Wilson is sure that he would either have read the will to Norm or Norm would have read it himself. He has no recollection of Norm saying anything about cl 5. To the best of Mr Wilson’s recollection, Norm was not on oxygen at the time.
- [168] Mr Wilson did not make any inquiries of Norm’s GP or anyone else about his health. Mr Wilson’s evidence is that he satisfied himself of Norm’s capacity to make the will from Norm’s general demeanour and the conversations which he had with him at the time. Mr Wilson had no specific recollection of the conversations. He explained:

“Look, I have no independent recollection of those conversations. But I – it was just, again, having done many wills, over the time you – you understand which – where people have issues or aren’t aware of what they’re doing. And I was – in my opinion, I was fully satisfied that Norm knew what he was doing. He wanted to make a will – he wanted to make an amendment to his will. I didn’t discuss the assets or I didn’t actually discuss any – any other discussions about the will about any other beneficiaries at that time but I was satisfied that he knew what he was doing.”

- [169] Mr Wilson’s friend witnessed the will.

**Matters of concern**

- [170] It is appropriate to address at this point four matters of concern in relation to Norm's testamentary capacity to make the 18 August 2016 will. The first is his cognitive impairment. The second is his recent upset when Justin and Vikki were away and his continuing upset at being at the Millmerran Nursing Home. The third is his apparent confusion about certain matters. The fourth is his change of mind over whether to forgive the \$500,000 loan to Keri Brown.
- [171] The evidence establishes that by this time Norm was suffering from a cognitive impairment associated with a dementing illness. As discussed, the test undertaken at St Andrew's in June 2016 is a "blunt instrument" because it was taken when Norm was in an unusual situation, hospitalised in Brisbane. The test administered on 18 May 2016 indicated a moderate impairment. If a similar test had been administered on 15 or 18 August 2016 at Millmerran, it may have yielded a different result. A different test administered in September 2016 showed only mild impairment. One cannot make any assumptions about what level of cognitive impairment would have been revealed by a test on 18 August 2016. Instead, the starting point is that Norm was suffering from vascular dementia which impaired, to some extent, his faculties, including his testamentary capacity. It is improbable that the vascular dementia had progressed to the level of impairment which existed much closer to his death. The level of his cognitive impairment on 18 August 2016 is best judged by reference to contemporaneous records and the observations of persons who saw and spoke to him at around that time.
- [172] As previously noted, Norm had been very upset and depressed when Justin and Vikki went overseas in July. They returned on 5 August 2016 and evidence of their observations of Norm after their return has been discussed. In addition, Norm expressed his displeasure to a number of people at being at the Millmerran Nursing Home. He was keen to leave and told many people, including Mr Wilson, about this. It is reasonable to assume some level of depression, notwithstanding the return of Justin and Vikki from overseas.
- [173] Another relevant matter is evidence of Norm's confusion about fees. For example, a few months earlier, on 25 June 2016, Norm told a member of staff at the Millmerran Nursing Home that he could not afford to stay there, as it was costing \$500 per day. Associate Professor Rosenfeld notes that this conversation occurred when Norm had only recently been admitted to the residential facility and had only recently been in hospital for multiple medical problems. The entry is consistent with episodes which occurred much later at Kaloma in which he was confused or forgetful about nursing home fees. However, I do not place too much weight on a conversation which occurred on 25 June 2016 in assessing Norm's testamentary capacity a few months later.
- [174] A concerning example of confusion or misunderstanding relates to a conversation which Norm had with Lachlan Wilson about getting into Kaloma. On 5 August 2016 Norm told Vikki and Justin that Mr Wilson had told him that Mr Wilson could get him into Kaloma straight away, and obtain a discount of \$40,000. Norm also believed that Mr Wilson's parents were in Kaloma. There appears to have been an occasion in August 2016 when Norm complained to Mr Wilson about the Millmerran Nursing Home and said that he wanted to be transferred to Kaloma. Norm asked Mr Wilson what he could do about it. Mr Wilson did not say that he could get Norm straight into Kaloma, ahead of other people on the waiting list and with a

discount. Norm's conversation with Justin and Vikki on 5 August 2016 suggests that Norm was confused or at least misunderstood what Mr Wilson had said to him. For example, he may have confused Mr Wilson's reference to his parents having been in Kaloma with the notion that they still were in Kaloma.

- [175] Another example of confusion is that Norm told Vikki on 11 August 2016 that Kathy had offered to give up her full-time job to look after him at his home. Kathy's evidence is that she did not make such an offer. Again, it is possible that Norm was simply confused about a conversation with Kathy. It is also possible that he was attempting to manipulate individuals and to obtain an offer from Vikki that he could live at her home.
- [176] Another area of concern is Norm's changing position in relation to the loan to Keri Brown. In late July 2016, Norm asked Tim Herden to write letters to Keri Brown and Rodney Kilner, advising that after his death he expected the loans made to them to be repaid. Those letters were sent on 3 August 2016. On or about 15 August 2016 Norm telephoned Tim to say that he would be changing his will to forgive the \$500,000 debt to Keri Brown. However, as noted, on 15 August 2016 he did not give instructions to Mr Wilson that the loan was to be forgiven. Mr Herden agreed under cross-examination that Norm vacillated about whether to forgive the loan he had made to Keri.
- [177] Mr Brown's evidence about discussions with Norm about the loan is noteworthy. After receiving the letter from Tim Herden, Mr Brown spoke to Norm. Norm told him that he was able to live off the interest that Mr Brown was paying on the loan. It was at a fairly high interest rate, namely 10 per cent. Norm said that he was able to live from the amount that was paid to him weekly and so, at that stage, did not have to "bite into his other investments." This approach to wealth and income may perplex many. Norm was worth millions of dollars and was able to draw a large income from his investments. However, adopting what may seem to be a miserly approach, he saw the 10 per cent interest payment on the \$500,000 loan to his friend, Mr Brown, as his source of income. According to Mr Brown, "Norm was adamant he didn't want it repaid." He even offered to loan Mr Brown more money at the same interest rate, an offer which Mr Brown understandably declined.
- [178] Norm wanted the loan to remain and to continue to be paid interest. He gave instructions in late July 2016 that after his death the loan would have to be repaid to his estate. He appears to have indicated a different attitude towards making provision in the will for forgiveness of the loan in the discussion which Mr Herden recorded in a diary note. However, when he gave his instructions to Mr Wilson, he apparently indicated that he did not want the loan forgiven. The evidence suggests that he changed his mind between speaking to Mr Herden (as recorded in the file note) and speaking to Mr Wilson. The evidence does not indicate constant vacillation. Instead, in giving instructions to Mr Wilson, he reverted to the instructions he had given to Mr Herden in late July 2016.

#### **Contemporaneous observations**

- [179] I have had regard to the medical and nursing home records in around August 2016. I have also had regard to the contemporaneous notes kept by Vikki.



- [180] In early August 2016 Norm was experiencing lower back pain which interfered with his sleep. He was started on a pain killer.
- [181] On 9 August 2016 Norm spoke to Vikki and suggested that there was a document which had been signed by Justin and Vikki, saying that he had to stay at the Millmeran Nursing Home until he died. This was untrue and Norm was assured about this. There were different discussions about his sleeping problems and procuring a new mattress.
- [182] Over the period between 12 and 18 August 2016, Norm engaged in a number of conversations about payment of car insurance. He was able to deal directly with the insurer in resolving certain matters.
- [183] At around this time there were points of conflict with certain staff at the nursing home, with Norm accusing one staff member of telling lies. He needed satisfaction that a receipt had been obtained for the \$290,000 RAD.
- [184] On 15 August 2016 Norm spoke to Vikki, reported that he had not slept well the night before and said that he was feeling a bit better. That same day Vikki told Norm that she had a quote from an individual to buy his 2013 Toyota Hilux. Norm asked if Vikki could contact another individual (who he named) for a price. Vikki's note for 15 August 2016 also includes that Norm attended an activity that morning, but was too tired to play indoor bowls that afternoon and so just rested in his room. He was looking forward to playing bingo the next day.
- [185] On 17 August 2016 Norm discussed a variety of matters including car insurance, moving to Kaloma and that he was having his catheter replaced a few days later by a doctor.
- [186] On 18 August 2016 Vikki received an email from Mr Roberts at Kaloma, advising that Norm was on the urgent waiting list, and that Kaloma would be working very hard to find him a place. The email promised Norm to bring him home to Kaloma as soon as Ms Roberts possibly could. Vikki rang Norm and he was happy to hear the news. He also told Vikki that he had had his catheter replaced the day before and had played a bit of indoor bowls. He had been concerned about some blood loss he had experienced that morning, but things had settled down in the afternoon. The medical records for 18 August 2016 do not suggest that Norm was in a poor state of health. His urine was clear.
- [187] Norm's capacity to consider financial matters in the weeks and months immediately prior to 18 August 2016 and in the period immediately after has some relevance. In June 2016 he was able to discuss with Mr Carlson and others the winding up of his self-managed superannuation fund. Others attended to the paperwork. Mr Carlson, who had known Norm for a long time and who had regular meetings with him about financial matters gave evidence about their discussions in June 2016 in Millmerran. They had discussed that it was not to Norm's benefit to keep the superannuation fund going, now that he had retired. Mr Carlson also discussed the matter with Vikki and Justin. According to Mr Carlson, there was no doubt in his mind when he took the instructions from Norm that Norm fully understood they were transferring all of his superannuation fund to his personal account in order to save tax in the event of his death.
- [188] According to Mr Herden, there was discussion about the tax advantages of winding up the superannuation fund. Because Norm had no dependents, the fund would have been subject

to a 15 per cent tax if paid to a non-dependent. In short, the superannuation fund was wound up for tax reasons and this was consistent with Norm's lifetime desire to minimise his tax. According to Mr Herden, at the time that he had conversations with Norm about the money which he had invested through Morgans, Norm had a rough idea of the amount which he had invested. Mr Herden went so far in cross-examination to say that Norm had this understanding right up until his death.

- [189] Mr Brown, who also regularly saw Norm, including on a few occasions when Norm was living at Millmerran, gave evidence that, except for certain occasions, discussed in his affidavit, Norm's understanding of his financial situation, including his investments and assets, was excellent. The exceptions related to occasions in 2017 when Norm was at Kaloma.

### **Mr Wilson's evidence**

- [190] Again, it is necessary to distinguish between Mr Wilson's observations when taking instructions on 15 August and speaking to Norm about the will on 18 August 2016, and Mr Wilson's opinion about testamentary capacity. Mr Wilson's recollection of the instructions he received on 15 August 2016 is aided by a file note. His observations of Norm on 18 August seem reliable enough and accord with contemporaneous records of Norm's health at the time. Mr Wilson's opinion about Norm's testamentary capacity as at 18 August 2016 was not informed by input from Norm's medical practitioners or carers about his health or cognition. Mr Wilson did not ask Norm to list his assets or to explain the competing claims of potential beneficiaries, or to confirm his reasons for excluding his family from his will. Nevertheless, Mr Wilson's assessment of testamentary capacity has some value, being based upon observations of Norm's conduct and conversations at the time.

### **Expert witnesses**

- [191] I have had regard to the expert reports and the oral evidence of Professor Byrne and Associate Professor Rosenfeld. Both are highly qualified and I was assisted by their insight into Norm's medical conditions, his cognitive impairment, the utility or otherwise of screening tests and what, based on their reviews, appeared to be his decision-making capacity. I also have regard to their opinions about Norm's testamentary capacity at the relevant dates. However, that matter is ultimately a decision for the Court, arrived at on the basis of the whole of the evidence. It is not a matter of choosing between the competing opinions of highly qualified experts.

- [192] In *Re Key*,<sup>24</sup> Briggs J stated:

“... the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insight into the workings of the mind otherwise entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges.”

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<sup>24</sup> [2010] 1 WLR 2020 at 2040 [98].

[193] To like effect, Vickery J in *Nicholson v Knaggs* stated:<sup>25</sup>

“In the end it is for the court, assessing the evidence as a whole, to make its determination as to testamentary capacity. In the present case, the opinions of expert witnesses as to whether the testator was competent or not competent, while not without weight, cannot be decisive as to testamentary capacity at the relevant times. The court must judge the issue from the facts disclosed by the entire body of evidence, including the observations of lay and professional witnesses who knew and saw the testatrix at the time of her making the relevant wills and codicils. The manner in which she gave her instructions, the content of those instructions, the setting in which the instructions were given and the outcome of enquiries made by the solicitor acting in the matter, all assume importance.”

[194] In *Revie v Druitt*<sup>26</sup> Windeyer J said that “lay evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors, often general practitioners who were treating doctors during the lifetime of the deceased, usually is of far more value than reports of expert specialist medical practitioners who have never seen the deceased”.

[195] In *Zorbas v Sidiropoulous (No 2)*, Hodgson JA said:<sup>27</sup>

“The criteria in *Banks v Goodfellow* are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the *Banks v Goodfellow* criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at the time of the will displaying understanding of the deceased’s assets, the deceased’s family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation.”

### **Did the deceased have testamentary capacity to execute the will dated 18 August 2016?**

[196] Questions of testamentary capacity are not resolved by the blind application of rules or formulae.<sup>28</sup> They require the application of criteria to an assessment of the whole of the

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<sup>25</sup> [2009] VSC 64 at [41].

<sup>26</sup> [2005] NSWSC 902 at [34].

<sup>27</sup> [2009] NSWCA 197 at [65].

<sup>28</sup> *Frizzo v Frizzo* [2011] QCA 308 at [66].

evidence. The question of testamentary capacity is time-specific. Nevertheless, appropriate regard should be had to the state of the testator's cognitive capacity and health at around the same time as the relevant date. Although the question of testamentary capacity does not involve the rigid application of a four part test, it is useful to consider separately in this case Norm's awareness, at least in general terms, of the nature, extent and value of his assets, and his ability to evaluate and discriminate between the claims of persons who may reasonably be thought to have a claim upon his testamentary bounty.

- [197] Although Mr Wilson did not ask Norm on 15 or 18 August 2016 about his assets, the other evidence, including the evidence of persons who knew Norm at the time, indicates that he was aware of what he owned and its approximate value. The presence of cl 5 in the will, which was carried over because the prior will was used as a template, raises again the fact that when Norm read the will or had it read back to him, he did not tell Mr Wilson that his self-managed superannuation fund had been wound up. Mr Wilson may have been told such a thing by Mr Herden and not have been troubled by the inclusion of cl 5. In any case, Norm was aware, due to recent dealings with Mr Carlson and Mr Herden, and his ongoing interest in his financial affairs, of the approximate amount which he held in shares. Mr Brown's evidence is that Norm was aware of what he owned.
- [198] Although not directly relevant to Norm's awareness of what he owned, the contemporaneous records show that in August 2016 he was sufficiently alert to financial matters including the RAD payment to the Millmerran Nursing Home and was able to discuss with Mr Wilson whether the debt owed by Mr Brown should be assigned to Kathy, rather than recovered. Norm preferred that the will gift \$500,000 to Kathy.
- [199] The evidence persuades me that as 18 August 2016, Norm was aware, at least in general terms of the nature, extent and value of his estate.
- [200] As to competing claims on his testamentary bounty, Norm had earlier explained to Mr Wilson in the context of an earlier will, and also explained to friends, why he was not inclined to leave anything to his family, including his nephew. He had earlier explained, and probably did not need to repeat to Mr Wilson, his gratitude to Justin and Vikki and why he was inclined to give them the principal benefit of his estate.
- [201] As for Kathy, about whom Mr Wilson was unaware, she had been a friend for about 25 or 30 years. The extent and nature of that friendship is attested to in her affidavit. Although he did not apparently say this to Mr Wilson, Norm told Mr Brown at a later stage that Kathy had led a hard life. There also is evidence that in 2015 Norm told Kathy:
- "I told Justin that after I die, I want you to pay out Kathy's house because I want her looked after."
- [202] and that Justin had promised to do that. Kathy told Norm that his wishes needed to be recorded in his will, not left to other people to organise.
- [203] Viewed in the light of other evidence in the case, Mr Wilson's file note of 15 August 2016 "She did not want to accept" was a reference to an earlier offer that Kathy had not accepted to pay her a substantial amount of money to pay out her mortgage. Kathy declined that and other offers for reasons which she explained in her evidence. Norm recalled that Kathy had declined

an offer of a substantial amount of money which he offered to pay during his lifetime. The substance of what he told Mr Wilson was that, Kathy having declined to accept that amount, he wanted to make provision for a person who had been a good friend to him for 25 years and was not well off financially.

- [204] As against the matters which support a conclusion that Norm had the capacity to evaluate the claims of Kathy and others, are the matters of concern which I have discussed.
- [205] First and foremost is Norm's cognitive impairment. The evidence suggests that it was not as severe in August 2016 as in November 2017. Nevertheless, there was significant cognitive impairment. It may not have been as significant as suggested by the test undertaken at St Andrew's a few months earlier or when Norm was admitted to the Millmerran Nursing Home. However, it would have affected at least his short-term memory and aspects of his decision-making.
- [206] Overlaying this was Norm's depression at being required to live in Millmerran. He was unhappy with various aspects of his life there and was particularly unhappy when Justin and Vikki were overseas for part of July and early August 2016.
- [207] As discussed, in August 2016, Norm was apt to be confused by things that he had been told by people such as Mr Wilson and by Kathy. However, I would not regard the evidence of confusion as necessarily showing that he lacked testamentary capacity.
- [208] Attention to contemporaneous records, including Vikki's diary notes, suggests that Norm's health and cognition were not in a particularly bad state on either 15 or 18 August 2016. The trouble he had experienced with his catheter was being resolved. On 18 August 2016 he received encouraging news from Kaloma that he was on the highest urgency list for a place there.
- [209] He was not ill that day and seems to have been able to participate in activities at the nursing home. The fact that he was not ill with a serious infection or fever is a significant point of distinction between his condition on 18 August 2016 and his condition on 28 November 2017, by which time his general cognitive state had further declined.
- [210] His change of view on or about 15 August 2016 as to whether the \$500,000 to Keri Brown should be forgiven was simply that. It does not necessarily suggest confusion. His attitude towards maintaining that debt, and not having it repaid during his lifetime, was idiosyncratic. Although Mr Brown was a good friend, Norm was not under a moral obligation to forgive the loan during Norm's lifetime or in his will.
- [211] Aspects of the evidence, including the matters which I have specifically mentioned in the preceding sections, raise a doubt as to the validity of the 18 August 2016 will. There is no contest about that. The issue is, notwithstanding those matters of concern, whether Kathy has discharged the burden of satisfying the Court, on the balance of probabilities, that Norm possessed the required mental capacity.
- [212] I apply the guiding principles. Cognitive capacity may be reduced below the ordinary standard, provided the testator retains sufficient intelligence to understand and appreciate the testamentary act in its different aspects. A mild or even moderate impairment of memory or

decision-making capacity does not necessarily mean that the testator's faculties are unequal to the task of disposing of his property.

- [213] By 18 August 2016, Norm's cognitive capacity had been compromised. He was unhappy. However, he was aware of what he owned and, in my view, able to evaluate the claims of friends, family and others upon his testamentary bounty. Any short-term memory loss or reduced executive functioning did not impair his testamentary capacity to the extent that he was not able to evaluate and discriminate between the respective strengths of the claims of such persons. He seemingly had a good memory for many matters. Whilst by November 2017 he may not have been up to the task of evaluating those respective claims due to progressive dementia, failing health, strong medication for pain and the onset of infection which led to urosepsis, I am not persuaded that he was in a similar compromised state 15 months earlier.
- [214] Although I accord limited weight to Mr Wilson's opinion about Norm's testamentary capacity on 18 August 2016, Mr Wilson's observations of Norm appear to accord with contemporaneous records.
- [215] Norm's decision to change his will and to give \$500,000 to Kathy cannot be described as irrational. No submission is made to that effect. The decision to gift her \$500,000 in his will reflected a recognition of her long friendship and her perceived need for financial improvement. The amount which Norm gifted to her in that will, when compared to the balance of his estate, was not disproportionate. Years earlier, in 2007, he had offered to pay Kathy's mortgage and the previous year he had indicated that he wanted his executors to pay off Kathy's mortgage. The amount of \$500,000 was broadly in line with these earlier expressed statements about the extent he wished Kathy to benefit.
- [216] Norm's mental faculties were affected by a dementing illness which rendered him incapable of caring for himself. Norm was also depressed by his circumstances in August 2016. However, these matters are not sufficient in the light of all of the evidence to conclude that he lacked testamentary capacity. I am satisfied, on the balance of probabilities, that he was not so affected by dementia, depression or any other condition as to make him unequal to the task of disposing of his property. I am satisfied that he possessed testamentary capacity when he made the 18 August 2016 will.

### **Conclusion and orders**

- [217] A solemn form grant of the will dated 18 August 2016 should be made to the applicants.
- [218] I will hear the parties, if required, on the question of costs. My provisional view is that the application was properly brought and that the respondent has enjoyed a substantial measure of success. There is no apparent reason to deprive either party of their costs. In the circumstances, my provisional view is that an order should be made for the parties' costs to be paid out of the estate on an indemnity basis. However, I will hear submissions, if requested.

## Annexure

Asset	1996	30.6.13	30.6.14	30.6.15	30.6.16	30.6.17	DOD
Cash and term deposits			\$2,360,140	\$3,047,555	\$3,370,056	\$3,211,940	\$3,342,034
Millmerran Aged Care RAD					\$290,000		
Kaloma Aged Care RAD						\$400,000	\$404,767
30 Old Kildonan Road	\$400,000		\$251,769	\$251,769	\$253,247	\$254,247	\$350,000
Commercial Shed # 1 (Lot 1, 6 Lagoon Street) (sold November 2014)		\$263,283	\$467,500				
Commercial Shed # 2 (Lot 2, 6 Lagoon Street) (sold July 2013)							
SMSF (managed by Morgans)			\$1,085,906	\$1,061,391	\$754.38 - Fund transferred to share portfolio		
Share portfolio (managed by Morgans)			\$1,005,434	\$1,040,007	\$2,314,974	\$2,523,748	\$2,635,929
Loan – Brent Robinson			\$114,800	\$114,800	\$114,800	\$114,800	\$114,800
Loan – Rodney Kilner			\$150,000	\$145,000	\$139,500	\$120,000	\$90,000
Loan – Keri Brown			\$500,000	\$500,000	\$500,000	\$500,000	\$500,000
			<b>\$5,935,549</b>	<b>\$6,160,522</b>	<b>\$6,983,332</b>	<b>\$7,124,736</b>	<b>\$7,437,530</b>

**ASSET SUMMARY**