

# SUPREME COURT OF QUEENSLAND

CITATION: *Hamill and Anor v Wright and Ors* [2018] QSC 197

PARTIES: **SUSAN BELLE HAMILL**  
(first plaintiff)  
and  
**RICHARD KEITH HAMILL**  
(second plaintiff)  
v  
**LORRAINE FRANCIS WRIGHT**  
(first defendant)  
and  
**TREVOR GRANT WRIGHT**  
(second defendant)  
and  
**MICHELLE WRIGHT**  
(third defendant)

FILE NO: SC No 10150 of 2017

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 August 2018

DELIVERED AT: Brisbane

HEARING DATE: 23 and 24 August 2018

JUDGE: Applegarth J

ORDERS:

- 1. The Court pronounces against the force and validity of the will of the late Lloyd Stephen Wright dated 14 April 2016.**
- 2. The Court pronounces against the force and validity of the will of the late Lloyd Stephen Wright dated 6 May 2016.**
- 3. The Court pronounces in solemn form for the force and validity of the last will of the late Lloyd Stephen Wright dated 28 March 2015, a copy of which is Exhibit A to the affidavit of scripts filed 4 October 2017.**

4. **The requirements for giving notice of intention to apply for a grant of probate of the will of the late Lloyd Stephen Wright dated 28 March 2015 and the publication of that notice be dispensed with.**
5. **It is declared that the late Lloyd Stephen Wright lacked the capacity to sever the joint tenancy held by him and Susan Belle Hamill over land described as Lot 339 on RP 138740, County of Ward, Parish of Nerang, Title Reference 15199199 (“the Lot”).**
6. **It is declared that at all times until his death on 19 July 2016, Lloyd Stephen Wright and Susan Belle Hamill held the Lot as joint tenants.**
7. **The purported transfer executed by Lloyd Stephen Wright on 16 May 2016, No 717386458 is set aside.**
8. **Pursuant to s 114 of the *Land Title Act 1994* (Qld), Susan Belle Hamill be registered as proprietor of the Lot.**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where the testator in 2015 made a will that favoured the first plaintiff over her siblings – where the testator developed delusions, and in 2016 made two wills disinheriting the first plaintiff – whether the delusions were material to his capacity to make the 2016 wills – whether testator had testamentary capacity to make the second will dated 14 April 2016 and the final will dated 6 May 2016

REAL PROPERTY – GENERAL PRINCIPLES – INTERESTS IN LAND INCIDENTS – JOINT TENANCY SEVERANCE – OTHER CASES – where the deceased created a joint tenancy with the first plaintiff over a residential property in 2015 – where in 2015 the deceased made clear his intention that the property pass to the first plaintiff when he died – where in 2016 the deceased claimed that he did not know what he was signing and did not know that he had entered a joint tenancy – where the deceased suffered delusions – where deceased gave instructions to sever the joint tenancy – whether deceased had capacity to sever joint tenancy

*Land Title Act 1994* (Qld), ss 59(1) and 114

*Anderson v Anderson* (2016) 18 BPR [98777]; [2016] NSWSC 1204 cited

*Banks v Goodfellow* (1870) LR 5 QB 549 cited  
*Bull v Fulton* (1942) 66 CLR 295; [1942] HCA 13 cited  
*Corin v Patton* (1990) 169 CLR 540; [1990] HCA 12 cited  
*Crago v McIntyre* [1976] 1 NSWLR 729 cited  
*Estate Sue* [2016] NSWSC 721 cited  
*Estate of Park* [1954] P 112 cited  
*Frizzo v Frizzo* [2011] QCA 308 cited  
*Frizzo v Frizzo* [2011] QSC 107 cited  
*Frizzo v Frizzo (No 2)* [2011] QSC 177 cited  
*Gibbons v Wright* (1954) 91 CLR 423; [1954] HCA 17 cited  
*Lagoski v Shano* (2007) 232 O.A.C. 21 cited  
*Re Estate of Griffith* (1995) 217 ALR 284 cited  
*Scott v Scott* [2012] NSWSC 1541 cited  
*Timbury v Coffee* (1942) 66 CLR 277; [1941] HCA 22 cited  
*Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285  
 cited  
*Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR  
 267 cited  
*Worth v Clasohm & Anor* (1952) 86 CLR 434; [1952] HCA  
 67 cited  
*Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 cited

COUNSEL: The plaintiffs were self-represented  
 The first defendant was self-represented  
 A M Christie for the second defendant

SOLICITORS: The plaintiffs were self-represented  
 The first defendant was self-represented  
 Go to Court Lawyers for the second defendant

- [1] In 2015 the testator, Lloyd Wright, moved to Queensland with his wife, Shirley, who suffered from dementia. They were supported by their daughter Susan, who had cared for her parents for many years, and by Susan's husband, Richard Hamill. The move to Queensland's warmer climate was prompted by Lloyd's frail health. Shirley's dementia was such that Susan could not personally care for both of her parents, so Shirley lived in a nursing home. Lloyd and Susan became joint tenants of a home at Burleigh Waters, in which they and Richard lived.
- [2] Lloyd wanted Susan, who did not own her own home and who had little by way of savings, to become the sole owner of the home after he died. He understood that the effect of the joint tenancy was that she would own the home if she survived him. This was what he wanted because of the love, support and practical help which she had provided to her parents over the years. Lloyd also made a will dated 28 March 2015 which gave his few other assets to his daughter, Susan.

- [3] In early 2016 Lloyd developed delusions. He wrongly believed that Susan and Richard had stolen a valuable coin collection, that they had taken \$26,000 belonging to him out of a joint account, that they were trying to drug him and that he was under police surveillance. The false accusations that he made and his behaviour led to a breakdown in Lloyd's relationship with Susan and Richard. He relocated to New South Wales on 31 March 2016. He made another will dated 14 April 2016 in unexplained circumstances, which gave everything to his daughter, Lorraine. On 6 May 2016 he executed another will which gave Susan nothing and which divided his estate between his other three surviving children. On 30 June 2016 he gave notice of a purported severance of the joint tenancy over the Burleigh Waters property.
- [4] Lloyd, who was born on 24 September 1925, died on 19 July 2016. He was survived by four children, who, for convenience, I also will refer to by their first names:
- Susan;
  - Lorraine;
  - Michelle (previously Michael);
  - Trevor.
- He was also survived by his wife, Shirley, who is now cared for by Susan.
- [5] The principal issue in this proceeding is whether Lloyd had:
- (a) the testamentary capacity to make the second will dated 14 April 2016 and the final will dated 6 May 2016; and
  - (b) the capacity to sever the joint tenancy.
- [6] In applying the legal principles to be discussed governing testamentary capacity and the capacity to sever a joint tenancy to the circumstances of this case, the following substantial factual issues arise:
- [7] Did Lloyd suffer from delusions in 2016, particularly at the time he made his will dated 6 May 2016 and gave instructions to sever any joint tenancy?
- [8] Were the delusions material to his testamentary capacity and his capacity to sever the joint tenancy?
- [9] If he was acting under delusions during the relevant period, have the defendants proven that they were not operative at the time he executed the will and instructed his solicitor to sever any joint tenancy? Expressed differently, have the defendants proven that he had the relevant capacity during a lucid interval?
- [10] More generally, and in circumstances in which substantial doubts have been raised about Lloyd's capacity at the relevant dates, the general issue is whether the defendants have affirmatively satisfied the Court that he was not under the influence of delusions when he made his last will and severed the joint tenancy.

**Additional background**

- [11] Susan had been close to her parents during her adult life, and until the sad events of early 2016 enjoyed a loving and trusting relationship with her father. Susan's husband, Richard Hamill, also enjoyed a good and trusting relationship with Lloyd Wright after he met him in May 1976.
- [12] Susan and Richard lived in Port Macquarie. In 2007, Lloyd and Shirley came to live in Port Macquarie, so they could be close to Susan and Richard. Susan and Richard were appointed as their executors and attorneys.
- [13] In 2011, Susan moved in with her parents as Lloyd had suffered a major health crisis and Shirley was already affected by dementia.
- [14] In 2014, Lloyd suffered another major health crisis, contracted double pneumonia and was not expected to live. After seven weeks in hospital he was discharged in an extremely weak condition. Rather than having him discharged to a nursing home, Susan cared for him. About six months later, his health had recovered somewhat and a decision was made to move to Queensland, where the warmer weather would be good for Lloyd's health.
- [15] Susan and Richard had lost their home and most of their wealth during the global financial crises.
- [16] When they moved to Queensland, a house was purchased at Burleigh Waters with the proceeds of the sale of Lloyd and Shirley's home. Lloyd, Susan and Richard moved into it in March 2015. Shirley's condition necessitated her living in a nursing home. Susan could not care for both of her parents at the same time, given Lloyd's poor physical health and Shirley's dementia.
- [17] For reasons that were explained by Lloyd in a statutory declaration dated 13 March 2015, the property at Burleigh Waters was purchased in the joint names of Lloyd and Susan. Lloyd was advised by a solicitor, and understood that the creation of the joint tenancy would, in effect, gift the house to his daughter if she survived him. He intended that she become the sole owner of the property. Lloyd also declared that his wife Shirley had expressed her wish, over many years, that Susan be provided with a home. This was because Susan had been caring for Lloyd and Shirley in their home for about four years, and before that had "always provided us with love and support as well as practical help". Lloyd also explained that Susan was dependent on him for a home and financial support, having no separate assets of her own.
- [18] Because Lloyd's principal asset, being his interest in the Burleigh Waters property, was held as a joint tenancy, it would not become part of his estate upon his death.
- [19] Lloyd made a will dated 28 March 2015 ("the 2015 will") which appointed Susan and Richard as his executors. Susan was the sole beneficiary under that will.

- [20] There is no issue that he had unimpaired mental capacity when he made the 2015 will. There also is no issue that Lloyd had unimpaired mental capacity when he created the joint tenancy on 20 March 2015.
- [21] Susan and Richard continued to care for Lloyd. Susan would take Lloyd to his GP, Dr Hempling, at Burleigh Waters. Lloyd was also under the care of a respiratory physician because of his compromised respiratory condition. He required oxygen for at least 16 hours a day.
- [22] Dr Hempling observed the relationship between Lloyd and Susan, which appeared to be a congenial and trusting relationship between the two up until the sad events of early 2016.
- [23] There is other evidence that Susan and Lloyd, along with Susan's son, Stephen, had a good relationship in late 2015. For instance, a neighbour, Mr Spoljaric, would observe Susan and Lloyd walking together and that they seemed very close and happy in each other's company. However, after Christmas 2015, Mr Spoljaric noticed that Lloyd was walking alone.
- [24] For reasons which will be explored in greater detail, in early 2016 Lloyd's mental condition and his relationship with Susan and Richard deteriorated. He developed delusions that Susan and Richard had stolen a valuable coin collection from him, that they had stolen money out of his bank account and that they were intent on killing him. He also had paranoid delusions that the police were surveilling him. Although he scored well on a Mini-Mental State Examination ('MMSE') on 18 February 2016, his general practitioner, Dr Hempling, was concerned about his mental condition. Dr Hempling did not think that he was an immediate danger to himself or to others so as to provide a sufficient basis for an involuntary referral for assessment. Dr Hempling did not believe that Lloyd was suffering, or at risk of, any form of abuse. Dr Hempling discussed a psychiatric review with Lloyd and asked him to attend again in a month. Dr Hempling suspected that, given his presentation, Lloyd would not agree to a specialist review of his mental state. That was on 23 February 2016 and that was the last time that Dr Hempling saw Lloyd.
- [25] During early 2016, Lloyd came under the influence of a local woman named Moira, who possibly was persuaded of the truth of some of Lloyd's delusions.
- [26] By this time, there was a joint ANZ bank account which required both Susan and Lloyd to sign. In March 2016, Moira tried to get Lloyd to revoke a power of attorney which had been executed in 2007, and she took Lloyd to the ANZ Bank in an attempt to withdraw the balance of the joint account. Lloyd tried to put the house on the market, having forgotten that it was in joint names.
- [27] By this time, Lloyd's relationship with Susan and Richard had completely broken down.

- [28] On 31 March 2016, Lloyd, assisted by others, left his home and drove south. After a car accident near Taree, he ended up living with his daughter Lorraine on the Central Coast of New South Wales.
- [29] On 14 April 2016, Lloyd executed a will that had been prepared by a solicitor at Burleigh Heads. On 6 May 2016, he executed another will, prepared by Sarah Lewis of Michael Lewis & Associates, Solicitors, of Gorokan, New South Wales. This will gave his car and his coin collection to Lorraine and divided the residue to his estate between Lorraine (60 per cent), Michelle (20 per cent) and Trevor (20 per cent).
- [30] By a letter dated 30 June 2016, Lloyd's solicitors notified Susan of their intention to lodge, pursuant to s 59 of the *Land Title Act*, a transfer form to sever the joint tenancy. The transfer effecting the severance was effected on 14 July 2016 by a registered dealing of a transfer document executed by Lloyd on 16 May 2016.
- [31] Susan and Richard seek orders pronouncing against the force and validity of the purported wills dated 14 April 2016 and 6 May 2016 and to pronounce in solemn form for the force and validity of the will dated 28 March 2015. They also seek orders to reverse the severance of the joint tenancy.
- [32] The first defendant, Lorraine, renounced her role as executor of the will dated 6 May 2016. Neither she nor her siblings, Trevor and Michelle, actively defended the proceedings and her defence filed 7 November 2017 was struck out. Shortly before the hearing date, Trevor indicated that he now wished to actively defend the proceedings. He obtained legal representation and filed a defence by leave. Michelle was on notice of the hearing, but chose not to defend the proceeding or to appear. Lorraine remained self-represented and adopted the submissions made on behalf of Trevor. Trevor's ultimate submission was that Lloyd had the requisite capacity to make the will dated 6 May 2016 and to sever the joint tenancy. He submits that if Lloyd was acting under a delusion at any point, it was not operative on the dates of execution of the relevant documents.
- [33] Susan and Richard submit that the defendants have not adduced any substantial evidence so as to discharge the onus of establishing capacity and that the limited evidence given by the solicitor who made the will, and also a letter written by Lloyd in May 2016, show that Lloyd disinherited Susan and severed the joint tenancy as a result of delusions that had a direct bearing on the making of those decisions. They ultimately submit that the defendants have not discharged their onus by showing that Lloyd's delusions of theft, drugging and financial abuse did not influence the impugned 2016 wills and the severance of the joint tenancy.

### **The relationship between Susan and Lloyd**

- [34] It is unnecessary to descend to the level of detail contained in Susan's affidavits about her relationship with her parents, and with Lloyd in particular. There is no contest that until the events of early 2016 she had been very close to both her parents during her adult life and had enjoyed a loving and trusting relationship with her father. It is

necessary, however, to recount some aspects of the relationship, including the circumstances under which they moved to Queensland in March 2015. The history of the relationship between Susan and Lloyd explains why he provided for her historically in his wills.

- [35] Susan was born in 1955. Early in her life, she had health and relationship difficulties and divorced her first husband (who she had married in 1972) in 1975. By that time she had two young children.
- [36] Lloyd suffered a massive heart attack in the early 1970s, and sustained permanent heart damage. He was declared unfit for work and was given a pension at the age of 50. He remained on pensions until his death aged 90.
- [37] In 1976 Richard Hamill came into Susan's life. They developed a trusting and loving relationship which has lasted 42 years. Although Richard had been admitted as a solicitor in 1969, he did not continue in practice and instead took up work in the administration in Papua New Guinea. Susan and Richard, in the first four years of their marriage, lived a few minutes away from her parents. Lloyd and Shirley bought a modest home in the New South Wales Central Coast and, over the years, Susan and Richard helped them in many ways. This included assisting them with a relocation to Nambucca Heads from Toukley. Lloyd then made the decision to move back to Toukley. Susan and Richard moved back to the Central Coast in 2006 as Lloyd was unhappy and was convinced that he did not have long to live. Eventually he decided he wanted to move back to Port Macquarie. So Lloyd and Shirley and Susan and Richard sold their respective houses and each couple bought a new house in Port Macquarie. Susan spent a great deal of time with her parents.
- [38] Susan and Richard suffered financial devastation in 2008. They had sold their property investments and put everything into a City Pacific fund which failed. In the result, they lost almost everything. They moved into a rental property and Richard worked until he was eligible for the age pension.
- [39] In 2010 Lloyd and Shirley signed new wills and powers of attorney, with Susan and Richard appointed as executors and attorneys. In fact, their relationship with Richard was such that he was left a one quarter share in a will made in 2010. Neither Susan nor Richard had any input into these wills, but when Lloyd showed the 2010 wills to Richard, he explained that Richard had done more for them than their other children combined.
- [40] In 2011 Lloyd suffered a major health crisis and was diagnosed with congestive heart failure. He was lucky to survive, and needed intensive care. Over the decades, Susan had promised her father not to put him in a nursing home or to send him to live with Lorraine. After he suffered congestive heart failure, he required Susan's help, including help to take him to heart and lung specialists. At the time Susan and Richard were living about half an hour away from her parents, and she "packed a bag and said she had to go and look after him". She did all the work around the house and yard. Richard



found a long-term housesitting job out of town and Richard and Susan's marriage was "put on hold".

- [41] By this time Shirley had been diagnosed with Alzheimer's and was unable to look after herself, let alone her husband. Richard continued to work to support himself and Susan. Eventually a friend of Susan's suggested that she would be eligible for a carer's pension from Centrelink for looking after her mother. Both her parents were in a fragile state and Susan spent all her time caring for them.
- [42] In the winters of 2013 and 2014 Lloyd suffered lung infections. In 2014 he was admitted to hospital with a collapsed lung and double pneumonia and was not expected to live. Relatives were notified. Whilst Lorraine and Michael visited their father in hospital, they had nothing to do with their mother who was being cared for at the time by Richard. Lorraine's visit in 2014 was only the third time she had visited her parents since 2006.
- [43] Lloyd slowly recovered to an extent, but was on oxygen 24 hours a day and required help to toilet, bathe and move around. The hospital had insisted that Lloyd be discharged to a nursing home, however, Susan was able to persuade them that she could care for him at home and she set up the lounge room like a hospital room. Susan, who had several years' prior experience working in aged care, became the carer for both her parents.
- [44] By December 2014 Shirley's physical and mental health had deteriorated to such an extent that Lloyd and Susan decided that she needed to be in a nursing home and a place was found for her in Port Macquarie. Lloyd decided that he would not survive another winter there and should move to Queensland. Susan and Richard were not very keen on moving again, and leaving friends and interests. However, they decided to move with Lloyd and to find a nursing home for Shirley on the Gold Coast. Lloyd and Shirley's house was sold in February 2015. Susan and Richard found a new home at Burleigh Waters in a location which they considered suitable, it being only a few minutes from the hospital and close to services, including a medical centre. Solicitors acted for Lloyd in the conveyance of Lloyd and Shirley's Port Macquarie home and in the purchase of the new home at Burleigh Waters. The proceeds of sale of the Port Macquarie home, after stamp duty, sales commission and other costs, was not sufficient to buy the Burleigh Waters home. The extra costs of the new home were about \$20,000.

### **The acquisition of the Burleigh Waters property and estate planning**

- [45] From earlier dealings in relation to Shirley's mother's home, Lloyd understood that a joint tenancy was a way in which someone could inherit a home. Shirley's mother had done this to protect her interests. Susan and Lloyd had discussed his estate planning over the years and he came to a decision that, as Susan was dependent on him for a home, and had looked after him and kept him alive for so long, that he would create a joint tenancy with her in the new home. A statutory declaration was prepared by the solicitor who acted for Lloyd in respect of the transaction. It was declared on 13 March 2015 and reads:

- “1. I am purchasing the property at 1/7 Bottlewood Court Burleigh Waters as joint tenant with my daughter, Susan Belle Hamill.
2. I have been advised by my Solicitor Mr Blake Fraser, and I understand that this creation of a joint tenancy will involve a gift to my daughter.
3. I further understand that should she survive me she will become sole owner of the property, which is my intention. I understand that all or part of the property will not form part of my estate or be dealt with under my will.
4. My wife Shirley Pamela Wright is in an aged care facility and has been legally incompetent for several years. Her wish, as expressed to me over the years and recently, has been for Susan to be provided with a home.
5. Susan has been caring for myself and Shirley in our home for about four years, and prior to that has always provided us with love and support as well as practical help.
6. Susan is dependent on me for a home and financial support, having no separate assets of her own.”

[46] Lloyd was also concerned that there should be no probate costs or litigation after his death. He made a will dated 28 March 2015 which appointed Susan his sole beneficiary on the understanding that she would disburse his personal estate according to his wishes.

[47] There is no issue on the pleadings, and no factual issue, that Lloyd was capable of making the will dated 28 March 2015, and also that he was capable of creating the joint tenancy. His treating general practitioner confirmed in writing that Lloyd had full mental capacity to make his own informed decisions on personal, health and financial matters at the time.

[48] Lloyd retained the settlement documents in relation to the sale of the Port Macquarie property and the acquisition of the Burleigh Waters property.

[49] The Burleigh Waters property was purchased in March 2015. Richard joined his wife and father-in-law at Burleigh Waters in April 2015, and spent thousands of dollars of his own money improving the new property. Lloyd paid for and had installed a new air conditioner in his bedroom. Lloyd had his own bank account into which his pension was deposited and expenses, such as the cost of the air conditioner, withdrawn.

### **The ANZ joint account**

[50] When Susan and her father moved to the Gold Coast they set up, at Lloyd’s instigation, a joint account. It was understood that, barring any emergencies, the funds would be used for final expenses for Shirley, Lloyd and/or Susan, with the remainder for the

survivor. The account was opened with a deposit of \$24,382 which had been left over after the property settlements. Lloyd was unhappy that he no longer had the \$50,000 or so that he usually had in reserve. As a result, Richard offered to take money from Richard's self-managed superannuation fund account to make up the balance and to keep Lloyd happy. As noted, Richard and Susan had lost most of their life savings when a fund failed and were paid only a few cents in the dollar when the fund was administered in liquidation. Richard delivered on his promise and sums totalling about \$26,000 were deposited into the joint account. As Susan observes, this was a selfless act on Richard's part.

### **Lloyd's relationships with the defendants**

- [51] Trevor Wright did not give evidence in the proceeding, despite having filed an affidavit late in the piece. That affidavit was not relied upon by him. The plaintiffs' material includes a statement given by Lloyd at Port Macquarie on 3 December 2014, witnessed by a lawyer, which explained why Lloyd's will of that date made no provision for Trevor. Lloyd explained that he had not had a relationship with Trevor for at least 14 years and had never approved of his lifestyle. Trevor had not been dependent on him for about 45 years and had "never done anything for me". He also noted that Trevor had inherited from his older brother, Terence, a reasonable amount of money and property. It seems that the only time Trevor saw his parents was at the funeral of their eldest son, Terence, who died tragically in a plane crash.
- [52] Michelle Wright chose not to participate in the proceedings or to appear at it. She was self-represented and prior to the trial had explained that her state of health was not good. There is no evidence that she had a close relationship as an adult with her parents. As noted, she did visit her father in 2014, when he seemed close to death. So far as Lloyd's testamentary intentions towards Michelle are concerned, there is evidence from a deponent who knew and saw Lloyd before he moved to Queensland. Lloyd was said to have been angry at her attempt to get a large amount of money from him while Lloyd was recuperating.
- [53] The only defendant who gave evidence was Lorraine Wright whose affidavit was principally directed towards events that took place during 2016. Her affidavit claimed that she had a good relationship with both her parents all her life. There is no evidence about the extent of her care for either of them over the decades, or when she last saw them before they moved to Queensland. She did not visit them after they moved to Queensland.
- [54] Lloyd's brother, Frederick Wright, also gave evidence relevant to Lloyd's relationships with his surviving children and Lloyd's intentions. Lloyd always spoke of Susan as a loving daughter, and told his brother that he was moving to Queensland to "get away from the rest of the family and buying the house with her so she would have a home".
- [55] Another witness, Ms Elford of Port Macquarie, gave evidence that after his last hospitalisation, Lloyd expressed a desire to move to Queensland because he was concerned about his health. He also spoke about distancing himself from his other

children, who rarely seemed to see him in any case. Ms Elford lived next door and had never seen any of his other children visit Lloyd or Shirley in Port Macquarie. She says that Susan was the only child who cared for him.

### **Overview – the creation of the joint tenancy and the making of the 2015 will**

- [56] The evidence overwhelmingly supports the conclusion that Susan was a tremendous source of support and care for her parents and that this care continued after the move to Queensland in early 2015. By contrast, Lloyd did not enjoy the support and care of any of the defendants over the years, and only went to live with Lorraine after he became delusional in early 2016.
- [57] Lloyd’s intentions in creating a joint tenancy with Susan in relation to the Burleigh Waters property is not only explained in the statutory declaration which he made at the time with the solicitor who conducted the transaction. Other evidence explained that his intent was that Susan should have the home through survivorship. This was a rational piece of estate planning. There is no contest that Lloyd had the capacity to understand what he was doing, and understood in 2015 that the house was being purchased in joint names with Susan. Such an arrangement gave expression to his intentions. The same applied to the creation of the ANZ joint account.

### **Other assets**

- [58] Lloyd owned a car and obviously owned other personal assets. Some valuables were kept in a safe. All documents relating to real estate transactions and receipts were kept in Lloyd’s cupboard in the garage, along with other personal items. As noted, he had a bank account which held a few thousand dollars, and there was the joint account which was established in the circumstances explained by Susan.
- [59] Shirley had long owned a coin collection. It obviously had sentimental value, but there is no evidence that it is particularly valuable. Because of her mental condition and circumstances, she did not keep it at the nursing home. Susan did not have any real idea what coins were in the boxes. The collection had been moved many times but never opened by her or Richard. The coin collection was kept at the Burleigh Waters home. It became the subject of concern and false allegations by Lloyd. He insisted that it be moved from a laundry cupboard and kept under his bed. Some time later he claimed that some 1913 halfpennies were missing.
- [60] Susan gave clear and convincing evidence that this coin collection belonged to her mother. It should not be confused with another coin “collection”, which became the source of misinformation and misunderstandings. Shirley’s coins were pre-decimal. Lloyd, by contrast, collected 50 cent, \$1 and \$2 coins. Richard asked Lloyd why he was keeping these coins and Lloyd said that “every coin minted goes up in value every year”. Richard pointed out that 20 years ago a \$2 coin might buy a pie. Lloyd saw his point, and Richard and Susan helped him to carry his coins to the bank, where they yielded about \$2,500.

**Lloyd's general health in 2015**

- [61] After he moved to the Gold Coast, Lloyd consulted a local GP, Dr Hempling, who placed him under the care of a respiratory physician. Dr Hempling undertook a thorough medical assessment of Lloyd as a new patient on 17 March 2015 and afterwards saw Lloyd regularly. Lloyd was accompanied by Susan. Dr Hempling observed there to be a congenial and trusting relationship between the two until problems emerged in January 2016. It is unnecessary to detail the various treatments Lloyd received for different ailments, and for treatment of blood pressure. Lloyd was required to use oxygen overnight and during the day.
- [62] During 2015 Susan and Lloyd would walk together around the neighbourhood and do things together in the home. They would visit Shirley in her nursing home, which was about 20 minutes away, two or three times a week. Richard did a lot of work improving the home and paid for furniture and equipment.
- [63] Richard would drive Lloyd and Susan places, including to specialist appointments. Richard would also assist Lloyd with paperwork for Centrelink, oxygen, home visits, banking, insurance and telephone. However, Lloyd was sufficiently capable to attend to matters himself and the occasion did not arise for Susan and Richard to exercise powers of attorney.
- [64] The evidence, including a DVD recording, shows a happy family, and a happy family occasion when Lloyd's grandson Stephen and his family visited Burleigh Waters in late 2015.

**Lloyd's delusions in early 2016**

- [65] In January 2016 things began to change. According to Susan, Lloyd became "cranky and depressed and a little withdrawn". He also seemed overtired and it emerged that he was awake much of the night, watching out for the police, who he was convinced had him under constant surveillance. This delusion continued and escalated to the point where he would insist that Susan confront people parked across the road, particularly if they were talking on mobile phones. She was unable to convince him that he was not under surveillance. She would try to reason with him and he would become furious with her for not dealing with the problem. He called her a fool and said it would "all come out in the end". Eventually, Susan realised that there was no use in trying to persuade him, since this was "his reality".
- [66] On 15 March 2016 Susan reported to Dr Hempling how her father had delusions of being watched and being under continual surveillance. Susan gave evidence about an inconsequential episode that had occurred in Port Macquarie many years earlier and, it seems, that in early 2016 Lloyd became convinced that the police were interested in this episode.
- [67] In early 2016 Lloyd also began to obsess about the coins. As noted, after Shirley's coin collection was relocated to under his bed, he complained that some halfpennies were

missing. On one occasion Susan was in his room having a heated discussion about the coins and Lloyd requested that Richard become involved. Lloyd demanded to know where the coins were and accused Richard of being a thief. Richard rejected this and stormed about, and even contemplated moving next door. However, he was concerned about Susan's welfare and did not accept the neighbour's invitation to relocate.

- [68] In addition to being concerned about police surveillance and becoming convinced that Richard's home improvements were funded from "stolen coins", Lloyd became furious when his GP wanted to do a health assessment. He said the only reason for that was to "put someone in a nursing home".
- [69] The rapid decline in Lloyd's mental health and the deterioration in his relationship with Richard and Susan coincided with his forming a relationship with a woman named Moira. Around this time Lloyd began to take his twice-daily walks on his own. He would meet Moira who lived in a retirement village a few streets away.
- [70] It is unnecessary to decide whether Moira was a well-intentioned individual who simply believed what Lloyd told her in early 2016, including his false accusations of valuable coin collections being stolen and the like, or instead wished to advantage herself. While there is evidence that she had previously been accused of being a "gold digger" in connection with another man who she befriended and to whose family she returned \$100,000, I shall assume in her favour that she accepted as true false allegations that Lloyd made of theft and elder abuse. She appears to have accepted those beliefs, and to have announced that she would be taking him to her own doctor because she claimed Lloyd's GP was "hopeless".
- [71] Lloyd's delusions about theft and mistreatment by Susan and Richard worsened.
- [72] In around February 2016, Lloyd began accusing Susan of drugging and poisoning him so that she could steal from him. Because he was getting so little sleep, and brooding over police and other surveillance, he would fall asleep during the day and attribute this to drugs.
- [73] There was a period of several weeks when he would only drink from unopened bottles of water and Coca Cola. He also complained that his food tasted different and said it was poisoned. His deafness made him increasingly suspicious. Richard went to the Robina police station to ask the police to reassure Lloyd that he was not under surveillance. They declined to do so. Susan and Richard contacted services and support groups but could not obtain any assistance.
- [74] Lloyd continued to question Richard about the money he had spent on the house, and eventually claimed that Richard had stolen the money from him. Richard showed Lloyd downloaded bank statements. These showed the purchases which Richard had made on Richard's account. Lloyd responded that he did not believe anything off the internet, as it was all lies. In fact, Richard had done work on a painting job in Sydney for a number of weeks, and had made \$4,700 which largely went into the house. Lloyd refused to believe this.

- [75] The situation worsened and Richard installed a lock on Susan's bedroom door so she could lock it from the inside. Richard slept in the lounge room for two months. There was no real conversation with Lloyd, who would just glare at Richard when their paths crossed. Lloyd isolated himself in his room with his door shut.
- [76] The evidence is that this sad decline in Lloyd's condition was rapid. He was paranoid and his increasing deafness led him to accuse Susan and Richard of talking about him when they were not.
- [77] A letter which Lloyd wrote in May 2016 recounts how, at Moira's suggestion, he obtained documents from the Council and the bank and how he was in shock to find that Susan owned "half of my property".
- [78] The delusions which Lloyd had in early 2016 about the theft of his coins and other improper conduct in relation to his property were, by definition, untrue, but they were not bizarre delusions. They were the kind of false allegations which might be believed by third parties who did not make proper inquiries or who wanted to believe such things. That individuals might believe Lloyd's false allegations is understandable since he was not suffering from any substantial cognitive impairment.
- [79] After Susan reported her concerns over her father's sudden change in behaviour in January 2016, Dr Hempling recommended that Lloyd should attend for review, including a screen for dementia and a brain scan. By late January and February 2016, Dr Hempling noticed that Lloyd's mood was low. Susan persuaded her father to visit the practice in order to discuss some blood tests. On 18 February 2016 Dr Hempling noticed that Lloyd was less "chatty" than on previous occasions and was reluctant to engage with him. Despite this, Lloyd agreed to do a MMSE and scored 27/30, which is consistent with normal cognition. On 23 February 2016 Lloyd attended a consultation with Dr Hempling on his own and described feeling upset with Susan and Richard. He seemed to be distressed that some of his items were missing, in particular some precious coins.
- [80] Dr Hempling gave evidence that at this appointment Lloyd placed a bottle of pills on his desk and stated that these were the medications that Susan and Richard had been drugging him with, or words to that effect. It seems that the "medication" was some innocuous Nature's Own brand herbal product called "Sleep Ezy" containing material like chamomile. The bottle of this product became Exhibit 1.
- [81] Dr Hempling explained that at the time of the 23 February 2016 consultation he considered arranging a specialist review of Lloyd's mental state. The difficulty was that, given his presentation, Dr Hempling thought that Lloyd would not agree with the referral. He decided not to go down that path since he had no reason to believe that Lloyd was an immediate danger to himself or to others, which might have been a sufficient basis to make an involuntary treatment order for assessment. Dr Hempling did not believe that Lloyd was suffering, or at risk of, any form of abuse. A psychiatric review was discussed with Lloyd and Dr Hempling advised him to re-attend in a month

or before then if he had concerns. This was to be the last time that Lloyd consulted Dr Hempling.

- [82] Unfortunately, the suggestion that Lloyd should be assessed in relation to his psychiatric condition only worsened his sense of paranoia and his belief that Susan and Richard wanted to put him in a nursing home. After one visit to the GP, he came home furious because the doctor wanted him to do a health assessment and Lloyd said that the only reason for that was to put someone in a nursing home.
- [83] Police, seemingly at the instigation of Lloyd or Moira or both of them, undertook a welfare check and the police who attended said that they wanted to obtain a copy of Lloyd's power of attorney.
- [84] Because of the deterioration in matters, Susan withdrew the \$26,000 that Richard had put into the ANZ joint account. It was returned to Richard's SMSF. Susan used the power of attorney and altered the ANZ joint account so that there was a requirement for both signatories to sign. This prevented the joint account, which was established for the joint purposes earlier indicated, being used contrary to this intent. For instance, it prevented the sums in the joint account being withdrawn by Lloyd under the influence of someone like Moira. As matters transpired, after Lloyd's death the money in the joint account was deposited by Susan in a trust account for her mother.
- [85] Susan's use of the power of attorney to impose a requirement for both signatories to sign was reasonable, given Lloyd's mental state and Moira's interest in his finances. It appears that Lloyd, possibly accompanied by Moira, went to the ANZ Bank but was unable to access the joint account on his own. He came home furious and accused Susan of having stolen his money. She tried to explain that Richard had put in the \$26,000, but Lloyd vehemently denied this. He had forgotten that they had created the joint account. It seems that he was contemplating buying another property, and that Moira was advising him. He falsely claimed that Susan had made him sign papers he did not understand when buying the house.
- [86] This was another deluded thought. He had forgotten by early 2016 the circumstances under which he had created a joint ownership of the property less than a year earlier.
- [87] Lloyd purported to revoke the power of attorney he had given to Richard and Susan.
- [88] In mid-March 2016 Lloyd spoke to Lorraine by telephone a number of times and told her about the halfpennies which were allegedly missing from his coin collection, and of other concerns. He said words to the effect "If I stay here it'll kill me", and he asked to visit her. She agreed.
- [89] On 31 March 2016 at 6.00 am there was a knock on the door of the Burleigh Waters residence. Richard opened the door and three people barged in and introduced themselves to Lloyd. They commenced carrying things out to his car. It may be that one of them was Moira's son. Lloyd left with them and that was the last time that Richard or Susan saw him. They reported the matter to the Robina police, but the



police said they could do nothing because he left voluntarily. As matters transpired, there was a car accident near Taree and Lorraine's daughter collected Lloyd in early April 2016.

### **The purported will dated 14 April 2016**

- [90] A purported will, drafted by a firm of solicitors at Burleigh Waters and dated 14 April 2016, must be mentioned. A copy of it was exhibited to a defence filed by Lorraine on 7 November 2017, which was subsequently struck out. Lorraine does not explain how her father, who was living with her at the time, came to make the will and sign it. She does not explain how she came to obtain the copy of it which is exhibited to her defence. That will appointed Lorraine as his sole executor and made her the sole beneficiary of his estate.
- [91] Richard attempted to obtain a copy of the original of the 14 April 2016 will and was told in response by the solicitors who had drafted it that they did not hold a copy of it and that their file, including the draft will, was picked up by a woman apparently named Lorraine Wright who gave her last known address as Lorraine Wright's actual address and who satisfied the firm that she was the apparent carer, executor, beneficiary or administrator of Mr Lloyd Wright. He was said to have confirmed this in a telephone call in 2016. I do not rely upon the contents of that solicitor's letter as evidence of the truth of its contents. I refer to it to provide context to Lorraine's evidence about the will. She denies having collected the file from the firm and says that she has not been to Queensland in the last 10 years. She says that in mid to late April 2016, after her father had arrived to live with her, she telephoned the lawyers on her father's behalf. She and her father both participated in a conversation. The phone call was made, she says, because her father had said words to the effect "I've made a new will with this firm". She was told by the solicitor that the will was never signed. Lorraine says that she does not know anything about the circumstances under which her father may have signed the will dated 14 April 2016.
- [92] In the light of Lorraine's evidence, the circumstances under which the will came to be signed are unclear. One of the witnesses has a Central Coast address close to where Lorraine and Lloyd were living on 14 April 2016.
- [93] Because of the absence of evidence concerning the circumstances under which it came to be signed, and because of the evidence concerning Lloyd's testamentary capacity in early 2016, to be discussed more fully in respect of the final will dated 6 May 2016, I am not satisfied that he had testamentary capacity to make the 14 April 2016 will.
- [94] The purported will of 14 April 2016 has an evidentiary significance bearing upon Lloyd's testamentary capacity to make the 6 May 2016 will and the circumstances under which he gave instructions in relation to that will.
- [95] There is no evidence that he told the solicitor who drafted his 6 May 2016 will, Ms Lewis, that he had made a will a few weeks earlier. There is no evidence that Lloyd even recalled having made the will two weeks earlier. This calls into question the state

of his memory in relation to previous wills. It also raises the question of what intervened between 14 April and 6 May 2016, to prompt Lloyd to change his testamentary intentions so as to include Trevor and Michelle, who would take 40 per cent of the residue of his estate.

### **Lloyd's health in 2016**

- [96] After relocating to the Central Coast of New South Wales in April 2016, Lloyd was cared for by a general practitioner. Dr Martin first saw him on 5 April 2016 when he presented with an ear problem. On 8 April 2016 Lloyd consulted Dr Martin who did an MMSE which produced a result of 29. This did not cause Dr Martin to suspect cognitive impairment. Dr Martin was not asked to specifically test for testamentary capacity, and did not purport to do so. However, over the course of the consultations which he had with Lloyd, Dr Martin did not have a concern about Lloyd's capacity to understand what he was doing or with his ability to recall from his own memory. Lloyd was always accompanied by Lorraine, but was able to speak for himself.
- [97] During a consultation on 9 May 2016, at which Lloyd presented with bleeding from his rectum, a lumpy mass was detected in his stomach. Bowel cancer was diagnosed. After a referral to an oncology department, Lloyd was placed in palliative care and hospitalised on occasions. He was last hospitalised on 17 July 2016, shortly before he died.
- [98] Dr Martin had six consultations with Lloyd after 5 April 2016. An average consultation lasts between 10 to 15 minutes but the first consultations were longer. During these consultations Dr Martin did not consider Lloyd to be mentally infirm or detect that he had any difficulties with memory. Lloyd did not mention any complaint about his children stealing a coin collection or of anyone putting drugs in his food or drink. He did not report that he had been watched by the police.

### **The making of the last will and the severing of the joint tenancy**

- [99] In late April 2016, Lloyd made an appointment with a firm of solicitors at Gorokan (where he was living with Lorraine) about revoking a power of attorney and making a will. In accordance with the firm's practice regarding revocation of a power of attorney from an elderly client, a letter was requested from a doctor confirming capacity to revoke a power of attorney. Dr Martin, who had seen Lloyd on 8 April 2016, provided a short note dated 2 May 2016:
- “This is a note to state that Lloyd recently completed a clinical examination for Dementia here in the Surgery. His score was 29, which indicates that he does not have Dementia.”
- [100] Lloyd, in company with Lorraine, attended an appointment with Ms Lewis on 3 May 2016. Ms Lewis' file notes indicate that he said words to the effect that his former power of attorney “has taken client's half of house”. He told her that he could not trust Susan and Richard and was “not sure what they have done with his money and property

1/7 Bottlewood Court, Burleigh Waters, Qld". Lloyd instructed her to do a title search on the Burleigh Waters property and if a joint tenancy existed to sever it.

[101] As appears from Ms Lewis' notes of that consultation, as at 3 May 2016, Lloyd told her that he did not know what had been done with the Burleigh Waters property and did not know whether it was held on a joint tenancy. This makes it difficult to understand paragraph 27 of Ms Lewis' affidavit in which she says that on this first presentation he instructed her that his estate comprised "an interest in the house at 1/7 Bottlewood Court, Burleigh Waters, his bank accounts, his car and some collectable coins". I read this to mean that he told her that he had an interest in the house but did not know what it was. Ms Lewis says that at this first interview he said he wanted "to get rid of an old will and create a new will".

[102] The next appointment was on 6 May 2016. Lloyd again attended in company with Lorraine and he told Ms Lewis that he wanted Lorraine to be his sole executor. He wanted his estate divided as follows:

- 60 per cent to Lorraine;
- 20 per cent to Michelle; and
- 20 per cent to Trevor

with provision as to what would happen to their share if they predeceased him.

[103] Neither the contemporaneous file notes nor the affidavit indicate what inquiry was made in relation to previous wills, including the document which Lloyd had referred to as "an old will" a few days earlier. Therefore, there is no evidence that he told Ms Lewis that he had made a will a few weeks earlier which left everything to Lorraine. Nor did he tell her about his 2015 will, and that he had created a joint tenancy, intending it to have a kind of testamentary effect so as to recognise Susan's care and support for him and his wife over a long period. As at 6 May 2016, he seemingly had forgotten that he had created a joint tenancy and, as noted, a few days earlier had asked Ms Lewis to undertake a title search of the property.

[104] According to Ms Lewis, Lloyd told her he was concerned that he had lost control of his money and he was not sure what his current attorneys, Richard and Susan, had done with it. He was not sure that all the proceeds from the sale of his Port Macquarie property had been accounted for in purchasing the Queensland property. Having regard to the file notes, it is not apparent whether these things were said at the meeting on 6 May 2016 or a later meeting on 2 June 2016. The file notes would tend to suggest the latter. In any case, according to Ms Lewis, on one such occasion he told her that "I just signed what they wanted me to sign because I trusted them".

[105] In saying that he was concerned about a failure to account for the proceeds of his sale at Port Macquarie, Lloyd seemingly had forgotten:

- The sale of the Port Macquarie property and the purchase of the Burleigh Waters property were not undertaken pursuant to a power of attorney;
- He had solicitors acting for him in relation to both the sale of his Port Macquarie property and the purchase of the Burleigh Waters property;
- The net proceeds of sale were insufficient to purchase the Burleigh Waters property, such that there was no surplus to account;
- He had retained relevant settlement documents.

[106] As for the instructions which Lloyd in fact gave to Ms Lewis, she found his instructions to be clear and concise and he was clear about what he wanted to do. She did not ask him leading questions. He told her what he wanted.

[107] He did not tell Ms Lewis, apparently, that Susan and Richard had stolen his coin collection. He did not complain to her that they had tried to poison him, or say that he had been under police surveillance at the Gold Coast.

[108] The circumstances under which the will dated 6 May 2016 were explained to Lloyd are outlined in Ms Lewis' affidavit and the affidavit of the firm's office assistant, Ms Hammond, who witnessed his signature. The will was read to him. He understood it. Ms Lewis explained it to him and it was duly witnessed. The next consultation was on 2 June 2016 and the file note for this occasion reports that when Lloyd and Lorraine attended, he told Ms Lewis that he was "not sure what happened with all the proceeds of the sale". He wanted to question Richard and Susan about what happened to the sale proceeds. He was advised that the Burleigh Waters property was in joint names as joint tenants. He was shown the title search in that regard.

[109] Ms Lewis was not concerned about Lloyd's capacity to revoke the powers of attorney and to make the will he had instructed her about on 6 May 2016.

[110] Consistent with her earlier instructions to sever any joint tenancy and to pursue questions in relation to accounting for the exercise of powers of sale, Ms Lewis wrote to the plaintiffs on 3 June 2016 and again on 21 June 2016. It is unnecessary to dwell upon Richard's email on 29 June 2016 which explained that the power of attorney had never been used during the many years it had existed since 2007, and the only occasion it had been used was to change the joint account to "both to sign" in April 2016 in the light of Lloyd's increasingly bizarre behaviour and to "prevent the actions of his new female acquaintance who was the only threat to his best interests". In any case, Ms Lewis interpreted this response as a refusal to provide an accounting and, in accordance with her instructions to sever the joint tenancy, she instructed her town agents to send a letter to Susan. The letter was dated 30 June 2016. As noted earlier, it notified of an intention to lodge the relevant transfer form so as to sever the joint tenancy.

[111] On 18 July 2016 Ms Lewis attended upon Lloyd at his home and learned that he was dying. As a result, she did not pursue taking instructions in relation to a forced sale of the property in Queensland.

### **Evidence of delusions**

- [112] Earlier I have outlined evidence of delusions that Lloyd expressed and adhered to in early 2016. They include:
- The theft of coins;
  - Allegations that Susan and Richard had been drugging him and attempting to poison him;
  - That Richard and Susan had stolen money from him; and
  - That he had been misled or tricked into signing papers which, unbeknownst to him, created a joint tenancy.
- [113] The existence of some of these delusions is confirmed by what Lloyd told Dr Hempling. These matters were of sufficient concern to Dr Hempling to consider and recommend a psychiatric review. After the events of late March 2016, on 1 April 2016, Dr Hempling contacted the Acute Older Persons Mental Health Team for advice and recorded his genuine concern that Lloyd may have been suffering a degree of mental impairment that was affecting his judgment.
- [114] Dr Hempling gave evidence and was cross-examined. This included evidence that if Lloyd had been suffering from delusions, he would expect them to continue.
- [115] The continuance of delusions in relation to theft, financial abuse and other misconduct is evidenced by a letter which Lloyd wrote in May 2016.
- [116] The circumstances in which the letter came to be written are unexplained. It is dated 12 May 2016, being six days after the date of the will made in Ms Lewis' office. However, the letter was only signed by Lloyd and witnessed by a JP on 26 May 2016. Ms Lewis gave no evidence about the letter and there is no evidence that she was ever shown it. Lorraine, with whom Lloyd was living at the time, must have known about the letter and how it came to be created. The letter was sent to the plaintiffs on her behalf by a community legal centre in March 2018. In any case, the parties proceeded on the basis that the letter was written by Lloyd. It is in a typed form.
- [117] The letter contains evidence of delusions. One such delusion relates to what is described as "a very valuable coin collection". Lloyd reported that he noticed the pennies were missing and estimated their weight to be about 25 pounds. He said that when he asked Susan and Richard about what happened to "my pennies, they acted like I knew nothing". He also refers to the rest of his coins "which weighed about 45 pounds" and that Susan and Richard suggested he was going mad. This amounts to a persistence in the allegation that Susan and Richard stole valuable coins. This time it was not a few 1913 pennies, but approximately 25 pounds of pennies.
- [118] The letter goes on to recount how, after discussing his situation with Moira, she had suggested that they go to the Council and the bank to get documents about his property and finances. He reports that the documents he got from the Council said that Susan

“owned half my new property”, and was on the title as a joint tenant. He also said that he found out that the whole of his wife’s and his estate would go to Susan “which was never my intention as I have three other children”. He wrote “I was in shock to find she owned half of my property”. This was not some mere forgetfulness. It was completely inconsistent with the arrangements which Lloyd had made, documented in a statutory declaration and told others about. His clear testamentary intention, as expressed to family and friends in 2015, was that Susan should become the owner of the house when he died.

[119] The letter also recorded his surprise when he found out that Susan and Richard had powers of attorney. He went on to say that he had no idea how this happened and how he was “obviously unaware of what he was signing and my daughters (sic) intent”.

[120] Next, the letter persists in alleging that Susan and Richard stole money from him. He refers to the joint account with the ANZ and says “I never realised it would be a joint account in two names”. However, the evidence is this is precisely what he and Susan intended. Next, he says that this allowed Susan to access the account “and my \$50,000 savings, which now has only \$24,000 as she took out \$26,000 saying it was her’s”. The letter goes on to refer to finding out about “my missing money and coins etc”. In its context, this is referable to the \$26,000 of his money which he alleges was, in effect, taken out of his bank account.

[121] The letter details the circumstances under which he lived and says that in the last week that he was living there Susan and Richard “had taken the remainder of my whole coin and note collection which was in my possession under my bed without my permission”. The truth is that the relevant coin collection belonged to Shirley and it was not stolen. It probably was not very valuable. In any event, in the circumstances in which he left the home, which were unpleasant in the extreme with three unknown people arriving without notice, Susan declined to hand over her mother’s coin collection. She explained in her evidence why she felt that way and her position is entirely understandable. It was her mother’s coin collection and she should not have been expected to hand it over to her father who was in a poor mental state and under the influence of Moira.

[122] The letter concludes with reference to “thefts and abuse” by Richard and Susan.

### **The duration of the delusions**

[123] The May 2016 letter written by Lloyd proves that his delusions continued. These delusions included the theft of coins, the theft of \$26,000 out of a bank account, the misuse of a power of attorney and misconduct so as to create a joint tenancy and thwart his intention to benefit his other three children. While the letter of May 2016 does not make specific references to drugging and poisoning, it makes grave allegations of abuse without any justification. The allegations of abuse are consistent with what he had told Dr Hempling a few months earlier about the loss of precious coins and that Susan and Richard had been drugging him.

- [124] As noted, in his instructions to Ms Lewis at around this time, Lloyd had raised allegations of financial abuse, including a failure to account for the proceeds of sale of the Port Macquarie home and, as with his May 2016 letter, claimed not to know of any joint tenancy. He could not explain to her how Susan became a joint tenant, and acted under the delusion that she and Richard had contrived this result.
- [125] It is unnecessary to precisely align specific false allegations made on different dates to different individuals, including Susan and Richard, Dr Hempling, Moira, Lorraine, Ms Lewis and the intended recipient of his May 2016 letter. The different allegations involve delusions about Susan and Richard stealing a valuable coin collection, of being drugged by them and of them attempting to poison him. It includes allegations of misappropriation of \$26,000 out of a bank account and dishonestly using their powers and influence to make Susan a joint tenant in the purchase of the Burleigh Waters property. Lloyd was deluded about financial abuse and being drugged by Susan and Richard. His belief that Susan and Richard were stealing from him and drugging him were clearly false. They could not be accounted for. They were firmly held regardless of attempts to explain the truth to him. For example, when he was shown bank statements which explained how the property had been improved with Richard's money, rather than with the proceeds of allegedly stolen coins, he refused to accept the contents of those documents, saying that they were lies from the internet.
- [126] The assertions that Susan and Richard were in control of his finances and had misused the power of attorney in some fashion (either to create the joint tenancy, to create the joint bank account or to withdraw the \$26,000) were false. At the relevant time Lloyd was not cognitively impaired, as the results of his MMSE showed. He was able to visit banks and other places. He had access to bank records. Access to the bank statements in relation to the joint account (which he presumably had in order to write his May 2016 letter) would have shown to him that the \$26,000 was deposited as Susan told him it had been, by Richard, and that the same amount had been withdrawn. Also, he had no reason to believe that the balance of the proceeds of sale of the Port Macquarie property had been diverted. There was no balance. As the settlement documents he had kept showed, because of the transactional costs of stamp duty and the like, and the fact that the Burleigh Waters property cost a little more than the Port Macquarie property, his savings went below \$50,000. This was the reason that Richard topped up the joint account. Susan attempted to explain these matters to her father. He refused to accept the truth and persisted in the delusion that she and Richard were stealing from him and abusing him in other ways such that, if he stayed with them, he would shortly die.

#### **Expert opinion on capacity**

- [127] Professor Morris, a practising psychogeriatrician, was engaged to provide an expert report on Lloyd's testamentary capacity. He was briefed with relevant Court documents and medical reports, including a letter from Dr Martin dated 21 August 2017 and other documents.
- [128] The defendants did not file any affidavit from Dr Martin or Ms Lewis within the time allowed by earlier Court directions. However, Professor Morris had the advantage of

reading Ms Lewis' file notes. The matter has been the subject of direction hearings before Mullins J and pre-trial reviews before me. Unfortunately, the second defendant did not produce affidavits from Dr Martin, Ms Lewis and Ms Hammond until the first morning of the hearing. The late provision of these affidavits came as a surprise to the plaintiffs and to the Court. In the circumstances, the plaintiffs had good grounds to object to leave being granted for leave to file those affidavits so late. However, they did not oppose leave and those three late affidavits became Exhibits 2, 3 and 4. Given their lateness, copies of the affidavits were not provided to or read by Professor Morris before he gave his oral evidence. However, he had notice of Dr Martin's view about Lloyd's mental capacity and had read Ms Lewis' relevant file notes and correspondence. The substance of Dr Martin's affidavit and Ms Lewis' affidavit were put to Dr Morris under cross-examination.

[129] In his report, Dr Morris gives a retrospective assessment of testamentary capacity, and had regard to Lloyd's will-making pattern. He notes that the two 2016 wills were the first of many wills to effectively disinherit Susan. Whether it be a common-sense point or a matter for medico-legal opinion, a change in a will-making pattern to exclude a commonly-included "natural" beneficiary may be said to be suspicious.

[130] Professor Morris' report addresses the relevant evidence, including the MMSE results. Whilst an MMSE score is commonly presented in determinations of decision-making capacity, Professor Morris points to recent research in which an MMSE score was found to perform just above chance level for classifying patients who lack testamentary capacity.

[131] Against the background of the available evidence concerning the close and mutually beneficial relationship which had existed between Susan and Lloyd and the sudden rupture in that relationship, Professor Morris considers two possible explanations for the alteration in Lloyd's will-making pattern. The first explanation is described as follows:

“One explanation is that Mr Wright developed a false belief (delusion of persecution) that Susan and Richard Hamill were stealing from him and drugging him. A delusion involves an idea that is (a) clearly false, (b) not accounted for by the person's cultural or religious background or his or her level of intelligence, and (c) held firmly regardless of evidence to the contrary. Furthermore, these beliefs are held with a degree of conviction which (d) does not lend itself to entertaining the possibility of an alternative explanation and (e) results in a preoccupied level of concern with significant affective involvement.”

[132] Professor Morris proceeds to review the evidence, including Lloyd's May 2016 letter in which he said that he only learned about the joint tenancy after he obtained documents from the Council and was "shocked" to find that Susan owned half of his property, and that it had never been his intention to benefit her with the whole of his estate when he had three other children. Professor Morris correctly observes that this statement is incompatible with the statutory declaration made one year earlier which explained why the property was being purchased as a joint tenant with Susan. As Professor Morris



observes “It is not consistent with rational thought to claim ‘trickery’ when you have signed legal documents with a legal practitioner, a statutory declaration with a Justice of the Peace, and discuss this arrangement with your treating GP”. These and other features were discussed by Professor Morris who offered the following opinion:

“All these features of his thought processes indicate a disturbance of thinking consistent with the onset of a psychotic process characterized by the development of a paranoid delusional system involving his daughter Susan Hamill and her husband Richard. In this state of mind he would have been more susceptible to suggestion and influence by others especially if these influences were consistent with his paranoid persecutory preoccupations.

The presence of this delusional system would have impaired his capacity to make the two wills in 2016 and influenced the disposition of his assets.”

- [133] Professor Morris identified a number of possible causes of the development of such a delusional state in a man of Lloyd’s age. These were said to include:

“... the onset of a delusional disorder of older age; delusional thinking complication a major depressive illness; the effects of severe illness such as the bowel cancer he suffered from in 2016 (an organic psychosis); the effects of medication; and the psychological and behavioural manifestations of a neurodegenerative memory and cognitive impairment disorder.”

- [134] Professor Morris could not be certain as to which of these causes explained Lloyd’s delusional thinking. He continued:

“However, a likely condition responsible in this case would be a paranoid delusional system arising from misinterpretation of his experiences and loss of contact with reality due to the effects on cognition, reasoning and rational judgment produced by a neurodegenerative disorder such as vascular disease of the brain (as noted on his MRI brain scan of 18/2/2016) or early or prodromal Alzheimer’s disease. Systematized delusional states can complicate patients with mild cognitive impairment and can be the most distressing part of the condition for patient and family members. Another likely condition responsible for a specific paranoid delusional system as seen in this case is a delusional disorder of older age. Delusional disorder is where non-bizarre delusions of a persecutory type dominate the clinical picture where there is little evidence of hallucinations in a setting where the patient’s functioning is not markedly impaired and behaviour is not obviously odd or bizarre.”

- [135] Professor Morris considered an alternative explanation of Lloyd’s mental state as an understandable response to poor treatment provided toward him from Susan and Richard. He had regard to Dr Martin’s opinion in a letter dated 21 August 2017 that Lloyd did not suffer with any psychiatric condition. However, as Professor Morris explained:

“The difficulty with recognising a non-bizarre delusion is that a person’s functioning is generally not impaired, nor is their behaviour obviously odd. The delusion may seem believable at face value, and patients may appear normal as long as an outsider does not touch upon their delusional themes. This could explain why people who heard Mr Wright’s story did not recognize it as a delusion. Furthermore, no evidence has been provided to the assessors of any mistreatment of Mr Wright by Susan or Richard Hamill.”

[136] On balance, Professor Morris thought it more likely that Lloyd’s beliefs regarding the theft and drugging were the result of a delusional, or delusion-like belief. The presence of such a persecutory delusional belief would have directly and consistently affected the disposition of his estate from January 2016 until his death.

[137] Under cross-examination Professor Morris considered what was put to him about Ms Lewis’ affidavit evidence about the instructions she received from Lloyd, including the fact that he was clear and concise and knew exactly what he wanted to do. Professor Morris had regard to this evidence, but correctly noted that the fact that Lloyd had a capacity to give unprompted instructions and appeared to know what he was doing so as to satisfy a lawyer that he had capacity was not sufficient to identify the kind of difficulties which would be detected by a proper specialist examination of testamentary capacity. He adhered to the view of a disturbance of mind in the form of a delusion. Professor Morris also pointed to the fact that Lloyd told Ms Lewis that he was not aware of the creation of the joint tenancy whereas there was substantial evidence that he actually knew of that arrangement in 2015 and knew what he was doing. That raised a question for Professor Morris as to whether Lloyd had testamentary capacity when he was seeing Ms Lewis.

[138] Professor Morris also considered what was put to him about Dr Martin’s consultations and, without criticising Dr Martin, he observed that there was an issue about what evidence Dr Martin had and also the fact that most of his consultations were short. A proper assessment of testamentary capacity may take an hour and a half with a patient. Further, as Professor Morris stated:

“Patients who may have delusions or other forms of mental impairment often don’t reveal those to doctors.”

### **The test for testamentary capacity**

[139] The classic test for testamentary capacity appears in *Banks v Goodfellow*:<sup>1</sup>

“It is essential to the exercise of [a testamentary] power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to

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<sup>1</sup> (1870) LR 5 QB 549 at 564-565 (“*Banks v Goodfellow*”).

the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

This passage has been consistently applied in Australian courts.<sup>2</sup>

[140] The test may be said to have four elements. The testator or testatrix:

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

As to the last element, in the words of *Banks v Goodfellow*, no disorder of the mind should poison his or her affections or pervert his or her sense of right, nor any insane delusion influence his or her will, nor anything else prevent the exercise of his or her natural faculties. In short, the test requires proof of the absence of delusions that are material to the testator’s decision to make a testamentary disposition.

### **Delusions**

[141] A delusion has been defined as a “fixed and incorrigible false belief which the victim could not be reasoned out of”.<sup>3</sup>

[142] Despite delusional beliefs, a testator may live what appears to be a normal life, and make what appears on the face of things a rational will. *Bull v Fulton* is an example of such a case in which the testatrix acted under the delusion that her nephews, who had acted as her solicitors, were guilty of deceit or of forgery.<sup>4</sup>

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<sup>2</sup> See *Frizzo v Frizzo* [2011] QSC 107 at [21] – [26], upheld in *Frizzo v Frizzo* [2011] QCA 308 at [53], [67], [68]; G E Dal Pont and K F Mackie, “Law of Succession” (Lexis Nexis Butterworths, 2<sup>nd</sup> ed., 2017) at 44 [2.5].

<sup>3</sup> *Bull v Fulton* (1942) 66 CLR 295 at 339 (“*Bull v Fulton*”).

<sup>4</sup> *Ibid*; see also *Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR 267 (“*Woodhead*”). In *Estate Sue* [2016] NSWSC 721 the experts and the Court accepted that, beyond the realm in which a delusion order operates, a person who suffers from such a disorder may live what appears to be a normal, everyday life.

- [143] A party who relies upon a delusion is not required to prove a general mental illness. Mental infirmity of a kind which denies testamentary capacity does not necessarily involve “insane delusions”.<sup>5</sup> The relevant issue is whether the testator suffered from a delusion or delusions which were material to the existence of testamentary capacity, for instance, the capacity to comprehend and appreciate the claims upon his bounty.<sup>6</sup>
- [144] As *Banks v Goodfellow* identifies, delusions are only relevant to the question of testamentary capacity if they are connected with aspects of the will. The issue is whether the disorder or delusion was such as to render the testator or testatrix incapable of making a reasonable and proper disposition of his or her property or of taking a rational view of the matters to be considered in making a will.<sup>7</sup>
- [145] The third and fourth elements of the test in *Banks v Goodfellow* may overlap in the case of a delusion. The delusion may prevent the deceased from being able to comprehend and appreciate claims on his bounty and to evaluate the respective claims of persons who may reasonably be thought to have such a claim.
- [146] A delusion may concern a fact, or state of affairs, bearing upon a judgment as to the moral claim a person has upon one’s bounty. A delusion may also involve a value judgment which is so extreme as to warrant the description of a delusion.<sup>8</sup> Where the question relates to the falsity of a fact, or state of affairs, the task of the Court is relatively straightforward.<sup>9</sup>

### **The burden of proof**

- [147] The burden of proof lies with the party who seeks to propound the will. This includes satisfying the Court that the testator possessed the required testamentary capacity. A presumption of capacity arises where a will is rational on its face and duly executed. Where the evidence as a whole is sufficient to throw a doubt upon the testator’s competency, then the Court must decide against the validity of the will unless it is affirmatively satisfied that the testator was of sound mind, memory and understanding when he executed it.<sup>10</sup> The issue is decided according to the civil standard of proof. The existence of a doubt is not enough to displace the presumption. Instead, a doubt requires “a vigilant examination of the whole of the evidence which the parties place before the Court”.<sup>11</sup> That examination having been made, a residual doubt is not enough to defeat the claim for probate unless “it is felt by the Court to be substantial

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<sup>5</sup> *Re Estate of Griffith* (1995) 217 ALR 284 at 290.

<sup>6</sup> *Ibid* 290-291.

<sup>7</sup> *Timbury v Coffee* (1942) 66 CLR 277 at 280.

<sup>8</sup> *Re Estate of Griffith* (1995) 217 ALR 284 at 291.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Bull v Fulton* at 343.

<sup>11</sup> *Worth v Clasohm* (1952) 86 CLR 434 at 453.

enough to preclude a belief that the document propounded is the will of a testatrix who possesses sound mind, memory and understanding at the time of its execution.”<sup>12</sup>

- [148] If the delusions are such as to be of such a character as to have “a direct bearing on the provisions of the will” then it is for the propounder to show that the delusions did not affect the capacity to make the will which is being propounded.<sup>13</sup>
- [149] I respectfully adopt the summation of principle concerning the onus of proof stated by Meagher JA in *Tobin v Ezekiel*.<sup>14</sup> In short, if the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally competent. That presumption may be displaced by circumstances which raise a doubt as to the existence of testamentary capacity. Those circumstances shift the evidential burden to the party propounding the will to show that the testator was of “sound disposing mind”. That doubt, unless resolved on a consideration of the evidence as a whole, may be sufficient to preclude the Court being affirmatively satisfied as to testamentary capacity.
- [150] Accordingly, proof of a delusion relevant to testamentary capacity which counterbalances or displaces the presumption of testamentary capacity casts the onus of those propounding the will to prove that the delusion did not affect the testator’s mind when he made the will. The evidence of a delusion or delusions, in conjunction with the evidence as a whole, may be sufficient to preclude affirmative satisfaction on the balance of probabilities as to testamentary capacity.
- [151] Ultimately, the Court must be affirmatively satisfied on the balance of probabilities that the testator possessed the required mental capacity. In a case in which a delusion which is material to the question of testamentary capacity is established, the Court must be satisfied affirmatively that the delusion or delusions did not affect the testator’s mind when he made the will.<sup>15</sup>

### **Lucid intervals**

- [152] A testator who suffers from delusions may make a valid will if it is shown that the will was made in a lucid interval, for example, if it is shown that there was no delusion at the time the will was made. *Timbury v Coffee* illustrates this in the case of a testator whose drinking bouts reduced him to a state of physical exhaustion and mental disturbance.<sup>16</sup> His drinking bouts usually resulted in his being taken to hospital with delirium tremens and delusions. In the intervals between such bouts he was active and intelligent, and in most respects behaved in a perfectly reasonable manner.

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<sup>12</sup> Ibid.

<sup>13</sup> *Bull v Fulton* at 299; *Woodhead* at 273.

<sup>14</sup> (2012) 83 NSWLR 757 at 770-771; [2012] NSWCA 285 at [44] – [45].

<sup>15</sup> *Woodhead* at 274.

<sup>16</sup> (1941) 66 CLR 277.

### Capacity to sever the joint tenancy

- [153] The parties agree that the question of whether Lloyd had the capacity to instruct his solicitor to sever the joint tenancy and to unilaterally sever the joint tenancy raises essentially similar issues to the issues that arise in relation to the question of testamentary capacity.
- [154] Section 59(1) of the *Land Title Act* 1994 (Qld) permits a registered owner of a lot subject to a joint tenancy to unilaterally sever the joint tenancy by registration of a transfer executed by the registered owner.
- [155] It is unnecessary to essay the features of a joint tenancy including the “right of survivorship”, which has been said to not be a “right” in any legal sense.<sup>17</sup> When one joint tenant dies during the subsistence of the joint tenancy, his or her interest ceases.<sup>18</sup> The interests of the remaining joint tenants expand by accretion. I respectfully adopt the observations of Hallen J in *Anderson v Anderson*:<sup>19</sup>

“A joint tenancy is readily severable. Severance is the conversion of a joint tenancy into a tenancy in common. It destroys the right of survivorship. If severance does not occur or is held to be ineffective, an attempt by one joint tenant to devise jointly held property by Will is also ineffective since, upon death, the interest of a joint tenant who dies, passes by survivorship to the remaining joint tenant, or tenants. The severance has a final, or irrevocable, character, precluding the joint tenant from claiming, by survivorship, any interest in the property that was held in joint tenancy.”

- [156] The question of the capacity of an individual to undertake a transaction arises in many legal contexts. In *Gibbons v Wright*,<sup>20</sup> it arose in the context of a variety of instruments and the purported severance of a joint tenancy. *Gibbons v Wright* established that different degrees of mental soundness may be required for the validity of different transactions, and that the “standard” is relative to the particular transaction.<sup>21</sup> In *Gibbons v Wright*, Dixon CJ, Kitto and Taylor JJ stated:

“The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of

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<sup>17</sup> *Anderson v Anderson* (2016) 18 BPR [98777] at 36,294; [2016] NSWSC 1204 at [328].

<sup>18</sup> *Corin v Patton* (1990) 169 CLR 540 at 575.

<sup>19</sup> *Anderson v Anderson* at [330].

<sup>20</sup> (1954) 91 CLR 423.

<sup>21</sup> *Crago v McIntyre* [1976] 1 NSWLR 729 at 739.

mind as to be capable of understanding the general nature of what he is doing by his participation.”<sup>22</sup>

Their Honours continued that “the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument”. They approved the remark of Hodson LJ in *Estate of Park*<sup>23</sup> that “one cannot consider soundness of mind in the air, so as to speak, but only in relation to facts and the subject matter of the particular case”. Their Honours also stated:

“Ordinarily the nature of the transaction means in this connection the broad operation, the ‘general purport’ of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out.”<sup>24</sup>

- [157] In discussing the statement of principle in *Gibbons v Wright* in the context of powers of attorney, Lindsay J in *Scott v Scott* emphasised that attention must be focused on all the circumstances of the case, including the purpose for which the instrument may ostensibly have been prepared and the circumstances in which it was executed.<sup>25</sup> In some contexts, for instance where a power of attorney confers a power to dispose of the principal’s property to or for the benefit of the attorney or third parties, the nature and degree of mental capacity required to grant such a power may approximate that required for the making of a valid will. In that event, the “standard” laid down by *Banks v Goodfellow* might apply or be approximated.<sup>26</sup> Lindsay J also emphasised that it is not a matter of imposing, or recognising, a different standard of mental capacity in the evaluation of the validity of different transactions. The concept of “mental capacity” must be assessed relative to the nature, terms, purpose and context of the particular transaction.<sup>27</sup>
- [158] Applying these principles, it is important to have regard to the context in which the joint tenancy was created and the context in which it was purportedly severed in this case. Both involved a testamentary context. In simple terms, the creation of the joint tenancy in 2015 was an exercise in estate planning so as to provide Susan with a home if she survived her father, and so that his interest in the property did not become part of his estate. The purported severance of the joint tenancy also was related to Lloyd’s testamentary intentions. For so long as the joint tenancy subsisted, Susan had a “right of survivorship”. Unless the joint tenancy was effectively severed, Lloyd’s interest, in effect, passed by survivorship to Susan, and was not to form part of his estate upon his

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<sup>22</sup> Ibid 437.

<sup>23</sup> [1954] P 112 at 136.

<sup>24</sup> *Gibbons v Wright* at 438.

<sup>25</sup> [2012] NSWSC 1541 at [199].

<sup>26</sup> Ibid [202].

<sup>27</sup> Ibid [205].

death. As the joint tenant, Susan was, in practical effect, a potential beneficiary who would own the house upon Lloyd's death. In broad terms, she would benefit from his death in the same way a beneficiary under a will would benefit if the house was in the estate at the time of his death.<sup>28</sup> Severance would have the effect of revoking Susan's "right of survivorship" and, to that extent, benefit the defendants if the May 2016 will was upheld. If he had the capacity to sever the joint tenancy and was not under undue influence, Lloyd had the right to, in effect, disinherit Susan of her "right of survivorship", or, expressed differently, prevent her from receiving the whole of the property.<sup>29</sup>

- [159] If, however, Lloyd lacked the mental capacity to sever the joint tenancy, then to allow the purported severance to stand would thwart the testamentary intentions that were implicit in the creation of the joint tenancy and the 2015 will.
- [160] Given the circumstances under which the joint tenancy came to be created and the purpose and context of the purported severance, it is appropriate to have regard to the requirements relating to testamentary gifts. Although the purported severance deprived Lloyd of his "right of survivorship", it also benefited him in that, if effective, he became free to dispose of his interest in the house through a will, and it benefited the beneficiaries under such a will. The purported severance resulted in his half interest in the property becoming part of his estate, rather than becoming the property of Susan, the surviving joint tenant upon his death.
- [161] Therefore, I accept the approach of the parties that the capacity to sever the joint tenancy in this case makes it appropriate to apply, with appropriate adaptations, the testamentary capacity test established by *Banks v Goodfellow*.
- [162] No issue arises as to the standing of Susan to apply for an order declaring the purported severance to be invalid and to obtain an order pursuant to s 114(3) of the *Land Title Act 1994* (Qld) that she be registered as proprietor of the relevant lot. No question of indefeasibility of title is raised.

### **The parties' submissions**

- [163] The plaintiffs submit that the evidence establishes that Lloyd lacked capacity when executing the impugned wills in 2016 and severing the joint tenancy. In the words of *Banks v Goodfellow*, his affections were poisoned by a disorder of the mind, and delusion influenced him to dispose of his property in a way that he would not have done so had he not been so influenced.
- [164] Reliance is placed upon the circumstances of his relationships prior to the onset of his delusions and associated memory loss of the circumstances under which the property was acquired and the joint tenancy created.

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<sup>28</sup> *Lagoski v Shano* (2007) 232 OAC 21 at [34].

<sup>29</sup> *Ibid* [38].



[165] In response to the second defendant's reliance upon the evidence of Dr Martin and Ms Lewis, the plaintiffs point to the opinion of Professor Morris (as reflected in the authorities) that a person with a non-bizarre delusion may live what appears to be a normal life. As Professor Morris observed:

“The difficulty with recognizing a non-bizarre delusion is that a person's functioning is generally not impaired, nor is their behaviour obviously odd. The delusion may seem believable at face value, and patients may appear normal as long as an outsider does not touch upon their delusional themes.”

[166] The evidence is said to support the conclusion that Lloyd had delusions which would have directly and consistently affected the disposition of his estate from January 2016 until his death. Attempts by Susan and Richard to reason him out of his false beliefs were unsuccessful. In turn, he was influenced by Moira and Lorraine, who accepted and acted on his delusions.

[167] Neither Dr Martin nor Ms Lewis were on notice of Lloyd's delusions. Dr Martin did not have occasion to inquire into those aspects. Ms Lewis relied upon Dr Martin's short statement that Lloyd did not have dementia, and the manner in which Lloyd was able to express his intentions and understand matters. At the time she took instructions for the will and to sever any joint tenancy, Lloyd gave an apparently rational explanation for disinheriting Susan. Ms Lewis was not in a position to ascertain that his instructions were based on non-bizarre delusions.

[168] The first and second defendants submit that the issue for determination is whether between May and July 2016 Lloyd suffered from a delusion or delusions which “influence[d] his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made”.<sup>30</sup> Particular reliance is placed upon the evidence of Dr Martin and Ms Lewis. Reliance is also placed on the fact that his MMSE on 18 February 2016 and 2 May 2016 showed normal cognition.

[169] They submit that Professor Morris did not have the benefit of the affidavits of Dr Martin and Ms Lewis. It is also submitted that Professor Morris tended to suggest that only a specialist could assess capacity, and that Professor Morris' opinion should be discounted on that basis. I should note in response that Professor Morris simply pointed out the differences between a GP considering capacity in the context of a short consultation or a number of short consultations and an assessment of capacity by a specialist who specifically explores testamentary capacity over a longer period, and with more information.

[170] The first and second defendants submit that Lloyd's May 2016 letter does not refer to being drugged or watched by police, and that the errors in it in relation to matters such as the creation of the joint tenancy can be attributed to forgetfulness.

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<sup>30</sup> Citing *Banks v Goodfellow* at 564-565.

- [171] As to the delusions upon which the plaintiffs rely, the first and second defendant submit that although there may be evidence that Lloyd misapprehended matters, there is insufficient evidence of efforts to reason him out of his views.<sup>31</sup> One exception which is acknowledged is the attempt by Richard to reason Lloyd out of his false beliefs about the money which had been spent on the house, when Richard showed him downloaded bank statements and Lloyd claimed the internet was all lies.
- [172] Ultimately, the defendants submit that in circumstances in which Dr Martin and Ms Lewis were on notice of a capacity issue, reliance should be placed upon their observations of Lloyd at the relevant time, namely the time he executed the will and severed the joint tenancy. The defendants submit that if Lloyd was acting under a delusion at any point, it was not operative at those dates.

### **Did Lloyd suffer delusions in early 2016?**

- [173] The evidence clearly establishes that Lloyd suffered delusions. The evidence has been canvassed at length. He believed that Richard and Susan had and were stealing money from him. He believed they were trying to poison him and had drugged him. When he ascertained, with the assistance of Moira, that the house was held in joint names, he was shocked. He had forgotten the circumstances under which the joint tenancy was created. As a result, he believed that he had been tricked into signing documents which created a joint tenancy. His false beliefs about theft extended beyond a valuable coin collection. He believed that Susan and Richard had taken \$26,000 of his money out of a bank account. His false beliefs about the respects in which they had obtained his property and abused him were fixed. As noted, Richard explained that he had not stolen money from Lloyd and showed him downloaded bank statements in order to show how he had spent money on the house. Lloyd would not alter his view despite this attempt to reason with him. He said that the internet was all lies.
- [174] In addition, when Lloyd came home from the bank, “absolutely furious”, and accused Susan of having stolen his money, she tried to explain how Richard had put in the other half. Lloyd vehemently denied this. It was only after attempts to reason with Lloyd failed that Susan sought advice and assistance from Dr Hempling.
- [175] In summary, the plaintiffs have established that Lloyd suffered delusions in the first half of 2016.

### **Were the delusions operative on the dates Lloyd gave instructions and executed the relevant documents?**

- [176] The delusions continued after Lloyd relocated to New South Wales. Their persistence is evident in the making of another will on 14 April 2016, and in his lengthy May 2016 letter, which was written at about the time he executed his final will and gave

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<sup>31</sup> cf *Worth v Clasohm* at 449.

instructions to sever any joint tenancy. As discussed, that letter displays the persistence of his delusions.

**The defendants' reliance upon the evidence of Dr Martin and Ms Lewis**

- [177] The delusions which Lloyd suffered were non-bizarre delusions which, at face value, might appear well-founded to someone who did not inquire into their accuracy.
- [178] The issue of testamentary capacity in this case does not concern substantial cognitive impairment of the kind which might be detected by an MMSE.
- [179] As for Dr Martin, he did not purport to test Lloyd's testamentary capacity. He saw Lloyd in the course of seeing a new patient and conducting routine, short consultations. On the basis of the MMSE conducted on 8 April 2016, he advised that Lloyd had scored 29, which indicated that "he does not have dementia". Dr Martin was not asked to, or required to, consult Lloyd so as to ascertain his testamentary capacity. However, if he had been, and asked Lloyd why he intended to disinherit Susan then the explanation given may have appeared rational. Whilst in the course of his dealings with Lloyd, Dr Martin saw nothing that caused him to question Lloyd's capacity or memory. Dr Martin was not tasked to test testamentary capacity. The first and second defendants point out that there is no evidence that Lloyd reported to Dr Martin anything about police surveillance. However, there is no evidence that he thought he was being surveilled by police in New South Wales once he moved there. In those circumstances, it is unsurprising that he apparently said nothing about police surveillance to Dr Martin.
- [180] Dr Martin did not inquire into Lloyd's testamentary intentions and therefore was not concerned to detect and assess non-bizarre delusions. It is no criticism of Dr Martin that he did not inquire of Lloyd's previous GP as to any concerns which Dr Hempling had in relation to Lloyd's mental state. If he had done so, then Dr Hempling presumably would have told him about the concerns which Dr Hempling had, including Lloyd's belief that he was being drugged by Richard and Susan and Dr Hempling's concern that Lloyd should be psychiatrically assessed. In the circumstances, Dr Martin's evidence provides limited evidence in relation to testamentary capacity.
- [181] Ms Lewis was concerned about Lloyd's testamentary capacity. She could not be expected, however, to detect non-bizarre delusions without undertaking inquiries and investigations.
- [182] On the basis of the information available to her at the time, she formed the view that Lloyd had testamentary capacity. This included reliance upon Dr Martin's letter of 2 May 2016 and the matters which have been outlined earlier to the effect that Lloyd knew what he wanted, was clear and concise in providing instructions and was able to recite what he understood to be the contents of his estate.
- [183] The non-bizarre delusions about which Ms Lewis was unaware informed those instructions. Lloyd told her at their first meeting that the grantee of his power of attorney had taken half his house, that he could not trust Susan and Richard and he was

not sure what they had been doing with his money and property. He later told her that he did not know what he was signing at the time in relation to the Queensland property, but just signed it. His instructions to Ms Lewis were consistent with elder abuse and misuse of a power of attorney. The allegations were not bizarre. It was plausible that he did not know that a joint tenancy had been created. However, the truth is that he intended to create a joint tenancy and explained to others that he intended Susan to inherit the house when he died.

- [184] Any solicitor taking instructions in the circumstances in which Ms Lewis did faced a difficult task. It is unnecessary to canvass the materials in relation to guidelines and practice in this area. Various documents concerning solicitors and assessing capacity form supplements to the second defendant's submissions. Some of the responsibilities of lawyers in such a situation are addressed in the texts.<sup>32</sup> I am not assessing Ms Lewis' professional conduct. However, I would not wish to be taken as suggesting that she did not perform her professional duty. On what was known to her as at 6 May 2016, she believed that Lloyd exhibited sufficient testamentary capacity. A failure to prepare a will in accordance with his instructions and have him execute it may have had unfortunate consequences and exposed her to professional liability. Having formed a view about his capacity, it was her professional duty to act upon his instructions. Her conduct and the view she formed about his capacity should not be unfairly criticised as a result of hindsight bias, knowing what the Court does now, but which Ms Lewis did not at the time, of the non-bizarre delusions which influenced Lloyd's instructions.
- [185] At that time she was not involved in an investigation into the circumstances under which the joint tenancy had been created. In those circumstances, she did not speak to the solicitor who had acted in relation to the transaction and who had witnessed Lloyd's statutory declaration which explained his reasons for the joint tenancy. At the time she lacked information about the other allegations which Lloyd had made about Richard and Susan. Her instructions were to sever the joint tenancy if searches revealed such a joint tenancy to exist. She was also instructed to revoke the powers of attorney and did so.
- [186] On 3 June 2016 she wrote to Susan and Richard about their alleged use of the power of attorney and requested that they provide "reasonable accounts and receipts" in respect of the exercise of the powers of attorney granted in either New South Wales or Queensland. Her letter also expressed concern about what had happened to Lloyd's real property and bank accounts and advised that Lloyd was "very concerned that you own a property with him as joint tenants". After a follow-up letter dated 21 June 2016, Richard responded and rejected a number of allegations. His email of 29 June 2016 stated that the sole use of the power of attorney was in relation to the change of the joint bank account to require both to sign. His email also explained the circumstances under which they moved to the Gold Coast and how Lloyd's estate planning arrangements were on the basis of advice from a solicitor and that he documented his reasons in a

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<sup>32</sup> See G E Dal Pont and K F Mackie, "Law of Succession" (Lexis Nexis Butterworths, 2<sup>nd</sup> ed., 2017) at 796 [24.2] – 799 [24.7].

statutory declaration. It is unnecessary to debate whether this response should have prompted Ms Lewis to investigate the accuracy of Lloyd's previous instructions. His previous instructions to sever the joint tenancy were acted upon in the form of the town agent's letter dated 30 June 2016.

- [187] The information which Ms Lewis obtained on 29 June 2016 came well after the instructions which she had received in relation to a new will and several weeks after the new will had been executed. Insofar as capacity is concerned, the relevant inquiry is into Lloyd's capacity at the time he gave instructions and executed his final will on 6 May 2016. At that time, Ms Lewis was given to understand that he had not agreed to a joint tenancy, that Susan and Richard had misused their powers as attorneys and could not be trusted because of what they had been doing with Lloyd's money and property. These things were untrue, but Ms Lewis was not to know that. On the basis of what she was instructed, and the manner in which those instructions were given, she was entitled to believe that Lloyd had rational reasons for not providing for Susan in his estate and to sever any joint tenancy.
- [188] Whilst I have regard to Ms Lewis' assessment of Lloyd's capacity at the time he gave his instructions, she was not then in a position to recognise the non-bizarre delusions that were influencing his instructions.
- [189] A related issue, which touches upon the third element in *Banks v Goodfellow*, is the state of Lloyd's memory. As noted, he seemingly did not tell Ms Lewis about the will which he had recently made which favoured Lorraine, or his reasons for now favouring Michelle and Trevor as well. He had forgotten the circumstances under which he created the joint tenancy about a year earlier. He seemingly could not remember that solicitors had acted in connection with the relevant conveyances, and that, on the basis of the settlement documents which had been in his possession, there was no balance of the proceeds of the Port Macquarie home to account for. His inability to recall the circumstances under which he came to create the joint tenancy and his reasons for creating a joint tenancy calls into question whether he had an ability to appreciate and evaluate Susan's claim upon his testamentary bounty, including the reasons that had influenced him to provide for her by way of a joint tenancy and as sole beneficiary under his 2015 will. He seemingly had forgotten what had influenced him to provide for Susan and to exclude his other children. His inability to remember these and other things both calls into question his capacity to appreciate and evaluate claims on his bounty and provides some evidence of his delusional state. He seemingly had no knowledge of a number of documents which he had signed the year before. This ignorance would have confirmed his delusional state about the circumstances under which the Burleigh Waters house was acquired and that he did not intend it to be held as a joint tenant.
- [190] This is not a case of mere forgetfulness, where Lloyd said he could not recall anything about the creation of the joint tenancy and his reasons for creating it. He disavowed these things and asserted he had, in effect, been tricked into creating a joint tenancy, contrary to his intentions. This was a delusion.

[191] In summary, neither the evidence of Dr Martin nor Ms Lewis which is relevant to the issues of capacity persuades me that Lloyd had the required capacity at the relevant time. Their evidence does not persuade me that his delusions were not operative on the dates he gave his instructions and executed the relevant documents.

### **Assessment of other evidence**

[192] For completeness I should state that I found Susan and Richard Hamill to be credible and reliable witnesses. Other lay witnesses who gave evidence in the form of affidavits which were read by the plaintiffs were not required for cross-examination and there is no reason to not accept their evidence. Dr Hempling's evidence, both in the form of his affidavit and his brief cross-examination, also commanded acceptance.

[193] Professor Morris gave a retrospective opinion. I have already remarked upon the circumstances in which he did not have the benefit of reading the affidavits of Dr Martin and Ms Lewis. However, he was aware of their opinions. Professor Morris' opinions were well-founded on substantial evidence. I accept his opinions. I take account of the fact that his is a retrospective opinion and, accordingly, has less weight than the opinion of a specialist who has had the advantage of personally observing and questioning the testator.<sup>33</sup>

[194] Whilst Dr Martin and Ms Lewis had the advantage of observing Lloyd, the limitations on their evidence and opinions about his capacity must be recognised. For the reasons I have discussed in relation to their evidence, neither was in a position to recognise the non-bizarre delusions under which Lloyd was functioning at the time.

### **Conclusions**

[195] Based on my assessment of the evidence as a whole, I reach the following conclusions:

[196] Lloyd suffered from non-bizarre delusions in 2016, including the time he made and executed the will dated 6 May 2016 and gave instructions to sever any joint tenancy. Those delusions continued at the time the joint tenancy was severed.

[197] His delusions were material to his testamentary capacity and to his capacity to sever the joint tenancy. They were directly relevant to whether Susan had a claim upon his testamentary bounty, and also to whether the house should become her property as a surviving joint tenant or, instead, a half interest in the property should become part of his estate.

[198] In the words of *Banks v Goodfellow*, his delusions were such as to "poison his affections" for Susan and prevented him from being able to evaluate, and discriminate between, the respective strengths of the claims of each of his children upon his testamentary bounty.

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<sup>33</sup> See generally *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [89]; *Frizzo v Frizzo* [2011] QSC 107 at [25].

- [199] For similar reasons, he lacked the capacity to sever the joint tenancy.
- [200] The second defendant (whose submissions were adopted by the first defendant) has not proven that the delusions were not operative on the dates that Lloyd gave instructions in relation to his will and to sever any joint tenancy or on the dates he executed relevant documents.
- [201] My conclusions about the effect of his non-bizarre delusions are reinforced by evidence of his inability to recall the circumstances in which he created a joint tenancy a little over a year earlier and his reasons for doing so, namely the care which Susan had provided to Lloyd and Shirley over the years and the fact that Susan had no home of her own, as well as the lack of care provided to him and his wife by his other children.
- [202] The whole of the evidence establishes that Lloyd lacked testamentary capacity in April and May 2016 and lacked the capacity to sever the joint tenancy in May and June 2016.
- [203] Because I have reached the conclusion that he lacked those capacities, it is unnecessary to decide the matter by reference to the onus of proof. However, I find, in the alternative, that the defendants have not discharged the onus of proving that he had the required testamentary capacity. The evidence of his delusions, in conjunction with the evidence as a whole, precludes a state of affirmative satisfaction on the balance of probabilities as to his testamentary capacity. Insofar as the plaintiffs have assumed an onus to prove a lack of capacity to sever the joint tenancy, they have discharged that onus.

### **Orders**

- [204] The plaintiffs have been successful in their claim. I propose the following orders:
1. The Court pronounces against the force and validity of the will of the late Lloyd Stephen Wright dated 14 April 2016.
  2. The Court pronounces against the force and validity of the will of the late Lloyd Stephen Wright dated 6 May 2016.
  3. The Court pronounces in solemn form for the force and validity of the last will of the late Lloyd Stephen Wright dated 28 March 2015, a copy of which is Exhibit A to the affidavit of scripts filed 4 October 2017.
  4. The requirements for giving notice of intention to apply for a grant of probate of the will of the late Lloyd Stephen Wright dated 28 March 2015 and the publication of that notice be dispensed with.
  5. It is declared that the late Lloyd Stephen Wright lacked the capacity to sever the joint tenancy held by him and Susan Belle Hamill over land described as Lot 339 on RP 138740, County of Ward, Parish of Nerang, Title Reference 15199199 (“the Lot”).

6. It is declared that at all times until his death on 19 July 2016, Lloyd Stephen Wright and Susan Belle Hamill held the Lot as joint tenants.
7. The purported transfer executed by Lloyd Stephen Wright on 16 May 2016, No 717386458 is set aside.
8. Pursuant to s 114 of the *Land Title Act 1994* (Qld), Susan Belle Hamill be registered as proprietor of the Lot.

### **Costs**

- [205] Having succeeded in their claim over the opposition of the first and second defendants, the plaintiffs have substantial grounds to obtain an order for costs in their favour. It is unnecessary to canvass the respects in which the claim was defended at different times. The plaintiffs were put to substantial costs in engaging expert evidence and obtaining other evidence. The ordinary rule that costs should follow the event would seem to apply in the circumstances.<sup>34</sup>
- [206] Notwithstanding this, the plaintiffs do not press for an order that the defendants pay their costs. This is a generous position in the circumstances. The plaintiffs have succeeded in obtaining orders which will have the effect of transferring the house property to Susan, as Lloyd intended in 2015, and which would have occurred but for his delusions and incapacity in the months immediately before his death. There will be little in the estate. The very small estate should not be burdened with any order for costs in favour of any of the defendants. The plaintiffs as executors would be entitled to be indemnified in respect of their costs out of the estate. The substantial success of the plaintiffs, and their *prima facie* entitlement to recover their costs from the first and second defendants, mean that the defendants should bear their own costs. In the circumstances, there will be no order as to costs.

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<sup>34</sup> *Frizzo v Frizzo (No 2)* [2011] QSC 177.