# Testamentary capacity and knowledge and approval

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## LEGALWISE SEMINAR:

## ESTATE DISPUTES AND LITIGATION: CAPACITY, EVIDENCE AND CONFLICT OF INTEREST

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Prior to coming to the bar Craig was a solicitor with Teece Hodgson & Ward and from 2015 – April 2017 was an Accredited Specialist in Wills & Estates Law. He was named as a Rising Star in the 2016 edition of Doyle's Guide in the area of Wills & Estate Litigation.

## Introduction

1. The Supreme Court of NSW has published provisional statistics for the 2016 calendar year as at 25 January 2017[1]. The statistics for Estate Litigation and Protective matters are relevantly:

| | Filings 2014 | Filings 2015 | Filings 2016 |
|---|---|---|---|
| **Probate applications** | 24,526 | 26,408 | 26,243 |
| **Proceedings in Probate List** | 212 | 207 | 262 |
| **Proceedings in Family Provision List** | 774 | 972 | 1,018 |
| **Proceedings in Protective List** | 110 | 107 | 81 |

2. The number of filings in the contested Probate list are low, particularly compared with the number of Family Provision filings. This is not surprising, given the flexibility with which the boundaries of eligibility are contemporarily considered, the general discretion which the Court has once eligibility is established, and the tendency for claims to settle at mediation or otherwise prior to hearing.

3. Within the matters commenced in the Probate list there will be contests about the execution of a Will within the formal requirements of section 6 of the Succession Act 2006, contests about whether the dispensing provision of section 8 should be applied in the case of informal testamentary documents, contests about revocation of the grant, and estate accounts.

4. There are relatively few opportunities to consider and apply the principles applicable to testamentary capacity and knowledge and approval, and, in the appropriate case, undue influence and fraud (the latter which I will not address).

5. In this paper I set out the principles applicable to testamentary capacity and knowledge and approval and outline the present discourse regarding the relationship between those concepts. I will then consider some recent cases.

[1] http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/sco2_statistics.aspx Last accessed on 19 November 2017,

**Testamentary capacity**

6. In *Banks v Goodfellow* (1870) LR 5 QB 549 at 565, Cockburn CJ set out the locus classicus test for testamentary capacity, in the following terms:

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

7. Once testamentary capacity is established, it is necessary to establish that the testator knew and approved of the contents of the will.

8. The application of the burden of proof, and the presumptions which apply with respect to testamentary capacity and knowledge and approval were summarized by Isaacs J in *Bailey v Bailey* (1924) 34 CLR 558 at 57 They were summarized by Meagher JA (with whom Basten and Campbell JJA agreed) in *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [44] – [48] as follows:

> *"[44] The starting point is that the onus of proof lies upon the proponent of the will to satisfy the court that it is the last will of a "free and capable" testator: Barry v Butlin at 482; 1092; Fulton v Andrew [1875] LR 7 HL 448 at 461; Tyrrell v Painton [1894] P 151 at 157; Bailey v Bailey [1924] HCA 21 ; 34 CLR 558 at 570; Timbury v Coffee [1941] HCA 22 ; 66 CLR 277 at 283.*
>
> *To establish that a document is the last will, it must be proved that the testator knew and approved its contents at the time it was executed so that it can be said that the testator comprehended the effect of what he or she was doing: Barry v Butlin at 484; 1091; Cleare v Cleare (1869) LR 1 P & D 655 at 657–658; Atter v Atkinson (1869) LR 1 P & D 665 at 668 and 670; Nock v Austin [1918] HCA 73 ; 25 CLR 519 at 522, 528.*

*[45] 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": Waring v Waring [1848] EngR 693; (1848) 6 Moo PC 341 at 355; [1848] EngR 693; 13 ER 715 at 720; Sutton v Sadler [1857] EngR 738; (1857) 3 CB NS 87 at 97–98 ; [1857] EngR 738; 140 ER 671 at 675–676; Smith v Tebbitt (1867) LR 1 P & D 398 at 436; Bull v Fulton [1942] HCA 13 ; 66 CLR 295 at 343; Kantor v Vosahlo [2004] VSCA 235 at [49], [50].*

*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: Bull v Fulton at 299, 341; Worth v Clasohm [1952] HCA 67; 86 CLR 439 at 453.*

*[46] Upon proof of testamentary capacity and due execution there is also a presumption of knowledge and approval of the contents of the Will at the time of execution. That presumption may be displaced by any circumstance which creates a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator. In Thompson v Bella-Lewis [1996] QCA 27; [1997] 1 Qd R 429 McPherson JA (dissenting in the result) said (at 451) of the circumstances able to raise a suspicion concerning knowledge and approval that, except perhaps where the will is retained by someone who participated in its preparation or execution or who benefits under it, "a circumstance must, to be accounted 'suspicious', be related to the preparation or execution of the will, or its intrinsic terms, and not to events happening after the testator's death". See also McKinnon v Voigt [1998] 3 VR 543 at 562–563; Robertson v Smith [1998] 4 VR 165 at 173–174. Once the presumption is displaced, the proponent must prove affirmatively that the testator knew and approved of the contents of the document: Barry v Butlin at 484–485; 1091; Cleare v Cleare at 658; Tyrrell v Painton at 157, 159; Nock v Austin at 528.*

*[47] Evidence that the testator gave instructions for the will or that it was read over by or to the testator is said to be "the most satisfactory evidence" of actual knowledge of the contents of the will: Barry v Butlin at 484; 1091; Gregson v Taylor [1917] P 256 at 261; Re Fenwick [1972] VicRp 75; [1972] VR 646 at 652.*

*What is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case; for example in Wintle v Nye [1959] 1 WLR 284 the relevant circumstances were described (at 291) as being such as to impose "as heavy a burden as can be imagined". Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it.*

*In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction: Fulton v Andrew at 472; Tyrrell v Painton at 160. That requires that it be affirmatively established that the testator knew the contents of the will and appreciated the effect of what he or she was doing so that it can be said that the will contains the real intention and reflects the true will of the testator: Tyrrell v Painton at 157, 160; Nock v Austin at 523–524, 528; Fuller v Strum [2001] EWCA Civ 1879; [2002] 1 WLR 1097 at [33]; Dore v Billinghurst [2006] QCA 494 at [32], [42].*

*[48] In this context the statements prescribing "vigilance" and "careful scrutiny" and referring to the court being "affirmatively satisfied" as to testamentary capacity and knowledge and approval are not to be understood as requiring any more than the satisfaction of the conventional civil standard of proof: see Worth v Clasohm at 453. What such statements do is emphasise that the cogency of the evidence necessary to discharge that burden will depend on the circumstances of each case and in particular the source and nature of any doubt or suspicion in relation to either of these matters: Kantor v Vosahlo at [22], [58]; Dore v Billinghurst at [44]. They also recognise that deciding whether a document is indeed a person's last will is a serious matter, so any decision about whether the civil standard of proof is satisfied should be approached in accordance with Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336 or, now, s 140(2) of the Evidence Act 1995."*

9. Also relevant are the collation of authorities set out by Hallen AsJ (as His Honour then was) in *Petrovski v Nasev; Estate of Janakievska* [2011] NSWSC 1275 at [246] – [254].

10. Proof of knowledge and approval, if not by presumption, is usually sought to be achieved through evidence of the reading over of the Will, aloud, by a witness, or by the testator personally. There are circumstances in which reading over will not be enough, but reading over will be given some weight. The same end can be achieved through evidence of the testator volunteering knowledge of the terms of the Will and an understanding of it, or by evidence of the instructions given for the Will directly from the testator.

**Suspicious circumstances and knowledge and approval**

11. In many cases the circumstances giving rise to the shifting of the burden on knowledge and approval concern the beneficiary's involvement in the taking of instructions, or the preparation and execution of the Will.

12. The concept is best illustrated by factual examples. In *Nock v Austin* [1918] 25 CLR 520 at 525-526, Barton and Gavan Duffy JJ described the facts as follows:

> *"In the present case the will was drawn by one of the executors, Mr. A. J. Morgan, a solicitor. The instructions were taken by his co-executor, Mr Austin, from the lips of the testator, and brought to Mr. Morgan in his office. These two gentlemen participate largely in the residue. Not too much is to be made of the fact that two months earlier the testator had made a will in which the proportion allotted to these two gentlemen was larger. The testator left only a few pounds a week to his wife, and nothing to his son (of whose drinking habits he did not approve) until after her death. Then on he was to have £3 a week for his life, the balance of income going to Austin during the son's life, while after his death there was a trust for conversion and division in equal parts between two Queensland hospitals and the two executors."*

13. Probate of the Will was granted, after the evidence of testator's capacity and as to knowledge and approval was "minutely given", and "tested by most searching cross-examination".

14. More outrageous were the facts of *Wintle v Nye* [1959] 1 All ER 552 which were described as follows:

> *"In 1937 a lady of sixty-six years of age, unversed in business, whose property had been managed by her brother until his death in 1936, was being advised in the preparation of her will, by the respondent, her solicitor, who had for many years been her family solicitor and then had the management of her property. The value of her estate at that time was estimated at £38,000 after allowing for death duties. By the first draft of her will her executors were to be the respondent and a bank, and her residuary estate was to be given to charities. Between the first consultation on October 1936, and the execution of the will, there were some twenty interviews between the testatrix and the respondent at which her will was discussed. The will that she ultimately executed appointed the respondent to be her sole executor and gave the residuary estate to him, a clause being included requesting him to apply the same in accordance with a letter not yet written; there were other bequests, including an annuity of £300 to the testatrix' sister with a provision that on her death one-third of the funds set aside for the annuity was to be given to charities. The residuary gift, however, was of substantial value. The will was drawn by the respondent and executed in his office. The testatrix had no independent advice, but the respondent deposed that he had advised her to consult a separate solicitor and that she had declined to do so. The respondent deposed that the testatrix' reason for leaving him her residuary estate was that she did not want to leave her sister in control of more of her estate than a limited income, that the respondent could supply further funds for her sister's maintenance and that there was no one whom the testatrix preferred or could rely on, other than the respondent, to look after her sister. In 1939 the respondent advised the testatrix to execute a codicil, which he drew, revoking the gifts to charities on the death of the testatrix' sister; the respondent testified that he gave this advice as a consequence of reading of the depreciation in value of estates and of their possible inadequacy to meet legacies. The testatrix executed the codicil. The consequence of the revocation of the gifts to charities was that their amount fell into residue. The testatrix died in 1947 and the respondent proved the will and codicil. Her estate was assessed for death duty at £115,000.*

15. At first instance, the Will was admitted to Probate, following decision by a *jury*. However, the appeal was allowed, due to a misdirection.

16. Beneficiaries who are not legally trained are also often involved in the preparation of a will to a degree which gives rise to suspicious circumstances.

17. There will be some cases in which facts outside the immediate context of the taking of instructions, the preparation of the will and the execution of the will, may be relevant to suspicious circumstances, but generally there must be some connection, or otherwise additional facts which make those facts relevant.

**Circumstances and testamentary capacity**

18. In *Gray v Taylor; The Estate of the late Stanislaw Zajac* [2017] NSWSC 497, Slattery J, referring to the earlier High Court of Australia decision in *Bull v Fulton* (1942) 34 CLR 558, described the burden in relation to testamentary capacity in the following terms at [121]: "*The party propounding the instrument carries the onus to establish testamentary capacity. In the event that substantial doubt is cast on the testator's competency, the Court must find that the will is invalid unless it can be satisfied that the testator was of sound mind, memory and understanding at the time of execution.*" This is consistent with the framework described by Meagher JA in *Tobin v Ezekiel*.

19. The shifting onus is rarely pleaded for testamentary capacity in the same way as suspicious circumstances for knowledge and approval. Where the treating medical evidence is equivocal, and neither party or one party only leads retrospective medical evidence, the Court is in some instances left to decide the matter on the question of onus: see, for example, *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, rather than by preferring the evidence of one expert over that of another.

**The relationship between testamentary capacity and knowledge and approval**

20. In *Estate Stojic, deceased* [2017] NSWSC 168, Lindsay J notes the relationship between testamentary capacity and knowledge and approval at [84] – [86] as follows:

> *"[84] The concepts of "testamentary capacity" (classically explained by reference to Banks v Goodfellow (1870) LR 5 QB 549 at 565) and "knowledge and approval" are distinct. A testator might have the capacity (ability) to understand but not, in fact, understand a Will and its effect. Nevertheless, an*

*application of each concept to particular facts generally draws upon a common factual matrix because a court's determination must be made on the whole of the available evidence. That is so, particularly, where, as in these proceedings, the parties have not adduced expert medical evidence on the specific question of "capacity".*

*[85] In any event, the Court needs to be satisfied that the testator had the capacity to remember, to reflect and to reason and, generally, that he did so in a rational way: King v Hudson [2009] NSWSC 1013 at [50]- [51]; Dickman v Holley; Estate of Simpson [2013] NSWSC 18 at [159]; Estate of George Aeneas McDonald [2015] NSWSC 1610 at [53]- [70]. Decisions about "testamentary capacity" and "knowledge and approval" are necessarily fact-sensitive.*

*[86] The ultimate question, on the facts of the particular case, is whether the Court is satisfied that a particular testamentary instrument represents the last Will of a free and capable testator: Woodley-Page v Symons (1987) 217 ALR 25 at 35. The proponents of a Will bear the onus of proving that fact on the balance of probabilities, taking into account the nature of the case and the gravity of matters alleged: Evidence Act 1995 NSW, section 140; Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 at 361. The effect of an initial doubt about the validity of a Will is to require a vigilant examination of the whole of the evidence which the parties place before the Court; that examination having been made, a residual doubt is not enough to defeat a claim for probate unless it is felt by the Court to be substantial enough to preclude a belief that the document propounded is the last Will of a free and capable testator: Worth v Clasohm [1952] HCA 67; (1952) 86 CLR 439 at 452-453."*

21. In *Hoff v Atherton* [2004] EWCA Civ 1554, Chadwick LJ set out the following statement of principle at [64]:

*"Further, it may well be that where there is evidence of a failing mind - and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will - the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will – that is to say, that he did understand what he was doing and its effect - it may require evidence that the effect of the document*

*was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents – in the wider sense to which I have referred.*"

22. *Hoff v Atherton* was referred to by White J in *Estate of Stanley William Church [2012] NSWSC 1489* at [65] – [67] and by the NSW Court of Appeal in *Church v Mason* [2013] NSWCA 481 at [19], but it was not decided whether the proposition would be accepted in this jurisdiction. The principle was again set out by White J in *Estate of George Aeneas McDonald; Howard v Sydney Children's Hospital* [2015] NSWSC 1610, but again it was not necessary to decide because in that case there was no evidence of a failing mind.

23. In *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831, Robb J said at [471]:

*"In my view, where it is shown that a testator suffered from a mental disability at the time he or she made the will, and that the will was read by or read over to the testator before it was executed, so that in that sense the testator knew of the contents of the will, it will not necessarily follow from a finding that the testator had testamentary capacity that the will contains the real intention and reflects the true will of the testator. There may be cases where the testator's mental disability has had the consequence that, by one means or another, the process by which the will was prepared and executed has miscarried, so that, in whole or in part, the will does not reflect the true will of the testator."*

**Presumptions**

24. On the basis for the presumptions, in *Boyce v Bunce* [2015] NSWSC 1924, Lindsay J said that they were:

*[58] "Part of the machinery of judicial decision-making designed to address the essential question whether a particular document was the last will of a free and capable testator, probate presumptions are a means to that end, not an end in themselves.*

*[59] That they do not displace the necessity for the Court to focus on the essential question is confirmed by traditional language of probate judges:*

*(a) calling upon a court of probate to exercise vigilant care and circumspection in investigating a case, and not to grant probate without full and entire satisfaction that an instrument propounded as a will did express the real intentions of the deceased (Barry v Butlin [1838] EngR 1056; (1838) 2 Moo PC 480 at 485; [1838] EngR 1056; 12 ER 1089 at 1091); and*

*(b) speaking of a need to "satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator" (Tyrrell v Painton [1894] P 151)."*

25. A document which is not executed in accordance with the formalities prescribed in s 6 of the *Succession Act* 2006, but propounded under s 8 of the *Succession Act* 2006, would not, ordinarily, attract the benefits of the presumptions arising from due execution. As to the applicability of presumptions to informal testamentary documents, in *Re Estate of Wai Fun CHAN, Deceased* [2015] NSWSC 1107, Lindsay J said:

*"[18] By its very nature, an informal will (that is, a testamentary document not executed in accordance with section 6) does not, without fundamental reservations, attract a traditional "presumption" of capacity or knowledge and approval arising from "due execution".*

*[19] However, a reference to a "presumption" of this character in probate discourse is more empirical than prescriptive. It is an aid to the investigation of questions of fact, and to the determination of disputed questions of fact, in a world of imperfect knowledge. It might better be understood as an inference commonly drawn from established facts: Calverley v Green [1984] HCA 81; (1984) 155 CLR 242 at 264.*

*[20] So understood, the wisdom probate "presumptions" encapsulate may be able to be harnessed in dealing with informal wills.*

*[21] For example, if (as in the present proceedings) an informal will is rational on its face, and the process of its creation is equally, patently rational, common*

*experience would lead most observers to infer (in the absence of some other fact) that the will-maker was mentally competent and that he or she knew and approved of the contents of the will.*

*[22] The circumstance (fact) that the informal will was created at the instigation, or (as in this case) with the active involvement, of a substantial beneficiary would be likely, in common experience, to raise a suspicion about the status of the document which would, pending closer examination of all material facts, displace any inference of regularity that might otherwise commonly be drawn.*

*[23] The facts that are to be regarded as "material" in this context are those that bear upon a decision as to whether the particular document was the last will of a free and capable testator.*

*[24] In each case the essential question, in deciding whether a particular document should be admitted to probate in whole or part, is whether it was the last will of a free and capable testator: Woodley-Page v Symons (1987) 217 ALR 25 at 35"*

26. In the same way, there is a basis for considering the strength of the presumptions arising from due execution by reference to the gravity of the suspicious circumstances where they adhere. In *Simon v Byford & Ors* [2014] EWCA Civ 280 at [47] Lewison LJ said "*Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made…. Normally proof of instructions and reading over the will will suffice… it is a holistic exercise based on the evaluation of all of the evidence both factual and expert.*"

**A selection of recent cases**

27. The principles concerning testamentary capacity and knowledge and approval are not really novel, apart from developments concerning the relationship between them, and inferences which might be drawn, or not drawn, concerning an informal testamentary document, or where there are grave suspicious circumstances. Regardless, many cases concerning these matters which proceed to hearing depend on fine distinctions including inferences rather than direct evidence. A selection of recent cases illustrates the point.

**McNamara v Nagel [2017] NSWSC 91, Robb J, 17 February 2017**

28. *McNamara v Nagel* concerned the estate of the late Rona Winifred Nagel, who died on 23 June 2012. The plaintiff, Kylie Anne McNamara, the deceased's granddaughter, propounded a Will dated 8 June 2012 under which she was the sole beneficiary. The will provided that, if Kylie predeceased her grandmother, the estate would be given as to 40% to the deceased's daughter Debra, as to 25% to the deceased's daughter Gae, 10% to the deceased's son Robert, 15% to another granddaughter Jayne and 10% to a grandson Patrick.

29. The defendants, Robert and Gae, propounded the prior Will dated 11 June 1997 under which $10,000 was given to Patrick; the deceased directed that her home at Hurstville be sold and that the net proceeds of sale be divided as to 25% to Robert, 25% to Gae, 25% to Debra, 12.5% to Kylie and 12.5% to Jayne. The residue was to be divided equally between Kylie and Jayne.

30. The deceased's estate was modest, said in the inventory of property to be valued at $667,678, comprising a unit at Beverley Hills valued at $520,000 and $144,110.50 in bank accounts.

31. The Judgment sets out the evidence given by each of the lay witnesses, the expert medical evidence, and what can be ascertained from the hospital notes which were obtained on subpoena.

32. Instructions for the last Will were taken by a solicitor when the deceased was in hospital, and Kylie was present in the room but did not really intervene.

33. A careful analysis of Kylie's evidence, and the extent to which it was challenged in cross-examination, is set out at paragraphs [24]ff of the Judgment. Much of Kylie's evidence was directed towards conversations with the deceased during which no-one else was present. The Court was satisfied that Kylie's evidence was a product of her own recollection; it was reasonably reliable and to an extent it was not contradicted. The Court found that the relationship between Kylie and the deceased was exceptional for a grandparent/grandchild relationship, Kylie having lived with her grandparents for some years; and she having paid close attention to her grandmother in her later years. To some extent Kylie's evidence as to conversations with her grandmother regarding

her intentions, and her attitude towards her children, were corroborated by the evidence of the deceased's gardener Mrs Bray, however Mrs Bray was not made available for cross-examination (she apparently having disappeared), her evidence was admitted only pursuant to s 63 of the *Evidence Act* 1995.

34. The Court found that the deceased was the moving force behind the making of the new Will rather than Kylie, and the Court accepted the evidence of Kylie and of the solicitor that the deceased appeared to be alert and mentally competent at the time of giving instructions and execution of the Will.

35. The evidence of the solicitor that he read the Will to the deceased word-for-word was accepted.

36. The evidence of Debra was that when she visited the deceased in hospital, on or around the day of the making of the Will, the deceased was tired, and incoherent. Similar observations were given by other family members concerning their visits on days surrounding the making of the Will.

37. The hospital notes recorded that the deceased was suffering from sepsis following an operation to remove kidney stones and there was some evidence of confusion.

38. The defendants relied on the evidence of Associate Professor Rosenfeld, Senior Specialist in Geriatric Medicine at Prince of Wales Hospital. He expressed the opinion that the deceased suffered not only from delirium whilst in hospital, but also significant cognitive impairment and clouded consciousness and cognition.

39. Kylie relied on Dr Obeid, Director of Medical Services (Rehabilitation) at Hills Private Hospital. He expressed the opinion that the deceased suffered from delirium, but that there was no evidence of cognitive impairment.

40. His Honour found:
    a. circumstances existed to raise a doubt as to the existence of testamentary capacity (para 277).
    b. there were suspicious circumstances, however slight (para 280 – 283).

c. the manner in which the deceased gave her instructions and executed her will, with the primary term being a simple one, supported knowledge and approval (para 284 -6).

d. the evidence of Kylie and of the solicitor that the deceased was lucid and alert at those times, was accepted (para 287).

e. The Court should hesitate to find that a testator lacked capacity by reason of the presence of some brain disease that had not previously manifested in any cognitive dysfunction (para 306).

f. The last will should be admitted to Probate.

**Ryan v Dalton; Estate of Ryan [2017] NSWSC 1007**

41. Francis James Ryan died on 23 July 2014.

42. The Plaintiffs were the deceased's three adult children. They were entitled to share equally the residue of his estate under a Will dated 1 June 2011.

43. Under a later Will dated 24 January 2013, the residue of the deceased's estate was given to the three plaintiffs and to the deceased's de facto partner Deirdre Molloy in equal 25% shares.

44. The Defendant was the solicitor who prepared both Wills, and she was the named executor of the 2013 Will.

45. The solicitor's affidavit evidence is set out at paragraph [61] of his Honour's Judgment. She had been contacted by Dierdre on 14 January 2013 by telephone and asked to make an appointment for the deceased to see her to make a new Will. Instruction were taken in a café. There was a general discussion about the Second World War. The deceased gave instructions that he wished to give his estate to his three children and to Deirdre in equal shares and for the solicitor to be the executor. The solicitor drafted the Will, and sent it to Deirdre on the deceased's instructions. Deirdre made an appointment for the solicitor to see the deceased on 24 January 2013. At that conference, the solicitor read out the Will work by word. She observed the deceased to nod. Detailed instructions were also given about the deceased's assets.

46. The Defendant also relied on a letter from the deceased's general practitioner which said that he was unable to determine capacity without a formal assessment, but that the deceased may have retained capacity in his view.

47. The Plaintiffs relied on evidence which included:
    a. May 2010 discharge summary from Dudley Hospital in Orange after a knee replacement, which recorded mild post-op confusion, mild cognitive impairment, and a note that Deirdre was concerned about his short term memory.
    b. July 2010 geriatrician's report, recording cognitive changes, predominantly affecting short term memory.
    c. Lay observations of the deceased's forgetfulness, and later aggression, agitation, confusion and disorientation during the course of 2011 and 2012.
    d. Notes from the hostel in which the deceased lived from September 2011 which recorded confusion on many days in January 2013.
    e. Expert medical evidence of Dr Chanaka Wijeratne, a consultant psychiatrist and Associate Professor (adjunct) in the School of Medicine Sydney at University of Notre Dame.

48. Dr Wijeratne said that the material indicated that the deceased had increasing cognitive impairment, but that what was important was the executive function, said to be defined as "a person's ability to think abstractly, to weigh pros and cons of particular arguments, and to come to a judgment". Dr Wijeratne said that it was very unlikely that the deceased retained testamentary capacity at the relevant time.

49. His Honour found that:
    a. The will appeared to be rational on its face.
    b. The evidence gave rise to a doubt about testamentary capacity.
    c. The evidence of the solicitor did not dispel that doubt (paragraph 98).

50. An order was made that there be a grant of Probate of the 2011 Will.

51. At paragraphs [104] – [107] his Honour sets out observations regarding the obligations of solicitors when taking instructions for a Will generally, as follows:

*[104]* "*The Court notes that the NSW Law Society's 2009 publication was reissued in 2016 as When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors.*

*[105] Assistance in relation to making a will remains one of the most likely reasons for Australians to seek the assistance of a solicitor. The demographic trend to which I have referred suggests that a good understanding of the issues surrounding mental capacity is an essential skill for any solicitor who holds himself or herself out as competent to provide legal services to natural persons. It is to be hoped that the recommendations of the two recent reports, will be acted upon as quickly as possible.*

*[106] Questions of testamentary capacity are necessarily fact sensitive. No rule or procedure will cover every case to avoid the possibility of litigation. Nevertheless, the effort involved in paying attention to questions of capacity at the time instructions for a will are taken and the will is executed (including, where necessary, obtaining an assessment of the client where it is thought one is called for) pales into insignificance with the expense, delay and anxiety caused by litigation after the testator's death. Bearing that in mind, and without wishing in any way to derogate from, for example, the desirability of all solicitors being familiar with the guidelines, the recent experience of the Court suggests that proposing some basic rules of thumb (which, as such, are necessarily arbitrary) may be of assistance.*

*[107] It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:*

*(1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.*

*(2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.*

*(3) In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.*

*(4) In case of anyone:*

*(a) over 70;*

*(b) being cared for by someone;*

*(c) who resides in a nursing home or similar facility; or*

*(d) about whom for any other reason the solicitor might have concern about capacity,*

*the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.*

*(5) Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.*

*[108] I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely."*

52. The above restates the principles set out by Santow J in *Pates v Craig; The Estate of Cole (1995 unreported)* which are extracted in *Mason & Handler's Succession Law and Practice NSW, Lexisnexis Butterworths* at [10,019], and referred to by Hallen J in *Romascu v Manolache* [2011] NSWSC 1362 at [169], and by Slattery J in *Gray v Taylor & Anor; The Estate of the late Stanlislaw Zajac* [2017] NSWSC 497.

**Gray v Taylor & Anor; The Estate of the late Stanislaw Zajac [2017] NSWSC 497**

53. The late Stanislaw Zajac died on 17 October 2013. He had no spouse and no children. Under his last Will dated 3 June 2011 the deceased appointed his friends Mr Godyn and Ms Taylor as executors, and gave the residue of his estate to be divided between them, together with his brother Kazmierz, and his sister Teresa in equal shares.

54. Under his second last Will dated 17 May 2006, the deceased named his then solicitor Nigel Duncan as his executor (he later renounced probate), he gave his superannuation and life insurance to his niece Agata, he gave his sister Maria a legacy of $25,000, his nephew Wayne $25,000, and the residue of his estate to Kim Gray, being the daughter of his sister Maria.

55. The deceased estate was estimated to have a value of $854,000, comprising his home valued at $700,000, money in a bank account of $85,000 and superannuation of $69,000.

56. Ms Gray's evidence was that she had a close relationship with the deceased when she was young, but that since 1999 she saw him only on special occasions.

57. The deceased knew Mr Godyn from the 1980's. They attended Illawarra Polish Club events, and they shared meals together. Ms Taylor first met the deceased in 2010. From 2006 to 2010 she owned a delicatessen on the same street as the deceased. He visited daily to buy groceries, and they struck up a friendship.

58. In 2010, on a trip to Poland, the deceased was assaulted, and suffered a brain injury. It was Ms Gray's evidence that the deceased's cognitive function, overall health and ability to care for himself deteriorated after the assault. This evidence was accepted.

59. In April 2011 the deceased was admitted permanently to Coledale Hospital. Mr Godyn gave evidence that he did not ever notice the deceased in a state of confusion when he was in Coledale Hospital. This evidence was not accepted.

60. On 24 May 2011 Mr Godyn signed the deceased out of the hospital, and took him to see a solicitor, whom he had not seen before. The solicitor at the time had been admitted for about nine months. The purpose of the conference was said to be for the making of a power of attorney and appointment of enduring guardianship. However during the conference the solicitor's evidence was that the deceased asked to make a new Will, and volunteered the terms. This was accepted, as was the solicitor's evidence as to the deceased volunteering information about his family in Poland, and not wanting to benefit his sister Maria. He did not mention Maria's daughter Ms Gray who was a beneficiary under the prior Will. He also did not give, and was not asked about, details of his estate. The solicitor was not told of the deceased's head injury, nor of the fact that he was residing in Coledale Hospital. The solicitor was not told that

a social worker had considered an application to the Guardianship Tribunal the previous week; an application was made on 26 May 2011, and a hearing was later held on 29 July 2011 following which Ms Gray was appointed as the deceased's guardian and financial manager.

61. The solicitor's evidence was that the deceased presented as alert and mentally competent during the conference and that he followed what was explained to him about the power of attorney, the appointment of enduring guardian, and the will. At the deceased's request, Mr Godyn sat in on the conference. Although the solicitor invited Mr Godyn to wait outside, the deceased insisted that he remain.

62. A will was prepared, and executed on 3 June 2011. The hospital notes did not disclose confusion or unusual behaviour on the deceased's part during the days surrounding the making and execution of the Will.

63. His Honour found that:

    a. Doubts existed as to the deceased's testamentary capacity at the time of execution of the 2011 Will.

    b. The scheme of the 2011 Will was uncomplicated. The gifts to Mr Godyn, to Ms Taylor, and to the deceased's siblings, were rational. The exclusion of Ms Gray was rational, she having had less contact with the deceased than in previous years, and the exclusion of Maria was rational, she having fallen out of favour.

    c. The hospital records, which provided a continuous stream of information, showed an overall stabilisation in the deceased's condition from about May 2011, and that he was usually orientated, compliant, alert and cooperative.

    d. The testing of the neuropsychologist Ms Williams was variable. Ms Williams concluded that he could not care for himself at home, but she was only assessing him for his care needs.

    e. The solicitor did not ask the deceased to explain the Will back to her. But the deceased gave direct instructions for it, and he spontaneously gave information about his family, his ethnic Polish origins, the Polish community in Australia and

his friends here. And he readily brought up his sister Maria's name when speaking of why he did not wish to benefit her.

f. Although the solicitor did not ask the deceased about his estate, he was able to give a reasonably accurate account of his property either side of the Will. And his estate was not complex.

64. The 2011 will was admitted to Probate.

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