

DISPUTES AS TO THE VALIDITY OF A WILL IN NSW – TESTAMENTARY CAPACITY AND KNOWLEDGE AND APPROVAL OF THE CONTENTS OF A WILL

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Disputes in relation to the validity of a will may arise because there are issues as to:

1. the due execution of the will;
2. whether the deceased had testamentary capacity;
3. whether the deceased knew and approved of the terms of the will;
4. whether undue influence was placed on the deceased to sign the will;
5. whether fraud has occurred eg. the signature of the deceased is a forgery.

These issues usually arise out of a set of suspicious circumstances in relation to the preparation or execution of a will, or its intrinsic terms. The focus of this paper is on the two grounds that are most commonly pleaded being lack of testamentary capacity and knowledge and approval. In relation to forgery these cases are usually determined with the assistance of handwriting experts. A claim of undue influence requires proof of coercion of a testator which is generally very difficult to prove.

Presumption of testamentary capacity

If the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator had testamentary capacity to execute the will. That presumption may be displaced by circumstances which raise a doubt as to the existence of testamentary capacity (**Tobin v Ezekiel** 2012 NSWCA 285). Examples include that the deceased's medical records refer to issues with their mental state such as dementia, or persons involved with the deceased observed that he or she was exhibiting issues with their mental state at about the time the subject will was executed.

Those circumstances shift the evidential burden to the party propounding the will to show that the testator was of sound and disposing mind. The relevant test of capacity is set out in **Banks v Goodfellow** (1870) LR 5 QB549. The elements are essentially as follows:

1. The testator understood the nature of the act and its effects;
2. The testator understood the extent of the property of which he or she is disposing;
3. The testator should have been able to comprehend and appreciate the claims to which he or she ought to have given effect;
4. With a view to point 3 that no disorder of the mind or insane delusion shall have prevented the exercise of his natural faculties.

The above test is not set, though, at such a high level that a testator cannot have some diminution in their prior mental capacity (see **Timbury v Coffee** (1941) 66 CLR 277 DixonJ)

Where testamentary capacity is in issue there should be a full examination of the medical records of the deceased, consideration of evidence from persons who were involved with the deceased as to their observations of the deceased's mental state, and possibly expert medical evidence.

Presumption of knowledge and approval

Upon proof of testamentary capacity and due execution there is also a presumption that the testator had 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.

Examples of these circumstances are where a beneficiary was instrumental in the preparation of the will, the testator did not ever read the will or have it read to him/her before signing, the testator was not given adequate time to consider the terms of the will, the testator did not receive independent advice, the will was complex and the testator was unsophisticated and unable to comprehend its terms, the terms of the will involve a major departure from prior wills with parties who would naturally expect to have a claim on the deceased's estate being excluded, or the will was written in a language that the testator could not read and there was no translation.

The onus then shifts on to the party propounding the will to prove affirmatively that the testator knew and approved the terms of the will and its effect.

Dispelling the suspicion in regards to knowledge and approval

Evidence that the testator gave instructions for the will, that it was read over by or to the testator who then indicated his or her approval of its terms, is said to be the most satisfactory evidence of actual knowledge of the contents of the will. What evidence is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case. Particular vigilance is required when a person who played a part in the preparation of the will takes a substantial benefit under it.

Where knowledge and approval is in issue the usual starting point is the file of the solicitor who prepared the will, evidence from that solicitor and attesting witnesses, and evidence from other persons with whom the deceased discussed his/her testamentary intentions before and after executing the subject will.

The following Supreme Court of NSW case studies, in some of which our firm was involved, are illustrative of the complexity of applying the above legal principles.

Case study 1- Croft v Sanders [2019] NSWCA 303 (12 December 2019)- a case of partial diminution in mental capacity and episodic delusions

Background

Mr Croft died on 4 January 2016 aged 85. He was survived by his six daughters, his wife having pre-deceased him.

His estate was worth about \$3.2M dollars and included a half share in his home at Beecroft and an apartment at North Ryde, cash, a half share in the shares of the company that owned his and his late wife's business, and shares in another business. His late wife owned the other half shares in these assets.

The deceased executed a will on 11 October 2013 leaving \$40,000 to each of his 5 daughters and the residue of his estate worth approximately \$3M dollars to his other daughter Anna.

In an earlier will made 26 May 2008 Mr Croft had left substantial shares of his estate to each of his daughters.

After Mr Croft's death, two of his daughters Leah and Esther, alleged that their father lacked testamentary capacity when he made the 2013 will. The lack of testamentary capacity was alleged to have arisen from dementia, delusions and hallucinations, that prevented him from weighing the respective claims of all of his children to his estate.

Breakdown of relationship between Mr Croft and his wife and daughter Leah

In the year that Mr Croft executed his last will there was a major change in his matrimonial and financial circumstances, in that in January 2013 his wife through solicitors declared an end to their marriage and sought a division of their matrimonial assets.

On 17 January 2013 Mr Croft through his solicitors wrote to his daughter Leah complaining that she had taken his wife to Leah's home without consulting him and that she was preventing him from contacting his wife.

In May 2013 Mrs Croft severed the joint tenancies on the Beecroft and Ryde properties that were in her and her husband's joint names. She then executed a will in that month that excluded Anna from any share of her half interest in the shares in the company that owned her and her husband's business. When Mr Croft's wife predeceased him his wife's estate was worth approximately \$1.9 M.

Mr Croft's instructions to his solicitor, Mr Miller as to the 2013 will

In June 2013 Mr Croft instructed his solicitor Mr Miller that he wished to review his will and requested a copy of his 2008 will. They then had some telephone discussions about the progress of his wife's claims before meeting on 2 October 2013.

It was Mr Miller's evidence that at this meeting Mr Croft explained with some clarity and detail the position of his family law proceedings with his wife, the nature of his assets and the change in his asset position, that he no longer intended to be making any provision for his wife, that he believed that apart from Anna his other daughters were supporting his wife in the proceedings, his concern that Anna would not receive any significant benefit from his wife's will, that as Anna had taken over the management of his and his wife's business in 2009 that he wanted her to receive his shares in the business, that Anna and her husband had provided him with a great deal of support over an extended period especially since the family court proceedings were commenced, that he thought his wife would make provision for his other daughters in her will, that he intended to leave each of his other five daughters \$40,000 as he was concerned that they would make a claim on his estate, the balance of his estate was to be received by Anna and other detailed instructions.

The evidence of Mr Miller was that he did not have any reason to doubt Mr Croft's testamentary capacity as a result of the instructions provided in this meeting.

Medical evidence

The hallucinations and delusions set out in the evidence from the lay witnesses and in the deceased's clinical notes included that Mr Croft had said at different times that:

- i. his wife was running a brothel and that some of his daughters were involved in this brothel or were prostitutes;
- ii. that prostitutes were being sent to his home;
- iii. Leah had kidnapped his wife and Leah was possessed by demons;
- iv. that recordings of his wife's voice had been put in his house by some of his daughters;
- v. that he saw his daughter Ruth running down a fence;
- vi. that he had seen a black panther and child size owls near his house;
- vii. that there were prostitutes who came down the street ringing bells in the middle of the night and that they had knocked on his door;
- viii. that his bank had given him \$100,000 as he or his father had been good customers;

- ix. that people were moving things at his house when he was not there;
- x. that four of his daughters were scheming against him.

The making by Mr Croft of many of the above statements was confirmed in the records of the medical practice where Mr Croft attended. However, the medical evidence did not establish whether these hallucinations and delusions were episodic.

Mr Croft's treating GP Dr Tracy was not called to give evidence but her records confirmed that Mr Croft was experiencing many of the hallucinations and delusions as set out in the lay witnesses' evidence. Dr Tracy's notes from February 2013 indicated that she believed that these delusions were being caused by the steroid medication he was taking on a daily basis for his lung problems. These problems arose from his exposure to hundreds of racing pigeons that he kept at his home. A mini-mental test carried out on Mr Croft in March 2013 did not indicate any significant cognitive impairment as he scored 26 out of 30. A subsequent mini-mental test showed a similar result.

In April 2013 Dr Tracy referred Mr Croft to a psychiatrist, Dr Singh who reported that Mr Croft did not suffer any significant underlying cognitive impairment other than the hallucinations and delusions. He recommended a reduction in his steroid medication if possible.

By July 2013 Dr Tracy was reporting that Mr Croft was showing some improvement after his steroid dose was reduced.

In the month after Mr Croft executed his October 2013 will Dr Tracy was again concerned about his mental state as he was disorientated as to the day, confused about his medications, and accusing his family of running a brothel and of changing the locks on his home. Dr Tracy referred him to see a psychiatrist Dr Howpage in mid-November 2013 to whom he claimed that his wife had amassed millions of dollars through illegal activities and that she had sent people to watch him. Dr Howpage diagnosed a late onset schizophrenia type illness.

The medical experts who were relied upon in these proceedings by the parties (neither of whom had actually treated Mr Croft) were in agreement that Mr Croft had suffered a dementing illness that may have been associated with vascular brain disease and that other forms of dementia may have been present. They also agreed that he suffered from psychotic symptoms and there was a variability in his cognitive ability at various times. They agreed that at the time the deceased executed his will he would have understood the nature of the act of making a will and its effects. They also agreed he would have understood the extent of the property of which he was disposing. Where they disagreed was whether Mr Croft was able to comprehend and appreciate the claims on his testamentary bounty and whether his mental condition would have prevented the exercise of his natural faculties in this exercise.

Decision of Lindsay J

Justice Lindsay determined that the medical evidence was inconclusive. However, he satisfied himself as to the deceased's testamentary capacity by relying on the form and apparent rationality of the 2013 will from the deceased's perspective, together with the lay evidence of those persons who deposed to regular, rational, and measured dealings with Mr Croft. He was satisfied that there were factual explanations sufficient to counterbalance concerns about Mr Croft's hallucinations and occasional wild talk.

Appeal of this decision is unsuccessful

On appeal it was argued by Mr Croft's two daughters that the primary judge had given inadequate weight to the evidence of the deceased's hallucinations and delusions and underlying cognitive impairment. It was further argued that in focusing on the rationality of the 2013 will from the deceased's perspective the primary judge had diverted himself from the question of capacity.

In the Court of Appeal it was determined that:

1. It was not an error for the primary judge to treat the apparent rationality of the 2013 will from the deceased's perspective as being relevant to the primary judge's assessment of capacity and that the primary judge did not, as alleged equate rationality of the will with capacity;

2. The lay evidence confirmed that the deceased's underlying condition did not deprive him of capacity. Further, the hallucinatory or delusionary beliefs about his daughters were more probably than not episodic rather than continuous, and on the balance of probabilities the deceased did not labour under the delusions and hallucinations when he gave instructions for his will.
3. Further the contemporaneous medical evidence was that the deceased had mild underlying cognitive impairment. The lay evidence established that he was able to weigh the claims on his testamentary bounty.

This case is illustrative of the complexity of establishing the lack of testamentary capacity in circumstances where a testator's mental state is only partially affected or diminished by their condition.

Case study 2: Estate of George McDonald; Howard v The Sydney Children's Hospital Network & others [2015] NSWSC 1610 (30 October 2015)-

Background facts

In this case it was agreed by the parties that the deceased, Mr McDonald had testamentary capacity. The central issue was whether the deceased knew and approved of the terms of this will ie the document expressed his real intention.

Mr McDonald died on 14 November 2013 at the age of 93 leaving an estate worth \$2M dollars (comprised by his home) to his adjoining neighbour Mrs Howard. Mr McDonald was unmarried, had no children and his only sibling had died some years earlier.

Mr McDonald lived by himself in Greenwich and was a friend of Mrs Howard for a 21 year period from the time Mrs Howard's family moved into a home at the rear of his home. Mr McDonald was a daily visitor to Mrs Howard's home chatting with her as she prepared the evening meal, playing with her children, taking the children on outings to the zoo and looking after the Howard family's pets when they went away. As Mr McDonald got older Mrs Howard assisted him with shopping, washing, trips to the doctor, visiting him at hospital, and some chores.

1999 will- majority of estate to charity

Mr McDonald had the same solicitor Mr Russell for about 40 years. In 1999 Mr McDonald at the age of 79 executed a will prepared by Mr Russell in which he left his estate in equal shares to the New Children's Hospital Westmead and to World Vision Australia. Mrs Howard and her husband were left a trampoline. A general power of attorney was also prepared appointing Mr Howard (who was a dentist) as his attorney. The power of attorney was not registered and Mr Howard was not made aware of this document.

Proposal to transfer Mr McDonald's home to the Howards- mid 2000

In June 2000 Mr Howard claimed that Mr McDonald (who was then 80 years old) came to him and said that he wanted to leave his house to Mrs Howard and her family. In response Mr Howard proposed to Mr McDonald that he could transfer his house, they provide him with a life estate, and they then pay him at least \$10,000 a year in income up until his death. Mr Howard suggested that Mr Macdonald get legal advice on this proposal.

This proposal was then put in writing from Mr and Mrs Howard's solicitors to Mr McDonald's solicitor, Mr Russell and included added terms that the obligation to pay the income was to be secured by a mortgage over Mr Howard's farm property and that the Howards' would make a gift of \$20,000 to the New Children's Hospital after Mr McDonald's death.

Mr Russell's evidence was that Mr McDonald told him that "Mrs Howard had a dream that I gave the house to her. She told me about the dream and has suggested that Mr and Mrs Howard own my house and that I remain living in the house and they pay me some money every year".

After Mr McDonald received legal advice from Mr Russell, he did not accept Mr and Mrs Howard's proposal.

Over the next ten years Mr McDonald continued to have a good relationship with Mrs Howard and she took him to medical appointments, visited him in hospital, assisted with laundry, and other assistance. Mr McDonald's health began to deteriorate after heart surgery in 2009 and from 2011 he did not leave his house without Mrs Howard's assistance.

2011 codicil to 1999 will- majority of estate to charity

In November 2011 Mr McDonald at the age of 91 made a codicil with his solicitor, Mr Russell who visited him at his home. Mr Russell noted that although Mr McDonald was having problems with his legs there was no change in his mental capacity. The codicil involved minor changes in relation to the gifts of his personality and the bulk of his estate was to be given to World Vision and the Children's Hospital.

In the last 2 years of Mr McDonald's life his health deteriorated and he had difficulty visiting the Howard family and also became incontinent. Mrs Howard continued to assist Mr McDonald and visited him at his home.

June 2013 will- \$25,000 to charities and balance to Mrs Howard

Mr Howard claimed that in May 2013 Mr McDonald told him that he wanted to leave his estate to Mrs Howard and that he was agreeable for Mr Howard to organise the preparation of the will. Mr McDonald also indicated that he wanted to leave \$5,000 to his church and \$20,000 to the Children's Hospital at Westmead.

Mr Howard did not contact Mr McDonald's solicitor or any other solicitor to arrange for them to consult with Mr McDonald and advise him as to preparing this will. Mr Howard's evidence was that he prepared the will himself after doing some research, as he thought it was not a difficult task. He did not ask Mr McDonald if he wanted him to be the executor because he had assumed that he was the executor in Mr McDonald's previous wills.

The will drafted by Mr Howard appointed Mr Howard as executor, left Mr McDonald's entire estate to Mrs Howard, and included a non-binding request that Mrs Howard donate \$20,000 to the Children's Hospital at Westmead and \$5,000 to the Presbyterian Church at Greenwich.

Mr Howard then arranged for his farm manager Mr Stone who was in Sydney on 7 June 2013 to go with him and Mr Howard's son, to Mr McDonald's home to witness the will.

Mr Howard took two copies of the will and placed one on the table for Mr McDonald to read. Mr Howard then slowly read the terms of the will to Mr McDonald in the presence of the two witnesses and said to him "Are you happy with that?". Mr McDonald replied "Yes" and nodded his approval. Mr McDonald then signed the two copies of the will and the witnesses signed the documents. Mr McDonald then stated that he did not want Mrs Howard to know anything about this will until after he had died. Mr Howard then retained the two executed copies of the will.

Mr McDonald meets with his solicitor shortly before his death

Within a few months of executing this will Mr McDonald was hospitalised in October 2013 and as his condition deteriorated his solicitor Mr Russell saw him on 6 November 2013 to discuss his affairs. At this meeting he was instructed to appoint Mrs Howard as his guardian and this form was completed. There was no discussion about Mr McDonald's 1999 will, the 2011 codicil, or any changes to his will.

Mr McDonald died on 14 November 2013. After Mr McDonald's death his solicitor Mr Russell was very surprised to be notified by Mr Howard of the existence of the June 2013 will.

Mr Howard sought probate of the June 2013 will and joined World Vision Australia, the Sydney Children's Hospital Network (Randwick and Westmead), the Presbyterian Church of Australia, and Mrs Howard as defendants to the proceedings.

Decision of White J

In dealing with the suspicious circumstances Justice White determined that:

1. Mr McDonald's decision to leave his estate to Mrs Howard was not suspicious. The closeness of his relationship with Mrs Howard and the absence of any relatives made this perfectly rational.
2. Mr McDonald's decision to leave his estate to Mrs Howard rather than to a number of charities as he had done in prior wills was not suspicious. A change of mind was not of itself suspicious, as every passing year strengthened the friendship between Mr McDonald and Mrs Howard.

In relation to the preparation of the will White J accepted that Mr McDonald did tell Mr Howard that he wanted to leave his estate to Mrs Howard.

In relation to Mr McDonald's knowledge and approval of the terms of the will prepared by Mr Howard White J noted that a copy of the will was put down on the table for him to read as Mr Howard read out its terms from another copy of the will. Mr McDonald then signified his consent to its provisions orally, by gesture, as well as by signing it. In his judgement he stated:

"The strength of the inference that a testator knows and approves of the contents of the will where it has been read by or read over to him depends on the complexity of the will. In the present case it must have been clear to Mr McDonald that the will left his estate to Mrs Howard, subject to the provision made for the Greenwich Presbyterian Church and the Westmead Children's Hospital."

Knowledge and approval does not require proof that the testator actually considered claims on their bounty

Justice White also explored the question as to whether it was necessary in order to show that Mr McDonald knew and approved of the contents of the will that he had in fact weighed the claims of the charities on his testamentary bounty to which he had given effect in previous wills.

White J noted that although Mr McDonald had indicated to Mr Howard that he wanted to leave some money to the Children's Hospital he was not provided with his earlier wills that detailed his previous testamentary disposition. He was also not given the will prepared by Mr Howard to read and consider before the meeting that took place to sign the will. Nor was Mr McDonald provided with a copy of the will he signed with Mr Howard.

In dealing with this issue Justice White stated "I am satisfied that Mr McDonald understood that subject to gifts to be made to the two charities, all of his estate would be given to Mrs Howard. I am not satisfied that in deciding that he should leave the bulk of his estate to Mrs Howard he considered his prior wills, or that he weighed the claims of the Children's Hospital and World Vision, for which he had previously made generous provision...But I do not think it necessary that he should have done so in order to have made a valid will."

So where there is no evidence of a failing mind the test of knowledge and approval does not require proof that the testator actually considered claims on their bounty or that they actually considered their prior testamentary dispositions.

Probate granted to Mr Howard

Justice White granted probate to Mr Howard of the June 2013 will and rectified the will to convert the non-binding requests for Mrs Howard to donate monies to the stated charities, into monetary legacies.

Costs of the proceedings

In relation to the costs of the proceedings Justice White stated that "the litigation is the fault of the testator, and I might add of Mr Howard". He then ordered that the costs of World Vision and the Sydney Children's Hospital Network be paid out of the estate even though they were unsuccessful.

Case study 3: *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831- knowledge and approval of some terms of a will but not others, resulting in some terms being severed but the grant of probate still being made.

Background facts

Lady Macarthur Onslow died at the age of 90 on 10 May 2013 leaving a very large estate in the sum of \$47M dollars with an additional \$250M in a trust which she controlled. She was survived by her son and daughter.

In these proceedings the deceased daughter contested the probate of the deceased's last will executed in October 2014 raising issue as to her mother's testamentary capacity, and lack of knowledge and approval of the terms of that will.

Earlier 1988 will – equal shares to son and daughter

At the age of 65 the deceased executed a will where she essentially divided her estate equally between her two children apart from leaving an apartment to her daughter and a legacy to her housekeeper. This included an equal division of her shares in the company that controlled the trust where about 80% of her wealth was held.

Cognitive decline of the deceased 1988-2004

Between 1988 and October 2004 the deceased's mental capacity declined significantly with the deceased being diagnosed with Alzheimer's disease in 2002. Her symptoms included memory loss, an inability to continue doing her bookkeeping and accounts, an inability to locate everyday items in her house, driving her car in a dangerous manner, a lack of care about her appearance, irritability, failure to complete tasks, an inability to pay cleaners and other staff, misplaced distrust of her daughter, violent conduct towards her daughter, and general irrational behaviour.

The 2004 will – son controls discretionary trust

On 15 October 2004 the deceased then aged 82 years made a will which involved a major departure from the 1988 will in that it effectively gave control of a family discretionary trust which held about 80% of her wealth to her son. This was done in the will by gifting her son more shares in the trustee company than her daughter.

The deceased's son relied on evidence from both the deceased's solicitor and from her treating neurologist to establish that she had testamentary capacity. The deceased's neurologist had seen the deceased a few months before and after she executed her last will and was of the opinion that she had testamentary capacity. The deceased's daughter relied on evidence of her herself, other lay witnesses, and an expert psychiatrist.

Decision of Justice Robb

Justice Robb determined that notwithstanding that the deceased suffered from cognitive impairment she still had testamentary capacity. This then left the issue of knowledge and approval.

In relation to the presumption in favour of knowledge and approval he determined that this presumption was displaced by the evidence of the deceased's dementia, the complexity of her estate structure, the protracted manner in which the instructions were taken, and the manner in which the draft will was put before her for a brief consideration when it was about to be executed, all of which raised sufficient suspicion.

Robb J noted that the deceased's instructions to her solicitor were that her will involve an equal distribution to her two children. She had also made this statement on prior occasions including to her neurologist. However, the 2004 will did not reflect these instructions. Accordingly he held that although she had testamentary capacity she did not appreciate the effect of the clauses of the will which gave her son control of the discretionary trust. In relation to the balance of the terms of the 2004 will she did have knowledge and approval of these terms.

Robb J then omitted or severed those clauses that gave her son control of the trust from the grant of probate of the 2004 will.

This case is of interest as it sets out a situation where a person may have testamentary capacity but not be able through some cognitive impairment to approve the contents or effect of all or part of a will. Further the court may sever parts of a will permitting the remainder to be admitted to probate.

Case study 4 – Tobin -v- Ezekiel [2012 NSWCA] 285 (13 September 2012)

This is a leading Court of Appeal decision dealing with the burden of proof in cases involving testamentary capacity and knowledge and approval issues. The legal principles in this case have been broadly summarised at the beginning of this paper.

Mrs Ezekiel died in 2005 and was survived by her two sons and two daughters. The principal asset of her estate was her home at Bondi worth about \$1.8M. Mrs Ezekiel's last will was executed in 1997 when she was 73 years of age and living independently with her husband in their home.

In the 1997 will she left her home to her husband and in the event that he predeceased her she then left her home to her two sons as tenants in common. Her husband executed a will on the same terms.

Mrs Ezekiel's son Albert was unmarried and had been living in his parent's home in Bondi since it was purchased in 1965. He was 64 years old at the time of this judgement.

Mrs Ezekiel's two daughters sought to propound a 1977 will in which Mrs Ezekiel left her estate in equal shares to her four children in the event that her husband predeceased her. In this regard they pleaded that Mrs Ezekiel lacked testamentary capacity when she executed the 1997 will, she did not know and approve of the terms of the 1997 will, and undue influence had been placed on her by her son Albert to sign the 1997 will. In the alternative they sought an order for provision from their mother's estate pursuant to the Family Provision Act.

The medical records of Mrs Ezekiel and the evidence of her treating general practitioner did not indicate that Mrs Ezekiel had any cognitive issues at the time she executed the 1997 will.

In relation to the knowledge and approval issue the suspicious circumstances raised by Mrs Ezekiel's daughters were that Mrs Ezekiel's sons had made the arrangements for their parents to see Mr Woolley a solicitor who they had not previously used to prepare their wills, the sons made arrangements for their parents to be transported to Mr Woolley's office, accompanied their parents to Mr Woolley's office, that the wills prepared after this meeting involved a substantial change to Mrs Ezekiel's long-standing intentions so as to exclude her two daughters for whom she would have been expected to make provision, and that her sons were involved in procuring a will that substantially benefited them. Further suspicion arose from certain false statements made by Mrs Ezekiel's sons in their affidavit evidence about these arrangements.

What occurred at this initial meeting with Mr Woolley was not entirely clear as he was not alive at the time of this hearing and his file was not available as his files had been destroyed. Mrs Ezekiel's sons denied being present during this meeting when Mr Woolley took instructions from their parents.

The sequence of events after this initial meeting was that Mr Woolley posted draft wills to Mr and Mrs Ezekiel and then met with them at their home about 3 weeks later. Mrs Ezekiel made arrangements for her friend Mr Musrie to come to her house to witness the execution of these wills with Mr Woolley. Mr Musrie gave evidence that Mr Woolley read out the wills to Mrs Ezekiel and her husband, explained the wills to them, and then had Mr and Mrs Ezekiel read their wills. Mr Woolley then asked "is that okay?" to which they both responded "yes". They then proceeded to sign the wills. Mrs Ezekiel's sons were not present during this meeting with Mr Woolley.

Mrs Ezekiel subsequently stated to her Rabbi in about 1999 or 2000 in respect of the execution of this will that "I have taken care of the girls and now I have to take care of Albert. He has no place to live".

Justice Brereton determined that as the will was duly executed and not irrational on its face prima facie testamentary capacity was established. Further that as the medical and lay evidence did not suggest Mrs Ezekiel had any cognitive defect there was insufficient doubt in respect of her testamentary capacity for the burden of proof to be shifted to Mrs Ezekiel's sons. Further, Mrs Ezekiel's daughters had not established on the balance of probabilities that Mrs Ezekiel lacked testamentary capacity.

In relation to the question of knowledge and approval Brereton J did not consider that the change in Mrs Ezekiel's testamentary intentions in 1997 was suspicious and that she had provided some reasons for this change in the statements she made to her Rabbi. The sourcing of a solicitor and the conveying of Mrs Ezekiel to this solicitor's office did not of itself establish that Mrs Ezekiel's sons had given instructions to the solicitor in respect of their mother's will. Further the sons were not present when the will was read to Mrs Ezekiel who in turn read the will and acknowledged its contents. Accordingly, he determined that she did know and approve of the terms of the 1997 will.

The claim in respect of undue influence failed as there was no direct evidence of actual coercion of Mrs Ezekiel's will. What must be proved is actual coercion of the mind as to produce an act contrary to the will of the testator. The evidence that Mrs Ezekiel's son Albert was rude, demanding and sometimes offensive to his mother did not show that he overbore her will.

I will not deal with the claims for family provision made by Mrs Ezekiel's daughters in this summary other than to say that these claims at first instance failed before Justice Brereton but that in the Court of Appeal one of Mrs Ezekiel's daughters whose financial position was not particularly strong received an award of \$225,000 from the estate.

On appeal Mrs Ezekiel's daughters argued that the evidence established circumstances giving rise to a suspicion of undue influence which required Mrs Ezekiel's sons as proponents of the 1997 will to dispel that suspicion. Further that the primary judge had erred in not finding that there were suspicious circumstances and in not concluding that Mrs Ezekiel's sons had failed to prove that the will was the true expression of her free testamentary wishes.

As to the first issue Meagher JA rejected the argument that the suspicion of undue influence placed an onus on Mrs Ezekiel's sons to displace that suspicion. Meagher JA determined that where suspicious circumstances give rise to a doubt as to knowledge and approval those propounding the will must dispel that doubt by proving affirmatively that the testator appreciated the effect of what he or she was doing. They do not need to go further and disprove any suspicion of undue influence or fraud. The onus of proving undue influence or fraud is on those alleging it.

As to the second issue Meagher JA determined that the primary judge had erred in failing to hold that there were suspicious circumstances which were sufficient to rebut the presumption as to knowledge of approval and shift the evidentiary burden to Mrs Ezekiel's sons. Meagher J stated "In my view his Honour erred in failing to find, in the face of the lies and concealment, that there was a realistic possibility that the sons had been involved in giving instructions for the will. In circumstances where the mirror wills left everything to Albert and Morris, this constituted sufficient reason to doubt that the contents of the Will accorded with Lily's intention".

Although those suspicious circumstances were enough to shift the evidentiary burden back to Mrs Ezekiel's sons Meagher JA determined that the terms of Mrs Ezekiel's will were straightforward, the will was sent by Mr Woolley in advance to Mrs Ezekiel to consider with an offer for him to attend her house to have the will signed, Mrs Ezekiel took up that offer and she arranged for another witness to attend, Mrs Ezekiel's sons did not attend this meeting for the execution of the will, and at this meeting the will was read to Mrs Ezekiel and explained before she also read the will and acknowledged its terms, all of which affirmatively established that the instrument expressed Mrs Ezekiel's true intentions.

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