16 May 2016

SIR NINIAN STEPHEN LECTURE

WILL DRAFTING - MAYBE IT IS ROCKET SCIENCE

EQUITY TRUSTEES LIMITED

25 MAY 2016

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"In *Perrin and Ors v Morgan and Ors* [1943] AC 399 (HL) at 415, Lord Atkin warned judges, faced with disputes over wills, of the prospect that they might one day be obliged to meet "the group of ghosts of dissatisfied testators" who "according to a late Chancery judge wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills." Waiting there too will be those whose wills have been interfered with unnecessarily or excessively." - *Golosky v Golosky* (NSWSC, 5 October 1993), per Kirby P.

Of comfort no man speak.
Let's talk of graves, of worms and epitaphs,
Make dust our paper, and with rainy eyes
Write sorrow on the bosom of the earth.
Let's choose executors and talk of wills.

[William Shakespeare "Richard II", Act 3, Scene 2]

1. In *Fell v Fell* (1922) 31 CLR 268 at 273, Isaacs J (although in the minority) set out certain principles for the construction of Wills. Those ten canon continue to apply although it is not necessary to set them out for the purpose of tonight's talk.

2. In *Hatzantonis v Lawrence* [2003] NSWSC 914 at [6]-[10] Bryson J said:

> "*6 In ascertaining the meaning of wills, consideration should in my opinion start with the fundamental rule stated by Viscount Simon LC in Perrin v. Morgan [1943] AC 399 at 406:-*
>
> *... the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case – what are "expressed intentions" of the testator.*"

3. When it comes to principles of construction as embodied in the leading cases, 1873 is probably regarded as recent.

4. In *Allgood v Blake* (1873) 8 LR Ex 160 at 162-164, Blackburn J said:

> "*A general rule is that in construing a Will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the Will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words …*
>
> *No doubt in many cases the testator has for the moment forgotten or overlooked material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the Will as made by the testator, not to make a Will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has, by blunder, expressed what he did not mean …*
>
> *We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand; not deviating from the literal sense of the words without sufficient reason, or more than is justified; yet not adhering slavishly to them, when to do would obviously defeat the intention which may be collected from the whole Will.*"

5. One does not need to be addressing a Common Law defamation jury to have an excuse to quote Shakespeare on the 400th anniversary of his death. In Hamlet, Act V Scene 1, the Prince of Denmark says - "*How absolute the nave is! We must speak by the card or equivocation will undo us. … the age is grown so picked that the toe of the peasant comes so near the heal of the courtier, he galls his kibe.*"

6. Chief Justice Dixon in *Church Property Trustees Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 at 406 said:

> "*But we are not engaged in an exercise to show how 'absolute' we are and to defeat the testator's intentions on the principle that he must speak by the card or equivocation will undo him, but in an attempt to ascertain his intentions and to apply them according to law. As I see it his intention is clear enough …* "

7. In "Construction of Wills in Australia", the late David Haines QC writes -

> "*1.40 Mistakes often appear in wills prepared by non-professional persons or by solicitors or wills officers employed by profit-making trustee companies or the Public Trustee. The first matter to consider in such circumstances is whether the statutory remedy of rectification is available. If the statutory remedy of rectification is not available, a court of construction has the power to declare upon a mistake appearing in a will prepared by any of the above and interpret it as such. The power has come to be known as the 'blundering attorney's clerk or law stationer' principle, a phrase coined by Sir James Bacon VC in* ***Re Redfern; Redfern v Bryning****. If the person preparing the will makes a mistake and it is clear on its face that the testator has not accurately or completely expressed his or her meaning by the words so used, and it is also clear what are the words which he or she omitted, 'those words may be supplied in order to effectuate the intention, as collected from the context'. This principles is invoked to supply words which have been omitted from a will and thus obviate an irrational and absurd result which would otherwise be obtained.*
>
> *1.41 Some professionally drawn wills read as if they have been the subject of cut and paste, as the argot of the word processor has it, and are prepared without any regard for accuracy in expression or 'for the congruity of the dispositions and directions'. If so, ordinary rules of construction should not be used as such rules assume "that people mean exactly what they are saying'."*

8. In respect of a person who dies after 1 March 2008, it is necessary to consider *Succession Act, 2006* (NSW) which, so far as is relevant, by s.32, provides -

"***32 Use of extrinsic evidence to construe wills***

(1) In proceedings to construe a will, evidence (including evidence of the testator's intention) is admissible to assist in the interpretation of the language used in the will if the language makes the will or any part of the will:

(a) meaningless, or
(b) ambiguous on the face of the will, or
(c) ambiguous in the light of the surrounding circumstances.

(2) Despite subsection (1), evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1) (c).

(3) Despite subsection (2), nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will."

9. Ultimately, all authorities must be seen in light of Justice Bryson's very practical and very sensible statement in *Perpetual Trustee Company Limited v Attorney General (NSW) and Public Trustee (Estate of the late Richard Harris)* (NSWSC unreported, 27 March 1987) wherein, after an examination of many competing authorities with regard to statements of principle on the question of construction, he said -

"*… I can see no justification for the fixing on it (the expression in the will), as a result of a series of judicial decisions about a series of different wills, a cast-iron meaning which must not be departed from unless special circumstances exist, with the result that this special meaning must be presumed to be the meaning of every testator in every case unless the contrary is shown. I agree, of course, that if a word has only one natural meaning, it is right to attribute that meaning to the word when used in a will unless the context or other circumstances which may be properly considered show that an unusual meaning is intended, but the word 'money' has not got one natural or usual meaning. It has several meanings, each of which in appropriate circumstances may be regarded as natural.* ***It is, after all, testators who are telling the courts what dispositions they wish to make, and the process of construction of wills is not a process of legal education administered by courts to testators***."

10. In *Boland v Nahkle; Re Estate of Talbot* (unrep, 6 April 1992) BC 9203240 at 1, Powell J introduced his judgment with the following paragraph:

"*The circumstances of the present application serve, yet again to highlight first, what appears to be a widespread lack of knowledge among members of the legal profession about proper practice and procedure in matters in this [Probate] Division of the Court; and, second,*

> *the inordinate delays to the due administration of, and the unnecessary costs to which, the estates of deceased persons are regularly subjected as the result of the failure to abide by the appropriate rules of practice and procedure.*"

11. On 12 June 1992, His Honour elevated his level of frustration. On that date he commenced his judgment in *The Public Trustee v Mullane; Estate of Mullane* (unrep) BC 9201821 at 1 with the following introductory paragraph:

> "*Although I suppose that, after 18 months as Probate Judge, I should have become inured to the fact, I never cease to be amazed by the fact that each Friday's Probate List presents me with multiple examples of the almost total lack of knowledge and understanding on the part of a large proportion of the legal profession as to the proper practice and procedure in matters in this [Probate] Division of the Court. In the circumstances, I can but assume it to be true that, as I have been recently informed is the case, Succession and Probate Practice are no longer compulsory subjects in any law school in this State.*"

12. Lest it be thought I speak from a position of immunity, I remind you in *Springfield v Brown* (1991) 23 NSWLR 535, His Honour described my submissions as "over simplistic and facile" (at 539A).

13. It is time to give some attention to some unsuccessful efforts to make a Will.

14. In *Manning v Hughes - Estate of Ludewig* [2010] NSWSC 226, Justice White said, inter alia, -

> "*45 Mr Palmer did not keep a file note of his attendance on Mrs Ludewig on 12 July. In his oral evidence Mr Palmer said that he did not read the will aloud to Mrs Ludewig but that it was given to her to read and it was explained to her (T63). He did not ask her afresh how she wanted to leave her estate. He said that Mrs Ludewig had ample opportunity to change the draft will if it did not reflect her instructions. It is clear from Mr Robert Manning's evidence that the draft will contained a clause providing for Mrs Ludewig's body to be cremated and she asked for that to be removed. That clause was removed from the draft and a new document created which Mrs Ludewig signed. Mr Palmer and his secretary attested her signature to the will.*
>
> *46 Mr Palmer did not ask the questions which would have elucidated whether Mrs Ludewig had testamentary capacity. He said that he was of the firm belief that Mrs Ludewig understood the content of the proposed will and that she was giving her instructions to him voluntarily without any pressure by any of her family. Mr Palmer said that he would have asked Mrs Ludewig whether she was married and whether she*

had children because if she had a husband or children, it would be unusual to leave her estate to her siblings. But he did not ask her whether she had any other brothers or sisters or other people important in her life. He did not ask her about her assets. It appears that he did not ask about previous wills. He did not ask her whether she had a long-standing relationship with anyone else.

47 This was unfortunate. As is said in Charles Rowland, Hutley's Australian Wills Precedents, 7th ed, (2009) LexisNexis Butterworths at [1.14]:

> *'Where the solicitor is drafting a will and there is any possibility that the testator's capacity might later be questioned, the solicitor should ask questions the answers to which will establish whether or not each of the requirements for capacity laid down in Banks v Goodfellow is satisfied. It follows that the solicitor taking instructions for a will must have the Banks v Goodfellow tests at the front of her or his mind.'*

…

49 Because Mr Palmer did not ask Mrs Ludewig about her assets and did not ask questions (other than whether she was married or had children) which would be relevant to assessing her capacity to appreciate those who might have claims on her estate and her capacity to weigh those claims, the court does not have the benefit which it ought to have in such circumstances of the inquiries a solicitor ought to make. Mr Palmer's own opinion that Mrs Ludewig had capacity carries no weight. He did not ask the questions which needed to be asked for such an assessment to be made."

15. In *Petrovski v Nasev - Estate of Janakievska* [2011] NSWSC 1275, Justice Hallen found lack of testamentary capacity, no knowledge and approval, and undue influence - the trifecta. Dealing with the duties of a solicitor involved in the creation of a Will, His Honour said -

> "*87 Because it played a major part in the submissions, it is necessary to say something about the duties of a solicitor who takes instructions for and who has a will executed.*
>
> *88 In Jarman on Wills , 8th ed (1951) London, Sweet and Maxwell, Vol. 3, page 2073, it is said:*
>
> > *"Few of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills."*
>
> *89 In Pates v Craig & Anor; The Estate of Cole (NSWSC, 28 August 1995, unreported), Santow J, made some general comments regarding circumstances where a legal practitioner receives instructions from an established client to prepare a will on behalf of another person, where that client is to be principal, or major, beneficiary under the proposed*

will and, in particular, where the client instigates that will. His Honour said:

> *"There do not appear to be rules of professional conduct specifically governing the first situation. Thus r 22 of the Professional Conduct and Practice Rules deals with situations where a solicitor receives instructions to prepare a will in which that solicitor or an associate of that solicitor is to receive a substantial benefit. Whatever 'associate' may mean, it probably falls short of including a conventional solicitor/client relationship. Reg 28 of the old Legal Profession Regulation 1987 is to a similar effect. That does not, however, mean that no ethical considerations arise in such circumstance. The essence of a solicitor's fiduciary obligations to a client is the unfettered service of that client's interests. This will require the solicitor to avoid acting for more than one party to a transaction where there is a likelihood of a real conflict of interest between the parties. As Wootten J stated in Thompson v Mikrelsen (Supreme Court of NSW, 3 October 1974, unreported), in the analogous context of conveyancing transactions: 'The reasonable expectations of a client instructing a solicitor [is] that the solicitor will be in a position to approach the matter concerned with nothing [in mind] but the protection of his client's interests against [those] of another party. [The client] should not have to depend on a person who had conflicting allegiances and who may be tempted either consciously or unconsciously to favour the other client, or simply to seek a resolution of the matter in a way which is least embarrassing to himself.'*
>
> *The same considerations may arise in the context of preparation of wills. It is clear that a conflict of interest may arise between the interests of an intended principal beneficiary seeking to procure a will in his, or her, favour and the interests of the testator. The testator should be assisted by his legal or her legal adviser only in making a valid will. This means, inter alia, that the natural objects of the testator's bounty must be capable of being appreciated, by the testator, even though the testator may choose to exercise that capacity so as to omit such objects or disfavour them. In such circumstances, the legal practitioner would be expected to give advice to the intended testator on a number of matters. Some of these may be potentially contrary to the interests of the proposed beneficiary. The legal practitioner should take such steps as are reasonably practicable to enable that practitioner to give proper consideration to any matters going to the validity of the proposed will and then should advise and act in conformity with that consideration. Such a conflict will especially arise where there is a reason to fear lack of testamentary capacity on the part of the testator by reason such as fragility, illness or advanced age. Further, in such context, the solicitor could not prudently rely on the informed consent of both clients to act in such a transaction where their interests conflict, there being doubts about the capacity of the testator to give such informed consent...*
>
> *There is an additional consideration, not dependent on the question of conflict of interest. That is, the duty of the solicitor*

taking instructions from an obviously enfeebled testator, where capacity is potentially in doubt, to take particular care to gain reasonable assurance as to the testamentary capacity of the testator. It is clearly undesirable to attempt to lay down precise and specific rules as to what that necessarily entails for every case. Such rules may lead to a perfunctory, mechanical checklist approach. What should be done in each case will depend on the apparent state of the testator at the time and other relevant surrounding circumstances. Any suggestion that someone, potentially interested, has instigated the will, whether or not a client of the will draftsperson, should particularly place the solicitor concerned, on the alert. At the least, a solicitor should ask the kind of questions designed to probe the testator's understanding of the basic matters which connote testamentary capacity... For this purpose, and subject to the earlier caveat concerning checklists, the advice concerning the taking of instructions contained in Mason & Handler's "Wills, Probate and Administration Service NSW (Butterworths) [at 10,019] is a useful guide:

> *'[10,019] TAKING OF INSTRUCTIONS - ISSUES OF TESTAMENTARY CAPACITY*
>
> *If any doubts do rise as to the testator's capacity the following procedures on the taking of instructions will assist significantly in the avoidance of potential problems for the estate as well as for the solicitor in the discharge of his duties:*
>
> *(i) The solicitor who is to draw the will should attend on the testator personally and fully question the testator to determine capacity - the questions should be directed to ascertain whether the testator understands that he is making a will and its effects, the extent of the property of which he is disposing and the claims to which he ought to give effect;*
>
> *(ii) One or more persons should be present, selected by the solicitor having regard to their calibre as witnesses if required to testify whether the issue of capacity is raised. Where possible, one of the witnesses should be a medical practitioner, preferably the doctor who has been treating the testator and is familiar with him, who should in making a thorough examination of the testator's condition, question him in detail and advise the solicitor as to the capacity and understanding of the testator. The presence of other persons at this time would require the testator's consent;*
>
> *(iii) A detailed written record should be made by the solicitor, the results of the examination recorded by the medical practitioner and notes made by those present.*
>
> *If after careful consideration of all the circumstances the solicitor is not satisfied that the testator does not have testamentary capacity he should proceed and prepare*

> *the will. It is a good general practice for the solicitor who took instructions to draw the will and be present on execution and this practice should not be departed from in these circumstances. On execution, the attesting witnesses should, where possible, come from those persons (including the solicitor) referred to above who were present at the time of instructions and, again, as at every stage, detailed notes of the events and discussions taken.'*
>
> *If those questions and the answers to them, leave the solicitor in real doubt as to what should be done, other steps may be desirable. This may include obtaining a more thorough medical appraisal or, if the testator declines, considering whether the will can be properly drawn, should assurance on testamentary capacity fail to satisfy the test just quoted."*
>
> *90 In Nicholson v Knaggs , Vickery J, at [664], recommended a "considered and appropriately structured interview with the testatrix" and emphasized that "in order to establish knowledge and approval of a will by a testator, more is required than 'merely establishing that the testator executed it in the presence of a witness after it had been read to, or by, him' (at [387])". I respectfully agree.*"

16. Dealing with the evidence of the solicitor, His Honour said -

> "*137 Ms Zlatevska gave her oral evidence reasonably confidently and clearly. She stated that she considered herself experienced and competent in drafting wills. She also gave evidence that she had drafted many wills for people whose first language was not English. I accept that from the mid to late 1990s, she had commenced to draft wills for clients of her firm, and that she had drafted about 50 wills per year.*
>
> *138 There are a number of aspects of her evidence that satisfy me that I must consider her evidence with considerable care. A difficulty that she faced was to recall events that occurred nearly 7 years ago in what is, and was, a busy solicitors' practice.*
>
> *139 I note that there was no attack on Ms Zlatevska's integrity. The attack related more to what she ought to have done, compared with what she did, as a solicitor, in relation to the deceased, in the circumstances known to her by 17 December 2004. In what follows, I remember that this case is not about the professionalism of Ms Zlatevska, but whether the Court is satisfied of the validity of the 2004 Will.*
>
> *140 Ms Zlatevska did not give any evidence of any usual, or regular, practice in relation to the way in which she took instructions, drafted, or had the wills she had drafted, executed. Nor did she give any evidence of a practice in relation to questioning an elderly person prior to a will being executed, by for example, asking questions that would elicit general, or other, knowledge. She was not asked any questions about her knowledge, in 2004, of Banks v Goodfellow (1870) LR 5 QB 549*

and I do not know whether she had "the Banks v Goodfellow tests at the front of her mind" (Hutley's Australian Wills Precedents, 7th ed, (2009) LexisNexis Butterworths at [1.14]) . She gave no evidence of having taken any special precautions when seeing the deceased on 17 December 2004.

141 She did refer to discussing "the usual sort of pleasantries" and "common courtesies" with the deceased. How long this lasted is not clear. In any event, other than enquiring about her state of health, Ms Zlatevska did not state, with specificity, what had been discussed, or how the deceased responded to any questions asked. Whilst she may have met the deceased in Church, this is not a case in which instructions for a contested will were taken by a solicitor who was very familiar with the deceased.

142 Ms Zlatevska did not say that what she spoke with the deceased about was designed to test the deceased's cognitive powers, or was otherwise for the purpose of ascertaining her testamentary capacity. She did not say that the deceased's responses led her to form the view that she ultimately expressed. One might have expected the evidence of the solicitor relying upon such pleasantries or courtesies, if relied upon to determine capacity, to be more expansive about what had been said.

143 Ms Zlatevska gave evidence that when they went into the conference, the deceased and she were sitting side by side, and that the deceased appeared to be looking at the 2004 Will, whilst she was translating its contents for the deceased. She also said:

> *"I started to read, I said, "This is your last will and testament" and*
> *"that is your address and name"*

…

153 The contemporaneous documents that formed the contents of her will file, which had been the subject of a subpoena to produce, were sparse. The documents produced were a draft Will (in the form that was subsequently signed by the deceased) which had been prepared following the instructions given to her by Alek, a copy of the letter dated 28 October 2004 that she had written, and caused to be sent to the deceased, one file note (consisting of two pages, the contents of which I shall set out in full), a copy of one page of a practice diary that revealed that her conference with the deceased, at which conference the 2004 Will was executed, was to occur at 1:00 p.m. on 17 December 2004, and a letter to the Registrar of this court under cover of which the copy of the diary page was enclosed.

154 There is no file note of the instructions given to her by Alek in October 2004. I have earlier referred to her affidavit evidence on this topic, which was brief in the extreme. This is despite Ms Zlatevska acknowledging that it was "good practice" to create a file note in the context of taking instructions for, and the execution of, a will.

…

161 What is said to be the contemporaneous file note of the events that occurred on 17 December 2004, which is in Ms Zlatevska's handwriting, is in the following form:

> *"FILE NOTE: 1.00PM 17 DECEMBER 2004*
> *Conference Mrs Vasilka Janakievska and Alek.*
> *Confirmed her telephone instructions, showed me her medicare card.*
> *Does not receive pension. Signed Will*
> *Discussed Will want us (sic) place in safe custody*
> *Do not write to her home or give anything to anyone."*

162 The most curious feature about the file note is that Ms Zlatevska accepted that she had never had any telephone conversation with the deceased, and that the reference "Confirmed her telephone instructions" should not have been written in it.

163 Mr Dubedat's evidence was that the words "Confirmed her telephone instructions" were written at a later time than the words "or anything". She admitted that it was probable that the words had not been written on the file note on the date it bears, as she was well aware, then, that she did not have any telephone conversation with the deceased. She was unable to explain when, or the circumstances in which, the words were written on the file note. She could not explain, otherwise, how those words came to be written by her in the file note. She agreed that it would be unsafe to rely on the accuracy at least of that part of the file note.

164 Ms Zlatevska also acknowledged that she had known for some time that the file note was inaccurate, at least to the extent that it referred to confirming the deceased's telephone instructions. She was unable to explain why, despite having sworn an affidavit as recently as 29 September 2011, in which affidavit she specifically dealt with aspects of the file note, she had not corrected this error.

165 Despite her denial in the witness box, the failure to correct the error suggested that she had not appreciated that the file note contained such a significant error (at least until that time).

166 Another curious feature of the file note is that Ms Zlatevska accepted that the words "Signed will" had been written on the file note after she had written the balance, or perhaps the bulk, of the file note. She gave no evidence in her affidavit of the reasons why this was done, when, or in what circumstances. This was not explored in cross-examination.

167 It is clear also, that Ms Zlatevska's file note lacks many of the details that one might expect a solicitor of some years experience to include in a contemporaneous file note, especially in circumstances where questions had been raised with her about the state of health of the deceased and where there was likely to be a dispute about the validity of any Will procured at that time.

168 Importantly, the file note lacks almost all of the details that Ms Zlatevska was able to include in her affidavit sworn on 11 May 2010, that is almost five and a half years after the event and in her evidence

in the witness box, almost seven years after the event. The file note does not even include a statement to the effect that she translated the contents of the 2004 Will to the deceased. (I note also, in this regard, that the 2004 Will does not include any similar statement as appeared in the 1999 Will to the effect that the Will had been translated to the deceased before it had been executed by her.)

169 The only reference to the deceased's knowledge of her assets in the file note relates to the deceased not receiving a pension. Yet, Ms Zlatevska's affidavit refers to the deceased informing her that she had two properties, one in Erskineville and one in Rockdale (that she lived in) and money in the bank. I think it is more probable that Alek had provided this information to her.

170 Even if I accept that this conversation occurred, there is no evidence, in the affidavit, of any enquiry as to the value of either property or how much money was in the bank. In fact, in her oral evidence, she accepted that she asked no questions about the deceased's understanding of the value of the Erskineville property.

171 Finally, as will be obvious, there is nothing about persons who had a claim on the bounty of the deceased in the file note. In her affidavit, however, Ms Zlatevska was able to state that the deceased, in answer to the question "Are there other people whom you might wish to benefit", nominated only Pavle, "... because he has been my life, I want him to have the same share" as Alek. Later, the deceased had said that Alek "deserved something because he is my late husband's brother".

172 There is no mention of any of Pavle's daughters, two of whom had been beneficiaries named in the 1999 Will.

173 It is most regrettable that Ms Zlatevska did not see fit to record in the file note of her interview with the deceased, more detailed facts of what had occurred. Had she done so, the Court's task might have been a great deal easier. Instead, I am left with having to rely upon the contents of her affidavit, sworn many years after the event, and at a time when litigation was on foot. I must consider the contents of this affidavit with all of the other aspects of Ms Zlatevska's evidence including the instructions previously given to her by Alek.

…

182 In addition, she took no steps to ascertain whether the deceased was suffering from any medical condition that might affect her capacity. Her conversation on this topic appears to have been limited to the enquiry "How are you" as part of the "general pleasantries". Ms Zlatevska did not enquire whether the deceased was under the care of any particular doctor, when she had last seen a doctor, or whether she was taking any medication. She acknowledged that the deceased was "elderly".

183 In discussing the contents of the Will with the deceased, Ms Zlatevska appears to have been satisfied with asking the deceased whether that was what she wanted (after reading out the clause) and with the deceased nodding, or indicating affirmatively. She gave oral

evidence that the deceased, apart from nodding, only said "that's right" in relation to the remainder clause, if anything happened to Alek or Pavle."

17. In *Dellios v Dellios* [2012] NSWSC 868, Justice White (who heard a number of cases as a Judge in charge of the Probate List) said -

"*44. The duties of a solicitor, when asked to prepare a will for a person in circumstances similar to those of Paula, are not in doubt. In Pates v Craig and Anor; In the Estate of Cole (Supreme Court of New South Wales, Santow J, 28 August 1995, unreported BC9505250) Santow J referred to the potential for there being a conflict of interest between the interests of an intended principal beneficiary seeking to procure a will in his or her favour and the interests of the testator. His Honour said that:*

> *"The legal practitioner should take such steps as are reasonably practicable to enable that practitioner to give proper consideration to any matters going to the validity of the proposed will and then should advise and act in conformity with that consideration. Such a conflict will especially arise where there is reason to fear lack of testamentary capacity on the part of the testator by reasons such as fragility, illness or advanced age...*
>
> *...*
>
> *There is an additional consideration, not dependent of the question of conflict of interest. That is, the duty of the solicitor taking instructions from an obviously enfeebled testator, where capacity is potentially in doubt, to take particular care to gain reasonable assurance as to the testamentary capacity of the testator ... What should be done in each case will depend on the apparent state of the testator at the time and other relevant surrounding circumstances. Any suggestion that someone, potentially interested, has instigated the will, whether or not a client of the will draftsperson, should particularly place the solicitor concerned on the alert. At the least, a solicitor should ask the kind of questions designed to probe the testator's understanding of the basic matters which connote testamentary capacity ..."*

…

46. Mr Bennett was contacted by Athena Dellios. He had acted for Chris and Athena's son in a family law matter. On 23 January 2006 Athena told Mr Bennett that her sister-in-law, Paula, would like him to come to her house to make a will for her. When he asked why Athena was calling and not Paula, she replied that it was because Paula could not speak English very well and was very shy. Mr Bennett deposed that Athena gave instructions as to what she said Paula wanted the will to provide. Athena denied giving those instructions. I do not accept that denial. It is clear that Mr Bennett received instructions for the will before he saw Paula. He took a draft of the will to the house the following day. He did not prepare the will after having obtained Paula's instructions. In

my view, Athenas denied having given those instructions to Mr Bennett because she considered that it might in some way be harmful to Chris's case if she had given those instructions. Indeed, it is a relevant consideration that the initial instructions came from the wife of the sole beneficiary and a contingent beneficiary herself. But the fact that the initial instructions came from Athena is clear beyond any doubt. Her denial reflects adversely on her credit.

47. Athena told Mr Bennett that Paula wanted to leave her property to Chris. Mr Bennett asked what would happen if Chris died before Paula and whether in that case the property should go to Athena. She replied "I suppose so". On the basis of those instructions Mr Bennett prepared the draft will which he took with him the next day when he visited Paula at her home. When he arrived four people other than Paula were present, namely Chris, Athena and also a Mr Victor Kulakovski and Mr Peter Gosis. Mr Bennett said that it was not normal to have so many people and family at a time when signing a will, but Victor Kulakovski said to him words to the effect that "We're Macedonian and we all know everything about each other. It's always like this for us".

48. In cross-examination Mr Bennett said that the other family members had refused to leave. He was introduced to Paula. She was sitting in a chair near the door and separate from the others who were sitting around a table. The room was small. Mr Bennett asked Athena whether Paula spoke any English. Athena replied "Only a little". Mr Bennett did not attempt to ascertain, by speaking to Paula herself, the extent to which she understood English. Thereafter, the conversation proceeded by Mr Bennett asking questions, many of them leading questions, of Victor Kulakovski, and his apparently translating those questions to Paula and then conveying Paula's responses. Other questions were answered directly by other persons present and not by Paula. Mr Bennett deposed:

> *"I said to Victor 'Does Paula know we are here today about a Will for her, what to do with her property when she had died [sic]?'*
>
> *Victor then had a conversation with Paula in Macedonian.*
>
> *Victor then replied 'Yes, she knows that'*
>
> *I said to Victor 'Can you ask her what property she owns'*
>
> *Victor then had a further conversation with Paula in Macedonian.*
>
> *Victor replied 'She only owns a half share in this house and a little money in a bank account'*
>
> *Athena said 'As well as all you can see here in the house - no value at all'*
>
> *I said to Victor 'Ask Paula who owns the other half share'*
>
> *Victor then had a conversation with Paula in Macedonian.*
>
> *Athena said 'Chris Dellios. There has been a big court case'*

I replied 'What was the court case about?'

Peter Gosis then said 'There were 2 brothers who died. One 12 years ago in Canada. He had 2 daughters. The other died in December, 2005. He had 4 children, all married except for John'.

I said to Peter Gosis 'How old is John?'

Peter replied 'About 45 years old'

I said to Athena Dellios 'Whose name is the property in for the Council records?'

Athena replied 'Rates still come here in the name of the dead brother. Chris pays the rates. Paula's share comes from her Mother's Will which has not yet been finished. The problem is all caused by John. The matter has been going on for years. He is fighting the Will of Paula Dellios' parents for a larger share of the properties. Her brother refused to transfer Paula's share of the Will to Paula'

I said to the group 'Was Paula a party to the court case?'

Athena said 'No she was not. It was mainly between John and Chris.[']

I said to Victor 'Ask Paula if that is all her property'

Victor had a conversation with Paula in Macedonian.

Victor said 'Yes, that is all her property'.

I said to Athena 'Where are the deeds to the property?'

Athena and Victor had a conversation between them.

Athena replied 'With John's, the nephew's, solicitor'.

I said to Victor 'I will summarise a Will which Athena asked me to bring. Can you please translate to Paula when I speak?'

Victor replied 'Yes'.

I then said to Victor 'Please tell Paula that a Will is the document which sets out what you want to do with your property when you are dead'

Victor had a conversation in Macedonian with Paula Dellios.

Victor then said 'Yes she understands'

I said to Victor 'She has made Chris Dellios her Executor. This means he is the person who will look after her affairs when she is gone. Please ask Paula if this is correct'

Victor had a conversation with Paula Dellios in Macedonian.

Victor replied 'Yes, she understands'

I said to Victor 'Tell her that the Will provides for all her property to go to Chris Dellios when she dies. Please ask if this is so'

Victor had a conversation with Paula Dellios in Macedonian. I observed Paula Dellios look at Chris Dellios.

Victor said 'Yes that is correct'

I said to Victor 'The Will then says if Chris dies before Paula, all her property goes to Athena. Is that what she wants?'

Victor had a conversation with Paula in Macedonian. I observed Paula looking at Athena ...

Victor said 'Yes that is correct'

The Will is then signed and Peter Gosis is one of the witnesses and I am the other".

49. These discussions do not provide a basis for me to be satisfied that Paula then understood the nature of the act of making a will and its effect, nor that she understood the extent of the property which she was disposing, nor that she was able to comprehend and appreciate the claims on her estate to which she ought to give effect. The first reason is that I do not know, and Mr Bennett did not know, whether his questions were accurately translated to Paula and whether her responses were accurately conveyed to him. Neither Victor Kulakovski, nor Peter Gosis was called. Although Chris and Athena Dellios were present, they both denied being present. I do not accept that denial. But it means that they gave no evidence as to what was said in Macedonian to and by the plaintiff and Paula.

50. If the accuracy of the translation were accepted, the discussion does not provide an adequate basis for drawing a conclusion in favour of Paula having testamentary capacity. The only non-leading question that was apparently asked of Paula to which she gave a response indicative of capacity was when she was asked what property she owned, and Victor replied after a conversation with her that she owned a half-share in the house and a little money in a bank account.

51. There was no non-leading question to elicit her understanding about what a will was. Rather, the statement was framed by Mr Bennett that a will was what would be done with her property when she had died.

52. I do not think that any conclusion can be made of Paula's understanding of those propositions from Victor's reply that she knew that.

53. It is of some importance that, although Mr Bennett asked Victor to ask Paula who owned the other half-share of the house, it does not

appear that Paula responded to that enquiry. Rather, there was a discussion by other persons present about the prior litigation.

54. In that context, Athena stated incorrectly that the problem was all caused by John, and that John had been "fighting the Will of Paula Dellios' parents for a larger share of the properties".

55. Although it is not directly relevant to any of the four criteria for testamentary capacity in Banks v Goodfellow (1870) LR 5 QB 549 and 565, it is some evidence of Paula's lack of cognitive capacity that she apparently did not answer the question as to who owned the other half-share of the house.

56. Mr Bennett then said what was the effect of the will he had prepared. Whilst Victor stated that Paula understood what was said, no attempt was made to ask Paula, unprompted, as to how she wished her property to be left.

57. Moreover, this conversation took place in the presence of the other family members, a matter which Mr Bennett appreciated was undesirable, and in the presence of the proposed beneficiaries.

58. In his affidavit, Mr Bennett deposed that:

> *"Following the signing of the Will and in the presence of all the above people we all stayed in the room and chatted generally."*

59. Some time in or after 2008, Mr Bennett prepared notes from his then recollection of the events of this day, parts of which formed the basis to his affidavit. Omitted from his affidavit was the following, which was recorded in the notes he prepared.

> *"Following the signing of the will, in the presence of all others, I asked these questions:*
>
> *to AD - who looks after PD*
>
> *AD - CD and I, one of us come here every day.*
>
> *JCB - to group - do the other nieces and nephews come to see PD.*
>
> *AD no-one.*
>
> *JD Does PD go to a doctor regularly.*
>
> *AD - We take her to Dr Wu (in Richmond).*
>
> *JCB - Why does she see him? Does she have any serious illness.*
>
> *AD She gets medicine for her nerves. She worked very hard on the farm with her parents and now they are both dead, she gets very stressful and misses them.*

JCB - Has PD any history of a mental illness.

AD - no not at all. She is extremely quiet, but does need her medication.

JCB - Did PD go out or read papers.

AD - No she just watched TV."

60. Mr Bennett denied that the reasons he asked these questions was because he had concerns with Paula's capacity. He said that he could see that Paula was a little elderly lady, and on a five-acre property in a fairly large house, and so might need some care. He denied suspecting that Paula had a history of mental illness. He said that she was an elderly lady, and he just wanted to make sure in his own mind that there was no issue of mental illness.

61. However, the question whether or not Paula had any history of a mental illness is a somewhat surprising question to have asked, in the context of the conversation that preceded it, unless there was something about her demeanour that had caused him some concern.

62. Mr Bennett says, and I accept, that had he been told that Paula had been institutionalised in psychiatric institutions from 1950 to 1967, and had been prescribed anti-psychotic medication, that he would have acted entirely differently.

63. However, having received the assurance from Athena, uncontradicted by others, as to the nature of the medication that Paula was taking, in the absence of any history of mental illness, Mr Bennett's then concern was that the will had better be redone with an independent person in case someone made a claim. He had in mind obtaining an independent person who could speak and translate Macedonian. That is an understandable caution, given that he had no way of knowing how accurately the discussion had been translated.

64. Mr Bennett arranged for a Ms Natalie Yanevski to accompany him on a second visit. She was employed in a firm of real estate agents as a receptionist and was fluent in Macedonian and English.

65. The second visit took place on 6 February 2006. Mr Bennett had prepared a new will that was in the same terms as the will of 24 January. Mr Bennett deposed that on 6 February, the persons present as well as himself and Ms Yanevski were again Paula, Chris, Athena, Victor Kulakovski and Peter Gosis. He deposed that the following discussion took place.

"On 6 February, 2006, I collected Natalie from my brother's office and arrived at Agnes Banks at 4:00pm. We went into the lounge room and there were present Chris Dellios, Athena Dellios, Victor Koulakovski [sic] and Peter Gosis. I introduced them all to Natalie.

I said to Natalie 'Speak to her about the weather and see if you can understand each other'.

I then observed Natalie having an animated conversation in Macedonian ...

I said to Natalie 'Please tell Paula that we are here to make her Will again and to make sure she understands and that you have come along to interpret'

Natalie then had a conversation with Paula in Macedonian.

Natalie said 'Yes she understands'

I said 'Ask Paula if she owns any property and if so, what does she own?'

Natalie spoke to Paula in Macedonian.

Natalie said 'Yes she owns one half of this house and a bank account with the Commonwealth Bank'

I said 'Ask Paula whether she knew we were there today to make a Will for her which concerned her property to take effect after Paula dies'

Natalie spoke to Paula in Macedonian.

Natalie said 'Yes she understands'

I said 'Ask Paula whether her mother and father are['] [sic]

Natalie spoke to Paula in Macedonian.

Natalie said 'Her mother and father are both dead'

I said 'Ask Paula whether she has any brothers and sisters alive other than Chris'

Natalie spoke to Paula in Macedonian.

Natalie said 'She has Chris alive and two brothers had died and they both have children still alive'

I said 'Please show the Will to Paula and ask her to confirm her name and address and that she has appointed Chris Dellios as the executor. Chris Dellios was to carry out her wishes in the Will after she dies'

Natalie spoke to Paula in Macedonian.

I said 'Please explain that the Will provides that Paula wants to leave all her property to Chris Dellios. Ask her "Is this correct?"

Natalie spoke to Paula in Macedonian.

Natalie said 'Yes that is correct'

I said 'Please explain that Clause 3 of the Will then provides that if Chris Dellios dies before Paula, then all her property goes to Athena Dellios' Ask her 'Is this correct'

Natalie spoke to Paula in Macedonian.

Natalie said 'Yes that is correct'

I did not ask Natalie to read the rest of the Will.

I said 'Tell Paula that it is time to sign the Will'

Natalie spoke to Paula in Macedonian. Paula got up from her seat and came to the table. I directed Natalie how Paula was to sign and how Natalie was to sign the Will.

Natalie spoke to Paula in Macedonian

Natalie said 'Paula asks if she is to sign in English or Macedonian?'

I said 'Tell Paula to sign in English please'

After the Will was signed, the previous Will and one copy dated 24 January, 2006 was produced and a line was drawn across it by someone. I do not know the whereabouts of the original Will."

66. A contemporaneous statement was prepared on the afternoon of 6 February. Both Mr Bennett and Ms Yanevski claimed credit for the preparation of the statement. It was signed by Ms Yanevski on the day. She stated the following:

"1. I am one of the attesting witnesses to the signature of the Will of Paula Dellios. The other attesting witness was Mr John Bennett, Solicitor. Present for part of the time were Mr Chris Dellios, Athena Dellios and Mr Victor Kulakovski.

2. I speak both English and Macedonian fluently.

3. On meeting the Testatrix, I spoke generally to her about the weather and her family. I questioned her whether her mother and father were still alive and her knowledge of her siblings. She advised me that her mother and father were both deceased and that she had two brothers, one brother, Chris Dellios, is still alive and her other brother, David (Demetriou) Dellios, had recently died and left a wife and two children surviving.

4. The Testatrix mentioned to me that she lived alone and had little or no contact with any other members of the family other than her brother Chris, his wife Athena and their children. Chris and Athena visit her every day, take her shopping and to doctor appointments, and generally care for her. Her house appeared clean and tidy. She appeared to be very clean and respectful.

> *5. I explained to her that the purpose of me being there was to translate and read to her entirely the Will and to make my assessment as to whether I believed she understood the nature of the Will and whether her wishes were properly contained in the Will.*
>
> *6. I believe that Paula Dellios had full knowledge that she was making a Will and I believe that the Will was signed by her freely."*

67. On that day, Mr Bennett added some words in handwriting against paragraph three, namely, "very very hot", then against the statement "I questioned her whether her mother and father were still alive" he wrote "They're dead!", and against the reference to "David (Demetriou) [sic] Dellios" Mr Bennett wrote "Peter died in Canada 2 daughters."

68. Ms Yanevski is a witness whose evidence I accept. I do not accept the whole of Mr Bennett's evidence as to the discussion that took place on 6 February. He deposed that in response to his question "Ask Paula whether she has any brothers and sisters alive other than Chris", Natalie (Yanevski), after speaking to Paula, said "She has Chris alive and two brothers had died and they both have children still alive."

69. I do not accept that that was the statement made. I think the statement that was made was as recorded in paragraph three of Ms Yanevski's statement, namely, that Paula said that "her mother and father were both deceased, and that she had two brothers: Chris, who was still alive; and another, David (Dimitriou), who had recently died, and had left a wife and two children surviving".

70. This was not correct. Although Dimitrios had recently died, he had left four children surviving, and she had another brother, Peter, who had died, and who had two children surviving.

71. I accept Mr Bennett's evidence that Paula gave a responsive answer to the non-leading question as to what property she owned, namely, that she owned half of this house and a bank account with the Commonwealth Bank. That answer was substantially accurate.

72. I would be satisfied that this requirement for testamentary capacity, namely, that the testatrix know or appreciate the general extent of her estate was satisfied. However, when there was discussion about the contents of the will, it occurred, as had the earlier discussion, in a way in which did not elicit Paula's understanding in any meaningful way.

73. Again, it was stated to Paula that Chris Dellios, being the executor, was to carry out her wishes after she died. The dispositive contents of the will were explained at least in part, but again there was no unprompted enquiry of Paula as to how she wished her property to be left.

74. It was also again undesirable that the confirmation of instructions was obtained in the presence of the other family members, including the proposed beneficiaries. Paula did make statements which I infer were unprompted that she lived alone and had little or no contact with other

members of the family, other than Chris and Athena and their children. I infer that she did tell Natalie Yanevski that Chris and Athena visited every day and took her to shopping and doctor appointments. These would all be sound reasons for her making the will in the terms she did.

75. Thus the evidence about testamentary capacity is not all one way. Parts of Ms Yanevski's statement support the plaintiff's case that Paula had capacity. Moreover, her statement suggests that Paula had an ability to construct sentences which went beyond that which had been observed by Dr Wu and by Marie Kulakovski.

76. The important consideration is whether or not Paula was able to comprehend and appreciate the claims on her estate to which she ought to give effect. It appears that she was not able to bring to mind all of the nieces and nephews that would inherit part of her estate on intestacy.

77. On the other hand, they were not obvious natural objects of her bounty and I would not conclude merely from the wrong statements that she made about her relatives that for that reason she lacked testamentary capacity. But I think there is more involved in assessing the claims of other people on her estate than merely remembering who her nieces and nephews were."

18. In *Dickman v Holley: Estate of Simpson* [2013] NSWSC 18, speaking of the solicitor who took the Will which was found to be invalid, Justice White said -

"*46. Mr Hopper returned later that day with a power of attorney and a will. The will was a short document. He said he had no doubt that he read clause 3 of the will to her which was a clause whereby the Salvation Army was to receive her estate. He says that Mrs Simpson repeated that she wanted her estate to go to the Army. Mr Hopper had no recollection of discussing the nature and value of Mrs Simpson's property with her, but recalled that he knew that she owned real estate. He says it would have been his practice to have asked Mrs Simpson whether there was anybody else she would like to have left her estate to, but does not recall any response from her to that question. Mr Hopper said that it was his practice to ask whether a client has an existing will and believes that he would have had that conversation with Mrs Simpson, but does not recall it. He did not recall any conversation he might have had identifying beneficiaries under an earlier will or the date of any earlier will.*

47. The power of attorney was made out in favour of Mr Jeskie and Mr Nicholson. He saw Mrs Simpson sign the power of attorney and witnessed her signature. He asked Mr Nicholson who would be the second witness to the will. Mr Nicholson said that Mr Jeskie and his wife would be there any minute. Mr Hopper did not wait for them. He left the unsigned will with Mrs Simpson and arranged for the executed copy to be delivered to him later. It is not clear why Mr Hopper did not witness Mrs Simpson's will along with Mr Nicholson. Mr Hopper said that it is clear he was not present when the will was signed, because if he had been, he would have witnessed it. In his letter to Mr Kerridge of 21 September 1999, Mr Hopper said that he was present when Mrs Simpson signed the power of attorney and the first will.

> *48. Mr Hopper said that he was unaware that the deceased had made a prior will leaving everything to Mr Dickman. He was definite in that recollection. It follows that either he did not ask Mrs Simpson whether she had a prior will, or, if he did, she did not say that she had, naming Mr Dickman as her sole beneficiary. Mr Hopper said that he was familiar with the legal tests for testamentary capacity and in his second affidavit set out a summary of that test. But in his oral evidence he acknowledged that that was what he was now informed was the test for testamentary capacity and he had not earlier been aware of that, as such. He said "I had established my own test which I had used over the years which I believe was the appropriate test and it became a matter of course for me to go through that process of asking the questions that I usually ask these people."*
>
> *49. As set out at para [44] above, Mr Hopper deposed that it was his practice with elderly people to have a general discussion about the time of year or who the current Prime Minister is or other events to gauge whether the person is sufficiently aware and capable of making a will. He deposed he had this type of discussion with Mrs Simpson. I infer that this was Mr Hopper's "own test" of testamentary capacity. Mr Hopper said that it was not his practice to ask a client whether they had made prior wills because he would tell the client that the will they were to make would revoke any other will that they had made. He said "And so the question as to whether they had one or not, I don't think I ever raised with them." Mr Hopper said that Mrs Simpson was as sharp as a tack and was definite in her statement of intention to leave her estate to the Salvation Army for Elizabeth Jenkins Place.*"

19. In *Farr v Hardy* [2008] NSWSC 996, Justice White ordered additional provision in favour of the deceased's widow. They had been married for over 20 years and, shortly before his death, the deceased described his wife "*as a most faithful, dedicated and dutiful wife and mother*". The deceased's estate at trial was worth over $2.2milion. The plaintiff had no assets of substance. By the Will, she was given the right to reside in the matrimonial home with the right of substitution and a life tenancy as to one third of the balance of the estate until she remarries or enters into a de facto relationship.

20. His Honour noted the deceased had two concerns in relation to his estate. He considered the plaintiff lacked the skills to manage the investments. His second concern was she would be "*subject to pressure from her relatives in the Philippines to transfer substantial assets to her family in the Philippines to her detriment and the detriment of their children*."

21. Concluding his judgment, His Honour turned to the question of costs. He said -

> "*106 The plaintiff is entitled to her costs of the proceedings on the party and party basis. Normally, the executors would be entitled to their costs on the indemnity basis. However, I have reservations as to whether the profit costs of Walsh & Associates should be recovered from the estate on the indemnity basis. I see no reason why their disbursements, including counsel's fees, should not be paid from the estate on the indemnity basis.*
>
> *107 I understand there to be no dispute that Mr Walsh drew the will for Mr Farr. Under the will, Mr Walsh was appointed as an executor and is entitled to charge all professional or other charges for any business or acts done by him or his firm in connection with the trusts of the will. The will was made when Mr Farr was terminally ill. The will was in such terms that a claim by the plaintiff under the Family Provision Act was inevitable. Mr Walsh must have known when he drew the will that he or his firm would stand to profit from his appointment as executor both in respect of his general work as executor and trustee and also in respect of the likely litigation under the Family Provision Act if his firm were appointed to act. Mr Walsh and Mr Hardy did appoint Mr Walsh's firm to act in the litigation. That litigation has been hard fought. As I have recorded, the executors denied that the plaintiff was left without adequate provision for her proper maintenance, and advancement in life. I do not consider that denial to be tenable.*
>
> *108 There is a serious question as to whether in these circumstances a costs order should be made in favour of the defendants which would entitle one of the executors, Mr Walsh, to derive a profit. I heard no evidence as to what advice Mr Farr received and as to whether any independent legal advice was provided to him in relation to these matters (see generally Rowland, Hutley's Australian Wills Precedents, 6th ed (2004) LexisNexis Butterworths at [11.6]-[11.9]).*"

22. In *Hill v Van Erp* (1997) 188 CLR 159, Justice Toohey (agreeing with Justice Dawson) said (at [124]) - "*I conclude that a solicitor retained to draw up and attend to the execution of a will is in a relationship of proximity with an intended beneficiary under the will which gives rise to a duty to exercise reasonable skill and care in those matters.*"

23. In *Vagg v McPhee* [2013] NSWCA 29, the plaintiff unsuccessfully appealed the decision of the trial Judge (*Vagg v McPhee* [2011] NSWSC 1584) to dismiss the claim which sought damages because of the failure to sever a joint tenancy so that certain property would pass to beneficiaries. The Court was not prepared to find there was a duty on the solicitor to the beneficiaries to "*ensure that Mrs Vagg took such steps, so that her residual estate would*

have included a half interest in property, which they would have inherited under the terms of the Will, on her death" (at [121]).

24. In *Fischer v Howe* [2013] NSWSC 462, the trial Judge found the solicitor did breach a duty to a prospective beneficiary under an informal Will which, in the circumstances, the solicitor should have made.

25. That finding of negligence was overturned on appeal - *Howe v Fischer* [2014] NSWCA 286. The High Court declined to grant special leave - *Fischer v Howe* [2015] HCASL 35.

26. The philosophical dilemma is aptly summarised by Adamson J at first instance where Her Honour said (at [72]) - *"The duty owed to intended beneficiaries cannot be in conflict or at odds with the duty owed by the solicitor to the client. It is always subject to the client's express instructions. Were it otherwise, the solicitor could not fulfill both the duties owed to the client and the duties owed to the intended beneficiaries.*"

27. At this point, it is appropriate to remind this audience of the role of experts and evidence concerning what might be an appropriate standard to which a legal practitioner might aspire to in dealings with the client who seeks to make a testamentary instrument. A number of our colleagues have given expert evidence in recent cases.

28. At [84] in *Fischer*, Justice Adamson said - "*The principles which apply to the determination of the standard of care are well established. Evidence of applicable practice amongst professionals is a useful guide but it is for the courts to adjudicate on what is the appropriate standard of care;* ***Rogers v Whittaker*** *(1992) 175 CLR 479 at 487.*"

29. Her Honour cited with approval the comments of Justice Young in *Miller & Ors v Cooney & Ors t/a Howard Cooney Harvey* [2004] NSWCA 380 when dealing with the proposed evidence of a solicitor as to the inadequacies of solicitors who were parties to the litigation. His Honour said -

> "*The attitude I have taken in this type of case is, I believe, vindicated by the authorities and that is:*
>
> *(a) to reject evidence in which an expert says that in his or her view a solicitor was negligent in doing or not doing a certain thing. This is the question for the Court to decide;*
>
> *(b) to admit evidence of an 'industry wide' good practice;*
>
> *(c) to admit, subject to relevance, evidence as to what is common practice amongst solicitors of good repute;*
>
> *(d) not to admit evidence as to what the expert witness solicitor himself would have done if the purpose for which that evidence is tendered is to have me infer that all good solicitors would have done things that way…*"

30. The times are indeed a'changin.

31. In *Calvert v Badenach* [2014] TASSC 61, Chief Justice Blow (sitting at first instance) found no breach of duty of care by the solicitor in giving legal effect to the testator's instructions. That decision was overturned by the Full Court - *Calvert v Badenach* [2015] TASFC 8.

32. In its judgment delivered on 11 May 2016, the High Court unanimously (with five Judges delivering three separate judgments) upheld the Appeal and reinstated the decision of the trial Judge - [2016] HCA 18. The decision of the High Court in *Hill v Van Erp* (1997) 188 CLR 159 was distinguished on the grounds that in that case, the interest of the testator and the beneficiary wholly coincided and that the solicitor could have discharged his duty to the beneficiary without conflict in the discharge of the duty to the testator.

33. In the High Court, Gageler J said -

> "*56. The central flaw in the reasoning of the Full Court, in my opinion, was to treat the scope of the duty of care which the Solicitor owed to Mr Calvert as co-extensive with the scope of the duty of care which the Solicitor owed to the Testator. The scope of the Solicitor's undoubted duty of care to Mr Calvert was certainly encompassed within the scope of the duty of care which the Solicitor owed to the Testator. In a critical respect, however, it was narrower.*
> *57. Subject to statutory or contractual exclusion, modification or expansion, the duty of care which a solicitor owes to a client is a comprehensive duty which arises in contract by force of the retainer and in tort by virtue of entering into the performance of the retainer**[48]**. The duty is to exercise that degree of care and skill to be expected of a member of the profession*

having expertise appropriate to the undertaking of the function specified in the retainer[49]. Performance of that duty might well require the solicitor not only to undertake the precise function specified in the retainer but to provide the client with advice on appurtenant legal risks[50]. Whether or not performance of that duty might require the solicitor to take some further action for the protection of the client's interests beyond the function specified in the retainer is a question on which differences of view have emerged[51]. That question was not addressed in argument, and need not be determined in this appeal.

58. The duty of care which a solicitor who is retained to prepare a will owes to a person whom the testator intends to be a beneficiary is more narrowly sourced and more narrowly confined. The duty arises solely in tort by virtue of specific action that is required of the solicitor in performing the retainer[52]. The duty plainly cannot extend to requiring the solicitor to take reasonable care for future and contingent interests of every prospective beneficiary when undertaking every action that might be expected of a solicitor in the performance of the solicitor's duty to the testator. If the tortious duty of care were to extend that far, it would have the potential to get in the way of performance of the solicitor's contractual duty to the testator. Extended to multiple prospective beneficiaries, it would be crippling.

59. The solicitor's duty of care is instead limited to a person whom the testator actually intends to benefit from the will and is confined to requiring the solicitor to take reasonable care to benefit that person in the manner and to the extent identified in the testator's instructions. The testator's instructions are critical. The existence of those instructions compels the solicitor to act for the benefit of the intended beneficiary to the extent necessary to give effect to them. The instructions define the intended benefit, absence of which constitutes the damage which is the gist of the cause of action in negligence[53]. The instructions expose the intended beneficiary to carelessness on the part of the solicitor in giving effect to those instructions against which the intended beneficiary cannot protect. The instructions thereby give rise to a position of vulnerability on the part of the intended beneficiary of a kind which has been recognised to be ordinarily necessary to justify the imposition of tortious liability for damage comprised of purely economic loss[54]. Confined to taking reasonable care to benefit the intended beneficiary in the manner and to the extent identified in the testator's instructions, the solicitor's tortious duty to that beneficiary is coherent with the solicitor's contractual and tortious duty to the client, thereby allowing the two to co-exist[55]. The duty is coherent because it admits of no possibility of conflict: the interests of the client and the interests of the beneficiary necessarily coincide completely[56].

…

62. Unless there is some further factor affecting the relationship of the parties, however, a solicitor retained to prepare a will can have no duty to a person whom the testator intends to benefit other than to act in the manner and to the extent identified in the testator's instructions. That is because, outside the scope of the testator's instructions: there can be no requirement for the solicitor to act for the benefit of the person; there can be no damage to the person if the solicitor fails to act for that person's benefit; there can be no relevant vulnerability on the part of the person to the action or inaction of the solicitor; and there can be no necessary coincidence between the person's interests and those of the client. Where the testator's instructions stop, so does the solicitor's duty of care to the intended beneficiary.

> *63. Confinement of the solicitor's tortious duty to an intended beneficiary to the taking of reasonable care in carrying the client's instructions into effect admits of the possibility that the solicitor may act carelessly in relation to the testator and yet incur no liability to any beneficiary. That possibility does not lead to the moral dilemma and systemic embarrassment of a scenario in which "[t]he only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim"**[59]**. Beyond the scope of the instructions which identify the manner in which and extent to which the testator intends to benefit a person, that person suffers no relevant loss at the hands of the careless solicitor. The confinement of the solicitor's duty to the intended beneficiary therefore does not run counter to the "impulse to do practical justice" which historically drove its recognition**[60]**.*
>
> *…*
>
> *65. That is not to say that the Solicitor's duty of care to the Testator may not have been wider. There is in that respect no difficulty in the conclusion of the primary judge that the exercise of that degree of care and skill to be expected of a solicitor undertaking the function of preparing the Testator's will required the Solicitor to ask the Testator whether he had family and, on learning from asking that question that he had a daughter, to warn the Testator of the risk that his daughter might make a statutory claim against his estate. The conclusion was founded on expert evidence of an experienced solicitor, which the primary judge accepted.*
>
> *66. There is more difficulty in the conclusion of the Full Court that the exercise of the same degree of care and skill extended so far as to require the Solicitor to advise the Testator that he could transfer some or all of his property during his lifetime so as to avoid exposing his estate to such a claim. That seems a lot to expect for the price of a will, and the expert evidence accepted by the primary judge did not go that far. The correctness of that further conclusion of the Full Court does not need to be determined. Even if they constituted breaches of the duty of care which the Solicitor owed to the Testator, the omissions of the Solicitor add nothing of themselves to the claim made against the Solicitor by Mr Calvert.*"

34. Of course, both Hill and Calvert were beneficiaries who were included in the Will and whom the relevant testator intended to benefit. The difference was the nature of the action which could have been taken by the particular solicitor to avoid the risk. In the earlier case, it was the simple task of having a suitably qualified (or not disqualified) witness. In the recent case, it would have required a much greater expansion of the retainer which was to (merely) draft a simple Will. That is where the two cases (and the relevant principles) diverged.

35. The comment of Justice Gageler that "*the appropriately modest sum of $440.00*" (at [52]) for the degree of care and skill required by the Full Court "*seems a lot to expect for the price of a Will*" may give practitioners a false

sense of security. A duty of care and the expected level of discharge thereof will not always be determined by the hourly charge out rate.

36. Across the Tasman, some cases have been brought which deal with alleged negligence in the determination of testamentary capacity.

37. In *Ryan v Public Trustee* [2000] 1 NZLR 700, a beneficiary under a Will for which written and oral instructions were given but which was not made, successfully sued the Public Trustee for damages.

38. The testatrix made an appointment at the Public Trust Office and saw an officer who was not a solicitor but was well experienced in Will making. She gave written and oral instructions and Ryan was to have one sixth of her estate. The Headnote continues -

> "*The officer made extensive notes which considered the testamentary capacity of the testatrix. He discussed testamentary capacity with the Regional Solicitor and with the matron of the rest home. The note concluded by recording his agreement with the matron of the rest home who did not think the testatrix had testamentary capacity and his decision not to proceed meantime and the that the matter could be looked at if the testatrix raised the matter. The will was drafted in accordance with the instructions but was not executed. The testatrix did not raise the matter again. No contemporary expert assessment of her testamentary capacity was made. Notes kept by doctors and nursing staff were considered by a psychiatrist and a neurologist who were unable to say whether the deceased had a sound disposing mind at the time she gave instructions for the unexecuted will. Although the Public Trust District Solicitor told the Public Trust officer that he would need to obtain a report from the doctor who made a report for the application under the Protection of Personal and Property Rights Act, 1988, this was not done. Two solicitors gave expert evidence about what should be done when there is a doubt about testamentary capacity and the extent to which enquiry should be made.*"

39. Justice Ellis held:

> "*The Public Trustee owed a duty of care to the testatrix to investigate her capacity by consulting with a doctor and others whether or not she had testamentary capacity. The duty was the same as that of a solicitor to take all proper steps a reasonably competent solicitor would take. The Public Trustee through its officer did not make proper inquiries. As a result of a failure of the Public Trustee to perform the duty Mrs Ryan lost the opportunity of having a will made in her favour.*"

40. His Honour concluded -

> "*It seems to me that after due inquiry and if capacity is in doubt, then the will should be made accompanied by a full record of opinions so that if need be, a Court can adjudicate. Otherwise the client is deprived of the opportunity of making a possibly valid will. …*
>
> *The question then becomes whether the Public Trustee owed a duty of care to Mrs Ryan. In Gartside v Sheffield, Young & Ellis [1983] NZLR 37 (CA) a solicitor's duty of care to an intended beneficiary was recognised, and the Court followed the decision of Megarry V-C in Ross v Caunters [1980] Ch 297 when he said at pp 311-312:*
>
> > *"I find it difficult to envisage a fair and reasonable man, seeking to do what is fair and just, who would reach the conclusion that it was right to hold that solicitors whose carelessness deprives an intended beneficiary of the share of a testator's estate that was **[*51]** destined for that beneficiary should be immune from any action by that beneficiary, and should have no liability save for normal damages due to the testator's estate.*"

41. Because the plaintiff brought a concurrent claim for family provision and was awarded one sixth of the deceased's estate, the only damages which His Honour considered appropriate was an award of $10,000.00 covering the six years during which the plaintiff was kept out of her inheritance and "*coupled with the stress of litigation*".

42. In *Knox v Till* [1999] 2 NZLR 753, the Court of Appeal dismissed what the appellants' counsel described as a "novel" claim which had no authority to support it.

43. The appellants were residuary beneficiaries under a Will who, in separate proceedings, successfully challenged the testamentary capacity of the deceased to make a later Will, which later Will was not admitted to Probate. The residuary beneficiaries brought an action in negligence against the solicitors acting for the testator on whose instructions the (rejected) later Wills were prepared. Damages were sought in respect of costs incurred in challenging the later Wills.

44. The appellants alleged two duties. First, a duty to take reasonable steps to ensure that the testator had testamentary capacity. Secondly, a duty to

refuse to prepare a Will for execution if testamentary capacity was not established to the solicitors' reasonable satisfaction.

45. The claim had been struck out at first instance. The appeal was summarily dismissed.

46. In *Public Trustee v Till* [2001] 2 NZLR 508, the Public Trustee whose (earlier) Will had been successfully propounded in the above case, took action on behalf of the estate to recover the costs incurred by the Public Trustee on the ground that the (later) solicitors had failed in their duty to consider the deceased's testamentary capacity and to advise the deceased on the consequences of making a Will while not having capacity.

47. The Headnote reads -

> "*1 The decision about whether to make a will and about its contents was a matter for the client. A solicitor was required only to consider and advise upon the issue of testamentary capacity where the circumstances were such as to raise doubt in the mind of a reasonably competent practitioner. The duty was limited by the scope of the retainer and by the fundamental duty to comply with the client's instructions. A solicitor was not ordinarily authorised to make inquiries of others such as family members and medical advisers without the client's instructions. There was nothing in the circumstances surrounding the taking of instructions for the final wills which ought to have alerted a reasonably competent practitioner to any lack of testamentary capacity.*
>
> *2 The plaintiff had failed to show that the solicitor negligently failed to make further enquiries about testamentary capacity; that such inquiries would have established at least doubts about testamentary capacity; that the solicitor negligently failed to advise the client of the result of such enquiries and the implications of a challenge to the will; that if appropriate advice had been given the client would not have proceeded to make the new will; and that there was a diminution of the estate attributable (as opposed to loos to the residuary beneficiaries) to the costs of subsequent Court proceedings caused by and within the contemplation of the solicitors in the event of their negligence.*"

48. Under "Observation", the Headnote reads -

> "*To create and keep records which could undermine the validity of the will could be in conflict with the solicitor's duty to fulfil the client's instructions. There could be no difficulty on the other hand, in the solicitor, with the client's instructions, obtaining medical advice about*

> *testamentary capacity and, upon it being confirmed, retaining that evidence to support the validity of the will if required, or in having a medical adviser witness the will and being in a position to confirm that the testator had testamentary capacity at the time.*"

49. The comment concerning the keeping and creation of records concerning capacity would not generally be accepted by experienced Probate practitioners. If contemporaneous records exist, then they would be available from other sources in any later Probate suit. The solicitor, perhaps in the context of his role as an officer of the Court, because it is the Probate Court which is considering the validity of the document, is probably going to be asked about his recollection at some later stage. The Court would expect that he give his evidence honestly and, notwithstanding the solicitor/client relationship, in a disinterested fashion. There are more than enough cases where solicitors have been embarrassed by their failure to keep any, or any sufficient, record.

50. Justice Randerson continued -

> "*[25] In my view, the most which could be contemplated as a legal duty upon a solicitor is an obligation to consider and advise upon the issue of testamentary capacity where the circumstances are such as to raise doubt in the mind of the reasonably competent practitioner. However, any such duty would necessarily be confined by the scope of the retainer and would also be limited by the solicitor's fundamental duty to comply with the client's instructions. In particular, a solicitor would not ordinarily be authorised to make inquiries of others such as family members or medical advisers without the client's instructions. As well, any decision about whether to make a will and about its contents is, in the end, a matter for the client.*
>
> *[26] A solicitor is generally bound to follow the client's instructions and could not decline to proceed with a will except in the exceptional circumstances already discussed such as illegality, breach of ethical obligations, or where a client is so obviously lacking in mental capacity that the instructions are not truly instructions at all. A solicitor must also be conscious of the duty to proceed with due expedition, especially where the client's circumstances are such as to suggest urgency is required.*
>
> *[27] It must also be borne in mind that a solicitor has no special expertise or training in the assessment aspect of testamentary capacity. The most that could be expected of the reasonably competent practitioner is the ability to recognise possible warning signs such as advanced age, ill health, irrational behaviour, disorientation, clear signs of lack of understanding, or plainly defective recollection of assets or family members. Even then, a reliable assessment of*

> *testamentary capacity could not be made without expert medical advice undertaken with the client's authority.*
>
> *[28] In the absence of the kind of clear indicators already discussed, the solicitor is not under any general obligation to inquire into the issue of testamentary capacity. Ordinarily, where a solicitor has made the conventional inquiries about the client's understanding of the nature of a will, the extent of assets and liabilities and details of family members or other beneficiaries, a solicitor will be entitled to presume testamentary capacity unless there is reason to suppose otherwise.*
>
> *[29] For reasons which I later elaborate, the prospects of a claim of this nature ever succeeding must be remote. Take the present case. As there is no allegation that the solicitors were negligent in proceeding to have the December and January wills executed, the claim could only succeed if it could be established on the balance of probabilities:*
>
> *(a) That the solicitor negligently failed to make further inquiries about testamentary capacity.*
>
> *(b) That the inquiries, if made, would have established a lack of testamentary capacity or at least doubts about that capacity.*
>
> *(c) That the solicitor negligently failed to advise the client of the result of the inquiries and the implications of a challenge to the validity of the will.*
>
> *(d) That if the appropriate advice had been given, the client would not have proceeded to make the new will.*
>
> *(e) That the will is then found to be invalid on the grounds of lack of testamentary capacity.*
>
> *(f) That any diminution of the estate attributable to the costs of the subsequent Court proceedings was caused by and was within the reasonable contemplation of the solicitors in the event of their negligence.*"

51. The claim was dismissed.

52. In *Brown v Wade* [2010] WASC 367, Simmonds J followed the New Zealand cases and said at [142] - "*(I)t is accepted law that where there are doubts as to the capacity of a testator, the will may still be made, but appropriate records should be kept so that the matter can be determined in the appropriate proceedings.*"

53. In *Fradgley v Pocklington (No 2)* [2011] QSC 355, Mullins J said -

> "*[28] There was a dilemma facing the plaintiff when he received instructions directly from Miss Drake that she wished to change her will. It is the dilemma that is faced by any solicitor whose elderly client who resides in a nursing home seeks to make a new will. It is not practical or appropriate for the solicitor to undertake all the inquiries that are made for the purpose of proof of a will in solemn form. The*

> *solicitor may be excused from acting on the client's instructions, if it is patently clear that the client does not have testamentary capacity. If the solicitor is satisfied that the client is capable of giving instructions, even if the circumstances are such that there may be a doubt as to testamentary capacity, the solicitor must act on the client's instructions to make the will. Although there are authorities that suggest that it would be prudent for a solicitor to obtain supporting medical opinion before making a new will for an elderly client where there is a doubt about testamentary capacity, the solicitor is constrained by the client's instructions: Public Trustee v Till [2001] 2 NZLR 508 at [19], [25]-[28].*"

54. In Probate law, a nod is not as good as a wink. Whilst it is easy for a barrister (inevitably after the event) to prescribe the counsel of perfection, most matters with regard to proof of testamentary capacity should cause no difficulty in day to day practice.

55. In England, there is what is called the "golden rule". That is, in circumstances where there is a doubt about testamentary capacity, a medical report should be obtained before executing any Will. That is not the law in Australia. It is probably not even the practice. For a number of reasons, as a general proposition, if a prospective testator wishes to make a Will, then the Will should be made, perhaps without delay (and, if necessary, taking advantage of the statutory provisions with regard to informal testamentary documents). It is far easier for a solicitor to participate in the unsuccessful defence of a Will made without testamentary capacity than to argue against putative beneficiaries of a Will which was never made but which, had it been made, was made by someone with capacity. No solicitor will be sued for making a Will which is not admitted to Probate. Costs are the only consequence. However, the converse does not apply.

56. By all means engage the testatrix in conversation. Do not spend too much time on asking the client the name of the Prime Minister and who won the football match last weekend. Instead, ask positive questions about what is the effect of a Will and what are the testator's assets and their value. Ask about previous relationships and the names of children. Enquire how and when the previous Will was made, what were its provisions and why is it proposed to change those provisions. Do not ask questions that invite merely a "yes" or "no" answer. Ask questions which require the testator to think for

himself or herself. Ask questions which seek that the testator demonstrate the ability to use the frontal lobe by making executive decisions. This would involve asking the testator to go further than that required by ***Banks v Goodfellow*** and explain why some beneficiaries are included and others excluded and some beneficiaries receive more than others. Demonstrate that the testator can discriminate.

57. Whereas once plaintiffs were reluctant to sue bankers and financial advisers and medical practitioners, there is now a greater degree of enthusiasm in the bringing of claims against solicitors and, dare I say, barristers or specialist advocates. Large law firms who do matters on a speculative basis and who advertise on all forms of media are enthusiastic and well-resourced litigators. The courts are slowly but surely removing the last bastions of professional immunity - see *Attwells & Anor v Jackson Lalic Lawyers Pty ltd* [2016] HCA 16 where the High Court, by majority found no advocates immunity where advice given by the legal practitioner led to an agreed settlement of proceedings where that settlement was nevertheless in the context of the hearing of litigation.

58. Incompetence can be expensive even if there is no allegation of negligence. The litigation in *The Estate of Stanislaw Budniak; NSW Trustee & Guardian v Budniak* [2015] NSWSC 934 took seven hearing days and nearly $1 million in solicitor/client costs. In a decision of 474 paragraphs after hearing from many family members, treating medical practitioners of various degrees of qualification and employees of the NSW Trustee & Guardian, Justice Hallen found neither testamentary capacity nor knowledge and approval could be proved to the satisfaction of the Court because Trustee & Guardian employees were incapable of properly explaining and completing a simple instruction form and Will to an elderly testator who probably wanted to make a new Will but was not competently assisted in that task.

59. Sir Ninian Stephen was born in June 1923. On 30 June 1970, he was appointed a Judge of the Supreme Court of Victoria which position he held until 29 February 1972. On 1 March 1972, he was appointed a Justice of the High Court of Australia which position he held until 11 May 1982 when he

resigned to become, in due course, the 20th Governor General of the Commonwealth of Australia.

60. On the High Court, His Honour's career spans volumes 127-152 of the Commonwealth Law Reports. In all those years, the High Court heard two Will construction cases. Justice Stephen sat on one - *Bruyn & Ors v Perpetual Trustee Co Limited &* Ors (1974) 131 CLR 387. That case can be described as having "risen without trace". The High Court last heard a case concerning testamentary incapacity in 1942 - *Bull v Fulton* (1942) 66 CLR 295. Before someone reminds me of *Worth v Clasohm* (1953) 86 CLR 432, I regard that case as dealing with onus rather than the law of incapacity. Since the introduction of the *Family Provision Act* in 1982, the High Court has looked at the subject twice *Singer v Berghouse* (1994) 181 CLR 201 and *Vigolo v Bostin* (2005) 221 CLR 19 or two and a half times if you count *Barns v Barns* (2003) 214 CLR 169. The credit (assuming that's what it is) for this matrix must be shared between the various State Courts of Appeal, the skill of trial judges, the diverse members of the profession and, undoubtedly, Frank Hutley who created a set of Will precedents which continues to be used. That Will construction and testamentary capacity cases have disappeared virtually from all appellate Courts is a tribute to the profession notwithstanding Justice Powell's comments. It is no bad thing that most lawyers have either never heard of, or have long forgotten, legal and equitable life estates, estates in remainder and springing uses.

61. Ladies and gentlemen, in 2016, it has never been a more exciting time to be a Wills and Estates lawyer.

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May 2016