

# SUPREME COURT OF QUEENSLAND

CITATION: *Tolbert v Hicklin* [2020] QSC 166

PARTIES: **CAMERON LEE TOLBERT**  
(Plaintiff)  
v  
**NINA RUTH HICKLIN**  
(Defendant)

FILE NO/S: BS 7852 of 2018

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 18 and 19 February 2020

JUDGE: Brown J

ORDER: **1. The Counterclaim is dismissed.**  
**2. The parties are to submit draft orders reflecting my reasons and any submissions as to costs within fourteen days of the date of publishing these reasons.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE A WILL – GENERALLY – claim to pronounce for the force and validity of a 1979 will – counterclaim seeking order pursuant to s 18 *Succession Act* 1981 (Qld) that the Court dispense with execution requirements for a will – where the deceased was admitted to hospital – where the deceased had instructed his daughter to contact a solicitor to make a will – where the solicitor met with the deceased and made notes of the deceased’s testamentary intentions – where the solicitor read the contents of the notes of testamentary intention to the deceased – where the deceased checked the notes of testamentary intention – where the deceased and solicitor signed the notes of testamentary intention – where the solicitor returned the following day to have the deceased execute a formal will – where the deceased could not execute the formal will and died shortly thereafter – where the draft will and notes of testamentary intention were markedly different – whether the deceased intended the notes of testamentary intention to be

his final will – whether the deceased had knowledge of, and approved of, the contents of the notes of testamentary intention

SUCCESSION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – KNOWLEDGE AND APPROVAL OF CONTENTS – EVIDENCE – CIRCUMSTANCES AROUSING SUSPICION – where the deceased was admitted to hospital – where the deceased had instructed his daughter to contact a solicitor to make a will – where the solicitor met with the deceased and made notes of the deceased’s testamentary intentions – where one year prior to his death, the deceased sought to create a will similar to the notes of testamentary intention – where the daughter did not inform her siblings of the draft will or notes of testamentary intention – whether the daughter was present when instructions to the solicitor were given – whether there were suspicious circumstances as to the creation of the notes of testamentary intention

*Succession Act* 1981 (Qld), s 18

*Banks v Goodfellow* (1870) LR 5 QB 549, considered  
*Estate of Angius; Angius v Angius* [2013] NSWSC 1895, considered

*Estate of Moran; Teasel v Hook* [2014] NSWSC 1839, cited  
*Mekhail v Hana* [2019] NSWCA 197, considered

*Re Gloria May Limpus Deceased* [2013] QSC 66, considered  
*Re: Ogle (Dec); Ex parte The Public Trustee* [2004] WASC 277, considered

*Re Prien* [2019] VSC 47, considered

*Re Spencer (deceased)* [2015] 2 Qd R 435; [2014] QSC 276; followed

*Rowe v Sudholz* [2019] QSC 306, considered

*Vukotic v Vukotic* [2013] VSC 718, cited

COUNSEL: J Byrnes for the Plaintiff  
L Nevison for the Defendant

SOLICITORS: Cooke & Hutchinson Lawyers for the Plaintiff  
Big Law Pty Ltd for the Defendant

## Introduction

- [1] The question for determination in this matter is whether notes prepared by a solicitor containing testamentary intentions should be recognised as the last will of Kenneth Hicklin pursuant to s 18 of the *Succession Act* 1981 (Qld) or whether the Court should pronounce the force and validity of the will of Kenneth Hicklin dated 7 August 1979.
- [2] Kenneth died on or about 10 June 2017. He was 64 years old at the time of his death. He had been in a long term de facto relationship with Jennifer Margaret Tolbert.

They had two children, Cameron and Nina. Like many families, they had what is described as a “blended family”. Lara and Terry were Jennifer’s biological children and Kenneth’s step children. Kenneth had been in their life as a parent from a young age and regarded all of the children as his children. It was evident that the Cameron, Terry, Lara and Nina (the **Siblings**) all looked upon Kenneth as their father and stated that they were a close family unit.

- [3] Kenneth made a will in 1979 which divided all of his estate equally between the Siblings in the event that Jennifer pre-deceased him (the **1979 Will**). While Cameron was not referred to in the 1979 Will, as he was born subsequent to it, the relevant clause in the 1979 Will extended to him.
- [4] In the early 2000s, Kenneth and Jennifer had bought a property at 7 Robin Street, Kallangur (the **Kallangur Property**), which remained their residence until their passing. Although, Jennifer resided in a nursing home from sometime in 2015.
- [5] Jennifer died on 26 December 2016. She died intestate. Her estate consisted of a property at Gin Gin, which she and Kenneth had bought in her name, and two term deposits. The Siblings regarded Jennifer’s estate as having passed to Kenneth. No formal steps were taken to obtain letters of administration and transfer the Gin Gin property into his name.
- [6] Nina had lived permanently with Jennifer and Kenneth since approximately 2007. In 2009, Nina’s son Ethyn was born. Both he and Nina lived with Kenneth and Jennifer at the Kallangur Property and are still residing at the property.
- [7] Just prior to his death, Kenneth gave instructions from his hospital bed to Andrew Paul Pattison who prepared a handwritten document containing instructions for a Will, dated 4 June 2017 signed by Mr Hicklin and witnessed by himself (the **2017 Document**).
- [8] According to the instructions in the 2017 Document, the Kallangur Property is to be held on trust for Ethyn, subject to any mortgage, and the balance of the estate is to be split between the Siblings.
- [9] Contrary to the usual approach adopted in these matters, the plaintiff, Cameron, brought proceedings for the Court to pronounce the force and validity of the 1979 Will and the defendant, Nina, brought a counterclaim for a declaration for the full force and validity of the 2017 Document as the Will of Kenneth. Ultimately nothing turns on that in this case. Lara and Terry support Cameron’s application and his appointment as the administrator of the 1979 Will should it be upheld as Kenneth’s last will.
- [10] There are two principal points of contest between the parties in relation to the 2017 Document:
  - (a) Whether or not Kenneth had intended for the 2017 Document to be his will; and
  - (b) Whether Kenneth had knowledge and gave approval of the contents of the 2017 Document.

- [11] There was no issue between the parties that the 1979 Will should be upheld if the Court does not order that the 2017 Document was Kenneth's last will. Perpetual Trustee have renounced their executorship of the 1979 Will. There is no dispute between the parties that it is appropriate to grant letters of administration to Cameron if the 1979 will is upheld.
- [12] The Siblings and their legal representatives approached the trial in a sensible and appropriate manner consistent with rules 5 and 700A of the *Uniform Civil Procedure Rule 1999 (Qld) (UCPR)*, identifying for the Court's determination the real matters in dispute.

### **Relevant legislation**

- [13] Section 10 of the *Succession Act 1981 (Qld) (Succession Act)* provides that a Will must be in writing and signed by the testator in the presence of two witnesses who must attest and sign the Will.
- [14] The 2017 document was only witnessed by Mr Pattison. As it does not comply with the requirements for the execution of a formal will as prescribed in s 10 of the *Succession Act*, the document can only have effect if the court dispenses with the formal requirements pursuant to s 18 of the *Succession Act*.
- [15] Section 18 of the *Succession Act* provides as follows:
- (1) This section applies to a document, or a part of a document, that—
    - (a) purports to state the testamentary intentions of a deceased person; and
    - (b) has not been executed under this part.
  - (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.
  - (3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—
    - (a) any evidence relating to the way in which the document or part was executed; and
    - (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.
  - (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).
  - (5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State."

## Overview of Legal Issues

- [16] The party who propounds the informal document bears the onus of proof on the civil standard. Dalton J in *Re Spencer (deceased)*,<sup>1</sup> identified that the relevant questions on applications such as the present are as follows:
- (a) Was there a document;
  - (b) Did the document purport to embody the testamentary intentions of the relevant deceased; and
  - (c) Did the evidence satisfy the court that, either, at the time of the subject document being brought into being, or at some later time, the relevant deceased, by some act or words, demonstrated that it was her/his then intention that the subject document should operate as her/his will.<sup>2</sup>
- [17] As the section is remedial, it is to be given a broad construction, but not so as to relegate the requirements of the execution of a will.<sup>3</sup>
- [18] There is no issue between the parties that the 2017 Document is a document and that it purports to embody the testamentary intentions of the relevant deceased. The point of dispute is the third requirement.
- [19] The deceased's intention is a matter of fact determined by reference to all the surrounding circumstances of the creation of the document in question. Statements of testamentary intention by the deceased are admissible. The fact that the deceased read and signed a document is not determinative of the issue. It is not sufficient for the document to be intended as a personal memo or a note of intended instructions, a draft or a trial run. The propounder of the document must prove to the Court, on the balance of probabilities, assessing the evidence with care in accordance with *Brigginshaw v Brigginshaw*, that the deceased wanted the particular document to be his or her final will and did not want any changes to it.<sup>4</sup>
- [20] In cases of validly executed wills, a presumption of capacity and knowledge and approval of the contents generally arises upon evidence of due execution. The presumptions of testamentary capacity and knowledge and approval do not arise in cases involving informal wills such as the present case. It therefore falls on the propounder of the document to establish those matters. Relevant to the question of whether the testator knew of and approved of the contents of the document as his will is whether there were any suspicious circumstances surrounding the creation of the document.
- [21] Cameron does not contend that Kenneth relevantly lacked testamentary capacity, but adopts the position that it is a matter for Nina to prove. Cameron does however contend that the Court cannot be satisfied that Kenneth executed the 2017 Document with knowledge and approval, such that he understood the 2017 Document and that the 2017 Document was intended to operate as his will.

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<sup>1</sup> [2015] 2 Qd R 435.

<sup>2</sup> *Re Spencer (deceased)* [2015] 2 Qd R 435 at [49].

<sup>3</sup> *Re Prien* [2019] VSC 47 at [38].

<sup>4</sup> *Re Prien* [2019] VSC 47 at [44].

### **Size of estate**

- [22] The Kallangur Property is the primary asset of Kenneth's estate. In addition to that, Jennifer had died intestate and under the intestacy rules Kenneth was to inherit the first \$150,000, the household chattels and one third of Jennifer's estate. Her estate included a property outside Gin Gin and two term deposits.

### **Evidence at trial**

- [23] The Siblings all gave evidence at trial. Each had a vested interest in the outcome, in terms of a share of Kenneth's estate, or in the case of Nina, her son having the benefit of the Kallangur Property which she was to hold as trustee until he came of age. I therefore approached each person's evidence with some circumspection. I found that each of the Siblings were honest and straight forward in the evidence they gave and mostly did not seek to provide answers which were self-serving.

### ***The 1979 Will***

- [24] Cameron, Lara and Terry gave evidence in support of the 1979 Will being Kenneth's final valid will. They all gave evidence that they were aware that the 1979 Will was Kenneth's will. According to Cameron, Kenneth joked with him that the 1979 Will was so old that he was not named in the will. Cameron stated that he knew the 1979 Will was in his father's files and that is where he found it.
- [25] Cameron stated that Jennifer had died intestate and he estimated that the Gin Gin property she owned was worth approximately \$80,000 and that she had two term deposits. In total, he thought her estate was worth approximately \$100,000. The Siblings had all agreed that Jennifer's estate should form part of Kenneth's estate. Cameron discussed that with his father. Lara and Terry gave similar evidence to that of Cameron, as to the size of their mother's estate. Lara also gave evidence that she took Kenneth to see the Public Trustee about his position with respect to Jennifer's estate. The Public Trustee representative they saw suggested that Kenneth get Letters of Administration in respect of Jennifer's estate, which according to Lara, caused him to get very anxious. Lara then suggested that they return to the Public Trustee another day. That appears to never have occurred.

### ***Events leading up to Kenneth's Death***

- [26] Kenneth had been in rehabilitation in May 2017. Subsequently, he was admitted to the Redcliffe Hospital on or about 1 June 2017, where his condition deteriorated up until his death on 10 June 2017. He is recorded as suffering from dyspnoea.
- [27] Neither Cameron, Lara nor Terry, who all live a considerable distance from Brisbane, managed to see Kenneth before he suffered a significant downturn in his health on or about 5 June 2017.
- [28] Cameron arrived at the hospital on the evening of 6 June 2017, by which time Kenneth was mumbling and was very difficult to understand. Lara had seen Kenneth in January 2017 before flying back to Darwin. Lara had spoken with Cameron, Terry and Kenneth over FaceTime while she was still in Darwin, approximately a week before Kenneth had died. She stated Kenneth kept falling asleep mid-sentence. Lara did not see Kenneth again until the morning of 10 June 2017. Terry did not see Kenneth in

person until 7 June 2017, by which time Kenneth's condition had deteriorated significantly.

- [29] Nina was the only child who lived in Brisbane and visited Kenneth regularly in hospital leading up to the downturn in his condition on 5 June 2017. Her evidence was that Kenneth was suffering from difficulty in breathing and lethargy from 1 June 2017. Kenneth was administered morphine from 2 to 9 June 2017.<sup>5</sup> Nina stated that she was not aware that he was placed on morphine until 6 or 7 June 2017.
- [30] According to Nina on Friday, 2 June 2017, Kenneth had asked her to contact a solicitor because he would like to finalise a will. Apparently he stated that the hospital had advised him to put his affairs in order. There are some notes in the medical records indicating that Kenneth was informed that nothing further could be done to treat his condition. Nina stated that there was discussion about completing an enduring power of attorney with hospital staff, to which the hospital staff had indicated that social workers could complete it and that they would send somebody to do that.
- [31] Nina agreed that she had had a conversation with Lara on 2 June 2017, in which she expressed to Lara how upset she was that Kenneth did not have a will and that she was concerned about herself and Ethyn. Nina agreed that she was concerned that Kenneth did not have a will, but stated that she did not tell Kenneth about her concerns or talk about being worried about what would happen to her. She stated that in the 2 June 2017 conversation with Kenneth, he had asked her about an enduring power of attorney. Nina gave evidence that she did not raise the enduring power of attorney with Mr Pattison as the doctor had said that there were social workers who could come and do that. Nina stated that she did ask for a medical certificate on 2 June 2017 and received it that day.
- [32] Nina stated that after her father had requested to contact a solicitor, she rang approximately six law firms in the area on Friday afternoon. She stated that she did not have any success in speaking to a solicitor, but had left messages for them to contact her. She located the law firms by carrying out a google search of solicitors in the area. She did not know Mr Pattison but he was one of the solicitors that she had left a message to contact her. Mr Pattison left a message for her the following day, Saturday, 3 June 2017. According to Nina and Mr Pattison, she returned Mr Pattison's call that day and he said that he was available to attend the hospital on Sunday at lunch time. She stated that she told him that she had to give Kenneth a call and ask him if it that was okay. According to her, Mr Pattison said, "if it is okay, please email through the directions where to find him". She spoke to Kenneth and subsequently emailed the details through.<sup>6</sup>
- [33] On 4 June 2017, the Sunday, Nina stated that she and Ethyn went to see Kenneth in the morning. Kenneth had asked them to go to the shops and buy him some puzzles. Nina stated that they were about to leave when a person came in (referring to Mr Pattison), she handed him a document and left with Ethyn. In cross-examination, Nina denied that she met Mr Pattison in the car park and brought him to Kenneth's room. Nina stated that the document that she had handed to Mr Pattison was a letter from a doctor to say that Kenneth was capable of making "these decisions" (the **Medical**

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<sup>5</sup> Exhibit 12.

<sup>6</sup> Exhibit 36, Email from Nina to Mr Pattison.

**Certificate**).<sup>7</sup> She could not recall why she asked the doctor to give her the Medical Certificate. She denied receiving the Medical Certificate on 5 June 2017 and providing it to Mr Pattison on that day.

- [34] Nina stated that when she and Ethyn returned from shopping, Mr Pattison was still speaking to Kenneth, so Nina and Ethyn returned to her car. She stated that Mr Pattison was sitting in the chair and was writing, and she did not know what he was writing and he did not give her a copy of the 2017 Document. She stated she was not present at any time while Kenneth talked to Mr Pattison. She stated that Mr Pattison rang her while she was waiting in the car and told her that he had finished with Kenneth and left. She then returned to see Kenneth. She stated that Kenneth did not tell her that he had signed the 2017 Document when with Mr Pattison and she was not aware of the document until after her father had passed away.
- [35] Nina stated that when Mr Pattison came in on Monday 5 June 2017, Kenneth appeared to have had something similar to an anxiety attack with breathing difficulties. Nina said she told Mr Pattison that Kenneth was not ready, so Mr Pattison left for about half an hour. She stated that before leaving, Mr Pattison handed her documents which she put in a blue folder on the table. When Mr Pattison returned, Nina explained that Kenneth was not better and they would have to do it some other time. She said Mr Pattison asked her to call him to update him on Kenneth's condition. Nina called Mr Pattison later in the day and told him that Kenneth had not deteriorated but they had decided to put him in his own room. Mr Pattison explained to her that when Kenneth was up to it and wished to read the documentation to let him know and he would come back and do a signing later. Nina received an email a couple of days later asking how Kenneth was and she told him he was no better.
- [36] Nina agreed that she had had a conversation with a social worker about the fact that Kenneth had not completed an enduring power of attorney and that she was hoping to finalise it that week. She did not recall agreeing with a social worker that the social worker would call in a medical team and get a Medical Certificate for her. She did not know if she spoke to the social worker on 5 or 6 June 2017.
- [37] Cameron, Terry and Lara did not see their father until the evening of 6 June 2017 and afterwards, by which time Kenneth was slipping in and out of consciousness and difficult to understand.

### ***Evidence of Mr Pattison***

- [38] The key witness in respect of the matters in issue was Mr Pattison who took the instructions from Kenneth and witnessed Kenneth signing the 2017 Document. The original 2017 Document was admitted into evidence after being removed from Mr Pattison's notebook.<sup>8</sup> Nina's solicitor prepared a type written version and Mr Pattison identified illegible words in his handwriting which were then handwritten in the typed document.<sup>9</sup>
- [39] Mr Pattison practised in general practice from 1980 until 2019. For the period from 1990 to 2019, he was the principal of his own firm. He had done multiple wills as part

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<sup>7</sup> Exhibit 25(a), Medical Certificate of Dr Ching.

<sup>8</sup> Exhibit 31, the 2017 Document.

<sup>9</sup> The type written version forms Exhibit 32.

of his practice, estimating it to be in the realm of 400 wills per year. Mr Pattison was retired by the time of the trial. He was subpoenaed to give evidence as he took a neutral position on the basis that his client, Kenneth, was deceased. Mr Pattison was an experienced solicitor and an honest and candid witness, although I found that his recollection appeared to have been affected by the passage of time. His evidence was also limited insofar as he met Kenneth for the first time on 4 June 2017 and could not speak to him again when he returned to the hospital with a draft will on 5 June 2017.

### ***The Meetings of 4 and 5 June***

- [40] According to Mr Pattison he received a message from Nina on his office answering machine on Saturday, 3 June 2017. He subsequently contacted Nina to find out where Kenneth was staying and said he would go to Redcliffe Hospital the following day. Mr Pattison was told by Nina that Kenneth's need for a will was not an emergency and that Kenneth was in a heart ward at Redcliffe Hospital or that he was in hospital due to a heart issue.<sup>10</sup> Given Kenneth was in hospital, Mr Pattison said that he told Nina that he would go up to the hospital on the Sunday, 4 June 2017. Mr Pattison asked Nina to email the details of where Kenneth was so he knew where to go. Mr Pattison stated that Nina emailed him those details later that day.<sup>11</sup>
- [41] Mr Pattison stated that he worked at his office on the morning of 4 June 2017 and then went to the hospital at approximately midday. He walked into the ward that Nina had indicated in the email and said to one of the patients, "Hi, you're Mr Hicklin" and that patient directed him over to another patient, who then acknowledged him. Kenneth was propped up in bed. Mr Pattison introduced himself and identified himself as a solicitor and started to tell him the reason for coming when Kenneth cut him off and said that he knew why Mr Pattison was there, that he was there to do his will. Kenneth told Mr Pattison that he had a heart condition but did not state that it was critical. According to Mr Pattison they had a bit of a chat but Kenneth wanted to get on with the will.
- [42] Mr Pattison recognised the Lexon documents in terms of the will instruction list checklist.<sup>12</sup> He did not however, know if he would have seen those documents as early as 4 June 2017. He only took a notebook to the hospital on 4 June 2017 and did not take a will instruction sheet.
- [43] Mr Pattison stated that he had no concerns about Kenneth physically or mentally, and that there was no sign of confusion or uncertainty in their discussion. Kenneth was propped up in bed and was alert and answered Mr Pattison's initial questions promptly. Mr Pattison then said to Kenneth that he would take some details and wrote notes. He gave evidence that he did not intend to finalise the will that day, and that the most he could do was to make a note of Kenneth's testamentary intentions.<sup>13</sup>
- [44] Mr Pattison said they started to discuss the formal matters of the will, such as his full name, current address and occupation. Mr Pattison asked Kenneth whether he had a will, to which Kenneth stated that he made one when he was in the army that was

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<sup>10</sup> T1-65/47 – T1-66/3.

<sup>11</sup> See exhibit 36.

<sup>12</sup> Exhibits 28 and 29, Lexon Will Appointment Checklist – B, and Lexon Will Instruction Checklist – B.

<sup>13</sup> T1-78/17-20.

more than 30 years old. Mr Pattison asked Kenneth who he wished to be executor of the will after explaining what it means, to which he responded with Nina.

- [45] Mr Pattison then asked Kenneth what he wanted to do with his property. Kenneth told him that he wished to leave the Kallangur Property, which had a small mortgage, with his grandson Ethyn whose name Mr Pattison recorded as 'Ethan'. His handwritten note stated: "Ethan Hicklin house at 7 Robin on trust for Ethan w/s is infant subject to any mortgage". Mr Pattison asked him about the remainder of his estate. Kenneth responded that he was going to leave it to be divided amongst the Siblings. Mr Pattison then asked what else Kenneth had. Kenneth stated that there was not much more than that. Mr Pattison asked Kenneth what that consisted of, and asked about superannuation. Kenneth stated that the RSL was helping him his defence service entitlement such that it did not need to be dealt with. Mr Pattison noted in the 2017 Document: "4 DFRB? RSL working on it". Kenneth said that he did not have money in the bank, other real estate or anything of particular value.
- [46] Mr Pattison said that he then informed Kenneth that there may be problems arising out of the Kallangur Property going to Ethyn, since the balance of his estate did not appear to be worth anything. He said that Kenneth stated that was not a problem. Mr Pattison then told him that in his experience, if he left his children nothing it was likely that one of his children would make a claim on the estate. He further stated that in his experience, people who have held similar views were often proved wrong. Kenneth reiterated that it would not be a problem, and Mr Pattison again told him that he could see a problem in the proposed provision. In response, Kenneth got a notebook that was on his bed stand and told Mr Pattison to ring the Siblings and that they would confirm that there was no issue. Mr Pattison stated that he told Kenneth that he would not call the Siblings on the basis that they may say there is no issue today, but then after Kenneth died, it would be a different position, so it would not solve the issue.
- [47] Mr Pattison agreed in cross-examination that the longest matter that was discussed was his concern about a family provision application.
- [48] Mr Pattison then found that Kenneth was starting to get cross with him as a result of the exchange and was getting agitated. Mr Pattison then stopped and began writing his notes as he did not want to upset Kenneth further, given that he was in hospital with a heart condition. Mr Pattison included a note regarding Kenneth's funeral plan, which Kenneth said would cover his funeral. Mr Pattison made an express note that he had advised him of the problem of his children contesting the estate and Kenneth saying "no problem".
- [49] After a while, he said Kenneth seemed to settle. Mr Pattison proceeded to tell Kenneth that he had made notes of what Kenneth sought in his will, and that he was going to go through it with Kenneth. Mr Pattison said that he should check the notes and if he agreed with what Mr Pattison wrote, he could sign it and date it as a note of his testamentary intentions. Mr Pattison stated that he informed Kenneth that the notes were not his will and that he would come back and do his will.<sup>14</sup> Kenneth then said, "Look, okay we'll do that". Mr Pattison said that he read out his notes, which were fairly simple: the house to Ethyn, the rest to the four children, who the executor was and a note about his funeral. Further, that if any of the children predeceased Kenneth,

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<sup>14</sup> T1-68/24-26.

their grandchildren would take their share. He then gave it to Kenneth to read and asked him after he had read it, “Are you happy with that? Is that what you want to do?” to which Kenneth responded “Yes, that’s what I want to do”. Mr Pattison stated that Kenneth did not ask any questions or clarify anything when Mr Pattison was going through his notes or when he was given them to check. Kenneth then signed and dated the notes and Mr Pattison witnessed it. Mr Pattison stated he did not get two witnesses to sign the document because it was not intended to be a final will. Rather it was just for the day and he would return the next day and complete it.<sup>15</sup> Mr Pattison later accepted that he did not try to get a nurse to be a second witness to the document as it has proved to be difficult in recent times. He agreed that he could have asked another patient.

[50] Mr Pattison then said to Kenneth that that was enough for the day and that he was going to go through the notes and put them into the form of a formal will. Mr Pattison then said words to the effect of, “This may carry us through if you walk out the hospital and get hit by a bus, this might – this probably will get you through, but we’re coming back to do the formal will tomorrow.”<sup>16</sup> Mr Pattison later said in evidence that could not recall whether he made that statement before or after Kenneth had signed the 2017 Document. However, Mr Pattison stated that he likely made that statement before asking Kenneth to sign the 2017 Document. Mr Pattison told Kenneth that he would come back the following day in his lunch hour if that was alright. Kenneth had agreed to that. By that stage, Mr Pattison stated that Kenneth was no longer propped up and was laying down in his bed.

[51] The 2017 Document in its entirety as signed by Kenneth was as follows:<sup>17</sup>

“East Wing  
Bed 16  
Hickson

4/6/2017  
12pm

Will.

No will since 1970s

1. Kenneth Hicklin  
7 Robin Crt,  
Kallangur  
Retired
2. Executor  
Nina Ruth Hicklin  
Daughter
3. Beneficiaries  
Ethan Hicklin house at 7 Robin  
On trust for Ethan  
w/s is infant, subject to  
any mortgage
4. DFRB?  
RSL working on it.

<sup>15</sup> T1-73/18-22.

<sup>16</sup> T1-68/32-36.

<sup>17</sup> The 2017 Document was signed by Kenneth Hicklin and Paul Pattison and was dated 4 June 2017.

5. Balance to be  
split between my  
children  
Lara Ann Margaret Sinclair  
Terry James Tolbert  
Cameron Lee Tolbert  
Nina Ruth Hicklin

If child predeceased me  
Then to grandchildren

Funeral benefit to pay for  
Funeral

Advised of problem re  
children contesting the estates  
and estate paying costs from the  
estate which could be  
of substantial (He said no problem)

Read and confirm

This document sets out my testamentary intent as of today”

- [52] Mr Pattison said, as he was finishing with Kenneth, a lady came up and said “Nina”, to which Mr Pattison said he was just about finished, and she left. Mr Pattison stated that she was not present when he was taking instructions and that she left when he said that he would be done in a few minutes.
- [53] Mr Pattison could not recall whether or not Kenneth had glasses on in their meeting. That is significant because the evidence of the Siblings was that he needed glasses to read. Mr Pattison stated that at the time he was propped up in bed.
- [54] Mr Pattison did not take any steps to confirm Kenneth’s capacity before he attended the hospital on 4 June 2020, unsurprisingly, given that he had had no introduction to Kenneth and been told it was not an emergency. He gave evidence that although Kenneth was in hospital, it was for a heart condition and the urgency arose because he would not have a will if he died. Further, Mr Pattison did not ask what medications Kenneth was on.
- [55] Mr Pattison stated that the reference to “Hickson” at the top of the 2017 Document was incorrect and that it was written there because he had recently done a will for a person with the last name Hickson. Mr Pattison agreed that the correct name was Hicklin.
- [56] Mr Pattison stated that he recorded his advice to Kenneth that there would be an issue if the Kallangur Property was to go to Ethyn, and that Kenneth had confirmed that there would be no problem, to ensure there was a record that he had given that advice. He agreed that he had Kenneth sign the document to also confirm that advice.

- [57] Mr Pattison put at the bottom of the 2017 Document, “This document sets out my testamentary intent as of today”, because the 2017 Document was not intended to be Kenneth’s will.
- [58] There is no suggestion that during the 4 June 2017 meeting Mr Pattison explained to Kenneth how a trust of the Kallangur Property in favour of Ethyn would operate. Further, during that conversation, Kenneth said there was no wife and may have said he was a widower. Mr Pattison did not ask for further details or any inheritance. Kenneth also did not inform Mr Pattison of the Gin Gin property that had been Jennifer’s.
- [59] Mr Pattison gave evidence that he attended the hospital at around lunch time on 5 June 2017 taking another solicitor with him so that there was two witnesses for the draft will. Nina told him that Kenneth had taken a turn at 8.00am that morning and was not in a position to sign the draft will. Mr Pattison said he went to Kenneth’s bed and observed that he seemed distressed and was making groaning noises. Mr Pattison told Nina that he had drafted Kenneth’s will. Mr Pattison said that he told her that she should organise a Medical Certificate or medical statement of capacity. According to Mr Pattison, Nina had stated that the hospital had already created a Medical Certificate and then provided him a letter with a short opinion from Dr Ching attesting to Kenneth’s cognitive capacity and stating that he could make decisions of a personal and financial nature.<sup>18</sup>
- [60] Mr Pattison says that after receiving the Medical Certificate of Dr Ching, he informed Nina that he would go to lunch while waiting to see if there was any change in Kenneth’s state. When he had returned, Nina informed him that there was no change in Kenneth’s state. Mr Pattison subsequently left Nina with the draft will and a letter from him to Kenneth advising of the risk of making a will in the terms which he did.<sup>19</sup> Mr Pattison told Nina that if Kenneth showed any sign of recovery, he would return. He stated that if an emergency arose, then someone would have to get him to sign his will and she would need two adult witnesses.
- [61] Mr Pattison agreed that the draft will he took to the hospital for signing on 5 June 2017 was more detailed than the 2017 Document. He agreed that the draft will did not contain the advice about the fact that his will could result in a family provision claim and did not say anything about the defence force retirement benefits, both of which were recorded in the 2017 Document. Mr Pattison stated that in providing Kenneth with the letter confirming the advice he had given him in terms of the exposure to a family provision challenge by his children, his intention was for him to go through the letter and then confirm whether he wished the draft will to stand or whether he wished to make any changes.
- [62] Mr Pattison states that after he had prepared the draft will and Kenneth had died, he put the notebook containing the 2017 Document into safe custody in case it was relevant in the future.

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<sup>18</sup> Exhibit 25(a).

<sup>19</sup> Exhibits 10 and 10(a).

*The 2017 Document, File Note and Statement*

- [63] On 7 June 2017, Mr Pattison prepared a typed file note as to what had occurred at his attendances on 4 and 5 June 2017. He signed that typed file note on 8 June 2017,<sup>20</sup> and confirmed its accuracy in evidence (the **File Note**).<sup>21</sup> He also prepared a statement at the request of Nina’s solicitors as to his involvement in the making of the draft will, which he also confirmed in evidence was accurate (the **Statement**).<sup>22</sup> He provided that Statement to Nina’s solicitor. The Statement responded to questions that were posed to him.
- [64] Mr Pattison accepted that there were differences between the File Note, which was prepared on, or about, 8 June 2017 and the Statement which was prepared on, or about, November 2017. His oral evidence also differed in some respects from the File Note and the Statement.
- [65] While Mr Pattison stated in Court that he had explained to Kenneth what was meant by “testamentary intentions” or “testamentary intent”, referred to at the bottom of the 2017 Document, the File Note and Statement do not record such an explanation being given. In particular, there was no record that Mr Pattison stated the 2017 Document would operate as his will if Kenneth signed it until a more formal document was finalised. His Statement referred to him going through the 2017 Document as going through the terms of the will with [the Deceased] and explained the terms of the proposed will. Mr Pattison’s oral evidence was to the contrary of the 2017 Document being a will, insofar as he stated that he told Kenneth the 2017 Document was not his will.<sup>23</sup>
- [66] Mr Pattison accepted that there was a difference in what he had explained to Kenneth between the File Note and the Statement. In particular, the File Note stated “I then went through my notes and explained to him the terms of the proposed will. I then gave him my pad and told him to check the notes and to sign them. He did this. I told him I would see him tomorrow” as opposed to the Statement which recorded “I went through the terms of the will with Mr Hicklin. I then gave him my notebook and told him to check the terms of the Will which he did. I told him that is the Will set out his testamentary intentions he should sign it which he did”. Mr Pattison gave evidence that he believes he told Kenneth to check the 2017 Document as opposed to reading it.
- [67] I consider that the File Note which was prepared within days of his meeting with Kenneth is the most accurate record of what occurred in the meeting of 4 June 2017 and that he did not say that the 2017 Document was Kenneth’s will. That accords more with his oral evidence and the fact that the 2017 Document stated: “This document sets out my testamentary intent as of today”. Mr Pattison anticipated returning the next day with Kenneth’s formal will. He was not told, nor did he perceive, that Kenneth was in imminent danger of death. He did not seek a second witness because it was not to be Kenneth’s will. The Statement was written some time after the File Note and was in response to questions asked, rather than being a

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<sup>20</sup> Exhibit 13.  
<sup>21</sup> T1-73/44-45.  
<sup>22</sup> Exhibit 26.  
<sup>23</sup> T1-68/20-39.

spontaneous record of what he said, as was the File Note. To the extent Mr Pattison said in evidence that he explained the meaning of testamentary intent or testamentary intentions, I do not accept that the explanation consisted of anything more than explaining it contained his instructions for how he wished to dispose of his estate, rather than that it was a will itself.

- [68] Mr Pattison's File Note does not refer to receiving a Medical Certificate as to Kenneth's capacity. His Statement said he had advised Nina that he would seek a Medical Certificate. Nina stated that she had anticipated that and she handed him an envelope with a certificate. "She said that the Doctor had no trouble giving it because the Doctor said he was in hospital for his heart not his head."
- [69] I consider that the inconsistencies in his evidence, File Note and Statement can be attributed to the passage of time, as well as, the fact that this was a very brief encounter with Kenneth who he only met on 4 June 2017. While comments may be made with the benefit of hindsight of what he may have done, I do not attribute this to any lack of care, but rather the circumstances which he found himself, acting on the basis of what he was told.

### *After Kenneth's Death*

- [70] Evidence was led from each of the Siblings as to what took place after Kenneth had died. The relevance of that evidence appeared to be as to whether Nina knew of and had any involvement in the 2017 Document as well as her understating of Kenneth's capacity. It is however suspicious circumstances in relation to the preparation and execution of the will that is relevant, not the conduct that occurs after. To the extent that it is suggested it somehow casts light on what occurred in the period prior to, and leading up to, 4 and 5 June 2017, I will briefly discuss the evidence of the events subsequent to Kenneth's death.
- [71] All the Siblings gave evidence that their father had not told them of 2017 Document when they spoke to him in June 2017.
- [72] According to Nina, after Kenneth passed away, she rang Mr Pattison to see how much money she owed him and it was at that time he first mentioned a letter of intent.<sup>24</sup>
- [73] Nina believed that when Kenneth died that he had died without a will. Nina's evidence was that she was not aware of the 1979 Will. Cameron, Lara and Terry, each gave evidence that Nina had told them that she believed Kenneth did not have a will when he passed away. According to Terry, Nina told him that Mr Hicklin did not have a Will and she was worried about what would happen to her.
- [74] It was not until the Siblings were arranging to see a solicitor, Mr Lane, that Nina told them about Kenneth meeting with Mr Pattison on 4 June 2017. According to Terry, Nina told them that she had called the solicitor at Kenneth's request. The Siblings then arranged to meet with Mr Pattison on 13 or 14 June 2017 instead of Mr Lane. According to Cameron, Lara and Terry, Mr Pattison referred to the instructions he had taken from Kenneth as a letter of intent, but because Kenneth was his client he refused to disclose the contents of that document other than mentioning Ethyn.

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<sup>24</sup> Which is referred to in these reasons as the 2017 Document.

- [75] According to Cameron, Mr Pattison had told them that Nina met him in the carpark on 4 June 2017 and took him to Kenneth's room. Further, that Nina stayed until she took a phone call near the end of the meeting. According to Lara, Mr Pattison had stated that Nina had arranged to meet him on 4 June 2017 to take him to meet Kenneth. According to Terry, Mr Pattison had said that Nina met him in the carpark and then took him to Kenneth's room. Mr Pattison stated that he did not tell the siblings at his meeting with them that he had met Nina in the carpark. He said he had gone straight to the ward and there was not anyone in the ward except the people in the beds.
- [76] Mr Pattison's recollection of the 14 June 2017 meeting appeared to be affected by the passage of time. His recollection was there were only three of the children at the meeting, rather than four, which is contrary to the evidence of the Siblings. He did not make a file note of their attendance. He said that they came in without an appointment. He stated that he did not meet Nina in the carpark on 4 June 2017.
- [77] There was no suggestion in the File Note or the Statement that Mr Pattison had met Nina in the carpark, nor that she had been present in the meeting on 4 June 2017. In my view, Mr Pattison was in all likelihood referring to Nina waiting in the carpark when he was finishing with Kenneth, or he was just confused in what he said, given the Siblings turned up unannounced. While I accept that he may have told Cameron, Lara and Terry that he met Nina in the carpark and went with her to the ward I do not find that to be the fact.
- [78] Lara gave evidence that Mr Pattison had said he had taken notes of his meeting with Kenneth and returned to his office that afternoon to prepare a draft will. Mr Pattison told them that Kenneth was not in a condition to sign the draft will on 5 June 2017, which he had left with Nina. According to Lara, Mr Pattison had described Kenneth as being unconscious when he attended on 5 June 2017.
- [79] Cameron, Lara and Terry found Mr Pattison would not answer their questions. They also found Nina was quiet throughout the meeting and did not say that she had the blue folder given to her by Mr Pattison until after the meeting.
- [80] Cameron stated that in later discussions with Nina, she denied knowledge of the 2017 Document or the draft will. He had, however, noticed that she was walking around the hospital with a blue folder when he arrived on 6 June 2017.
- [81] Lara stated that after the meeting with Mr Pattison she had prepared a document together with Nina for the Siblings to sign.<sup>25</sup> Nina did not accept that she was with Lara when she was preparing the document dated 9 June 2017.<sup>26</sup> Although, Nina did accept that Lara had discussed that document with her. Nina stated that she was sitting on the back deck when Lara was writing it and was not in a good headspace.
- [82] According to Lara, that document set out what she believed their positions was, including confirming that the 1979 Will was the last known will of Kenneth, and was created so that the Siblings would have some direction when they met with Mr Lane the following day. Nina stated that her recollection was that the document that Lara prepared was after Mr Pattison had told the Siblings about the letter of intent and she

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<sup>25</sup> Exhibit 14.

<sup>26</sup> Exhibit 14.

believed that it was prepared to make the letter of intent non-existent, but no one signed it.

- [83] Lara states she did not find Nina was any more distressed at that time than they all were. Terry did not find Nina overly stressed, but she was when he and Cameron were going through the house looking for Kenneth's will. Terry stated that after Nina had told her siblings that there was no money in the Kallangur Property, but she subsequently located money in three different spots in the Kallangur Property. That money was then banked as part of Kenneth's estate. Cameron stated that he found the 1979 Will in Kenneth's files.
- [84] Lara said that the note she prepared was unnecessary once Cameron located the 1979 Will, which they agreed they would take to the meeting with Mr Lane the next day.
- [85] I consider that Lara did prepare the document (Exhibit 14) of her own volition, although she then discussed it with Nina. I consider that she is mistaken in her evidence that Nina was involved in its writing and that it suffered from being a reconstruction that was affected by her own view that the 1979 Will should be treated as Kenneth's last valid will. I do not attribute any significance to the document in resolving the issues before the Court. It was not signed and was not in my view an admission by anyone, including Nina, of what was contained in the document.
- [86] In the first meeting with Mr Lane after the Siblings had met with Mr Pattison, Lara recalled that Nina told her siblings that she had the blue folder that contained the draft will prepared by Mr Pattison on 5 June 2017. According to Terry, Nina mentioned it when they were arriving to see Mr Lane. Lara recalled that when Nina went and retrieved the blue folder from a friend's residence where she had left it, there were two copies of a draft will and a letter from Mr Pattison.
- [87] Mr Lane obtained documents from Mr Pattison. In a later meeting with Mr Lane, where the 2017 Document was discussed, Lara and Cameron recalled Nina stated that her father did not have capacity to sign the 2017 Document. Cameron and Terry both stated that Mr Lane informed the Siblings that the validity of the 2017 Document would need to be determined. According to Lara, when Mr Lane told Nina that Ethyn will require separate representation she became emotional. According to Lara, she asked Nina that night whether she thought Kenneth was fit to do the draft will or meet with Mr Pattison and Nina responded that she did not think Kenneth had capacity.
- [88] According to Lara, she had spoken to Nina almost every day and when Nina had spoken to her on 2 June 2017 she was concerned that Kenneth did not have a will and was not in a good state. When Lara spoke to Nina on 6 June 2017, Lara stated that Nina was emotional about Kenneth not having a will. Lara then spoke to Nina on 8 June 2017, who was again agitated and emotional about Kenneth not having a will. Nina was particularly concerned about how things would be worked out with her and Ethyn. When Lara saw Nina on 10 June 2017, Nina again brought up the subject of Kenneth not having a will. Lara stated that she sought to reassure her that they would work it out as a family. Lara denied that on 2 June 2017 Nina had said that Kenneth had asked her to make arrangements for a will. According to Lara, Nina had said she had wanted to make an appointment for Kenneth to see a lawyer. Lara asked Nina what the point was when Kenneth was unable to hold a sentence together or hold a cup.

- [89] According to Cameron, Terry and Lara, Nina had told her siblings them that her father was not fit to sign the 2017 Document. However, Cameron stated Nina did not go into details and he could not be sure that Nina was referring to the 2017 Document, which was his understanding, or referring to the draft will. Nina had told him on 5 June 2017 that Kenneth was not coping and needed medication. He thought her statement about capacity was all over the period, including 4 June 2017. He stated that Nina had carried a blue folder around the hospital and the Friday after Kenneth had died she produced a document which he thought was the 2017 Document. He stated that Nina had said that it was for a power of attorney for a care plan. He later identified in evidence that the documents in the blue folder were a letter from Mr Pattison to Kenneth and a draft will,<sup>27</sup> not the 2017 Document.<sup>28</sup>
- [90] According to Lara, the 2017 Document was not provided to Mr Lane until a couple of months after their meeting and was not contained in the blue folder that Nina said she had been given by Mr Pattison and which she retrieved after the meeting with Mr Lane. Nina identified that the documents in the blue folder were a letter from Mr Pattison to Kenneth and the draft will.<sup>29</sup>
- [91] Nina stated that it was her belief that Kenneth had not executed a final will when he died on 10 June 2017. Nina stated that she did tell her siblings that that Kenneth had asked her to contact a solicitor and Mr Pattison had been in the process of completing a will, but that Kenneth was unable to sign it. Nina stated that the blue folder was in the back of her car for approximately three days, along with some of Kenneth's possessions from the hospital.
- [92] Nina agreed that in the 14 June 2017 meeting, Mr Pattison had said that he had met Kenneth on 4 June 2017 regarding a will, had made some written notes and had Kenneth sign it, which he referred to as a "Letter of Intent". Nina stated that she did not say anything about the letter of intent during the meeting because she had only been told about its existence when she rang Mr Pattison to say that Kenneth had died.
- [93] Nina agreed that she had stated to her siblings that Kenneth had not been fit to make a will, but did not recall saying that in relation to Kenneth's state on 4 June 2017. Nina stated her concern over Kenneth's capacity is why she asked the doctor for a Medical Certificate.
- [94] She stated that the first time she saw the 2017 Document was after her solicitor had obtained a copy from Mr Pattison and showed it to her. That accords with the correspondence written on behalf of Nina's lawyers to Cameron's lawyers and Mr Pattison.<sup>30</sup>

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<sup>27</sup> Exhibit 10.

<sup>28</sup> T1-23/1-7.

<sup>29</sup> Exhibit 10

<sup>30</sup> Exhibits 17, 18 and 20.

*Other Matters*

- [95] Cameron, Lara and Terry all live away from Brisbane. Cameron lived in Rockhampton. Cameron stated neither he nor Kenneth were great communicators on the phone but he and his family would try visit Kenneth and Jennifer every year or two. Cameron stated that he did not know whether Nina bore the brunt of caring for Kenneth and Jennifer, as Blue Care would attend to Jennifer before she went to a nursing home and Kenneth's deterioration was reasonably quick. Lara moved according to her husband's posting in the army. When in Brisbane, Lara spent a lot of time at the Kallangur Property, including helping her parents get the house ready, shortly after they had purchased it, by cleaning and painting. Kenneth and Jennifer looked after Lara's son while she went to work. After Lara's husband was posted to Darwin and her family shifted there, they would come back at least once a year with the family. Terry said he would stay with Kenneth and Jennifer at Kallangur occasionally and visited Jennifer a couple of times per year. He found it difficult to stay at the Kallangur Property because Kenneth and Nina would often argue.
- [96] Cameron, Lara and Terry gave evidence that Kenneth was very particular about the spelling of people's names and objected to people calling Lara "Laura". According to each of the Siblings' evidence, he knew the spelling of Ethyn's name and would, according to them, have detected its misspelling as "Ethan".<sup>31</sup>
- [97] According to Cameron, Kenneth wore glasses for reading, and occasionally for watching television and driving. According to Lara, Kenneth would use the glasses for reading his mail, attempting to read the paper, the computer, and occasionally for watching television and for driving. Terry gave evidence that Kenneth wore glasses to do all the documents when he had worked in the Army. Nina agreed that Kenneth required glasses to read.
- [98] Nina identified a draft will prepared by Ms Wheldon for Kenneth,<sup>32</sup> who was a friend of hers. That draft will provided for the Kallangur Property to be left in trust for Ethyn until his 25<sup>th</sup> birthday when Ethyn would have the option of purchasing the Kallangur Property, in which case proceeds of sale would be distributed to all of Kenneth's grandchildren, to the exclusion of Ethyn otherwise the proceeds of sale would be distributed amongst all of his grandchildren, including Ethyn, if Ethyn did not exercise the option. Nina stated that Kenneth did not sign that draft will.
- [99] In re-examination, Nina clarified that Ms Wheldon was the mother of one of Ethyn's best friends and that they associated out of working hours and with their children. Ms Wheldon was a lawyer. Nina stated that the draft will came into existence after Ms Wheldon came over to her house and the kids were playing. Kenneth asked Ms Wheldon if she could prepare the draft will. Nina stated that it was sent to her by Ms Wheldon because Kenneth used her email address.

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<sup>31</sup> Terry gave evidence that he had misspelt Ethyn's name on a Christmas card and Kenneth told him that he had to correct it.

<sup>32</sup> Exhibit 6.

### Testamentary Capacity

- [100] The Court must first determine whether the deceased had testamentary capacity. As stated above, the presumption of capacity only applies to a formal will and not in the present case.
- [101] In order to be satisfied of testamentary capacity of the deceased, the court must be satisfied that the deceased:
- (a) Understood the nature and effect of making a will;
  - (b) Was aware of the general nature and value of his estate;
  - (c) Was aware of those who would have a natural claim on his estate; and
  - (d) Was able to evaluate and discriminate between such claims.<sup>33</sup>
- [102] A poor memory does not necessarily indicate a lack of capacity. The question is the soundness of the testator's ability to decide how assets are to be divided. The testator must, at least, be aware in general terms of the nature, extent and value of the estate.<sup>34</sup>

### Consideration

- [103] The evidence of Kenneth's testamentary capacity was fairly scant. While the plaintiff did not contest capacity, it remained a matter which Nina had to establish in order to propound the 2017 Document as Kenneth's will. A brief letter was provided by Dr Ching which stated that Kenneth was "cognitively intact" and that he was "competent to make decisions pertaining to his lifestyle, medical treatment, and finance."<sup>35</sup> Dr Ching stated that he had been involved in Kenneth's care. Mr Pattison was also confident that Kenneth had capacity after speaking to him when he arrived on 4 June 2017, although he did not undertake the *Banks v Goodfellow* test in any detail prior to taking instructions.<sup>36</sup> Nina's evidence as to capacity was equivocal, insofar as she stated that is why she sought a letter.
- [104] One aspect of the *Banks v Goodfellow* test is that the deceased must be aware of the general nature and value of his estate. A matter that does raise a point of concern is the fact that Kenneth did not, in his discussions with Mr Pattison, refer to the property at Gin Gin, which was the property that had been in Jennifer's name. His failure to make reference to it raises a question of whether he knew the extent of his estate. According to the evidence of the Siblings, Kenneth knew that he was entitled to inherit her property, which was a belief shared by the Siblings. Kenneth had discussed his position with Cameron, who had provided him with reassurance in that regard. He had also attended the Public Trustee with Lara, and according to Lara, became very anxious when obtaining letters of administration such that she decided to defer the discussions for a further day. However, no letters of administration had been obtained by Kenneth when Jennifer passed away. In those circumstances, Kenneth would have been aware that no steps had been taken to transferring the property into his name.

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<sup>33</sup> *Banks v Goodfellow* (1870) LR 5 QB 549, discussed by Applegarth J recently in *Rowe v Sudholz* [2019] QSC 306 at [22] – [28].

<sup>34</sup> *Rowe v Sudholz* [2019] QSC 306 at [23].

<sup>35</sup> Exhibit 25.

<sup>36</sup> (1870) LR 5 QB 549.

- [105] I do not find Kenneth lacked an understanding of the general nature of his estate. Kenneth's lack of reference to Jennifer's property is explicable on the basis he took no action to transfer the Gin Gin property into his name nor took any active steps in relation to the property. His medical condition was not directly related to his cognitive function. In addition to the letter of Dr Ching, the medical notes lend some support to the fact that Kenneth had testamentary capacity given they record that he was conversing with medical staff, including, it appears as late as 5 and 6 June 2017, although that interaction was clearly very intermittent given his deteriorating condition.
- [106] I am persuaded on the balance of probabilities that Kenneth had testamentary capacity on 4 June 2017 when the 2017 Document was created.

### **Intended to have an immediate effect**

- [107] As stated above, the issue in the present case is whether or not the evidence satisfies the court that either, at the time of the subject document being brought into being, or at some later time, Kenneth, by some act or words, demonstrated that it was his then intention that the document, without more on his part, would operate as his will.
- [108] Lindsay J in *Estate of Moran; Teasel v Hook*,<sup>37</sup> commented on the words "without more on her part" stating that those words do not add anything that is material to the language in the equivalent New South Wales provision.<sup>38</sup> His Honour stated that:

"What those words do is direct attention to a consideration of whether the particular document was intended to operate as a will: to have present operation as such, not to serve merely as a draft, a diary note or the like."

- [109] The person propounding the will must prove on the balance of probabilities that the deceased wanted that particular document to be his or her final will and did not want any changes to it.<sup>39</sup>
- [110] In order to admit a document to probate, the testator must have intended to have performed a testamentary act. The signing of will instructions may well constitute evidence of such a testamentary intention. However, the Court must ascertain whether it was intended to take effect in the absence of a more formal instrument or whether it may be regarded as merely expressing an intention to instruct a solicitor to prepare a will making a particular disposition of property, but not that it has testamentary operation. In that regard, Philippides J (as she then was) in *Re Gloria May Limpus Deceased*,<sup>40</sup> set out a useful summary of the legal principles, particularly with regard to instructions for a will being admitted to probate. In her Honours discussion of the authorities, her Honour particularly referred to the decision of Sanderson M in *Re: Ogle (Dec); Ex parte The Public Trustee*,<sup>41</sup> where Sanderson M noted that each case depends on particular circumstances, but in determining whether

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<sup>37</sup> [2014] NSWSC 1839 at [28] referring to *Estate of Angius; Angius v Angius* [2013] NSWSC 1895 (*Angius*).

<sup>38</sup> *Succession Act 2006* (NSW) at s 8(2)(a), the Queensland equivalent is s 18(2) *Succession Act 1981* (Qld).

<sup>39</sup> *Re Estate of Robertson* [2018] VSC 373.

<sup>40</sup> [2013] QSC 66 at [5] – [14].

<sup>41</sup> [2004] WASC 277 at [16].

the document is a testamentary instrument is a less difficult task when independent evidence is available.

[111] In *Estate of Angius*, Hallen J stated that:<sup>42</sup>

“The sole question for the court is the status of the undated document — whether the court is satisfied that the deceased intended the undated document to form her Will. It would not be sufficient if the court came to the view that the deceased had intended the undated document to record only her instructions for a Will, or to be a draft Will made to assist in the preparation of a final Will by her then solicitors.

Nor is it enough if the court is only satisfied that the undated document contained the deceased’s ideas about her testamentary intentions. The document must be intended to be the legally operative act which purports to dispose of the deceased’s property upon her death and be intended by her to have present operation as her Will.

...

It is also clear that one must resolve the questions in dispute by looking at the probabilities on the totality of the evidence available to the court, including, but not limited to, evidence relating to the manner in which the undated document was executed, if at all, and any evidence of the testamentary intentions of the deceased, including evidence of statements made by her. Thus, the court determines, firstly, the objectively discerned nature of the content of the document, and then, subjectively, whether the specific deceased had the necessary intention.”

[112] Determining whether a deceased person knew and approved of the relevant will involves a consideration of whether the deceased actually understood the will and its effect, such that it could be said that the will represents the deceased’s testamentary intentions.<sup>43</sup> The fact that the deceased read and signed the document is to be given weight but is not conclusive. In that regard, McMillan J in *Re Prien* stated that:<sup>44</sup>

“In determining whether the testator knew and approved of the contents of the codicil, the sufficiency of evidence will depend upon the circumstances of each case. While evidence that the codicil was read by the deceased is relevant, and should be given due weight, it will not be conclusive. Other considerations include: the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice.” (citations omitted)

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<sup>42</sup> *Angius* [2013] NSWSC 1895 at [281] – [282] and [284].

<sup>43</sup> *Re: Prien* [2019] VSC 47 at [48].

<sup>44</sup> *Re: Prien* [2019] VSC 47 at [49].

[113] To adapt the words of McMillan J in *Re Prien*<sup>45</sup> to the present case, the question is whether Kenneth actually understood the 2017 Document to be his will and its intended effect such that it can be said it reflected his testamentary intentions.

[114] As part of the consideration of “knowledge and approval”, the Court considers whether there are suspicious circumstances surrounding, in the present case, a deceased’s alleged informal will. The presence of suspicious circumstances attending the execution of the informal will may suggest that the informal will was not known or approved of by the deceased. If suspicious circumstances are raised in relation to the bringing into existence of the document to arouse or excite the suspicion of the Court a vigilant examination of all the evidence is required. The propounder must show that the testator or testatrix knew the contents of the will and appreciated its effect so that it can be said that the will contains the real intention and reflects the true will of the testator or testatrix.<sup>46</sup> What is sufficient to dispel relevant doubt or suspicion will vary with the circumstances of the case, although particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it.<sup>47</sup> However, as was stated by McMillan J in *Vukotic v Vukotic*:<sup>48</sup>

“... the ‘suspicious circumstances’ rule is not an opportunity to litigate an allegation of fraud or of undue influence by another means or on flimsy or incomplete evidence.”

[115] In the present case, circumstances have been pleaded by the plaintiff in relation to Nina’s conduct and her alleged involvement in the 2017 Document which could raise suspicious circumstances. Ultimately those matters were not pressed in the plaintiff’s closing submissions but given they were not abandoned I will address them briefly.

[116] While I am persuaded that the evidence satisfactorily dispels any suspicious circumstances based on the below reasons, I am not persuaded on the balance of probabilities that Kenneth intended that the 2017 Document was to be and take effect as his will upon signing it, rather than as instructions for a will to be completed the next day.

## **Knowledge and approval of the will**

### ***Suspicious circumstances***

[117] Cameron, in the Statement of Claim, pleaded that there were suspicious circumstances in relation to how the 2017 Document was prepared and how it came to be executed. In that regard, Cameron pleaded that the 2017 Document was not done entirely on Kenneth’s own initiative, given Nina’s involvement. Cameron pleaded that:<sup>49</sup>

<sup>45</sup> [2019] VSC 47 at [48].

<sup>46</sup> *Mekhail v Hana* [2019] NSWCA 197 at [131], Leeming JA (with whom Basten JA and Emmett AJA agreed).

<sup>47</sup> *Mekhail v Hana* [2019] NSWCA 197 at [144] referring to *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [47].

<sup>48</sup> *Vukotic v Vukotic* [2013] VSC 718 at [132].

<sup>49</sup> Amended Reply at [3(a)].

- (a) Ms Wheldon, a friend of Nina, had previously prepared a draft will for Kenneth which had provided for the Kallangur property to be left for Ethyn on trust until his 25<sup>th</sup> birthday; and
- (b) Nina had contacted Mr Pattison and was said to be proximate to Kenneth and Mr Pattison when the 2017 Document was prepared and at one stage during the meeting between Kenneth and Mr Pattison.

[118] It was not a matter pressed by the plaintiff's counsel in his closing submissions and rightly so, given the matters relied upon as giving rise to suspicious circumstances in relation to the execution of the 2017 Document were satisfactorily explained by the evidence presented.

[119] The preparation of the will by Ms Wheldon was explained by Nina as being the result of her father asking Ms Wheldon to prepare such a will when she was visiting Nina. The will being sent to Nina's email address was the result of Kenneth using Nina's email address for everything. The draft will prepared by Ms Wheldon was never signed by Kenneth. I accept Nina's evidence that she did not have a role to play in relation to that draft will.

[120] As to the remaining circumstances, I accept Nina's evidence that Kenneth asked her to contact Mr Pattison and that she was not present at any time while the 2017 Document was being prepared, nor had she spoken to Mr Pattison in advance of the 2017 Document. While I accept Mr Pattison had seemingly relayed to the Siblings in the meeting of 14 June 2017 that he had met Nina in the carpark and she had taken him to the room, I do not find that was in fact the case. Both Mr Pattison's evidence and Nina's evidence was that he had asked her to email him the details of the ward and the bed number which she had in fact done.<sup>50</sup> In his oral evidence, Mr Pattison had also denied that he had met Nina in the hospital carpark.<sup>51</sup> Further, Mr Pattison's File Note does not refer to having met Nina in the carpark. In that regard, as stated above, I consider that it is likely that Mr Pattison was confused in the meeting of 14 June 2017 or that possibly Cameron, Lara and Terry were confused and the reference to Nina being in the carpark was after, not before the meeting of 4 June 2017.

[121] Mr Pattison and Nina have different recollections as to when she did meet Mr Pattison. According to Nina, she was with Kenneth at the hospital when Mr Pattison arrived. She stated that as she was leaving she gave Mr Pattison a Medical Certificate. Mr Pattison says he did not meet Nina prior to his meeting Kenneth. However, consistent with Mr Pattison's evidence, Nina stated that she returned to Kenneth's ward while Mr Pattison was still sitting with Kenneth and Mr Pattison had said that he was going to be a few minutes, following which, Nina had left. According to Nina she was waiting in the car when Mr Pattison rang her to say that he had finished with Kenneth. However, little turns on that because neither Mr Pattison nor Nina suggested Nina was present at the time Kenneth gave instructions to Mr Pattison. I accept that evidence and find that Nina was not present.

[122] That is also supported by the evidence of Mr Pattison and Nina. It is also supported by the fact that she was not aware that the 2017 Document. While the fact that the 2017 Document recorded Kenneth's instructions that Ethyn was to have the Kallangur

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<sup>50</sup> Exhibit 36.

<sup>51</sup> T1-78/35-38.

Property, which was also of benefit to Nina, and the Siblings were to get the balance of the estate, which was not worth much according to Kenneth, there is a rational explanation for Kenneth's wishes. Nina and Ethyn had lived with Kenneth and Jennifer since Ethyn's birth. The evidence supports that Nina had moved back and forth to the Kallangur Property in the early 2000s until she moved back there on a permanent basis in 2007. She and Ethyn had also been the most present in Kenneth's life leading up to his death. Cameron, Lara and Terry had all established themselves and lived independently. A rational explanation is that Kenneth was seeking to provide a stable home for Ethyn, given that Nina was a single mother and, upon his passing, would lose his support and would be on her own. Although, the fact that he was proposing to do so in absolute terms compared to the previous draft prepared by Ms Wheldon, which provided for other grandchildren benefiting from the proceeds when Ethyn reached 25 and either buying the Kallangur Property or selling it, raises a question of whether that is what he had intended, given he had no time to reflect upon the terms of the 2017 Document.

- [123] Further, I am satisfied that Nina obtaining a Medical Certificate from Dr Ching was likely to have been in response to Kenneth asking her to get a solicitor for him and does not suggest some further involvement by her in Kenneth's seeking to give instructions for a will. I accept her evidence that she did not know if Kenneth had capacity and therefore sought the Medical Certificate. I consider, however, in all likelihood it was provided to Mr Pattison on Monday 5 June 2017. Mr Pattison's evidence was that he did not receive the medical certificate from Nina until Monday 5 June 2017 after he said he would need such a certificate, albeit that she had it ready to give to him. That accords with the fact he did not have any concerns about Kenneth's capacity when he saw him on 4 June 2017 but Kenneth's condition had deteriorated on Monday 5 June 2017. I consider it is likely that while Nina may have requested the Medical Certificate on 2 June 2017 after Kenneth had discussed her contacting a solicitor, but that she did not receive the Medical Certificate until 5 June 2017. Nina had a discussion about obtaining an enduring power of attorney with the social worker where the medical note refers to "Plan Ph call to med team re EPOA & med cert for dt".<sup>52</sup> If she had already received such a certificate, it is likely that she would have alerted the social worker to that. The fact that the medical notes referred to an EPOA and not a will is, in my view, not the result of any confusion by Kenneth, but rather the result of discussions with the medical team at the hospital.
- [124] According to Nina, there was also a discussion about Kenneth getting an enduring power of attorney, but was told that the hospital would do so. That seems to be given support by the reference on 5 June 2017 to Mr Hicklin not having completed the EPOA and that his daughter was "hoping to finalise it this week".
- [125] While Cameron, Terry and Lara appeared to view Nina's conduct before and after Kenneth's death with some suspicion, particularly as Nina had failed to immediately tell them that Kenneth had seen a solicitor in hospital and the solicitor had provided her with a folder containing a draft will. That is understandable given her delay in telling them what had occurred and given the change from the position under the 1979 Will. However, Nina's conduct must be considered in context. She was the only child with Kenneth when his health took an unexpected downturn after he had been admitted to rehabilitation to recover from a broken hip. The medical notes make

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<sup>52</sup> See Exhibits 8, 9 & 11.

reference to her describing feeling overwhelmed. Nina had told her siblings that her father did not have a will and was distressed by that. The evidence supports the fact that she did not know about the 2017 Document until after Kenneth died and did not see a copy until October 2017. Rather she knew the draft will prepared by Mr Pattison had not been executed. Nina freely admitted that she was concerned about her future and Ethyn's future and was concerned that Kenneth did not have a will. Nina had raised those concerns with Lara and later with Terry. I consider Nina's hesitancy in telling her siblings what had happened was because she knew that Kenneth had not signed the draft will from Mr Pattison which primarily benefitted Ethyn. While it would have been ideal if her communication with her siblings was more open, I do not infer that she was seeking to hide any surreptitious behaviour by her in relation to Kenneth seeking to create a new will.

[126] I find that the matters raised as being suspicious circumstances were satisfactorily explained by the evidence after a vigilant examination.

### **Was the 2017 Document intended to be his Will?**

[127] Nina relies on a number of matters to support the fact that the 2017 Document was intended to have immediate effect as Kenneth's will characterising it as a "stop gap" will. In particular, Nina refers to a number of facts including that:

- (a) The document had a heading "Will";
- (b) The document was dated;
- (c) It provided for Nina to be appointed as an executor;
- (d) It was fully dispositive of Kenneth's estate, providing for the Kallangur Property to be held of trust for Ethyn subject to any mortgage and the balance to be split between the Siblings. It stated that if any child predeceased him, then it was to pass to his grandchildren;
- (e) It is signed by Kenneth with a date near his signature below a statement "This document sets out my testamentary intent as of today"; and
- (f) Was witnessed by Mr Pattison.

[128] It is submitted on behalf of Cameron, however, that the following factors indicate that the 2017 Document was not intended to take effect as Kenneth's will, including that:

- (a) Mr Pattison had not met Kenneth prior to 4 June 2017 and the 2017 Document started out as his hand written file note of his meeting;
- (b) Mr Pattison's evidence had told Kenneth that the 2017 Document was not his will before he signed it and further only suggested at the end of the meeting that he should sign it;
- (c) There was no evidence that Mr Pattison explained to Kenneth that the 2017 Document would take effect as his will pending finalisation of a more formal document. His evidence was that he told Kenneth that "if you walk out of the hospital and get hit by a bus, this will probably get you through" was ambiguous and there was no evidence that Kenneth adopted the statement. Further, it is likely that the comment that the 2017 Document would "get [Kenneth] through" was not made until after Kenneth had signed the document;

- (d) That the statement at the end of the 2017 Document that “This document sets out my testamentary intent as of today” is distinct from stating it has an effect as a will;
- (e) The fact that the 2017 Document was not executed as a formal will with two witnesses, and Mr Pattison did not seek a second witness, although that would have been possible;
- (f) That Mr Pattison had told Kenneth that he would return the following day with a document for him to execute as a will;
- (g) That it was not expected that Kenneth was at risk of death or in capacity. Nina had informed Mr Pattison it was not an emergency. According to Mr Pattison, Kenneth had only told him that he had “a bit of a heart issue”;
- (h) Mr Pattison had not ascertained, on 4 June 2017, that there was medical evidence supporting Kenneth’s testamentary capacity;
- (i) That the 2017 Document contained comments such as “DFRB? RSL working on it” and “Advised of problems re children contesting the estate and estate paying costs from the estate which could be substantial (he said no problem)”, which were not part of any intended testamentary disposition;
- (j) Mr Pattison only recorded the notes in a notebook, not a document such as the Lexon pro-forma Will instruction sheet; and
- (k) Kenneth did not inform Nina when she came to his hospital room after Mr Pattison had been there that he had made a new will, notwithstanding she was recorded as the executor. Nor was there any evidence of any statement by Kenneth to anyone supporting the fact that he considered the 2017 Document to be a final testamentary instrument.

[129] In my view, while the evidence supports the fact that the 2017 Document contains Kenneth’s testamentary intentions, I am unpersuaded that when he signed the 2017 Document it was a testamentary act whereby he intended that it would take effect as a will, albeit a stop gap will, upon his signing of it. While the 2017 Document had a heading of “Will”, it was in shorthand terms including some matters which were just a record of what was discussed, such as the defence service entitlements and matters of advice, such as claims that may be made by the children as a result of his proposed requests. It did not expressly revoke all previous wills, which although generally implied by the execution of a testamentary document, it is significant in the absence of a clear explanation that, upon signing the 2017 Document, it was intended to take effect as Kenneth’s will. The 2017 Document was stated to be Kenneth’s testamentary intent as of that day, that statement is somewhat ambiguous and is consistent with the document being a record of his testamentary intentions rather than a will itself. I am not persuaded that Mr Pattison explained to him that the document could take effect as a will immediately upon his signing.

[130] In particular, the question as to whether the statement, “if you walk out of the hospital and get hit by a bus, this will probably get you through” was made before or after Kenneth signed the 2017 Document was the subject of significant uncertainty by Mr Pattison in his evidence. In Mr Pattison’s evidence in chief, he stated that he had made the statement after Kenneth had signed the 2017 Document. However, in his cross-examination he stated that he thought it was before but he could not be certain.

In Mr Pattison's Statement, he suggested that he made it beforehand. It was not referred to at all in the File Note which Mr Pattison made on 8 June 2017. While I accept that Mr Pattison did make the comment I am not satisfied that he informed Kenneth that the 2017 Document would "probably get him through if he got hit by a bus" prior to Kenneth signing the 2017 Document. In any event, even if it was made beforehand, I consider that for somebody unfamiliar with testamentary law, the statement without explanation was an ambiguous one, which did not clearly explain that by signing the 2017 Document it was intended to be his will, albeit a stop gap will, until Mr Pattison returned the next day.

- [131] Further, Mr Pattison had told Kenneth that the 2017 Document was not a will. Mr Pattison had told Kenneth that he would return the next day with a draft will after he had gone through his notes, which comprise the 2017 Document. Consistent with the fact he had told Kenneth the 2017 Document was not his will, Mr Pattison had stated that one of the reasons he wanted Kenneth to sign the 2017 Document was that he advised Kenneth that leaving the Kallangur property to Ethyn could give rise to the Siblings making a claim against the estate, which would cost the estate significant amounts of money. That discussion, Mr Pattison stated, took the greatest amount of time during the 4 June 2017 meeting. He reiterated to Kenneth that he would provide a letter setting out his concerns in that regard. His File Note of 8 June 2017, which was the document prepared closest in time to the events in question, states:<sup>53</sup>

"I then went through my notes and explained to him the terms of the proposed Will. I then gave him my pad told him to check the notes and sign them. He did this. I told him I would see him tomorrow."  
(emphasis added)

- [132] Mr Pattison accepted that it was likely that Kenneth was only asked to check the notes, rather than to read them carefully to ensure that they reflected his testamentary intentions and giving him time to reflect upon the document and ask questions. While I accept Kenneth was definite in stating that he wanted the Kallangur Property to go to Ethyn and it was said to be held on trust for him, in the draft will prepared by Ms Wheldon, he had only provided for Ethyn to have the benefit of the Kallangur Property until he was 25, after which he had to buy it or sell it and the proceeds were shared by all the grandchildren. While that previous will was unsigned it does suggest that Kenneth may have changed his view with time to reflect. Given his lack of reference to the property at Gin Gin when speaking of his assets, I do not infer that he took account of the Siblings and his other grandchildren having the benefit of that property.
- [133] I consider Mr Pattison did turn his mind to the notes also serving as a stop gap will if anything happened to Kenneth. However, I find that was more of an afterthought once Kenneth signed the 2017 Document, in circumstances where Mr Pattison had not clearly explained to Kenneth that the 2017 Document would take effect as his will.
- [134] In the absence of suspicious circumstances, and given the evidence that Mr Pattison signed the 2017 Document, establishing knowledge and approval is not unduly onerous, it is a matter which still must be established.

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<sup>53</sup> Exhibit 13.

- [135] While Kenneth was given the 2017 Document to check before he signed it, I am not satisfied that he understood that it was to be his will and intended it to have that effect. Mr Pattison could not recall whether or not Kenneth had his glasses on when he “checked” the contents of the document. All of the evidence of the Siblings supported the fact that Kenneth required glasses for reading. Further, the 2017 Document was hand written with some shorthand terms, which were not readily comprehensible, which Mr Pattison had to explain in Court. While it was headed “Will” it also had another person’s name “Hickson” and contained matters Mr Pattison was making a file note of in relation to his defence service entitlements and matters of advice given to Kenneth in relation to potential claims by the children. It was not clearly a document that was a will on its face, albeit it contained his testamentary intentions. As stated above, it did not expressly state it revoked all previous wills. It was just as open to be interpreted as a record of instructions for the proposed will rather than a will itself. Kenneth did not ask any questions suggesting he understood its content. While the 2017 Document was not complex, Kenneth did not ask Mr Pattison to explain his shorthand notations, which Mr Pattison had to explain in Court, nor did he correct Mr Pattison’s spelling of “Ethan” to “Ethyne.” The evidence supported the fact that the spelling of Ethyne’s name was something Kenneth was very particular about. Despite “checking” the document, Kenneth did not pick up the spelling error in Ethyne’s name. Those factors suggest that Kenneth did not read the 2017 Document thoroughly and take the care one would expect if it was to be his will.
- [136] Further, Mr Pattison stated that Kenneth got quite agitated in their discussion and although he considered that Kenneth had calmed down, he also observed that Kenneth was lying down at the end of their meeting on 4 June 2017. Those matters also suggest that he was not in a position to focus on the content of the document. While I accept Mr Pattison orally went through the notes it was, as I have found above, by way of confirming his instructions for the preparation of a will and the advice given, not on the basis that it was a will. Kenneth did not inform Nina that he had made a will on 4 June 2017. There is no evidence that Kenneth had subsequently confirmed his intention that the 2017 Document was his will or was binding or in any way ratified the 2017 Document as his will.
- [137] Section 18 of the *Succession Act* is beneficial in nature and to ensure that a testator’s intentions are given effect, such that the benefits of change should not be withheld by requiring too rigid a manner of proof.<sup>54</sup> However, when all of the circumstances are considered, this is not a case where I cannot be satisfied that the 2017 Document was regarded by Kenneth as anything more than a note of his testamentary intentions or instructions which were going to be reproduced in a formal will.

### **Conclusion**

- [138] I am not satisfied to the requisite standard that the 2017 Document is a document that Kenneth intended to form his will such that the requirement of s 18(2) of the *Succession Act* is satisfied. The counterclaim should be dismissed.
- [139] It is therefore appropriate to pronounce the 1979 Will as Kenneth’s last valid will.

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<sup>54</sup> *Re Garris* [2008] 2 Qd R 59 at [9].

**Orders**

[140] Nina raised a question in relation to the appropriate form of order. In the circumstances, the parties' legal representatives should confer and provide a proposed form of order to the court within fourteen days. The present case was one which I consider had to be brought before the court for determination given the existence of the 2017 Document. In those circumstances, it would seem the appropriate order is that the costs of the parties be paid out of the estate. I will allow the parties fourteen days to make submissions as to the appropriate order as to costs, to be provided at the same time as the proposed form of order.

[141] I therefore order:

1. The counterclaim is dismissed.
2. The parties are to submit draft orders reflecting my reasons and any submissions as to costs within fourteen days of the date of publishing these reasons.